COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. SALEM SUPERIOR COURT
DOCKET NO. ESCR201x-xxxxx

COMMONWEALTH OF MASSACHUSETTS, Plaintiff,	)	MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS (amended)
v.	)	
Lxxxx Pxxxxxx, Defendant	)	

STATEMENT OF FACTS

The instant indictment arises from an alleged routine motor vehicle violation occurring on March 2x, 20xx in the town of Rowley. On that date, Patrolman Mxxxxxx Zxxx observed a 2009 Dodge Journey bearing Massachusetts registration traveling towards Haverhill Street from a stationary position in the driveway of 2x Dxxxxxx Road.

According to the Patrolman, the operator, whom he would eventually identify as the Defendant, wore "headphones"[1] in his ears as he pulled out of a driveway 150 yards (or 450 feet) away. The Defendant wore a baseball hat and a hooded jacket. The Defendant's vehicle had privacy glass on all but the front windows and windshield. Despite these obstructions, despite the extreme distance, and despite the tiny size of the earbuds, Officer Zxxx

[1] The Commonwealth provided a single photograph of the "headphones" which spurred the arrest. The "headphones" appear in actuality to be a set of earbuds (which, as will be discussed more fully infra, are distinct from "headphones") with thin wires which seem to connect to a microphone of the sort used for hands-free communication. See Photograph of Seized Evidence, attached.

claimed to see that the Defendant wore such headphones "in both ears."

At the closest point of observation, the Defendant was traveling approximately 25 miles per hour[2] at a distance of 40-50 feet. From that vantage point, Officer Zxxx had a view of only the Defendant's profile and could not observe the left side of the Defendant's head.

At the time of the stop, the Defendant was not wearing headphones.

Officer Zxxx's claim that he observed the Defendant emerge from a driveway down the street is at odds with his prior testimony on the same subject. In both his police report and at the grand jury, Officer Zxxx claimed only to observe the Defendant as he traveled southbound on Dxxxxxx Road.

Nevertheless, for that reason alone[3], the Patrolman stopped the Defendant. The officer observed no unsafe operation, such as marked lanes violations, speeding, or any other moving violation. The

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[2] A mile is 5,280 feet. See https://standards.nasa.gov/history_metric.pdf. At a speed of 25 miles per hour, the Defendant passed by Officer Zxxx's stationary position at a rate of 36.7 feet per second.

[3] Patrolman Zxxx also alleged that he watched this area "on a whim" after "receiving knowledge" of possible drug activity at 4x Dxxxxx Road. This "knowledge" was irrelevant for a number of reasons. First, if Officer Zxxx truthfully reported seeing the Defendant turn in a driveway - which the Defendant disputes - the Defendant is alleged to have turned into 4x Dxxxxxx Drive - not 4x Dxxxxxx Drive. Second, Officer Zxxx conceded that none of his investigations were "specific to that area." Instead, his information was relative to a house on Gxxxx Street. Third, Officer Zxxx failed to explain the basis for his belief of drug activity in the area (whether from an untested informant or otherwise) and thus, no permissible inference may be drawn from his "belief." Fourth, Officer Zxxx never referenced this "knowledge" of drug activity in any report or before the grand jury, nor did the Commonwealth provide notice of same until the motion hearing. This omission raises an inference of recent contrivance. Finally and notwithstanding the preceding, the Commonwealth specifically disclaimed this alleged "knowledge" as a factor supporting reasonable suspicion of a crime.

Defendant pulled over immediately, without incident, and provided a valid license when asked.

Patrolman Zxxx verified the vehicle's valid registration at 2:20 P.M., and verified the Defendant's valid and active license status at 2:26 P.M.

Rather than issue a citation upon receipt of the Defendant's valid documents, however, Zxxx requested several other queries to be run, including a triple-I criminal history and board of probation check.

Prior to the receipt of any information responsive to those queries, Officer Zxxx contacted Ipswich Detective Gxxxxxxx. Detective Gxxxxxxx was assigned to a Drug Enforcement Agency ("DEA") task force. Officer Zxxx spoke with Detective Gxxxxxxx while the Defendant remained in his car. During this conversation, Officer Zxxx inquired if Detective Gxxxxxxx had any familiarity with the Defendant.

Detective Gxxxxxxx informed Officer Zxxx he had never heard of the Defendant - in connection with any drug investigation or otherwise.

At Officer Zxxx's request, Detective Gxxxxxxx then conducted a series of queries relative to the Defendant. Gxxxxxxx's queries commenced at 2:28 P.M. and ended at 2:45 P.M.

Officer Zxxx provided conflicting testimony regarding his reasons for calling Detective Gxxxxxxx. At the grand jury and in his

police report, Officer Zxxx claimed that he contacted Detective Gxxxxxxx because dispatch had informed Officer Zxxx that Pxxxxxx had used a different name in the past. However, at the motion hearing, Officer Zxxx testified that he learned of the different names only by calling Detective Gxxxxxxx.

As a result, the foregoing makes clear that Officer Zxxx elected to call a DEA agent based solely on the fact that he had pulled over an Hispanic operator for a headphone violation. Moreover, he did so after confirming that the operator had a valid license and the vehicle was properly registered.

Having requested the queries, at 2:37 P.M., Detective Gxxxxxxx accessed a triple-I report, which revealed that the Defendant had previously used the name Rxxxx Rxxxxxxxx. See triple-I report.

Despite finding no active warrants under either name, and despite the fact that the Defendant had no recent arrests and no convictions whatsoever under any name, the officer offered the previous name as an excuse to further detain and question the Defendant. The patrolman ordered the Defendant to exit the vehicle, purportedly "to speak with him about his true identity[.]"

Patrolman Zxxx remembered nothing of the conversation regarding Pxxxxxx's past use of a different name.

The Patrolman claimed that following that conversation, he asked the Defendant if there was anything inside the car that was contraband, though he did not recall the precise words he used for

that request. The Defendant answered in the negative. The Patrolman claimed he requested consent to search, which he alleges the Defendant granted. The Defendant, a native Spanish-speaker, is not proficient in English, and denies intelligently giving consent. See Report of Dr. Mxxxxxx O'xxxxxxxx.

The Patrolman pat-frisked the Defendant, finding no weapons or contraband. Patrolman Zxxx claims that he then radioed for a canine unit to assist with the search[4], during which call K-9 Trooper Sxxxx coincidentally appeared. Zxxx called for the K-9 at 2:35 P.M.

Meanwhile, Detective Gxxxxxxx continued running various queries. Those queries revealed that the Defendant had obtained a license under "Rxxxxx Rxxxxxxxx," in 1998. The license expired in 2001. Detective Gxxxxxxx did not learn that the Rxxxx Rxxxxxxxx license expired until 2:37 P.M. - two minutes after the K-9 arrived.

The foregoing reveals that Patrolman Zxxx claims that he stopped the Defendant for an alleged "headphones" violation, contacted a DEA agent to inquire about narcotics activity, learned that he used a different name in the past, issued an exit order to discuss the Defendant's identity, allegedly obtained consent to search, requested a canine unit, during which request a canine unit coincidentally

[4] The officers never requested consent for the use of the K-9 in the Defendant's car. The police conducted their search nonetheless, with Cxxxxx allegedly indicating positively in the area of the glove box. Cxxxxx was trained to detect marijuana, and has alerted to the presence of non-criminal amounts of marijuana. At the time of the search in this case, Trooper Sxxxx was unable to determine if the dog alerted to a criminal or non-criminal substance. Following the alert, the assembled officers' further search resulted in the discovery of suspected narcotics in a hidden compartment behind the glove box.

appeared, and after which Patrolman Zxxx learned the license under Rxxxx Rxxxxxxxx had lapsed in 2001.

This series of increasing intrusions all occurred after he confirmed a valid license and registration, and before he confirmed the Defendant's prior use of a different name, which served as the Patrolman's sole proffered justification for the extended motor vehicle stop.

The Patrolman arrested the Defendant and charged him with trafficking in a controlled substance. Despite initiating the stop on the basis of the alleged civil motor vehicle infraction (the alleged "headphones" violation), the Patrolman issued no citation for this or any motor vehicle offense.

ARGUMENT

The stop, search, and arrest of the Defendant is marred by numerous constitutional violations.

First, the officer lacked reasonable suspicion or probable cause to stop the Defendant on the basis of the civil motor vehicle infraction alleged, and the failure of the officer to issue a citation for the alleged infraction precludes its use as justification for the stop and resultant search of the vehicle. See Mass. Gen. Laws ch. 90, § 13; Mass. Gen. Laws ch. 90C, § 2; Commonwealth v. Brazeu, 64 Mass. App. Ct. 65 (2005); Commonwealth v. Carapelluci, 429 Mass. 579 (1999).

Second, even if this Honorable Court concludes that Patrolman

Zxxx lawfully stopped the Defendant, the continued interrogation, exit order, and investigatory search of the vehicle exceeded the constitutional bounds imposed on the Patrolman by the nature of the stop. Commonwealth v. Bartlett, 41 Mass. App. Ct. 468 (1996); Rodriguez v. United States, __ U.S. __, 135 S.Ct. 1609 (2015).

Third, the Defendant lacked the capacity to voluntarily grant consent to search. Even were this Honorable Court to hold otherwise, the consent request resulted from the unconstitutional expansion of the scope of the stop and is thus itself the fruit of the poisonous tree, and the manner of the search exceeded the scope created by the language of the Patrolman's request. Commonwealth v. Yehudi Y., 56 Mass. App. Ct. 812 (2002); Commonwealth v. Santos, 65 Mass. App. Ct. 122 (2005); Commonwealth v. Rogers, 444 Mass. 234 (2005); Commonwealth v. Gaynor, 443 Mass. 245, 255 (2005).

Finally, a review of the stops, citations, searches, and arrests involving Patrolman Zxxx for the year preceding the Defendant's arrest indicates a pattern of disparate treatment of Hispanic and non-white motorists and suggests that the prolonged detention and eventual search of the Defendant appears to be the result of selective enforcement in violation of the Fourteenth Amendment to the United States Constitution and articles 1 and 10 of the Massachusetts Declaration of Rights. Commonwealth v. Lora, 451 Mass. 425, 436 (2008).

I. THE STOP OF THE DEFENDANT ON THE BASIS OF THE ALLEGED HEADPHONES INFRACTION VIOLATED THE DEFENDANT'S RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER ARTICLE 14 OF THE MASSACHUSETTS DECLARATION OF RIGHTS; PATROLMAN Zxxx'S OBSERVATIONS DID NOT GIVE RISE TO REASONABLE SUSPICION OR PROBABLE CAUSE THAT THE DEFENDANT VIOLATED MASS. GEN. LAWS CH. 90, § 13, AND THE FAILURE TO CITE THE DEFENDANT FOR THE ALLEGED OFFENSE IN VIOLATION OF CH. 90C, § 2, PRECLUDES ITS USE AS THE BASIS FOR THE STOP.

"Where the police have observed a traffic violation, they are warranted in stopping a vehicle." Commonwealth v. Santana, 420 Mass. 205, 207 (1995), quoting from Commonwealth v. Bacon, 381 Mass. 642, 644 (1980). Here, Patrolman Zxxx initiated the stop of the Defendant solely on the basis of his claimed observation of the Defendant wearing earbuds (which he characterized as "headphones") in both ears while driving. This, the Patrolman contends, amounted to a violation of Mass. Gen. Laws ch. 90, § 13, justifying his stop of the Defendant.

As a threshold matter, the Defendant requests that the Court reject Patrolman Zxxx's testimony that he observed two earbuds in the Defendant's ears. The Patrolman's testimony that he observed earbuds in both ears is not credible, and therefore cannot serve to justify the stop of the instant Defendant.

The Patrolman claims that he viewed the earbuds in the Defendant's ears from a stationary position 450 feet away. In prior testimony, Zxxx claimed only to have observed the Defendant traveling southbound on Dxxxxxx Road. The Defendant was in a car with all but the front windows tinted, wearing a hat and a hooded jacket. The

earbuds in evidence are tiny. The combination of the hooded jacket, baseball hat, thin wires, miniscule nature of the earbuds in question, as well as the brief duration of the Patrolman's view and the necessarily limited degree of his observations simply does not logically permit his observations to be credited.

Moreover, facing northbound from Dxxxxx Road (as the Patrolman must to view the Defendant), bushes, trees, and other outbuildings block a north-facing view of the road. Thus, the Patrolman would not have been in a position to view the Defendant until his vehicle passed within approximately 40-50 feet of the surveillance location traveling at a speed of over thirty feet per second. From that perspective, Officer Zxxx would only have had a profile view of the Defendant and thus could not observe headphones "in both ears."

Based on the foregoing, the Court should reject Patrolman Zxxx's claim that he observed the Defendant wearing headphones in both ears. On that basis, the Court should allow the Defendant's motion to suppress.

The incredible nature of the Patrolman's claimed observations aside, his failure to issue a citation to the Defendant for this or any other civil motor vehicle infraction precludes this Honorable Court from considering the alleged headphone violation as a permissible basis for the stop of the Defendant.

Mass. Gen. Laws ch. 90C, §2 provides in relevant part that:

> "[A]ny police officer assigned to traffic enforcement duty shall ... record the occurrence of automobile law violations upon a citation, filling out the citation and each copy thereof as soon as possible and as completely as possible and indicating thereon for each such violation whether the citation shall constitute a written warning and, if not, whether the violation is a criminal offense ..., whether the violation is a civil motor vehicle infraction ..., or whether the violator has been arrested in accordance with section twenty-one of chapter ninety. Said police officer shall inform the violator of the violation and shall give a copy of the citation to the violator. Such citation shall be signed by said police officer and by the violator, and whenever a citation is given to the violator in person that fact shall be so certified by the police officer. The violator shall be requested to sign the citation in order to acknowledge that is has been received" (emphasis added).

The statute further provides that "[a] failure to give a copy of the citation to the violator at the time and place of the violation shall constitute a defense in any court proceeding for such violation, except where the violator could not have been stopped or where additional time was reasonably necessary to determine the nature of the violation or the identity of the violator, or where the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure." Id.

Here, Patrolman Zxxx violated the mandatory provisions of ch. 90C, §2, which require that he "shall record the occurrence" of the claimed motor vehicle violation upon a citation. The Patrolman never issued a citation at all for the alleged headphone offense, and thus

failed his statutory obligations altogether. This triggers the statute's built in remedy, which provides that this failure "shall constitute a defense in any court proceeding."

In other contexts, the failure to obey the mandates of ch. 90C, §2 has led to the dismissal of complaints or indictments charging motor vehicle offenses. See e.g., Commonwealth v. Carapelluci, 429 Mass. 579, 582 (1999) (dismissing complaint for failure to issue citation, where Commonwealth offers no explanation other than "inattention by police"). "Where the requirements of the statute are not followed, the complaint shall be dismissed regardless of whether the defendant was prejudiced by the failure." Id. at 581, citing Commonwealth v. Mullins, 367 Mass. 733, 735 (1975); Commonwealth v. Perry, 15 Mass. App. Ct. 281, 283 (1983).

Here, the Defendant is not charged with criminal motor vehicle offenses that would be dismissed for this failure in other contexts. However, the statutory remedy provides a defense "in any proceeding." In the context of the instant proceeding, the most appropriate formulation of the statutory remedy is to preclude the Commonwealth from seeking to justify the stop of the Defendant on the basis of the alleged motor vehicle infraction.

Again, the legislative history of ch. 90C is illustrative. As originally enacted, 90C, § 2 provided only that failure to give a citation "shall constitute a defence in any trial for such offense[.]" (emphasis added). However, by enacting St.1985, ch. 794,

the Legislature amended § 2 to its now-familiar form, which provides that failure to abide by its mandatory provisions "shall constitute a defense in any court proceeding for such violation[.]" (emphasis added) See St.1985, ch. 794, § 3.

By this amendment, the Legislature broadly expanded the statute's protections and provisions from the narrow field of trial defenses to "any court proceeding." Because the very nature of a "defense" is contingent on the manner of a particular "court proceeding," the amendment therefore evidences an explicit adoption of proceeding-dependent remedies, including (for example) suppression.

Suppression as a remedy is counseled further in light of the statutory goals of providing notice to the Defendant of the alleged violation and of preventing the "manipulation or misuse of the citation process" (the so-called "no fix" purpose). Id. at 582. The extension of the remedy to "any court proceeding" broadens the protection against "manipulation" of the citation process, and allows failures of notice to be remedied prior to the trial date.

Likewise, application of suppression as a remedy in the instant matter furthers these statutory goals. This is not a case where the Defendant's arrest put him on notice of the alleged violation (such as an arrest for operating under the influence). Rather, the alleged violation which caused the stop is not an arrestable offense, and

played no role in the investigation following the stop of the Defendant.

The officer did nothing to further his suspicions as to the "headphones," which would be expected were this the true reason for the stop. This failure implicates the statute's second purpose, the prevention of "manipulation or misuse" of the citation process. The lack of a contemporaneous citation suggests a "manipulation" of the process, insofar as the only remaining documentation of the alleged violation exists in the Patrolman's police report, which the officer wrote after the arrest, search, and discovery of contraband had already unfolded.

Had the Patrolman given the citation at the scene, there would be little possibility that the officer "manipulated" the process by creating a post-hoc justification after the stop had yielded evidence of an offense separate from that which allegedly caused the stop. Because the Patrolman here "completely disregarded the statutory mandate to mail or deliver the citation to the defendant 'as soon as possible[,]' by fail[ing] to mail or deliver the citation at all," the officer has thwarted one of the statute's central goals. Id., citing ch. 90C, §2.[5]

[5] This is not the only evidence of Patrolman Zxxx's manipulation of the citation process. As is described more fully infra, a review of his stops, citations, and arrests for the year preceding the Defendant's arrest suggest that he has consistently misreported or failed to record altogether the identifying information and search data required by the Racial Profiling Data Collection Act. Zxxx's abuse of the citation process therefore thwarts two separate statutory provisions intended at preventing exactly that behavior.

As a result, the Court should grant the Defendant a remedy analogous and co-extensive to that provided for similar failures in other proceedings. Where the same failure required dismissal of a motor vehicle offense in Carapelluci, this Honorable Court should exclude the uncited motor vehicle infraction from consideration in determining whether Patrolman Zxxx properly stopped the Defendant.

Excluding the claimed "headphones" violation, there remains no basis justifying the Defendant's stop, such that the progressively invasive seizure and search that followed cannot be constitutionally sustained. Because the Patrolman stopped the Defendant in the absence of reasonable suspicion or probable cause that he committed a motor vehicle infraction, this Honorable Court should allow the Defendant's Motion.

Even were this Honorable Court to credit the Patrolman's testimony and excuse his failure to cite the Defendant for the alleged civil infraction, his claimed observations nevertheless fail to establish the alleged violation. The statute which the Patrolman claimed as a basis for the stop, Mass. Gen. Laws ch. 90, § 13, provides in relevant part that "[n]o person shall operate a motor vehicle while wearing headphones, unless said headphones are used for communication in connection with controlling the course or movement of said vehicle."

The Legislature inserted this clause into § 13 by way of St.1974, ch. 24, captioned "An Act Prohibiting the Wearing of

Headphones While Operating a Motor Vehicle." This provision has remained intact and unmolested through numerous subsequent amendments to the same statute.

Most recently, in passing St.2010, ch. 155, § 8, the Legislature amended ch. 90, § 13 to provide that "[n]o person, when operating a motor vehicle, shall permit to be on or in the vehicle or on or about his person anything which may interfere with or impede the proper operation of the vehicle or any equipment by which the vehicle is operator [sic] or controlled, except that a person may operate a motor vehicle while using a federally licensed [two]-way radio or mobile telephone ... as long as [one] hand remains on the steering wheel at all times."

No case – reported or otherwise – of the Commonwealth's Appellate Courts deal squarely with the issue presented in this matter. That is, there is no controlling authority on what constitutes a violation of the headphones clause in Mass. Gen. Laws ch. 90, § 13. Nevertheless, the plain language of the statute suggests that the claimed observations which Patrolman Zxxx relied on in stopping the Defendant did not, in fact, amount to a violation of the statute.

"Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent and the courts enforce the statute according to its plain wording so long as its application would not lead to an absurd result." Commonwealth v. Bernard, 84

Mass. App. Ct. 771, 775 (2014), quoting Worcester v. College Hill Properties, LLC, 465 Mass. 134 (2013) (quotations, citations, and ellipses omitted).

Here, the "clear and unambiguous" language of the statute indicates that the Patrolman wrongly stopped the Defendant. The statute, by its express terms, does not preclude the use of "headphones" in all instances. That is, the use of "headphones" is expressly permitted when "said headphones are used for communication in connection with controlling the course or movement of said vehicle." See Mass. Gen. Laws ch. 90, § 13.

The phrase "used for communication in connection with controlling the course or movement of said vehicle" suggests that the Defendant's alleged use is entirely permissible. When used with a hands-free communication device, or for the purposes of communicating or receiving directions ("controlling the course or movement"), the statute's plain terms permit the use of headphones.

This reading is consistent with the only other provision of § 13 referring to communication devices. In its first clause, the statute permits use of a "... mobile telephone ... as long as [one] hand remains on the steering wheel." Read together, therefore, these clauses appear to except the use of mobile devices and headphones from the statute's overall prohibition of unsafe driving, so long as the devices are used for communication and the driver maintains at least one hand on the wheel.

Because the manner in which the Defendant operated did not violate the statute and because he used the single earbud for a purpose permitted under the statute, the Patrolman could not rely on this statute to stop the Defendant. See e.g., Commonwealth v. Brazeau, 64 Mass. App. Ct. 65 (2005).

The Appeals Court's decision in Brazeau appears to be the only reported opinion analyzing Mass. Gen. Laws ch. 90, § 13. Though the Court considered a different provision of this statute, the facts of the case are strikingly similar to the instant matter, such that the Court's rationale applies in equal force here.

There, a North Brookfield police officer stopped the defendant for a claimed violation of ch. 90, § 13's provision that "[n]o person, when operating a motor vehicle, shall permit to be on or in the vehicle or on or about his person anything which may interfere with or impede the proper operation of the vehicle or any equipment by which the vehicle is operated or controlled[.]" The officer testified that he stopped the defendant solely on the basis of his observation of "several items hanging from [the defendant's] rearview mirror," which he alleged to be a violation of this clause. Id.

However, nothing about the defendant's operation "aroused his concern: the vehicle was in its lane of travel, did not swerve, and was not being driven erratically or at improper speed." Id. at 67. Notwithstanding the lack of any deficient operation on the part of the defendant, he determined that "the items hanging were impeding

the operation of the operator." He further "concluded that the driver 'could not see the road properly' and that this 'might have affected her ability to drive safely.'" Id.

The Court concluded that "even if the officer's testimony is fully credited," he nevertheless lacked "a particularized and objective basis for suspecting a traffic violation." Id. The Court held, "[t]he mere existence of two or three small items hanging from a rearview mirror does not suffice, we think, to constitute a violation of [Mass. Gen. Laws ch.] 90, § 13, or warrant police investigation. Although the Legislature could have chosen to do so, it has not specifically prohibited the hanging of objects from a vehicle's rearview mirror." Id. at 68, contrasting Minn. Stat. § 169.71(1) ("No person shall drive or operate any motor vehicle ... with any objects suspended between the driver and the windshield, other than sun visors and rear vision mirrors").

Taking judicial notice that "objects such as air fresheners, graduation tassels, and religious medals commonly are hung from review mirrors of motor vehicles," the Court ultimately expressed its "doubt that the legislature intended this ordinary practice to be grounds, without more, for issuing a citation or justifying a stop by police." Id. Because the officer made no observations particularizing any effect the hanging objects had on the vehicle's operation, and in fact "found no fault with her driving[,] ... his belief that [the defendant's] operation was or may have been impeded

by the item or items that he saw hanging from her rearview mirror had no reasonable, objective support." Id.

Brazeau stands for the unremarkable position that a violation of § 13 does not arise from every unadorned observation of the existence of a condition described in the statute. Rather, it is the quality of the condition - whether it in-fact interferes with or impedes – the driver's operation that determines whether a violation has occurred.

In Brazeau, the fact of items hanging from the rearview mirror did not constitute a violation because their presence did not demonstrably "interfere with or impede" the driver's operation, and thus did not violate § 13. Likewise, in the instant case, the presence of earbuds did not and cannot provide "reasonable, objective support" that the Defendant used them in a way that violated § 13.

That is, the Defendant operated the vehicle safely and appropriately, had his hands on the wheel, and used the earbuds in a manner consistent with the statute. Thus, in the instant case as in Brazeau, the officer lacked an objectively reasonable belief that the Defendant violated § 13, and therefore lacked justification for the stop of the Defendant on that ground.

Finally, as a matter of statutory interpretation, the headphone clause of § 13 is plainly inapplicable to the facts of the instant matter.

Where an operative word of a statute is left undefined – as is the term "headphone" in § 13 - Courts are "guided by the legislative imperative that, when interpreting statutes, '[w]ords and phrases shall be construed according to the common and approved usage of the language.'" Commonwealth v. Moody, 466 Mass. 196, 208 (2013), quoting Mass. Gen. Laws ch. 4, § 6. An undefined term in an otherwise "plain and unambiguous" statute "must be given its ordinary meaning." Commonwealth v. Brown, 431 Mass. 772, 775 (2000).

In determining the "ordinary meaning" of statutory language, the Appeals Court and the Supreme Judicial Court have frequently relied on dictionary definitions. See e.g., Moody, supra, at id. (determining meaning of "record" in context of Massachusetts wiretap statute by reference to Webster's Third New International Dictionary 1898 (1974)); Commonwealth v. Miller, 22 Mass. App. Ct. 694 (1986) (resolving meaning of "dirk knife" in context of dangerous weapon statute by reference to Webster's Third New International Dictionary 642 (1971)).

At the time the Legislature inserted the headphone clause into § 13, Webster's New Collegiate Dictionary defined the term as "an earphone held over the ear by a band worn on the head." See Webster's New Collegiate Dictionary (1973). By contrast, the same dictionary defined "earphone" as "a device that converts electrical energy into sound waves and is worn over or inserted into the ear." Id.

Thus, the definition of "headphone" incorporates some devices that might also be defined as "earphone," but only those which are "held over the ear by a band worn on the head." Id. This critical distinction evidences a legislative decision that § 13 not extend to the use of "earphones." The statute therefore cannot be read to treat "earphones" and "headphones" synonymously, in the manner urged by the Commonwealth and Patrolman Zxxx. This is particularly true where the Legislature has in analogous contexts recognized and addressed the distinction.

For example, in St.1991, ch. 33, § 101, the Legislature enacted Mass. Gen. Laws ch. 265, § 42, which forbids the use of "a radio, boom box, so-called, or similar broadcasting equipment without the use of earphones or other apparatus on a public conveyance[.]" The Legislature's use of the more inclusive "earphones" and the inclusion of the expansive modifier "or other apparatus" indicates a purposeful adoption of a broader requirement consistent with the evident intent of the statute.

That is, in the 265, § 42 context, the Legislature crafted a broad prohibition in an apparent effort to prevent passengers from annoying each other with unwanted exposure to music or other broadcasts. Consistent with that intent, the Legislature used a word carrying a broader definition, and included a catchall proviso ("or other apparatus") applicable apart from the "earphones" requirement.

Similarly, Mass. Gen. Laws ch. 90, § 12A prohibits the use of cellular telephones, including "hands-free mobile telephone[s] or other mobile electronic device[s]" by operators of vehicles or vessels used in public transportation. "Electronic device" in this context is defined at 220 CMR § 155.02(13)(b)(2), as "wireless or portable electronic handheld equipment that may be hands-free or not. This includes, but is not limited to, cellular telephones, smart phones, ... or any headphones or earbuds[6] of any type, and any other portable electronic devices."

This view of the headphone clause in § 13 is merely a straightforward application of the canonical statutory construction principle of *expressio unius est exclusio alterius*, "the express mention of one thing excludes all others." Iannella v. Fire Comm'r of Boston, 331 Mass. 250, 252 (1954). As demonstrated by the above examples, the Legislature is aware of the distinction between "headphones" and "earphones," and chose in enacting Mass. Gen. Laws ch. 90, § 13 to limit its application solely to the use of headphones.[7]

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[6] Merriam-Webster defines "earbud" as "a small earphone inserted into the ear." See http://www.merriam-webster.com/dictionary/earbud.

[7] Other jurisdictions have recognized this distinction. See e.g., Minn. Stat. § 169.471 (prohibiting use of "headphones or earphones" while operating a motor vehicle); 75 Pa. Cons. Stat. § 3314 ("no driver shall operate a vehicle while wearing or using one or more headphones or earphones"); R.I. Gen. Laws § 31-23-51 (prohibiting operation while wearing "earphones, a headset, headphone, or other listening device"); Va. Code § 46.2-1078 (prohibiting use of "earphones," defined as "any device worn on or in both ears") (emphasis added).

Simply, the Legislature's use of the less inclusive term "headphones" in this statute demonstrates its intent to exclude the class of the more broadly defined "earphones" that do not fit both definitions. Had the Legislature intended for the use of earbuds such as those which the Defendant allegedly wore at the time of his stop to be prohibited under Mass. Gen. Laws ch. 90, § 13, it would have used language to that effect, as it did in the other contexts described above. See e.g., Brazeau, supra, at id.

Furthermore, that the headphone clause of § 13 has remained unchanged since 1974, and has withstood several amendments updating its provisions in keeping with the pace of modern technology only underscores the Legislature's apparent intent in limiting the reach of this statute. Had the Legislature's exclusion of earbuds from this statute been an oversight, or a relic of the pre-Cambrian days when such devices lacked today's ubiquity[8], it could have amended the headphone clause as it has other clauses within the same statute.

II. PATROLMAN Zxxx LACKED REASONABLE SUSPICION TO SUSPECT THE DEFENDANT'S INVOLVEMENT IN ANY CRIMINAL ACTIVITY, SUCH THAT THE CONTINUED INTERROGATION OF THE DEFENDANT BEYOND HIS PRODUCTION OF A VALID LICENSE AND REGISTRATION AND THE RESULTING EXIT ORDER UNREASONABLY PROLONGED THE STOP IN VIOLATION OF THE DEFENDANTS' RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 14 OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

[8] Each iPhone sold since its introduction in 2007 has come with a set of earbuds. Apple celebrated the sale of its 500,000,000th iPhone in March 2014, accounting for an equivalent number of the iconic white earbuds alone, without accounting for imitators, competitors, or replacements. See http://www.forbes.com/sites/markrogowsky/2014/03/25/without-much-fanfare-apple-has-sold-its-500-millionth-iphone.

Though an officer may validly stop a vehicle on the basis of a motor vehicle infraction, "[i]t goes without saying that the driver cannot be held indefinitely until all avenues of possible inquiry have been tried and exhausted." Commonwealth v. Feyenord, 445 Mass. 72, 80 at n. 9 (2005). Rather, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' - to address the traffic violation that warranted the stop, and attend to related safety concerns." Rodriguez v. United States, __ U.S. __, 135 S.Ct. 1609, 191 L.Ed.2d 492, 498 (2015), citing Illinois v. Caballes, 543 U.S. 405, 407 (2005).

"Because addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate th[at] purpose.'" Id., quoting Florida v. Royer, 460 U.S. 491, 500 (1983). "Authority for the seizure thus ends when tasks tied to the traffic infraction are - or reasonably should have been - completed." Rodriguez, 191 L.Ed.2d at 498.

Where police make a stop for a routine motor vehicle infraction, they may not order the driver to exit the vehicle or otherwise "expand a threshold inquiry of a motorist and prolong his detention," absent reasonable suspicion of criminal activity. Commonwealth v. Feyenord, 445 Mass. 72, 77 (2005). That is, once the purpose of the stop is met, the officer is to "complete the ... citation process and, barring other reasons to detain the occupants,

leave them free from further police restraint." Commonwealth v. Cruz, 459 Mass. 459, 465-466 (2011).

Likewise, absent reasonable suspicion, police cross into unconstitutional territory where a routine stop is prolonged for the purpose of allowing a canine search. Rodriguez, supra at id. "[A] dog sniff ... is not an ordinary incident of a traffic stop. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission." Id. (record citation omitted).

In Rodriguez, as in the instant matter, the officer stopped the defendant for a civil motor vehicle infraction. In that case, the officer's "records check" revealed nothing remarkable, and he ultimately decided to issue a written warning. The officer gave the defendant and passenger "all their documents back and a copy of the written warning." Id. at 497.

The officer testified that, by that point, he "got all the reasons for the stop out of the way, [and] took care of all the business." Id. Nevertheless, the officer – who happened to be a canine officer – continued the detention so he could walk his dog around the vehicle's exterior. The dog alerted to the presence of drugs during this search. "All told, seven or eight minutes had elapsed from the time [the officer] issued the written warning until the dog indicated the presence of drugs." Id.

The Court rejected the Government's argument that the dog sniff could be justified by ordinary safety concerns attendant to motor vehicle stops. While "an officer may need to take negligibly burdensome precautions in order to complete his mission safely ... on-scene criminal investigation into other crimes ... detours from that mission." Id. at 500. The Court further declined to hold that an officer can earn "bonus time to pursue an unrelated criminal investigation" on the stop by "completing all traffic-related tasks expeditiously." Id.

The Court admonished, "[t]he reasonableness of a seizure ... depends on what the police in fact do." Id. If, the Court held, "an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the] stop's mission.'" Id. at 500, quoting Caballes, supra, at 407. "A traffic stop 'prolonged beyond' that point is 'unlawful.'" Id. at 500-501, quoting Caballes at id.

Here, there can be little question that Patrolman Zxxx increased the length and scope of the stop beyond what was necessary to effectuate its purpose. The time stamped RMV query provided in discovery indicates that the Patrolman stopped the Defendant at or around 2:20 P.M. By the time of the query's return, then, the Patrolman knew that the vehicle's registration was valid. By 2:26 P.M., the Patrolman knew that the Defendant possessed a valid license. See Specific Query Reports, attached.

Thus, by 2:26 P.M., the Patrolman had everything he needed to accomplish the ostensible "mission" of the stop – namely, the issuance of a citation for the alleged motor vehicle infraction. Because the "tasks tied to the traffic infraction ... reasonably should have been ... completed" by 2:26 P.M., the "[a]uthority for the seizure" ended at that moment. Rodriguez, 191 L.Ed.2d at 498.

In Rodriguez, the Court held that the seven to eight minute delay beyond the point at which the stop should have terminated could only be constitutionally justified by reasonable suspicion, and remanded the case to the Eighth Circuit for that determination. Here, the nine minute delay between 2:26 P.M. when Zxxx received confirmation of the validity of the Defendant's license and 2:35 P.M. (the time by which he had contacted Detective Gxxxxxxx and requested the K-9 unit) is thus also unconstitutional absent reasonable suspicion.

However, no basis for such suspicion existed. Patrolman Zxxx learned that the Defendant "may have a different identity" from Detective Gxxxxxxx only after he confirmed a valid license and registration. Patrolman Zxxx's decision to explore the possibility of a drug connection by calling Detective Gxxxxxxx clearly and impermissibly exceeded the "mission" of the stop - to issue a citation for an alleged headphones violation. Every second that Officer Zxxx was on the phone with Detective Gxxxxxxx fishing for a possible drug angle constituted an unconstitutional seizure.

The Commonwealth suggests that the possible prior use of a different identity created reasonable suspicion and supported prolonging the stop. However, this information did not come from dispatch incident to "ordinary inquiries incident to [the traffic] stop." Rodriguez, supra, at 499, quoting Caballes, supra, at 408.[9]

Rather, the information regarding the prior name came from Patrolman Zxxx's call to a Detective in a neighboring jurisdiction, who had no role or involvement in the stop. It is, therefore, the call to Gxxxxxxx which occurred after the traffic stop should have reasonably concluded that prolonged the seizure and which must be supported by reasonable suspicion. The length of the delay resulting from Zxxx's call to Gxxxxxxx is irrelevant. Whether the stop was prolonged for one second or one hour, any enlargement of the stop is unconstitutional unless preceded by reasonable suspicion. Rodriguez, supra, at 495 (even "de minimis" delays are Constitutionally intolerable).

However, this call yielded the only information the Patrolman has cited in support of reasonable suspicion – the Defendant's alleged past use of a different name.

The Commonwealth may not justify prolonging the stop by relying on the fruits of the unlawful detention. The Commonwealth's argument to the contrary flies in the face of one of the most settled of

[9] Moreover, the state and federal criminal arrest record checks which Patrolman Zxxx requested were not reasonably related to the "mission" of the stop. Patrolman Zxxx did not need to catologue the Defendant's past arrests in order to issue him a traffic ticket for a headphones violation.

constitutional principles: "a search is not to be made legal by what it turns up." United States v. Di Re, 332 U.S. 581, 595 (1947); see also Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981) (an officer's suspicion must be reasonable before the seizure begins; "[w]ere the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion"); Florida v. J.L., 529 U.S. 266, 271 (2000) ("reasonableness of official suspicion must be measured by what the officers knew before they conducted their search").

Apart from the claimed identity issue, the Patrolman offered no other basis for prolonging the detention, and it is evident that none existed. The Defendant provided his true name, a valid license bearing that name, cooperated fully, and made no movements or gestures suggesting criminal activity. See e.g., Commonwealth v. Torres, 424 Mass. 153 (1997); Commonwealth v. Bartlett, 41 Mass. App. Ct. 468 (1996); contrast Feyenord, supra, at 78 and n. 5 (holding reasonable suspicion supported extending routine motor vehicle stop for further inquiry into occupants' identities where defendant "produced a registration in another person's name, failed to identify himself, and appeared nervous," but noting "it is important to distinguish this case from cases in which the driver of a vehicle stopped for a traffic violation produces a valid driver's license and registration").

Moreover, the mere existence of a past name or arrest record cannot form the basis to justify reasonable suspicion of criminal activity. United States v. Powell, 666 F.3d 180, 188 (4th Cir. 2011). The instant matter presents a dramatic example of why this is so. Here, the prior name arose seventeen years before the stop, its use ended thirteen years before the stop, and the prior arrest record dated back six years and contained only nolle prossed cases. That a person may have engaged in suspicious conduct in the past does not diminish their present protection under the local and federal constitutions.

This is so because "[i]f the law were otherwise, any person with any sort of criminal record — or even worse, a person with arrests but no convictions — could be subjected to [an] investigative stop by a law enforcement officer at any time without the need for any other justification at all. To find reasonable suspicion in this case could violate a basic precept that law-enforcement officers not disturb a free person's liberty solely because of a criminal record. Under the Fourth Amendment our society does not allow police officers to 'round up the usual suspects.'" United States v. Laughrin, 438 F.3d 1245, 1247 (10th Cir. 2006)

Because Patrolman Zxxx increased the scope and length of the detention beyond when the tasks associated with the routine motor vehicle stop should reasonably have been completed, and because he lacked reasonable suspicion to do so, the continued detention and

resulting search of the Defendant's vehicle violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights.

III. THE SEARCH OF THE DEFENDANT'S CAR CANNOT BE JUSTIFIED BY HIS ALLEGED GRANT OF CONSENT; THE DEFENDANT'S CONSENT RESULTED FROM THE UNLAWFUL EXIT ORDER; THE SCOPE OF THE SEARCH EXCEEDED THE CONSENT WHICH THE OFFICER REQUESTED; AND AND THE DEFENDANT LACKED SUFFICIENT ENGLISH LANGUAGE PROFICIENCY TO EFFECTIVELY GRANT CONSENT, SUCH THAT THE DEFENDANT'S CONSENT TO SEARCH IS INVOLUNTARY AND THE RESULTING SEARCH VIOLATED HIS RIGHTS UNDER ARTICLE 14 OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

"When the Commonwealth relies on consent as the basis for a warrantless search, it must demonstrate consent unfettered by coercion, express or implied, ... [which is] something more than mere acquiescence to a claim of lawful authority." Commonwealth v. Walker, 370 Mass. 548, 555 (1976) (quotations and citations omitted). "The question whether consent was voluntary is a question of fact to be determined in the circumstances of each case, with the burden of proof on the government." Commonwealth v. Aguiar, 370 Mass. 490, 496 (1976).

As a threshold matter, the Patrolman's claim that the Defendant provided consent to search is not credible. The Defendant, a native Spanish-speaker, lacked sufficient understanding of the English language to understand the Patrolman's request and respond appropriately.

In November 20xx, the Defendant retained the services of Dr. Mxxxxxx O'Lxxxxxxx, an expert in foreign languages and cultures, for evaluation and testimony in connection with the instant Motion to Suppress. Dr. O'xxxxxxx conducted extensive testing of the Defendant's English-language proficiency, designed to determine whether the Defendant could understand the "important exchanges of information" attendant with the stop and arrest of the Defendant. Id. at pg. 3.

Some selected findings from Dr. O'xxxxxxx's report underscore the Defendant's inability to communicate in English. Beginning the interview in English, Dr. O'xxxxxxx reported that "by the third or fourth question [the Defendant] was unable to continue, and I switched to Spanish." Id. at pg. 14. Dr. O'xxxxxxx further opined that the Defendant's general language ability is "very limited" and that he "understands a limited number of very simple learned phrases, spoken slowly with frequent repetitions." Id. at 15.

With specific reference to whether the Defendant could give consent to search in English, Dr. O'xxxxxxx reported "considerable difficulty in the communications between the two, because Mr. Pxxxxxx speaks very little English." Id. at 17. Noting that "[he] did not know the exact words that were used by Officer Zxxx," he tested the Defendant's ability to understand using simple phrases akin to a request for consent. Id.

Dr. O'xxxxxxx first asked the Defendant the following phrases: "is there any contraband in your vehicle[;]" "can I look in your vehicle[;]" and "may I search your vehicle." Id. In follow-up, he asked to identify the Defendant a series of words, comprised of a mixture of random words (such as "backwards," which the Defendant interpreted as "bad words") and legally significant words, such as "search" and "permission," which the Defendant did not understand. Id. at 18.

Ultimately, Dr. O'xxxxxxx arrived at the opinion that the Defendant "requires an interpreter to deal with any encounter of a serious nature. He is unable to understand English well enough to be Mirandized in English or to understand a request for permission to search his car." Id. at 22.

In Dr. O'xxxxxxx's estimation, the Defendant "was at an extreme disadvantage in this encounter with the Rowley Police because of his inability to speak English." Id. As such, the notion that the Defendant could provide voluntary consent in these circumstances is untenable and cannot support the search of the Defendant's vehicle.

Even were this Honorable Court to credit the Patrolman's implausible assertion that the Defendant and he had "no trouble" communicating, any claimed grant of consent remains involuntary as the product of an unlawful seizure.

"Where consent is obtained as a result of the exploitation of a prior illegality that follows close in time, then consent is not

considered to be freely given." Commonwealth v. Yehudi Y., 56 Mass. App. Ct. 812 (2002), citing Commonwealth v. Midi, 46 Mass. App. Ct. 591 (1999). Consent is deemed voluntary only where there is sufficient attenuation between the primary illegality and the subsequent grant. Id.

The Massachusetts Appeals Court in Yehudi Y. considered a challenge to the denial of a juvenile defendant's motion to suppress. The juvenile sought to suppress evidence that had been obtained in a search of his bedroom, conducted after officers obtained consent from the juvenile's parents "while [officers were] improperly inside the home." Id. at 817 (emphasis in original). The Appeals Court explained that "the fact that there was no break in the nexus between the illegal entry and the request for consent" indicated that the parents' consent lacked sufficient attenuation from the improper entry. Id. at 818-819 (internal citations omitted).

Here, as in Yehudi Y., the Defendant's grant of consent occurred immediately following the constitutional violation (the unlawful interrogation and exit order). Indeed, because the Defendant gave consent after the exit order and during the continued questioning, in a sense, his grant occurred while the primary illegality was ongoing.

There thus existed no "break in the nexus," (see Id. at 818) between the prior illegality and the "consent" to search. The "consent" given was thus involuntary and ineffective, and could not be used to justify the resulting search. Commonwealth v. Yehudi Y.,

56 Mass. App. Ct. 812 (2002); see also Commonwealth v. Arias, 81 Mass. App. Ct. 342 (2012) (defendant's consent to search his automobile involuntary and invalid where granted during impermissible stop and patfrisk).

Even the request for consent in the instant matter was unlawful. As described more fully supra, where officers initiate a motor vehicle stop based on a traffic violation, the scope of the stop is circumscribed by the reason for the stop. See Commonwealth v. Santos, 65 Mass. App. Ct. 122, 124 (2005) ("the nature of the stop ... defines the scope of the initial inquiry by a police officer") (citations omitted).

Thus, the stop here should have been confined to inquiries regarding the Defendant's alleged use of earbuds. The Patrolman here made no inquiries into the circumstances supporting the stop. He did not issue a citation for the alleged traffic violation. Because upon production of license and registration the Patrolman had no basis for suspecting criminal activity, he had a constitutional obligation to terminate the encounter with a citation.

To sanction the instant exit order and "consent" search, where the scope of the Patrolman's inquiry should have been confined to the reason of the stop, would invite that which Santos cautions against, "random, unequal treatment of motorists." Id. at 128.

The Patrolman in the instant matter lacked any reasonable basis to expand the scope of the traffic stop, conduct an interrogation

unrelated to the alleged traffic violation, or to issue an exit order. The resulting search of the vehicle thus worked a further violation of the Defendant's rights under Article 14 of the Massachusetts Declaration of Rights. Thus, "[i]t follows that all of the evidence seized after the primary illegality – the continued detention of [the Defendant]... – should be suppressed as the fruit of the poisonous tree[.]" Torres, supra, at 163.

Finally, even if this Honorable Court finds lawful the Patrolman's request for consent, the degree of consent he requested and claims he received was far exceeded by the degree of intrusion that followed.

Evaluation of the existence and scope of consent requires analysis of the manner in which the Patrolman requested consent. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment [to the United States Constitution] is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Commonwealth v. Gaynor, 443 Mass. 245, 255 (2005).

Here, following his removal of the Defendant from his vehicle, the Patrolman requested his consent to "look inside his car" the vehicle. This plainly implies a limited intrusion, a peek rather than an exhaustive search. What followed, however, far surpassed a simple "look inside[.]" The Patrolman scoured the vehicle,

introduced a K-9 to the interior, and ultimately disassembled the passenger compartment in search of suspected contraband.

Under the circumstances of this case, it simply strains credulity to suggest that a "reasonable person" would interpret the phrase "look inside" to encompass such an extraordinarily invasive search. Id. Because the scope of the Patrolman's search far exceeded the bounds implied by the language of his request, any grant of consent (if credited) cannot justify the intrusion that occurred here.[10]

IV. ANALYSIS OF DATA PERTAINING TO PATROLMAN Zxxx'S STOPS, CITATIONS, ARRESTS, AND SEARCHES EVIDENCES A DISPARATE TREATMENT OF NON-WHITE MOTORISTS AND RAISES AN INFERENCE THAT IMPERMISSIBLE RACIAL BIAS MOTIVATED HIS DECISION TO STOP AND SEARCH THE DEFENDANT, IN VIOLATION OF ARTICLE 14 OF THE MASSACHUSETTS DECLARATION OF RIGHTS AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

"It is well established that '[t]he equal protection principles of the Fourteenth Amendment ... and arts. 1 and 10 ... prohibit discriminatory application of impartial laws.'" Commonwealth v. Lora, 451 Mass. 425, 436 (2008), quoting Commonwealth v. Franklin Fruit Co., 388 Mass. 228, 229-230 (1983). "[I]f a defendant can establish that a traffic stop is the product of selective enforcement predicated on race, evidence seized in the course of the stop should

[10] See also United States v. Infante-Ruiz, 13 F.3d 498, 505 (1st Cir. 1994) (police exceeded scope of consent by searching briefcase in locked trunk; officers "did not notify [the consenting occupant] that he was looking for drugs, making it somewhat more difficult to impute ... consent to search every container within the car that might contain drugs"); United States v. Turner, 169 F.3d 84 (1st Cir. 1999) ("objectively reasonable person" would not understand detectives' request to search for "any signs [that a] suspect had been inside [the defendant's apartment]" and "any signs a suspect had left behind" would encompass search of defendant's computer for sexually explicit images).

be suppressed unless the connection between the unconstitutional stop by the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" Id. at 440, quoting Wong Sun v. United States, 371 U.S. 471, 487-488 (1963).

"Statistics may be used to make out a case of targeting minorities for prosecution of traffic offenses[,]" so long as "[t]he statistics proffered ... address the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated." Id., quoting State v. Soto, 324 N.J.Super. 66, 83 (1996) and Chavez v. Illinois, 251 F.3d 612, 637-640 (7th Cir. 2001).

Evidence alleging disparate treatment must show that the community impacted by the challenged practice "varied significantly from the racial composition of the population of motorists making use of the relevant roadways, and who therefore could have encountered the officer or officers whose actions have been called into question." Id. at 442.

In the instant matter, information provided in discovery and through public records requests answers the "crucial question" propounded by the Lora Court. That is, information gleaned through these processes reveal Patrolman Zxxx's disproportionate targeting of non-white motorists for investigatory searches following otherwise routine motor vehicle stops.

On December 4, 20xx, the Defendant filed motions for discovery pursuant to Mass. R. Crim. P. 14 and 17, seeking disclosure of citation and other data from Patrolman Zxxx, the Rowley Police, the Ipswich Police, and the Massachusetts State Police, from 20xx through 20xx. The Defendant grounded this request on a preliminary analysis of data gathered by and obtained from the Executive Office of Public Safety and Security ("EOPSS") pursuant to a public records request.

EOPSS gathered this data pursuant to the requirements of St.2000, ch. 228, §§ 1-10, also known as "An Act Providing for the Collection of Data Relative to Traffic Stops," ("Act"). The Act required the revision of the Massachusetts Uniform Citation ("Citation") to include a field requiring officers to note whether a search of a vehicle occurred at the time a citation was issued. See St.2000, c. 228, § 5.

Further, the Act required the Registry of Motor Vehicles to collect data from Citations, including (1) identifying characteristics of the individuals who receive a warning or citation or who are arrested, including the race and gender of the individual; (2) the traffic infraction; (3) whether a search was initiated as a result of the stop; and (4) whether the stop resulted in a warning, citation or arrest. See St.2000, c. 228, § 8.

The Act's provisions, however, are not implicated in stops that do not result in citations. That is, where there is no citation

given, neither EOPSS nor the Registry of Motor Vehicles are able track or maintain data.

Analysis of the data provided by EOPSS indicated that in the four years represented by the EOPSS response, the town of Rowley issued 1,191 citations. Of these, 1,083 were issued to White drivers, while only 47 were issued to Hispanic drivers. That is, 91% of the Department-wide cited population is White, while Hispanics comprise only 4% of the cited population.

Further analysis indicated that while White drivers comprise 91% of the cited population, Hispanic drivers are more likely to be searched in connection with a stop and citation than are White drivers.

Of the 1,191 citations the Rowley Police Department issued in 20xx-20xx, 59 resulted in a non-inventory vehicle search. Non-inventory vehicle searches follow citations issued to Hispanic drivers in 6.4% of stops (3 searches out of 47 citations). With White drivers, searches follow citations only 4.8% of the time (52 searches out of 1083 citations). Thus, based on the four-year average, Hispanic drivers are more likely to experience a non-inventory motor vehicle search following a citation than are White drivers on a ratio of 1.3 to one.

The Defendant presented this information in support of his discovery motions requesting further information regarding Patrolman Zxxx's stops. On this showing, this Honorable Court (Lx, J.) ordered

the Rowley Police Department to disclose its racial profiling policies, as well as Patrolman Zxxx's citations, arrest reports, audit logs, and any other records showing the officer's stops for one year prior to the Defendant's arrest.

The Rowley Police Department provided its Racial Profiling Policy and Motor Vehicle Inventory Policy in due course. Moreover, though the Patrolman did not turn over his citations as ordered, he provided various other documents in response to the Court's discovery order.

First, he provided reports captioned "Citation Status Report," and "Arrest Status Report." These reports omit any identifying information pertaining to the race of the driver or whether a non-inventory search occurred in connection with the citation or arrest.

Next, the Patrolman provided a lengthy untitled report detailing each stop he participated in for the relevant time period (which the Defendant refers to hereafter as "Stop Status Report"), regardless of whether the stop ended in a verbal warning, citation, or arrest. This document does contain the requested identifying information for some, though not all, of the stops.

Curiously, this report entirely omits any reference to the stop of the Defendant. Nevertheless, the Defendant includes the stop of his vehicle in the calculus.

Finally, the Patrolman provided his arrest reports for the relevant time period. These too contain the pertinent identifying information for arrested parties.

The "Stop Status Report" suggests that Patrolman Zxxx conducted 149 motor vehicle stops during the relevant time period.[11] Of these 149 stops, Patrolman Zxxx reported 107 stops of White drivers, one stop of a Black driver, and one stop of an Asian driver. The remaining forty stops are recorded as "U," presumably for "unknown," or are left undocumented altogether. Id.

That Patrolman Zxxx categorized so many motorists as "unknown" or entirely unrecorded makes precise statistical analysis of his stops difficult. Nevertheless, an initial review of his records show that White drivers make up at least 70.5% of Patrolman Zxxx's stops.

Cross-referencing the "Stop Status Report" with the Citation and Arrest reports revealed that the Patrolman conducted only three non-inventory searches in connection with 149 motor vehicle stops[12], each of which involved Ipswich Detective Gxxxxxxx, and in each of which Patrolman Zxxx requested the assistance of a canine unit.

[11] The Stop Status Report contains information for stops only incidentally involving Patrolman Zxxx, in addition to those which he initiated. In fairness, the Defendant has excluded from consideration those stops, citations, arrests, and searches which were initiated by officers other than Patrolman Zxxx.

[12] Review of the arrest reports reveals two other motor vehicle searches occurring in the relevant time period. The Defendant omits these from the instant analysis, as neither search followed a motor vehicle stop, but rather involved searches of abandoned vehicles. See Arrest Reports 13-xxx-AR, 14--AR.

The first such search occurred in October 2013, after Patrolman Zxxx stopped Jxxxx Mxxxxxx and Exxxxxx Sxxxxxx for "several Marked Lanes viol[ations]." See Stop Status Report, pg. 38-39. The Patrolman's short narrative in that report reveals the pretextual nature of that stop, however, as he continues that the "Operator [is] known to me as [a] cocaine dealer." Id.

The Patrolman had the vehicle towed after the stop and searched by a canine unit, which "yielded negative results." He gave a verbal warning for the "marked lanes violation" and made no arrests. As a result of the verbal warning, the EOPSS data described above did not include the identifying data for this stop. The Stop Status Report describes Mr. Mxxxxxx as "B" (indicating black), while Mr. Sxxxxxx is described as "W" (indicating white). See Rowley Police Department Racial Profiling Policy.

The Stop Status Report indicates the existence of an incident report (13-44-OF). Though Patrolman Zxxx did not include this report in his response to this Honorable Court's discovery order, the Rowley Police Department provided a copy of the report pursuant to a records request. In his narrative, Patrolman Zxxx describes Mr. Mxxxxxx and Mr. Sxxxxxx as Hispanic, contrary to the Stop Status Report's designation of these individuals.

Next, in January 20xx, the Patrolman stopped Jxxx Rxxxxx-Lxxx on the basis of "intelligence" that he participated in drug dealing at a specified residence on Gxxx Street. Though the Patrolman claimed to

have made arrests based on prior observations, no such arrests are evident in the discovery provided.

Again, Patrolman Zxxx sought guidance from Ipswich Detective Gxxxxxxx. Likewise, he again requested the assistance of a canine unit for the search of the vehicle. This stop did result in a citation and arrest, as well as charges for trafficking in a controlled substance. Patrolman Zxxx did not provide the citation in discovery, though the Arrest Report indicates that he categorized Mr. Lugo-Rivera's race as "W" (indicating white).The Patrolman did note Mr. Lxxx-Rxxxxx's ethnicity as Hispanic. Id.

The Rowley Police Department's policy regarding the use of race codes provides that Hispanic drivers are to be noted with an "H." See Racial Profiling Policy. Thus, his categorization of Mr. Lugo-Rivera as "White" despite his awareness of Mr. Lxxx-Rxxxxx's Hispanic descent is a telling deviation from his Department's policy.

The final non-inventory search conducted pursuant to a motor vehicle stop is that involving the Defendant, as described above. Here, the Defendant received no citation, and thus his stop is also not tracked for purposes of the Act. However, like Mr. Lxxx-Rxxxxx, the Arrest Report in his case also categorizes his race as "White" and his ethnicity as "Hispanic." See 14-xx-AR.

Because the stops of Mr. Mxxxxxx and Mr. Pxxxxxx did not result in a citation, the EOPSS data described above included neither party in any category. Further, because Mr. Lxxx-Rxxxxx is listed as white

(and because ethnicity is not tracked at all), he is miscategorized as such in the EOPSS citation data.

Nevertheless, a pattern emerges from the information which Patrolman Zxxx provided in discovery. Adjusting the total stops of White drivers from 106 to 104, and revising the Hispanic population from zero to three to account for the three motorists that Zxxx mislabeled as described above, his revised stopped population is 69.8% White and 2% Hispanic. Of all of his motor vehicle stops across all populations in the pertinent time period, only three resulted in non-inventory searches utilizing canines.

All three involved Hispanic drivers.

Thus, 100% of Patrolman Zxxx's non-inventory searches following motor vehicle stops affect Hispanic drivers. As far as the officer's discovery responses reveal, he has subjected no white drivers whatsoever to the same degree of scrutiny. That is to say, nothing in the discovery suggests that Patrolman Zxxx has ever contacted Ipswich Detective Gxxxxxxx, requested a K-9 officer's assistance, and searched a vehicle after stopping a White driver, or a driver of any race apart from Hispanic for that matter.

In Lora, the Court created a suppression remedy where a defendant is able to present credible statistical evidence that "one class is being treated from another class that is otherwise similarly situated." Id. at 440. The Defendant has met that burden here. The evidence described above shows that the racial composition of the

population of searched motorists "varie[s] significantly from the racial composition of the population of motorists making use of the relevant roadways, and who therefore could have encountered the officer ... whose actions have been called into question." Id.

There can be no more credible evidence than the Rowley Police Department's own records of Patrolman Zxxx's activities. And though the Patrolman's records evidence misreporting in violation of his Departmental Policy and the Racial Profiling Data Collection Act, the assembled information evidences his impermissible targeting of Hispanic motorists at a rate that varies significantly (to say the least) from the population of motorists whom he has encountered.

The racial composition of Patrolman Zxxx's stops – according to his own records — is 69.8% White and 2% Hispanic (the remainder largely unknown or uncategorized). Of 149 stops that Patrolman Zxxx conducted, in the relevant time period, he conducted K-9 searches only three times. All three involved Hispanic motorists, comprising a full 100% of his searches. Conversely, his records reflect that 70% of his stops are of White drivers, none of which he ever searched.

The foregoing indicates that the miniscule population (2%) of Hispanic drivers represented in the records of Patrolman Zxxx's stops bears 100% of his search activity. In contrast, White drivers, the largest population by far, are untouched.

Because it is mathematically impossible to achieve a higher disparity than as appears here, this Honorable Court should find that

the Defendant has met his burden in showing statistical evidence that his race impermissibly motivated the stop and resulting search of his vehicle, in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights.

CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that this Honorable Court allow his Motion to Suppress.

Respectfully submitted,
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