COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BRISTOL, ss. **2021 SITTING**

SJC-13171

COMMONWEALTH

V.

CHRISTOPHER DEJESUS

ON APPEAL FROM A JUDGMENT OF THE BRISTOL COUNTY SUPERIOR COURT

COMMONWEALTH'S BRIEF

Respectfully submitted,

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Police investigators viewed Snapchat videos that showed the defendant holding a distinctive-looking firearm. The day after the Snapchat videos were posted, during the course of a warrantless entry into a basement of a multi-unit house the defendant did not live in, police discovered the firearm in plain view and observed that the basement was the location in which the Snapchat video had been made. The defendant was charged with unlawful possession of the firearm and an extended magazine. On appeal, he challenges the denial of his motion to suppress and the sufficiency of the evidence at trial.

I. Did the motion judge properly find that the defendant had not demonstrated automatic standing with regard to the firearm and magazine, where the defendant was not charged with possessing the items at the time of the warrantless entry, and where no one – the defendant, other individuals involved in his offense, or anyone else – had a reasonable expectation of privacy in the open areas of the basement?

II. Did the trial evidence establish that the defendant exercised dominion and control over the firearm and extended magazine, where the Snapchat footage showed the defendant holding the firearm and posturing with it, pointedly displaying the attached magazine, and mimicking the action of aiming and firing the weapon?

STATEMENT OF THE CASE

On September 6, 2018, the Bristol Grand Jury returned Indictment No. 1873CR00315, charging the defendant, Christopher DeJesus, with: 1) unlawful possession of a firearm (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. 269, § 10 (h)). [R.16-23].[1] Indictments one and three also charged the defendant as an armed career criminal (G.L c. 269, § 10G). [R.20,23]. The firearm, feeding device, and ammunition were all seized on July 26, 2018, following a warrantless entry into the basement at 14 Downing Street in Fall River. See R.25.

On December 4, 2018, the defendant filed a motion to suppress all items seized from the basement of 14 Downing Street. [R.8,25; CRA.3]. An evidentiary hearing was held on February 1, 2019, and Dupuis, J., heard argument from the parties on February 8, 2019. [R.9]. Both parties also submitted memoranda of law in support of their positions. [R.9; CRA.6]. On March 26, 2019, Judge Dupuis issued a memorandum and order denying the defendant's motion. [R.11].

A four-day jury trial began on May 20, 2019, in the Bristol Superior Court (McGuire, J., presiding). [R.5]. On May 22, 2019, at the close of the

[1] Record references will be as follow: Defendant's Brief, [DB._]; Defendant's Record Appendix, [R._]; Commonwealth's Record Appendix, [CRA._]; transcript of February 1, 2019, evidentiary hearing on motion to suppress, [M._]; trial transcript, [T_._].

Commonwealth's case, the defendant moved for a required finding of not guilty on all three charges. [T3.184-187]. Judge McGuire allowed the motion with respect to the ammunition charge, and denied it with respect to the other two charges. [T3.188].

On May 23, 2019, the jury returned guilty verdicts on the two remaining charges. [T4.71-72]. The defendant waived his right to a jury trial on the armed career criminal portion of indictment one, and Judge McGuire found him not guilty on that portion of the indictment. [R.13]. That same day, Judge McGuire sentenced the defendant to concurrent terms of two and one-half years to five years in state prison. [T4.105].

The defendant filed a timely notice of appeal on June 11, 2019. [R.30]. On March 1, 2021, the Appeals Court denied his appeal in a published decision, *Commonwealth v. DeJesus*, 99 Mass. App. Ct. 275 (2021). On September 13, 2021, this Court allowed the defendant's application for further appellate review. *Commonwealth v. DeJesus*, 488 Mass. 1103 (2021).

STATEMENT OF FACTS

Motion to Suppress

The Court's Findings and Rulings

An evidentiary hearing on the defendant's motion to suppress was held on February 2, 2019, at which Detective Matthew Mendes and Officer Frederick

Mello testified for the Commonwealth, and the defendant's girlfriend, Kyara Alston, testified for the defense.

Judge Dupuis made the following findings of fact:

> Based upon the credible evidence presented, and the reasonable inferences I draw from that evidence, I make the following findings of fact. [FN1] In the summer of 2018, the city of Fall River experienced a number of shootings. As a consequence, the police department organized a task force to address the growing violence in the city. Detective Matthew Mendes ("Mendes"), a member of the department's gang unit, was a member of that task force. As part of his duties, 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, Mendes was monitoring the Snapchat account belonging to Darius Hunt ("Hunt"), an individual known to Mendes as a member of the Asian Boy[z], a violent gang with a presence in the city of Fall River.
>
> [FN1 – I find Mendes and Mello believable witnesses and credit their testimony in its entirety. To the extent that the testimony of Kyara Alston is inconsistent with the testimony of Mendes and Mello, I do not credit her testimony.]
>
> The Snapchat application is similar to other social media sharing sites, and allows accountant holders to share videos and photographs with their contacts through a "story" function. Through this story function, Mendes observed a number of videos that 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, Mendes could tell when the video was taken. The videos that Mendes observed on the afternoon of July 26, 2018 were all taken within the twenty-four hours before he viewed them. These videos depicted the defendant, Hunt, and Derek Pires ("Pires") holding firearms at 14 Downing Street in Fall River. These three individuals were known to be members of the Asian Boy[z]. In particular, both Hunt and DeJesus are depicted on the video holding a black semi-automatic pistol with an extended magazine and a distinct

> tan/cream color 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. The defendant does not reside at 14 Downing Street, nor does he claim to have been an invited guest in the home.
>
> Mendes decided to conduct further investigation and travelled to that location with several other police officers. One of those police officers was Frederick Mello ("Mello"). Upon arriving at that location, Mendes observed a number of individuals milling outside the address. They quickly dispersed. Mendes observed DeJesus and Hunt in the right side yard. DeJesus walked down the sidewalk toward 4 Down[ing] Street, the home of his girlfriend and her mother.
>
> A number of the individuals ran toward the back yard of 14 Downing Street. Mendes believed Hunt went around the back of the home and gave chase. When Mendes got to the back yard, it was empty. Mendes could see that the rear door leading to the basement was ajar. Mendes could hear people running in the basement. Mendes followed the running footsteps and entered the basement. The basement is a common area utilized by the residents of the apartments in 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. Upon entering the basement, Mendes could hear people running up the front stairs leading out of the basement. These individuals were apprehended by officers located out front. 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 Hunt and DeJesus.

[R.26-27].

Based on these factual findings, Judge Dupuis denied the defendant's motion. She found that he lacked standing to challenge the search of the firearm where he was not a resident of 14 Downing Street, he was not present in the home at the time of the seizure, and he was charged with possession not at the time of the

contested seizure, but rather based on his possession of the firearm on the Snapchat video a day earlier. [R.28-30].

Further, the judge found that even assuming the defendant had established standing to challenge the search, he failed to demonstrate that he had a reasonable expectation of privacy in the basement of 14 Downing Street, where he was neither a resident nor guest. [R.30-31]. Moreover, she noted that any subjective expectation of privacy would not be objectively reasonable where the basement was a common area of a multi-unit dwelling, the door was ajar, and there were no locks on the basement door. [R.30-31].

Additional Facts Elicited At the Evidentiary Hearing

Additional facts that were elicited at the evidentiary hearing from Det. Mendes and Officer Mello, both of whose testimony the motion judge credited in its entirety, are as follows:

Through investigative work, Det. Mendes was able to determine that the address the defendant was standing outside of on one of the Snapchat videos was 14 Downing Street, but he could not be sure that the basement viewed in the other Snapchat videos was at that address, because he had never been inside before. [M.17-19,68-69,115-116]. After viewing the Snapchat videos, Det. Mendes did a check to see if the defendant, Hunt, or Pires – the three individuals on the video that Det. Mendes recognized from previous interactions – were linked to that

address, and he determined that none of them were. [M.19-20,52]. All three had been the focus of prior investigations and had prior arrests. [M.21-22,33-34].

A couple of hours after viewing the videos, a few officers drove by the address, "to see if there was anybody out in front of the residence," but no one was standing outside at that time. [M.71,74]. When Det. Mendes returned to 14 Downing Street later that evening with other officers, he was in an unmarked cruiser and it was for the purpose of doing surveillance. [M.43-44,73,74-75]. The officers did not go to that address that evening with the intention of searching the basement. [M.116,119]. They only decided to exit their cruisers to try and approach the group of individuals because they believed their "cover was blown." [M.46-47,75-76].

Once he was inside the basement, Det. Mendes recognized numerous items from the Snapchat videos, including a table, bench, chairs, and articles on the wall. [M.59]. He had never been in the basement before, and had not known in advance that it was the basement depicted in the video. [M.115].

The basement had a common area, as well as storage locations; Det. Mendes agreed with defense counsel that photographs depicted two storage areas, "with doors and latches and chicken wire so you can actually see into the rooms." [M.94]. Det. Mendes, who was focused on making sure there were no people in

the basement at that time, did not stop and look in either storage area, beyond a quick glance for whether anyone was standing there. [M.98].

As the officers were doing a protective sweep of the basement, Officer Mello went through an open door on the left, opposite the fenced-off storage areas, which were on the right. [M.125]. He "immediately recognized that that was the area that I had observed those individuals in that video." [M.125]. He panned the room, looking for people, and "saw the actual, I don't know if we've seen the video, but in the video there was a table where you could see a chair here, and then there was to the right, I think there was like a bureau there. On the bureau was an open bag with a firearm in it." [M.126]. He had been in the basement for "[m]aybe not even 20 seconds, 30 seconds." [M.126]. The room was tiny, but he looked under the table first to make sure nobody was underneath it, before standing up again and seeing the firearm. [M.139-140]. He did not touch the firearm, or manipulate the backpack in any way in order to see the firearm. [M.127,129].

Det. Mendes later learned that one of the individuals that was standing outside 14 Downing Street that evening had a girlfriend who lived in the building. [M.112-113].

Relevant Trial Evidence

The sole issue on appeal with regard to the trial evidence is whether the jury could have concluded, from the Snapchat footage, that the defendant had possessed

the firearm and extended magazine with the intention of exercising dominion and control. The relevant evidence on this point was as follows:

On July 26, 2018, at approximately 4:00 p.m., Det. Mendes observed and recorded a number of videos that Darius Hunt shared on Snapchat with his contacts. [T2.171,178,185]. A CD that included seven excerpts from the videos, all of which were posted approximately 19 or 20 hours before Det. Mendes viewed them, was admitted as an exhibit at trial. [Ex.4; T2.182-190].[2] The defendant can be seen in each excerpt. [Ex.4]. He is dressed in a black Nike T-shirt and blue shorts, and his arm tattoos are visible. [Ex.4; T2.189].

In the first excerpt, the defendant is standing next to another individual outside of 14 Downing Street and making hand signals for the camera. See Ex.4. In the other six excerpts, the defendant is inside a dark basement. See Ex.4. In the second excerpt, the defendant is playing with a black semi-automatic pistol with an extended magazine and a tan/cream colored grip in one hand, and making hand signals with the other hand, while a second male points a different gun at the camera, and a third male in the background makes hand signals. See Ex.4. In the third excerpt, the defendant is holding the pistol upside-down and swinging it, while another male points a handgun at the camera. See Ex.4. In the fourth

[2] Excerpts 1-3 on the CD showed that they posted approximately 20 hours earlier, and excerpts 4-7 showed that they were posted approximately 19 hours earlier. See Ex.4.

excerpt, the defendant is seated at a table and making hand signals, with the pistol lying on the table in front of him. See Ex.4. In the fifth excerpt, the defendant is standing and making hand signals with one hand, while he keeps the other hand between his legs. See Ex.4. In the sixth excerpt, the defendant is pointing the pistol at the camera, moving it around, and making shooting motions. See Ex.4. In the seventh and final excerpt, the defendant is motioning with the pistol, while another male points a gun at the camera; both men are moving the guns around and making shooting motions. See Ex.4.

ARGUMENT

I. THE DEFENDANT'S MOTION TO SUPPRESS WAS PROPERLY DENIED, WHERE HE DID NOT MEET HIS BURDEN OF DEMONSTRATING AUTOMATIC STANDING, AND NEITHER HE NOR ANYONE ELSE HAD ANY REASONABLE EXPECTATION OF PRIVACY IN THE OPEN AREAS OF THE BASEMENT.[3]

Standard of Review

In reviewing a ruling on a motion to suppress, this Court "accept[s] the judge's subsidiary findings of fact absent clear error but conduct[s] an independent review of [her] ultimate findings and conclusions of law." *Commonwealth v. Tremblay*, 480 Mass. 645, 652 (2018), quoting *Commonwealth v. Clarke*, 461 Mass. 336, 340 (2012). The Court's "duty is to make an independent determination of the correctness of the judge's application of constitutional principles to the facts

[3] This argument responds to Arguments I and II of the Defendant's Brief.

as found." *Clarke*, 461 Mass. at 340, quoting *Commonwealth v. Bostock*, 450 Mass. 616, 619 (2008). But this Court "may affirm a judge's order on a motion to suppress based not only on the facts as found, but also on evidence that was 'implicitly or explicitly credited' by the motion judge." *Commonwealth v. Jones-Pannell*, 472 Mass. 429, 436 (2015).

The Defendant Did Not Meet His Burden of Demonstrating Automatic Standing

As explained by the Appeals Court in its March 1, 2021, decision in this case, 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." *DeJesus*, 99 Mass. App. Ct. at 278, quoting *Commonwealth v. Frazier*, 410 Mass. 235, 241 (1991). The Supreme Court abandoned the rule in *United States v. Salvucci*, 448 U.S. 83 (1980), but this Court held in *Commonwealth v. Amendola*, 406 Mass. 592, 601 (1990), that the rule "survives in Massachusetts as a matter of State constitutional law." *DeJesus*, 99 Mass. App. Ct. at 278 & n.6. It applies where "possession of the seized evidence at the time of the contested search is an essential element of guilt." *Frazier*, 410 Mass. at 243, quoting *Amendola*, 406 Mass. at 601. But it does not apply if the possessory crime with which the defendant is charged occurred at a different time than the search itself. See *Commonwealth v. Mora*, 402 Mass. 262, 266-267 (1988) (automatic standing

inapplicable for reasons including that defendant's conviction was premised on his possession of shotgun at time he showed it to his girlfriend's brother, "and not on possession at the time of the search").

The Appeals Court concluded that the defendant had not met his burden of demonstrating his automatic standing to challenge the search of the basement:

> It is undisputed that the defendant was not in possession — actual or constructive — of the firearm at the time of the search. [FN8]. Thus, automatic standing does not apply on the basis of the defendant's possession. Cf. *Commonwealth v. Ware*, 75 Mass. App. Ct. 220, 227, 913 N.E.2d 869 (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]).
>
> [FN8 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."]

DeJesus, 99 Mass. App. Ct. at 279.

The defendant, in his current brief, makes no argument with regard to this central point of the Appeals Court's holding, which was also the central point of the motion judge's ruling. [R.29 ("I agree with the Commonwealth, and find that the defendant does not have standing to contest the seizure of the firearm as the defendant was charged with possession not at the time of the contested seizure, but from a video viewed by Mendes taken within twenty-four hours of the firearm's

seizure.")]. He focuses instead on contesting the Appeals Court's finding, in a footnote, that he was not on the premises at the time of the search. [DB.25-28].

Specifically, the Appeals Court noted that "[t]o 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 finding that the defendant was no longer on the premises at the time of the officers' search." *DeJesus*, 99 Mass. App. Ct. at 279 n.9. The motion judge found that "[t]he defendant was not present in the home during the seizure, cf. *Mora*, 402 Mass. at 267 (defendant not present during search)." [R.29]. The defendant does not challenge this, but appears to maintain that it was sufficient that he was "on or near the porch of 14 Downing Street" at the time police arrived. [DB.26]. Even assuming this could qualify as "presence at the time the item is seized," *Mora*, 402 Mass. at 267, it would not suffice to demonstrate that he had automatic standing, where he has not shown that he was charged with possessing the item at the time of the search.

The Defendant Did Not Meet His Burden Regarding Reasonable Expectation of Privacy

Next, the Appeals Court held that "[e]ven 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." *DeJesus*, 99 Mass. App. Ct. at 279-280.

This Court most recently laid out the analysis to be applied in assessing the "reasonable expectation of privacy" requirement of automatic standing in *Commonwealth v. Delgado-Rivera*, 487 Mass. 551 (2021), issued three months after the Appeals Court's opinion in *DeJesus*:

"Article 14 and the Fourth Amendment protect individuals from unreasonable, governmental searches and seizures." *Delgado-Rivera*, 487 Mass. at 554. "The rights secured by these protections are specific to the individual." *Id.* "Under the Fourth Amendment, the right to be free from an unreasonable search and seizure is a 'personal right.'" *Id.* "With respect to art. 14, 'an individualized determination of reasonableness' similarly is required in light of the individualized rights protected." *Id.*, quoting *Commonwealth v. Feliz*, 481 Mass. 689, 690-691 (2019), *S.C.*, 486 Mass. 510 (2020). "Thus, under both State and Federal law, 'the question is whether the challenged search or seizure violated the … rights of a criminal defendant who seeks to exclude the evidence' obtained from the search, specifically those rights of privacy that these constitutional provisions were 'designed to protect.'" *Id.*, quoting *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). "A defendant bears the burden of establishing such an infringement." *Id.* at 555.

"The substantive rights protected by these constitutional provisions, however, are not necessarily coterminous." *Delgado-Rivera*, 487 Mass. at 555. "Article 14 'does, or may, afford more substantive protection to individuals than that which prevails under the Constitution of the United States.'" *Id.*, quoting *Commonwealth v. Mora*, 485 Mass. 360, 365 (2020).

"The tests that courts have adopted to determine whether defendants validly may invoke the protections of these constitutional provisions are related but distinct." *Delgado-Rivera*, 487 Mass. at 555. "Traditionally, under art. 14, 'we determine initially whether the defendant has standing to contest the search and then whether she [or he] had an expectation of privacy in the area searched.'" *Id.*, quoting *Commonwealth v. Williams*, 453 Mass. 203, 207-208 (2009). "Only if the defendant proves both standing and a reasonable expectation of privacy do the protections of art. 14 apply." *Id.*, quoting *Commonwealth v. Almonor*, 482 Mass. 35, 40-41 (2019).

The Court noted that "[w]hile we have continued to recognize the conceptual differences between these State and Federal analyses, a number of our recent cases have implicitly eschewed the two-part inquiry set forth in *Williams* and instead, drawing heavily on recent Federal precedent, have focused on a defendant's reasonable expectation of privacy, without making a separate inquiry as to the question of standing." *Delgado-Rivera*, 487 Mass. at 557. "Indeed, extending this

focus even further, in *Mubdi*, 456 Mass. at 392-393, we concluded that, for possessory offenses involving drugs or firearms, defendants did not need to establish either standing or a reasonable expectation of privacy *so long as one of the individuals involved in the offense had a reasonable expectation of privacy*." *Id.* (emphasis added). The Court further explained – in a footnote addressing Justice Cypher's assertion in her concurring opinion that the holding of *Mubdi* was in tension with the principles this Court had previously articulated in *Commonwealth v. Carter*, 424 Mass. 409 (1997) – that "[t]he decision in *Mubdi* . . . clearly explained the rationale underlying its holding that, *in possessory offenses committed by multiple individuals*, defendants need show neither standing nor an expectation of privacy." *Id.* at 557 n.5 (emphasis added).

This appears to mark the first time this aspect of *Mubdi* has been explained by a decision of this Court.[4] Lacking this guidance, the Appeals Court construed it differently:

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[4] Compare *Commonwealth v. Tatum*, 466 Mass. 45, 57 n.2 (2013) (Lenk, J., dissenting, quoting *Mubdi* for proposition that defendant "must show that there was a search in the constitutional sense, that is, that *someone* had a reasonable expectation of privacy in the place searched," and stating that "[h]ere, the unknown third-party householder certainly had such an expectation of privacy, as did the defendant for that matter, insofar as he was an overnight guest."). Two published Appeals Court cases discussed the issue prior to *DeJesus*, albeit in footnotes: *Commonwealth v. Lawson*, 79 Mass. App. Ct. 322, 326 n.5 (2011) (Cypher, J., asserting tension between *Mubdi* and *Carter*, 424 Mass. at 411, but concluding that "[w]e need not resolve the tension between these cases, however, as the defendant was not an authorized driver"); *Commonwealth v. Holley*, 79 Mass. App. Ct. 542,

> 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").

DeJesus, 99 Mass. App. Ct. at 280.

The Appeals Court found that the defendant could not have had a reasonable subjective expectation of privacy "in the basement of a home that the defendant concedes he does not own or occupy," and did not claim to have been a guest in. *Id.* The Court further found that no one else had a reasonable expectation of privacy in the basement, either:

> 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, 970 N.E.2d 319 (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

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551 n.7 (2011) (noting, with reference to *Lawson*, apparent contradiction between *Mubdi* and *Carter*, and concluding, "Given the statements in *Mubdi*, which is the controlling law . . . , we address the reasonable expectation of privacy of both the defendant and his girlfriend.").

> pertinent case law would appear to place [the area] beyond any constitutionally protected privacy zone." *Commonwealth v. Dora*, 57 Mass. App. Ct. 141, 145, 781 N.E.2d 62 (2003).

DeJesus, 99 Mass. App. Ct. at 281. The Court concluded, "Absent a constitutionally protected reasonable expectation of privacy held by anyone, the motion judge properly denied the motion to suppress." *Id.* at 281.

This standard is significantly more favorable to defendants than that articulated by this Court in *Delgado-Rivera*, that "for possessory offenses involving drugs or firearms, defendants did not need to establish either standing or a reasonable expectation of privacy so long as one of the individuals involved in the offense had a reasonable expectation of privacy." *Delgado-Rivera*, 487 Mass. at 557. Nonetheless, the Appeals Court, correctly, found that the defendant was not entitled to relief even under this more favorable standard. And where no one had a reasonable expectation of privacy in this basement, the defendant cannot claim automatic standing under any construction of *Mubdi*.

And where the defendant "did not have a reasonable expectation of privacy over the premises or standing to challenge the entry and search of the premises," the Commonwealth was not required to demonstrate probable cause and exigent circumstances sufficient to justify the entry, as the defendant argues at DB.31-34. *DeJesus*, 99 Mass. App. Ct. at 281 n.11 ("In light of our conclusion . . . we need not reach the defendant's challenges to the existence of probable cause or exigent

circumstances justifying the search"); R.31 n.3 ("Given the court's ruling on standing and whether the defendant possessed a reasonable expectation of privacy, I need not reach the issue of whether or not the Commonwealth has proven that the police had exigent circumstances to enter 14 Downey Street.").

The Defendant Has Not Met His Burden With Regard to the Curtilage Claim He Raises For the First Time on Further Appellate Review

The defendant argues, for the first time, that the side yard and basement of 14 Downing Street fell within the curtilage of 14 Downing Street. [DB.35-49]. "Appellate review of a waived claim may result in one of [the] following outcomes: (1) if the record is incomplete or otherwise not adequate to permit review on the merits, the defendant, who has the burden of producing a record that is adequate to permit review, is left to pursue a remedy, if any, in the trial court and appellate relief is denied; or (2) if the record permits review on the merits and (a) there is no error, then there is no risk of a miscarriage of justice and appellate relief is denied, or (b) there is error, we review the record as a whole to determine whether the error created a substantial risk of a miscarriage of justice." *Commonwealth v. Santos*, 95 Mass. App. Ct. 791, 795 (2019). Here, the inadequacy of the record is such that the defendant himself resorts to arguing from inference, seeking to use absence of evidence regarding an issue on which he bore the burden of proof, *Delgado-Rivera*, 487 Mass. at 555, as support for the argument he now belatedly makes. See, e.g., DB.39 ("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"); DB.40 ("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 . . . ."). Nor is this the only fatal weakness in his claim.

As explained by this Court in *Commonwealth v. Escalera*, 462 Mass. 636 (2012), "The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *Escalera*, 462 Mass. at 647, quoting *Commonwealth v. McCarthy*, 428 Mass. 871, 873 (1999). "Today, the curtilage concept arises more commonly in the context of the Fourth Amendment and defines both the area to which Fourth Amendment protections extend and the area where police may search pursuant to a warrant." *Id.*, quoting *McCarthy*, 428 Mass. at 873-874. "In determining whether an area outside of the home constitutes the constitutionally protected curtilage of the home, 'the central component of [the] inquiry [is] whether the area harbors the intimate activity associated with the sanctity of a [person's] home and the privacies of life.'" *Commonwealth v. Sorenson*, 98 Mass. App. Ct. 789, 792 (2020), *further appellate review denied*, *S.C.*, 486 Mass. 1112 (Jan. 14, 2021), *cert denied*, *Sorenson v. Mass.*, 2021 U.S. LEXIS

3928 (U.S., Oct. 4, 2021), quoting *United States v. Dunn*, 480 U.S. 294, 300 (1987) (some quotation marks omitted).

This Court has historically found the scope of curtilage very limited with respect to multi-unit buildings, see *Commonwealth v. Thomas*, 358 Mass. 771, 774-775 (1971), *Sorenson*, 98 Mass. App. Ct. at 792, but has also recently cautioned that "a strict apartment versus single-family house distinction . . . would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity." *Commonwealth v. Leslie*, 477 Mass. 48, 54 (2017), quoting *United States v. Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016). Nor is this an entirely new issue: in *Commonwealth v. Fernandez*, 458 Mass. 137, 143 (2010), this Court referenced the Fourth Circuit's observation, in *United States v. Stanley*, 597 F.2d 866, 870 (4th Cir. 1979), that the "'common area' curtilage issue has been a thorny one for the courts."

But it is not necessary to determine the scope of residents' curtilage in the 14 Downing Street basement, because rights secured by the Fourth Amendment and art. 14 are "specific to the individual." *Delgado-Rivera*, 487 Mass. at 554. "[U]nder both State and Federal law, 'the question is whether the challenged search or seizure violated the … rights of a criminal defendant who seeks to exclude the evidence' obtained from the search, specifically those rights of privacy that these constitutional provisions were 'designed to protect.'" *Delgado-Rivera*, 487 Mass.

554, quoting *Rakas v. Illinois*, 439 U.S. at 140. "A defendant bears the burden of establishing such an infringement." *Id.* at 555.

Here, the defendant did not live in the building, nor did any other individual involved in his offense. Contrast *Leslie*, 477 Mass. at 57 (where detective's search "was a physical intrusion into the constitutionally protected area" of multifamily residence where one codefendant, Price, lived, "Price and by extension Leslie are relieved of the burden to show that Price had a reasonable expectation of privacy in the area searched"). And the record is silent on whether the defendant, or the firearm he is charged with possessing, was in the basement with the permission or knowledge of any resident of the building. [R.27].

Indeed, even if the issue had been timely raised and the record adequately developed, it is unlikely the open sections of the basement of this particular multiunit residence would fall within the curtilage of any of the residents. The essence of the evidence in the case is that multiple gang members, whose only record connection to the building is that an associate of the defendant's, who was present at the scene on the night of the search but was not arrested, had a girlfriend who lived there, were using the basement to make social media videos of themselves posing with real firearms. There is circumstantial evidence that, at the time police entered the basement, people who did not live in the building had literally just run in the back door, through the basement, and out the other side of

the house. Compare *Sorenson*, 98 Mass. App. Ct. at 794 ("From the record, it appears the hallway was a common hallway used by the residents of the building (and their guests) to reach each separate unit."). And the defendant's girlfriend, testifying on his behalf at the motion hearing, and asked whether all the tenants of 14 Downing Street had access to the basement, replied, "It's a public place." [M1.158]. The basement was plainly being used by people with no obvious connection to any of the apartments, including the defendant himself.

II. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT THE DEFENDANT UNLAWFULLY POSSESSED THE FIREARM AND LARGE-CAPACITY FEEDING DEVICE.[5]

The defendant argues that the evidence presented at trial was insufficient for the jury to convict him of unlawful possession of the firearm and large-capacity feeding device, because it only supported a finding that he had momentary possession of those items, "which is not illegal." [DB.51-60, & 53]. As the Appeals Court pointed out in rejecting this claim, "[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." *DeJesus*, 99 Mass. App. Ct. at 282, quoting *Commonwealth v. Hall*, 80 Mass. App. Ct. 317, 330 (2011). The Court noted that, as the defendant acknowledges, G. L. c. 269, § 10 (a), was amended in 1990 to

[5] This argument responds to Arguments II and IV of the defendant's brief.

eliminate a previous requirement "that the Commonwealth show that the defendant 'carrie[d] [the firearm] on his person,'" and that "[s]ince the time of that amendment, § 10 (a) has simply prohibited the knowing possession of a firearm without a license." *Id.* at 283 n.15, quoting *Commonwealth v. Duncan*, 71 Mass. App. Ct. 150, 153 n.43 (2008). The Court also rejected the defendant's claim on its own terms:

> 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. See *Commonwealth v. Seay*, 376 Mass. 735, 737-738, 383 N.E.2d 828 (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, 398 N.E.2d 738 (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.

DeJesus, 99 Mass. App. Ct. at 282-283. The Commonwealth relies on the Appeals Court's analysis here.

CONCLUSION

For the foregoing reasons, this Court should affirm the defendant's convictions.

Respectfully submitted
For the Commonwealth,

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COMMONWEALTH'S ADDENDUM

G.L. c. 269, § 10 (a)

Section 10: Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment

Section 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.

G.L. c. 269, § 10 (h)

Section 10: Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment

Section (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.

G.L. c. 269, § 10 (m)

Section 10: Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment

Section (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 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.

The provisions of this paragraph shall not apply to the possession of a large capacity weapon or large capacity feeding device by (i) any officer, agent or employee of the commonwealth or any other state or the United States, including any federal, state or local law enforcement personnel; (ii) any member of the military or other service of any state or the United States; (iii) any duly authorized law enforcement officer, agent or employee of any municipality of the

commonwealth; (iv) any federal, state or local historical society, museum or institutional collection open to the public; provided, however, that any such person described in clauses (i) to (iii), inclusive, is authorized by a competent authority to acquire, possess or carry a large capacity semiautomatic weapon and is acting within the scope of his duties; or (v) any gunsmith duly licensed under the applicable federal law.

G.L c. 269, § 10G

Section 10G: Violations of Sec. 10 by persons previously convicted of violent crimes or serious drug offenses; punishment

Section 10G. (a) Whoever, having been previously convicted of a violent crime or of a serious drug offense, both as defined herein, violates the provisions of paragraph (a), (c) or (h) of section 10 shall be punished by imprisonment in the state prison for not less than three years nor more than 15 years.
(b) Whoever, having been previously convicted of two violent crimes, or two serious drug offenses or one violent crime and one serious drug offense, arising from separate incidences, violates the provisions of said paragraph (a), (c) or (h) of said section 10 shall be punished by imprisonment in the state prison for not less than ten years nor more than 15 years.
(c) Whoever, having been previously convicted of three violent crimes or three serious drug offenses, or any combination thereof totaling three, arising from separate incidences, violates the provisions of said paragraph (a), (c) or (h) of said section 10 shall be punished by imprisonment in the state prison for not less than 15 years nor more than 20 years.
(d) The sentences imposed upon such persons shall not be reduced to less than the minimum, nor suspended, nor shall persons convicted under this section be eligible for probation, parole, furlough, work release or receive any deduction from such sentence for good conduct until such person shall have served the minimum number of years 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 section 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.

(e) For the purposes of this section, "violent crime" shall have the meaning set forth in section 121 of chapter 140. For the purposes of this section, "serious drug offense" shall mean an offense under the federal Controlled Substances Act, 21 U.S.C. 801, et seq., the federal Controlled Substances Import and Export Act, 21 U.S.C. 951, et seq. or the federal Maritime Drug Law Enforcement Act, 46 U.S.C. App. 1901, et seq. for which a maximum term of imprisonment for ten years or more is prescribed by law, or an offense under chapter 94C involving the manufacture, distribution or possession with intent to manufacture or distribute a controlled substance, as defined in section 1 of said chapter 94C, for which a maximum term of ten years or more is prescribed by law.

CERTIFICATE OF SERVICE

I, Shoshana E. Stern, hereby certify that I have this date, November 10, 2021, served a copy of the Commonwealth's Brief RE: *Commonwealth v. Christopher DeJesus,* Supreme Judicial Court No. SJC-13171, on counsel for the defendant by e-filing with the office of:

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Signed under the pains and penalties of perjury.

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November 10, 2021

CERTIFICATION

Commonwealth v. Christopher DeJesus
SJC-13171

As counsel for the Commonwealth, I certify that this brief complies with the rules of court that pertain to the filing of briefs. This brief is produced in proportionally spaced font, Times New Roman 14, and contains 6,353 words from the statement of the issues through the conclusion. Mass. R. App. P. 16(a)(5).

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