

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

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2019-P-1094

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COMMONWEALTH,  
Appellant,

V.

JORGE DELGADO-RIVERA,  
Defendant-Appellee

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ON APPEAL FROM A JUDGMENT OF THE  
Middlesex Superior Court

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**BRIEF OF APPELLEE**

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**ISSUE PRESENTED**

- I. Whether the Trial Judge correctly ruled that Defendant Jorge Delgado-Rivera had standing to challenge the warrantless search of a Co-Defendant's cellphone on the ground that the sender of text messages to a known associate has a reasonable expectation of privacy in the text messages received by the intended recipient's cellphone.

**STATEMENT OF THE CASE**

On September 20, 2017, a Middlesex County Grand Jury indicted Defendant Jorge Delgado-Rivera, as well as several co-defendants,<sup>1</sup> on charges of trafficking cocaine in 200 grams or more in violation of G.L. c. 94C, § 32E(b), conspiracy to violate Drug Law in violation of G.L. c. 94C, § 40, and money laundering in violation of G.L. c. 267A, § 2. (RA 6, 18-31).<sup>2</sup>

On November 20, 2018, Co-Defendant Leonel Garcia-Castaneda ("Castaneda") moved to suppress all evidence seized because of an alleged traffic violation stop and subsequent search on September 18, 2016, of his

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<sup>1</sup> Co-defendants include Leonel Garcia-Castaneda (No. 1781CR00462), Jairo Salado-Ayala (No. 1781CR00463), Maritza Medina (No. 1781CR00464), Brandon Ortiz (No. 1781CR00465), Adika Manigo (No. 1781CR00466), and Mark Yarde (No. 1781CR00467).

<sup>2</sup> References are as follows: to the Commonwealth's record appendix as "(RA [page])"; to the January 31, 2019 pretrial hearing transcript as "(Tr. [page]);" and to the Supplemental Appendix as "(SA. [page])."

vehicle, cellphone and/or person, in McAllen, Texas. (RA 12, 41-42). The search of Mr. Castaneda's cellphone conducted by Texas Law Enforcement uncovered text messages sent from a Massachusetts phone number, which was subsequently linked to Mr. Delgado-Rivera. (RA 34.)

On January 31, 2019, Mr. Delgado-Rivera orally moved to join in Castaneda's motion and filed a Motion to Join Co-Defendant's Motion to Assert Standing, together with an affidavit in support of his motion. (RA 12; Tr. 16; SA 3-4.)<sup>3</sup> The Trial Judge (Frison, J.) orally ruled that Mr. Delgado-Rivera had standing and allowed him to join Mr. Castaneda's Motion to Suppress (Tr. 45):

As to Mr. Delgado-Rivera, there is standing. I disagree with the premise that the electronic communications are similar to the mail. I do think that although you cited cases by other Supreme Courts, it sounds like [Massachusetts] ha[s not] squarely dealt with it, at least our highest court hasn't squarely dealt with it. So I actually agree with the analysis in Hinton that even though the receiver of the text messages can do away with them or give them to the police or do whatever with them, that is a little bit different than, say, putting stuff out

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<sup>3</sup> Mr. Delgado-Rivera has filed a Supplemental Appendix which includes his Motion to Join Co-Defendant's Motion to Assert Standing, and his affidavit, dated January 31, 2019. The Supplemental Appendix is cited as (SA ).

onto social media or more generally out in which it can be discovered by members of the public or police or anyone else. I think even text messages between two individuals does give the sender standing and I'm going to make that ruling in this case and allow the counsel for Mr. Delgado-Rivera to participate in the hearing on Mr. Castaneda's motion.

The hearing on the Motion to Suppress then commenced. Early in the hearing, an issue arose involving the Fifth Amendment rights of the Commonwealth's key witness, former Police Officer Jose Tamez of Pharr, Texas. (Tr. 65.) Before Officer Tamez testified about any details of the stop, search, and seizure at issue, Officer Tamez asserted his Fifth Amendment right not to incriminate himself. (Tr. 70.) The Commonwealth thereafter concluded it could not proceed since it had no other percipient witness to testify about the stop. Therefore, the Trial Judge (Frison, J.) granted Mr. Castaneda's Motion to Suppress. (Tr. 86-87, 89.)

On February 11, 2019, the Commonwealth requested findings of fact and rulings of law. (RA 12, 49-50.) On February 12, 2019, the Trial Judge (Frison, J.) issued the following rulings:

1. Delgado-Rivera and Garcia-Castaneda have standing to challenge the motor vehicle stop of defendant Garcia-Castaneda in Pharr,

Texas on September 18, 2016 by then-Officer Jose Tamez of the Pharr Police Department;

2. This Court has ruled that the defendants are allowed to cross-examine Jose Tamez, one of the Commonwealth's two witnesses to impeach his credibility about a 2017 incident of police misconduct and the 2018 allegation of police misconduct;

3. Jose Tamez has properly asserted (upon the advice of counsel appointed to him by this Court) his privilege against self-incrimination if questioned about the above-described incident and allegation of misconduct;

4. By asserting his privilege against self-incrimination, Jose Tamez is unavailable as a witness to the Commonwealth; and

5. Given Jose Tamez's invocation of his privilege against self-incrimination and his unavailability to testify for the Commonwealth at the motion hearing, the defendants' motion to suppress the motor vehicle stop must be allowed.

(RA 13, 51.)

On February 19, 2019, the Commonwealth filed a timely Notice of Appeal. (RA 13, 52.) On March 11, 2019, the Commonwealth filed an application for leave to pursue an interlocutory appeal pursuant to Mass.R. Crim.P. 15(a)(2) with the Single Justice of the Supreme Judicial Court. (RA 53-68.) On April 2, 2019, the Single Justice (Gaziano, J.) allowed the Commonwealth's interlocutory appeal, which was entered



on this Court's Docket on July 24, 2019. (RA 53, 69-71.)

**STATEMENT OF FACTS**

On September 18, 2016, Officer Jose Tamez of the Pharr Police Department stopped a vehicle in Texas, after purportedly observing a traffic infraction. (RA 34, 42, 44.) Mr. Castaneda was the driver and sole occupant of the vehicle. (RA 42,44.)

During the stop, "[t]he officer ordered [Castaneda] out of the car, searched [him], [his] cellphones and [his] car." (RA 42.) While the Commonwealth asserts that Mr. Castaneda consented to the search, that was a disputed fact as Mr. Castaneda disputed the Commonwealth's assertion and claimed he did not consent to a search of his cellphone. (RA 42.) Additionally, in his Affidavit, Mr. Delgado-Rivera stated, "I assert that all messages from my phone are private and only intended for one person. I did not consent to anyone else reading or viewing those messages." (SA 4.)

After Officer Tamez seized Mr. Castaneda's cellphone, he looked through it and observed text messages with a Massachusetts-based area code that allegedly pertained to shipments of narcotics and

payments to be made into certain bank accounts. (RA 34,42,44.)

Following the stop, Texas authorities informed Massachusetts authorities about the information reviewed on Mr. Castaneda's cellphone. This resulted in an investigation by Massachusetts authorities that, in turn, led to the indictment of, among others, Mr. Delgado-Rivera.

#### ARGUMENT

I. The Trial Judge Correctly Ruled That Mr. Delgado-Rivera Had Standing To Oppose The Government's Unauthorized Viewing Of Private Text Messages He Sent To Mr. Castaneda's cellphone.

The Trial Judge ruled that Mr. Delgado-Rivera had standing to challenge the government's warrantless intrusion into Mr. Castaneda's cellphone and its viewing of private text message communications between Mr. Delgado-Rivera and Mr. Castaneda. (Tr. 45.) Citing the case of State v. Hinton, 319 P.3d 9 (Wash. 2014), as persuasive authority, the Trial Judge concluded that "text messages between two individuals does give the sender standing." (Tr. 45.) As demonstrated below, this Court should affirm that decision, as Mr. Delgado-Rivera had a reasonable

expectation of privacy in the private text messages he sent to Mr. Castaneda's cellphone.

Since, as the Trial Judge ruled, Mr. Delgado-Rivera could not assert automatic standing under Article 14 of the Massachusetts Declaration of Rights,<sup>4</sup> Mr. Delgado-Rivera had to demonstrate that he had a reasonable expectation of privacy in the text messages he sent to Mr. Castaneda's cellphone. Neither the Appellate Courts of this Commonwealth, nor the United States Supreme Court have addressed that issue.

That said, those Courts have issued a series of decisions which bare upon privacy rights in the context of our rapidly evolving technological society. As recently stated by the Supreme Judicial Court, "In so doing, both [the Supreme Judicial Court] and the United States Supreme Court have been careful to guard against the 'power of technology to shrink the realm of guaranteed privacy' by emphasizing that privacy rights 'cannot be left at the mercy of advancing technology, but rather must be preserved and protected

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<sup>4</sup> Under Article 14, "A defendant has standing either if she has a possessory interest in the place searched or in the property seized or if she was present when the search occurred." Commonwealth v. Williams, 453 Mass. 203, 208 (2009).

as new technologies are adopted and applied by law enforcement'..." Commonwealth v. Almonor, 482 Mass. 35, 41 (2019), citing Commonwealth v. Johnson, 481 Mass. 710, 716 (2019). As demonstrated below, the underlying rationales of the following cases support the Trial Judge's ruling that Mr. Delgado-Rivera had a reasonable expectation of privacy in the text messages he sent to a known associate.

In Riley v. California, 573 U.S. 373 (2014), the United States Supreme Court held that police officers must secure a search warrant before searching a cellular telephone incident to an arrest. In doing so, the Court emphasized that modern cellular telephones contain "vast quantities of [digital] personal information literally in the hands of individuals." Riley, 573 U.S. at 386. The Court summarized its reasoning as follows:

Modern cellphones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," ... The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cellphone seized incident to an arrest is accordingly simple—get a warrant.

Riley, 573 at U.S. at 403. (Citation omitted.)<sup>5</sup>

In Commonwealth v. Augustine, 467 Mass. 230 (2014) ("Augustine I"), the Supreme Judicial Court found persons have an expectation of privacy in their historical cellular site location information retained by their cellular phone provider. In doing so, the Augustine Court reasoned:

[L]ike other courts, we recognize that the cellular telephone has become "an indispensable part of modern [American] life." ... [A]s of June, 2011, "there were more than 322 million wireless devices in use in the United States" ... [A]s of December, 2012, there were more than 326 million wireless subscriber connections in the United States ... Further, "[m]any households now forgo traditional 'landline' telephone service, opting instead for cellular phones carried by each family member." ...

...

Indeed, cellular telephones are increasingly viewed as necessary to social interactions as well as the conduct of business. More fundamentally, and of obvious importance to the present case, cellular telephones physically accompany their users everywhere -- almost permanent attachments to their bodies... "For many Americans, there is no time in the day when they are more than a few feet away from their [cellular

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<sup>5</sup> See also United States v. Warshak, 631 F.3d 266, 286(6th Cir. 2010) (electronic messages "require[] strong protection under the Fourth Amendment; otherwise, the Fourth Amendment would prove an ineffective guardian of private communication, an essential purpose it has long been recognized to serve").

telephones]." As anyone knows who has walked down the street or taken public transportation in a city like Boston, many if not most of one's fellow pedestrians or travelers are constantly using their cellular telephones as they walk or ride -- as the facts of this case appear to illustrate...

467 Mass. at 245-46.

In Commonwealth v. Fulgiam, 477 Mass. 20, 33 (2017), the Supreme Judicial Court held that a search warrant was required to obtain the content of text messages from a defendant's cellphone service provider because the defendant had a reasonable expectation of privacy in the content of his text messages. Noting the "heightened protection for the content of electronic communications," the Supreme Judicial Court reasoned, "A search of the content of text messages implicates similar privacy interests. Just as the government may not intercept private telephone calls or written communications without a warrant, we conclude that the Commonwealth may not obtain the content of text messages without a warrant." Fulgiam, 477 Mass. at 32-33.

Finally, in addressing the constitutionality of the government's right to "ping" a defendant's

cellphone for real time location, the Supreme Judicial Court concluded in Almonor, 482 Mass. at 45:

Indeed, society reasonably expects that the police will not be able to secretly manipulate our personal cellphones for any purpose, let alone for the purpose of transmitting our personal location data.

The Supreme Judicial Court went on to cite the following cases in support of that proposition, which cases are particularly applicable to this case:

- State v. Andrews, 227 Md. App. 350, 392, 134 A.3d 324 (2016) ("no one expects that their [cell] phone information is being sent directly to the police department" [citation omitted] );
- State v. Earls, 214 N.J. 564, 587, 70 A.3d 630 (2013) ("no one buys a cellphone to share detailed information ... with the police").

Before concluding:

A person obtains a cellphone for a variety of reasons, including for "the purpose of making and receiving telephone calls," to communicate with others electronically, or perhaps to conduct business... More particularly, individuals obtain cellphones because carrying one has become "indispensable to participation in modern society."

Almonor, 482 Mass. at 45.

The expanding rationale utilized in the above cases (Riley, Augustine I, Fulgiam, and Almonor) to determine privacy rights in the context of evolving technology supports the conclusion that Mr. Delgado-Rivera had a reasonable expectation of privacy in the

content of his text messages to Mr. Castaneda. "The measure of the defendant's [reasonable] expectation of privacy is (1) whether the defendant has manifested a subjective expectation of privacy in the object of the search, and (2) whether society is willing to recognize that expectation as reasonable." Commonwealth v. Fulgiam, 477 Mass. 20, 33 (2017), quoting Commonwealth v. Montanez, 410 Mass. 290, 301(1991).

As set forth in his Affidavit, Mr. Delgado-Rivera held a subjective expectation of privacy that his text messages to Mr. Castaneda would remain private. (SA 4.) This case involves electronic text messages between two private parties using private cellphones. Both Mr. Delgado-Rivera and Mr. Castaneda held reasonable expectations that the government would not engage in warrantless searches of their telephone information, and, in particular, the telephone numbers showing with whom they chose to associate. See District Attorney for the Plymouth Dist. v. New England Tel. & Tel. Co., 379 Mass. 586, 591 (1980) (G.L. c. 272, § 99, requires a warrant for obtaining caller identification). Significantly, neither party



consented to the government accessing the cellphone without a warrant. (RA 42; SA 3-4.)

The above cases further establish that Mr. Delgado-Rivera had an objectively reasonable expectation of privacy in his private text messages. Text messaging has become one of the most common forms of private communication; more so than face-to-face meetings or even telephone calls. It has become the communication vehicle of choice by which many citizens share personal information about themselves.

Commentators have long stated that "Article 14 protects the control we have over information about ourselves." Fried, Privacy 77 Yale.L.J. 475, 482 (1968). Therefore, an individual's expectation of privacy in a text message conversation should reflect the evolving technology by which we share information about ourselves. Since text messaging is becoming more pervasively used than telephones to communicate, text messages should, at a minimum, receive similar protections to oral phone communications.

Given the popularity of text messaging as a means of communication, an individual's expectation of privacy in their text communications should not end when the discussion ends simply because the text

messages remain in their telephones, whereas words spoken telephonically disappear. Rather, an expectation of privacy in text messages should continue after being received by the intended recipient simply because said communications were, indeed, meant only for the person who received the communication.

In addition to the rationale of Riley, Augustine I, Fulgiam and Almonor, the public policy of this Commonwealth, as expressed by the so-called Massachusetts wiretapping law,<sup>6</sup> establishes the importance of a person's right to expect privacy when orally communicating with other people. Specifically, the wiretapping law makes it a crime to secretly record a conversation, whether the conversation is in-person or taking place by telephone or some other medium. Put simply, that statute promotes the public policy that oral communication between parties should remain private, absent consent or a warrant.

In light of that public policy, citizens of this Commonwealth should not have their right to privacy penalized or invaded because evolving technology now allows private parties to communicate and store their

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<sup>6</sup> See G.L. c. 272, § 99.

private communications on their cellphones or the recipient's cellphone. As courts recognize, cellphones have become an integral part of our daily life, from socializing, to work, to hobbies, and individuals carry their personal lives within their cellphones. Since individuals expect privacy in their own cellphones, it is objectively reasonable that society would expect that text messages sent to a known associate remain private when the messages are received by the intended recipient's cellphone. This is especially true since it is well established that the government can search telephones only by means of a warrant meeting Constitutional requirements. See Riley v. California, 573 U.S. 373. Individuals do not send information directly to the police and do not expect the police to have non-consensual or warrantless access to their information.

As the Trial Judge approvingly cited, the Washington Supreme Court has held that a sender of a text message has a right to privacy in the text message seized from the third party to whom it was sent. See State v. Hinton, 319 P.3d 9 (Wash. 2014). In Hinton, the defendant sought to suppress his text messages to a third party that the police seized from

the third party's cellular phone. The Hinton Court concluded: "Given the realities of modern life, the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside of the realm of [Constitutional] protection." 319 P.3d at 16. The Hinton Court recognized that Hinton assumed the risk that the third party would betray him and share the information with police, but the Court recognized that the third party did not do so, just as Mr. Castaneda denies he voluntarily shared his cellphone information with the police.

The Hinton Court further reasoned that, "one who dials telephone numbers from his home phone, or one who shares personal information with a bank or motel, one who has a conversation with a known associate through personal text messaging exposes some information but does not expect governmental intrusion." 319 P.3d at 15. The Hinton decision recognized the significance of the rights it was protecting: "Protecting the privacy of personal communications is essential for freedom of association and expression." 319 P.3d at 16. Consequently, the Hinton Court ultimately concluded that its citizens

should be protected from governmental intrusion into affairs that they should be entitled to hold safe from governmental Trespass, regardless of technological advancements." 319 P.3d at 17.

The expansive view of standing adopted by the Washington Supreme Court is consistent with the Supreme Judicial Court's expanding its citizens' privacy rights with respect to evolving technology, as evinced by, among other decisions, Augustine I, Fulgiam, and Almonor. In the face of these cases, the Commonwealth relies on the so-called third-party doctrine, to which the United States Supreme Court adheres, and argues that disclosure to a third-party defeats any expectation of privacy by Mr. Delgado-Rivera. (Commonwealth Brief at pp.18-20.) However, contrary to the Commonwealth's argument, the Supreme Judicial Court reaffirmed, in Fulgiam, its rejection of the third-party doctrine in related circumstances:

In Augustine I, 467 Mass. at 255, we recognized an objectively reasonable expectation of privacy in a defendant's CSLI records. We further stated "that the nature of cellular telephone technology and CSLI and the character of cellular telephone use in our current society render the third-party doctrine of [United States v.] Miller [, 425 U.S. 435 (1976),] and Smith [v. Maryland, 442 U.S. 735, (1979),] inapposite." Augustine I, supra at 245. The

same result applies here with respect to the content of text messages stored on a cellular telephone service provider's servers.

477 Mass. at 34. Here, this Court should do the same and reject the anachronistic third-party doctrine in this case.

**CONCLUSION**

For the above reasons, Mr. Delgado-Rivera respectfully requests that this Court affirm the Trial Court's ruling and grant his Motion to Suppress.

Respectfully Submitted,

Jorge Delgado-Rivera,  
By his attorney,

/s/ Barry A. Bachrach

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Date: 11/14/19

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Rule 16(a)(13)(addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21(redaction). Compliance of the applicable length limit of Rule 20 of the Massachusetts Rules of Appellate Procedure were ascertained by using Courier New font, 12 characters per inch, and less than fifty (50) pages total and with no non-excluded pages. I certify that the information in this Certificate is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Barry A. Bachrach  
Barry A. Bachrach

**CERTIFICATE OF SERVICE**

Commonwealth v. Jorge Delgado-Rivera  
Docket No.: 2019-P-1094

Pursuant to Rules 13 and 19 of the Massachusetts Rules of Appellate Procedure and E-Filing Rule 7, the undersigned counsel for Defendant, Jorge Delgado-Rivera, certifies that on November 14, 2019, the Brief of the Appellee was submitted through the Electronic Filing Service Provider for electronic service to the following counsel of record:

Thomas D. Ralph, District Attorney  
Middlesex District Atty's Office  
15 Commonwealth Avenue  
Woburn, MA 01801

Signed under the pains and penalties of perjury this 14th day of November 2019.

/s/ Barry A. Bachrach  
Barry A. Bachrach

# ADDENDUM



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1 different analysis than the communications between two people,  
2 and I don't think that's enough here to give standing as to this  
3 particular search, despite that Appellate case.

4 As to Mr. Delgado-Rivera, there is standing. I disagree  
5 with the premise that the electronic communications are similar  
6 to the mail. I do think that although you cited cases by other  
7 Supreme Courts, it sounds like we haven't squarely dealt with it  
8 here, at least our highest court hasn't squarely dealt with it.  
9 So I actually agree with the analysis in Hinton that even though  
10 the receiver of the text messages can do away with them or give  
11 them to the police or do whatever with them, that is a little  
12 bit different than, say, putting stuff out onto social media or  
13 more generally out in which it can be discovered by members of  
14 the public or police or anyone else. I think even text messages  
15 between two individuals does give the sender standing and I'm  
16 going to make that ruling in this case and allow the counsel for  
17 Mr. Delgado-Rivera to participate in the hearing on Mr.  
18 Castaneda's motion.

19 So those are the rulings as to standing.

20 All the objections are noted.

21 Right now, I'm going to give the interpreters a break.  
22 They're doing a lot of talking and need a little bit of a break  
23 now. And I want to make sure that everyone can hear. So  
24 Counsel, please check with your own client and make sure that  
25 they can hear the translation that's happening.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

MIDDLESEX SUPERIOR COURT  
~~1781CR00461~~ and 1781CR00462

COMMONWEALTH

vs.

~~JORGE DELGADO-RIVERA~~, and  
LEONEL GARCIA-CASTANEDA

Rulings Of Law Regarding Commonwealth Witness's Assertion of 5<sup>th</sup> Amendment Privilege

In this matter, no testimony on the motions to suppress was taken – so there are no findings of fact as such. The following are rulings of law concerning the issues argued on January 31, 2019.

1. Delgado-Rivera and Garcia-Castaneda have standing to challenge the motor vehicle stop of defendant Garcia-Castaneda in Pharr, Texas on September 18, 2016 by then-Officer Jose Tamez of the Pharr Police Department, as well as the voluntariness of the search of defendant Garcia-Castaneda's motor vehicle and cell phones;
2. This Court has ruled that the defendants are allowed to cross-examine, Jose Tamez, one of the Commonwealth's two witnesses at the motion hearing and attempt to impeach his credibility about a 2017 incident of police misconduct and the 2018 allegation of police misconduct;
3. Jose Tamez has properly asserted (upon the advice of counsel appointed to him by this Court) his privilege against self-incrimination if questioned about the above-described incident and allegation of misconduct;
4. By asserting his privilege against self-incrimination, Jose Tamez is unavailable as a witness to the Commonwealth; and
5. Given Jose Tamez's invocation of his privilege against self-incrimination and his unavailability to testify for Commonwealth at the motion hearing, the defendants' motions to suppress the motor vehicle stop must be allowed.



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Honorable Shannon Frison  
Justice of the Superior Court  
February 12, 2019