COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Middlesex, ss. **No. 2022-P-0132**

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

v.

CARLOS GUARDADO,
Appellant.

On Appeal from Judgments of the Middlesex Superior Court

BRIEF AND ADDENDUM FOR THE APPELLANT

For the Appellant/Defendant,
Carlos Guardado

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ISSUE PRESENTED

I. Did the lower court err when it ruled the government did not violate Carlos Guardado's right, under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, to be free from unreasonable warrantless searches when it searched the glovebox of his vehicle, parked at his place of business, for a firearm that an informant claimed was inside a backpack in his vehicle, because:

a) the evidence established neither the informant's veracity nor that they had firsthand knowledge of the information alleged, as required under the *Aguilar-Spinelli* standard;

b) even if the *Aguilar-Spinelli* prongs were established, the tip did not support a search of the glovebox given that the tip described the precise container in which the firearm would be located, which would not reasonably be found in the glovebox;

c) even if probable cause to search the glovebox were established, the evidence must be suppressed because police gained access to it as a result of their illegal search/patfrisk of Mr. Guardado; and

d) probable cause to search the glovebox was not supported by the government's search of Mr. Guardado's backpack stored at his workplace given that the government did not: establish that it had probable cause to search the backpack; secure a warrant for that search; establish that the search fell under an exception to the warrant requirement; nor even that the search of the backpack preceded the search of the glovebox?

II. Where there was evidence that Mr. Guardado was working and that the firearm was stored in his vehicle parked at his place of business, did the trial judge err in refusing to instruct the jury that individuals are exempt from liability for unlicensed possession of a firearm if they are "in or on [their] place of business"?

STATEMENT OF THE CASE

Prior Proceedings

On June 25, 2019, Carlos Guardado was indicted for unlawful possession of a loaded firearm, unlawful possession of two large capacity feeding devices (one inside the firearm), and unlawful possession of ammunition, in violation of Massachusetts General Laws chapter 269, sections 10(a),(h),(m), and (n). RA.15-19.[1]

On December 12, 2019, Guardado filed a motion to suppress evidence seized without a warrant. RA.5,20.[2] An evidentiary hearing on that motion was held on March 2, 2020 (Barret, J., presiding). TrS/1. On March 19, 2020, the lower court denied the motion, issuing written findings. A.1-8.

Guardado's jury trial (Wilson, J., presiding) ran from June 1, 2020 to June 3, 2020. RA.10-11. The jury found Guardado not guilty of possession of the large capacity feeding device inside the firearm (count 2) and guilty of all remaining charges. RA.11. He was sentenced

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[1] References to the record on appeal are as follows: to the Addendum bound herewith by A.[page no.]; to the Record Appendix bound separately by RA.[page no.]; to the transcript of the March 2, 2020 motion to suppress hearing by TrS/[page no.]; to the trial held June 1 - to June 3, 2021 by Tr[volume number I-III]/[page no.].

[2] An amended motion was filed on December 20, 2019, and another on March 2, 2020. RA.5,23-37.

as follows: on count three, possession of a large capacity feeding device - not inside the firearm, to prison for not less than two years, six months, not more than three years; on count one, possession of the firearm, to the House of Correction for one year and six months, to be served concurrent with the sentence for count three; on count four, possession of ammunition, to two years supervised probation, to be served concurrent with the sentence for count three; and on count five, carrying a loaded firearm, to two years supervised probation, to be served concurrent with the sentence for count 4. RA.13. He received credit for 13 days of pre-trial incarceration. RA.13.

For the suppression hearing, Guardado was represented by Kenneth Resnick, the government by A.D.A. Joanna Staley. TrS/1. At trial, he was represented by Daniel Thompson, the government by A.D.A. Jacqueline McCormick Stillman. Tr1/1. Guardado was appointed Attorney Elaine Fronhofer to represent him for this appeal. RA.14.

Statement of Facts

Suppression hearing

Boston police officer Mathew Pieroway testified that on January 25, 2019, either late morning or early afternoon, he received a telephone call from a confidential informant, whom he referred to by the

pseudonym "Z." TrS/10. Z had provided information to police in the past, which, on one occasion, resulted in a narcotics-related arrest. TrS/8-9.

Z told Pieroway that "Chubs," whom Pieroway knew to be Carlos Guardado, was either driving around or going to the Watertown area in a green Honda with particular Maine plates, and inside that vehicle Guardado had a backpack with a silver firearm "inside the backpack." TrS/10-11,13,15,44. Pieroway testified that he already knew Guardado and was "very familiar with this vehicle." TrS/16,18. Asked if it was Z who informed him that Guardado was operating this car, Pieroway replied: "I had already known that …. It was collaborated [*sic*] you could say." TrS/41. Pieroway explained that in "[p]rior conversations with Z, we have identified Mr. Guardado's vehicle as this Maine registration." TrS/14.

Pieroway could not recall Z ever telling him specifically where Guardado was going. TrS/44. Z did tell Pieroway that Guardado worked at an AutoZone store but not that it was the store in Watertown. *Id.*

Pieroway stated Z was paid $250 by the police as a reward for providing this information. TrS/43.

Pieroway was not working when he received the call from Z. TrS/10. About ten minutes after receiving Z's call, Pieroway drove to Watertown and "at the same time" contacted Det. Lewis of the Watertown police and told Lewis the tip he had received. TrS/17,43-44.

While driving to Watertown, Pieroway had subsequent conversations with Z, who told him "the firearm is in a black backpack, inside the vehicle," information Pieroway also wrote in his report. TrS/47,48.

About 30 minutes after leaving his home, Pieroway arrived in Watertown. TrS/40. Some five hours after leaving his home, Pieroway "stumbled upon" Guardado driving in a green Honda Accord with plates that matched the information he had received, in an area of Watertown near an AutoZone. TrS/18-20,48,49. (Pieroway never specified the time that he finally found Guardado. He said he found Guardado within a half hour "of receiving information leading up to the vehicle's location" but never stated when he received that supplemental information. TrS/18. Pieroway did, however, state that it was about 20 minutes after he spotted Guardado that Det. Lewis arrived at the scene and Lewis's testimony indicated that he arrived at the AutoZone somewhere between 5:45 and 6:15 pm. TrS/21,63,67,70-71.)

After spotting Guardado, Pieroway parked at a "surveillance point" in an adjacent parking lot. TrS/50. From his "partially blocked" vantage point, he could see Guardado's upper torso, in the vicinity of his car in the AutoZone parking lot, walking toward the store. TrS/20,50. He did not see Guardado with a black backpack. TrS/20.

Twenty to thirty minutes after his arrival, other officers arrived. TrS/19,20-21,52. These included Lewis along with members of Lewis's unit, Pieroway's supervisor, Boston Sergeant Detective Feeney, Boston Detective Miskell, Boston Officer Jason Nunez, as well as officers from other towns. TrS/22-24.

Pieroway observed Guardado working, assisting customers in the AutoZone, including installing windshield wiper blades in the parking lot for a customer. TrS/21,53.

At approximately 6:45 pm, he observed Guardado approach his car "with keys in hand." TrS/23. Pieroway confirmed that, although his view was partially obscured, at that point, he had not seen the back-pack leave the car, nor was Guardado carrying one as he approached the car. TrS/23,50-51,53

As soon as Guardado opened the driver's side door, all of the officers approached Guardado. TrS/23. A search of the car did not

reveal a backpack. TrS/25. Police then searched Guardado himself for a firearm and took his car's keys from him. *Id.* Police unlocked the car's glovebox and found a silver firearm and ammunition. TrS/25-26.

In his report of the incident, written that day, Pieroway admitted that he wrote that, after police found the gun:

> Officers placed [Guardado] under arrest for unlawful possession of a loaded firearm. Officers then entered AutoZone to retrieve Guardado's property which he left at work.

TrS/45,56. At the hearing, however, Pieroway claimed that officers entered the AutoZone "at the same time" the car was searched. TrS/55,56.

Detective Mark Lewis testified that around 5:30 pm, he received a call from Pieroway informing him that a confidential informant had told him "Carlos Guardado was in possession of a silver firearm and that it was in his vehicle, in a black backpack." TrS/63,64. Further, that Pieroway told him Guardado was driving his vehicle in a particular area in Watertown. TrS/63. Ten to fifteen minutes after receiving this information, Lewis arrived at the AutoZone and Pieroway showed him where Guardado had parked his car and told Lewis that Guardado was in the AutoZone assisting customers because he worked there.

TrS/65,67,69. Approximately five other officers were already there surveilling the area. TrS/68.

While parked near the AutoZone, Lewis had someone in his department run Guardado's information through "CJIS" and "developed that he was not a license to carry [*sic*] in Massachusetts." TrS/64.

Approximately one-half hour after he arrived, Lewis observed Guardado walk to his car and open his door, at which point he, along with members of his task force and of the Boston police approached Guardado. TrS/70-71. He and Detective Miskell approached Guardado and "Miskell informed him … that we believe that there was a firearm inside his vehicle." TrS/73.

Lewis described the car as a "small sedan." TrS/83. He testified that he "immediately" did an initial search of the car's interior, its door pockets, and the trunk, which took "less than a minute." TrS/74-75,78,83. Finding no backpack, he then patfrisked Guardado, asserting he did so to make sure he was not in possession of "the firearm." TrS/83. The patfrisk revealed Guardado was unarmed but Lewis took Guardado's car keys from him, unlocked the glovebox and saw inside a silver firearm with a magazine inserted and another magazine, both containing ammunition. TrS/73-78,84.

Guardado was then arrested. TrS/79. Lewis testified that, after Guardado was arrested, Detective Sergeant Claflin of the Newton police department came out of the AutoZone and informed Lewis that he had found an empty "gun box" inside a black backpack in the store. *Id.*

Lewis said that after being arrested, Guardado said something like, "You got me with the gun" and that there "wasn't one in the chamber." TrS/80. He asserted that, later, at the station, Guardado told him that he had purchased the gun for $600. TrS/81.

Detective Sergeant John Claflin, Jr. of the Newton Police testified that at 6:30 pm on January 25, 2019, he arrived at the AutoZone in Watertown after receiving a call from Detective Lewis. TrS/86-7. After arriving, his attention was drawn to a green Honda and he was aware that he was to be on the lookout for Guardado. TrS/87-8. Upon seeing Guardado exit the store and walk toward the car, Claflin testified that he first went toward the car "just to make sure everything was safe there" and, thereafter, proceeded, along with Lieutenant Manning, to go into the AutoZone. TrS/89-90.

Claflin said his purpose in entering the AutoZone was to see if Guardado had left any "personal items behind, if there was a black backpack in there or anything along those lines." TrS/90. An employee

brought the officers "to an area where employees store their clothing" which was "behind the front desk." *Id.* While in the area where employees "store their belongings" an employee pointed to a backpack that was "behind the desk" and said it belonged to Guardado. TrS/91. The officer picked it up, felt the outside and felt a "hard case" which he asserted was "consistent" with a "gun container." TrS/91. He opened the backpack and found "a hard-sided container that's for a firearm." TrS/92. Upon opening the case, he discovered it was empty. TrS/94.

Claflin testified that, after leaving Guardado's car, it took him approximately 30 seconds to walk to the AutoZone, speak to the employees and to be directed to the area where employees put their personal items. TrS/90. He testified he was inside the AutoZone for approximately five minutes. TrS/94.

He asserted that, upon leaving the store, a firearm was recovered "within minutes after [his] arrival back in the parking lot." TrS/95. Claflin then told the officers conducting the search that he had recovered an empty firearm box and "they informed me that they had recovered the firearm" from the glovebox. *Id.* Claflin claimed that, after that, Guardado was placed under arrest. TrS/96.

Trial

The details of the search and arrest presented at trial were similar to those presented at the suppression hearing.

At trial, defense counsel elicited from Officers Lewis and Pieroway that, while surveilling the area, they observed Guardado working at the Watertown AutoZone. TrII/83,112. Both officers confirmed that Guardado was wearing AutoZone attire. TrII/83,85,112. Lewis had observed Guardado assisting customers and other officers had observed Guardado assisting customers in the parking lot, installing windshield wiper blades. TrII/83-85,105.

Officers Lewis, Pieroway, and Nunez all confirmed that Guardado's Honda was parked in an AutoZone parking spot. TrII/85,112,117.

At the close of the government's case, defense counsel moved for a required finding of not guilty on the charge of possession of a firearm based upon the statutory exemption and the evidence that established Guardado was "in or on" his place of business when the police found the firearm in his vehicle. TrIII/28-30. The court denied the motion. TrIII/31.

Nonetheless, in his closing, defense counsel argued to the jury that the government had failed to establish Guardado possessed a firearm "outside" his place of business. TrIII/49.

Prior to the jury being given their instructions, counsel asked that the jury be instructed that there is an exemption for criminal liability if it was established that Guardado was at his place of business when he possessed the firearm. TrIII/74. The court denied the request. TrIII/76. After the jury instructions were given, defense counsel objected and again asked that the court instruct on the exception for possession at one's place of business; again, the court refused. TrIII/108.

During deliberations, in response to a jury inquiry as to whether Guardado had to be "outside" his business to be criminally liable, the court informed the jury that "as a matter of law, I ruled that that exemption does not apply in this case." TrIII/119.

Additional details from the record relevant to this appeal are set forth in the argument.

SUMMARY OF ARGUMENT

Carlos Guardado's rights under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights were violated and the firearm and related contraband the police seized from the glovebox of his vehicle should have been suppressed because: (a) contrary to the lower court's understanding, no evidence was introduced that would support the conclusion the informant had firsthand knowledge that would satisfy the basis of knowledge prong of *Aguilar-Spinelli*, nor was there evidence this informant had provided more than one tip leading to an arrest, nor one that led to an arrest for a firearm, therefore the veracity prong was also not satisfied [Pages 23-33]; (b) given the tip was that the suspected contraband was "inside a backpack inside the car," the information received was insufficient to provide probable cause to search this small car's glovebox, where it would not be reasonable to conclude a backpack containing a firearm would be located [Pages 33-38]; (c) given that the police accessed the glovebox by unlawfully patfrisking Guardado and taking his keys, the evidence uncovered as a result of that unlawful police conduct must be suppressed [Pages 38-41]; and d) the government could not rely upon police finding an empty "gun box" at Guardado's

place of work to search his car's glovebox because: (i) the search of Guardado's backpack stored at his workplace was not supported by the tip the police received and, further, it did not fall under any exception to the warrant requirement, therefore the resultant search of the glovebox must be suppressed as "fruit of the poisonous tree," [Pages 41-47] and (ii) the evidence contradicted the suggestion that the search of the backpack *preceded* the search of the glovebox, therefore no "collective knowledge" justification could be made for the subsequent search of the glovebox. [Pages 47-50]

Given the evidence that Guardado was "in or on" his place of business when police found the firearm in his vehicle, the trial judge erred when he ruled that "as a matter of law" the statutory exemption for possession of a firearm at one's place of business did not apply and refused to instruct the jury regarding this exemption provision in the statute. [Pages 50-61]

ARGUMENT

I. The lower court erred when it determined the government's warrantless search of the glovebox of Carlos Guardado's vehicle was constitutional.

"Under the Fourth Amendment searches conducted without valid warrants are presumed in the first instance to be unreasonable." *Commonwealth* v. *Antobenedetto*, 366 Mass. 51, 57 (1974). The government bears the burden of proving "that a particular search falls within a narrow class of permissible exceptions." *Id.*

In *Commonwealth* v. *Cast*, 407 Mass. 891 (1984), the Court recognized the exception to the warrant requirement in the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights where "police have probable cause to believe that a motor vehicle on a public way contains contraband or evidence of a crime, and exigent circumstances make obtaining a warrant impracticable …." *Id.* at 901, citing *Carroll* v. *United States*, 267 U.S. 132, 149 (1925).

Standard of review

An appellate court accepts a judge's subsidiary findings of fact, absent clear error, but conducts an independent review of the judge's ultimate findings and conclusions of law. *Commonwealth* v. *Mubdi*, 456 Mass.

385, 388 (2010). A finding is clearly erroneous when it is not supported by the evidence. *Commonwealth* v. *Holley*, 52 Mass.App.Ct. 659, 663-664 and n. 3 (2001) (appellate court not obligated to defer to motion judge's findings that are not supported by the evidence).

a) Tip did not satisfy *Aguilar-Spinelli* criteria

Where a search is conducted based upon a tip from an informant, in order to establish probable cause to conduct a search, the two-prong *Aguilar-Spinelli* reliability test must be satisfied. *Commonwealth* v. *Upton,* 394 Mass. 363, 374-75 (1985), citing *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969) (rejecting the "totality of the circumstances" test and holding that art. 14 of the Massachusetts Declaration of Rights provides citizens greater protection than the Fourth Amendment). Under the *Aguilar-Spinelli* test, the government must prove:

> (1) some of the underlying circumstances from which the informant concluded that the contraband was where he claimed it was (the basis of knowledge test), and (2) some of the underlying circumstances from which the affiant concluded that the informant was 'credible' or his information 'reliable' (the veracity test).

Id. "[E]ach element of the test must be separately considered and satisfied or supplemented in some way." *Id.* at 376.

"These are vital, not merely perfunctory requirements." *Commonwealth* v. *Avery,* 365 Mass. 59, 63 (1974).

These prongs must be met whether the government is seeking a search warrant or where, as in this case, it claims the search was conducted under an exception to the warrant requirement. See *Commonwealth* v. *Cast*, 407 Mass. at 896.

Here, the government failed to establish *either* prong.

The Basis of Knowledge Prong

In its written findings, the lower court indicated that the "basis of knowledge" prong was satisfied because the informant "said he had specific knowledge of the firearm being in the black backpack *because he saw it there* …." A.2 (emphasis added).

There was no such testimony.

When Pieroway was asked why he thought the informant ("Z") had firsthand knowledge, the officer merely replied: "Because I had asked Z 'is the firearm real'" and Z replied yes. TrS/15. Pieroway's testimony did not establish Z had firsthand knowledge of this fact. Z – who was getting paid to feed information to the police – plainly might

have been passing along a rumor or secondhand information that Guardado had a "real" gun. TrS/43. The actual testimony is far different than the judge's incorrect assertion that Z had said he personally saw the firearm where he alleged it to be. The lower court's determination, which was based upon this misunderstanding of the evidence, was clearly erroneous. *Commonwealth* v. *Holley*, 52 Mass.App.Ct. at 664.

Nor could it be claimed that, despite the absence of direct evidence, the informant's firsthand knowledge could be inferred based upon the "level of detail" contained in the tip.

According to Officer Pieroway, Z told him Guardado would be traveling to or around the Watertown area with a silver firearm inside a black backpack in his green Honda. TrS/12,44,47. But Z did not tell Pieroway *where* in the city Guardado was going, nor any other details about Guardado on that day, such as what he would be wearing, nor even an *approximate* time of when Guardado would be driving to or in that municipality. This temporal gap in the information Z provided would explain why Pieroway left in search of Guardado at approximately noon that day but did not come upon him until some five *hours*

later.[3] Indeed, Pieroway admitted he literally just "stumbled upon" Guardado's car as he was out looking for him somewhere in Watertown and then followed him to the AutoZone. TrS/49.

The details provided by Z fall far below even those cases where the evidence was held *in*sufficient to infer firsthand knowledge. Cf. *Commonwealth* v. *Lyons*, 409 Mass. 16, 18-20 (1990) (informant's tip received at 1:15 am that two white men, one named "Wayne" had just purchased narcotics in Chelsea and were heading to Maine in a silver Hyundai with specific Maine registration number – despite police corroboration, at 2:00 am, of silver Hyundai with same registration number, heading to Maine, occupied by two white men – did not provided sufficient detail to establish informant's firsthand knowledge sufficient even to provide "reasonable suspicion" to "conduct an investigatory stop" let alone the more "rigorous" showing required for probable cause to search); *Commonwealth* v. *O'Brien*, 30 Mass.App.Ct. 807, 809-

[3] Pieroway testified he received the call from Z midday ("late morning or early afternoon") and was in his car heading to Watertown about ten minutes later. TrS/10,17,44. He further testified that about twenty minutes after he spotted Guardado and parked his car near the AutoZone, Detective Lewis and other officers arrived at the AutoZone. TrS/21. Lewis's testimony established that he arrived at the AutoZone somewhere between 5:45 pm and 6:15 pm. TrS/63,67,70-71. This means that the earliest Pieroway would have arrived at the AutoZone was around 5:25 pm.

812 (1991) (tip that man named Ralph, who drove black Oldsmobile Toronado with Rhode Island plates living at particular address had received stolen yellow pickup truck with white cap, which would be parked behind building there; despite police confirming theft of yellow pickup, and observing black Oldsmobile Toronado with Rhode Island plates parked in front of address and yellow pickup behind building, held insufficient to establish basis of knowledge); *Commonwealth* v. *Carrasquillo*, 30 Mass.App.Ct. 781, 787 (1991) (informant's tip that defendant had gone to New York City and would be driving to his home in Springfield in early afternoon, accompanied by Hispanic man with beard and mustache, transporting cocaine, and police corroboration that defendant's automobile was seen on main road from New York to Springfield during time period predicted, did not reveal any special familiarity with the defendant's affairs that might substitute for explicit information about the informant's basis of knowledge); *Commonwealth* v. *Brown*, 31 Mass.App.Ct. 574, 578 (1991) (informant's description of defendant, which included his name, physical appearance, approximate age, mode of travel, and time and place of arrival was not sufficiently detailed to show it was more than casual rumor); *Commonwealth* v. *Spence*, 403 Mass. 179, 182, n.3 (1988) (tip that two Black men, one

named Donald Williams, had travelled from Boston on Eastern Air shuttle to New York City, would be returning on 3 or 4 pm shuttle to Logan, that Williams was approximately 5'6", wearing black baseball cap, and that one of the men would be carrying heroin in crotch area of his pants, and where police went to Logan, noted last two passengers to leave 4 pm shuttle fit description provided, and defendant had noticeable bulge in left crotch area, both men moved slowly while scanning area, and frequently looked toward one officer, defendant left the group, walked quickly away without stopping in baggage area).

Despite the informant in *Spence* providing numerous details, what the high court held was lacking was evidence that they could predict the suspect's behavior with precision or accuracy. *Spence*, supra at 182 and n.3 (despite large amount of details provided, Court held informant provided "only sketchy detail about [the defendant's] expected behavior" and few details about his physical appearance).

Here, the informant provided far *less* information predicting Guardado's behavior. Further, the few accurate details that Z provided "were merely innocent details," an inadequate basis to presume firsthand knowledge. *Commonwealth* v. *Frazier*, 410 Mass. 235, 240 (1991) (informant's tip that included registration number of vehicle

and suspect's telephone number held insufficient). *Commonwealth* v. *Bottari*, 395 Mass. 777, 784 (1985) (corroboration of innocent details less significant in establishing probable cause than corroboration of facts suggestive of criminal activity).

Moreover, the lower court relied on the fact that Z had told Pieroway that Guardado would be travelling in his green Honda with a particular Maine license plate [A.5] but Pieroway's testimony was that Z had merely "confirmed" this fact, which Pieroway already knew. TrS/14. Indeed, Pieroway's testimony indicated it was *the police* who informed Z of these details about Guardado's vehicle. TrS/13-14,40,47.

Similarly, Pieroway testified that he already knew Guardado went by the nickname "Chubs." TrS/16. Pieroway testified he was unsure if Z even knew Guardado's real name. TrS/41.

In sum, the lower court's reliance upon these innocent details – that were not even clearly provided by Z – as proof of Z's basis of knowledge is misplaced. RA/2,5.

Aside from inaccurately predicting Guardado would have a black backpack inside his car containing a firearm, the only other information that Z clearly provided to the police was that Guardado

worked at an AutoZone store but, notably, Z did not say even say which one. TrS/44. Where the corroborated information is "essentially such as was commonly available and as consistent with [defendant]'s innocence as with criminal activity" that information is inadequate to corroborate the basis of knowledge test under *Aguilar-Spinelli*. *Commonwealth* v. *Matta*, 34 Mass.App.Ct. 921, 922 (1993) (corroborated information "did not include any specific details about the defendant which were not easily obtainable by an uninformed bystander").

Particularly in this case, where the only significant information in Z's tip proved inaccurate, the government failed to establish the basis of knowledge prong. See *Commonwealth* v. *Carrasquillo*, 30 Mass.App.Ct. at 787 (corroboration of informant's tip weakened by fact that, when stopped by police, defendant's automobile not headed in direction informant predicted); *Commonwealth* v. *O'Brien*, 30 Mass.App.Ct. at 811 (truck police observed did not fit the informant's description of the stolen pickup truck; former had a yellow cap, latter had white cap).

The lower court relied upon *Commonwealth* v. *Cast*, supra, to support its conclusion. A.6. But the level of detail presented here – a vague description of where defendant would be, no specific temporal

information, no description of what he would be wearing, and an inaccurate prediction that a backpack would be in the defendant's car and that the backpack contained the firearm – stands in stark contrast to those presented in *Cast.* There, the informant accurately described the defendant's "pickup truck, and his employment situation ... [and his use of] luxury automobiles and expensive hotels in conducting his business ..."; "accurately predicted the appearance and expected behavior of the defendant on the night of his arrest ...."; and "named the defendant, described his appearance, gave his phone number, knew of his national origin and citizenship status, how he had obtained that status as a result of marriage to a Massachusetts native, and described the anglicization of his name." 407 Mass. at 896-897. Other cases where courts have found a tip's level of detail was sufficient to infer the informant's direct personal knowledge further highlight just how deficient were the facts Z provided. See e.g., *Commonwealth* v. *Welch*, 420 Mass 646, 651-652 (1995) (in addition to naming defendant and identifying him as Medford firefighter, informant accurately provided defendant's telephone number, physical appearance, accurately predicted defendant would be driving Ford station wagon, delivering cocaine, at specific street corner, between 7:30 and 8 pm on

specific day); *Commonwealth* v. *Robinson*, 403 Mass. 163, 165 (1988) (at 4:00 am, informant accurately predicted defendant would arrive with large amount of cocaine between 5:00 and 5:30 am, at particular station, on particular bus, in addition to accurately describing suspect and their exact attire).

Because the government's proof did not meet the "basis of knowledge" prong, the lower court erred when it denied the motion to suppress.

The Veracity Prong

To support its finding that the government had established the "veracity" prong of *Aguilar-Spinelli,* the lower court wrote that Z had provided information that led to two separate arrests, one involving a firearm. A.1-2.

Once again, there was no such evidence.

At the suppression hearing, the prosecutor asked Pieroway if Z had provided information that led to "an" arrest (singular). TrS/8. Pieroway confirmed that narcotics were recently seized based upon Z's tip and that an arrest was made. TrS/8-9. That was the only testimony regarding *any arrest* made based upon a tip from Z.

After that exchange, the prosecutor asked whether Z "had provided information related to a firearm." TrS/9. Pieroway responded that Z had informed him that a firearm was being stored near a playground and that, based upon that information, police "recovered a firearm exactly where [they] had pointed us to …." TrS/10. Notably, the prosecutor did *not* then inquire whether this led to an arrest, let alone a conviction. Indeed, the evidence did not establish that this other "tip" from Z provided information that led to the discovery of even any unlawful activity.

Contrary to the motion judge's belief, all that the government's evidence established was that Z provided information on *one* occasion that led to an arrest, and *not* for a firearm; an insufficient basis to satisfy the veracity prong of *Aguilar-Spinelli*. *Commonwealth* v. *Melendez*, 407 Mass. 53, 58 (1990) (fact that informant gave information on one occasion in past which led to arrest insufficient to satisfy veracity test).

Because the government's proof did not meet the "veracity" prong, the lower court erred when it denied the motion to suppress.

b) Tip did not establish probable cause to search glovebox

Even if the government had met both the veracity prong and

the basis of knowledge prong (based upon Z's tip that a silver firearm was inside a black backpack in Guardado's car), the tip did not provide probable cause to search the car's *glovebox*. TrS/12-13,47-48.

Our jurisprudence makes a critical distinction in automobile search cases. On the one hand are those cases where police (1) have received sufficient information to establish "probable cause" to search the vehicle but (2) are not informed of precisely where in the vehicle or in what container the contraband is located. Only in situations satisfying both of those conditions may police search the entire vehicle. See e.g., *Commonwealth* v. *Wunder*, 407 Mass. 909, 913 (1990) (warrantless search of entire car including the containers [gym bag and cooler] found therein upheld *because* "[t]his is *not* a case where law enforcement officers had probable cause to suspect that contraband was in a *particular container* ...") (emphasis added); *United States v. Klein,* 860 F.2d 1489, 1494 (9th Cir. 1988) (search of entire car justified *because* how narcotics would be packaged and in what container, if any, they might be found was *unknown* to DEA agents at the time of defendant's arrest); *United States* v. *Reyes,* 792 F.2d 536, 541 (5th Cir.), cert. denied, 479 U.S. 855 (1986) (upholding warrantless search of gym bag in car, stating that "although the government agents had probable cause to

believe narcotics were in the Blazer, they had no reason to know the exact location ... [*t]herefore*, probable cause extended to the entire vehicle and its contents …") (emphasis added).

On the other hand, are those situations where, as here, the information the police are acting on *did* provide the specific location or container within a vehicle where the contraband was suspected of being located. In such cases, the scope of the search is limited to those areas where the information that provided probable cause to search indicated the contraband would be. See e.g., *Commonwealth* v. *Garden*, 451 Mass. 43, 51-52 (2008) (search permitted based upon odor of marijuana emanating from occupants' clothing but search of the Honda's trunk "exceeded the permissible scope of the search because Officer … could not reasonably have believed that the source of the smell … would be found in the trunk"); *Commonwealth* v. *Moses*, 408 Mass. 136, 144 (1990) (officers who observed defendant duck beneath dashboard after his vehicle was stopped could conduct interior search of automobile "confined in scope" to discover any weapon that could have been concealed *beneath dashboard*).

This distinction is particularly relevant in this case because, if there was any justification for the search of Guardado's vehicle, it was

specifically *because* of the level of detail in the informant's tip – that a firearm would be inside a black backpack inside the car.

Here, Detective Lewis testified that, after he conducted the warrantless search of the car, including the trunk, he turned to Guardado, who was standing beside his car, and patfrisked him "to make sure … he was not in possession with [*sic*] the firearm." TrS/83. Lewis then used the keys he had taken from Guardado to search the glovebox for a firearm. TrS/73-73. In other words, realizing there was no backpack in the car – contradicting the very information that ostensibly permitted the search – police then *expanded* their search to locations where there was clearly no backpack; first Guardado's person and then the glovebox.

It is contrary to both our jurisprudence and logic to initially assert probable cause is established because of the level of detail provided in the tip but then, when those very details prove inaccurate, to claim there is probable cause to search anywhere else police think the contraband "could" be. Once the search revealed no backpack was in the car, police did not have probable cause to search either Guardado (who was not carrying a backpack [TrS/53]) nor inside this small sedan's glovebox where it would not be reasonable to conclude a

backpack containing a firearm would be. See *Commonwealth* v. *Roland*, 448 Mass. 278, 281 (2007) ("reasonableness is the "'touchstone' of art. 14 ... and the Fourth Amendment"). See also *United States* v. *Ross*, 456 U.S. 798, 823 (1982) ("probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase").

The lower court's reliance upon *Commonwealth* v. *Davis*, 481 Mass. 210, 220 (2019) to support this conclusion is misplaced. A.6. In *Davis*, police observed the defendant operating a motor vehicle while under the influence of marijuana and arrested him for that crime. 481 Mass. at 211. Thereafter, in search of "instrumentalities" of the crime that was the subject of that arrest, police searched the car's glovebox. *Id.* at 222. In contrast, when police searched Guardado's car, Guardado had not been arrested nor had the police observed him commit any offense. Thus, a search of Guardado's glovebox could not be justified as a search for the "instrumentalities" of a crime police had just observed.

The lower court's reliance upon *Cast*, supra, is similarly misplaced. A.6. In *Cast*, the search of the entire car was explicitly justified because the informant "*did not specify* how the cocaine might be packaged or where in particular it might be located within Cast's

possession as he transported it." 407 Mass. at 902 (emphasis added). Importantly, as the Supreme Judicial Court in *Garden* pointed out:

> Nothing in the *Cast* case suggests that where automobiles are concerned, the general rule that officers limit their search to those locations where the objects of the search *might reasonably be found* is somehow suspended.

Garden, 451 Mass. at 52 (emphasis added).

The lower court erroneously denied the motion to suppress when it concluded that the tip permitted a search of the vehicle's glovebox.

c) Evidence was product of unlawful patfrisk

Even if the tip received did provide probable cause to search the glovebox, the evidence seized therefrom must be suppressed because that search was the result of an unlawful patfrisk of Guardado.

In *Commonwealth* v. *Torres-Pagan*, 484 Mass. 34 (2020), the Court explained that a "'patfrisk' is a 'carefully limited search of the outer clothing of [a] person[ ] ... to discover weapons'" for safety purposes. *Id.* at 36, quoting *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968). The Court further stressed that a patfrisk "is a serious intrusion on the sanctity of the person [that] is not to be undertaken lightly." *Id.* (internal citations and quotations omitted).

To withstand a legal challenge, the government "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U.S. at 21 & 29. *Commonwealth* v. *Silva*, 366 Mass. 402, 406 (1974) (holding same). Specifically, the "officer must reasonably suspect that the person stopped is armed and dangerous." *Arizona* v. *Johnson*, 555 U.S. 323, 327-328 (2009). *Commonwealth* v. *Loughlin*, 385 Mass. 60, 62 (2010) (patfrisk justified only if evidence supported reasonable belief defendants were "armed and presently dangerous").

The lower court wrote that in view of the information police had received and because their search of the vehicle police did not find a gun: "Det. Lewis was in fear for his safety due to the potential presence of a gun and, therefore, conducted a pat frisk on the defendant." A.3. Not only was there no testimony that Lewis was in fear for his safety when he patfrisked Guardado, the record undermines any suggestion that police had reasonable suspicion to believe Guardado was armed and presently dangerous when he did so.

Police had not seen Guardado remove a gun or even a backpack that might contain a gun from the vehicle. TrS/20. Nothing in Z's tip suggested one would be on Guardado's person. The police did

not report any information from which they could reasonably conclude Guardado was likely to be dangerous (they had stopped Guardado, apparently shortly after he started his shift at his AutoZone job). Police were not responding to a report of a violent incident. Indeed, no testimony suggested Guardado did anything other than stand by as a swarm of officers (far outnumbering Guardado) stood around him, while his car was searched by Detective Lewis; no furtive or suspicious movements, no threatening verbal of physical gestures, etc. TrS/22-24. See *Commonwealth* v. *Torres-Pagan*, 484 Mass. at 40-42 (discussing caselaw and factors that would/would not justify patfrisk).

Contrary to the lower court's assertion, not a single officer testified the patfrisk was done because officers feared for their safety. Rather, what the officers said again and again was that they searched Guardado, took his keys from him, and then used the keys to immediately search the glovebox. TrS/26,73-74,75,77,78,84.

In *Wong Sun* v. *United States*, 371 U.S. 471 (1963), the Supreme Court held:

> In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person … evidence seized during an unlawful search [can]not constitute proof against the victim of the search. …The exclusionary

> prohibition extends as well to the indirect as the direct products of such invasions.

Id. at 484 (internal citations omitted). Here, the officers' illegal conduct – the patfrisk of Guardado – that allowed for their subsequent search of the glovebox requires that the evidence obtained as a result must be suppressed as "fruit of the poisonous tree." *Id.* at 488. *Commonwealth* v. *Ferguson*, 410 Mass. 611, 614-616 (1991) (unlawful search of defendant's jacket that yielded contraband necessitated suppression of defendant's subsequent inculpatory statements that followed).

d) Discovery of empty "gun box" in Guardado's backpack kept at his workplace did not legitimize search of glovebox

Police observed Guardado drive to his place of employment, exit his car and enter his workplace. TrS/18-20. They did not see him remove a backpack from the car nor carry one into the store. TrS/20. They then observed Guardado working and, within an hour or so of his arrival, saw him exit the store and walk to his car – again, without a backpack. TrS/21,53.

At some point, Detective Sergeant Claflin proceeded into Guardado's workplace in search of what he described as Guardado's "personal items." TrS/90. There, he eventually found Guardado's

backpack (behind the front desk, where employees stored their belongings), opened it up and discovered an empty "gun box." TrS/90-91.

On the assumption that the search of the backpack *could* have occurred prior to the search of the glovebox, the lower court wrote that this "strengthened" the probable cause to search the glovebox. A.7. But *if* the search of the backpack did occur first (the timing of which was not established), the discovery of the empty gun box was the product of an unlawful search; one conducted without *either* probable cause or a requisite warrant, therefore, it could not support any subsequent search. *Wong Sun*, 371 U.S. at 484-488. See also *Commonwealth* v. *Fredericq*, 480 Mass. 70, 78 (2019) ("the exclusionary rule bars the use of evidence derived from an unconstitutional search or seizure").

Whether a search is subject to the protections of the Fourth Amendment or art. 14 "'turns on whether the police conduct has intruded on a constitutionally protected reasonable expectation of privacy.'" *Commonwealth* v. *Porter P.*, 456 Mass. 254, 259 (2010), quoting *Commonwealth* v. *Montanez,* 410 Mass. 290, 301 (1991). *Bond* v. *United States*, 529 U.S. 324, 337-338 (2000). This expectation is established by asking "whether the individual … has shown that he sought to preserve something as private" and whether their "expectation of privacy

is one that society is prepared to recognize as reasonable." *Bond*, 529 U.S. at 338 (internal citation and quotations omitted) (holding bus passenger had reasonable expectation of privacy in duffel bag stored in overhead bin where he used an opaque bag and placed bag directly above him).

Items such as one's personal luggage (purse, backpack, etc.) do not lose the protections from warrantless searches merely because they are stored at one's workplace. See *Mancusi* v. *DeForte,* 392 U.S. 364, 367-369 (1968) (recognizing employees may have a reasonable expectation of privacy against intrusions by police); *Oliver* v. *United States,* 466 U.S. 170, 178, n. 8 (1984) (holding such an expectation in one's place of work is "based upon societal expectations that have deep roots in the history of the [Fourth] Amendment."). See also *O'Connor* v. *Ortega*, 480 U.S. 709, 716 (1987) ("employee's expectation of privacy in the *contents* of the luggage is not affected in the same way" as their expectation of privacy in outward appearance of the luggage they have brought to work) (emphasis in original).

The officer's search of Guardado's "personal items" – his backpack – which he had secured in a non-public area of his workplace (behind the counter where employees stored their belongings), clearly *was*

"conduct that intruded on a constitutionally protected reasonable expectation of privacy." TrS/90-91. For that search to be constitutional:

> the Commonwealth bears 'a heavy burden' to show (1) that the search or seizure was supported by 'probable cause,' such that a warrant would have issued had one been sought,[ ] and (2) that there 'exist[ed] ... exigent circumstances' that made obtaining a warrant impracticable.

Commonwealth v. *White*, 475 Mass. 583, 588 (2018) (internal footnotes omitted), quoting *Commonwealth* v. *Tyree*, 455 Mass. 676, 684 (2010).

For the reasons discussed in Point I(b) supra, the tip police were acting upon – that a suspected firearm was located inside a backpack *in Guardado's vehicle* – did not provide probable cause for police to search Guardado's backpack stored in his workplace, especially given that there was no testimony that police observed Guardado remove a backpack from the vehicle. See discussion supra at 33-38.

But even if probable cause did exist, the government failed to establish there were exigent circumstances that necessitated an immediate *warrantless* search.

With respect to exigent circumstances, the Supreme Judicial Court has explained that:

> [T]he potential loss or destruction of evidence can constitute an exigent circumstance justifying a warrantless entry and search ... but *only if* the Commonwealth proves that the officers' belief was objectively reasonable *and supported by specific information*.

Commonwealth v. *Owens*, 480 Mass. 1034, 1036 (2018) (emphasis added). An appellate court reviews whether exigent circumstances existed with "particular emphasis on whether police 'consider[ed] how long it would take to obtain a warrant' before acting ...." *Commonwealth* v. *Tyree*, 455 Mass. at 690, quoting *Commonwealth* v. *Pietrass*, 392 Mass. 892, 899 (1984).

Here, "the record is devoid of evidence that obtaining a warrant" prior to searching Guardado's backpack "was impracticable." *Id.* at 690.

(Consent is another lawful basis for conducting a warrantless search. But the government presented no evidence that police requested, let alone were granted, permission to search Guardado's backpack. Notably, a fellow employee could *not* have provided valid consent to the search. See *Commonwealth* v. *Magri*, 462 Mass. 360, 366-368 [2012] [defendant maintained reasonable expectation of privacy in his backpack stored in bedroom of hosts home where he had been a guest, even where host indicated to police that defendant was no

longer welcome; host "who was not shown to have any interest in the defendant's [backpack and bags], lacked authority to consent to their search, notwithstanding her valid consent to a search of her apartment"].)

In its decision, the lower court suggested Claflin's manipulation of the backpack prior to opening it legitimized his subsequent search of the backpack's contents. A.4. To the contrary, the manipulation of the backpack was *itself* a violation of Guardado's Fourth Amendment right to be free from unreasonable warrantless searches. *Bond* v. *United States*, 529 U.S. at 338-339 (officer's physical manipulation of defendant's carry-on bag on bus violated Fourth Amendment).

Moreover, even if the manipulation of the backpack were lawful, what Claflin felt would not have provided probable cause to open and search the backpack. The lower court wrote that after finding Guardado's backpack, Claflin "picked up the backpack and could feel what he knew to be a gun storage box." A.4. But that was *not* Claflin's testimony.

Claflin testified he picked up and felt the backpack and could feel "a hard case inside of it, which would be consistent, in my

training, as [*sic*] a gun container." TrS/91. He added that this "hard case" was about 12 inches long by 8 inches high. *Id.*

That one could feel a 12 inch by 8 inch hard case that is "consistent" with a gun container is plainly not the same as feeling what he "knew" was a gun container. A.4. Obviously, a backpack containing a hard case of these dimensions could contain innumerable *non-contraband* items. See *United States* v. *Bonitz*, 826 F.2d 954, 956-957 (10th Cir. 1987) (exception to warrant requirement where container readily establishes its contents did not apply to hard plastic case, sitting in the open, that experts identified as gun case but that trial court thought "could equally be suspected of carrying a violin"). Cf. *Commonwealth* v. *Wilson*, 441 Mass. 390, 396-397 (1993) (under "plain feel" doctrine, officer may seize contraband discovered during *Terry*-type frisk *only* if they feel object whose contour or mass makes its identity *immediately known*).

Finally, this entire rationale for upholding the government's conduct was raised because of the lower court's equivocal suggestion that the officers' might have had *prior* "collective" knowledge of an empty gun box in Guardado's backpack when they searched the glovebox, which, the court reasoned, "could" have supported the

glovebox search. A.7. The lower court's less than definitive assertion of the timing of events is understandable given the officers contradictory testimony. However, the overall record supports the conclusion that, in fact, the glovebox search *preceded* the backpack search.

Officer Pieroway was the officer who: received the tip from the informant; orchestrated the arrival of fellow police officers; was the first to arrive at the scene; was present when Lewis searched Guardado's car and arrested him; and, was the officer who wrote the report of this incident – a report he wrote on the very day the search occurred. TrS/10,17-20,23-25,45. At the suppression hearing, Pieroway admitted that what he wrote in that report was that, *after* the gun was found in the glovebox and *after* Guardado had been placed under arrest: "Officers *then entered* AutoZone to retrieve Guardado's property which he left at work." TrS/56 (emphasis added).

Despite this clear and nearly contemporaneous recording of the events, which established the backpack was searched long after the glovebox search, at the suppression hearing, Pieroway completely changed his story. At the hearing, he claimed officers entered the AutoZone "at the same time" as the search of the car. *Id.* (A possible explanation for Pieroway's seemingly inexplicable revision was that it

later became apparent that the glovebox search was not supported by probable cause. By claiming fellow officers could have discovered the empty gun box prior to the glovebox being searched, that deficiency in their evidence might be overcome. It is interesting to note that, at trial, after the government had cleared the hurdle of the suppression motion, police described the order of these events exactly as Pieroway had *originally* recorded them. TrII/121-122.)

Moreover, Pieroway's *original* version of the events is also in line with Lewis's and Claflin's testimony about the timing of their movements.

Lewis testified that as soon as Guardado began to enter his car, he stopped Guardado and conducted a search of the entire car, including its trunk, which, he said, for this small sedan, took "less than a minute." TrS/71,78,83. He then immediately patfrisked Guardado, took his keys and promptly opened the glovebox. TrS/75. Crediting Lewis's testimony means that, from the time he arrived at Guardado's car, it would have taken approximately two minutes before he searched the glovebox.

Claflin testified that after he saw Guardado go to his car, he too went toward the car "just to make sure everything was safe there" and,

thereafter, proceeded to the AutoZone (he did not say how long he lingered to "make sure everything was safe"). TrS/89-90. He estimated he was in the AutoZone for five minutes during which time he: spoke to employees there; was then led to an area where employees store their personal belongings; saw a backpack sitting on the ground; picked up the backpack and manipulated it; then opened it up, removed the box that was inside, opened the "gun box" and observed it was empty. TrS/90-94.

The overall evidence supports the conclusion that the glovebox was searched before police searched the backpack inside the AutoZone. Claflin's self-serving claim that he believed the firearm was found after he exited the AutoZone [TrS/95] stands in contrast to all the other evidence presented. The government, which bore the burden of proving police had probable cause to conduct the warrantless search of the glovebox, failed to establish that the backpack search preceded the glovebox search. *Antobenedetto*, 366 Mass. at 57. Thus, the government could not rely upon police knowledge of the backpack's contents to justify the search of the glovebox.

Moreover, as discussed, even if the backpack search did precede the glovebox search, that search was unconstitutional and, therefore,

any subsequent discovery that resulted from it should have been suppressed. *Wong Sun*, 371 U.S. at 484-488. *Fredericq*, 482 Mass. at 78.

Here, the lower court erred when it found the government had met its burden of overcoming the presumptively unreasonable warrantless search of the glovebox. Because the statements by Guardado were the product of that unlawful search, they too should have been suppressed. *Id. Commonwealth* v. *Ferguson*, 410 Mass. at 614-616.

Reversal of the convictions are required because without the physical evidence or statements by Guardado that should have been suppressed, "the Commonwealth's case as presented before the trial judge and jury would have been lacking in essential proof." *Commonwealth* v. *Silva*, 366 Mass. at 410-411.

II. Trial court erroneously refused to instruct the jury that, in order to find Guardado guilty of possession of the firearm, the government needed to prove he was not on his place of business.

The government's first indictment against Guardado alleged he violated General Laws chapter 269, section 10(a) by "knowingly" having "under his control in a vehicle" a firearm, while "not being present in or on … his place of business." RA.14. The indictment mirrors the criminal statute. General Laws chapter 269 §10 imposes a penalty on:

"(a) Whoever … knowingly has under his control in a vehicle; a firearm … without either: (1) being present in or on his residence or place of business …." At the start of trial, this language ("said person not then being present in his residence or place of business") was read to the jury through the reading of the indictment. TrII/14.

Throughout trial, defense counsel elicited from every percipient witness that Guardado was, in fact, working at his place of business, the Watertown AutoZone (and was in AutoZone work attire) when he approached his vehicle, which was parked in the business's parking lot, where police found a firearm locked in the vehicle's glovebox. TrII/83-85,112. The lead officer on this case confirmed that leading up to that moment, he had observed Guardado carrying out his job duties while on the business's parking lot, replacing a customer's windshield wiper blades. TrII/105.

Given this evidence, which established Guardado was "in or on" his place of business when the police found the firearm in his vehicle, defense counsel moved for a required finding of not guilty on the first indictment. TrIII/28-30. Counsel also had filed a written motion that included model jury instructions which provide that, under such circumstances, a fourth element the government must prove beyond a

reasonable doubt is: "[t]hat the Defendant possessed the firearm outside of his … place of business." RA.45, quoting Massachusetts District Court Criminal Model Jury Instructions, Instruction 7.600 (Revised January 2013).

The trial judge ruled that the circumstances in this case were not what the legislature intended to exempt and denied the motion. TrIII/31.

Nonetheless, in his closing argument, defense counsel asked the jurors to find Guardado not guilty on the first indictment given the government's failure to meet its requisite burden of proving Guardado possessed a firearm while not at his place of business. TrIII/49.

Thereafter, prior to the jury being given its instructions, counsel asked that the jury be instructed in line with the above-quoted model jury instructions. TrIII/74-75. The judge denied the request asserting:

> … the statute would not cover th[is] factual situation … I interpret that legislative language to mean the business itself – the AutoZone store in which he is working, *not including … the parking lot of that store* ….

TrIII/76 (emphasis added). After counsel continued to argue, stressing that he had specifically elicited evidence that Guardado *was* at his place of business when found in possession of the firearm, the judge added

that he also found the instruction request "untimely." TrIII/77. After the jury instructions were given, defense counsel objected again and, once again, asked that the court instruct on the exception for possession at one's place of business and, once again, the judge refused. TrIII/108.

During deliberations, however, the jury sent out this inquiry:

> In their closing arguments, the defense lawyer mentioned that firearm possession, Indictment Number 1, must meet the criteria of being, 'outside a home or business.' This is not indicated in your written instructions to us. Can you please clarify if we need to consider this in our deliberations.

TrIII/114. The judge further instructed the jury as follows:

> Yes, the statute has an exemption … for having a weapon at home or at work. However, … *as a matter of law*, I ruled that that exemption does not apply in this case. It's not available to Mr. Guardado. …

TrIII/119 (emphasis added).

The jury instruction was incorrect.

Under the controlling statute, whether one has a firearm "under his control in a vehicle" while "being present in or on his residence or place of business" is a "question of fact" for the jury to decide. See *Commonwealth* v. *Moore*, 54 Mass.App.Ct. 334, 343-344 (2002) (holding that

the determination of whether defendant "was within his residence for purposes of the statute was a question of fact for the jury.")

Moore explained that "an area outside of the residence will still fall within the exemption if it is an area over which the defendant maintains exclusive control alone or with other members of the residence." *Commonwealth* v. *Moore*, 54 Mass.App.Ct. at 346. Applying *Moore*'s holding to this case means it was up to the jury to decide whether Guardado had authority to maintain exclusive control of the AutoZone's parking lot – alone or with other members of the business.

Nor could a valid claim be made that the statute was only meant to apply to person's who "owned" the place of business. Certainly, one would not argue that the exemption for one's place of residence only applies to those who "own" their home but not renters. There is no reason to read such a limitation into the statute for an employee's place of business. See *Retirement Bd. Of Somerville* v. *Buonomo*, 467 Mass. 662, 672 (2014) ("We will not add words to a statute that the Legislature did not put there, either by inadvertent omission or by design").

Moreover, this interpretation is in line with the Supreme Judicial Court's view that this exemption was to allow for an individual's "self-protection." *Commonwealth* v. *Seay*, 376 Mass. 735, 742 (1978)

("We think it clear that the Legislature intended in 1957 to exempt persons who would keep a firearm only in their homes or places of business *for self-protection* from the requirement of obtaining a license to carry.") (emphasis added). In other words, the Court specifically did not interpret the exemption as intended solely for an owner's protection of their property interest.

Finally, the trial judge's determination that the statute was never meant to apply to the "parking lot" of a place of business is patently inconsistent with the plain language of the statute. The statute criminalizes having a firearm under one's control "in a vehicle" except if you are "in *or on*" your place of business." G.L. c. 269, §10(a) (emphasis added). The addition of the phrase "or on" indicates the intention to include locations not "in" a building. See *Commonwealth* v. *Dunphy*, 377 Mass. 453, 459 (1979) ("The terms 'property' and 'residence' shall retain their common law meanings and denote those areas, *including outside areas* …) (emphasis added). And given that the statute refers to firearms located "in a vehicle," a parking lot of one's place of business would naturally be included in the exempted location. That is especially so in this case, where the government witnesses observed Guardado carrying out his business duties *in that parking lot.* TrII/105.

Further, that a parking lot *is* part of a "place of business" finds support in tort law. See *Papadopoulos* v. *Target Corp.*, 457 Mass. 368 (2010) (finding retailer may be liable for negligent care of company's parking that led to customer's injury).

Finally, if it is unclear whether Guardado's possession of a firearm in these circumstances would fall under a criminal statute's exemption, the rule of lenity requires a defendant be given "the benefit of the ambiguity." *Commonwealth* v. *Dayton*, 477 Mass 224, 226 (2017).

The government might argue that, even though Guardado was arrested at his place of business, here, the testimony supported the inference he had the firearm "under his control in a vehicle" *before* he parked it at the AutoZone. This, based upon Pieroway's testimony that he saw Guardado drive into the AutoZone parking lot and saw no one else enter the car prior to Guardado's arrest. TrII/102,104-105. There are two problems with this claim. First, no witness stated they could guarantee that Guardado had been under constant surveillance from the moment he was seen arriving at the AutoZone until his arrest. Thus, the jury could have concluded police might not have seen Guardado move the firearm from the AutoZone to the Honda. Second, even if there was undisputed evidence that police had the car and

Guardado under constant surveillance and no one entered the car, "not even undisputed facts may be removed from the jury's consideration, either by direction or by omission in the charge." *United States* v. *Natale*, 526 F.2d 1160, 1167 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976); *United States* v. *Hicks*, 748 F.2d 854, 859 (4th Cir. 1984) ("giving to the jury, as we must, the full scope of its right to pass on the credibility of the government's witnesses, we cannot say beyond a reasonable doubt that the jury would have reached these conclusions had the defense … been submitted to it.") To rule that the jury instruction was not required, a Court would have to inappropriately supplant the role of the jury by assuming that (1) the jurors would have credited every aspect of that testimony *and* (2) the jurors would make the requisite inferences. *Id. Hatfield* v. *Commonwealth*, 443 Mass. 1022, 1022 (2005) (jury "not *required* to credit the evidence supporting [party's] contention) (emphasis in original).

The jury instructions in this case were deficient because, as the Supreme Judicial Court has stressed: "whether G.L. c. 269, s 10(a), makes criminal the defendant's conduct depends solely on *where* the alleged violation occurred." *Commonwealth* v. *Dunphy*, 377 Mass. at 458 (emphasis added). The Court further stressed that a factual

determination of whether the defendant was present in or on his residence or place of business is "crucial" and that the trial judge's failure to adequately inform the jury on this element created a "substantial risk of a miscarriage of justice." *Id.* at 458, 459, citing *Commonwealth* v. *Freeman*, 352 Mass. 556, 563 (1967) (finding substantial risk of miscarriage of justice where jury was not properly instructed on "crucial issue"). See also *Commonwealth* v. *Brown*, 10 Mass.App.Ct. 935, 936 (1980), citing *United States* v. *Fields*, 466 F.2d 119, 121 (2d Cir. 1972) (reversal is required even where the jury is merely left speculating on the elements of the crime charged because "[s]uch 'errors go directly to a defendant's right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are.'")

Here, the government needed to prove Guardado's possession of the gun was "outside … his place of business." G.L. c. 269, §10(a). There was abundant evidence he *was* "in or on his … place of business." TrII/83-85,105,112,117. The court's instruction, that explicitly misinformed the jury that the government was not required to prove this element, created a substantial risk of a miscarriage of justice. *Commonwealth* v. *Dunphy*, 377 Mass. at 459.

Standard of Review: The standard of review if counsel had failed to request a jury instruction is whether the failure to give the instruction created a substantial risk of a miscarriage of justice. *Id.* For the reasons just stated, this standard was clearly met.

Here, however, counsel did request the court instruct the jury on this issue." Counsel did so both before and immediately after the incorrect jury instruction was given, and subsequently also objected to the improper instruction. TrIII/74-77,108. Although counsel did not object a third time – when the judge gave his erroneous instruction in response to the jurors' inquiry, the issue was clearly preserved. See *Commonwealth* v. *Biancardi*, 421 Mass. 251, 253-254 (1995), citing Mass.R.Crim.P. 24(b) (error preserved "where judge gave instruction inconsistent with defendant's request, "[t]here was no reasonable prospect in the circumstances that, on objection, the judge would have repudiated his stated position"); *Commonwealth* v. *Connolly,* 49 Mass.App.Ct. 424, 426, n.2 (2000) (issue of jury instruction error preserved for review where counsel "press[ed] his objections to the point where it would have been futile to object any longer").

As such, here the error must be found not to have not prejudiced Guardado. See *Commonwealth* v. *Moore*, 54 Mass.App.Ct. at 343. It

clearly did. Had the jury been properly instructed, it might have credited the testimony that Guardado was in or on his place of business at the time the crime was alleged to have occurred and presented a complete defense to this charge.

The judge's assertion that he was also rejecting counsel's jury instruction request because he deemed it "untimely" should not negate the more favorable standard of review. TrIII/77.

After the government exhausted all its available witnesses, the judge made use of the available time by holding an unannounced jury charge conference. TrII/216, 218-241. He then stated: "I've forced a jury charge conference on you without notice. … So please feel free to continue to look, and if there's things you want to talk about *before I actually deliver this charge*, you can talk about it." TrII/241-242 (emphasis added). Guardado should not be held to a higher standard of review where counsel made the request as the judge had directed, before the judge delivered the charge.

Conclusion

For the foregoing reasons, Mr. Guardado's convictions must be reversed.

Respectfully submitted,

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Dated: February 25, 2022

ADDENDUM
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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CRIMINAL ACTION
NO. 1981 CR 0263

COMMONWEALTH

vs.

CARLOS GUARDADO

DECISION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

This matter is before the court on the defendant's motion to suppress evidence seized pursuant to a warrantless search of the defendant, Carlos Guardado's ("Guardado"), vehicle on January 25, 2019. The defendant argues that the warrantless search of his vehicle was a violation of his rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and by Article 12 of the Massachusetts Declaration of Rights. The defendant also moved to suppress subsequent statements he made to the police. After argument and a review of the parties' submissions, the defendant's motion to suppress is **DENIED**.

FINDINGS OF FACT

On January 25, 2019, Lieutenant Pieroway of the Boston Police Department received information from a reliable confidential informant ("CI") known as "Z," that a man by the name of Carlos Guardado was in possession of an unlicensed gun. The CI was previously known to the Boston Police Department and had provided reliable information to the Drug Control Unit ("DCU") related to drug activity within the last year to 6 months that qualified him to be considered a "carded confidential informant" by the DCU. Information provided by the CI to the

Boston police in the past resulted in two separate arrests: one for drug-related offenses and the other for a firearm offense.

On January 25, 2019, the CI contacted Lt. Pieroway and gave him information about a silver firearm that was in the possession of Mr. Carlos Guardado, an individual that both the CI and Lt. Pieroway knew from unrelated prior criminal activity. The CI told Lt. Pieroway that the defendant would be operating a green Honda Accord with a Maine registration plate of 8793VY, and that he would be in the area of Watertown, MA. The CI also told Lt. Pieroway that the defendant would be carrying the silver gun in a black backpack. The CI said he had specific knowledge of the firearm being in the black backpack because he saw it there and confirmed to Lt. Pieroway that "it was real." The CI and Lt. Pieroway had previously discussed Guardado in relation to other potential criminal activity, as well as the nickname he was known by: "Chubs."

In response to the information that he received from the CI, Lt. Pieroway contacted other members of his DCU as well as Watertown Detective Mark Lewis, a person known to Lt. Pieroway from other investigations and prosecutions. Lt. Pieroway told the above-referenced law enforcement personnel that he had received information from a reliable informant that Guardado had a gun in his possession and that he would be in the Watertown area shortly.

Within thirty minutes to an hour of receiving the information from the CI, Lt. Pieroway located Guardado a short distance from the Arsenal Mall in Watertown. He saw Guardado pull into the Auto Zone parking lot, exit his vehicle, and enter the store where he appeared to engage in activities consistent with being an employee. Other law enforcement personnel arrived shortly thereafter and set up surveillance positions around the car and the Auto Zone store. At roughly 6:45 PM Lt. Pieroway observed the defendant walk out of the Auto Zone to his car. As he was beginning to get into the vehicle, he was approached by officers on the scene who identified

themselves and asked him to move away from the car. The defendant was then given his Miranda rights after which he acknowledged that he understood them.[1]

While the defendant stood with an officer to the rear of the green Honda, Det. Lewis, a fourteen-year veteran of the Watertown Police Department, searched the defendant's vehicle. He was unable to locate either a gun or a black backpack. Det. Lewis, while on his way to the Auto Zone store prior to encountering the defendant, ran a license and CORI check on Guardado that revealed he did not have a license to carry a firearm and, in addition, had a prior firearm incident on his record. The glove compartment in Guardado's vehicle was locked and, as such, was the only part of the vehicle's interior that was not searched at that time. In view of the information that he had received from the CI, information that he had learned with respect to the facts and circumstances of the incident, and the fact that a gun was not found in the interior of the car, Det. Lewis was in fear for his safety due to the potential presence of a gun and, therefore, conducted a pat frisk on the defendant. Nothing was found on the defendant other than a set of keys that went to the green Honda. Det. Lewis took the keys and promptly opened the glove box with them. Inside the glovebox he found a silver Smith & Wesson 9mm firearm that was loaded with two rounds of ammunition inside of a fifteen round magazine. Lewis also found another fifteen round magazine that was loaded with ten rounds of ammunition.

The defendant was placed under arrest. Shortly thereafter, Guardado stated spontaneously, "You got me for the gun. It's a 9 mm and there shouldn't be one in the chamber."

[1] The court notes that the defendant's understanding of his Miranda warnings was not a hotly contested issue in either the written submissions or at the hearing.

Back at the police station, the defendant was Mirandized once again. Thereafter, he stated that he had purchased the silver firearm for $650 from a guy in Quincy, Massachusetts and that he had possession of the gun for "awhile."

Simultaneous to the search of the defendant's vehicle, another search was done by Sgt. Claflin inside of the Auto Zone store. After receiving a call from Det. Lewis, Sgt. Claflin made his way over to the Auto Zone store. When he arrived he observed a dark green Honda with Maine plates and was informed that the suspect/defendant Guardado was in the Auto Zone store. Claflin had previously been made aware of the details regarding Guardado's possession of a firearm at the time he received the call from Det. Lewis. At around 6:45 PM, the defendant exited Auto Zone and made his way over to the green Honda. Sgt. Claflin held his position and was then told to go into the AutoZone store to see if the defendant had left any personal belongings or a black backpack. After entering the store and being directed to an employee storage area, Claflin saw a black backpack that was identified by a store employee as being Guardado's. He picked up the backpack and could feel what he knew to be a gun storage box. He was familiar with gun storage boxes from his experience and training in dealing with firearms. Having found a gun storage box, he immediately opened it to check for the presence of a gun. After he observed that the gun was not in the gun box, Sgt. Claflin made his way outside at which time observed the green Honda being searched. He testified that he does not think that the gun in the glove compartment had been found at that specific time. He also testified that he thinks it was "within a few minutes after he exited the store" with the black backpack and empty gun box, that the silver handgun was found in the glovebox of the Honda.

RULINGS OF LAW

Where law enforcement relies on information from a confidential informant, the familiar *Aguilar-Spinelli* test is applied. Under *Aguilar-Spinelli*, an affiant who relies upon information from an informant to establish probable cause to search must inform the magistrate of "(1) some of the underlying circumstances from which the informant concluded that the [evidence] was where he claimed it was (the basis of knowledge test), and (2) some of the underlying circumstances from which the affiant concluded that the informant was 'credible' or his information 'reliable' (the veracity test)." *Commonwealth* v. *Upton*, 394 Mass. 363, 374-375 (1985) (citations omitted); *Commonwealth v. Zorn*, 66 Mass. App. Ct. 228, 232 (2006). Here, the confidential informant provided reliable information with a sufficient basis of knowledge to allow for the police officers to make the stop of the defendant. See *id.*

The CI's information provided to Lt. Pieroway was detailed with respect to the defendant's possession of a silver handgun, that it would be located in a black backpack, being transported by Guardado, while operating a green Honda Accord with a Maine license plates. The CI's knowledge of the silver handgun being located in the black backpack was first-hand because he had seen it there. The CI knew the defendant by the same nickname known to police of "Chubs." The CI knew the green Honda would be located in Watertown. The Boston police had prior experience with the CI who had provided information to them that resulted in arrests involving drug and gun related offenses. Under these circumstances, the court finds that the Commonwealth provided sufficient information to satisfy the basis of knowledge and veracity test outlined in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

Probable cause is "not concerned with guilt beyond a reasonable doubt, '[r]easonable inferences and common knowledge are appropriate considerations.'" *Commonwealth* v. *Cast*, 407 Mass. 891, 895-896 (1990). "Probable cause exists where the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Commonwealth* v. *Garcia*, 87 Mass. App. Ct. 1108, at *2 (2015) (Unpublished Rule 1:28), rev. denied, 471 Mass. 1105 (2015), citing *Cast*, 407 Mass. at 895-896. "The issue of paramount importance is whether the police, prior to the commencement of a warrantless search, had probable cause to believe that they would find the instrumentality of a crime or evidence pertaining to a crime in the vehicle" (quotations and citation omitted). *Commonwealth* v. *Johnson*, 461 Mass. 44, 49 (2011). "The scope of a warrantless search of a vehicle conducted pursuant to this exception is defined by the object of the search, and extends to every part of the vehicle where there is probable cause to believe the object may be found." See *Commonwealth* v. *Davis*, 481 Mass. 210, 220 (2019), citing *Cast*, 407 Mass. at 906.

Here, the information received from the CI on June 25, 2019 was sufficient to give the police probable cause to believe they would find the gun in the green Honda and to conduct a search of the vehicle. See *Davis*, 481 Mass. at 220. That probable cause extended to the locked glove compartment based on the officers' reasonable belief that it was an area where the gun was likely to be found once the initial search of the vehicle did not yield the gun. See *id.* See also *Commonwealth* v. *Antobenedetto*, 366 Mass. 51, 55 (1974) (warrantless search permissible where it is for "instrumentality" or "evidence" of crime).

Although the court is of the opinion that there was sufficient probable cause to search the vehicle based on the information provided by the CI that was corroborated by the police through their observations prior to the search, such probable cause to search the glove compartment was strengthened by the observations made by Sgt. Claflin regarding the empty handgun case in the black backpack identified as Guardado's that was recovered from inside his place of work. The evidence was unclear as to the specific timing of the police's knowledge of the empty gun case and the warrantless search of the vehicle. However, the evidence was reasonably clear that the empty gun case was discovered before the glovebox compartment was searched. It could be argued that the collective knowledge doctrine would support the police search of the locked glove compartment using keys obtained from defendant. See *Commonwealth* v. *Gullick*, 386 Mass. 278, 283-84 (1982).

Because the court does not conclude that the stop and search of the defendant's vehicle was improper, the court denies the defendant's motion to suppress his subsequent statements as "fruits of the poisonous tree." There was no evidence presented to the court that suggests the defendant did not understand his Miranda warnings when they were given to him, prior to his making any statements. In addition, the first statement that the defendant made after receiving his Miranda warnings was spontaneous and not in response to police questioning. The statement given by the defendant when and where he purchased the gun, and how much he paid, was made during his interview at the police station after his Miranda warnings had been given to him a second time. The defendant had prior experience with the law and the court finds that his Miranda waiver was made knowingly, intelligently, and voluntarily. See *Commonwealth* v. *Rivera*, 441 Mass. 358, 364 (2004).

ORDER

For the above reasons, the defendant's motion to suppress evidence obtained from the warrantless search of his vehicle, and statements he made to police, is **DENIED**.

C. William Barrett
Justice of the Superior Court

DATE: March 19, 2020

STATUTORY ADDENDUM

U.S. CONST., Amend. IV

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

MASS. DECL. OF RIGHTS, art. 14

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

Mass. General Laws chapter 269, 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 under …

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.

…

(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.

…

(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.

…

(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 2 ½ years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

Mass.R.Crim.P., Rule 24

(b) Instructions to Jury; Objection. At the close of the evidence or at such earlier time during the trial as the judge reasonably directs, any party may file written requests that the judge instruct the jury on the law as set forth in the requests. The judge shall inform counsel of his proposed action upon requests prior to their arguments to the jury. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, specifying the matter to which he objects and the grounds of his objection. Upon request, reasonable time shall be given to each party to object to the charge before the jury retires. Where either party wishes to object to the charge or to request additional instructions, the objection or the request shall be made out of the hearing of the jury, or where appropriate, out of the presence of the jury.

Massachusetts District Court Criminal Model Jury Instructions, Instruction 7.6000 (revised January 2013)

Possession of a firearm without a license outside home or business

I. Firearm with barrel under 16 inches

The defendant is charged under section 10(a) of chapter 269 of our General Laws with knowingly possessing a firearm unlawfully.

In order to prove the defendant guilty of this offense, the Commonwealth must prove the following (three) (four) things beyond a reasonable doubt:

First: That the defendant possessed a firearm (or) (that he [she] had a firearm under his [her] control in a vehicle);

Second: That what the defendant (possessed) (or) (had under his [her] control in a vehicle) met the legal definition of a "firearm"; (and)

Third: That the defendant knew that he (she) (possessed a firearm) (or) (had a firearm under his [her] control in a vehicle).

A. If there is evidence that it was in the defendant's residence or place of business.

And Fourth: That the defendant possessed the firearm outside of his (her) residence or place of business. A person's "residence" or "place of business" does not include common areas of an apartment or office building, but only areas that are under that person's exclusive control.

CERTIFICATE OF COMPLIANCE

I, Elaine Fronhofer, hereby certify pursuant to Mass. R. App. P. 16(k) that this brief complies with the rules of court that pertain to the filing of briefs, including those required by Mass. R. App. P. 16(a)(1)-(8), 16(d)-(h), 18, 20 and 21. The font used for the main body of text is proportionally spaced Baskerville size14 point. The number of nonexcluded words is 10,934. The word-processing program used is Word, version 16.57.

/s/ Elaine Fronhofer___
Elaine Fronhofer

CERTIFICATE OF SERVICE

I, Elaine Fronhofer, hereby certify that I have this day served a copy of this brief on counsel for the appellant, ADA Thomas D. Ralph, by electronic service to tom.ralph@state.ma.us..

/s/ Elaine Fronhofer___
Elaine Fronhofer

Dated: February 25, 2022