

SJC-13816

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH,
Appellee,

v.

JOSE ARIAS,
Appellant.

ON APPEAL FROM A JUDGMENT OF
THE SUFFOLK SUPERIOR COURT

BRIEF OF THE APPELLANT
****REFERENCES IMPOUNDED MATERIAL****

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September 19, 2025

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GLOSSARY

Record Appendix Volume One is referred to as (R1.*page*). Record Appendix Volume Two is referred to as (R2.*page*). The Impounded Record Appendix is referred to as (IR.*page*). The Addendum is referred to as (A.*page*). The transcripts are referred to as (T*volume/page*), and the transcript volume numbers correspond to the following dates:

T1 – 12/10/2019 – pretrial hearing

T2 – 1/27/2020 – pretrial hearing

T3 – 1/13/2021 – pretrial hearing

T4 – 4/27/2021 – motion to suppress hearing

T5 – 9/12/2023 – trial 1, day 1

T6 – 9/13/2023 – trial 1, day 2

T7 – 9/14/2023 – trial 1, day 3

T8 – 9/15/2023 – trial 1, day 4

T9 – 3/5/2024 – pretrial hearing

T10 – 3/8/2024 – pretrial hearing

T11 – 3/11/2024 – trial 2, day 1

T12 – 3/12/2024 – trial 2, day 2

T13 – 3/13/2024 – trial 2, day 3

T14 – 3/14/2024 – trial 2, day 4

T15 – 3/15/2024 – motion hearing

T16 – 3/25/2024 – motion hearing and sentencing

ISSUES

Suppression issues

1(A). Whether the officers' delay in addressing the alleged civil traffic infraction – which involved an improper lefthand turn – for a *full day* was unreasonable, rendering the stop of Mr. Arias unconstitutional.

1(B). Whether the stop violated art. 14, given the motion judge's explicit finding that the civil traffic infraction was a pretext and not the "real reason" for the stop.

2(A). Whether officers lacked probable cause that Mr. Arias committed the arrestable crime of failure to stop for police based on *de minimis* facts, including traveling slowly for less than 0.1 miles and attempting to turn off of a busy street.

2(B). Whether the failure to stop statute, G.L. c. 90, § 25, is unconstitutionally void-for-vagueness.

2(C). Whether, in interpreting art. 14, Massachusetts should follow other states in departing from the Supreme Court's *Atwater* decision, which validates statutorily-authorized arrests for non-jailable misdemeanors punishable only by fine, *per se*, without any reasonableness consideration.

2(D). Whether art. 14 bars pretextual *arrests*.

Trial issue

3. Whether the trial judge erred in denying Mr. Arias' request to interview a juror whose post-verdict letter raised the possibility that statements reflecting bias based on disability infected deliberations.

STATEMENT OF THE CASE

On September 10, 2019, Mr. Arias was arraigned on one count of trafficking, class B (cocaine), 200 grams or more, G.L. c. 94C, § 32E(b)(4). (R1.14,34). On December 17, 2019, Mr. Arias filed a motion to suppress the drugs on the grounds that his stop, seizure, and arrest were unconstitutional. (R1.15,64-68). The Commonwealth filed an opposition on August 14, 2020. (R1.18,151-161). Mr. Arias filed a memorandum in support of the motion on September 10, 2020. (R1.18,162-181)

The suppression hearing was held on April 27, 2021 (Krupp, J.). (R1.19). Both Mr. Arias and the Commonwealth submitted supplemental letters to the motion judge on April 30, 2021. (R1.19).

In a written decision issued June 17, 2021, the motion judge allowed the motion to suppress only as to certain defendant statements. (R2.41-50;A.54-63). The motion to suppress was otherwise denied. (R2.41-50;A.54-63).

The first trial (Doolin, J.) spanned September 12 to September 15, 2023, and resulted in a deadlocked jury and mistrial. (R1.24-25).

The retrial commenced (Budreau, J.) on March 11, 2024. (R1.29). That day, the Commonwealth's motion to reduce the indictment to trafficking, class B (cocaine), 100 to 200 grams, was allowed. (R1.29;R2.76). On March 14, 2024, Mr. Arias was convicted of a lesser-inclusive offense: trafficking, class B (cocaine), 18 to 36 grams, G.L. c. 94C, § 32E(b)(1). (R1.31;R2.79).

On March 14, 2024, based on a post-verdict letter provided by a juror to the Court and defense counsel, Mr. Arias filed a motion to "vacate

verdict and declare mistrial,” and requested, alternatively, that the Court interview the juror. (R2.156,164;IR.3). On March 25, 2024, the trial judge denied that motion in a written decision. (R1.169-171;A.65-67).

Mr. Arias was sentenced on March 25, 2024, to state prison for two years to two-years-and-one-day. (R1.32;R2.161). Mr. Arias timely appealed. (R1.32;R2.172).

STATEMENT OF FACTS

1. The motion to suppress.

A. The alleged traffic infraction in Jamaica Plain on March 27.

On March 27, 2019, Boston police drug control unit (“DCU”) officers were on patrol in Brighton, wearing plain clothes and in unmarked vehicles. (R2.41;A.54). At 3:10 pm, DCU Sgt. Det. Feeney observed a light-skinned Hispanic male, later identified as Mr. Arias, enter the driver’s seat of a Chevrolet Equinox SUV (“SUV”) that was parked on Foster Street, and drive away. (R2.41-42;A.54-55). The SUV was registered to a 61-year-old Black man. (R2.41-42;A.54-55).

At the outset of the hearing, the parties stipulated that the Commonwealth would neither introduce, nor rely upon, information concerning a purported drug investigation as a basis for the stop and seizure of Mr. Arias. (T4/5-6). The motion judge’s decision notes: “[c]onsistent with the parties’ stipulation, I do not rely on the fact that police had any information prior to Sgt. Det. Feeney’s observations [at 3:10 pm on March 27].” (R2.41-42;A.54-55). “[P]olice apparently had

information about the SUV on March 27, 2019, but the Commonwealth does not rely on such information. I do not know what information the police had.” (R2.41-42;A.54-55).

Sgt. Det. Feeney followed the SUV as it turned right onto Washington Street but lost sight of it when he got snarled in traffic. (T4/17,20;R2.42;A.55). He did not observe the SUV commit any traffic violations. (T4/33).

DCU Officer Pieroway, driving an unmarked vehicle, heard radio communications from Sgt. Det. Feeney and located the SUV on Washington Street in the Oak Square area of Brighton. (R2.42;A.55). Officer Pieroway followed the SUV from Oak Square to Centre Street in Jamaica Plain – a six-mile route depicted below – without incident. (R2.42;A.55).



(R1.199).

Officer Pieroway was following the SUV on Centre Street in Jamaica Plain and traffic was heavy. (R2.42;A.55). There was a line of cars stopped at a stop sign at the intersection of Centre and South Streets. (R2.42;A.55). Centre Street has a single lane of travel, but there was enough room to drive in the bike lane to the right of the line of traffic. (R2.42;A.55). Officer Pieroway observed the SUV pull quickly to the right side of the line of traffic, pass about seven vehicles, fail to stop at the stop sign, and take an immediate left in front of the line of traffic. (R2.42;A.55).

Officer Pieroway's unmarked vehicle lacked sirens or "any means to pull a car over." (T4/79). Officer Pieroway testified that it was, accordingly, his "practice" to call for a marked police unit to initiate a motor vehicle stop. (T4/78). Despite his observation of the traffic infraction at Centre and South Streets, however, Officer Pieroway did not call for a marked unit to stop the SUV. (T4/87-88). Officer Pieroway acknowledged that Centre Street would have been congested at this time of day. (T4/91).

The judge found that "because he was in an unmarked vehicle without immediate backup, and because of his safety concerns, Officer Pieroway terminated his surveillance of the SUV." (R2.42;A.55). Presumably, this finding was based on Officer Pieroway's testimony that "it would not be safe for [him] to conduct the same maneuver [as the SUV] and maintain visual surveillance on [the SUV]." (T4/107).

The motion judge's findings, however, do not specifically address Officer Pieroway's decision not to call for a marked unit to stop Mr. Arias.

On cross-examination, when Officer Pieroway was asked what prevented him from requesting a marked unit, he responded: “Safety.” (T4/88). Officer Pieroway did not explain what would have been unsafe about calling a marked unit to stop Mr. Arias. On cross-examination, when Officer Pieroway was asked “[s]o you really had no intention of trying to stop this vehicle?” and answered, “[o]n that day, I did not.” (T4/88).

B. The search and seizure of the Mr. Arias in Brighton on March 28.

The following day, March 28, 2019, at about 3:15 pm, Sgt. Det. Feeney observed Mr. Arias exit a residence in Brighton and enter the SUV, which was parked on Foster Street. (R2.43;A.56). Sgt. Det. Feeney was parked about “10 or 12 car lengths” behind the SUV and “immediately” recognized Mr. Arias from the day before. (T4/34). Sgt. Det. Feeney did not stop Mr. Arias as he walked from the residence to the SUV or when Mr. Arias drove away.

Sgt. Det. Feeney followed the SUV as it traveled up Foster Street and turned onto Washington Street but again got tied up in traffic. (D3). Officer Pieroway heard Sgt. Det. Feeney’s radio calls and saw the SUV near Chestnut Hill Avenue and Washington Street. (R2.43;A.56). Officer Pieroway followed the SUV and requested that a marked police vehicle stop it. (R2.43;A.56).

Officer Pieroway stated over the radio: “We’re looking to stop a vehicle *for a drug investigation*. It will be a silver Chevy Equinox, 886-Victor-Echo-2. We’re at a red light here in front of Bank of America at Market and Wash.” (R2.43;A.56 [emphasis supplied by motion judge]).

The motion judge explicitly found that “[t]he traffic infraction on March 27, 2019 was a pretext for the motor vehicle stop on March 28, 2019.” (R2.44;A.57). The judge determined that the “real reason” for the March 28 stop was “to allow the DCU officers to pursue a drug investigation related to defendant and/or the SUV.” (R2.44;A.57).¹ To be clear, pursuant to the stipulation, no evidence regarding the purported drug investigation was introduced or relied upon by the Commonwealth. (T4/5-6;R2.41-42;A.54-55).

The marked unit arrived on Market Street – which runs one lane in each direction (R1.195-197) – and got behind the SUV; Officer Pieroway followed behind the marked unit. (R2.43;A.46). The motion judge found: “Officer Pieroway saw the marked unit activate its lights and sirens shortly after turning onto Market Street, just before Henshaw Street.” (T4/64,76;R2.43;A.56). The SUV “proceeded slowly about a block, past a few businesses, to the next street on the left (Bennett Street) and attempted to take a left onto Bennett Street.” (R2.43;A.56). Officer Pieroway testified that the SUV was travelling at a “slow crawl ... under the speed limit.” (T4/67-68). DCU Detective Miskell, who was also following behind the marked unit, pulled his vehicle slightly to the left, stopping the heavy oncoming traffic heading in the opposite direction. (R2.43;A.56). Det. Miskell’s maneuver “effectively cut off the SUV’s ability to take a left onto Bennett Street because the SUV was blocked by

¹ The motion judge noted that within four minutes of Officer Pieroway calling the marked unit to make the stop, he had requested the presence of a drug sniffing dog, which was cancelled minutes later, after Mr. Arias was patfrisked. (R2.44;A.57).

the stopped line of traffic heading in the opposite direction.” (R2.43;A.56). Officers immediately approached the SUV and ordered Mr. Arias to exit. (R2.44;A.57).

A map, introduced as an exhibit, reveals that there are no streets that intersect with Market Street in between Henshaw and Bennett:



(R1.187). This Court should take judicial notice that the distance on Market Street between Henshaw and Bennett Street is approximately 350 feet. See *Commonwealth v. Warren*, 475 Mass. 530, 531, n.4 (2016) (where record contains “geographical context for our review ... [appellate court] may take judicial notice of the location”).

Market Street has on-street parking (T4/73), but there was no evidence of open parking spaces for Mr. Arias to pull into. In fact, after hearing the evidence, the motion judge rejected the Commonwealth's contention that there would have been open parking spots on the righthand side of Market Street: "I can't find that there was space to the right for Mr. Arias to pull over. No one has told me that.... [W]e have every reason to believe that [Market Street] was pretty – pretty full at that time of the day."² (T4/149).



(R1.196, depicting Market Street, with Bennett Street off to the left).

² Officer Pieroway could not recall if there were any open parking spaces on Market Street. (T4/73).

Officers immediately “exited” Mr. Arias from the SUV and then moved him to the sidewalk. (R2.44;A.57). Officer Pieroway drove the SUV to a parking lot because the SUV, as situated, was “blocking the flow of traffic on both sides.” (T4/68).

The motion judge found that officers did not request Mr. Arias’ driver’s license or registration. (R2.44;A.57). There was no evidence that Mr. Arias was ever cited for the alleged March 27 traffic infraction in Jamaica Plain. Nor was there any evidence that Mr. Arias was cited for, or charged with, failing to stop for police on March 28 in Brighton.

Detective Miskell approached Mr. Arias and identified himself as a DCU detective, but did not tell Mr. Arias that he was under arrest. (R2.44;A.57). Detective Miskell patfrisked Mr. Arias and found a hard object in his pocket; when asked, Mr. Arias stated that the object was cocaine. (R2.44;A.57). Mr. Arias was handcuffed and read *Miranda* warnings. (R2.44;A.57). Mr. Arias directed police to additional drugs in the SUV, which police seized. (R2.44;A.57).³

2. Deliberating juror’s post-verdict letter.

Jury deliberations began on March 13, 2024. (R1.30). The jury resumed deliberations on the morning of March 14, 2024, and at 10:35 am submitted a note that read: “[t]he jury is unable to reach a unanimous decision at this time.” (R1.30-31;R2.130-131). After a pre-*Tuey*-

³ The motion judge suppressed certain statements made by Mr. Arias following his removal from the SUV. (R2.48-49;A.61-62).

Rodriguez instruction, the jury was sent back out to deliberate, and the verdict was returned that same day at 3:45 pm. (T14/6-8;R1.30-31).

Three hours after the verdict was returned, defense counsel received a letter, via email, from one of the deliberating jurors. (IR.6-7). The same letter was also provided to the clerk's office. (IR.8). In the letter, the juror stated that they have autism spectrum disorder and were pressured by other jurors into rendering the guilty verdict.⁴ (IR.8. See letter, redacted, at A.64).

Upon receiving the letter, Mr. Arias moved for a mistrial or, alternatively, for the trial judge to interview the juror. (R2.156;IR.3-5). After briefing and argument, the trial judge denied Mr. Arias' motion and declined to interview the juror. (R2.169-171;A.65-67).

SUMMARY OF ARGUMENT

The motion to suppress the drugs should have been allowed because the stop of Mr. Arias was unconstitutional. (pp.19-29). The officers' delay in addressing a civil traffic infraction allegedly observed *a full day* earlier – which the Commonwealth claimed justified the March 28 stop – was unreasonable, violating art. 14. (pp.20-26). Further, on a record where the motion judge explicitly found the civil traffic infraction to be a pretext for the stop, this Court should finally invalidate, under art. 14, the use of pretexts to justify investigatory stops. (pp.26-29).

Suppression was also warranted because the officers' post-stop actions, including removing Mr. Arias from his vehicle and patfrisking

⁴ Like the trial judge (R2.169-171), this brief uses the pronouns "they" and "their" for this juror.

him, were unlawful. (pp.29-47). There was no probable cause that Mr. Arias – who travelled a mere 350 feet before attempting to turn off of busy Market Street – committed the arrestable offense of failing to stop for police. (pp.30-35). The officers’ post-stop actions were also invalid because the failure to stop statute (G.L. c. 90, § 25) is unconstitutionally vague, Mr. Arias’ arrest for a non-jailable misdemeanor was unreasonable under art. 14, and his arrest was pretextual in contravention of art. 14 – all novel issues that should be decided in Mr. Arias’ favor. (pp.35-47).

Finally, the trial judge erred in declining to interview a juror whose post-verdict letter raised the specter that improper bias based on disability infected the jury. (pp.47-52). The letter raised a potential link between the juror’s disability (autism spectrum disorder) and pressure from other jurors who questioned this juror’s fitness to serve. (pp.48-50). Potential bias concerning a juror’s disability cannot be ignored. (pp.50-52).

ARGUMENT

I. The motion to suppress should have been allowed because the civil traffic infraction allegedly committed on March 27 did not justify the stop of Mr. Arias a full day later.

The Commonwealth sought to justify the March 28 stop of Mr. Arias based solely on the civil traffic infraction allegedly observed by police one day earlier. (T4/130-135;R1.152-155).⁵ Because officers unreasonably

⁵ Pursuant to the stipulation, the Commonwealth elicited no evidence – and made no argument – that the purported drug investigation provided

delayed initiating the traffic stop on the basis of the March 27 traffic infraction, the eventual stop of Mr. Arias was unconstitutional. Further, on a record where the motion judge explicitly found that the stop of Mr. Arias was a pretext, this Court should squarely address, and invalidate, pretextual stops under art. 14.

A. The officers' unreasonable delay in addressing the March 27 traffic infraction rendered the stop, a day later, unconstitutional.

The stop of Mr. Arias on March 28 was unreasonable and violated art. 14 and the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-810 (1996); *Commonwealth v. Rodriguez*, 472 Mass. 767, 773, 776 (2015). Although police officers may generally stop a vehicle when they observe a traffic violation, this authority is not “bottomless.” *Commonwealth v. Daveiga*, 489 Mass. 342, 350 (2022). The “ultimate touchstone” of both art. 14 and the Fourth Amendment is “reasonableness.” *Rodriguez*, 472 Mass. at 775.

To assess the objective reasonableness of a stop, the government interest – of “ensuring public safety on our roadways” – must be balanced against the intrusion on the defendant. *Daveiga*, 489 Mass. at 351. These limits “reflect the reality” that the encroachment on a driver’s privacy is “not minimal.” *Id.* at 350.

“If objective circumstances exist showing that the government’s interest in ensuring traffic safety has ended, the individual interest

reasonable suspicion or probable cause to stop Mr. Arias. (T4/5-6;130-15;R2.41-42;A.54-55).

prevails, and police authority to conduct a traffic stop must terminate.” *Id.* at 351. In *Daveiga*, the SJC identified three circumstances that mark the end of the government’s interest in ensuring traffic safety:

- (1) “where an officer unreasonably prolongs a traffic stop after having addressed the underlying traffic violation,”
- (2) “when an officer observes a traffic violation but unreasonably delays initiating a traffic stop on the basis of that violation,” and,
- (3) when an officer resolves a traffic violation, completing the “mission” of the investigation, but unreasonably reinitiates the encounter by subsequently conducting a traffic stop.

Id. at 351-354.

Daveiga involved circumstance (3). There, officers came across a double-parked Chrysler Pacifica largely blocking one-way Monadnock Street. *Id.* at 343. After a brief interaction with the occupants, officers allowed the Pacifica to leave. *Id.* Yet, when the Pacifica passed several open parking spots and made a left-hand turn – evidencing a less direct route back to Monadnock Street – officers grew suspicious and conducted a stop of the Pacifica on Dudley Street. *Id.* at 343-344.

The *Daveiga* Court determined that the Dudley Street stop was unconstitutional. *Id.* at 354. When the officers addressed the occupants on Monadnock Street, declined to issue a citation, and allowed the Pacifica to move “as to stop blocking the street,” the officers had completed the “mission” of the investigation. *Id.* Thus, at the time of the subsequent stop on Dudley Street, “the government’s interest had lapsed, leaving solely the defendant’s important interest in personal security from arbitrary police conduct.” *Id.*

The instant case gives rise to *Daveiga* circumstance (2): “when an officer observes a traffic violation but unreasonably delays initiating a traffic stop on the basis of that violation.” *Id.* at 351. Ultimately, the stop in this case must suffer the same fate as that in *Daveiga* because, at the time of the March 28 stop, the government’s interest in addressing the traffic infraction from the previous day “had lapsed.” See *Id.* at 354.

Although there appear to be no Massachusetts appellate decisions analyzing unreasonable delay in the initiation of a traffic stop, *Daveiga* favorably cites to – and adopts the reasoning in – *United States v. Mendonca*, 682 F.Supp.2d 98 (D. Mass. 2010). There, at around 11:00 am, undercover federal agents following the defendant on suspicion of drug activity observed him commit several traffic infractions. *Id.* at 101. Agents watched the defendant as he drove to a motel and proceeded to move boxes into his vehicle. *Id.* at 102. At around noon, when the defendant got into his vehicle and drove away, the undercover agents requested that a marked police unit stop the defendant. *Id.* at 101-102.

Notwithstanding the federal agents’ observations of traffic infractions, the *Mendonca* Court determined that the “lengthy” one-hour delay in initiating the stop rendered it unreasonable. *Id.* at 103-104. In reaching this conclusion, the *Mendonca* Court relied upon the pretextual nature of the stop. *Id.* (the “obvious rationale” for the stop was not the traffic infractions, but the suspicious activity at the motel). “Although pretextual stops based upon traffic infractions are generally permissible, see *Whren*, 517 U.S. at 813 ... a completed traffic misdemeanor cannot

hang over a suspect indefinitely until a time at which ... officers believe warrants a pretextual stop.” *Id.*

The delay in the instant case was even more unreasonable than that in *Mendonca*. Here, on March 27, after following Mr. Arias through Boston neighborhoods for six miles without incident, Officer Pieroway allegedly observed a traffic infraction in Jamaica Plain. Because Officer Pieroway’s unmarked cruiser lacked sirens or “any means to pull a car over,” his “practice” was to call for a marked unit to conduct a traffic stop. (T4/78-79). Yet, upon observing Mr. Arias’ traffic infraction in Jamaica Plain, Officer Pieroway did not follow this “practice”: he did not call for a marked unit to make the stop contemporaneously with his observations.

The judge made findings as to why *Officer Pieroway* declined to follow Mr. Arias. (R2.42;A.55. See Officer Pieroway’s testimony (T4/107): “it would not be safe for me to conduct the same maneuver and maintain visual surveillance on that vehicle”). However, the judge’s findings do *not* address why Officer Pieroway declined to call for *a marked unit* to stop Mr. Arias. When asked directly on cross-examination what prevented him from requesting a marked unit, Officer Pieroway only responded, “safety” (T4/88), without further explanation. It is not apparent why calling a marked unit to stop Mr. Arias for an observed civil traffic violation would have been unsafe, or why doing so would have been less safe than permitting a traffic violator to proceed unabated. Officer Pieroway had been following Mr. Arias for six miles without incident and possessed all necessary information – license plate; description of the vehicle and driver – to call in for a stop. The congested nature of the traffic on Centre Street (T4/91), suggests that the SUV

would not have made it far. In these circumstances, there was no compelling justification for Officer Pieroway to buck his normal “practice” – requesting that a marked unit make a stop – and decline to address, in real time, the traffic infraction he had just observed. See *Mendonca*, 682 F.Supp.2d at 104 (defendant “driving in broad daylight, in a relatively safe area and parked of his own volition” [cleaned up]).

The following day’s events further crystalize the unreasonableness of the eventual stop. While conducting surveillance in the afternoon of March 28, Sgt. Det. Feeney watched Mr. Arias, whom he “immediately recognized,” leave a residence on Foster Street and walk towards the SUV. Had a legitimate governmental interest in ensuring traffic safety endured, Sgt. Det. Feeney would have stopped Mr. Arias to address the March 27 infraction *before* Mr. Arias got back into the very same SUV and drove away – particularly because traffic stops may pose unique safety issues. See, e.g., *Commonwealth v. Torres-Pagan*, 484 Mass. 34, 41 (2020) (defendant “already had gotten out of his vehicle and could not use it as a weapon”). The decision *not* to address the previous day’s traffic infraction then-and-there suggests that the government’s traffic safety interests had “lapsed.” *Daveiga*, 489 Mass. at 354. Moreover, there was further delay: it was not until Mr. Arias got to Market Street that Officer Pieroway *finally* requested that a marked unit stop Mr. Arias “for a drug investigation.” (R2.43;A.56).

Here, as in *Mendonca*, officers had the opportunity to resolve the traffic infraction prior to the eventual stop but instead chose to delay. See *Mendonca*, 682 F.Supp.2d at 104. Like *Mendonca*, this was not a

“continuing offense,” but rather a one-time infraction involving an improper left turn, committed after six miles of observed appropriate driving. See *Daveiga*, 489 Mass. at 354, citing *United States v. Sandridge*, 385 F.3d 1032, 1036 (6th Cir. 2004) (contrasting a “continuing offense” like driving without a license with a “speeding or a parking violation”). Moreover, the delay here – *one full day* – far exceeded the unreasonable *one-hour* delay in *Mendonca*, 682 F.Supp.2d at 104. The stop of Mr. Arias was unreasonable under art. 14. because the government’s traffic safety interests had lapsed.

Of course, in truth, the government’s claim of an interest in traffic safety was a veneer – a “pretext,” as the motion judge found. (R2.44;A.57). The “real reason” for stopping Mr. Arias was not to address the March 27 infraction, but rather “to allow DCU officers to pursue a drug investigation.” (R2.44;A.57). Although pretextual stops have generally been deemed permissible, but see *subsection I(B), infra*, *Daveiga* and *Mendonca* make clear that a stop’s pretextual nature may bear objectively on its reasonableness. *Daveiga*, 489 Mass. at 354. As with the defendants in *Daveiga* and *Mendonca*, Mr. Arias’ constitutional privacy interests are “particularly compelling in this case where the objective circumstances so obviously show ... that the actual traffic stop was a pretext.” *Daveiga*, 489 Mass. at 354, citing *Mendonca*, 682 F. Supp. 2d at 104. Put another way, even *if* art. 14 permits pretextual stops, that principle has its limits and does not extend to pretextual stops conducted after the traffic infraction has been resolved (*Daveiga*) or after unreasonable delay (*Mendonca*; this case).

Notably, the motion judge, who did not have the benefit of *Daveiga*,⁶ was searching for authority on unreasonable delay in addressing traffic infractions (T4/134), and ultimately concluded: “[Mr. Arias] cites no authority for his argument that a motor vehicle stop may not be based on a traffic violation witnessed the previous day. I have been unable to locate any reported cases in Massachusetts on the issue one way or the other.” (R2.45-46;A.58-59). *Daveiga* – which adopts *Mendonca* and plainly pronounces that “police authority to conduct a traffic stop must terminate ... when an officer observes a traffic violation but unreasonably delays initiating a traffic stop,” *Daveiga*, 489 Mass. at 351 – is just the case the judge was looking for, providing clear guidance that what transpired here was prohibited.

On the afternoon of March 28, Mr. Arias’ interests in not having a traffic infraction “hang over [him] indefinitely until a time at which ... officers believe warrants a pretextual stop,” *Mendonca*, 682 F.Supp.2d at 104, far outstripped the government’s roadway safety interests. Therefore, the stop was unreasonable. Suppression of the drugs should have been ordered on this ground.

B. On this clear record, this Court should address head-on whether pretextual stops violate art. 14 and conclude that they do.

Concurring in *Long*, Justice Budd’s thorough review of Massachusetts law concerning pretextual stops led her to conclude: “the

⁶ The suppression motion was decided in June 2021; *Daveiga* was decided in March 2022.

[SJC] previously has not examined the constitutionality of pretextual stops from an art. 14 perspective.” *Commonwealth v. Long*, 485 Mass. 711, 748 (2020) (Budd, J., concurring). “[D]espite the fact that [*Commonwealth v. Santana*, 420 Mass. 205 (1995)] often is cited for the proposition that pretextual stops are valid ... there is no case of which I am aware that specifically has considered whether using pretext to make an investigatory stop without reasonable suspicion of the crime sought to be investigated is a violation of art. 14, and if not, why not.” *Id.* at 749 (Budd, J., concurring) (collecting cases). The legal question regarding the legality of pretextual stops under art. 14 is therefore – according to the now-Chief Justice – an open one.

Mr. Arias’ case squarely presents the issue. In *Santana*, although the defense argued that a broken taillight was used as a pretext for the stop, the motion judge “did not so find.” *Id.* (Budd, J., concurring) (“pretext was discussed only briefly and was not truly at issue” in *Santana*). But, here, the pretextual nature of the stop is undeniable based on the motion judge’s explicit findings. (R2.44;A.57). This Court should finally do what has yet to be done: determine, on a record with a well-supported factual finding of pretext, whether using a pretext for an investigatory stop, absent reasonable suspicion of the crime being investigated, survives art. 14 scrutiny.

Justice Budd’s case for prohibiting pretextual stops is compelling. Although art. 14 “ostensibly” protects motorists from unreasonable searches and seizures by prohibiting investigatory stops lacking reasonable suspicion of a crime, the authorization of pretextual stops “strips away that protection” by substituting suspicion of a traffic

violation. *Id.* at 741 (Budd, J., concurring). Accordingly, in practice, an officer lacking reasonable suspicion required for a stop, “can simply wait until the driver commits a traffic violation, stop the vehicle based on that violation, and then attempt to get more information during the stop to corroborate that hunch”; “no actual reasonableness analysis is required (or allowed).” *Id.* at 742 (Budd, J., concurring).

Pretextual stops thus fly in the face of our constitutional standard that seizures be *reasonable* because they are justified based on a reason that is not the “real reason.” *Id.* (Budd, J., concurring), citing *State v. Ladson*, 138 Wash. 2d 343, 358 n.10 (1999). Moreover, given the ubiquity of traffic infractions and, accordingly, the unending opportunity for officers to exercise traffic stop powers, pretextual stops serve as the “reviled” “general warrant of the modern-day.” See *Id.* at 742-743 (Budd, J., concurring) (citations omitted). Further, pretextual stops are anomalous: they expose drivers, absent reasonable suspicion of criminality, to the “very same investigatory stops we rightly prohibit when they are on foot.” *Id.* at 743 (Budd, J., concurring).

Turn to Mr. Arias’ case and Justice Budd’s analysis comes to life. Officers sought to seize Mr. Arias to further their drug investigation but lacked reasonable suspicion. The result should have been that Mr. Arias could proceed down Market Street absent government interference. See *Commonwealth v. Sweeting-Bailey*, 488 Mass. 741, 776 (2021) (Gaziano, J., dissenting) (justifying investigatory search based on a hunch’s “random and arbitrary nature” is inconsistent “with a free and ordered society”). Yet, pretext provided a workaround: the previous day’s traffic

infraction purported to authorize the stop – even though it was not the “real reason” (R2.44;A.57), just a fictional one. Of course, having observed Mr. Arias’ driving for six miles, it was inevitable that such fictional reason would emerge. See *Long*, 485 Mass. at 739 (Budd, J., concurring) (“few drivers can traverse any appreciable distance without violating some traffic regulation” [citation omitted]). In the pretextual stop, so authorized, the officers were unburdened from attempting to develop reasonable suspicion in their drug investigation because they effectively had a “general warrant” for Mr. Arias – a full realization of Justice Budd’s warnings.

Fictional reasons should not suffice under art. 14’s reasonableness standard. This Court should adopt a test akin to that proposed by Justice Budd, see *Id.* at 745-746 (Budd, J., concurring) (“the question would be whether a reasonable officer would have made the stop solely for the purpose of traffic enforcement”), and invalidate Mr. Arias’ stop on this additional ground.

II. The officers’ post-stop actions – including removing Mr. Arias from the SUV and patfrisking him – were not justified based on his purported failure to stop for police, as the Commonwealth claims.

Even assuming *arguendo* that the *stop* of Mr. Arias was permissible based on the March 27 traffic violation, officers needed “more” to justify the exit order and patfrisk of Mr. Arias, as the motion judge recognized. (R2.46;A.59, citing *Torres-Pagan*, 484 Mass. at 34, 36). The Commonwealth argued that the police actions undertaken after the stop were justified because officers had probable cause to arrest Mr. Arias for

failing to stop for police, G.L. c. 90 § 25, on Market Street on March 28.⁷ (T4/135-137;R1.155-156). The motion judge agreed. (R2.47;A.60). This legal determination was erroneous.

As explained below, most simply, officers lacked probable cause that Mr. Arias committed the crime of failure to stop, G.L. c. 90, § 25. But even assuming, *arguendo*, that probable cause could have existed, the question of whether police had adequate grounds to arrest Mr. Arias⁸ for that offense raises a confluence of issues – the vagueness of the failure to stop statute; the lawfulness of an unreasonable arrest for a non-jailable misdemeanor; and the propriety of pretextual arrests – all open legal questions that this Court should decide in Mr. Arias’ favor.

A. Officers lacked probable cause that Mr. Arias – who traveled slowly for a mere 350 feet and attempted to turn onto a side street from a main thoroughfare – committed the arrestable offense of failure to stop for police.

An arrest must be supported by probable cause. *Commonwealth v. Santaliz*, 413 Mass. 238, 241 (1992). General Laws c. 90, § 25 punishes drivers who, “shall refuse or neglect to stop when signalled to stop by any police officer who is in uniform or who displays his badge conspicuously on the outside of his outer coat or garment.” Although failure to stop carries no jail time, just a maximum penalty of a \$100 fine, *id.*, it is a

⁷ Again, pursuant to the stipulation, the Commonwealth did not seek to justify the police officers’ actions based on the purported drug investigation. (T4/5-6,130-150;R2.41-42;A.54-55).

⁸ Citing art. 14 and the Fourth Amendment, Mr. Arias challenged his arrest as unconstitutional in his suppression motion. (R1.64).

criminal offense and is, by statute, arrestable, under G.L. c. 90, § 21. But see *subsection 2(C), infra*. An individual violates § 25 if: “(1) while operating a motor vehicle, (2) he or she refuses or neglects to stop when signaled to do so by a police officer, (3) when the police officer is in uniform or has his badge conspicuously displayed on the outside of his clothing, and (4) the individual realizes that the police officer has made such a request, and intentionally disobeys that request.” *Shea v. Porter*, 56 F.Supp.3d 65, 83 (D. Mass. 2014), citing G.L. c. 90, § 25.

There was no probable cause that Mr. Arias committed this offense on Market Street on March 28. Mr. Arias’ response to the police lights and siren was not even *unreasonable*, let alone *criminal*.

Consider, first, the distance and speed Mr. Arias travelled prior to stopping. The marked unit activated its lights and siren “just before Henshaw Street” and Mr. Arias stopped at Bennett Street – a distance of only about 350 feet,⁹ less than 0.1 miles or, as the motion judge characterized it, “one block.”¹⁰ (R2.43;A.56). Of course, it would have taken *some* amount of time for Mr. Arias to realize that *he* was the motorist being pulled over, see *Shea*, 56 F.Supp.3d at 83 (statute punishes intentional disobedience *after* the individual “realizes that the police officer has made such a request” to stop him), particularly in the afternoon on a busy Boston street. Moreover, Mr. Arias did not increase

⁹ As discussed *supra*, this Court should take judicial notice of the distance between Henshaw and Bennett Streets.

¹⁰ The Commonwealth, which carried the burden, presented no evidence of how long it took Mr. Arias stop, but the duration was inferably short.

his speed; rather, after police lights came on, Mr. Arias travelled “slowly,” “under the speed limit.” (T4/67-68). Mr. Arias’ travel – for a short distance at a low speed – hardly establishes the intentional disobedience of a police request to stop; the far more reasonable explanation is that Mr. Arias was trying to determine if *he* was the target of a stop and was searching for a safe place to pull over.

Nor was Mr. Arias’ decision not to *immediately* stop on Market Street, a busy thoroughfare, unreasonable. Had Mr. Arias immediately stopped in Market Street’s single lane, he would have blocked traffic, which was “heavy” on this particular afternoon (T4/117). Cf. *Daveiga*, 489 Mass. at 343 (parked car “largely blocking the road” violated Boston traffic rule that “[n]o person shall drive in such a manner as to obstruct unnecessarily the normal movement of traffic ...”). That Market Street was not a suitable spot for a traffic stop is evidenced by Officer Pieroway’s subsequent decision (after the exit order) to move the SUV from Market Street to a parking lot to alleviate traffic blockage. (T4/67).

Further, the Commonwealth failed to establish that Mr. Arias had an alternative, suitable option for pulling over on the righthand side of Market Street, out of the travel lane. In fact, post-hearing, the motion judge rejected the Commonwealth’s argument that there would have been open parking spots on the righthand side of Market Street: “I can’t find that there was space to the right for Mr. Arias to pull over. No one has told me that.... [W]e have every reason to believe that [Market Street] was pretty – pretty full at that time of the day.” (T4/149).

Because there was no evidence of space on the righthand side of Market Street, and because stopping in the travel lane would have

blocked traffic, it was an entirely reasonable plan to turn off at the first available side street. This is precisely what Mr. Arias attempted to do – at Bennett, the first street after Henshaw (where police activated their lights and siren) intersecting with Market Street. Moreover, when Mr. Arias was blocked from turning onto Bennett Street (by traffic heading the opposite direction), he made no evasive or inappropriate driving maneuvers to get around the traffic or away from police, further casting doubt on any intent to evade police. In sum, Mr. Arias’ decision not to stop in the single lane of a main thoroughfare, and instead to attempt to pull off at a residential side street, was far from criminal – it was *reasonable*.¹¹

These facts are inapposite to those establishing a sufficient basis for failure to stop. In *Commonwealth v. Ross*, 73 Mass. App. Ct. 181, 181-182 (2008), for instance, a “chase” commenced after the defendant ignored an officer’s siren, blue lights, and strobe lights. On three occasions, when the officer attempted to pass the defendant to get him to pull over, the defendant “swerve[d]” toward the officer car, forcing the officer to “brake and fall back.” *Id.* The officer was yelling “pull over, pull over” and, after “a minute, heavy traffic caused the defendant finally to stop.” *Id.* at 182-183. See also *Commonwealth v. Gray*, 423 Mass. 293, 294-295 (1996) (defendant ignored “strobe” lights and horn; detective pulled alongside vehicle, displaying his badge, but defendant “continued

¹¹ Even the Commonwealth, which argued that Mr. Arias’ conduct constituted failure to stop, conceded that it was “a very small moment in time, it’s a very small incident.” (T4/135).

to drive until he was forced to stop by traffic” in neighboring town). *Ross* and *Gray* involve conspicuous notice from police followed by the defendant’s obvious, willful, and persistent failure to stop. The instant case does not.

Further, interpreting the failure to stop statute so strictly as to criminalize Mr. Arias’ driving would conflict with Appeals Court precedent. In *Ross*, the Appeals Court excused the officer’s lack of literal compliance with § 25 – that an officer either be “in uniform” or “display[] his badge conspicuously” on his clothing – because “[l]iteral compliance” with the statute would have “required that [the officer] display his badge to the defendant with one hand while simultaneously trying not to get hit with the other.” *Ross*, 73 Mass. App. Ct. at 183-184. See also *Gray*, 423, Mass at 296 (overlooking plain terms of the statute requiring that the officer be uniformed). “As long as the goals of [§ 25] are not thwarted, flaws of detail in its observance can be overlooked.” *Ross*, 73 Mass. App. Ct. at 183, quoting *Gray*, 423, Mass at 295. Concluding that Mr. Arias’ conduct was criminal would amount to the same overly strict application of § 25 that the *Ross* and *Gray* Courts sought to avoid. If anything, the rule of lenity suggests that a defendant’s “flaws in detail” should be even more readily excused than those by trained officers.

Finally, were this Court to find probable cause here – granting police officers the right to *arrest* drivers in such circumstances – it would mark a deterioration of art. 14’s protection of individual rights during traffic stops. Because traffic infractions are ubiquitous, *Long*, 485 Mass. at 722, freedom from being seized on the road is already tenuous. But a

finding of probable cause for failure to stop on these *de minimis* facts would allow police to easily turn stops into full *arrests*, rendering § 25 “susceptible to being exercised arbitrarily by law enforcement.” *Id.* at 741 (Budd, J., concurring).

Because officers lacked probable cause to arrest Mr. Arias, their post-stop actions – including the exit order and patfrisk – were unconstitutional and the drugs, as “fruits,” must be suppressed.

B. The failure to stop statute, G.L. c. 90 § 25, is unconstitutionally vague.

Assuming *arguendo*, that this Court determines that Mr. Arias’ conduct violated the failure to stop statute, § 25 should be deemed unconstitutional as void-for-vagueness. To avoid unconstitutional vagueness, a criminal statute must “[1] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary enforcement.” *Commonwealth v. Williams*, 395 Mass. 302, 304 (1985), citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Ambiguity in a criminal statute “must be strictly construed against the government.” *Commonwealth v. McGhee*, 472 Mass. 405, 414 (2015).

In *Kolender*, 461 U.S. 357-358, the Supreme Court overturned, as void-for-vagueness, a California loitering law that required persons who wander or loiter on the streets to provide “credible and reliable” identification. *Kolender* held: “[i]t is clear that the full discretion accorded to the police to determine whether the suspect has provided a credible and reliable identification necessarily entrusts lawmaking to the

moment-to-moment judgment of the policeman on his beat.” *Id.* at 360 (cleaned up; citations omitted). The California law, accordingly, “furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,” and “confers on police a virtually unrestrained power to arrest and charge persons with a violation.” *Id.* (cleaned up; citations omitted).

The Massachusetts failure to stop statute does the same work. The problem with G.L. c. 90, § 25 – which criminalizes drivers who “refuse or neglect to stop when signalled to stop by any police officer” – is twofold.

First, § 25 is far too vague to provide motorists with sufficient notice of what conduct is criminal. Although statutes need not be crafted with “mathematical precision,” they must establish a “comprehensive normative standard so that men of common intelligence will know its meaning.” *Commonwealth v. Bohmer*, 374 Mass. 368, 372 (1978). It is entirely unclear, under § 25, when a motorist will be deemed to have “neglect[ed]” to stop for police. See, e.g., *Williams*, 395 Mass. at 306 (Boston city ordinance did not establish when “sauntering and loitering ... escalates to obstructing travelers”). Technically, a motorist who travels *any* distance after police activate their lights and siren could be said to have “neglect[ed]” to stop for the officer. But that cannot be the law: drivers, of course, should not slam on their brakes when they see police lights. Common sense requires, at minimum, a reasonable amount of time for drivers to determine whether *they* are being stopped, check surrounding traffic, locate a safe and appropriate place to stop, slow down, and pull over to the side of the road. But § 25 does not recognize

these practicalities, nor does it account for circumstances in which an appropriate place to pull over, clear from traffic, is not immediately available. Section 25 thus lacks a “normative standard” informing motorists of when delay goes from imprudent, to unreasonable, to *criminal*.

This problem is exacerbated because it is nearly impossible for people to avoid at least *potentially* running afoul of this law. Driving is an “indispensable part of modern life,” and traffic violations are ubiquitous. Unlike other criminal laws which are avoidable by simple *inaction*, § 25 requires *action*: the driver must pull over. Doing so forces drivers, in nearly every traffic stop, to decide when and how to safely pull over, dependent on various road conditions and other variables. Motorists cannot traverse this terrain based on § 25’s standardless demand that one must not “neglect” to stop for police.

Second, the statute provides police officers with far too much discretion in determining whom to arrest. The statute leaves it to police to determine who has “neglect[ed]” to stop, thus “entrust[ing] lawmaking to the moment-to-moment judgment of police officers.” *Kolender, supra*, at 360. Such “minimal guidelines to govern law enforcement” permits “a standardless sweep that allows policemen ... to pursue their personal predilections.” *Id.* (citations omitted; cleaned up). The result is that, on identical, *de minimis* facts, one driver might get cited for the underlying traffic infraction, while another gets arrested for failure to stop.

In this regard, § 25 extends the problems associated with discretionary traffic stops, see *Long*, 485 Mass. at 739 (Budd, J.,

concurring) to post-stop *arrests*. Indeed, because of § 25’s vagueness, police predilections dictate not only who to stop, but who to *arrest*, curtailing the constitutional rights of everyone and paving the way for discrimination “to flourish.” *Id.* at 739 (Budd, J., concurring). This problem is magnified given the ramifications flowing from formal arrest: searches, handcuffing, booking, holding cell detention, arraignment, and criminal legal system exposure.

Section 25 should be struck down as void-for-vagueness and Mr. Arias’ arrest – which the Commonwealth attempted to justify under that statute – should be deemed unlawful.

C. Notwithstanding G.L. c. 90, § 21’s *per se* authorization for police to arrest a driver for the non-jailable offense of failure to stop, Mr. Arias’ arrest was unreasonable under art. 14, providing yet another ground for suppression.

Those who violate the failure to stop statute do not face the prospect of jail; the maximum penalty is merely a \$100 fine. G.L. c. 90, § 25. Nevertheless, police officers are expressly authorized to arrest motorists for failure to stop, by statute. G.L. c. 90, § 21 (officers “may arrest without a warrant ... any person who ... violates ... [G.L. c. 90, § 25]”).

In upholding the post-stop actions of the officers in the instant case, the motion judge relied on G.L. c. 90, § 21’s *per se* authorization for police to arrest a motorist for failure to stop. (R2.47;A.60). This was erroneous. As set forth below, even assuming *arguendo* that there was probable cause that Mr. Arias violated the failure to stop statute, arresting him in these circumstances was “unreasonable” and violative of art. 14. Put

another way, § 21's *per se* authorization to arrest for failure to stop is unconstitutional as applied to the facts of this case.

The authority to arrest is conferred by Massachusetts common law and statutes. *Lunn v. Commonwealth*, 477 Mass. 517, 529 (2017). There are, however, “limits of that power.” *Id.* Such limits include those established by the Fourth Amendment and art. 14, which prevent “unreasonable” seizures. See e.g., *Commonwealth v. Forde*, 367 Mass. 798, 803 (1975) (Fourth Amendment prohibits warrantless entry into dwelling absent sufficient justification).

It does not appear that Massachusetts appellate courts have considered whether art. 14 imposes constitutional limitations on a police officer's statutorily-derived power to arrest for a non-jailable misdemeanor offense punishable only by fine. Yet, reading the Supreme Court's seminal case on the subject, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), in conjunction with this Court's precedent regarding Massachusetts' common law on misdemeanor arrests, suggests that art. 14 *does* impose such limitations.

In *Atwater*, 532 U.S. at 323, the Supreme Court considered “whether the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers' authority to arrest without [a] warrant for minor criminal offenses.” *Atwater* involved a Texas law requiring seatbelts for front seat passengers; although it was a misdemeanor offense, punishable only by fine, Texas statutory law expressly authorized police officers to arrest violators without a warrant. *Id.* In a 5-4 decision, the Supreme Court

determined that, generally, “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” *Id.* at 354. The Fourth Amendment therefore does not require that courts “balance the interests and circumstances involved” in a particular arrest. *Id.* at 321-322.

Numerous states – including Louisiana, Minnesota, Montana, Nevada, New Mexico, and Ohio¹² – have rejected *Atwater*’s holding in interpreting their own state constitutions. This Court should follow suit.

The Supreme Court’s decision in *Atwater* rested upon an analysis of the “traditional protections against unreasonable searches and seizures afforded by the common law.” *Atwater*, 532 U.S. at 326 (citation omitted). The “common-law understanding of an officer’s authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable.” *Id.*, quoting *Payton v. New York*, 445 U.S. 573, 591 (1980). On this decisive issue, the Supreme Court concluded that, although *Atwater*’s argument was not “insubstantial,” the common law did *not* forbid warrantless misdemeanor arrests absent “breach of the peace.” *Id.* at 324-346.

However, Massachusetts common law requires more. Under “the common law of Massachusetts” an officer may effectuate a warrantless

¹² See *State v. Harris*, 916 So.2d 284 (La. Ct. App. 2005); *State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004); *State v. Bauer*, 307 Mont. 105 (2001); *State v. Bayard*, 119 Nev. 241 (2003); *State v. Rodarte*, 138 N.M. 668 (2005); *State v. Jones*, 88 Ohio St.3d 430 (2000).

arrest for a misdemeanor only if the “misdemeanor involves an *actual or imminent breach of the peace*, is committed in the officer’s presence, and is ongoing at the time of the arrest or only interrupted by the arrest.” *Lunn*, 477 Mass. at 529 (emphasis added), citing numerous authorities. Expressly contrasting *Atwater*, the *Lunn* Court held: “[t]he breach of the peace requirement for a misdemeanor arrest ... has become firmly embedded in the common law of Massachusetts.” *Id.* at 529 & n.20. *Lunn*’s clear articulation of Massachusetts common law’s “breach of the peace” requirement suggests that this Court is not bound by, and should reject, *Atwater*’s blanket Fourth Amendment rule when construing art. 14.

Moreover, evaluating the reasonableness of arrests on a case-by-case basis under art. 14 – even where the Legislature has authorized arrests for a particular minor misdemeanor by statute – is appropriate for reasons beyond our differing common law misdemeanor arrest standard.

First, as the four dissenting justices in *Atwater* explained, reasonableness balancing should be required given the interests at stake in an arrest for a non-jailable misdemeanor. A custodial arrest exacts an “obvious toll” on an individual’s “liberty and privacy.” *Atwater*, 532 U.S. at 364 (O’Connor, J., dissenting). But the governmental interests in effectuating an arrest for a non-jailable misdemeanor may be exceedingly limited. *Id.* at 368-369. See *Bauer*, 307 Mont. at 111-112 (rejecting *Atwater*; a person stopped for a non-jailable seatbelt infraction “should not be subjected to the indignity of an arrest and police station detention

when a simple, non-intrusive notice to appear” would suffice). Individuals in Massachusetts should not be exposed, without limitation, to unreasonable arrests for minor, non-jailable offenses.

Second, *Atwater*’s elimination of *any* balancing of individual and governmental interests vests far too much discretion in the hands of individual police officers. Applied to traffic infractions, as in Mr. Arias’ case, *Atwater*’s holding allows officers to either (1) issue a citation and let the person continue on her way, or (2) “arrest the driver ... search the driver ... search the entire passenger compartment of the car including any purse or package inside, ... and impound the car and inventory all of its contents.” *Atwater*, 532 U.S. at 372 (O’Connor, J., dissenting). Moreover, *Atwater*’s holding grants officers “unfettered discretion to choose that course without articulating a single reason why such action is appropriate.” *Id.* (O’Connor, J., dissenting). “Such unbounded discretion carries with it grave potential for abuse.” *Id.* (O’Connor, J., dissenting). See *Bayard*, 119 Nev. at 247 (departing from *Atwater* to, *inter alia*, “help minimize arbitrary arrests based on race, religion, or other improper factors”).

Finally, like other states that have rejected *Atwater*’s holding, Massachusetts appellate courts have recognized the enhanced liberty and privacy protections afforded by art. 14. See *Commonwealth v. Gonsalves*, 429 Mass. 658, 667-668 (1999). Compare *Harris*, 916 So.2d at 289 (Louisiana’s “higher standard of individual liberty” requires that misdemeanor arrests be reasonable). As the Minnesota Supreme Court recognized, it is particularly disharmonious to provide expansive

reasonableness protections over the *scope* and *duration* of traffic stops, see, e.g., *Commonwealth v. Cordero*, 477 Mass. 237 (2017), but to remove reasonableness requirements for *arrests* during traffic stops. *Askerooth*, 681 N.W.2d at 363-364 (departing from *Atwater* under state constitution, which requires that “Minnesota’s people be free from unreasonable seizures”).

A departure from *Atwater* would require a determination whether Mr. Arias’ arrest was “reasonable” under art. 14. See, e.g., *Rodriguez*, 472 Mass. at 775. It was not. There was no “breach of the peace,” which “in this context ‘generally means an act that causes a public disturbance or endangers public safety in some way.’” *Lunn*, 477 Mass. at 530. Mr. Arias travelled slowly for less than 0.1 miles and then attempted to take a lefthand turn; there was no danger to, or disturbing effect on, the public. Compare *Commonwealth v. Ubilez*, 88 Mass. App. Ct. 814, 821 (2016) (operation of car with revoked registration was not “erratic or negligent” and did not breach the peace), with *Commonwealth v. Mullins*, 31 Mass. App. Ct. 954, 954-955 (1991) (loud music “turned up to full blast” and obscenities shouted from apartment window caused gathering, disturbing neighbors).

Nor can Mr. Arias’ arrest be deemed “reasonable” under a balancing of individual versus governmental interests. The governmental interests in arresting Mr. Arias were virtually nonexistent given his *de minimis* driving conduct, which even the Commonwealth acknowledged was “a very small incident.” (T4/135). Yet the intrusion of a formal arrest was substantial: along with other indignities, an afternoon arrest for failure

to stop could have meant spending the night in custody, and time away from family and other obligations – on a non-jailable, fine-only offense.

This Court should make clear that art. 14 does not tolerate *unreasonable* arrests for non-jailable misdemeanors – like that of Mr. Arias.

D. The arrest of Mr. Arias was pretextual, violating art. 14.

The Commonwealth sought to justify the officers’ post-stop actions on a ground – failure to stop for police – that was undoubtedly a pretext. The evidence suggests that the officers did not arrest, or intend to arrest, Mr. Arias for failing to stop: they did not immediately handcuff and arrest him for that offense; they did not request his license and registration; and they *never* charged or cited Mr. Arias for failing to stop. Rather, the officers’ conduct – which included stopping the vehicle “for a drug investigation” and immediately calling for a drug-sniffing dog (R2.43-44;A.56-57) – indicates that their post-stop actions, much like their decision to stop Mr. Arias, were undertaken for the true purpose of furthering their drug investigation. The alleged failure to stop was just a pretext – and a *post hoc* rationalization at that.

Whether pretextual *arrests* are authorized under art. 14 appears to be an open question: it does not appear that any Massachusetts appellate court has squarely tackled the issue. In *Arkansas v. Sullivan*, 532 U.S. 769, 770-772 (2001), the United States Supreme Court determined that, as a matter of *federal* constitutional law, pretextual arrests are not impermissible. Under the Fourth Amendment, an arrest may be justified on pretextual grounds even if the officer had an ulterior true purpose for

the conduct; as with traffic stops, under federal law, “subjective intentions play no role” in the ordinary, probable-cause analysis of an arrest. *Id.*, (reversing the Arkansas Supreme Court), citing *Whren*, 517 U.S. at 813. Justice Ginsburg, joined by three other justices, concurred, in light of the Supreme Court’s “current case law,” but noted that if “experience demonstrates ‘anything like an epidemic of unnecessary minor-offense arrests,’ I hope the Court will reconsider its recent precedent.” *Id.* at 772-773 (Ginsburg, J., concurring).

Nevertheless, on remand in *Sullivan*, the Arkansas Supreme Court considered whether pretextual arrests were permissible as a matter of *state* constitutional law. The Court concluded that they were not: “pretextual arrests – arrests that would not have occurred *but for* an ulterior investigative motive – are unreasonable police conduct warranting application of the exclusionary rule.” *State v. Sullivan*, 348 Ark. 647, 655 (2002). See also *Ladson*, 138 Wash.2d at 353, citing *State v. Michaels*, 60 Wash.2d 638, 639-644 (1962) (reiterating Washington state’s “strict no-pretext rule,” by reaffirming *Michaels*’ holding that “[a]n arrest may not be used as a pretext to search for evidence”).

This Court should similarly hold that pretextual arrests – “arrests that would not have occurred *but for* an ulterior investigative motive,” *Sullivan*, 348 Ark. at 655 – are unreasonable under art. 14. Cf. *Rodriguez*, 472 Mass. at 776 (art. 14 providing greater search and seizure protection than federal constitution). See *Sullivan*, 348 Ark. at 651-652. The Arkansas Supreme Court illuminates the path for invalidating pretextual *arrests*, even if this Court is unpersuaded that pretextual

stops are constitutionally infirm. *Sullivan*, 348 Ark. at 652, n.1 (distinguishing between pretextual stops (permissible) and arrests (impermissible) based on “the different level of police intrusion involved with a traffic stop as opposed to a full custodial arrest”).

Consider how the pretextual arrest played out in Mr. Arias’ case. Officers seeking to stop and search Mr. Arias for a drug investigation, but lacking reasonable suspicion, waited until he drove off, used the prior day’s traffic infraction as a pretext to stop him, and then used his *de minimis* delay to later claim that he had “neglect[ed]” to stop – giving the officers free rein to conduct a full custodial arrest, including forcibly removing Mr. Arias from the car, detaining him, and subjecting him to an intimate search of his body. If this Court determines that Mr. Arias’ *de minimis* driving establishes probable cause of failure to stop, *and* that the non-jailable misdemeanor of failure to stop is nevertheless arrestable, *and* that it may even be used as a *pretext* to arrest when officers have an alternative investigatory agenda, it might as well render the reasonableness requirement of art. 14 a dead letter. On these facts, the efficacy of art. 14 in protecting individuals in Massachusetts from law enforcement overreach must be seriously questioned.

Although the SJC has expressed skepticism about a court’s ability to delve into an officer’s subjective motivations, see *Commonwealth v. Buckley*, 478 Mass. 861, 867 (2018), the instant case demonstrates that such concerns are overstated: the evidence here, including police radio communications, enabled the judge find to easily pretext, at least vis-à-vis the stop. (R2.44;A.57). Moreover, subjective motivations already play

a role in art. 14 jurisprudence: judges have “long considered the motivation” of an officer who conducts a search “where it is claimed to be an inventory or administrative search,” *Long*, 485 Mass. at 736 (Gants, C.J., concurring), and routinely rely upon an officer’s subjective interpretation of observed behavior in deciding search and seizure questions, see, e.g., *Commonwealth v. Karen K.*, 491 Mass. 165, 175 (2023). A judge can appropriately weigh objective evidence to determine whether an arrest was pretextual.

On this issue of first impression, this Court should determine that the arrest of Mr. Arias was pretextual, and thus violative of art. 14, providing yet another ground for suppression.

III. The trial judge erred in denying Mr. Arias’ request for the Court to interview a juror whose post-verdict letter suggested that bias based on disability may have infected deliberations.

The Sixth Amendment and art. 12 guarantee the right to a fair trial by an impartial jury. *Commonwealth v. Guisti*, 434 Mass. 245, 251 (2001); *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017). This right is violated by “the presence of even one” partial juror. *Commonwealth v. McCowen*, 458 Mass. 461, 494 (2010). As such, although “inquiry into jury deliberations is prohibited,” a judge “cannot ignore” the suggestion that improper bias has infected the jury deliberations. *Commonwealth v. Ralph R.*, 490 Mass. 770, 780 (2022) (“handled delicately” a judge may investigate potential juror bias without “invading the jury’s deliberative process”).

As explained below, the juror's letter here supported a "reasonable claim" that bias infected the jury deliberations. *McCowen*, 458 Mass. at 494. Because potential bias based on disability "cannot be ignored," *Ralph R.*, 490 Mass. at 784, the judge's rejection of the defense request to conduct an inquiry of the juror was error.

A. The juror's post-verdict letter raised a "reasonable claim" that improper bias infected the jury.

Where post-verdict communications from a juror support a "reasonable claim" that improper bias infected the jury, "the trial judge should conduct a hearing to determine the truth or falsity of the affidavit's allegations." *McCowen*, 458 Mass. at 494. "If the judge finds that the statements were not made, the judge need make no further findings." *Id.* If any of the challenged statements are shown to have been made, a two-part test applies: (1) the defendant must establish "that the jury were exposed to statements that infected the deliberative process with racially or ethnically charged language or stereotypes"; (2) the Commonwealth must then "show beyond a reasonable doubt that the defendant was not prejudiced by the jury's exposure to these statements." *Id.* at 496-497.

This case involves a threshold question: whether it was error for the judge not to ask the juror if statements reflecting bias were made. *Id.* at 494. Because the judge's decision was based entirely on the juror's letter, this Court should review *de novo*. See *Erickson v. Clancy*, 88 Mass. App. Ct. 809, 810 (2016) ("questions of law, and questions of fact based entirely on documents" are reviewed *de novo*).

The juror's letter raised a "reasonable claim" that improper bias infected the jury. *McCowen*, 458 Mass. at 494. The problem was not merely the suggestion, in the letter, that pressure was imposed by other jurors; indeed, "[t]ension between jurors" is "part and parcel" of jury deliberations. *Commonwealth v. Pytou Heang*, 458 Mass. 827, 859 (2011) (citations omitted) (fact that "one individual may bow to the pressure of eleven" is not cause for "reopening a case"). Rather, the problem was that *alongside* these allegations of pressure, the juror specifically referenced their disability, raising the possibility that statements reflecting improper bias were made during deliberations:

"I was repeatedly told by fellow jurors that I was being unreasonable, far-fetched, and unfairly biased against law enforcement. I do not believe I was any of those things, but *I have an autism spectrum disorder which can make me appear overly emotional. I did not anticipate that my autism would make me unsuited to the jury* - if anything, I thought it would be a benefit.

...

I was told that my bias and unwillingness to trust law enforcement officers was a problem and *that I should not have been allowed to serve on a jury...*"

(IR.8;A.64). The letter suggests a potential link between the juror's disability (autism spectrum disorder) and pressure from other jurors. Consider, in particular, the juror's assertion that they "did not anticipate that [their] autism would make [them] unsuited to the jury," in tandem with their claim of having been told, by another juror, that they should "not have been allowed to serve on a jury." (IR.8;A.64). While not

expressly alleged, the letter gives rise to a reasonable claim that negative comments directed at this juror – i.e., that they should “not have been allowed to serve” (IR.8;A.64) – were infused with bias based on disability. Even the “possibility” that improper bias infected jury deliberations “cannot be ignored.” *Ralph R.*, 490 Mass. at 780.

Mr. Arias’ request that the judge conduct a *voir dire* of the juror (R2.156,164), was not onerous. The letter came just hours after the verdict. Presumably, with a few questions the trial judge could have determined whether in fact biased statements had been uttered, *McCowen*, 458 Mass. at 494, without delving into the substance of deliberations. If the answer was “no,” that would have resolved the issue. *Id.* If the answer was “yes,” *McCowen*’s two-factor test would apply. Yet, the answer is unknown because the judge failed to conduct the inquiry. In the face of this letter, the judge’s failure to inquire of the juror, to determine whether a statement reflecting improper bias was made during deliberations, was error.

B. Juror bias based on disability would constitute such “other improper bias” threatening a defendant’s right to a fair trial.

Information that “reasonably suggests that a statement reflecting racial, ethnic, or other improper bias was made during jury deliberations ... ‘cannot be ignored.’” *Ralph R.*, 490 Mass. at 784 (emphasis added). It does not appear that Massachusetts appellate courts have had occasion to assess what would constitute “other improper bias” capable of infringing upon a defendant’s right to a fair trial. The bulk of juror bias cases involve potential racial or ethnic bias. See, e.g., *Pena-Rodriguez*,

580 U.S. at 222. The Supreme Court has distinguished juror racism from other forms of juror improprieties – i.e., compromise verdicts, substance abuse, or pro-defendant bias – which represent “anomalous behavior from a single jury – or juror – gone off course.” *Id.* at 223-224. But juror bias based on disability is different.

Recognizing the unique history that racism represents in the American criminal justice system, other biases based on inherent characteristics – such as disability – also pose a risk of “damag[ing] ‘both the fact and the perception’ of the jury’s role as ‘a vital check against the wrongful exercise of power by the State.’” *Id.* at 223 (citation omitted). As Justice Thurgood Marshall detailed in his *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) concurrence, there is a “lengthy and tragic history” of people with mental disabilities in the United States. *Id.* at 461-463 (describing former “regime of state-mandated segregation and degradation” which “in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow”). And courts have recognized individuals with mental disabilities as a distinctive class under equal protection. See, e.g., *Breen v. Carlsbad Mun. Sch.*, 138 N.M. 331, 340 (2005). In short, the prospect that comments reflecting bias concerning a juror’s disability were made during deliberations are the sort of biased statements that “cannot be ignored.” *Ralph R.*, 490 Mass. at 784.

Because the right to be tried by an impartial jury is “basic to a fair trial,” errors undermining that right are structural. *Commonwealth v. Vasquez*, 495 Mass. 279, 285 (2025). Structural errors require no showing of prejudice, and demand automatic reversal. *Id.* at 286. Mr.

Arias – who preserved the issue through, *inter alia*, his written filings (R2.135-136;154-158;162-164;IR3-5) – is entitled to automatic reversal.

CONCLUSION

This Court should reverse the order denying Mr. Arias’ motion to suppress. In the alternative, on the juror letter issue, this Court should reverse the judgment and vacate the conviction.

Respectfully submitted,

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Dated: March 20, 2025

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Criminal No. 19-479

COMMONWEALTH

vs.

JOSE LUIS ARIAS

MEMORANDUM AND ORDER
ON DEFENDANT'S MOTION TO SUPPRESS
PHYSICAL EVIDENCE AND STATEMENTS

Defendant Jose Luis Arias is charged with trafficking more than 200 grams of cocaine. The charge followed a stop of defendant's motor vehicle on March 28, 2019 and a search of his person and vehicle, which yielded the cocaine. Defendant now moves to suppress the fruits of the stop. At the evidentiary hearing, the Commonwealth called three witnesses.¹ For the following reasons, the motion is allowed as to defendant's statements, but is otherwise denied.

FINDINGS OF FACT

Based on the preponderance of the credible evidence, I find the following facts:

On March 27, 2019, Boston police officers assigned to the drug control unit at Area D-14 in Brighton ("DCU") were on patrol in plain clothes and in unmarked vehicles in Brighton. They were in communication over a dedicated police radio channel. At about 3:10 p.m., Sgt. Det. William J. Feeney observed a grey Chevrolet Equinox SUV, Mass. Reg. 886VA2 ("the SUV") parked on Foster Street in Brighton near the Rogers Playground.² The vehicle was registered to

¹ Sgt. Det. William J. Feeney, Off. Mathew Pieroway, and Det. Andrew Miskell.

² The police apparently had information about the SUV and/or defendant before Sgt. Det. Feeney's observations of the SUV on March 27, 2019, but the Commonwealth does not rely on any such information. I do not know what information the police had. Consistent with the

Ciade E. Carvajal, a 61-year old black man. Sgt. Det. Feeney observed a light-skinned Hispanic male, later identified as defendant, get into the SUV and drive away. Although Sgt. Det. Feeney saw the SUV take a left on Washington Street, he got snarled in traffic and was unable to follow the SUV much farther.

DCU Officer Mathew Pieroway was in communication with Sgt. Det. Feeney. Off. Pieroway was in plain clothes and was driving an unmarked vehicle, which coincidentally also happened to be a Chevrolet Equinox. Hearing communications from Sgt. Det. Feeney about the SUV, Off. Pieroway began surveillance of the SUV, locating it in the Oak Square area. Off. Pieroway then followed the SUV on Washington Street toward Chestnut Hill Avenue, and ultimately to the area of Center and South Streets in Jamaica Plain.

In the vicinity of Holbrook Street in Jamaica Plain, although Center Street, as it approaches South Street, allows a single lane of traffic, it has enough room to the right for a car to drive on a bike lane next to the lane of traffic. As Off. Pieroway was following the SUV on Center Street around Holbrook Street, traffic was heavy. A line of traffic was stopped at the stop sign at South Street. Off. Pieroway observed defendant pull the SUV quickly around the right side of the line of traffic, which was stopped at the South Street stop sign, pass approximately seven vehicles stopped at the intersection, fail to stop at the stop sign, and take an immediate left in front of the line of traffic.³ Because he was in an unmarked vehicle without immediate back-up, and because of his safety concerns, Off. Pieroway terminated his surveillance of the SUV.

parties' stipulation, I do not rely on the fact that the police had any information prior to Sgt. Det. Feeney's observations.

³ On March 27, 2019, the police followed the SUV for approximately six miles. Despite this lengthy surveillance, other than this traffic violation, the police did not observe any other traffic offense, evasive driving, or indication that defendant was aware he was being followed.

The next day, March 28, 2019, at about 3:15 p.m., Sgt. Det. Feeney saw defendant exit a residence on Foster Street in Brighton and enter the SUV, which was parked on Foster Street, across the street from where it had been parked the day before. Sgt. Det. Feeney began to follow the SUV, which drove on Foster Street and turned onto Washington Street. Again, Sgt. Det. Feeney got tied up in traffic, but other DCU officers continued the surveillance.

Off. Pieroway heard Sgt. Det. Feeney's radio calls. When he was in the vicinity of Chestnut Hill Avenue and Washington Street, Off. Pieroway spotted the SUV. Off. Pieroway began to follow the SUV and requested a marked police vehicle to stop the SUV. In making the request, Off. Pieroway stated on the police radio: "we're looking to stop a vehicle for drug investigation. It will be a silver Chevy Equinox, 8-8-6-Victor-Echo-2. We're at the red light here in front of the Bank of America at Market and Wash." (Emphasis added).

Off. Pieroway observed a marked unit arrive. As the SUV was traveling up Market Street, the marked vehicle was behind the SUV and Off. Pieroway was somewhat behind it in his unmarked vehicle. Off. Pieroway saw the marked unit activate its lights and sirens shortly after turning onto Market Street, just before Henshaw Street. Rather than pull over immediately on Market Street, the SUV proceeded slowly about a block, past a few businesses, to the next street on the left (Bennett Street) and attempted to take a left onto Bennett Street.

DCU Det. Andrew Miskell was also following the marked unit. After seeing the SUV fail to stop, continue to drive forward slowly, and attempt to take a left on Bennett Street, Det. Miskell pulled his vehicle slightly to the left into oncoming traffic, stopping the heavy traffic in the opposite direction. Det. Miskell's driving maneuver effectively cut off the SUV's ability to take a left onto Bennett Street because the SUV was blocked by the stopped line of traffic heading in the opposite direction.

The driver of the marked unit and a Boston police detective approached the driver of the SUV (defendant) and asked him to exit the SUV.⁴ As Det. Miskell stated, “he [defendant] was exited from the vehicle” within seconds. There was no request for defendant’s license or registration. The officers moved defendant from the middle of Market Street to the sidewalk on the Bennett Street side of Market Street.

Meanwhile, Det. Miskell pulled his vehicle onto Bennett Street and parked. He walked back to where defendant was being held and identified himself as a DCU detective. Det. Miskell did not tell defendant that he was under arrest. Det. Miskell then pat frisked defendant, locating a hard object in defendant’s pocket. When asked, defendant said that the object was cocaine. Det. Miskell then put defendant in handcuffs and read certain warnings prescribed by Miranda v. Arizona, 384 U.S. 436 (1966), from a preprinted card. I do not know what was on the card or what Det. Miskell read. Defendant was not asked to sign a form stating that he understood the Miranda warnings. Rather, defendant verbally acknowledged he understood the warnings that were read. After giving defendant these warnings, Det. Miskell posed some questions to defendant, who answered them and directed the police to additional drugs in the SUV.

The traffic infraction on March 27, 2019 was a pretext for the motor vehicle stop on March 28, 2019. As is evident from the transcript of Off. Pieroway’s radio call for a marked unit to stop the SUV, the real reason for the stop on March 28 was to allow the DCU officers to pursue a drug investigation related to defendant and/or the SUV.⁵

⁴ Neither the driver of the marked unit nor the detective testified at the hearing.

⁵ According to the transcript of the relevant turret tape recordings, Off. Pieroway called for the marked unit to stop the SUV at 3:27 p.m. The marked unit stopped the SUV within three minutes and Off. Pieroway immediately requested that a drug-sniffing dog be sent to the location of the stop in the vicinity of 354 Market Street. The dispatcher called for the drug dog just before 3:31 p.m. At approximately 3:33 p.m., after pat frisking defendant, Off. Pieroway told

Defendant now challenges the fruits of the stop, including any statements he made.

DISCUSSION

I. The Stop and Search

A police officer may stop a motor vehicle if the officer observes the vehicle violate a traffic law. Commonwealth v. Santana, 420 Mass. 205, 207 (1995) (police authorized to stop vehicle for broken taillight); Commonwealth v. Bacon, 381 Mass. 642, 644 (1980). Regardless of the police officer's motive for the stop,⁶ the stop is lawful if the officer has reasonable suspicion that the driver committed a traffic violation. Commonwealth v. Avellar, 70 Mass. App. Ct. 608, 613 (2007).

The police had a lawful basis to stop defendant on March 28, 2019 for the traffic violation that Off. Pieroway observed the previous day. By the time of the stop, Off. Pieroway had seen defendant travel in an unauthorized lane on Center Street, fail to stop for a stop sign, and cut off a line of stopped traffic as he took a left turn from a right lane. In addition, the police had observed that the driver of the SUV on March 28, 2019 was the same person who committed the traffic violation on March 27, 2019. The information about the observed traffic violation from the previous day was not so stale that the police could not act on it.

Defendant cites no authority for his argument that a motor vehicle stop may not be based on a traffic violation witnessed the previous day. I have been unable to locate any reported cases in Massachusetts on the issue one way or the other. It bears noting, however, that the Supreme

the police dispatcher to cancel the drug dog and that they would need a tow truck (for the SUV) at their location.

⁶ See Commonwealth v. Buckley, 478 Mass. 861, 873 (2018) (“Outside of the racial profiling context – as this case is – the reasonableness of a traffic stop does not depend upon the particular motivations underlying the stop. . . . [L]egal justification alone, such as an observed traffic violation, is sufficient.”). Compare also Commonwealth v. Long, 485 Mass. 711, 727 (2020) (same), with Long, 485 Mass. at 737-748 (Budd, J., concurring).

Judicial Court has recognized the “governmental interest” in enforcement of the Commonwealth’s traffic laws to be “significant” and “clear and compelling.” Commonwealth v. Rodriguez, 472 Mass. 767, 776-777 (2015).

In the circumstances of this case, the decision not to call for back-up and try to stop the SUV for the traffic violation on March 27, 2019, was reasonable. The police also acted reasonably thereafter, undertaking to stop the SUV’s operator at their next available opportunity, which was the next day when the same operator was seen to be driving the SUV. Such delay was reasonable. See also, e.g., United States v. Zuniga, 860 F.3d 276, 282-283 (5th Cir. 2017) (“We make no attempt to articulate a *specific* time limitation to which officers must adhere in effecting a stop following a traffic violation. . . . [W]e hold only that the elapsed time between an observed violation and any subsequent stop must be reasonable upon consideration of the totality of the circumstances.”) (emphasis in original); Hairston v. Commonwealth, 67 Va. App. 552, 564-566, 797 S.E.2d 794, 800-801 (Va. Ct. App. 2017) (“the fact that a period of time passed after [the] Detective [] saw the appellant commit the reckless driving offense and before she seized him for further investigation or arrest does not defeat the existence of probable cause”) (and cases cited).

While the police had a lawful basis to stop the SUV on March 28, 2019, based on the traffic violation observed the day before, these observations were only sufficient to justify the stop of the SUV. Without more, the police only had enough information to stop the SUV and give the driver a citation for the traffic violation. The police did not have sufficient information from their observations on March 27 and March 28 either to justify an exit order based on a reasonable belief that officer safety, or the safety of others, was in danger, Commonwealth v. Gonsalves, 429 Mass. 658, 661, 663-664 (1999), or to justify a pat frisk based on a reasonable

belief that defendant was armed and dangerous. Commonwealth v. Torres-Pagan, 484 Mass. 34, 36 (2020), citing Arizona v. Johnson, 555 U.S. 323, 326–27 (2009).

But here there was more. A person operating a motor vehicle must stop and provide identification when signaled by a police officer who exercises rightful authority. See G.L. c. 90, § 25 (“Any person who, while operating or in charge of a motor vehicle, . . . shall refuse or neglect to stop when signaled to stop by any police officer who is in uniform or who displays his badge conspicuously on the outside of his outer coat or garment, . . . shall be punished”); Commonwealth v. Gray, 423 Mass. 293, 296 (1996) (driver’s failure to stop for “a person with authority” gave detective authority to arrest driver). By activating its blue lights and sirens, the marked police vehicle put the SUV’s driver on notice that he was required to stop. See Commonwealth v. Ross, 73 Mass. App. Ct. 181, 184 (2008). As every driver knows, defendant was required to stop promptly when the police acted under a show of lawful authority to pull over the SUV. G.L. c. 90, § 25. When the SUV failed to pull over, but continued to drive forward slowly, and attempted to turn onto Bennett Street, the police had probable cause to stop the SUV and arrest the driver. See G.L. c. 90, § 21 (“Any officer . . . may arrest without a warrant . . . any person who . . . violates” G.L. c. 90, § 25). Although the police did not cite defendant for failure to stop, defendant’s failure to stop allowed the police to stop and arrest him, and then to search him incident to arrest.⁷

⁷ Defendant cites Commonwealth v. Brantley, 90 Mass. App. Ct. 901, 902 (2016) (rescript), as supporting the notion that a driver may be arrested for failing to stop after a show of lawful authority, but attempts to distinguish the facts in Brantley from the facts in this case. Defendant’s argument is based on the incorrect assumption that Brantley sets a floor for what constitutes an arrestable offense for failure to stop. It does not. Instead, Brantley provides an example of probable cause to believe a driver has committed the offense of failing to stop. Id. at 902 (“defendant’s operation of the vehicle, backward toward the officer after being stopped, established probable cause to support arrest for” failure to stop). In contrast, in this case, after the marked police vehicle activated its lights and sirens, defendant continued to drive his SUV away

II. Defendant's Statements

The police may not question a person who is in custody unless the person knowingly and intelligently waives his Fifth Amendment rights protected through the prophylactic mechanism of Miranda warnings. To safeguard a defendant's right to remain silent, "prior to custodial interrogation, a suspect must 'be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.'" Commonwealth v. Simon, 456 Mass. 280, 286 (2010), quoting Miranda, 384 U.S. at 444; Commonwealth v. Martin, 444 Mass. 213, 218 (2005). The Commonwealth bears the burden to demonstrate that a defendant "waive[d] the privilege against self-incrimination [] willingly, knowingly, and intelligently." Simon, 456 Mass. at 287.

The first question in this context is whether defendant was in custody at the time of the statements. "Whether a person is in custody depends of four factors: '(1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and (4) whether, at the time the incrimination statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest.'" Id., quoting Commonwealth v. Groome, 435 Mass. 201, 211-212 (2001). "The crucial question is whether, considering all the circumstances, a reasonable person in the defendant's position would have believed that he was in custody." Groome, 435 Mass. at 211.

from the police without stopping, and attempted to cross a line of oncoming traffic to turn onto a perpendicular street. Such behavior established probable cause to believe defendant was committing the offense of failing to stop.

With respect to defendant's statements, Det. Miskell first asked defendant about the object he felt during the pat frisk. The question to defendant followed a substantial show of police force, with multiple units responding, the police removing defendant from his vehicle within seconds, and a pat frisk of defendant by a DCU officer. At the time, defendant was in custody for failing to stop and, although the police did not tell defendant that he was under arrest, a reasonable person in defendant's position would have believed he was in custody. Moreover, the question posed to defendant was posed after Det. Miskell felt the hard object in defendant's pocket. Det. Miskell's question was posed prior to any Miranda warnings being given. As such, defendant's statement must be suppressed.

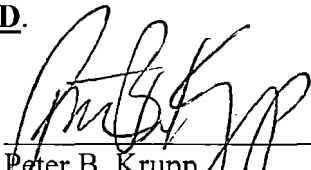
Defendant's other statements on the street were made in response to police questioning after defendant was told he was under arrest and handcuffed. Full and complete Miranda warnings were required. The Commonwealth bears the burden of demonstrating defendant's knowing and intelligent waiver of his Fifth Amendment rights. Where the Commonwealth has failed to prove in any detail what rights were read to defendant, it has failed to shoulder its burden.

Although defendant's statements must be suppressed, the additional evidence found during the search of the SUV, which was found more easily due to defendant's statements at the scene, will not be. Having arrested defendant for possession of drugs on his person, the SUV was going to be towed and would have been subject to an inventory search, at a minimum. Moreover, it was clear from Det. Miskell's questions that the police were planning to search the SUV for additional evidence of drug distribution and would have been able to secure a search warrant to do so. The contents of the SUV would inevitably have been discovered as a result. See, e.g., Commonwealth v. Ubilez, 88 Mass. App. Ct. 814, 817-820 (2016).

ORDER

Defendant's Motion to Suppress Physical Evidence and Statements (Docket #17) is **ALLOWED** only insofar as defendant's statements to Det. Miskell at the time of his stop and arrest shall be suppressed. The motion is otherwise **DENIED**.

Dated: June 17, 2021



Peter B. Krupp
Justice of the Superior Court

Dear Ms. Hennigan,

The below message is addressed to Judge Budreau, and I sincerely hope it makes it to his desk as well as to all relevant parties. Please reply with confirmation before the date of Mr. Arias' sentencing that my message has been received and distributed as appropriate, or that I need to reach out through other avenues to be heard. I can be reached at [REDACTED] or by e-mail at [REDACTED]. I will be sending a physical copy of this message to your office, but if I am able to find an e-mail address I believe will reach you, I will send this same message electronically.

RECEIVED
SUFFOLK SUPERIOR
CRIMINAL COURT
2024 MAR 18 AM 9:21

Dear Judge Budreau,

I was a juror in the case of the commonwealth against Jose Arias, in your court room from March 12th-14th, 2024. I believe justice has not been done here, as for two days in [REDACTED] was repeatedly told by fellow jurors that I was being unreasonable, far-fetched, and unfairly biased against law enforcement. I do not believe I was any of those things, but I have an autism spectrum disorder which can make me appear overly emotional. I did not anticipate that my autism would make me unsuited to the jury - if anything, I thought it would be a benefit. That said, being yelled at for 2 days that there was evidence presented that spoke to the accused party's guilt was not something I was strong enough to withstand, and I will regret it for the rest of my life.

I came into the second day of deliberation confident that the commonwealth had not met its burden of proof on the grounds that I saw no direct evidence of any traffic stop, apart from the testimony given. I was told that my bias and unwillingness to trust law enforcement officers was a problem and that I should not have been allowed to serve on a jury, which in hindsight is ridiculous, as I am not distrustful of law enforcement officers in general. Hindsight is always 20/20, but as we agreed to the verdict today, I felt overwhelmed by grief because I did not feel sure that any of the charges alleged against the defendant were true. I am sure this doesn't hold much weight at this time in light of the legal verdict that was given, but I cannot allow sentencing to move forward without expressing that I was persuaded to set aside my better judgement and good conscious by the other jurors, who repeatedly told me my reservations were unreasonable and that it was not okay for me not to trust the police officers' testimony without corroborating evidence just because I had no direct evidence that I should not trust them.

There was pressure to deliver a verdict after we stated we were unable to. I felt I was being judged and ridiculed for refusing to agree based on doubts the other jurors deemed unreasonable. They told me I was being outlandish, far-fetched, and absurd each time I argued that "probably is not enough." I would like it on the record that I was not convinced of anything at all - the commonwealth was not able to physically prove that Mr. Arias was even present at the alleged traffic stop on March 28th, 2019 - but I was not able to stand on my convictions in the face of peer pressure for an extended period. I was literally told repeatedly by multiple other jurors that my doubts constituted "imaginary doubt," which, again in hindsight, is the most extreme gaslighting I have ever heard of, let alone experienced.

Sincerely,
[REDACTED]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
CRIMINAL ACTION
NO. 1984CR00479**

COMMONWEALTH

vs.

**JOSE ARIAS
Defendant**

ORDER ON MOTION TO VACATE AND DECLARE A MISTRIAL

Defendant, Jose Arias, moves this Court to vacate his conviction and declare a mistrial after a juror sent a letter to the Court indicating that they felt pressured into changing their verdict and now regrets their decision.¹ Defendant first seeks further inquiry with the juror and then moves this Court to vacate the conviction. This Motion is DENIED for the following reasons.

DISCUSSION

This Court must adhere to the principle that “it is essential to the freedom and independence of [jury] deliberations that their discussions in the jury room should be kept secret and inviolable...” with limited exceptions. *Commonwealth v. Pytou Heang*, 458 Mass. 827, 858 (2011) quoting *Commonwealth v. Fidler*, 377 Mass. 192, 196, (1979), quoting *Woodward v. Leavitt*, 107 Mass. 453, 460 (1871). When, as in this case, the Court receives a post-verdict letter from a juror, the judge has no duty to investigate or to conduct an evidentiary hearing “unless the court finds some suggestion or showing that extraneous matters were brought

¹ This Court uses the pronouns they and their for this juror.

into the jury's deliberations,” *Id* quoting *Commonwealth v. Dixon*, 395 Mass. 149, 151 (1985), “or that a juror made a statement to another juror that reasonably demonstrates racial or ethnic bias.” *Commonwealth v. Pytou Heang*, 458 Mass. at 858. See also *Commonwealth v. McCowen*, ante 461, 494 (2010); *Commonwealth v. Semedo*, 456 Mass. 1, 22–24 (2010); Mass. G. Evid., § 606(b). “An extraneous matter may include an improper communication to a juror by a third party or improper consideration by a juror of information not in evidence.” *Id*. See also *Commonwealth v. Semedo*, *supra* at 22–23 *Commonwealth v. Fidler*, *supra* at 197.

Recognizing these limitations on the Court’s discretion for interviewing a juror post-verdict, defendant argues that a voir dire of the juror at issue is warranted because (1) the juror’s self-admitted mental health condition undermined their ability to make a reasoned and unanimous decision about defendant’s guilt; and (2) this condition is an extraneous factor that this court can consider when assessing whether the verdict or deliberations were tainted by outside forces. This court disagrees.

First, the letter received from the juror can best be summarized as a regret letter. While the juror does assert that she has mental health or personality disorder that disrupted her communications and relationships with other jurors, such tensions are not unusual between jurors when they are attempting to reach difficult decisions about a verdict regardless of the personalities involved. Furthermore, the juror’s letter does not support a finding that they was incompetent or unable to reason and reach an independent decision about defendant’s guilt. The fact that the juror felt pressured and even disparaged by the remaining jurors for failing to see the facts their way does not, without an allegation of racial or ethnic bias, warrant any further inquiry. *Commonwealth v. Pytou Heang*, 458 Mass. at 858.

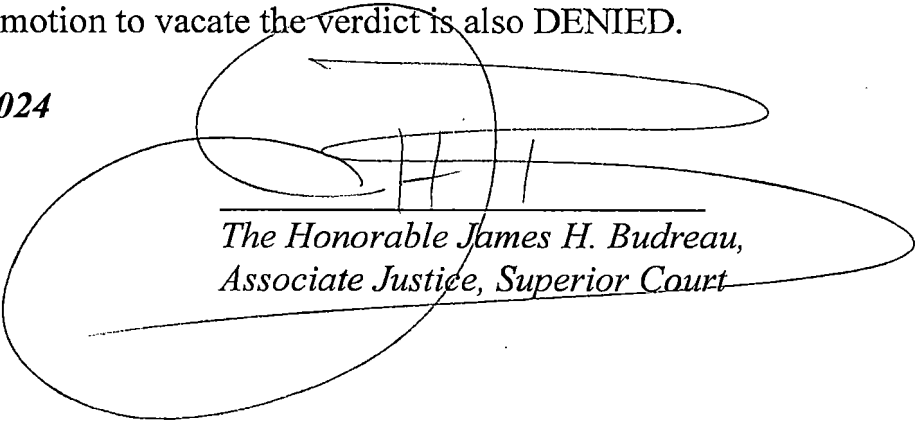
Second, this Court observed this juror during the empanelment process, the individual voir dire and trial. At no time did this Court observe any behavior or conduct that would suggest this juror was unable to perform their duty as an impartial and fair juror. Not only were both parties content with this juror after the individual voir dire, but neither party complained that this juror was inattentive or distracted during trial. Finally, the defense did not ask to poll the jury after the verdict was read and this Court made no observations of this juror that would have caused a sua sponte polling by the Court. While the juror may have regretted their decision post-verdict, that simply is not grounds for further inquiry.

Commonwealth v. Pytou Heang, supra. There is no support for the defendant's position that this juror's alleged extraneous mental health condition infringed upon, tainted or otherwise undermined the unanimity of this verdict. *Id.*²

ORDER

For the above reasons, defendant's motion for an evidentiary hearing is DENIED. Defendant's motion to vacate the verdict is also DENIED.

Dated: April 1, 2024



*The Honorable James H. Budreau,
Associate Justice, Superior Court*

² This assumes that this juror's disorder qualifies as an extraneous factor that could warrant the vacating of a verdict. While there is no case law on this issue, there are certainly circumstances where this Court could envision a severe mental health condition or personality disorder, i.e., when competency has lapsed during deliberations, might qualify for the type of extraneous factor contemplated by appellate courts for permissible inquiry to assess the validity of a verdict. This was not the case here.

UNITED STATES CONSTITUTION

FOURTH AMENDMENT

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

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

MASSACHUSETTS DECLARATION OF RIGHTS

ARTICLE 12

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

ARTICLE 14

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

Part I ADMINISTRATION OF THE GOVERNMENT

Title XIV PUBLIC WAYS AND WORKS

Chapter 90 MOTOR VEHICLES AND AIRCRAFT

Section 21 ARREST WITHOUT WARRANT

Section 21. Any officer authorized to make arrests may arrest without a warrant and keep in custody for not more than twenty-four hours, unless a Saturday, Sunday or a legal holiday intervenes, any person who, while operating a motor vehicle on any way, as defined in section one, violates the provisions of the first paragraph of section ten of chapter ninety. Any arrest made pursuant to this paragraph shall be deemed an arrest for the criminal offense or offenses involved and not for any civil motor vehicle infraction arising out of the same incident.

Any officer authorized to make arrests, provided such officer is in uniform or conspicuously displaying his badge of office, may arrest without a warrant and keep in custody for not more than twenty-four hours, unless Saturday, Sunday or legal holiday intervenes, any person, regardless of whether or not such person has in his possession a license to operate motor vehicles issued by the registrar, if such person upon any way or in any place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees, operates a motor vehicle after his license or right to operate

motor vehicles in this state has been suspended or revoked by the registrar, or whoever upon any way or place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees, or who the officer has probable cause to believe has operated or is operating a motor vehicle while under the influence of intoxicating liquor, marihuana or narcotic drugs, or depressant or stimulant substances, all as defined in section one of chapter ninety-four C, or while under the influence from smelling or inhaling the fumes of any substance having the property of releasing toxic vapors as defined in section 18 of chapter 270, carbon tetrachloride, acetone, ethylene, dichloride, toluene, chloroform, xylene or any combination thereof, or whoever uses a motor vehicle without authority knowing that such use is unauthorized, or any person who, while operating or in charge of a motor vehicle, violates the provisions of section twenty-five of chapter ninety, or whoever operates a motor vehicle upon any way or in any place to which members of the public have a right of access as invitees or licensees and without stopping and making known his name, residence and the register number of his motor vehicle goes away after knowingly colliding with or otherwise causing injury to any person, or whoever operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered in violation of paragraph (a) of subdivision (2) of section 24 and by such operation causes another person serious bodily injury as defined in section 24L, or whoever commits motor vehicle homicide in violation of subsection (a) or (b) of section 24G.

Any person who is arrested pursuant to this section shall, at or before the expiration of the time period prescribed, be brought before the appropriate district court and proceeded against according to the law in

criminal or juvenile cases, as the case may be, provided, however, that any violation otherwise cognizable as a civil infraction shall retain its character as, and be treated as, a civil infraction notwithstanding that the violator is arrested pursuant to this section for a criminal offense in conjunction with said civil infraction.

An investigator or examiner appointed under section twenty-nine may arrest without a warrant, keep in custody for a like period, bring before a magistrate and proceed against in like manner, any person operating a motor vehicle while under the influence of intoxicating liquor or marihuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, irrespective of his possession of a license to operate motor vehicles issued by the registrar.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XIV PUBLIC WAYS AND WORKS

Chapter 90 MOTOR VEHICLES AND AIRCRAFT

Section 25 REFUSAL TO SUBMIT TO POLICE OFFICER

Section 25. Any person who, while operating or in charge of a motor vehicle, shall refuse, when requested by a police officer, to give his name and address or the name and address of the owner of such motor vehicle, or who shall give a false name or address, or who shall refuse or neglect to stop when signalled to stop by any police officer who is in uniform or who displays his badge conspicuously on the outside of his outer coat or garment, or who refuses, on demand of such officer, to produce his license to operate such vehicle or his certificate of registration, or to permit such officer to take the license or certificate in hand for the purpose of examination, or who refuses, on demand of such officer, to sign his name in the presence of such officer, and any person who on the demand of an officer of the police or other officer mentioned in section twenty-nine or authorized by the registrar, without a reasonable excuse fails to deliver his license to operate motor vehicles or the certificate of registration of any motor vehicle operated or owned by him or the

number plates furnished by the registrar for said motor vehicle, or who refuses or neglects to produce his license when requested by a court or trial justice, shall be punished by a fine of one hundred dollars.

CERTIFICATE OF SERVICE

I, John P. Warren, do certify that I served the enclosed Brief of the Appellant electronically upon the Commonwealth through the efilings system, to:

Brooke Hartley, Esq.
Office of the District Attorney/Suffolk
1 Bulfinch Place
Boston, MA 02114

March 20, 2025

/s/ John P. Warren
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(13); Mass. R. A. P. 16(e); Mass. R. A. P. 18; Mass. R. A. P. 20; and Mass. R. A. P. 21, and does not exceed 11,000 words. The brief is printed in Century Schoolbook font consisting of 10,988 non-excluded words as tallied by the word count function of Microsoft Word.

March 20, 2025

/s/ John P. Warren

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