COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

BRISTOL COUNTY NO. SJC 13171

COMMONWEALTH OF MASSACHUSETTS

v.

CHRISTOPHER D DEJESUS

BRIEF OF CHRISTOPHER D DEJESUS
ON APPEAL FROM THE BRISTOL SUPERIOR COURT
BRISTOL COUNTY

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STATEMENT OF THE CASE[1]

On September 6, 2018 a grand jury returned three indictments charging Christopher D DeJesus ("Mr.

[1] The transcripts of the four-day jury trial held from May 20, 2019 to May 24, 2019 are in four volumes with the first day cited as "(Tr(I). [page no.])," the second day cited as "(Tr(II). [page no.])," and the third day cited as "(Tr(III). [page no.]), and the fourth day cited as "(Tr(IV). [page no.])." The transcript of the motion to suppress evidentiary hearing held on February 1, 2019 is cited as "(Tr(M). [page no.])." The Record Appendix will be cited as ("R. [page no.])" and filed separately.

DeJesus") with possession of a firearm without a license in violation of G.L. c.269, §10(a), possession of a large capacity feeding device in violation of G.L. c.269, §10(m), and possession of ammunition in violation of G.L. c.269, §10(h). (R. 14-22).

On December 4, 2018, defense counsel filed a motion to suppress and an evidentiary hearing (J, Dupuis, presiding) was held on February 1, 2019. After the hearing the motion judge requested parties to submit memorandums of law. On February 8, 2019, a hearing was held in which the court heard oral argument from both parties. On March 26, 2019, the motion judge issued a memorandum and order with findings of facts denying Mr. DeJesus' motion to suppress. (R. 23-29).

From May 20, 2019 to May 23, 2019 a four-day a jury trial, (J, Maguire, presiding), was held in Bristol Superior Court. At the close of the Commonwealth's case Mr. DeJesus filed a written motion for a required finding of not guilty on all counts and after a hearing the Court denied the motion on all counts. (Tr(III). 191), (R. 11). The jury returned guilty verdicts on the first two indictments. (Tr(IV). 71-72), (R. 12).

The Court sentenced Mr. DeJesus to state prison for a term of two and one-half years to five years for the conviction of possession of a firearm without a license. (Tr(IV). 106-107), (R. 12). The Court sentenced Mr. DeJesus to state prison for a term two and one-half years to five years for the conviction of the possession of a large capacity device and to run concurrently with the first term. (Tr(IV). 106-107), (R. 12).

Mr. DeJesus timely filed his Notice of Appeal on June 11, 2019. (R. 13, 30). The case was entered into the Appeals Court on October 1, 2019. An oral argument was held in the Appeals Court on November 17, 2020. On March 1, 2021, the Appeals Court issued a full opinion affirming the judgement. (A copy of the Appeals Court's opinion is filed with this brief).

On September 13, 2021, the Supreme Judicial Court allowed Mr. DeJesus's Application for Further Appellate Review. The case was entered into this Court on September 14, 2021.

STATEMENT OF FACTS

Motion to Suppress Testimony

Three witnesses testified: Fall River Police Officer Matthew Mendes ("Officer Mendes"), Fall River Police Officer Frederick Mello ("Officer Mello"), and Kyara Rene Alston ("Ms. Alston").

On March 26, 2019, Judge Renne P. Dupuis issued an order denying Mr. DeJesus's motion to suppress evidence. (R. 23-29). Judge Dupuis findings of facts are cited below and supplemented by additional facts from the evidentiary hearing. (R. 24-25).

In the summer of 2018, the city of Fall River experienced a number of shootings. As a consequent, the police department organized a task force to address the growing violence in the city. Officer Mendes, a member of the Fall River police gang unit, was part of this task force. Officer Mendes would monitor the social media of various individuals suspected of contributing to the violence in the city. In the late afternoon of July 26, 2018, Officer Mendes was monitoring the Snapchat account belonging to Darius Hunt ("Mr. Hunt"), an individual known to Officer Mendes as a member of the Asian Boys, a

violent gang with a presence in the city of Fall River. (R. 24).

The Snapchat application is similar to other social media sharing sites, and allows account holders to share videos and photographs with their contacts through a "story" function. Through this story function, Officer Mendes observed a number of videos that Mr. Hunt shared on the application with his contacts. When viewing videos or photographs on the Snapchat application, there is a distinct difference in the feature of a recently taken video that is then immediately shared on the application, compared to a video that was previously taken, stored on the device's camera roll, and then uploaded to the application. From these differences, Officer Mendes could tell when the video was taken. (R. 24-25).

The videos that Officer Mendes observed on the afternoon of July 26, 2018 were all taken within twenty-four hours before he viewed the videos. These videos depicted Mr. DeJesus, Mr. Hunt, and Derek Pires ("Mr. Pires") holding firearms at 14 Downing Street in Fall River. These three individuals were known to be members of the Asian Boys. In particular, both Mr. Hunt and Mr. DeJesus are depicted on the video holding

a black semi-automatic pistol with an extended magazine and a distinct tan/cream colored grip. The home at 14 Downing Street is a three-family dwelling. It has a porch in the front with a white railing. There are stairs leading up to the front door. Mr. DeJesus does not reside at 14 Downing Street, nor does he claim to have been an invited guest in the home. (R. 24-25).

Officer Mendes decided to conduct further investigation and travelled to the location with several other police officers, one of which was Officer Mello. Upon arriving at the location, Officer Mendes observed Mr. DeJesus and Mr. Hunt in the right-side yard. Mr. DeJesus walked down the sidewalk toward 4 Downing Street, the home of his girlfriend and her mother.

A number of individuals ran toward the back yard of 14 Downing Street, Officer Mendes believed Mr. Hunt went around the back of the home and gave chase. When Officer Mendes got to the back yard, it was empty. Officer Mendes could see that the rear door leading to the basement was ajar. Officer Mendes could hear people running in the basement. Officer Mendes followed the running footsteps and entered the

basement. The basement is a common area utilized by the residents of the apartments of the home. There are no locks on the doors leading into the basement. The back outside door was open and easily accessible from the outside. (R. 25).

Upon entering the basement, Officer Mendes could hear people running up the front stairs leading out of the basement. These individuals were apprehended by the officers located out front. Officer Mello observed a firearm in plain view in an open bag placed on a table in the basement. The firearm appeared to be the same firearm that he observed in the video being handled by Mr. Hunt and Mr. DeJesus. The bag containing the firearm and other items was seized. (R. 25).

Additional facts from the hearing are as follows:

After viewing the video Officer Mendes dispatched officers to the location to do a drive by and no individuals were scene at the location. (Tr(M). 73-74). The officers returned to the station between 6:30 P.M. and 7:00 P.M. (Tr(M). 73-74). The police decided not to secure a search warrant or an arrest warrant, but instead decided to go back to the

location later in the evening to conduct more surveillance. (Tr(M). 74).

The police arrived on the scene between 10:15 P.M. and 10:30 P.M. (Tr(M). 43, 70). Once the individuals saw the police they began to disperse. (Tr(M). 47). Mr. DeJesus lives at next door at 4 Downing Street. (Tr(M). 47). As the police approached to location, Officer Mendes noticed Mr. DeJesus and Mr. Hunt in the side yard. (Tr(M). 44). As the people dispersed, the police stopped Mr. DeJesus as he walked to his house. (Tr(M). 47-48).

The home was a three-family home. (Tr(M). 56). The basement had a long hallway which leads into a bigger space which contained a washer and dryer. (Tr(M). 56). A staircase leads to the front of the house where a front stairwell leads to the three units. (Tr(M). 56-58). The police were of the opinion that all tenants had access to the basement. (Tr(M). 57-58). The basement had rooms with at least one of room having a door. (Tr(M). 57). A table that was in the video was seen in the basement, along with chairs and a bench. (Tr(M). 59).

The police conducted a protective sweep to make sure no one was hidden in the basement. (Tr(M). 60).

The police found a second common area containing more laundry appliances, a table, and a bench. (Tr(M). 60-61). On the bench was a bag containing the firearm. (Tr(M). 61). The basement also had two storage areas with doors and latches and chicken wire. (Tr(M). 94).

On cross examination Officer Mendes indicated that the backdoor had a doorknob and admitted that he did not know if the door was capable of locking or not, or if there was lock on the door. (Tr(M). 87-88). Officer Mello indicated that Mr. DeJesus was on the porch when the police arrived. (Tr(M). 123).

There is no evidence that anyone gave consent to the search of the cellar or consent to the entry into the building.

Trial Testimony

The facts at trial were substantially similar to the facts at the motion to suppress hearing.

On July 26, 2018 at around 4:00 P.M., Officer Mendes viewed a video on Mr. Hunt's SnapChat account, which had been taken about 20 hours earlier. (Tr(II). 181). A redacted video was entered into evidence. (Tr(III). 182-184).

At around 10:15 P.M.-10:30 P.M., nine police officers arrived at 14 Downing Street to do a

surveillance of the location. (Tr(II). 190-191, 226-227), (Tr(III). 54). As the officers arrived, they noticed folks hanging outside in the yard of 14 Downing Street. (Tr(II). 190-191, 227), (Tr(III). 53). No criminal activity was observed.

After seeing the police, some folks dispersed to the back yard. (Tr(II). 193-194, 228), (Tr(III). 11). Officer Mendes saw about three to four folks run to the back yard on the left side of the house. (Tr(II). 229). Instead of leaving the area as their surveillance is complete, the police decided to exit their vehicles and give chase to the individuals.

The back door to the cellar was ajar and unlocked, the police officers entered the cellar and following the individuals. (Tr(II). 194), (Tr(III). 14). When the officers where in the cellar they could hear folks going up the front stairs. (Tr(II). 195-196). The police decided to conduct a sweep of the basement and they found in a backpack a Springfield Armory 1911 45-Caliber semi-automatic black pistol with an extended magazine in a backpack. (Tr(II). 196-198, 203), (Tr(III). 61-62, 76). Nothing with Mr. DeJesus's name was found in or around the backpack. (Tr(III). 108

After the police exited the cruisers Officer Kevin Bashara noticed Mr. DeJesus in the yard near the porch of the building and on the side of 4 Downing Street. (Tr(III). 51, 53-54). Mr. DeJesus began to walk in the direction of the officer which is also in the direction of 4 Downing Street. (Tr(III). 54). Officer Bashara asked Mr. DeJesus to stop walking, he complied, was very polite and cooperative. (Tr(III). 52). Mr. DeJesus lives at 4 Downing Street with his girlfriend Ms. Alston and her mother. (Tr(II). 174), (Tr(III). 52). The police arrested Mr. DeJesus and transported him to Fall River Police Station. (Tr(II). 206-207). Officer Nuno Medeiros tested the firearm and it fired a bullet. (Tr(III). 158-159).

The basement had typical items found in a storage basement. (Tr(III). 17). The basement was a common basement and it was the police understanding that all of the tenants have access to the basement. (Tr(III). 13). The police also secured a search warrant for 4 Downing Street and were not able to find anything of interest. (Tr(II). 217-218).

The SnapChat video exhibit consisted of seven clips which were as follows:

Excerpt 1: (2 seconds long) Person outside on a bike playing with his fingers.

Excerpt 2: (6 seconds long) Person holding a firearm, a second person holding another firearm taking shots at the camera.

Excerpt 3: (6 seconds long) Person holding an end of a firearm, second person holding and taking shots with a second firearm.

Excerpt 4: (3 seconds long) Person making a sign with his fingers.

Excerpt 5: (2 seconds long) Person holding a gun off screen near his waist.

Excerpt 6: (4 seconds long) Person takes a few shots with a firearm then turns firearm.

Excerpt 7: (4 seconds long) Person with firearm take a few shots at the camera. Second person holding a firearm.

SUMMARY OF THE ARGUMENT

Motion to Suppress

The motion judge erred in denying Mr. DeJesus's motion to suppress evidence seized as a result of the warrantless search of the cellar of 14 Downing Street. (pp. 23-32). There was no probable cause to search the location and the Commonwealth failed to articulate the existence of exigent circumstances to justify the warrantless search. (pp. 33-36).

Officer Mendes viewed 20-hour old video of Mr. DeJesus holding and posturing with a gun. (p. 35). Instead of securing a warrant, the police decided to descend on 14 Downing Street with about nine officers at 10:30 P.M., about 6 hours after seeing the video. (p. 35). Upon arriving at the location, the police observed some folks on the porch and side yard. (p. 34). Once the folks saw the police they began to disperse and the police decided to give chase eventually following some individuals into the cellar. (p. 35).

Any exigency that might have been created was created by the police chasing the individuals. (pp. 35-37). As the police did not have exigency circumstances prior to the arrival at 14 Downing

Street, the police cannot rely on any exigency they helped to create. (pp. 35-37). Consequently, the search was not justified and the motion to suppress should have been allowed. (pp. 35-37).

In addition to the above the cellar is part of the curtilage of the home in which the police entered without justification. (pp. 38-51). The police entry into the cellar went beyond the scope and purpose of any license they had to be on the premises; and as such, constituted a search which required probable cause and a warrant or exigent circumstances. pp. (47-51). As none was present, the evidence needed to be suppressed. (pp. 50-51).

The error was not harmless as the firearm found was the key piece of evidence to prove the firearm was operational. (pp. 37-38). Without this evidence the Commonwealth's case with respect to possession of a firearm could not survive a required finding of not guilty. (p. 38). This same premises holds true with respect to the charge of possession of a large capacity feeding device as there is no way to confirm it exist short of seeing the actual device. (pp. 53-54).

Required Finding of Not Guilty

The only evidence that Mr. DeJesus had possibly possessed the firearm was seen in the video introduced into evidence. (pp. 56-58). In this video Mr. DeJesus only had momentary possession of the firearm, which is not illegal. (pp. 56-58). Mr. DeJesus is seen posturing with the firearm for a very short period of time. (pp. 58-59). No evidence is presented as to who owned the gun or if Mr. DeJesus has brought the gun to location, or any other connection to Mr. DeJesus. (pp. 60-61).

As Mr. DeJesus only had momentary possession of the firearm, the element of possession is lacking and he is entitled to a required finding of not guilty. (p. 61-64).

As the large capacity feeding device is part of the firearm and there is no evidence outside of this that Mr. DeJesus owned the feeding device, the element of possession is also lacking with respect to this charge. (pp. 45-46). Mr. DeJesus is entitled to a required finding of not guilty. (pp. 64-65).

ARGUMENT

I. MR. DEJESUS'S CONVICTION FOR POSSESSION OF A FIREARM WITHOUT A LICENSE SHOULD BE REVERSED WHERE THE MOTION JUDGE ERRED IN DENYING HIS MOTION TO SUPPRESS AS THE COMMONWEALTH FAILED TO ARTICULATE THE PRESENT OF PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES TO JUSTIFY THE WARRANTLESS SEARCH OF 14 DOWNING STREET

Defense counsel filed a motion to suppress the evidence found as a result of the police warrantless entry into the home. (R. 6). An evidentiary hearing was held and the motion judge denied the motion and issued a finding of facts. (R. 23-29). The motion judge erred in denying the motion as the Commonwealth failed to articulate a justification for the entry. Commonwealth v. Molina, 439 Mass. 206, 211 (2003), Commonwealth v. Alexis, 481 Mass 91, 101 (2018).

When evaluating the denial of a motion to suppress, a reviewing court will accept a motion judge's subsidiary findings of facts absent clear error. Commonwealth v. Eckert, 431 Mass. 591, 592 (2000), Commonwealth v. Molina, supra at 208, Commonwealth v. Tyree, 455 Mass. 676, 682 (2010). A reviewing court may supplement the facts where necessary with uncontroverted evidence drawn from the suppression hearing. Commonwealth v. Mubdi, 456 Mass. 385 (2010), Commonwealth v. Watson, 403 Mass. 725, 726

n. 5 (2000), Commonwealth v. Figueroa, 468 Mass. 203 (2014). A reviewing court will however make an independent evaluation to determine a correct application of constitutional principles to the facts. Commonwealth v. Eckert, supra at 593, Commonwealth v. Molina, supra at 208, Commonwealth v. Alexis, supra.

"The right of a police officer to enter into a home, for whatever purpose, represents a serious governmental intrusion into one's privacy." Commonwealth v. Molina, supra at 209, citing Commonwealth v. Marquez, 434 Mass. 370, 374 (2001), Commonwealth v. Forde, 367 Mass. 798, 805 (1975). As a result, "a warrantless entry into a dwelling to arrest in the absence of sufficient justification for the failure to obtain a warrant" is prohibited. Commonwealth v. Molina, supra at 209, Commonwealth v. Forde, supra at 806. The Fourth Amendment of the United States Constitution and Article 14 of the Massachusetts Declaration of Right scrupulously guard against the intrusion of the government into a citizen's home without a warrant. Commonwealth v. Alexis, supra at 97, Commonwealth v. Molina, supra.

The Commonwealth must demonstrate the existence of probable cause and exigent circumstances such that

"it was impracticable for the police to obtain a warrant, and the standards as to exigency are strict." Commonwealth v. Molina, supra at 209, Commonwealth v. Forde, supra at 800, Commonwealth v. Huffman, 385 Mass. 122, 125-126 (1982) (principles governing search warrants and arrest warrants are substantially similar). Factors such as "a showing that the crime was one of violation or that the suspect was armed, a clear demonstration of probable cause, strong reason to believe suspect was in the dwelling, and a likelihood that the suspect would escape if not apprehended," support a finding of exigency. Commonwealth v. Molina, supra at 209, citing Commonwealth v. Forde, supra at 807. Factors such as whether the entry was peaceable and made in the daytime are also relevant. Commonwealth v. Molina, supra, Commonwealth v. Forde, supra. These factors should be examined as a whole to evaluated if the circumstances prevented the officers from taking the time to obtain a warrant. The primary purpose of this test is to balance one's constitutional rights with the safety of others and the risk of flight. Commonwealth v. Molina, supra at 210, Commonwealth v. Forde, supra at 807.

It should also be noted that when "the exigency is reasonably foreseeable and the police offer no justifiable excuse for their prior delay in obtaining a warrant, the exigency exception to the warrant requirement is not open to them." Commonwealth v. Alexis, supra at 97, Commonwealth v. Forde, supra at 803. In addition, the "exigent circumstance requirement is not satisfied by virtue of altercations resulting from a warrantless [entry] at the home, where there is no showing of exigent circumstances leading to the warrantless [entry] itself." Commonwealth v. Alexis, supra at 97, citing Commonwealth v. Forde, supra.

Automatic Standing – Standing to Challenge Search

Mr. DeJesus does not live at 14 Downing Street but has standing to challenge the entry into the cellar. Mr. DeJesus was charged with possession of a firearm and possession of a large capacity device. (R. 14-22). As one of the elements of each of the crimes is possession, Mr. DeJesus has automatic standing to challenge the entry and search of the cellar. Commonwealth v. Ware, 75 Mass. App. Ct. 220, 227-228 (2009), Commonwealth v. Amendola, 406 Mass.

592, 601 (1990), Commonwealth v. Midi, 46 Mass. App. Ct. 591, 593 (1999).

The Commonwealth contends that the possession of the firearm occurred at the time of the taking of the video, the day before the search. (R. 26-27). Furthermore, the Commonwealth argues, and the Appeals Court agrees, that Mr. DeJesus does not have standing to challenge the search as he was not in possession of the firearm at the time of the search or present on the property at the time of the search. Commonwealth v. Mora, 402 Mass. 262 (1988), (R. 26-27). However, it is the Commonwealth's own evidence that places Mr. DeJesus on the premises. (Tr(M). 44, 47-48). Compare Commonwealth v. Franklin, 376 Mass. 885, 900 (1978).

The police arrived on the scene between 10:15 P.M. and 10:30 P.M. (Tr(M). 43, 70). As the police approached to location, they noticed Mr. DeJesus on or near the porch[2] of 14 Downing Street. (Tr(M). 44, 123). As the people started to disperse, the police stopped Mr. DeJesus as he walked to his house, which is next door at 4 Downing Street. (Tr(M). 47-48).

[2] Officer Mendes places Mr. DeJesus in the side yard next to the porch (Tr(M). 44), while Officer Mello places him on the porch. (Tr(M). 123).

Most critically, in its closing argument at trial the Commonwealth advocates a nexus between Mr. DeJesus's presence on the scene, the firearm, and Officer Mendes's investigation. (Tr(IV). 24-25). In his closing argument the district attorney advocates:

> He goes to that same location a short time later, and within hours of seeing a video on social media was able to track that firearm.
>
> Does that sound like a good investigation? He was able to locate Mr. DeJesus in the exact same location, right outside of 14 Downing Street. Not at 4 Downing Street where he lived but right outside of 14 Downing street.
>
> Speculation? Conjecture? I would suggest not.
>
> He then locates the firearm in the basement of that same location with Officer Mello.

(Tr(IV). 24-25) (emphasis added)

If an effort to make a nexus between Mr. DeJesus and the firearm, the Commonwealth has placed him on the premises at the time of the search. (Tr(IV). 24-25). Furthermore, fairness dictates that as the Commonwealth advocates at trial that Mr. DeJesus is present at the location at the time the search, one cannot take an opposite position with respect to the motion hearing. Commonwealth v. Franklin, supra at 900 (to have fairness at each stage of a trial evidence that aids the Commonwealth at one part of a

trial cannot be ignored when it might help a defendant establish standing during another portion of a trial).

In addition, a person does not need to be present in the same room as the search but just needs be on the premises of the search to be deemed present, here in the side yard near the porch, or on the porch, when the search occurred in the cellar. (Tr(M). 44, 123). Commonwealth v. Franklin, supra at 890, 900. (present by being in an adjacent room). Therefore, as Mr. DeJesus was present at the time of the search, he has automatic standing to challenge the search. Commonwealth v. Franklin, supra at 890, 900. Commonwealth v. Ware, supra, Commonwealth v. Amendola, supra, Commonwealth v. Midi, supra. The Appeals Court's opinion that Mr. DeJesus was not present at the time of the search, in not in line with our case law. Commonwealth v. Franklin, supra at 900.

Expectation of Privacy

As Mr. DeJesus has automatic standing, he is not required to demonstrate that he himself had an expectation of privacy at the location searched, but needs to demonstrate that at least someone did have an expectation of privacy. Commonwealth v. Mubdi, 458

Mass. 385, 392 (2010), Commonwealth v. Amendola, supra. To determine if one had a reasonable expectation of privacy we look at (1) whether the individual has manifested a subjective expectation of privacy in the object of the search, and (2) whether society is willing to recognize that expectation to be reasonable. Commonwealth v. Montanez, supra at 301. To determine reasonableness of one's expectation certain factors are used including the character of the location, whether the individual owned or had property rights in the area, and whether the area was freely accessible to others. Commonwealth v. Williams, 453 Mass. 203, 208 (2009).

The tenants and the landlord, the owner of the building, both have an expectation of privacy in the cellar. The cellar was divided up into many rooms, two common areas with tables and benches, two laundry rooms, two storage rooms with doors. (Tr(M). 56-61, 94). The cellar door was ajar at the time, but the police could not confirm if there was or was not a lock on the door. (Tr(M). 87-88). Although all have access to the cellar, it is critical to note that there is no evidence that the public was granted access to the area searched, nor the public used the

area, or the tenants has their guests enter through the cellar. The cellar is not a public hallway in the building. Contrast Commonwealth v. Montanez, supra.

This is similar to a living room in an apartment, where it may be shared by others, it is not shared with the public; and as such, a person has a reasonable expectation of privacy in this common area. It is certainly reasonable to expect someone, who owns or rents, a location that is not given access to the public, is in an enclosed space like the cellar with many rooms including separate laundry and storage rooms (Tr(M). 56-61, 94), they would also have an expectation of privacy free from third parties. Cf. Commonwealth v. Mubdi, supra at 394. (expectation of privacy in a closed center console of a car).

Probate Cause and Exigent Circumstances

The burden now falls on the Commonwealth to justify the warrantless entry and search by demonstrating the presence of both probable cause and exigent circumstances. Commonwealth v. Molina, supra at 209, Commonwealth v. Forde, supra at 800.

a) Probable Cause

At the time of the police arrived, they had no idea where the firearms were located and did not know if any of the persons seen had firearms on their persons. Furthermore, no crime was observed or one reported to have been made by any of the folks seen in the yard. All that the police saw was the folks who dispersed and with some of them entering the cellar. (Tr(M). 47-51). (R. 24-25). This is not enough for probable cause that a crime had or will occur.

b) Exigent Circumstances

No crime was committed at the time the police arrived on the scene. The police were not in hot pursuit of any of the folks seen at the location. Commonwealth v. Alexis, supra, at 101, Commonwealth v. Molina, supra at 210-211. The crime in question happened a day earlier. Commonwealth v. Alexis, supra, Commonwealth v. Molina, supra. (R. 24-25). Officer Mendes saw the video at around 4:00 P.M. and after some investigation decided not to secure a warrant. (Tr(M). 67, 72-74).[3] Instead, the police

[3] At the motion to suppress hearing Officer Mendes indicated that he dispatched some officers to look at

decided to descend on to 14 Downing Street at 10:30 at night with about nine police officers for the purposes of conducting additional surveillance. (Tr(M). 43-44, 70-71, 122-123). There was no showing that it was impracticable for the police to secure a warrant in the six-hour time period between seeing the video and descending on 14 Downing Street with nine police officers. Commonwealth v. Alexis, supra at 100. Commonwealth v. Molina, supra at 209.

When the police arrived, they saw people on the porch and the side yard who began to disperse upon seeing the police officers. (Tr(M). 47-51, 122-124). Instead of completing their surveillance by leaving the area, the police decided to give chase even chasing the folks into the back yard and then into the cellar of the building. (Tr(M). 47-51, 122-124).

This case is really no different than the case of Commonwealth v. Alexis, a case that is directly on point. In Commonwealth v. Alexis, several police

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the location and the officers found an empty yard and returned to the station between 6:30 P.M. and 7:00 P.M. (Tr(M). 73-74). The police decided not to secure a search warrant or an arrest warrant, but instead decided to go back to the location later in the evening to conduct more surveillance. (Tr(M). 74).

officers descended on a home without a warrant. Id. at 94. Once the defendant retreated into the house the police gave chase. Id. 94-95. The police in that case, like the instant case, did not have exigent circumstances prior to coming to the venue. Id. Any exigent circumstances that might have been created was a result of the police's own actions. Id. at 100-101. As in Commonwealth v Alexis, and the instant case, where the police do not have exigent circumstances prior their arrival, the police cannot avail themselves of any exigent circumstances which are reasonably foreseeable to be the result of their actions, even if the police were acting lawfully. Commonwealth v. Alexis, supra at 100, Commonwealth v. Molina, supra at 210, Commonwealth v. Forde, supra at 803. And as with Commonwealth v. Alexis, it was reasonably foreseeable that folks might disperse upon the arrival of several police officers at night and thus any exigency created was due to the result of the police officer's actions. Commonwealth v. Alexis, supra, Commonwealth v. Molina, supra.

Lastly, there was no evidence presented that any evidence would be destroyed or that any individuals would flee. Commonwealth v. Tyree, supra at 686,

Commonwealth v. Alexis, supra. Commonwealth v. Molina, supra.

Error Not Harmless

As there were no probable cause nor exigent circumstances prior to the police arrival all evidence seized from the result of the search should have been suppressed. Commonwealth v. Alexis, supra at 101, Commonwealth v. Molina, supra at 210, Commonwealth v. Forde, supra at 803. The motion judge therefore erred in denying Mr. DeJesus motion to suppress.

The error was not harmless. The only evidence that ties Mr. DeJesus to the crimes charged is the firearm seized. One of the elements is if the firearm in question was operational, which can only be done if the firearm is in evidence. If there is no evidence that the firearm is operational, the Commonwealth's evidence could not survive a require finding of not guilty. The error cannot be said to be harmless.

Cellar and side yard are part of curtilage of 14 Downing Street

a) Curtilage law

The same result is reached as the cellar of 14 Downing Street is within the curtilage of the home. Commonwealth v. Leslie, 477 Mass. 48 (2017), Commonwealth v. Escalara, 462 Mass. 636, 647 (2012). Although the curtilage of a home analysis typically deals with an exterior portion of a premise, interior portions of a home have been deemed to be part of the curtilage of a home. Commonwealth v. Leslie, supra, Commonwealth v. Escalera, supra at 647-649, Commonwealth v. Wallace, 67 Mass. App. Ct. 901, 902 (2006). Both Article 14 and the Fourth Amendment grant the curtilage of a home the same constitutional protection as the home itself, as the curtilage is considered part of the home. Commonwealth v. Leslie, supra, at 54-55, Florida v. Jardines 569 U.S. 1, 5 (2013). Specifically, with the respect to places and things encompassed by the Fourth Amendment protection, a home is first among equals. Commonwealth v. Leslie, supra, at 54-55, Florida v. Jardines, supra. In addition, Fourth Amendment jurisprudence regards "the area 'immediately surrounding and associated with the

home' – what our cases call the curtilage – as 'part of the home itself for Fourth Amendment purposes.'" Florida v. Jardines, supra at 6, quoting Oliver v. United States, 466 U.S. 170, 180 (1984), Commonwealth v. Leslie, supra, at 54-55. Lastly, as the curtilage is part of the home, one is not required to make an independent showing that one had exclusive control or expectation of privacy in the locale searched. Florida v. Jardines, supra, (holding that warrantless entry into a house's front porch and side yard to conduct a dog sniff violates the Fourth Amendment even if it does not intrude on the homeowner's reasonable expectation of privacy), Commonwealth v. Leslie, supra, at 54-57. United States v. Jones, 565 U.S. 400, 408-409 (2012) (reasonable expectation of privacy test "is unnecessary to consider when the government gains evidence by physically intruding into constitutionally protected areas"). Simply put, the curtilage of a home is the home and thus is a constitutionally protected area.

It must be noted that the same constitutional protection afforded a curtilage of a single-family home is also afforded to the curtilage of a multifamily home. Florida v. Jardines, supra,

Commonwealth v. Leslie, supra, at 54-55. Although, it had been held that the curtilage of a multifamily home may be viewed with a more of a limited scope than a single-family home, Commonwealth v. Thomas, 358 Mass 771, 774-775 (1971), it was held in Commonwealth v. Leslie, with respect to Fourth Amendment protection, a multifamily home must be treated the same as a single-family home, as a "strict apartment versus single-family house distinction is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race and ethnicity." Commonwealth v. Leslie, supra, at 54, quoting United States v. Whitaker, 820 F.3rd 849, 854 (7th Ci. 2016). Accordingly, if an area in or around a multifamily home is deemed part of the curtilage of the home it is afforded constitutional protection. Commonwealth v. Leslie, supra.

The analysis does not turn on whether or not one has exclusive control or an expectation of privacy in the area searched, but turns on the determination if the area is part of the curtilage of the home. Florida v. Jardines, supra, Commonwealth v. Leslie, supra, at 54-55. United States v. Jones, supra at 408-409. And if so, a police intrusion into this area

constitutes a search that must be justified by probable cause and a warrant or exigent circumstances, as if it were the home itself. Commonwealth v. Leslie, supra, at 54, 57, Florida v. Jardines, supra

b) Curtilage determination

To determine if a given area is deemed part of the curtilage of the home, we looked the factors laid down in United States v Dunn, 480 U.S. 294, 301 (1987). Commonwealth v. Leslie, supra, at 55. We look at the following factors: "(i) the proximity of the area claimed to be curtilage to the home, (ii) whether the area is included withing an enclosure surrounding the home, (iii) the nature of the uses to which the area is put, (iv) the steps taken by the resident to protect the area from observation by people passing by." United States v. Dunn, supra. Commonwealth v. Leslie, supra, at 55. We look case by case basis with the factors not a finely tune formula, but are useful analytical tools which "bear on the centrally relevant point – whether the area in question is so intimately tied to the home itself that is should be placed under the umbrella of protection

of the Fourth Amendment." United States v. Dunn, supra. Commonwealth v. Leslie, supra, at 55.

When one looks at the four Dunn factors, one can only conclude that the cellar is part of the curtilage of 14 Downing Street. Proximity. The cellar is connected and part of the building, and is connected to the three units via a common stairway. (Tr(M). 56-58). Enclosure. As the cellar is part of the home it is enclosed within the home with two egresses, a common stairway to the units and a cellar door. (Tr(M). 56-58). There is no other entrance or opening to the cellar, other than any cellar windows. Nature of use. The record reflects that the tenants were using the cellar for storage and laundry. (Tr(M). 56-61, 94). There is evidence that the cellar was used by the tenants and their immediate friends to convene in the locale, as evidence by the taking of the video. There is no evidence in the record to show that the cellar was used by the public at large or that the tenants had their guest come through the cellar to enter the home. Cf. Commonwealth v. Fernandez, 458 Mass. 137, 145-146 (2010). Although there is no evidence that a single tenant has exclusive use of the cellar, this is not dispositive and is just a single

factor in the entire analysis. Commonwealth v. Leslie, supra, at 56. In the end, the tenants collectively used the cellar and did so as an extension of their own apartment. Commonwealth v. Leslie, supra, at 56. (The fact that not one tenant has sole use of porch and side yard does not prevent it from being deemed part of the curtilage of the home as all members used the porch as an extension of the home). Steps taken to protect from observation. There were only two egresses, a stairway and a cellar door. There is no evidence if the door had a number of windows, nor is there any evidence that there were many cellar windows. As such, it can only be assumed that the cellar is typical of a cellar of a three-family home, with limited observation into the cellar via a few cellar windows, and if any, windows in the cellar door. The police could not say if the door did or did not have a lock. (Tr(M). 86-88).

Also, there is strong argument that the side yard and back yard are both part of the curtilage of the home. Just as in Florida v. Jardines, supra, the side yard and back yard can be deemed part of the curtilage. Here, there is nothing in the record to hold otherwise.

In addition to the Dunn factors regarding the instant case, our cases have already found that the cellar of a multi-family home is part of the curtilage of a home. Commonwealth v. Escalera, supra at 647-649. See also State v. Reddick, 207 Conn. 323, 333 (1998). In Escalara the cellar door had a lock, we cannot say if there was or was not a lock on the door at 14 Downing Street, (R.25) (Tr(M). 86-88)[4], but that is not dispositive on the case. In the end, we are talking about steps taken to protect an area from observation by the public at large, not steps taken to block out thugs. "The security of locks and doors may be vital in a society where thugs and thieves prey on the unwitting and unable, but the importance of such security devices for personal safety hardly makes them a constitutional necessity for purposes of search and seizure. Titus v. State, 696 So. 2d 1257, 1264 (1997). It is perfectly reasonable to understand that

[4] The motion judge was of the opinion there were no locks on the doors (R. 25), but on cross examination Officer Mendes made it clear he did not know if the cellar did or did not have a lock on the door. (Tr(M). 86-88). Given some folks were in the side yard and the cellar was used to entertain is not unreasonable to conclude that the cellar was being used that evening and someone left the door ajar. Also, the folks just entered the door after dispersing and may have left it ajar as they entered the cellar.

a person who has a cellar door, in the back of the house no less, would not expect trespasser readily coming into the cellar to observe. Indeed, finding a trespasser in one's cellar would lead most of us to call the police. Florida v. Jardines, supra at 9. An entry into a unlock door stills constitutes a breaking and entering, and a trespass, something most folks would not expect a person to do.

c) Standing

Mr. DeJesus may challenge the search of the cellar as he has automatic standing. As stated earlier, Mr. DeJesus has standing to challenge the search as he was present on the property at the time of the search and is charged with a crime involving possession. Commonwealth v. Ware, supra at 227-228, Commonwealth v. Amendola, supra at 601, Commonwealth v, Midi, supra at 593, Commonwealth v. Franklin, supra at 900. As the area in within the curtilage of the home, and thus considered part of the home for constitutional purposes, Mr. DeJesus is not required to make an independent showing if anyone had an expectation of privacy, and may challenge the search as if were made in the home. Commonwealth v. Mubdi,

supra, Florida v. Jardines, supra, Commonwealth v. Leslie, supra, at 54-55, United States v. Jones, supra at 408-409, Commonwealth v. Franklin, supra at 900. The practical consequence of automatic standing is that a defendant may succeed in the suppression of the evidence where the search was unconstitutional. Commonwealth v. Mubdi, supra at 393, Commonwealth v. Montanez, supra at 301 ("when a defendant has standing under our rule for State constitutional purposes, we then determine whether a search in the constitutional sense has taken place"). One such example of an unconstitutional search is one that involves a search of the curtilage of a home without justification. Florida v. Jardines, supra, Commonwealth v. Leslie, supra, at 54-55, United States v. Jones, supra at 408-409. Simply put, Mr. DeJesus may challenge the search as he sits in a position of a non-occupant present at the time the home was searched. Commonwealth v. Franklin, supra at 900. (An individual has standing to challenge a search of a home even though he had no possessory interest in the home, as he was present at the time of the search in an adjacent room and was charged with possession of a shotgun occurring earlier in the home).

d) Police Intrusion

The analysis now turns to whether or not the police physically intruded into the cellar without justification. Commonwealth v. Leslie, supra. Police officers, like private citizens, are afforded a limited license to enter the public areas of a premises. This license, however, is limited in scope, purpose and duration, with all three parts subject to review. Commonwealth v. Leslie, supra, at 57, Florida v. Jardines, supra. The police, by their own admission, were merely conducting a surveillance of the location. (Tr(M). 43-44, 70-71, 122-123). In fact, the police came to location twice that day, once around dinner time (Tr(M). 73-74)[5] and a second time with several officers around 10:30 P.M. (Tr(M). 43, 70). The police were not operating on probable cause that a crime occurred, nor were working on the basis of an informant's tip, in hot pursuit, nor observed a crime committed in their presence. Accordingly, the limit and scope of the police officer's license to enter, if at all, the premises at 10:30 P.M. at night, was at most to enter and come up to the porch and side

[5] See Note 3, supra.

yard area to perhaps engage the occupants in conversation, but no more.

As the folks on the porch and side yard began to disperse the police did not have a right to give chase. As stated earlier, there was no justifiable reason to chase private citizens. Commonwealth v. Alexis, supra, 97-101. As such, the police entry into the back yard of the premises was beyond the scope of their license. And most certainly entering into the cellar chasing folks when no crime or other reason was present to legally allowed them to chase the occupants went beyond the scope or purpose of any license. The police at that point were really no different than a private citizen who would have no right to enter the cellar. The fact that the cellar door was ajar nor locked, does not change the point, as logic dictates that at any time of the day, much less at 10:30 P.M., a person is not given a license to enter the cellar of a multifamily home. Also, there is nothing in the record to indicate that this particular cellar was open to the public at large, but merely open to the occupants and friends.

And most critically, the entry into the cellar was an intrusion into a home, here the curtilage at

least, without a warrant or justification; and as such, the entry was impermissible by a police officer from a constitutional standpoint. Commonwealth v. Alexis, supra, 97-101, Commonwealth v. Molina, supra at 209, Commonwealth v. Forde, at 806, Commonwealth v. Ramos, 470 Mass. 740, 744-745 (2015). The Fourth Amendment and Article 14 "scrupulously guard against the intrusion of the government into a citizen's home without a warrant." Commonwealth v. Molina, supra at 211. By entering the cellar, the police not only overstepped any license that would be available to a private citizen but in addition overstepped any license by virtue of their status as the police. Commonwealth v Alexis, supra, Commonwealth v. Molina, supra at 209, Commonwealth v. Forde, at 806, Commonwealth v. Ramos, supra at 744-745. Indeed, the police not only enter the basement but executed a preventive sweep of the different rooms of the basement. (Tr(M). 60).

e) Justification

As the police officers' physical entry into cellar was an intrusion into the curtilage of the home and beyond the scope or purpose of a license, their

entry is deemed a search which must be justified by probable cause and a warrant or by exigent circumstance. Commonwealth v. Leslie, supra, at 54, 57, Florida v. Jardines, supra

As stated earlier, there is no probable cause nor did the police secure a warrant. Also, with regards the presence to exigent circumstances, if any, were only the result of the police's own creation, if even in good faith. As such, the police may not avail themselves of these particular exigent circumstances. Commonwealth v. Alexis, supra at 100-101, Commonwealth v. Forde, supra at 803. As the police entry into the cellar went beyond their license and was a physical intrusion into a protected area not supported by justification, the evidence seized from the cellar must be suppressed. Florida v. Jardines, supra, Commonwealth v. Leslie, supra, at 54-55, United States v. Jones, supra at 408-409. As stated above the error was not harmless.

f) Possible waiver

In his appellate brief and at oral argument, Mr. DeJesus did not directly present the curtilage argument in support of the challenge to the search of

the cellar. If for some reason this Court finds that this portion of the argument is waived, it does not end the analysis. Commonwealth v. Jorge, 98 Mass. App. Ct. 1116 (2020), Commonwealth v. Randolph, 493 Mass. 290, 293-294 (2002), Commonwealth v. Alphas, 430 Mass. 8, 13 (1999). All claims, waived or not, must be considered. Id., Commonwealth v. Santos, 95 Mass. App. Ct. 791, 795-797 (2019) and cases cited. The "wavier doctrine is inapplicable where the error below would create a substantial risk of a miscarriage of justice." Commonwealth v. Santos, supra at 795, quoting Commonwealth v. Vuthy Seng, 436 Mass. 537, 550 (2002). The only difference is the standard of review, which for an unpreserved claim is a determination if the error created a substantial risk of a miscarriage of justice. Commonwealth v. Randolph, supra at 293-294, Commonwealth v. Santos, supra at 795, Commonwealth v. Vuthy Seng, supra at 550. If the motion to suppress was allowed, there would be no firearm in evidence, and no way to determine if the item in the video exhibit was an operational firearm. The Commonwealth's case would not even survive a required finding of not guilty, or for that matter a pretrial motion to dismiss for lack

of evidence. As such, failure to allow the motion to suppress would result in a substantial risk of a miscarriage of justice. Commonwealth v. McGovern, 397 Mass. 863, 867-868 (1986) (conviction based on legally insufficient evidence creates a substantial risk of miscarriage of justice).

II. MR. DEJESUS'S CONVICTION FOR POSSESSION OF A LARGE FEEDING DEVICE SHOULD BE REVERSED WHERE THE MOTION JUDGE ERRED IN DENYING HIS MOTION TO SUPPRESS AS THE COMMONWEALTH FAILED TO ARTICULATE THE PRESENT OF PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES TO JUSTIFY THE WARRANTLESS SEARCH OF 14 DOWNING STREET

Mr. DeJesus was also charged with possession of a large capacity feeding device. In order for the Commonwealth to find a person guilty possession of a large capacity feeding device the Commonwealth must prove: (1) an individual possesses the device, (2) the item meets the definition of a large capacity feeding device, (3) that the individual knew he possessed the feeding device, and (4) that the individual knew that the feeding device met the legal definition of a large capacity feeding device. (Tr(IV). 61-62).

As one of the elements of this crime is possession, Mr. DeJesus would have been able to challenge and succeed on suppressing the evidence.

See Issue I, supra. And the denial of the motion would have been in error. See Issue I, supra.

The error would not be harmless. Without the evidence of the firearm and its magazine, the Commonwealth's evidence with respect to the large capacity feeding device is limited to what is scene on the video. As the one does not have physical possession of the feeding device it would be impossible to figure out if it indeed meets the legal requirements of a large feeding device, one of the elements of the crime. The Commonwealth's case would not survive a required finding of not guilty.

With respect to the curtilage argument mentioned in Issue I, supra, and any issue regarding waiver, the curtilage argument provides an additional reason why the evidence should be suppressed. As the suppression of the evidence leaves the Commonwealth with insufficient evidence to survive a required finding of not guilty, the error creates a substantial risk of a miscarriage of justice. Commonwealth v. McGovern, supra at 867-868.

III. THE TRIAL JUDGE ERRED IN DENYING MR DEJESUS'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY WITH RESPECT TO THE CHARGE OF POSSESSION OF A FIREARM WITHOUT A LICENSE WHERE HE ONLY HAD MOMENTARY POSSESSION OF THE FIREARM

At the close of the Commonwealth's case the defense counsel filed a motion for required finding of not guilty, which was denied. (Tr(III). 184-189), (R. 11). The motion should have been allowed with respect to the charge of carrying a firearm without a license as Mr. DeJesus only had momentary possession of the firearm in question. Commonwealth v. Atencio, 245 Mass. 627, 631 (1963), Commonwealth v. Brown, 10 Mass. App. Ct. 935 (1980).

In criminal cases, the prosecution must convince the trier of fact of all the essential elements of guilt. Commonwealth v. Militello, 66 Mass. App. Ct. 325, 331-332 (2006). Proof beyond a reasonable doubt is constitutionally required as a matter of due process under the Fifth and Fourteenth Amendments to the United States Constitution. In re Winship, 397 U.S. 358, 361-362 (1970), Commonwealth v. Amirault, 404 Mass. 221, 240 (1989).

The standard of review to sustain a required finding of not guilty is, "[W]hether, after viewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979).

In order sustain a conviction under G.L. c.269 sec 10(a) the Commonwealth must prove: (1) a defendant knowingly possessed a firearm, (2) that the firearm met the legal definition of a firearm, (3) that the defendant knew that he possessed the firearm, and (4) that the defendant possessed the firearm outside of his residence. Commonwealth v. White, 452 Mass. 133, 136 (2008). The issue at hand is whether or not Mr. DeJesus possessed the firearm in question.

Commonwealth's evidence limited to the SnapChat video

The Commonwealth's evidence regarding a firearm and any connection to Mr. DeJesus was limited to a video exhibit, containing seven clips, showing different individuals playing and posing with what appears to be operational firearms and later a firearm found as a result of a search of the cellar of 14 Downing Street. (Tr(II). 196-197, 203), (Tr(III). 61-62, 76, 181-184). It is the Commonwealth's position that the firearm found in the cellar was the same

firearm as one of the firearms seen in the video; and specifically, the Commonwealth contends that this firearm is the same firearm that Mr. DeJesus and Mr. Hunt are handling in the video. (Tr(IV). 30, 35).

When the police arrived on the night of the search, Mr. DeJesus was near the porch of 14 Downing Street. (Tr(III). 51-54). Officer Bashara noticed Mr. DeJesus walking towards him and asked Mr. DeJesus to stop, and he complied, was very polite and cooperative. (Tr(III). 51-54). At no point was Mr. DeJesus seen holding the firearm seized nor any other firearm. Furthermore, Mr. DeJesus is not a resident of 14 Downing Street or owned any item that was found with the firearm found in the cellar. (Tr(II). 174), (Tr(III). 52, 108). Therefore, no evidence gathered on the night of the search can support a finding that Mr. DeJesus was in possession of the firearm, either by actual possession or by constructive possession.

The Commonwealth evidence is therefore limited to just the video exhibit. The problem for the Commonwealth is that Mr. DeJesus only had momentary possession of the firearm, which is not illegal. Commonwealth v. Atencio, supra at 631, Commonwealth v. Seay, 376 Mass. 735, 737 (1978).

Momentary Possession

In Commonwealth v. Atencio, supra at 631, the Supreme Judicial Court held that temporary possession of a firearm is not carrying [possession] a firearm within the meaning of G.L. c. 269 sec. 10(a).[6] There needs to be a showing that a defendant knowingly had more than momentary possession of a working firearm to be guilty under the statute. Commonwealth v. Seay, supra at 737 and cases cited. Commonwealth v. Brown, supra (bartender not deemed to possess a firearm as he took a firearm from a patron and intended to give it to the police after he closed the bar for the night).

One does not know if Mr. DeJesus brought the gun to the location to participate in the video or he was playing with the gun which belonged to another individual. Furthermore, when the gun in question was eventually found, it was not found on Mr. DeJesus's person, nor in his home, nor near anything items that belonged to him. (Tr(III). 108). This only buttresses the point that no one knows who owned the gun or can

[6] The element of movement of a firearm was eliminated from the law effective January 2, 1991. See St. 1990, C.511.

be inferred who maintained possession of the gun. Any thought to any one person is per speculation.

Five of the seven video excerpts in the video exhibit show individuals playing with firearms, with each clip being a mere six seconds or less in length. The total time elapsed in these five clips is less than 25 seconds. Although there are five clips, it appears that these clips are from the same act by the individuals. In these five clips we have at least two individuals playing with two separate firearms. Nothing is done with the firearms other than pretending to shoot the firearm for the purposes of making a video. Given the brief period of time, and that Mr. DeJesus is using a firearm as a prop to make the video, one cannot determine if he intended to exercise dominion and control over the firearm as a firearm or as a prop.

The Commonwealth case lacks any additional evidence which would support a finding of more than momentary possession of a firearm. Contrast Commonwealth v. Seay, supra at 737 (defendant had the gun on his person prior to entering a foyer to attempt to sell the revolver), Commonwealth v. Ashley, 16 Mass. App. Ct. 983 (1983) (witnesses stated that the

defendant brought the gun to a card game) and cases cited, Commonwealth v. Stallions, 9 Mass. App. Ct. 23 (1980) (during an altercation in which police were called to the area, the defendant was seen taking the firearm from another walking over to a fence and then returning the firearm), Commonwealth v. McCauley, 11 Mass. App. Ct. 780 (1981) (possession inferred when one dropped the gun to the floor several times).

What separates these cases from the instant case was that there was evidence that the defendants either had the gun on his person, and therefore no one else had given it to him, or there is an inference that he had the gun on this person and brought it to the location, or there was inference he was going to use the firearm as a firearm and therefore intended to possess it. Any of which could support an inference that one intended to possess the gun more than just a momentary period, and to use the firearm as a firearm. There is no such evidence in the instant matter. There is no witness who testified that any of the above circumstances were present.

This case is really no different than one who uses a firearm to play Russian Roulette. In this particular case a person only momentarily possesses

the firearm for a given act, and does not intend to possess, and exercise dominion and control over, the firearm as a firearm. Commonwealth v. Atencio, supra at 631. With Russian Roulette, the gun is momentarily possessed for the purpose of the game and nothing more. Commonwealth v. Atencio, supra. Here, the firearm was held for a short time for the purpose of making a movie. Further, it should be noted that movie actors are not charged with possession of firearms they use as props to make movies.

The Appeals Court takes the position that since there was a change in the law, the removal of the movement element (See Fn. 3), the case law which predates the change is not on point. That is simply not the case as we are dealing with proof of possession, which is still present in the law. And the case law cited, insofar as case law relates to what constitutes possession, is still valid. In the end, if one is not deemed to exercise sufficient dominion and control over an item to deemed to have possessed the item, then there is no possession.[7]

[7] The Appeals Court cites two cases, Commonwealth v. Hall, 80 Mass. App. Ct. 317 (2011) and Commonwealth v. Harvard, 356 Mass. 452 (1969), to support a point that even a short period of time can constitute possession.

No Exercise of Dominion and Control

The same conclusion can be reached if one were to determine Mr. DeJesus's intention from a standpoint of how he intended to exercise dominion and control over the firearm. The exercise of dominion and control is traditionally how possession is determined. Commonwealth v. Brzezinski, 405 Mass. 401, 409 (1989), Commonwealth v. Rosa, 17 Mass. App. Ct, 495, 498 (1984), Commonwealth v. Paniaqua, 413 Mass. 796, 801 (1992) (possession is the intentional exercise of control over an item). With the brief amount of time[8] and in front of a camera phone making a movie, one

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In both those cases the individual intended to use the items for the items purpose, drugs to be sold (Harvard) and pornography (Hall); and as such, there is in an inference to exercise dominion and control, which is not the case with someone using a gun for a short period of time for a game or prop.

[8] Mr. DeJesus does not dispute that a short period could in some cases can support a finding that one exercise dominion and control over an item. For example, a drug middle man bought drugs from his supplier then a few seconds later sold the drugs to one of his customers would be deemed to exercise dominion and control over the drugs as it was his intention to sell the drugs for profit. See Footnote 7, supra. One must look at the actions as a whole to come to this determination, timing is one factor and must be considered in the context of the entire act. Here we have a person playing with a firearm in cellar for under 25 seconds to make a movie and not someone holding onto a gun in a grocery store parking lot, bar, other public location, or during a heated exchange among individuals or gangs.

must determine from this limited evidence if Mr. DeJesus intended to exercise dominion and control over the firearm as a firearm, or did he intend to exercise dominion and control over a firearm that was a movie prop. Given the short period of time, and no other evidence, this conclusion cannot be determined one way or the other. When the evidence tends to supports either of two inconsistent propositions neither can be said to have established by legitimate proof. Commonwealth v. Croft, 345 Mass. 143, 145 (1962).

Conclusion

In looking at the evidence in the light most favorable to the Commonwealth all we have are individuals playing and posing with a gun for the purposes of being on short video taken in the privacy of their home amongst their friends. No further evidence regarding these people and the gun are known. Therefore, it cannot be said that Mr. DeJesus had more than momentary possession of the firearm. Accordingly, Mr. DeJesus's motion for required finding of not guilty with respect to possession of a firearm should have been granted. Commonwealth v. Atencio,

supra at 631, Commonwealth v. Brown, supra, Commonwealth v. Seay, supra at 737.

IV. THE TRIAL JUDGE ERRED IN DENYING MR DEJESUS'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY WITH RESPECT TO THE CHARGE OF POSSESSION OF A LARGE CAPACITY FEEDING DEVICE WHEN HE ONLY HAD MOMENTARY POSSESSION OF THE FIREARM WHICH HELD THE DEVICE

Mr. DeJesus's motion for required finding of not guilty should also been allowed with respect to possession of a large capacity feeding device. As with Issue 3, supra, the charge hinges on the element of possession, and that momentary possession of an item is not illegal. Commonwealth v. Atencio, supra at 631, Commonwealth v. Brown, supra, Commonwealth v. Seay, at 737. As the feeding device is connected to the firearm and that Mr. DeJesus possession of the firearm was not illegal, so was his possession of feeding device not illegal. Commonwealth v. Atencio, supra at 631, Commonwealth v. Brown, supra, Commonwealth v. Seay, at 737.

CONCLUSION

For the foregoing reasons stated in Issue I and Issue III, Mr. DeJesus's conviction for possession of a firearm should be reversed with an entry of not guilty enter on his behalf. For the foregoing reasons stated in Issue II and Issue IV, Mr. DeJesus's conviction for possession of a large feeding device should be reversed with an entry of not guilty enter on his behalf.

Respectfully submitted,
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October 18, 2021

CERTIFICATE OF COMPLIANCE

I, the undersigned, counsel to the defendant herein, hereby certify that his 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)(1)-(8), (brief of the appellant), 16(e) (referenced to briefs to the record), 16(f) (reproduction of statutes, rules, regulations, etc.), 16(h) (length of briefs), 18 (appendix to the briefs), and 20 (form of briefs, appendices, and other papers).

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ADDENDUM

Massachusetts General Laws

Massachusetts Gen. Laws Ch. 269, §10(a)

Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

Massachusetts General Laws Ch. 269, §10(h)

(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

(2) Any person who leaves a firearm, rifle, shotgun or ammunition unattended with the intent to transfer possession of such firearm, rifle, shotgun or ammunition to any person not licensed under section 129C of chapter 140 or section 131 of chapter 140 for the purpose of committing a crime or concealing a crime shall be punished by imprisonment in a house of correction for not more than 21/2 years or in state prison for not more than 5 years.

(i) Whoever knowingly fails to deliver or surrender a revoked or suspended license to carry or possess firearms or machine guns issued under the provisions of section one hundred and thirty-one or one hundred and thirty-one F of chapter one hundred and forty, or firearm identification card, or receipt for the fee for such card, or a firearm, rifle, shotgun or machine gun, as provided in section one hundred and twenty-nine D of chapter one hundred and forty, unless an appeal is pending, shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars.

Massachusetts General Laws Ch. 269, §10(m)

Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid Class A or Class B license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not

less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

CERTIFICATE OF SERVICE

I, Thomas E. Hagar, Attorney for Defendant, hereby certify that on October 19, 2021, I served via Efile Mr. DeJesu's brief, motion to accept brief length with affidavit and certificate of service on Attorney Shoshana Stern, Office of the District Attorney, 888 Purchase Street, New Bedford, MA 02740.

/s/ Thomas E. Hagar
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October 19, 2021

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19-P-1431 Appeals Court

COMMONWEALTH vs. CHRISTOPHER DeJESUS.

No. 19-P-1431.

Bristol. November 17, 2020. - March 1, 2021.

Present: Kinder, Shin, & Hand, JJ.

Firearms. Constitutional Law, Search and seizure, Standing to question constitutionality, Privacy. Search and Seizure, Standing to object, Expectation of privacy. Privacy. Evidence, Firearm. Practice, Criminal, Motion to suppress, Motion for a required finding.

Indictments found and returned in the Superior Court Department on September 6, 2018.

A pretrial motion to suppress evidence was heard by Renee P. Dupuis, J., and the cases were tried before Thomas F. McGuire, Jr., J.

Thomas E. Hagar for the defendant.
Tara L. Johnston, Assistant District Attorney, for the Commonwealth.

HAND, J. The defendant, Christopher DeJesus, was indicted in the Superior Court on three counts -- (1) unlawful possession of a firearm without a license, G. L. c. 269, § 10 (a); (2)

unlawful possession of a large capacity feeding device, G. L. c. 269, § 10 (m); and (3) unlawful possession of ammunition, G. L. c. 260, § 10 (h).[1] He was charged after police identified him in several Snapchat[2] videos posing with a firearm. As we discuss in greater detail, infra, the firearm was one of several items recovered in the course of a warrantless search of the basement of a multifamily home that had also been depicted in some of the Snapchat videos.

Prior to trial, the defendant filed a motion to suppress evidence recovered during the search. Following an evidentiary hearing, a judge (motion judge) concluded that the defendant had neither standing to contest the search nor a reasonable expectation of privacy in the area searched, and denied the motion.

After a jury trial, the defendant was convicted of two charges -- unlawful possession of both a firearm and a large capacity feeding device -- and acquitted of the remaining

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[1] He was also charged as an armed career criminal in connection with the first and third indictments. G. L. c. 269, § 10G (a).

[2] "Snapchat is a social media application that allows users to send or post still images or videos. . . . A user may post images or videos to their 'story,' which allows all those individuals with whom the user is 'friends' to view them on the user's Snapchat page, but they remain available for viewing only for twenty-four hours." Commonwealth v. Watkins, 98 Mass. App. Ct. 419, 420 (2020).

charges in the indictments.[3] The trial judge sentenced the defendant to concurrent terms of from two and one-half years to five years in State prison.

On appeal, the defendant argues that the motion judge erred in denying his motion to suppress evidence obtained in the course of the warrantless search of the basement of a multifamily home, and that the trial judge erred in denying his motion for a required finding of not guilty of possession of the firearm at issue and the large capacity feeding device attached to it. We conclude that the defendant did not have standing to challenge the search, and that even if he did, he had no reasonable expectation of privacy in the area searched. We are also satisfied that the evidence was sufficient to prove the defendant's possession of the firearm and the large capacity feeding device. Accordingly, we affirm the judgments.

Discussion. 1. Motion to suppress. "In reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error 'but conduct an independent review of his ultimate findings and conclusions of law.'" Commonwealth v. Medina, 485 Mass. 296, 299-300 (2020), quoting

[3] The trial judge allowed the defendant's motion for a required finding of not guilty on the indictment for illegal possession of ammunition and, after a jury-waived trial, found the defendant not guilty of the armed career criminal enhancements.

Commonwealth v. Cawthron, 479 Mass. 612, 616 (2018). The defendant does not challenge the motion judge's factual findings as erroneous, and we summarize them here, supplementing as necessary with uncontroverted testimony from the motion hearing.

In the summer of 2018, following a series of shootings in Fall River, the Fall River police department organized a task force to address growing violence within the city. As part of this task force, Detective Matthew Mendes, a member of the department's gang unit, monitored the social media accounts of various individuals suspected of contributing to the violence. On July 26, 2018, Mendes was monitoring the Snapchat account of Darius Hunt, an individual known to Mendes as a member of a gang with a presence in Fall River. Mendes observed a number of videos on Hunt's Snapchat account (videos), which he identified as being taken within twenty-four hours prior to his having viewed them. These videos depicted Hunt, the defendant, and a third individual. In several of the videos, the defendant was "holding a black semi-automatic pistol with an extended magazine and a distinct tan/cream colored grip"; the videos also depicted a basement area and the outside of a three-family dwelling at 14 Downing Street in Fall River (the premises).[4]

[4] As we note, infra, the defendant did not live at the premises and does not claim that he was an overnight guest there.

Mendes and several other officers traveled to the premises, intending to conduct further investigation. On arrival, the officers observed a number of individuals, including Hunt and the defendant, standing outside on the premises; when the police approached, the individuals dispersed. Some of the individuals ran to the back yard while the defendant walked down the sidewalk toward the home of his girlfriend and her mother, at 4 Downing Street. Mendes ran around to the back of the premises, chasing Hunt. Although the back yard was empty when he arrived, Mendes observed that the rear door to the basement was ajar, and he heard people running in the basement.

Mendes and two other officers followed the footsteps and entered the basement through the open door. The basement, a common area utilized by the residents of the apartments on the premises, had no locks on the doors leading into it. Once inside the basement, the officers observed a firearm in plain view in an open bag placed on a table; the firearm appeared to be the same one the police saw in the videos being handled by Hunt and the defendant. The police "seized the scene," obtained a search warrant, and later took possession of the bag containing the firearm and other items. The defendant was arrested on the sidewalk between 14 Downing Street and 4 Downing Street.

The defendant moved to suppress evidence seized from the basement of the premises, including the firearm and ammunition, arguing that the evidence was discovered in the course of an improper warrantless search of the basement.[5] The motion judge denied the motion, concluding that the defendant lacked both standing to challenge the search of the basement at the premises and a reasonable expectation of privacy in the area searched.

On appeal, the defendant argues that the motion judge erred in these conclusions; more specifically, he contends that he was entitled to automatic standing to challenge the search under art. 14 of the Massachusetts Declaration of Rights and the cases stemming from the Supreme Judicial Court's ruling in Commonwealth v. Amendola, 406 Mass. 592, 600-601 (1990). We are not persuaded.

The automatic standing rule, set forth by the United States Supreme Court in Jones v. United States, 362 U.S. 257 (1960), provides that "defendants charged with crimes of possession have standing to challenge the search."[6] Commonwealth v. Frazier, 410

[5] We glean this from the motion judge's detailed memorandum of decision denying the motion to suppress. The record does not include a copy of the defendant's motion.

[6] Although the rule was abandoned by the Federal courts in United States v. Salvucci, 448 U.S. 83 (1980), it continues to be recognized under Massachusetts State law. See Commonwealth v. Amendola, 406 Mass. at 601 ("we hold today that the automatic standing rule survives in Massachusetts as a matter of State constitutional law"). See, e.g., Commonwealth v. Mubdi, 456

Mass. 235, 241 (1991), citing Jones, supra at 263. It applies where "possession of the seized evidence at the time of the contested search is an essential element of guilt."[7] Frazier, supra at 243, quoting Amendola, 406 Mass. at 601.

"Under the Fourth Amendment to the United States Constitution, the question whether the defendant has standing to challenge the constitutionality of a search or seizure is merged with the determination whether the defendant had a reasonable expectation of privacy in the place searched," and therefore, "a defendant has no standing if he has no reasonable expectation of privacy in the place searched." Commonwealth v. Mubdi, 456 Mass. 385, 391 (2010), citing Rakas v. Illinois, 439 U.S. 128, 138-139 (1978). Under art. 14, "the question of standing remains separate from the question of reasonable expectation of privacy." Mubdi, supra. See Commonwealth v. Williams, 453 Mass. 203, 208 (2009) ("Although the two concepts [of standing

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Mass. 385, 390 (2010); Commonwealth v. Frazier, 410 Mass. 235, 241 (1991); Commonwealth v. Ware, 75 Mass. App. Ct. 220, 227 (2009).

[7] It is immaterial whether the defendant is charged with possession on a theory of constructive possession or actual possession, so long as he or she is charged with possession at the time of the search or seizure. See, e.g., Commonwealth v. Carter, 424 Mass. 409, 410-411 (1997) ("We have granted a defendant automatic standing to challenge the seizure of property in the possession of another at the time of the search, if the defendant has been charged with the constructive possession of that property at that time").

and expectation of privacy] are interrelated, [under art. 14] we consider them separately"). Thus, using an art. 14 analysis, where automatic standing applies, the defendant need not demonstrate his or her own personal privacy interest, see Mubdi, supra at 392; instead, a defendant with automatic standing need only "show that there was a search in the constitutional sense, that is, that someone had a reasonable expectation of privacy in the place searched." Id. at 393.

a. Standing. It is undisputed that the defendant was not in possession -- actual or constructive -- of the firearm at the time of the search.[8] Thus, automatic standing does not apply on the basis of the defendant's possession. Cf. Commonwealth v. Ware, 75 Mass. App. Ct. 220, 227 (2009), quoting Amendola, 406 Mass. at 601 ("[w]hen a defendant is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt, the defendant shall be deemed to have standing to contest the legality of the search and the seizure of that evidence" [emphasis added]).[9]

[8] This distinction was later made clear to the jury through the trial judge's instructions that "the [d]efendant is not charged with possession of a firearm . . . at the time the police entered the basement and seized certain objects. The [d]efendant is charged with possession of a firearm . . . at the time the video recording was made."

[9] To the extent the defendant argues that he is entitled to automatic standing as a consequence of his presence on the premises at the time of the search, we note the motion judge's

The defendant has not met his burden of demonstrating his automatic standing to challenge the search of the premises.[10]

b. Expectation of privacy. Even had the defendant shown that he had automatic standing to challenge the search, his entitlement to protection under the automatic standing rule falters on his inability to demonstrate that he, or anyone else, had a reasonable expectation of privacy in the area searched, and thus, that a search in the constitutional sense had taken place. See Mubdi, 456 Mass. at 393 ("that someone had a reasonable expectation of privacy in the place searched"). See also Commonwealth v. Johnson, 481 Mass. 710, 715, cert. denied, 140 S. Ct. 247 (2019) (defendant bears burden of demonstrating violation of reasonable expectation of privacy); Commonwealth v. Rice, 441 Mass. 291, 295 (2004) (same). Relevant to this determination is the character of the location involved, whether the defendant owned or had access to the area, and the area's accessibility to others. See Williams, 453 Mass. at 208, citing Commonwealth v. Welch, 420 Mass. 646, 653-654 (1995).

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finding that the defendant was no longer on the premises at the time of the officers' search.

[10] Because the defendant has failed to demonstrate either "a possessory interest in the place searched or in the property seized," or that he was "present when the search occurred," he has not otherwise demonstrated his standing. Williams, 453 Mass. at 208.

The search was conducted in the basement of a home that the defendant concedes he does not own or occupy; the defendant does not claim to have been a guest in the home. Even if we were to conclude that the defendant had a subjective expectation of privacy in the basement -- which we do not -- given the nature of access to the area and that the defendant neither owned nor controlled the area, that expectation would have been unreasonable. See Commonwealth v. Carter, 39 Mass. App. Ct. 439, 442 (1995), S.C., 424 Mass. 409 (1997) (expectation of privacy not objectively reasonable where "defendant did not own the place involved, was not a tenant, and was not an invitee of the . . . apartment dweller"). See also Sullivan v. District Court of Hampshire, 384 Mass. 736, 742 (1981) ("an individual can have only a very limited expectation of privacy with respect to an area used routinely by others").

Assessing the defendant's showing of an objective expectation of privacy -- that is, whether anyone had a reasonable expectation of privacy in the items and area searched -- we consider whether "(i) [an] individual has 'manifested a subjective expectation of privacy in the object of the search,' and (ii) 'society is willing to recognize that expectation as reasonable' (citation omitted)." Johnson, 481 Mass. at 715, quoting Commonwealth v. Augustine, 467 Mass. 230, 242 (2014), S.C., 470 Mass. 837 and 472 Mass. 448 (2015). "This

determination turns on whether the police conduct has intruded on a constitutionally protected reasonable expectation of privacy." Commonwealth v. Montanez, 410 Mass. 290, 301 (1991). Here, neither consideration is present.

Generally, tenants in a multiunit home do not have a reasonable expectation of privacy in common areas. See Williams, 453 Mass. at 209 (no reasonable expectation of privacy in basement common area accessed by unlocked door); Montanez, 410 Mass. at 302 (no reasonable expectation of privacy, and therefore no constitutional search, in "common area, accessible to the public, that was freely and frequently used by people other than the defendant"). See also Commonwealth v. Sorenson, 98 Mass. App. Ct. 789, 792 (2020), quoting Commonwealth v. Escalera, 462 Mass. 636, 648 (2012) (curtilage "applied narrowly to multiunit apartment buildings"). Nor do we find authority to suggest that landlords have a reasonable expectation of privacy in the areas freely accessible to their tenants. The basement searched in the present case was readily available to use by all tenants in the building, as well as their invitees and the landlord, and none exerted exclusive control. Additionally, none of the doors leading into the area had locks. Thus, in this case, "the relevant criteria and pertinent case law would appear to place [the area] beyond any constitutionally protected

privacy zone." Commonwealth v. Dora, 57 Mass. App. Ct. 141, 145 (2003).

Absent a constitutionally protected reasonable expectation of privacy held by anyone, the motion judge properly denied the motion to suppress.[11]

2. Sufficiency of the evidence. The defendant moved for a required finding of not guilty on all counts at the close of the Commonwealth's case, arguing that the evidence was insufficient to allow the jury to find that the gun at issue qualified as a "firearm" for the purposes of G. L. c. 140, § 121; the motion was renewed when the defendant rested.[12] The trial judge allowed the motion as to the indictment for unlawful possession of ammunition,[13] but denied it as to the firearm and the large capacity feeding device. On appeal, the defendant changes tack, arguing instead that the evidence was insufficient to prove that the defendant's brief handling of the firearm as depicted in the

[11] In light of our conclusion that the defendant did not have a reasonable expectation of privacy over the premises or standing to challenge the entry and search of the premises, we need not reach the defendant's challenges to the existence of probable cause or exigent circumstances justifying the search.

[12] The defendant cross-examined the Commonwealth's witnesses; as was his right, he chose not to put on evidence of his own.

[13] The trial judge's ruling was based on his determination that the ammunition was not visible in the videos.

videos amounted to his "possession" of the gun.[14] We are not persuaded.

A motion for a required finding of not guilty is a challenge to the sufficiency of the evidence, see, e.g., Commonwealth v. Jones, 432 Mass. 623, 625 (2000), and we review the judge's ruling under the Latimore standard, "viewing the evidence in the light most favorable to the Commonwealth and ask[ing] whether the evidence and inferences reasonably drawn therefrom were 'sufficient to persuade a rational jury beyond a reasonable doubt of the existence of every element of the crime charged.'" Commonwealth v. Squires, 476 Mass. 703, 708 (2017), quoting Commonwealth v. Lao, 443 Mass. 770, 779 (2005), S.C., 450 Mass. 215 (2007) and 460 Mass. 12 (2011). See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

Under G. L. c. 269, § 10 (a), the Commonwealth must prove the defendant knowingly possessed an item that meets the legal definition of a firearm. See Commonwealth v. White, 452 Mass. 133, 136 (2008); Commonwealth v. Watkins, 98 Mass. App. Ct. 419,

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[14] Although this argument is raised for the first time on appeal, "a conviction premised on legally insufficient evidence always creates a substantial risk of a miscarriage of justice." Commonwealth v. Kurko, 95 Mass. App. Ct. 719, 722 (2019), quoting Commonwealth v. Montes, 49 Mass. App. Ct. 789, 792 n.4 (2000). We review any error against that standard. See Commonwealth v. Silvelo, 96 Mass. App. Ct. 85, 104 n.13 (2019) (Shin, J., dissenting).

421-422 (2020). "[P]ossession does not depend on the duration of time elapsing after one has an object under his control so long as, at the time of contact with the object, the person has the control and the power to do with it what he or she wills." Commonwealth v. Hall, 80 Mass. App. Ct. 317, 330 (2011), citing Commonwealth v. Harvard, 356 Mass. 452, 457-458 (1969).

The defendant argues that it is not possible to determine from the video evidence whether he owned the firearm or was temporarily holding it and that, if he only had momentary possession of the firearm, it would not be sufficient to sustain a finding of possession.

We are satisfied that the evidence in this case was sufficient to prove the defendant had possession of the firearm and the large capacity feeding device at the time of the videos, which clearly show the defendant holding the firearm and posturing with it, pointedly displaying the attached feeding device, and mimicking the action of aiming and firing the weapon.[15] See Commonwealth v. Seay, 376 Mass. 735, 737-738

[15] The defendant offers an analogy to Commonwealth v. Atencio, 345 Mass. 627, 628, 631 (1963), in which participants in a game of "Russian roulette" were found to have only temporary possession of a firearm, having each held the gun and pulled the trigger once. The basis of the court's determination in Atencio was that the defendants did not carry the firearm within the meaning of G. L. c. 269, § 10, as it existed at the time, where "[t]he idea conveyed by the statute is that of movement, [that the defendant] 'carries on his person or under his control in a vehicle.'" Atencio, supra at 631. Since that

(1978) (defendant handling gun in foyer and stairway area of his apartment building prior to sale more than momentary); Commonwealth v. Stallions, 9 Mass. App. Ct. 23, 25 (1980) (defendant's taking gun, walking fifteen to twenty feet, and returning gun within one to two minutes of having taken it "far more than momentary"). We are satisfied that at the time of the videos' recording, the defendant had control and power over the firearm and large capacity feeding device such that a rational jury could have concluded that the defendant was in possession of them for that period of time. We discern no error in the judge's denial of the motion for a required finding of not guilty.

Conclusion. The defendant failed to demonstrate that he had standing to challenge the warrantless search of the common area in which the firearm and other contraband were found, or that anyone had a reasonable expectation of privacy in the contraband left there. Accordingly, the motion to suppress was properly denied. Because the evidence was sufficient to

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time, and as the defendant acknowledges, the statute has been amended; the requirement that the Commonwealth show that the defendant "carrie[d] [the firearm] on his person" has been eliminated. Commonwealth v. Duncan, 71 Mass. App. Ct. 150, 153 n.4 (2008) ("the cases relied upon by the defendant all predate the 1990 amendment to G. L. c. 269, § 10 [a], which eliminated the words 'carries on his person' from § 10 [a]. See St. 1990, c. 511, § 2. Since the time of that amendment, § 10 [a] has simply prohibited the knowing possession of a firearm without a license").

establish the defendant's possession of the firearm at issue and the large capacity feeding device, there was no error in the denial of the motion for a required finding.

Judgments affirmed.