

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

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No. FAR-  
2017-P-1045

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COMMONWEALTH OF MASSACHUSETTS,  
Appellant

V.

ONAXIS BARRETO,  
Defendant-Appellee

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COMMONWEALTH'S APPLICATION FOR  
LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

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SUFFOLK COUNTY

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## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....	ii
REQUEST FOR LEAVE TO OBTAIN FURTHER REVIEW.....	1
STATEMENT OF PRIOR PROCEEDINGS.....	1
STATEMENT OF RELEVANT FACTS.....	2
POINTS ON WHICH FURTHER APPELLATE REVIEW IS SOUGHT..	11
FURTHER APPELLATE REVIEW IS APPROPRIATE.....	11
I.    FURTHER APPELLATE REVIEW IS WARRANTED BECAUSE THE APPEALS COURT ERRED IN APPLYING THE LAW TO THE FACTS FOUND BY THE MOTION JUDGE AND REVERSING THE DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS.....	11
II.   THE QUANTUM REQUIRED FOR REASONABLE SUSPICION.....	17
CONCLUSION.....	21
ADDENDUM.....	22

**TABLE OF AUTHORITIES**

**Cases**

<i>Commonwealth v. Alvarado</i> , 423 Mass. 266 (1996) .....	13
<i>Commonwealth v. Anderson</i> , 461 Mass. 616 (2012) .....	12
<i>Commonwealth v. Bostock</i> , 450 Mass. 616 (2008) .....	14, 16, 20
<i>Commonwealth v. Cabrera</i> , 76 Mass. App. Ct. 341 (2010) .....	18
<i>Commonwealth v. DePeiza</i> , 449 Mass. 367 (2007) .....	13
<i>Commonwealth v. Edwards</i> , 476 Mass. 341 (2017) .....	17
<i>Commonwealth v. Grandison</i> , 433 Mass. 135 (2001) .....	13
<i>Commonwealth v. Isaiah I.</i> , 448 Mass. 334 (2007) .....	8
<i>Commonwealth v. Isaiah I.</i> , 450 Mass. 8183 (2008) .....	18
<i>Commonwealth v. Johnson</i> , 461 Mass. 44 (2011) .....	17, 20
<i>Commonwealth v. Jones-Pannell</i> , 472 Mass. 429 (2015) .....	8
<i>Commonwealth v. Kennedy</i> , 426 Mass. 703 (1998) .....	13, 16
<i>Commonwealth v. Moses</i> , 408 Mass. 136 (1990) .....	13
<i>Commonwealth v. Onaxis Barreto</i> , 94 Mass. App. Ct. 337 (October 29, 2018) .....	passim
<i>Commonwealth v. Smigliano</i> , 427 Mass. 490 (1998) .....	17
<i>Commonwealth v. Sykes</i> , 449 Mass. 308 (2007) .....	13
<i>Commonwealth v. Thibeau</i> , 384 Mass. 762 (1981) .....	13

<i>Commonwealth v. Watson</i> , 430 Mass. 725 (2000) .....	18
<i>Commonwealth v. Wren</i> , 391 Mass. 705 (1984) .....	13

### **Statutes**

G.L. c. 94C, § 32E .....	1
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**REQUEST FOR LEAVE TO OBTAIN FURTHER REVIEW**

The Commonwealth respectfully requests leave from this Court to obtain further appellate review of the decision in *Commonwealth v. Onaxis Barreto*, 94 Mass. App. Ct. 337 (October 29, 2018). There, the Appeals Court reversed the motion judge's denial of a motion to suppress evidence because the majority concluded the facts found by the motion judge did not support the experienced police officers' reasonable suspicion that a drug transaction had occurred sufficient to warrant further investigation and an exit order. Further appellate review is appropriate because the Appeals Court's decision contravenes well established case law regarding the factual quantum necessary to establish reasonable suspicion.

**STATEMENT OF PRIOR PROCEEDINGS**

On August 28, 2014, a Suffolk County Grand Jury returned a single indictment charging the defendant, Onaxis Barreto, with trafficking in cocaine over 200 grams, in violation of G.L. c. 94C, § 32E (c) (4) (C.A. 12-13) (Docket No. 1484CR10751).<sup>1</sup>

On October 21, 2014, the defendant filed a motion to suppress evidence (C.A. 15). On October 14, 2015,

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<sup>1</sup> References to the Commonwealth's Record Appendix in its Application for Further Appellate Review as (C.A. [page]), and though included in the Commonwealth's Appendix, to the suppression transcript as (Tr. [page]).

the Honorable Kenneth Salinger held a hearing on the motion and, on October 28, 2015, he issued findings of fact, rulings of law, and an order denying the motion (C.A. 16-17, 20-29).

The defendant filed a motion for reconsideration on November 4, 2015, which was denied on November 10, 2015 (C.A. 17). The defendant filed two notices of appeal: on November 9, 2015, and on November 20, 2015, after his motion to reconsider was denied (C.A. 17). On February 4, 2016, the Honorable Geraldine Hines allowed the defendant's application for interlocutory appeal and directed that his appeal be entered in the Appeals Court (C.A. 17).

On May 11, 2018, the Appeals Court (Milkey, Hanlon, Singh, JJ.), heard oral argument (C.A. 1). On October 29, 2018, a divided panel reversed the denial of the motion to suppress evidence in a published opinion, *Commonwealth v. Onaxis Barreto*, 94 Mass. App. Ct. 337 (October 29, 2018) (C.A. 1, 8). The Commonwealth did not seek rehearing in the Appeals Court.

#### **STATEMENT OF RELEVANT FACTS**

The following facts are taken, verbatim, from the motion judge's "Findings of Fact" which the Appeals

Court properly concluded are "supported by the record and therefore are binding on [them]."<sup>2</sup>

### **1.1 The Stakeout**

On June 9, 2014, Officers Fabiano and Gero were both assigned to the citywide Drug Control Unit of the Boston Police Department (Tr. 7, 54-55). Gero and Fabiano were both experienced narcotics investigators (Tr. 8-9, 55-56). That afternoon they were looking to intercept and stop a green Volvo station wagon because an unidentified informant had told Fabiano that he could find such a vehicle in the area of Waverly and Copeland Streets in Boston and that the vehicle would contain a large amount of illegal narcotics (Tr. 9-10, 58). The Commonwealth did not present any evidence to demonstrate the basis for the informant's knowledge, that the police had any reason to believe that the informant was truthful, or that the police had corroborated the source's information that the Volvo would contain illegal drugs. The informant had not told them the license plate number of the Volvo and had not identified or described the driver (Tr. 58).

Acting solely on the tip, at around 5:00 p.m. on June 9, 2014, Fabiano and Gero set up observation posts in unmarked vehicles that they parked on Warren Street in view of the three-way intersection of Warren, Copeland, and Waverly Streets (Tr. 11-12). It was still daylight and the officers had a good view of the intersection (Tr. 11-12; Exh. 1). Copeland and Waverly Streets are side streets off of Warren; they form a roughly ninety degree angle with each other, where they meet and also connect with Warren Street (Exh. 1). A person driving down Copeland and reaching this three-way intersection could either make a turn to the

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<sup>2</sup> The Commonwealth has inserted parenthetical citations to the transcript of the motion hearing where they support the judge's factual findings.

right onto Warren Street heading north, a turn to the left onto Warren Street heading south, or a sharper turn onto Waverly Street heading southeast (Exh. 1). Although the Court credits Ofc. Gero's testimony that over the years he has made numerous arrests for possession or distribution of illegal narcotics in the general neighborhood,<sup>3</sup> the Court finds that as of June 9, 2014, the Boston police had no reason based on past experience to expect to see a drug transaction take place on Waverly Street or Copeland Street, which are both relatively quiet residential streets<sup>4</sup> (Tr. 12, 31-32).

Fabiano and Gero were both dressed in plain clothes (not uniforms) and were in unmarked "soft" cars that did not have any police markings, sirens, or flashing lights (Tr. 9-10). Gero had parked his vehicle on the northbound side of Warren Street, facing Waverly Street and Copeland Street which were on his right (Tr. 11-12). Fabiano had parked on the southbound side of Warren Street, directly opposite the intersection with Copeland and Waverly Streets, which were on his left (Tr. 58).

Fabiano and Gero were joined by Ofc. Fisher and Ofc. Lopes, who were assigned to the District B-2 Anti-Crime Unit and were together in an unmarked police cruiser with emergency lights and sirens (Tr. 43-45).

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<sup>3</sup> Officer Gero testified that he had participated in the execution of search warrants in which he recovered illegal narcotics on Copeland, Warren, and Waverly Streets and many of the surrounding streets (Tr. 12). Specifically as to Waverly Street, Officer Gero had executed a search warrant two houses down from where the defendant had pulled over that day (Tr. 31-32). Gero had executed search warrants at that specific address on two prior occasions (Tr. 31-32).

<sup>4</sup> Although there was evidence from which the motion judge could find that Copeland and Waverly Streets were residential streets (Tr. 30-34), there was no evidence that the streets were "relatively quiet."



Fisher and Lopes were present because Fabiano had asked them to be available to stop a green Volvo wagon as part of a drug investigation (Tr. 45). Fisher and Lopes were also wearing plain clothes. They parked their vehicle a short distance behind Fabiano's vehicle, on the southbound side of Warren Street, also in view of the intersection with Copeland and Waverly Streets (Tr. 45-46). Fabiano, Gero, Fisher, and Lopes were in communication by radio (Tr. 10, 57).

### **1.2 The Possible Drug Transaction**

At around 5:15 p.m., Officers Fabiano, Gero, and Fisher all saw a green Volvo wagon drive toward them on Copeland Street, stop at the traffic light at the three-way intersection at Warren Street, and then take the sharper left turn onto Waverly Street (Tr. 13, 47, 58-59). The Volvo was being driven by defendant Barreto (Tr. 25-26, 63). The officers could see that the Volvo carried no passengers (Tr. 13, 58). The Court credits the testimony by Fabiano and Gero that Barreto made this turn without using any turn signal (Tr. 13, 58-59). All three police vehicles followed the Volvo down Waverly Street, with Gero in the lead, followed a moment later by Fabiano, who in turn was followed by the unmarked cruiser with Fisher and Lopes (Tr. 13-14, 59).

As Gero turned around the sharp corner from Warren Street onto Waverly Street, he saw that Barreto had stopped the Volvo by the curb on the left side of Waverly, in front of the first building on the left (a residential building), roughly 50 feet from Warren Street (Tr. 13-14, 59). Gero communicated this observation with Fabiano by radio (Tr. 13). Fabiano, in turn, told Fisher and Lopes not to stop the Volvo yet, because he and Gero wanted to make further observations first (Tr. 47).

Gero slowly drove past the Volvo (Tr. 14). As he did so, Gero saw Barreto lean down and to his right, with his shoulders and positioned as if he was reaching toward the floor of the passenger side with both hands (Tr. 14, 38). Gero could not see either of Barreto's hands and thus could not see exactly what Barreto was doing (Tr. 14). Since Gero could not see Barreto's hands he did not know whether Barreto had anything in his hands (Tr. 38). After passing the Volvo, Gero pulled over and parked further up Waverly Street on the right side, i.e. the opposite side from where the Volvo was stopped (Tr. 14-15).

As Fabiano followed Gero and drove by the now parked Volvo, he saw another man walk from the nearest apartment building toward the Volvo (Tr. 59). Fabiano drove past the Volvo and parked further down Waverly Street, also on the right side of the street, roughly 100 feet past where the Volvo was stopped (Tr. 59). Fabiano could see the Volvo in his left side view mirror (Tr. 60). Fabiano observed the man who had walked out of the apartment building walk up to the driver's window of the parked Volvo wagon (Tr. 59-60).

Fisher and Lopes drove further down Waverly, past Fabiano, and also parked (Tr. 47). They waited for further instruction from Fabiano (Tr. 47).

Gero saw the second man standing next to the driver's door of the Volvo (Tr. 15). He saw Barreto, who by now was again sitting upright in the driver's seat of the Volvo, turn his head and shoulders to the left, toward the man standing just outside his door (Tr. 15). It appeared that the two men were speaking (Tr. 15). At this time the police did not know the identity or anything else about the driver of the Volvo or the man standing next to the driver's door (Tr. 31). Gero saw the pedestrian lean toward the Vol-

vo, in a manner consistent with the man placing his hands on the Volvo door or reaching inside the Volvo (Tr. 16). The Court does not credit Gero's testimony on direct examination that he actually saw the pedestrian reach his hands inside the Volvo (Tr. 16). Instead, it credits Gero's testimony on cross-examination that he could not actually see the pedestrian's hands inside the Volvo. From Gero's vantage point on the right side of Waverly Street some distance in front of the Volvo, Barreto's body would have blocked Gero's view of the driver's window in the Volvo that was parked on the left side of Waverly Street. There is no way that Gero could have known exactly what the pedestrian was doing with his hands. Gero could not see Barreto's hands either (Tr. 14). Neither Gero nor any of the other officers saw Barreto and the pedestrian reach their hands toward each other, bring their hands together, or exchange any object (Tr. 35). But Gero could tell that the pedestrian was moving one or both of his arms while he was standing next to the Volvo and facing Barreto, in a manner consistent with the two men exchanging something (Tr. 16, 35-36). The entire interaction between Barreto and the pedestrian lasted about 30 seconds, after which the pedestrian turned away from the Volvo and walked back into the same apartment building he had come out of a moment earlier (Tr. 16, 60). None of the police officers saw anything in the pedestrian's hands as he walked away from the Volvo (Tr. 37). Nor did they see him putting anything into a pocket, or making any motion with his arm as if he had just put something in a pocket. The police never followed or identified the pedestrian (Tr. 37).

Based on their training and experience with hand-to-hand drug transactions, Gero and Fabiano both suspected that the pedestrian had purchased some kind of illegal drugs from Barreto (Tr. 20).

### **1.3 The Vehicle Stop, Exit Order, and Vehicle Search**

After the pedestrian stepped away from the Volvo, Barreto pulled the vehicle away from the curb and continued to drive down Waverly Street (Tr. 16-17). Fabiano instructed Fisher and Lopes by radio to follow the Volvo and to stop it when they could safely do so (Tr. 17, 48, 60). They stopped the Volvo a short distance down Blue Hill Avenue, using their flashing lights (Tr. 17, 48). Gero and then Fabiano followed in their vehicles, and parked nearby (Tr. 17).

Fisher got out of the unmarked police cruiser and walked up to the driver's side of the Volvo (Tr. 49). He asked Barreto for his driver's license and motor vehicle registration (Tr. 49-50). Barreto complied and asked in English why he had been stopped (Tr. 50). Fisher asked Barreto to state his name and his date of birth (Tr. 50). Barreto stated his name and the year he was born (Tr. 50). Fisher then asked Barreto to state his full birth date (Tr. 50). [Barreto continued to respond with the year and not the day (Tr. 50).]<sup>5</sup> Barreto said that he did not understand (Tr. 50). During this brief interaction Fisher noticed that Barreto was not making eye contact with him (Tr. 50). Fisher thought Barreto seemed nervous (Tr. 50).

At this point, Gero walked up and joined Fisher near Barreto's seat in the Volvo (Tr. 17). Gero observed that Barreto seemed to be breathing heavily, was looking

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<sup>5</sup> The Commonwealth has supplemented Judge Salinger's findings of fact with this additional piece of testimony elicited at the motion hearing. The motion judge deemed the witnesses' testimony credible "to the extent that it is consistent with findings stated in this memorandum" (C.A. 20). See *Commonwealth v. Jones-Pannell*, 472 Mass. 429, 431 (2015), citing *Commonwealth v. Isaiah I.*, 448 Mass. 334, 337 (2007).

in his rear view and side view mirrors at the various police officers and vehicles that had pulled up behind him, and was not making eye contact with Fisher or Gero (Tr. 17-18, 50).

Gero ordered Barreto to step out of the vehicle (Tr. 19). Barreto complied (Tr. 19).

As Barreto was getting out of the Volvo, Gero could see the inside of the driver's door (Tr. 19, 40). He noticed what appeared to be a roll of U.S. currency inside a clear plastic bag that had been placed in the storage compartment located on the inside of the driver's door (Tr. 19, 40; Exh. 6). Based on his training and experience, his prior observations of Barreto before and during his brief interaction with the pedestrian on Waverly Street, and his observation of money on the inside of the driver's door, Gero believed that he had probably just seen Barreto sell illegal drugs for money that he stuck inside the driver's door (Tr. 19-20).

Gero brought Barreto to the rear of the Volvo and tried to ask Barreto some questions (Tr. 20). Barreto said that he did not speak English and did not understand Gero's questions, and kept looking at the Volvo (Tr. 20-21). Gero pat frisked Barreto (Tr. 40). He did not find any weapons or contraband (Tr. 40-41). Fisher then moved Barreto to the sidewalk and stood with him there (Tr. 51).

Gero walked back to the driver's door of the Volvo (Tr. 21). He got into the vehicle (Tr. 21). By this time Fabiano had arrived and was standing on the passenger's side of the vehicle (Tr. 22, 61). Gero opened the Volvo's center console, immediately to the right of the driver's seat (Tr. 21). He saw a magnet inside the center console, and reported that observation to Fabi-

ano (Tr. 21). Based on their training and experience, both Gero and Fabiano knew that sellers of illegal drugs often had hidden compartments installed in their motor vehicles, and that such "hides" can often be opened by using a magnet like the one in the center console to trigger a hidden switch (Tr. 22-23). Once Gero said that he had seen the magnet, Fabiano entered the Volvo on the front passenger side and saw a wire that appeared to run from the center console to somewhere underneath the front passenger seat (Tr. 62, 65). Fabiano pointed out the wire to Gero (Tr. 62, 66). Neither Gero nor Fabiano could see the magnet or this wire before they got into the Volvo (Tr. 66). Once Fabiano pointed out the wire, Gero leaned over and pushed down on the front passenger seat (Tr. 23, 62). Gero felt the outline of a hard box (Tr. 23). He and Fabiano assumed that this box was a hidden compartment used by Barreto to hide illegal drugs (Tr. 23, 62).

Fabiano called by radio for a drug sniffing K-9 to join them (Tr. 23, 62). Roughly 15 to 20 minutes later Officer Scannell and K-9 Hans arrived on the scene (Tr. 23-24). Scannell had Hans sniff the exterior and interior of the Volvo (Tr. 24). He reported that Hans had alerted or given a positive indication for narcotics on the front passenger seat (Tr. 24).

Fabiano went back into the Volvo and peeled back the cushion on the front passenger seat (Tr. 24, 63). He could then see the top of a metal box hidden inside and under that seat (Tr. 63).

The police towed the Volvo to the nearest police station (Tr. 24, 63). Fabiano and Gero searched the vehicle at the station (Tr. 24, 63). They opened the metal box that had been hidden under the passenger seat (Tr. 24, 63). Inside they found a large amount of cocaine that was inside a

number of green plastic bags as well as several large stacks of United States currency bundled together with rubber bands (Tr. 24, 63).

**POINTS ON WHICH FURTHER APPELLATE REVIEW IS SOUGHT**

The Commonwealth seeks further appellate review on one issue: whether the Appeals Court erred in concluding that the experienced police officers lacked the reasonable suspicion that a drug transaction had just occurred necessary to warrant further investigation and an order to the defendant to exit the motor vehicle. To be clear, all that is at issue is whether the police possessed reasonable suspicion sufficient to issue an exit order. There is no dispute that plain view observations made upon the defendant's opening the car door provided probable cause to arrest the defendant and to search the vehicle for additional contraband and fruits of the crime.

**FURTHER APPELLATE REVIEW IS APPROPRIATE**

**I. FURTHER APPELLATE REVIEW IS WARRANTED BECAUSE THE APPEALS COURT ERRED IN APPLYING THE LAW TO THE FACTS FOUND BY THE MOTION JUDGE AND REVERSING THE DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS.**

A majority of the Appeals Court concluded the exit order given to the defendant was not supported by reasonable suspicion despite observations by experienced narcotics officers of what they reasonably believed to be an illegal drug transaction. See *Commonwealth v. Barreto*, 94 Mass. App. Ct. 337, 347 (2018). The Commonwealth respectfully asserts that in reaching

this conclusion the majority misapplied the law to the facts found, and that the law was applied correctly by both the motion judge and the dissenting justice (Hanlon, J.). Viewed as a whole and through the trained eyes of experienced narcotics investigators, the facts and circumstances provided reasonable suspicion that the police had just witnessed a street level drug transaction that warranted a threshold inquiry and further investigation. Moreover, in reaching this conclusion, the police were not required to ignore entirely the information supplied by an unidentified informant that a green Volvo station wagon would be in the area carrying a large amount of illegal narcotics (Tr. 58). While insufficient in itself to satisfy the basis of knowledge and reliability components of "indicia of reliability", the unidentified informant's tip provided context that fortified the reasonable suspicion of the police that a drug transaction had just occurred.

"An investigatory stop [of a motor vehicle] is justified if police have 'reasonable suspicion, based on specific, articulable facts and reasonable inferences therefrom, that an occupant of a motor vehicle had committed, was committing, or was about to commit a crime.'" *Commonwealth v. Anderson*, 461 Mass. 616, 621 (2012), quoting *Commonwealth v. Alvarado*, 423



Mass. 266, 268 (1996). To qualify as reasonable, the officer's suspicion must be based on specific articulable facts and inferences drawn from those facts, rather than on a hunch. *Commonwealth v. Moses*, 408 Mass. 136, 140 (1990); *Commonwealth v. Wren*, 391 Mass. 705, 707 (1984).

Notably, reasonable suspicion can arise from "the application of [the officers'] experience and training at the police academy to their detailed observations of the defendant." See *Commonwealth v. DePeiza*, 449 Mass. 367, 373 (2007). "Seemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry." *Commonwealth v. Sykes*, 449 Mass. 308, 314 (2007), quoting *Commonwealth v. Grandison*, 433 Mass. 135, 139 (2001); see also *Commonwealth v. Kennedy*, 426 Mass. 703, 708 (1998) (court does not scrutinize in isolation each of facts and circumstances known to officers, but instead looks at whole "silent movie" through eyes of experienced officers); *Commonwealth v. Thibeau*, 384 Mass. 762, 764 (1981) ("[F]acts and inferences underlying the officer's suspicion must be viewed as a whole when assessing the reasonableness of his acts."). As noted in Justice Hanlon's well-reasoned dissent, "[t]he law is clear that a police officer may order a driver to get out of a vehicle when he has reasonable suspicion

that the driver has committed a crime. See *Commonwealth v. Bostock*, 450 Mass. 616, 621-622 (2008)." See *Barreto*, 94 Mass. App. Ct. at 349.

In the instant case, viewed through the eyes of two experienced narcotics officers, specific and articulable facts gave rise to a reasonable suspicion that the defendant and the unknown male who approached the defendant's vehicle from a nearby house, and met briefly, were engaged in a street level drug transaction. Moments before the meeting, the police (Officer Gero) "saw Barreto lean down and to his right, with his shoulders and positioned as if he was reaching toward the floor of the passenger side with both hands" (Tr. 14, 38). The police (Officer Fabiano) then saw another man walk from the nearest apartment building toward the defendant's parked Volvo (Tr. 59-60). The police (both Fabiano and Gero) saw the second man standing next to the driver's door of the Volvo (Tr. 15, 59-60). Officer Gero then saw Barreto, who by now was again sitting upright in the driver's seat of the Volvo, turn his head and shoulders to the left, toward the man standing just outside his door (Tr. 15). It appeared that the two men were speaking (Tr. 15).

Officer Gero saw the pedestrian lean toward the Volvo, in a manner consistent with the man placing his

hands on the Volvo door or reaching inside the Volvo (Tr. 16). The police did not see the defendant and the pedestrian reach their hands toward each other, bring their hands together, or exchange any object (Tr. 35). But the police (Gero) could tell that the pedestrian standing next to the Volvo and facing Barreto was moving one or both of his arms in a manner consistent with the two men exchanging something (Tr. 16). The entire interaction between Barreto and the pedestrian lasted about 30 seconds, after which the pedestrian turned away from the Volvo and walked back into the same apartment building he had come out of a moment earlier (Tr. 16, 60). Based on their training and experience with hand-to-hand drug transactions, and viewed in context and in real time, Gero and Fabiano both suspected that the pedestrian had purchased some kind of illegal drugs from Barreto.

Although the interaction occurred in a "residential area," the police need not have ignored that the area was one in which they had made drug arrests and executed search warrants for drugs in the past. Moreover, in concluding that they had just witnessed a drug transaction, the police also were not required to ignore the information provided by the unidentified informant. Although insufficient by itself, the informant's tip provided context to the police observa-

tions. Taken as a whole, the "silent movie" as it played out to the trained officers led to the reasonable suspicion that an illegal drug transaction had just occurred. See *Kennedy*, 426 Mass. at 708.

In sum, the Commonwealth respectfully submits that the facts and inferences upon which the police acted were specific and articulable, and viewed through the eyes of experienced narcotics investigators provided reasonable suspicion and more than a hunch that street level drug transaction had occurred. As police thus had reasonable suspicion an illegal drug transaction had just occurred, a stop and exit order was proper to confirm or dispel that suspicion. When the defendant opened the door to exit, the police made the plain view observation of a roll of U.S. currency inside a clear plastic bag in the storage compartment located on the inside of the driver's door (Tr. 19, 40; Exh. 6). This observation, in conjunction with the officers' reasonable suspicion of drug activity, gave rise to probable cause to arrest the defendant and search the vehicle. The evidence found as a result of that search should not be suppressed. See *Commonwealth v. Bostock*, 450 Mass. 616, 619-21 (2008) (exit order may be justified by reasonable suspicion of criminal activity, even absent safety concerns); *Commonwealth v. Johnson*, 461 Mass. 44, 49-

50 (2011) (probable cause justified search of motor vehicle).

## II. THE QUANTUM REQUIRED FOR REASONABLE SUSPICION.

The Appeals Court majority erred in applying the facts found to the established law because it erroneously transformed "reasonable suspicion" into a higher quantum of proof than is required. Reasonable suspicion is a lower standard than that of probable cause. See *Commonwealth v. Smigliano*, 427 Mass. 490, 492 (1998). The facts must be viewed collectively, and in light of the officer's experience, not parsed individually. See *Commonwealth v. Edwards*, 476 Mass. 341, 346-347 (2017). The Appeals Court majority erred by engaging in precisely the parsing warned against in case law. Indeed, at multiple points, the majority opinion views the facts in isolation, focuses on possible innocent explanations, and discounts the experienced officers' trained eyes. That appellate judges may conceive possible innocent explanations for what the officers observed does not negate what reasonably appeared to be a street level drug transaction through their trained eyes. What the police observed is a "silent movie"; what the Appeals Court majority postulates is an alternative explanation for that movie. "That there may have been an innocent explanation for the actions of the defendant and his cohort[] does not

remove those actions from consideration in the reasonable suspicion analysis." *Commonwealth v. Cabrera*, 76 Mass. App. Ct. 341, 347 (2010).

In fact, that there could possibly be an innocent explanation for the defendant's meet up with the unknown male is completely irrelevant, as seemingly innocent activities must be viewed through the eyes of the experienced drug investigators. See *id.* at 345-347. In addition, as the dissent properly notes, police officers do "not have to exclude all the possible innocent explanations for the facts in order to form a reasonable suspicion." *Commonwealth v. Isaiah I.*, 450 Mass. 818, 823 (2008). Seemingly innocent activities, taken together, can give rise to the reasonable suspicion required for a threshold inquiry. See *Commonwealth v. Watson*, 430 Mass. 725, 729 (2000).

Additionally, the Appeals Court majority erred in discounting the tip from the unidentified informant as adding no contextual heft whatsoever to the observations of the police. In the words of the majority, the "observations corroborated the unexceptional fact that at some undisclosed point in time, a green Volvo station wagon would be in the identified neighborhood." *Barreto*, 94 Mass. App. Ct. at 346. In dismissing the information that: (1) on that afternoon, (2) a green, (3) Volvo, (4) station wagon, (5) would

be in the area of Waverly and Copeland Streets, as a single "unexceptional fact", the majority blinds itself to specific identifiers and to the statistical improbability that on that day, (1) at that time ("in the afternoon"), the police would just happen to observe what their trained eyes told them was a street level drug transaction being conducted out of a (2) green, (3) Volvo, (4) station wagon, (5) in the area of Waverly and Copeland Streets, a happening consistent with the information reported by the informant. It is true that Massachusetts relies on the "indicia of reliability" of the informant's tip under familiar *Aguilar-Spinelli* principles (basis of knowledge and veracity) for purposes of determining reasonable suspicion that is predicated on information from an unnamed informant. But nothing in the case law prohibits considering the tip *at all* when reasonable suspicion is predicated on observations of experience police investigators that corroborates the tip. While the Appeals Court majority acknowledges that a tip may be verified by police corroboration, see *Barreto*, 94 Mass. App. Ct. at 346 n. 17, the majority turned analysis on its head when it reasoned that the facts presented did not establish the "significant corroboration of that tip [] needed" here. See *id.* at 346

n. 17. Here, as suggested by the dissenting justice,<sup>6</sup> it was not the independent observations of the police that corroborated the tip, but the tip that provided additional context for the police determination that they had just observed as street level drug transaction.

As police had reasonable suspicion justifying the stop and exit order to the defendant, officers' subsequent observations of the roll of money observed in the defendant's driver's side door established probable cause to search that vehicle. The evidence found as a result of that search should not be suppressed. See *Commonwealth v. Bostock*, 450 Mass. 616, 619-21 (2008) (exit order may be justified by reasonable suspicion of criminal activity, even absent safety concerns); *Commonwealth v. Johnson*, 461 Mass. 44, 49-50 (2011) (probable cause justified search of motor vehicle).

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<sup>6</sup> The tip was but "one of a number of factors contributing to reasonable suspicion . . . ." *Barreto*, 94 Mass. App. Ct. at 350 (Hanlon, J., dissenting).



**CONCLUSION**

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court allow the Commonwealth's petition for further appellate review.

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November 2018

**ADDENDUM****G.L. c. 94C, § 32E. Marijuana, Cocaine, Heroin, and Other Controlled Substances – Unauthorized Trafficking; Penalties.**

(a) Any person who trafficks in marihuana by knowingly or intentionally manufacturing, distributing, dispensing, or cultivating or possessing with intent to manufacture, distribute, dispense, or cultivate, or by bringing into the commonwealth a net weight of fifty pounds or more of marihuana or a net weight of fifty pounds or more of any mixture containing marihuana shall, if the net weight of marihuana or any mixture thereof is:

(1) Fifty pounds or more, but less than one hundred pounds, be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than fifteen years or by imprisonment in a jail or house of correction for not less than one nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of one year and a fine of not less than five hundred nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum one year term of imprisonment, as established herein.

(2) One hundred pounds or more, but less than two thousand pounds, be punished by a term of imprisonment in the state prison for not less than 2 nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of 2 years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(3) Two thousand pounds or more, but less than ten thousand pounds, be punished by a term of imprisonment in the state prison for not less than 3½ nor more than fifteen years. No sentence imposed under the provisions of this section shall

be for less than a mandatory minimum term of imprisonment of  $3\frac{1}{2}$  years and a fine of not less than five thousand nor more than fifty thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(4) Ten thousand pounds or more, be punished by a term of imprisonment in the state prison for not less than 8 nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of 8 years and a fine of not less than twenty thousand nor more than two hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(b) Any person who trafficks in a controlled substance defined in clause (4) of paragraph (a), clause (2) of paragraph (c) or in clause (3) of paragraph (c) of Class B of section thirty-one by knowingly or intentionally manufacturing, distributing or dispensing or possessing with intent to manufacture, distribute or dispense or by bringing into the commonwealth a net weight of 18 grams or more of a controlled substance as so defined, or a net weight of 18 grams or more of any mixture containing a controlled substance as so defined shall, if the net weight of a controlled substance as so defined, or any mixture thereof is:

(1) Eighteen grams or more but less than 36 grams, be punished by a term of imprisonment in the state prison for not less than 2 nor more than 15 years. No sentence imposed under this clause shall be for less than a minimum term of imprisonment of 2 years, and a fine of not less \$2,500 nor more than \$25,000 may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(2) Thirty-six grams or more, but less than 100 grams, be punished by a term of imprisonment in the state prison for not less than  $3\frac{1}{2}$  nor more than 20 years. No sentence imposed under this clause shall be for less than a mandatory minimum term of imprisonment of  $3\frac{1}{2}$  years, and a fine of

not less than \$5,000 nor more than \$50,000 may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(3) One hundred grams or more, but less than two hundred grams, be punished by a term of imprisonment in the state prison for not less than 8 nor more than twenty years. No sentence imposed under the provisions of this clause shall be for less than a mandatory minimum term of imprisonment of 8 years and a fine of not less than ten thousand nor more than one hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(4) Two hundred grams or more, be punished by a term of imprisonment in the state prison for not less than 12 nor more than twenty years. No sentence imposed under the provisions of this clause shall be for less than a mandatory minimum term of imprisonment of 12 years and a fine of not less than fifty thousand nor more than five hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(c) Any person who trafficks in heroin or any salt thereof, a controlled substance defined in paragraph (d) of Class A of section 31, morphine or any salt thereof, opium or any derivative thereof by knowingly or intentionally manufacturing, distributing or dispensing or possessing with intent to manufacture, distribute, or dispense or by bringing into the commonwealth a net weight of 18 grams or more of heroin or any salt thereof, a controlled substance defined in paragraph (d) of Class A of section 31, morphine or any salt thereof, opium or any derivative thereof or a net weight of 18 grams or more of any mixture containing heroin or any salt thereof, a controlled substance defined in paragraph (d) of Class A of section 31, morphine or any salt thereof, opium or any derivative thereof shall, if the net weight of heroin or any salt thereof, a controlled substance defined in paragraph (d) of Class A of section 31, morphine or any salt thereof, opium or any derivative thereof or any mixture thereof is:-

(1) Eighteen grams or more but less than 36 grams, be punished by a term of imprisonment in the state prison for not less than 3½ nor more than 30 years. No sentence imposed under this clause shall be for less than a mandatory minimum term of imprisonment of 3½ years, and a fine of not less than \$5,000 nor more than \$50,000 may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(2) Thirty-six grams or more but less than 100 grams, be punished by a term of imprisonment in the state prison for not less than 5 nor more than 30 years. No sentence imposed under this clause shall be for less than a mandatory minimum term of imprisonment of 5 years, and a fine of not less than \$5,000 nor more than \$50,000 may be imposed, but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(3) One hundred grams or more but less than two hundred grams, be punished by a term of imprisonment in the state prison for not less than 8 nor more than 30 years. No sentence imposed under the provisions of this clause shall be for less than the mandatory minimum term of imprisonment of 8 years, and a fine of not less than ten thousand nor more than one hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established therein.

(4) Two hundred grams or more, be punished by a term of imprisonment in the state prison for not less than 12 nor more than 30 years. No sentence imposed under the provisions of this clause shall be for less than a mandatory minimum term of imprisonment of 12 years and a fine of not less than fifty thousand nor more than five hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established therein.

(c½) Any person who trafficks in fentanyl or any derivative of fentanyl by knowingly or intentionally manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute or dispense or by bringing into the commonwealth a net weight of 10

grams or more of fentanyl or any derivative of fentanyl, or a net weight of 10 grams or more of any mixture containing fentanyl or any derivative of fentanyl, shall be punished by a term of imprisonment in state prison for not less than 3 and one-half nor more than 20 years. No sentence imposed under the provisions of this subsection shall be for less than a mandatory minimum term of imprisonment of 3 and one-half years.

(c<sup>3/4</sup>) Any person who trafficks in carfentanil, including without limitation, any derivative of carfentanil by knowingly or intentionally manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute or dispense or by bringing into the commonwealth carfentanil or any derivative of carfentanil, any mixture containing carfentanil or a derivative of carfentanil; provided, that such person had specific knowledge that such mixture contained carfentanil or any derivative of carfentanil shall be punished by a term of imprisonment in state prison for not less than 3 and one-half nor more than 20 years. No sentence imposed pursuant to this subsection shall be for less than a mandatory minimum term of imprisonment of 3 and one-half years.

(d) Any person serving a mandatory minimum sentence for violating this section shall be eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to the house of correction, except that such person shall not be eligible for parole upon a finding of any 1 of the following aggravating circumstances:

(i) the defendant used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so, during the commission of the offense;

(ii) the defendant engaged in a course of conduct whereby he directed the activities of another others who committed any felony in violation of chapter 94C; or

(iii) the offense was committed during the commission or attempted commission of a violation of section 32F or section 32K of chapter 94C.

A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.

**COMMONWEALTH'S APPENDIX**

<i>Commonwealth v. Onaxis Barreto</i> , 94 Mass. App. Ct. 337 (October 29, 2018) . . . . .	1-11
Suffolk Superior Court Docket Number 1484CR10751 . . .	12-19
Motion Judge's Findings of Fact, Rulings of Law, and Order Denying Defendant's Motion to Suppress Evidence . . .	20-29
Suppression Hearing Transcript . . . . .	30-125



## Commonwealth v. Barreto

Appeals Court of Massachusetts

May 11, 2018, Argued; October 29, 2018, Decided

No. 17-P-1045.

### Reporter

94 Mass. App. Ct. 337 \*; 2018 Mass. App. LEXIS 150 \*\*; 2018 WL 5317074

under the circumstances, be suppressed as the "fruit of the poisonous tree."

COMMONWEALTH vs. ONAXIS BARRETO.

**Prior History:** [**\*\*1**] Suffolk. INDICTMENT found and returned in the Superior Court Department on August 28, 2014.

A pretrial motion to suppress evidence was heard by *Kenneth W. Salinger, J.*, and a motion for reconsideration was considered by him.

An application for leave to prosecute an interlocutory appeal was allowed by *Geraldine S. Hines, J.*, in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by her to the Appeals Court.

### Core Terms

tip, reasonable suspicion, Street, corroborated, informant, driver's, interaction, reliability, drug transaction, police officer, probable cause, observations, arrests, station wagon, exit order, informant's tip, illegal drug, circumstances, officer's, caller, door, pedestrian, exchanged, narcotics, suppress, neighborhood, unidentified, anonymous, vehicle's, leaned

### Case Summary

#### Overview

**HOLDINGS:** [1]-The trial court erred by denying defendant's motion to suppress because, although the judge was correct not to rely on the informant's tip, without such reliance, his ruling that the police had reasonable suspicion to order defendant out of his vehicle could not stand and, in turn, without a valid exit order, the police could not rely on their discovery of the wad of money in the driver's door, and the police therefore lacked probable cause to search his vehicle. Because the evidence in issue was traceable to the illegal order that the defendant leave the car, it had to,

### Outcome

Denial of motion to suppress reversed.

### LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions to Suppress

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

#### HN1 [📄] **De Novo Review, Conclusions of Law**

When reviewing a decision on a motion to suppress, an appellate court accepts the judge's findings of fact absent clear error, but make an independent determination whether the judge correctly applied constitutional principles to the facts as found.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches

#### HN2 [📄] **Warrantless Searches, Vehicle Searches**

A warrant is not required to search an automobile when

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.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches

### [HN3](#) **Warrantless Searches, Investigative Stops**

Regarding a search, testimony of an observed hand-to-hand exchange in some circumstances can establish the requisite degree of suspicion that an illegal narcotics sale has occurred even where the police do not "actually see an object exchanged."

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

### [HN4](#) **Warrantless Searches, Investigative Stops**

A mere "hunch" is not enough to establish reasonable suspicion for a search.

Criminal Law & Procedure > ... > Warrantless Searches > Exigent Circumstances > Information From Others

### [HN5](#) **Exigent Circumstances, Information From Others**

The Massachusetts Supreme Judicial Court has made it clear that the Commonwealth cannot rely on an informant's tip unless the reliability of that tip has been demonstrated pursuant to the two-pronged Aguilar-Spinelli test (in which courts are to assess the extent to which the informant's veracity and basis of knowledge have been shown). In continuing to adhere to the Aguilar-Spinelli test in the context of challenges brought pursuant to [Mass. Const. Decl. Rights art. 14](#), the court on multiple occasions has rejected calls that it adopt the less demanding "totality of the circumstances" test employed by the United States Supreme Court in

challenges brought pursuant to the *Fourth Amendment to the United States Constitution*.

Criminal Law & Procedure > ... > Warrantless Searches > Exigent Circumstances > Information From Others

### [HN6](#) **Exigent Circumstances, Information From Others**

Under existing case law, if the requisite level of suspicion depends on an informant's tip, that tip must satisfy Aguilar-Spinelli.

Criminal Law & Procedure > ... > Warrantless Searches > Exigent Circumstances > Information From Others

### [HN7](#) **Exigent Circumstances, Information From Others**

An anonymous tip — such as one made by an unidentified caller to 911 — typically includes some information that is helpful to assessing the caller's basis of knowledge or reliability.

Criminal Law & Procedure > ... > Warrantless Searches > Exigent Circumstances > Information From Others

### [HN8](#) **Exigent Circumstances, Information From Others**

While the Commonwealth will need to demonstrate a tip's reliability based on the informant's reliability and his or her basis of knowledge, independent police corroboration may make up for deficiencies in one or both of these factors. Thus, while the Aguilar-Spinelli test must be satisfied, there is more than one way of doing so. Moreover, in the context of reasonable suspicion, the demonstrated reliability of an informant's tip need not be as robust as what is needed to demonstrate probable cause.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

Criminal Law & Procedure > Search &  
Seizure > Warrantless Searches > Vehicle  
Searches

Commonwealth.

**Judges:** Present: MILKEY, HANLON, & SINGH, JJ.

## [HN9](#) Warrantless Searches, Investigative Stops

**Opinion by:** MILKEY

Corroboration of purely innocent details that are observable by any bystander, such as the description of a vehicle and its location, provides only limited enhancement to the reasonable suspicion determination.

## Opinion

## Headnotes/Syllabus

### Headnotes

MASSACHUSETTS OFFICIAL REPORTS  
HEADNOTES

*Controlled Substances > Practice, Criminal > Motion to suppress > Constitutional Law > Search and seizure > Investigatory stop > Reasonable suspicion > Search and Seizure > Motor vehicle > Reasonable suspicion > Evidence > Anonymous statement > Corroborative evidence*


A Superior Court judge erred in denying a criminal defendant's pretrial motion to suppress evidence (cocaine and other incriminating evidence) found by police while conducting an investigatory search of the defendant's motor vehicle, where the police, who conducted the search in response to their observation of a roll of cash on the inside of the driver's door when the defendant stepped out in response to their exit order, did not have a valid ground (i.e., reasonable suspicion that the defendant had engaged in criminal activity) on which to order the defendant out of the vehicle, given that the police observations of the defendant's brief curbside interaction with an unidentified pedestrian created at most a "hunch" that a drug transaction had just occurred and, moreover, did not provide sufficient corroboration, beyond purely innocent details, of an informant's tip to establish its reliability for purposes of assessing reasonable suspicion. [341-347] HANLON, J., dissenting.

**Counsel:** *Eduardo Masferrer* for the defendant.

*Kathleen Celio*, Assistant District Attorney, for the

**MILKEY, J.** In August, 2014, a grand jury indicted the defendant for trafficking in 200 grams or more of cocaine. *G. L. c. 94C, § 32E (b) (4)*. The charge was based on evidence found during a [\*338] warrantless search of the defendant's motor vehicle. Following an evidentiary hearing, a Superior Court judge denied the defendant's motion to suppress that evidence.<sup>1</sup>

On the defendant's interlocutory appeal, we reverse.

**Standard of review.** [HN1](#)  "When reviewing a decision on a motion to suppress, we accept the judge's findings of fact absent clear [\*\*2] error, but make an independent determination whether the judge correctly applied constitutional principles to the facts as found." *Commonwealth v. Evans*, 87 Mass. App. Ct. 687, 688, 34 N.E.3d 772 (2015). The judge made careful, detailed findings, all of which are supported by the record and therefore are binding on us. Notably, the judge rejected some of the police witnesses' claims about what they were able to observe from a distance, and the specific factual claims that the judge did credit were qualified. The factual recitation that follows is drawn from the judge's findings.<sup>2</sup>

**Background.** 1. *The tip provided to police.* The Boston police focused on the defendant's vehicle because of a tip they had received from an undisclosed source. Specifically, on or before June 9, 2014, the police received information that a green Volvo station wagon containing a "large" amount of drugs would be near a certain intersection in the Roxbury section of Boston. No other information regarding the tip was provided at the evidentiary hearing.<sup>3</sup>

<sup>1</sup> The defendant filed a motion to reconsider that ruling, which also was denied.

<sup>2</sup> In reciting an interchange between the judge and counsel at the motion hearing, we of necessity rely on the transcript of that hearing.

<sup>3</sup> The record does not contain any recording of the tip, or other memorialization of what words the informant used to convey his or her thoughts. Instead, one of the testifying officers simply stated that the police had "received information from a

Thus, for example, there was no evidence that the tipster provided the license plate number of the vehicle, what time it would arrive, or any information whatsoever about the vehicle's occupants, if any. Similarly, there was no evidence [\*\*3] about who the tipster was, how he or she purportedly came into possession of the alleged information, how that information was passed along to police, or whether the police had any reason to trust it.

It was not happenstance that so little evidence was presented about the tip, and none about the tipster. At the beginning of the evidentiary hearing, the prosecutor made it clear that she did not intend to go into such issues because she did not want to risk [\*\*339] identifying the informant.<sup>4</sup>

Thus, in an effort to head off any inquiry into the tip, the prosecutor expressly disavowed trying to establish the tip's reliability pursuant to applicable case law, and she made it clear that she would be "objecting to any sort of [cross-examination] questions regarding the ... source of that information that the police had." Defense counsel responded that he was content with this arrangement based on his understanding of how the informant's alleged information would be treated. Specifically, he stated as follows: "It's a statement for context only that's not being used because it doesn't satisfy [the standard set forth in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969)]. For those purposes, I've agreed to not go into the — who the source is, [\*\*4] how is it that it came about, what were the exact details of the tip because we're [sic] not using it under *Aguilar-Spinelli* to support [the stop or search]." The judge responded by stating, "Okay. Fair enough." The prosecutor made no effort to disabuse defense counsel of his understanding.

2. *Police observations.* Upon receiving the tip, four police officers set up surveillance at the intersection mentioned by the informant. At about 5:15 P.M. on June 9, 2014, they saw a green Volvo station wagon turn at the intersection without the driver using his turn signal. The vehicle then parked approximately fifty feet away.

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source that a green Volvo station wagon that had a large amount of narcotics was in [the] area of [three streets in Roxbury]."

<sup>4</sup> At one point, the prosecutor — when pressed by the judge on whether she would be "attempting in any way to rely upon information from th[e] confidential source" — hedged slightly by stating her view that "stuff can be corroborated."

Shortly thereafter, one of the officers observed the vehicle's operator, subsequently identified as the defendant, lean down toward his right side "as if he [were] reaching toward the floor of the passenger side with both hands." According to the judge's findings, the officer could not see the defendant's hands or what the defendant might have been doing with them. Observing from a distance, the officers saw a man approach the parked vehicle from an adjacent building and interact with the defendant at the driver's side window for approximately half a minute. While the judge [\*\*5] found that the police observed the unidentified man who had approached the defendant's vehicle lean toward it "in a manner consistent with that man placing his hands on the Volvo door or reaching inside the Volvo," he also found that the police did not observe the defendant and the unidentified man actually "reach their hands toward each other, bring their hands [\*\*340] together, or exchange any object." Furthermore, the judge found that the police did not see anything in the pedestrian's hands as he was walking away from the vehicle, nor did they see him put anything into his pocket, or move his arm in a manner suggesting that he had just put anything there. Despite the absence of any observation of an item being exchanged between the men, the judge found that their interaction was "consistent with the two men exchanging something."

After the man walked away, the defendant drove his vehicle to an adjacent street, where the police stopped his vehicle. Although the defendant appeared nervous, he produced his driver's license and vehicle registration when requested to do so. At this point, there were at least four officers at the scene, and one of them ordered the defendant out of the vehicle. [\*\*6] As the defendant was stepping out of the vehicle, the officer saw a roll of cash in a clear plastic bag on the inside of the driver's door. After further questioning of the defendant proved fruitless<sup>5</sup>

and a patfrisk of him revealed nothing, the police initiated a thorough search of the vehicle, subsequently aided by a drug-sniffing dog. They eventually uncovered a metal box underneath the passenger seat, inside of which was a large amount of cocaine and additional cash.


The defendant moved to suppress all the evidence the police had collected pursuant to the stop and search of

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<sup>5</sup> The police questioned the defendant in English. Although the defendant supplied his license and registration, he told the police that he did not speak English and therefore did not understand their further inquiries.



his vehicle, including the cocaine, its packaging, the money (which totaled \$11,050), the defendant's cellular telephones, and a magnet that police believed was used to access a "hide" inside the vehicle. The judge ruled in the Commonwealth's favor. In doing so, he did not rely on the informant's tip in any fashion. In fact, with regard to that tip, the judge found that "[t]he Commonwealth did not present any evidence to demonstrate the basis for the informant's knowledge, that the police had any reason to believe that the informant was truthful, or that the police had corroborated the source's information that the [\*\*7] [defendant's vehicle] would contain illegal drugs." Instead, the judge concluded that the police had reasonable suspicion to stop the vehicle and to order the defendant out of it based on the brief interaction that the police had observed between the defendant and the unidentified man who had approached his vehicle. Then, according to the judge, once the police observed the wad of bills in the driver's door while the exit [\*341] order was being executed, they gained probable cause that justified their subsequent search of the vehicle.

 *Discussion*. 1. *Introduction*. The dispute before us is relatively narrow. It is uncontested that the police found the cocaine and other incriminating evidence during an investigatory search of the defendant's vehicle. It follows that this search was valid only if the Commonwealth at that point had probable cause to conduct the search. [\*Commonwealth v. Eggleston\*, 453 Mass. 554, 557, 903 N.E.2d 1087 \(2009\)](#).<sup>6</sup>


Moreover, the Commonwealth acknowledges that its claim that it had probable cause depends on the police having observed the roll of bills in the door of the vehicle while they were executing the exit order. Therefore, if the exit order was not valid, the Commonwealth's claim that it had probable cause to search the vehicle falls [\*\*8] short.


While the police could have stopped the vehicle for the civil traffic violation they observed,<sup>7</sup>

this would not have justified the exit order that led to the discovery of the roll of bills.<sup>8</sup>

Rather, in the particular circumstances of this case, the validity of the exit order — and hence the Commonwealth's claim that it obtained probable cause once it found the wad of bills — depends on the police having gained reasonable suspicion that the defendant was engaged in illegal drug activity. See [\*Commonwealth v. Bostock\*, 450 Mass. 616, 621-622, 880 N.E.2d 759 \(2008\)](#) (exit order justified when police have reasonable suspicion that operator engaged in criminal activity). The key question, then, is whether, by the time the police ordered the defendant out of his vehicle, they had "reasonable suspicion, based on specific, articulable facts and reasonable inferences therefrom, that an occupant of the ... motor vehicle [\*342] had committed, was committing, or was about to commit a crime." [\*Commonwealth v. Anderson\*, 461 Mass. 616, 621, 963 N.E.2d 704](#), cert. denied, 568 U.S. 946, 133 S. Ct. 433, 184 L. Ed. 2d 265 (2012), quoting [\*Commonwealth v. Alvarado\*, 423 Mass. 266, 268, 667 N.E.2d 856 \(1996\)](#). We turn to that question and begin by examining the grounds on which the judge relied.

2. *Reasonable suspicion*. a. *Police observations*. The motion judge found, without referring to the tip, that the police had reasonable suspicion to believe that the defendant [\*\*9] was selling illegal drugs based on the defendant's brief interaction with the unidentified pedestrian (after the defendant stopped his vehicle on a public street and reached toward the floor of the vehicle). We disagree.

As noted, the police did not observe any item being exchanged between the defendant and the person who approached and leaned toward his vehicle. As the Commonwealth highlights, [\*HN3\*](#) testimony of an observed hand-to-hand exchange in some circumstances can establish the requisite degree of suspicion that an illegal narcotics sale has occurred

<sup>6</sup> Because of the so-called "automobile exception," a warrant was not required so long as the police had probable cause. See [\*Commonwealth v. Eggleston\*, 453 Mass. at 557](#), quoting [\*Commonwealth v. Cast\*, 407 Mass. 891, 901, 556 N.E.2d 69 \(1990\)](#) ([\*HN2\*](#) "[A] warrant is not required to search an automobile 'when 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'").

<sup>7</sup> The fact that the traffic violation was not the actual reason

the police stopped the defendant's vehicle would not matter. See [\*Commonwealth v. Buckley\*, 478 Mass. 861, 872-873, 90 N.E.3d 767 \(2018\)](#). For purposes of our review, we have assumed that the length of time between the observed traffic violation and the stop was short enough that the initial stop could be justified on this basis.

<sup>8</sup> The defendant cooperated with the police after the stop, and the Commonwealth makes no claim that the exit order independently was justified for safety reasons. See [\*Commonwealth v. Gonsalves\*, 429 Mass. 658, 665 n.5, 666-668, 711 N.E.2d 108 \(1999\)](#).

even where the police do not “actually see an object exchanged.” [\*Commonwealth v. Kennedy\*, 426 Mass. 703, 710, 690 N.E.2d 436 \(1998\)](#).<sup>9</sup>

However, in those narcotics sale cases in which reasonable suspicion has been found in the absence of police observing an item being exchanged, there were significantly more suspicious circumstances than those encountered here. For example, in [\*Commonwealth v. Stewart\*, 469 Mass. 257, 261, 13 N.E.3d 981 \(2014\)](#), the court found reasonable suspicion for police to stop the defendant where — knowing that he previously had been arrested for drug dealing — they observed that “three persons followed [him] down a narrow street often used by drug users, with [a] woman counting currency as she walked, and then all four huddled briefly together [\*\*10] in a doorway, before they dispersed.” See [\*Commonwealth v. Gomes\*, 453 Mass. 506, 511-512, 903 N.E.2d 567 \(2009\)](#); [\*Commonwealth v. Moses\*, 408 Mass. 136, 140, 557 N.E.2d 14 \(1990\)](#).<sup>10</sup>

[\*343] Here, as a police witness acknowledged, neither the defendant nor the putative buyer was known to the police.<sup>11</sup>

Furthermore, the judge found that the police had no

reason, based on past experience, to expect a drug transaction to occur in this particular area, which was made up of “relatively quiet residential streets.”<sup>12</sup>

All the police observed was an unknown driver stop his vehicle in a residential neighborhood, lean down toward the passenger-side floor, and subsequently have a brief interaction with an unknown pedestrian during which the pedestrian leaned toward the vehicle (as if to place his hands on or in it). As far as it goes, the judge's finding that what the police saw was “consistent with” a hand-to-hand exchange of illegal drugs is unassailable. However, the defendant's observed actions would also be “consistent with” a broad range of other interactions. These would include, as [\*344] mere examples, the driver's saying a quick hello to an acquaintance he passed on the street, the driver's asking for directions after looking for a map, or the driver's stopping to drop off tickets to a sporting [\*\*11] event or another item to a friend he had arranged to meet. Even if there were sufficient evidence to establish reasonable suspicion that an exchange had taken place, there was not enough to establish that the exchange was of illegal drugs. Put otherwise, if the looming presence of the unsubstantiated tip is truly disregarded, then the specific

<sup>9</sup> *Kennedy* involved probable cause. Ipso facto, there is no per se rule requiring that police see an object exchanged in cases where, as here, the less rigorous standard of reasonable suspicion applies.

<sup>10</sup> In *Commonwealth v. Gomes*, the court held that the police officer had reasonable suspicion to stop the defendant in a high crime area at around 4 A.M., where the defendant was known to previously have been arrested on drug charges and was observed “displaying items in his hand[, which the officers could not see,] and then appearing to swallow those items as the [police] approached.” [453 Mass. at 511](#). In *Commonwealth v. Moses*, the court held that the police officer “had reason to suspect that a drug transaction was taking place” where he saw four individuals who were “standing near an automobile parked next to the sidewalk with its motor running [and] appeared to be interacting in some way with three ... men who sat in the automobile[, and then, o]n making eye contact with [the officer,] all four [men on the sidewalk] quickly dispersed in two different directions[, and] [o]ne of the occupants of the automobile, on making eye contact with [the officer], immediately ducked under the dashboard, completely out of [the officer's] sight.” [408 Mass. at 140](#).

<sup>11</sup> In its appellate brief, the Commonwealth repeatedly refers to the person who approached the vehicle as “Hispanic,” even though his ethnicity has no relevance here. We point this out only to alert the parties to the issue of implicit bias, from which

no one is immune. See [\*Commonwealth v. Buckley\*, 478 Mass. at 878 n.4](#) (Budd, J., concurring) (discussing implicit bias). We acknowledge that in their testimony, the witnesses described the pedestrian they had observed as Hispanic, and that the Commonwealth's appellate counsel apparently borrowed such references in their brief. It is not difficult, however, to avoid unnecessary references that may implicate such bias whether it be present or not. The motion judge did so in this case. Relying on the same testimony as appellate counsel, the judge referred to the unknown parties by their roles (the pedestrian and the driver) and thereby focused his analysis on the relevant facts, the conduct of the individuals.

<sup>12</sup> Our dissenting colleague highlights that the judge credited the testimony of a police witness that over a ten-year period, “he ha[d] made numerous arrests for possession or distribution of illegal narcotics in [that] general neighborhood.” *Post* at 349. In our view, such general background information added little, if anything, to the reasonable suspicion calculus. See [\*Commonwealth v. Johnson\*, 454 Mass. 159, 163, 908 N.E.2d 729 \(2009\)](#) (urging that judges consider presence in a high crime area “with caution” given “that so-called high crime areas are inhabited and frequented by many law-abiding citizens who are entitled to be protected against being stopped and frisked just because of the neighborhood where they live, work, or visit”). “The term ‘high crime area’ is itself a general and conclusory term that should not be used to justify a stop or a frisk, or both, without requiring the articulation of specific facts demonstrating the reasonableness of the intrusion.” *Ibid*.

actions that the police observed — even when seen through the eyes of experienced officers — created at most a “hunch” that a drug transaction had just occurred. As the Supreme Judicial Court has long held, [HN4](#) [↑] a “mere ‘hunch’ is not enough” to establish reasonable suspicion. [Commonwealth v. Silva](#), 366 Mass. 402, 406, 318 N.E.2d 895 (1974).<sup>13</sup>

The Commonwealth seeks to justify the stop by having us add to the mix the undisclosed informant's tip about a green Volvo station wagon containing drugs.<sup>14</sup>

Although the judge himself placed no reliance on the tip, it is plain from one of the arresting officer's testimony that, unsurprisingly, such information played a major part in leading him “to believe that a possible drug transaction [had] occurred.” Because we can affirm the denial of the motion to suppress on any ground fairly supported by the record, see [Commonwealth v. Va Meng Joe](#), 425 Mass. 99, 102, 682 N.E.2d 586 (1997), we must evaluate whether considering the tip here makes **[\*\*12]** a difference.

b. *The import of the tip.* [HN5](#) [↑] The Supreme Judicial Court has made it clear that the Commonwealth cannot rely on an informant's tip unless the reliability of that tip has been demonstrated pursuant to the two-pronged [Aguilar-Spinelli](#) test (in which courts are to assess the extent to which the informant's veracity and basis of knowledge have been shown). See [Commonwealth v. Upton](#), 394 [\*\*345] Mass. 363, 375, 476 N.E.2d 548 (1985), citing [Aguilar v. Texas](#), 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and [Spinelli v. United States](#), 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). In continuing to adhere to the [Aguilar-Spinelli](#) test in the context of challenges brought pursuant to [art. 14 of the Massachusetts Declaration of Rights](#), the court

on multiple occasions has rejected calls that it adopt the less demanding “totality of the circumstances” test employed by the United States Supreme Court in challenges brought pursuant to the *Fourth Amendment to the United States Constitution*. See [Upton](#), 394 Mass. at 371-375 (rejecting the rule adopted in [Illinois v. Gates](#), 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 [1983]). See also [Commonwealth v. Lyons](#), 409 Mass. 16, 18, 564 N.E.2d 390 (1990) (declining to follow the rule stated in [Alabama v. White](#), 496 U.S. 325, 328, 110 S. Ct. 2412, 110 L. Ed. 2d 301 [1990]); [Commonwealth v. Mubdi](#), 456 Mass. 385, 395-396, 923 N.E.2d 1004 (2010).

In its brief, the Commonwealth appears to maintain that where, as here, the tip is not the sole basis for the police action, the *Aguilar-Spinelli* test does not apply. Rather, the Commonwealth seems to suggest, the information received from the informant can be considered as one factor among others that collectively tip the scales. In this manner, the Commonwealth effectively advocates for a “totality of the circumstances” **[\*\*13]** test that the Supreme Judicial Court has time and again rejected. [HN6](#) [↑] Under existing case law, if the requisite level of suspicion depends on an informant's tip, that tip must satisfy *Aguilar-Spinelli*.

Here, nothing in the record establishes the informant's basis of knowledge or his or her veracity. Indeed, although the Commonwealth refers to the information the undisclosed informant provided as an “anonymous tip,” this actually overstates its force. [HN7](#) [↑] An anonymous tip — such as one made by an unidentified caller to 911 — typically includes some information that is helpful to assessing the caller's basis of knowledge or reliability. See [Commonwealth v. Depiero](#), 473 Mass. 450, 452-453, 42 N.E.3d 1123 (2016) (anonymous 911 caller reported seeing drunk driving in Cambridge, with the vehicle “swerving all over the road”). The Commonwealth not only failed to make any evidentiary showing with regard to these issues, but also expressly foreswore attempting to do so when the evidentiary hearing began.<sup>15</sup>

<sup>13</sup>To be sure, as our dissenting colleague accurately points out, the police observed the defendant exhibit nervous behavior once they pulled over his vehicle. However, the fact that someone became anxious after being stopped by at least four armed police officers has negligible force (particularly to the extent that the defendant did not speak English, a factual issue the judge did not resolve). See [Commonwealth v. Cruz](#), 459 Mass. 459, 468, 945 N.E.2d 899 (2011) (“It is common, and not necessarily indicative of criminality, to appear nervous during even a mundane encounter with police”).

<sup>14</sup>The defendant has not argued that the statements the prosecutor made at the evidentiary hearing should estop the Commonwealth from trying to rely on the tip on appeal. We assume arguendo that the Commonwealth's arguments based on the tip are properly before us.

<sup>15</sup>The fact that the record does not even memorialize what words the informant allegedly spoke itself impedes the Commonwealth's efforts to establish the indicia of reliability of information the police received. See [Commonwealth v. Mubdi](#), 456 Mass. at 396 (“By failing to introduce the 911 call in evidence, the Commonwealth has made difficult what otherwise might have been a straightforward assessment of the caller's source of information”).

That said, the cases have long recognized that [HN8](#)<sup>16</sup> while the Com- [\*346] monwealth will need to demonstrate a tip's reliability based on "the informant's reliability and his or her basis of knowledge[, i]ndependent police corroboration may make up for deficiencies in one or both of [\*14] these factors." [Commonwealth v. Lyons, supra at 19](#). Thus, while the *Aguilar-Spinelli* test must be satisfied, there is more than one way of doing so. Moreover, in the context of reasonable suspicion, the demonstrated reliability of an informant's tip need not be as robust as what is needed to demonstrate probable cause. [Lyons, supra](#). The question then is whether the observations the police made at the scene provided sufficient corroboration of the tip to establish its reliability for purposes of assessing reasonable suspicion.

At most, the police observations corroborated the unexceptional fact that at some undisclosed point in time, a green Volvo station wagon would be in the identified neighborhood.<sup>16</sup>

As the Supreme Judicial Court recently observed, [HN9](#)<sup>17</sup> "Corroboration of purely innocent details that are observable by any bystander, such as the description of a vehicle and its location, provides only limited enhancement to the reasonable suspicion determination." [Commonwealth v. Pinto, 476 Mass. 361, 365, 67 N.E.3d 713 \(2017\)](#). To the extent that the Commonwealth argues that the brief curbside interaction between the defendant and the unidentified pedestrian corroborated the tip that there were drugs inside of a green Volvo station wagon, we are unpersuaded.<sup>17</sup>

See [Commonwealth v. Mubdi, 456 Mass. at 387, 398-399](#) (fact that [\*15] a person was observed interacting with defendant and other occupant of defendant's vehicle and started to walk away from the vehicle after seeing approaching police officers held insufficient to corroborate informant's tip about a purportedly illegal sale of a firearm). Compare [Common \[\\*347\] wealth v. Dasilva, 66 Mass. App. Ct. 556, 560, 849 N.E.2d 249 \(2006\)](#) (anonymous tip that defendant illegally possessed a firearm was corroborated by police observations that, "[a]fter looking directly at the marked police cruiser, the defendant moved his right hand toward his waistband, fled up the stairs of the building where he was standing, and continued to flee even after [a police officer] ordered him to stop"). Without a sufficient showing that the informant's tip should be considered reliable, it cannot be relied upon to demonstrate reasonable suspicion.<sup>18</sup>

*Conclusion.* The judge was correct not to rely on the informant's tip. However, without such reliance, his ruling that the police had reasonable suspicion to order the defendant out of his vehicle cannot stand. In turn, without a valid exit order, the police cannot rely on their discovery of the wad of money in the driver's door, and the police therefore lacked probable cause to search his vehicle. "Because [\*16] the evidence in issue was traceable to ... the illegal order[ ] that the defendant[ ] leave the car, it must in these circumstances be suppressed as the 'fruit of the poisonous tree.'" [Commonwealth v. Loughlin, 385 Mass. 60, 63, 430 N.E.2d 823 \(1982\)](#). The order denying the defendant's motion to suppress is reversed.

*So ordered.*

<sup>16</sup> As noted, the informant provided no information about the vehicle's registration number or about the vehicle's occupants, if any. It is far from clear that the informant's tip satisfied the separate particularity requirement. Compare [Commonwealth v. Lopes, 455 Mass. 147, 155, 157-158, 914 N.E.2d 78 \(2009\)](#). We do not resolve this issue, as the defendant has not raised it and we reverse on other grounds.

<sup>17</sup> In this regard, we note that it stands to reason that the extent to which police corroboration can fill in the gaps of demonstrating an informant's basis of knowledge and veracity will vary depending on how great those gaps are. If the evidence regarding the tip itself comes close to meeting the *Aguilar-Spinelli* test on its own, then presumably a lesser amount of corroboration is needed. Where, however, as here, there has been no direct showing of the informant's veracity and basis of knowledge, significant corroboration of that tip would be needed.

<sup>18</sup> Contrary to the suggestion made by our dissenting colleague, there are no cases that hold that a tip as unsubstantiated and uncorroborated as the one before us can be relied upon — in whole or in part — to establish reasonable suspicion. Indeed, it is difficult to find examples in the case law where the Commonwealth put forward so little evidence to try to establish that a tip was reliable. Of course, it is possible that the actual circumstances of the tip provided police solid grounds for believing that the defendant was engaged in illegal drug activities (with or without the subsequent observations that police made). But in the context of a motion to suppress, the Commonwealth can rely only on what it puts in evidence. While the Commonwealth has substantial leeway to protect its confidential sources, see [Commonwealth v. D.M., 480 Mass. 1004, 1005, 100 N.E.3d 347 \(2018\)](#), and cases cited, it must live with the litigation risks of doing so.



Dissent by: HANLON

## Dissent

HANLON, J. (dissenting). I agree with much of the majority's thoughtful decision. Respectfully, however, I dissent on the crucial issue — whether, at the time that the officers told the defendant to get out of the vehicle, they had a reasonable suspicion to believe that he had engaged in an illegal drug transaction. The stop itself clearly was justified by the earlier traffic violation, a conclusion that the defendant does not really dispute. The motion judge explicitly credited the officers' testimony “that [the defendant] made [a] turn [from Copeland Street through the intersection at Warren Street and onto Waverly Street] without using any turn signal.”<sup>1</sup>

*Background.* As the majority notes, the judge's findings were careful and thorough. First, he found that, at the time of the encounter, the two lead officers, Fabiano and Gero, “were both experienced narcotics investigators.” They were assisted by officers from the District \*\*17 B-2 anti-crime unit. “That afternoon they were looking to intercept and stop a green Volvo station wagon because an unidentified informant had told Fabiano that he could find such a vehicle in the area of Waverly and Copeland Streets in Boston and that the vehicle would contain a large amount of illegal narcotics.”

When the officers stopped the defendant driving a green Volvo station wagon, they knew: first, the defendant had stopped his vehicle on Waverly Street, in front of the first building on the left, “a residential building.” Second, “a second man immediately left the nearest building and walked to the driver's door of [the defendant's] vehicle[. A]s the second man approached[, the defendant] leaned down to his right as if he were reaching toward the floor by the front passenger seat,” using both hands. Third, the defendant then sat back up and interacted for no more than thirty seconds with the second man, who stood immediately outside the driver's door of the defendant's vehicle. During this interaction, the second man leaned toward the vehicle as if he were placing his

hands on the vehicle's door or reaching into the vehicle; he “was moving one or both of his arms while he [\*\*18] was standing next to the Volvo and facing [the defendant], in a manner consistent with the two men exchanging something.” Fourth, after approximately thirty seconds, the defendant drove away and the second man walked back into the building he had emerged from a moment earlier. The motion judge found that, “[b]ased on their training and experience with hand-to-hand drug transactions, [the officers] both suspected that the pedestrian had purchased some kind of illegal drugs from [the defendant].”

At the time that the officers ordered the defendant out of the vehicle, they had some additional information. They had asked [\*\*349] for his license and registration, noting that the defendant “seemed to be nervous ... [and] that [he] seemed to be breathing heavily, was looking in his rear view and side view mirrors at the various police officers and vehicles that had pulled up behind him, and was not making eye contact” with either of the officers who were speaking with him. Finally, while the judge declined to use the talismanic words “high crime area” and, in fact, specifically found that, as of this date, “the Boston police had no reason based on past experience to expect to see a drug transaction [\*\*19] take place on Waverly Street or Copeland Street, which are both relatively quiet residential streets,” he also “credit[ed] Officer Gero's testimony that over the years he ha[d] made numerous arrests for possession or distribution of illegal narcotics in this general neighborhood.”<sup>2</sup>

*Discussion.* 1. *Exit order.* The law is clear that a police officer may order a driver to get out of a vehicle when he has a reasonable suspicion that the driver has committed a crime. See [Commonwealth v. Bostock, 450 Mass. 616, 621-622, 880 N.E.2d 759 \(2008\)](#). Therefore, as noted, the issue is whether the officer had reasonable suspicion when he ordered the defendant out of the vehicle.

“[R]easonable suspicion is a lower standard than probable cause.” [Commonwealth v. Smigliano, 427 Mass. 490, 492, 694 N.E.2d 341 \(1998\)](#). See [Commonwealth v. Hill, 49 Mass. App. Ct. 58, 63, 726](#)

<sup>1</sup> “[T]he authority to conduct a traffic stop where a traffic violation has occurred is not limited by ‘[t]he fact that the [police] may have believed that the [driver was] engaging in illegal drug activity.’” [Commonwealth v. Buckley, 478 Mass. 861, 866, 90 N.E.3d 767 \(2018\)](#), quoting [Commonwealth v. Santana, 420 Mass. 205, 208, 649 N.E.2d 717 \(1995\)](#).

<sup>2</sup> Specifically, Gero testified, “In that specific area of Warren and Copeland is a — Warren Garden is across the street. That area — I've participated in numerous search warrants of the surrounding streets. I've made firearm arrests, drug arrests, arrests for breaking and [entering.] warrant arrests in that general area of the past [ten] years.”

N.E.2d 422 (2000):

“The specific facts on which the police based their stop of the defendant have been described as follows: ‘(1) a vehicle pulled up and an interaction occurred between someone in the vehicle and someone [in the parking lot], who apparently retrieved something before concluding the interaction with the vehicle’s occupant; (2) [the interaction occurred] in a place known by the police officer[s] as a place of high incidence of drug traffic; and (3) [the interaction was] witnessed by an experienced officer, who had made numerous [\*\*20] drug arrests [although not necessarily in the neighborhood] and considered the event as [suggesting] a drug sale.’ [Commonwealth v. Kennedy](#), 426 Mass. [703], 708, 690 N.E.2d 436 [1998]. Moreover, ‘the quickness of the interaction between [the other [\*350] party and the defendant] reasonably could be interpreted by the officer as suspicious conduct, similar to the suspicious conduct of the “furtive” transaction observed in [[Commonwealth v. Santaliz](#), 413 Mass. 238, 241, 596 N.E.2d 337 (1992)].’ [Commonwealth v. Kennedy](#), *supra* at 708-709. We are mindful that in *Kennedy* the seller had been arrested previously for narcotics sales and was the subject of complaints from people in the neighborhood, *id.* at 704; that in *Santaliz*, there was an obvious exchange of an object and money, *supra* at 240; and that in both *Kennedy* and *Santaliz* the officers had had considerable experience with drug transactions in the same location. However, in each of those cases the facts were deemed sufficient to establish probable cause for arrest. *If the facts set out in Kennedy and Santaliz were sufficient to support a finding of probable cause, the facts established here were sufficient to establish reasonable suspicion*” (emphasis supplied).

See also [Commonwealth v. Santiago](#), 470 Mass. 574, 579, 24 N.E.3d 560 (2015) (“Although [the officer] did not see any item actually exchanged, the defendant’s extended arm and [the recipient’s] corresponding gesture [\*\*21] in relation to his shirt pocket provided some basis for [the officer’s] belief that a drug transaction between the two men had just taken place”).

I also suggest that [art. 14 of the Massachusetts Declaration of Rights](#) does not require us to ignore completely the fact that the officers made their observations after receiving a tip that a green Volvo station wagon containing a “large” amount of drugs

would be in the area of Waverly and Copeland Streets. Certainly, the tip by itself did not satisfy either prong required by the teaching of *Aguilar-Spinelli*.<sup>3</sup>

However, viewing the tip as one of a number of factors contributing to reasonable suspicion does not, as the majority fears, impermissibly weaken the standard to a mere “totality of the circumstances.” See [Commonwealth v. Depiero](#), 473 Mass. 450, 452, 42 N.E.3d 1123 (2016) (“[T]he information gleaned from the anonymous call in the present case, corroborated by other information, was sufficiently reliable to warrant a finding that the officer had reasonable suspicion to stop the defendant’s vehicle”). In this case, the tip was corroborated by the fact that someone driving a green Volvo station wagon engaged in what the officers [\*\*351] reasonably suspected was a drug transaction some fifty feet up Waverly Street from the intersection of Waverly, Copeland, and [\*\*22] Warren Streets.

The majority does not cite to any case holding that such a tip must be disregarded completely, and there are a number of other cases that hold otherwise. See, e.g., [Commonwealth v. Anderson](#), 461 Mass. 616, 623, 963 N.E.2d 704, cert. denied, 568 U.S. 946, 133 S. Ct. 433, 184 L. Ed. 2d 265 (2012) (“Where the caller is anonymous, there are at least two ways to establish the caller’s reliability. The first is through independent corroboration by police observation or investigation of the details of the information provided by the caller. See ... [Florida v. J.L.](#), 529 U.S. 266, 270, 120 S. Ct. 1375, 146 L. Ed. 2d 254 [2000], quoting [Alabama v. White](#), 496 U.S. 325, 327, 110 S. Ct. 2412, 110 L. Ed. 2d 301 [1990] [anonymous tip, suitably corroborated, may exhibit ‘sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop’]”); [Commonwealth v. Wilson](#), 441 Mass. 390, 395-396, 805 N.E.2d 968 (2004) (“Independent police corroboration of the details in the telephone call by [the t]rooper ... when he arrived at the location identified by the caller and saw a group of nine men establishes that the caller’s information was also reliable. [Commonwealth v. Willis](#), 415 Mass. 814, 819, 616 N.E.2d 62 [1993]”).

Finally, the fact that the tip predicted a future event (the Volvo would arrive at the particular intersection containing drugs) also buttresses its credibility. See [Commonwealth v. Va Meng Joe](#), 425 Mass. 99, 104,

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<sup>3</sup> See [Aguilar v. Texas](#), 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); [Spinelli v. United States](#), 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

[682 N.E.2d 586 \(1997\)](#) (“Corroboration of future behavior, which goes beyond ‘readily available information,’ has a special significance when determining the reliability of an informant”).

“For more **[\*\*23]** than seventy-five years, we have avoided an overly formulaic approach to the determination of whether there is [reasonable suspicion to detain] a person who is suspected of participation in a street-level drug transaction.” [Commonwealth v. Sanders, 90 Mass. App. Ct. 660, 660, 63 N.E.3d 54 \(2016\)](#). “‘A police officer may make an investigatory stop ‘where suspicious conduct gives the officer reasonable ground to suspect that a person is committing, has committed, or is about to commit a crime.’ ... The action of the officer ‘must be based on specific and articulable facts and reasonable inferences therefrom, in light of the officer’s experience.’” [Commonwealth v. Gomes, 453 Mass. 506, 510-511, 903 N.E.2d 567 \(2009\)](#), quoting [Commonwealth v. Wilson, 441 Mass. \[at\] 394](#).” [Commonwealth v. Stewart, 469 Mass. 257, 261, 13 N.E.3d 981 \(2014\)](#).

While certainly, as the majority observes, there are many possible explanations for each of the facts individually (yes, the defendant could have been dropping off Celtics tickets, and yes, **[\*352]** the defendant likely was nervous because there were several police officers), police officers do “not have to exclude all the possible innocent explanations for the facts in order to form a reasonable suspicion.” [Commonwealth v. Isaiah I., 450 Mass. 818, 823, 882 N.E.2d 328 \(2008\)](#). “Although nervous or furtive movements do not supply reasonable suspicion when considered in isolation, they are properly considered together with other details **[\*\*24]** to find reasonable suspicion.” [Commonwealth v. DePeiza, 449 Mass. 367, 372, 868 N.E.2d 90 \(2007\)](#). “We view the ‘facts and inferences underlying the officer’s suspicion ... as a whole when assessing the reasonableness of his acts.’” [Commonwealth v. Thibeau, 384 Mass. 762, 764, 429 N.E.2d 1009 \(1981\)](#). “Seemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry.” [Commonwealth v. Watson, 430 Mass. 725, 729, 723 N.E.2d 501 \(2000\)](#).” [Commonwealth v. Gomes, 453 Mass. at 511](#). “We do not examine each fact known to [police] at the time of the stop in isolation; instead we view the ‘facts and inferences underlying the officer’s suspicion ... as a whole when assessing the reasonableness of his acts.’” [Commonwealth v. Isaiah I., supra](#), quoting [Commonwealth v. Thibeau, supra](#). I am satisfied that, in the case before us, all the facts together support the

judge’s conclusion that the exit order was properly grounded in reasonable suspicion.

2. *Search.* After the defendant got out of the Volvo, one of the police officers observed in plain view a roll of money packaged in a clear plastic bag and tucked into the compartment on the inside of the driver’s door. This observation — a large sum of cash — together with the officers’ reasonable suspicion that the defendant had just engaged in a drug transaction gave them probable cause to believe that the vehicle would contain evidence of the drug **[\*\*25]** transaction, as well as evidence that the defendant was in possession of illegal drugs, intending to distribute them. Compare [Commonwealth v. Stephens, 451 Mass. 370, 385, 885 N.E.2d 785 \(2008\)](#). The police could then search the Volvo without a warrant under the motor vehicle exception. See [Commonwealth v. Johnson, 461 Mass. 44, 49-50, 958 N.E.2d 25 \(2011\)](#).

I believe that the judge’s order denying the motion to suppress should be affirmed.

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[Skip to main content](#)**1484CR10751 Commonwealth vs. Barreto, Onaxis**

- Case Type
- Indictment
- Case Status
- Open
- File Date
- 08/28/2014
- DCM Track:
- B - Complex
- Initiating Action:
- COCAINE, TRAFFICKING IN, 200 GRAMS OR MORE c94C §32E(b)
- Status Date:
- 08/28/2014
- Case Judge:
- Leibensperger, Hon. Edward P
- Next Event:
- 12/11/2018

[All Information](#)[Party](#)[Charge](#)[Event](#)[Tickler](#)[Docket](#)[Disposition](#)**Party Information****Commonwealth**

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### Party Charge Information

- **Barreto, Onaxis**
- - Defendant
- Charge # 1 :  
**94C/32E/D-2 - Felony** COCAINE, TRAFFICKING IN, 200 GRAMS OR MORE c94C §32E(b)
- 
- Original Charge
- 94C/32E/D-2 COCAINE, TRAFFICKING IN, 200 GRAMS OR MORE c94C §32E(b) (Felony)
- Indicted Charge
- 
- Amended Charge
- 

### Events

<a href="#">Date</a>	<a href="#">Session</a>	<a href="#">Location</a>	<a href="#">Type</a>	<a href="#">Event Judge</a>	<a href="#">Result</a>
09/24/2014 09:30 AM	Magistrate's Session		Arraignment		Held as Scheduled
10/14/2014 09:30 AM	Magistrate's Session		Pre-Trial Conference		Held as Scheduled
10/21/2014 09:30 AM	Magistrate's Session		Status Review		Held as Scheduled
11/21/2014 09:30 AM	Magistrate's Session		Hearing on Compliance		Rescheduled
12/19/2014 09:30 AM	Magistrate's Session		Hearing on Compliance		Rescheduled
01/20/2015 09:00 AM	Criminal 9		Non-Evidentiary Hearing on Suppression		Canceled
02/03/2015 09:00 AM	Criminal 1		Pre-Trial Hearing		Rescheduled
02/05/2015 09:30 AM	Magistrate's Session		Hearing		Rescheduled
03/27/2015 09:00 AM	Criminal 9		Non-Evidentiary Hearing on Suppression		Not Held

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
04/01/2015 09:00 AM	Criminal 1		Bail Review		Held as Scheduled
05/19/2015 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Held as Scheduled
06/02/2015 02:00 PM	Criminal 4		Final Pre-Trial Conference		Canceled
06/09/2015 09:00 AM	Criminal 4		Jury Trial		Canceled
07/22/2015 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Not Held
10/14/2015 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Held as Scheduled
12/01/2015 02:00 PM	Criminal 4	BOS-8th FL, CR 815 (SC)	Trial Assignment Conference	Salinger, Hon. Kenneth W	Canceled
01/19/2016 02:00 PM	Criminal 4	BOS-8th FL, CR 815 (SC)	Trial Assignment Conference		Canceled
03/15/2016 02:00 PM	Criminal 4	BOS-8th FL, CR 815 (SC)	Trial Assignment Conference	Muse, Hon. Christopher J	Canceled
09/13/2016 02:00 PM	Criminal 4	BOS-8th FL, CR 815 (SC)	Conference to Review Status		Held as Scheduled
03/14/2017 02:00 PM	Criminal 4	BOS-8th FL, CR 815 (SC)	Conference to Review Status		Canceled
03/28/2017 09:30 AM	Criminal 4	BOS-8th FL, CR 815 (SC)	Conference to Review Status	Hogan, Hon. Maureen	Not Held
06/05/2017 02:00 AM	Criminal 4	BOS-8th FL, CR 815 (SC)	Conference to Review Status	Leibensperger, Hon. Edward P	Rescheduled
10/03/2017 02:00 PM	Criminal 4	BOS-8th FL, CR 815 (SC)	Conference to Review Status	Leibensperger, Hon. Edward P	Rescheduled
02/06/2018 02:00 PM	Criminal 4		Conference to Review Status		Held as Scheduled
05/08/2018 02:00 PM	Criminal 4	BOS-8th FL, CR 815 (SC)	Conference to Review Status	Hogan, Hon. Maureen	Rescheduled
07/10/2018 02:00 PM	Criminal 4	BOS-8th FL, CR 815 (SC)	Conference to Review Status	Brieger, Hon. Heidi	Canceled
09/18/2018 02:00 PM	Criminal 4		Conference to Review Status	Salinger, Hon. Kenneth W	Rescheduled
12/11/2018 02:00 PM	Criminal 4		Conference to Review Status		

**Ticklers**

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Pre-Trial Hearing	09/24/2014	09/24/2014	0	
Final Pre-Trial Conference	09/24/2014	06/07/2015	256	
Case Disposition	09/24/2014	06/21/2015	270	

**Docket Information**



<u>Docket Date</u>	<i>Docket Text</i>	<u>File Ref Nbr.</u>
08/28/2014	Indictment returned	1
08/28/2014	MOTION by Commonwealth for summons of Deft to appear; filed & allowed (Ball, J)	2
08/28/2014	Summons for arraignment issued ret September 24, 2014.	
09/15/2014	Summons returned with no service	
09/24/2014	Defendant came into court. Spanish Interpreter present.	
09/24/2014	Appearance of Deft's Atty: Eduardo A Masferrer filed.	3
09/24/2014	Domestic Violence Inquiry made.	
09/24/2014	Allegation of Domestic Abuse and written finding filed.	4
09/24/2014	Deft arraigned before Court	
09/24/2014	Deft waives reading of indictment	
09/24/2014	RE Offense 1:Plea of not guilty	
09/24/2014	Bail set: \$500,000.00 with surety or in the alternative \$50,000.00 cash without prejudice. Bail Warning Read. Said bail having been met, posted and verified ordered transferred from the Roxbury District Ct #14-1715. Transfer sheet filed. COB: 1. GPS monitoring. 2. Surrender passport	
09/24/2014	Commonwealth files Statement of the Case.	5
09/24/2014	Commonwealth files Notice of Appearance of ADA Kathleen Celio.	6
09/24/2014	Commonwealth files Notice of Discovery I.	7
09/24/2014	Assigned to Track "B" see scheduling order	
09/24/2014	Tracking deadlines Active since return date	
09/24/2014	Continued to 10/14/2014 for hearing Re: PTC by agreement.	
09/24/2014	Continued to 2/3/2015 for hearing Re: PTH by agreement.	
09/24/2014	Continued to 6/2/2015 for hearing Re: FPTC at 2pm in Rm. 815 by agreement.	
09/24/2014	Continued to 6/9/2015 for hearing Re: trial by agreement in Rm. 815. Kaczmarek, MAG - K. Celio, ADA - E. Masferrer, Atty - JAVS	
09/24/2014	Case Tracking scheduling order (Anne Kaczmarek. Magistrate) mailed 9/24/2014	
10/14/2014	Defendant came into court. Spanish Int present.	
10/14/2014	Pre-trial conference report filed	8
10/14/2014	Commonwealth files Notice of Discovery II.	9
10/14/2014	Continued to 10/21/2014 for hearing Re: Filing of motions by agreement. Wilson, MAG - K. Celio, ADA - E. Masferrer, Atty - JAVS	
10/21/2014	Defendant came into court.	
10/21/2014	Deft files Motion for Mandatory Discovery.	10
10/21/2014	Deft files Motion to Suppress Evidence with Affidavit in support of.	11
10/21/2014	Continued to 11/21/2014 for hearing Re: Discovery Compliance by agreement.	
10/21/2014	Continued to 1/20/2015 for hearing Re: Motion to Suppress by agreement in Rm. 713. Wilson, MAG - K. Celio, ADA - E. Masferrer, Atty - JAVS	
11/21/2014		

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>
	Defendant not present, case continued until 12/19/2014 by agreement for hearing Re: Discovery Compliance. Wilson, MAG - K. Celio, ADA - JAVS	
12/18/2014	Commonwealth files: Notice of discovery III	12
12/19/2014	Defendant not present, case continued until 1/20/2015 by agreement for hearing Re: Motion to Suppress in Rm. 713. Kaczmarek, MAG - G. Ogus for K. Celio, ADA - JAVS	
12/22/2014	Commonwealth files Response to Defendant's Motion for Discovery	13
02/03/2015	Defendant came into court	
02/03/2015	Appearance of Commonwealth's Atty: Gina Kwon	
02/03/2015	Case continued until 2/5/2015 by agreement for scheduling of motion to suppress(int requested). Lauriat, J. - G. Kwon, ADA. - JAVS.	
02/05/2015	Defendant comes into court. Spanish Int present. Case continued until 3/27/2015 by agreement for hearing Re: Motion to Suppress (2 hours) in Rm. 713. Wilson, MAG - G. Kwon, ADA - E. Masferrer, Atty - JAVS	
03/27/2015	Defendant comes into court, continued by agreement until 4/1/2015 for Hearing re: Live Bail First Session and 5/19/15 for Hearing re: Motion to Suppress Courtroom 713. G. Kwon, ADA - E. Masferrer, Attorney.	
04/01/2015	Defendant came into court	
04/01/2015	After hearing, Deft's oral motion to reduce bail is denied without prejudice. Lauriat, J. - G. Kwon, ADA. - E. Masferrer, Atty. - JAVS.	
05/19/2015	Defendant came into court	
05/19/2015	Spanish Interpreter present and sworn	
05/19/2015	Defendant's oral motion for for reduction of bail made.	
05/19/2015	After hearing, oral motion for reduction of bail , ALLOWED	
05/19/2015	Bail set: \$250,000.00 Surety or in the alternative \$25,000.00 Cash. Bail Warning Read. Fifty thousand dollars previously posted . Twenty five thousand may be returned to surety.	
05/19/2015	Case continued to 7/22/15 by agreement for hearing re: Motion to Suppress. (Non Custody) (Cancel 6/2/15 and 6/9/2015 dates) Hely, J - G. Kwon, ADA - E. Masferrer, Attorney - Javs/ERD	
07/22/2015	Defendant came into court.	
07/22/2015	Defendant's oral motion to remove GPS Allowed by agreement. Conditions of Bail (1) Report to Probation once per week in person (2) Random urine screens.	
07/22/2015	Continued at request of the Commonwealth to 10/14 /2015 for hearing on Motion to Suppress. Hely, J. Macy Lee, ADA - E. Masferrer, Attorney.	
09/26/2015	** On 09/26/2014 \$50,000.00 was received for case SUCR2014-10751, funds received by the surety Sandra Nunez. The defendant in the case is Onaxis Barreto.  As of the date of conversion a remaining balance of \$25,000.00 was converted for BAIL.	
09/26/2015	**Converted and manual data; Converted from MassCourt Lite, BasCot or ForeCourt(09/26/2015). Refer to case file for assessments, disbursements, and receipt validations.**	
10/14/2015	Commonwealth's Memorandum  Memorandum in Opposition to Defendant's Motion to Suppress Evidence, filed.	14
10/14/2015	Matter taken under advisement Defendant came into Court. Spanish Interpreter present and sworn. The following event: Evidentiary Hearing on Suppression scheduled for 10/14/2015 09:00 AM has been resulted as follows:	



<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>
	Result: Held - Under advisement After Hearing, Motion to Suppress P#11, taken under advisement. Defendant's Memorandum to be filed by 10/21/15. Continued by agreement to 12/1/15 for Trial Assignment Fourth Session Courtroom 815. Salinger, J. - K. Celio, ADA - E. Masferrer, Attorney - Javs.	
10/22/2015	Onaxis Barreto's Memorandum in support of Motion to Suppress Evidence, filed	15
10/28/2015	Findings of Fact and Rulings of Law:  Denying Defendant's Motion to Suppress Evidence, Filed. Salinger, J. Copies mailed to both parties 10/28/15.	16
10/28/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Eduardo Antonio Masferrer, Esq. Attorney: Kathleen Celio, Esq.	
11/04/2015	Defendant 's Motion to Reconsider.  Notice sent to Salinger J. with copy of Motion and Docket Sheets	17
11/05/2015	The following form was generated: A Clerk's Notice was generated and sent to: Other interested party: Hon. Kenneth W Salinger	
11/09/2015	Defendant 's Notice of Intent to Seek Interlocutory Appeal	18
11/10/2015	Endorsement on Motion for reconsideration by Defendant, (#17.0): DENIED (Sent copy to ADA K. Celio and Atty. E. Masferrer)	
11/12/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Eduardo Antonio Masferrer, Esq. Attorney: Kathleen Celio, Esq.	
11/20/2015	Notice of Intent to Seek Interlocutory Appeal of Denial of Motion to Reconsider Denial of Motion to Suppress Evidence  Applies To: Barreto, Onaxis (Defendant)	19
12/01/2015	Event Result: The following event: Trial Assignment Conference scheduled for 12/01/2015 02:00 PM has been resulted as follows: Result: Canceled Reason: Request of Defendant	
01/19/2016	Event Result: The following event: Trial Assignment Conference scheduled for 01/19/2016 02:00 PM has been resulted as follows: Result: Canceled Reason: Request of Defendant	
02/11/2016	General correspondence regarding Notice of Docket Entry Received from the SJC: OrderL Interlocutory 20 Appeal Allowed to Appeals Court. (Hines, J.)	
03/04/2016	OTS is hereby notified to provide the JAVS transcript of the proceedings of 10/14/2015 09:00 AM Evidentiary Hearing on Suppression, 05/19/2015 09:00 AM Evidentiary Hearing on Suppression. Original 3/04/16 2nd Notice 2/6/17 3rd Notice 6/2/17 with CD	
03/15/2016	Event Result: The following event: Trial Assignment Conference scheduled for 03/15/2016 02:00 PM has been resulted as follows: Result: Canceled Reason: Other event activity needed	
09/13/2016	Event Result: The following event: Conference to Review Status scheduled for 09/13/2016 02:00 PM has been	

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>
	<p>resulted as follows:  Result: Held as Scheduled  Appeared:  Defendant Barreto, Onaxis (Comes into court) - Spanish Interpreter Present and Sworn  Attorney Masferrer, Esq., Eduardo Antonio  Attorney Lee, M.  CR LeRoux, R.</p>	
03/14/2017	<p>Event Result:  The following event: Conference to Review Status scheduled for 03/14/2017 02:00 PM has been resulted as follows:  Result: Canceled  Reason: Court Closure</p>	
03/28/2017	<p>Defendant not in Court  Event not held  Case continued to 6-5-17 by agreement Re: Status /Appeal  Hogan, J.  M. Lee, ADA for K. Celio, ADA</p>	
06/05/2017	<p>Event Result:  The following event: Conference to Review Status scheduled for 06/05/2017 02:00 AM has been resulted as follows:  Result: Rescheduled  Reason: Joint request of parties, Deft not in court. Cont to 10/3/17 Status RE: Appeal by Agreement. IVses, 815 at 2PM. Deft non Custody. Counsel to notify if Interpreter is needed. Leibensperger/J, E. Masferrer/Atty</p>	
06/05/2017	<p>The following form was generated:   Notice to Appear  Sent On: 06/05/2017 11:07:38</p>	
06/23/2017	CD of Transcript of 10/14/2014 09:30 AM Pre-Trial Conference, 05/19/2015 09:00 AM Evidentiary Hearing on Suppression received from OTS.	
08/08/2017	Appeal: notice of assembly of record sent to Counsel	
08/08/2017	Appeal: Statement of the Case on Appeal (Cover Sheet).	
08/14/2017	<p>Notice of docket entry received from Appeals Court  Case was entered in this court on August 8, 2017</p>	21
10/03/2017	<p>Defendant not in Court  Case continued to 2-6-17 by agreement Re Status 808  Lauriat, J. K. Celio, ADA, FTR</p>	
02/06/2018	<p>Event Result: Deft not in court. Case cont. to 5/8/18 at 2pm rm. 815 for status re: appeal by agreement. Judge: Hogan, Hon. Maureen, K. Celio ADA, X atty, C. Lavallee CR.  The following event: Conference to Review Status scheduled for 02/06/2018 02:00 PM has been resulted as follows:  Result: Held as Scheduled   Judge: Hogan, Hon. Maureen</p>	
05/07/2018	<p>Event Result:  Judge: Brieger, Hon. Heidi  The following event: Conference to Review Status scheduled for 05/08/2018 02:00 PM has been resulted as follows:  Result: Rescheduled  Reason: Joint request of parties, Deft not in court. Appeal of Motion to Suppress to be argued on 5/11/18 Cont to 7/10/18 by agreement, Hr Re; Status Re: appeal, at 2pm ctrm 815. Brieger/J, K.Celio/ADA, E. Masferrer/Atty, by email.   Judge: Brieger, Hon. Heidi</p>	
05/21/2018	<p>Notice of docket entry received from Appeals Court  ORDER: The trial court is to forthwith transmit original exhibit 6 to the evidentiary hearing on the motion to suppress (Photograph)  (Case given to Exhibit Department)</p>	22

<u>Docket Date</u>	<i>Docket Text</i>	<u>File Ref Nbr.</u>
07/09/2018	<p>Defendant not in Court.</p> <p>By Order of the Court case is continued to 9/18/18 for Hearing Re: Status of Appeal at 2:00PM in Courtroom 815.</p> <p>Event Result:: Conference to Review Status scheduled on: 07/10/2018 02:00 PM</p> <p>Has been: Canceled For the following reason: By Court prior to date Hon. Kenneth W Salinger, Presiding</p> <p>Appeared:</p> <p>Staff: Rebeca Figueroa, Assistant Clerk Magistrate</p> <p>Judge: Salinger, Hon. Kenneth W</p>	
09/07/2018	<p>Event Result:: Conference to Review Status scheduled on: 09/18/2018 02:00 PM</p> <p>Has been: Rescheduled For the following reason: By Court prior to date Hon. Kenneth W Salinger, Presiding</p> <p>Appeared:</p> <p>Staff: Rebeca Figueroa, Assistant Clerk Magistrate</p>	

**Case Disposition**

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Active	09/24/2014	Leibensperger, Hon. Edward P

16

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT.  
1484CR10751

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COMMONWEALTH

v.

ONAXIS BARRETO

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FINDINGS OF FACT, RULINGS OF LAW, AND ORDER  
DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Defendant Onaxis Barreto is charged with trafficking in cocaine in an amount greater than 200 grams. Barreto asks the Court to suppress all evidence against him on the ground that the police illegally stopped and then searched the motor vehicle that Barreto was driving at the time of the arrest. For the reasons discussed below, the Court concludes that the Commonwealth has met its burden of proving that the warrantless stop, search, and arrest were lawful, and will therefore DENY Barreto's motion to suppress.

1. Findings of Fact. The Court heard testimony by Boston Police Officers Stephen Fabiano, Gerard Gero, and Nicholas Fisher at an evidentiary hearing held on October 14, 2015. The Court credits their testimony to the extent that it is consistent with findings stated in this memorandum. The Court also received a number of photographs and a map in the form of a satellite view into evidence. The Court makes the following findings of fact based on this evidence and on reasonable inferences that the Court has drawn from this evidence.

1.1. The Stakeout. On June 9, 2014, Officers Fabiano and Gero were both assigned to the citywide Drug Control Unit of the Boston Police Department. Gero and Fabiano were both experienced narcotics investigators. That afternoon they were looking to intercept and stop a green Volvo station wagon because an unidentified informant had told Fabiano that he could find such a vehicle in the area of Waverly and Copeland Streets in Boston and that the vehicle would contain a large amount of illegal narcotics. The Commonwealth did not present any evidence to demonstrate the basis for the informant's knowledge, that the police had

any reason to believe that the informant was truthful, or that the police had corroborated the source's information that the Volvo would contain illegal drugs. The informant had not told them the license plate number of the Volvo and had not identified or described the driver.

Acting solely on this tip, at around 5:00 p.m. on June 9, 2014, Fabiano and Gero set up observation posts in unmarked vehicles that they parked on Warren Street in view of the three-way intersection of Warren, Copeland, and Waverly Streets. It was still daylight and the officers had a good view of the intersection. Copeland and Waverly are side streets off of Warren; they form a roughly ninety degree angle with each other, where they meet and also connect with Warren Street. A person driving down Copeland and reaching this three-way intersection could either make a turn to the right onto Warren Street heading north, a turn to the left onto Warren Street heading south, or a sharper turn onto Waverly Street heading southeast. Although the Court credits Ofc. Gero's testimony that over the years he has made numerous arrests for possession or distribution of illegal narcotics in this general neighborhood, the Court finds that as of June 9, 2014, the Boston police had no reason based on past experience to expect to see a drug transaction take place on Waverly Street or Copeland Street, which are both relatively quiet residential streets.

Fabiano and Gero were both dressed in plain clothes (not uniforms) and were in unmarked "soft" cars that did not have any police markings, sirens, or flashing lights. Gero had parked his vehicle on the northbound side of Warren Street, facing Waverly Street and Copeland Street which were on his right. Fabiano had parked on the southbound side of Warren Street, directly opposite the intersection with Copeland and Waverly Streets, which were on his left.

Fabiano and Gero were joined by Ofc. Fisher and Ofc. Lopes, who were assigned to the District B-2 Anti-Crime Unit and were together in an unmarked police cruiser with emergency lights and sirens. Fisher and Lopes were present because Fabiano had asked them to be available to stop a green Volvo wagon as part of a drug investigation. Fisher and Lopes were also wearing plain clothes. They

parked their vehicle a short distance behind Fabiano's vehicle, on the southbound side of Warren Street, also in view of the intersection with Copeland and Waverly Streets. Fabiano, Gero, Fisher, and Lopes were in communication by radio.

1.2. The Possible Drug Transaction. At around 5:15 p.m., Officers Fabiano, Gero, and Fisher all saw a green Volvo wagon drive toward them on Copeland Street, stop at the traffic light at the three-way intersection at Warren Street, and then take the sharper left turn onto Waverly Street. The Volvo was being driven by defendant Barreto. The officers could see that the Volvo carried no passengers. The Court credits the testimony by Fabiano and Gero that Barreto made this turn without using any turn signal. All three police vehicles followed the Volvo down Waverly Street, with Gero in the lead, followed a moment later by Fabiano, who in turn was followed by the unmarked cruiser with Fisher and Lopes.

As Gero turned around the sharp corner from Warren Street onto Waverly Street, he saw that Barreto had stopped the Volvo by the curb on the left side of Waverly, in front of the first building on the left (a residential building), roughly 50 feet from Warren Street. Gero communicated this observation with Fabiano by radio. Fabiano, in turn, told Fisher and Lopes not to stop the Volvo yet, because he and Gero wanted to make further observations first.

Gero slowly drove past the Volvo. As he did so, Gero saw Barreto lean down and to his right, with his shoulders and positioned as if he was reaching toward the floor of the passenger side with both hands. Gero could not see either of Barreto's hands and thus could not see exactly what Barreto was doing. Since Gero could not see Barreto's hands he did not know whether Barreto had anything in his hands. After passing the Volvo, Gero pulled over and parked further up Waverly Street on the right side, i.e. the opposite side from where the Volvo was stopped.

As Fabiano followed Gero and drove by the now parked Volvo, he saw another man walk from the nearest apartment building toward the Volvo. Fabiano drove past the Volvo and parked further down Waverly Street, also on the right side of the street, roughly 100 feet past where the Volvo was stopped. Fabiano could see the



Volvo in his left side view mirror. Fabiano observed the man who had walked out of the apartment building walk up to the driver's window of the parked Volvo wagon.

Fisher and Lopes drove further down Waverly, past Fabiano, and also parked. They waited for further instructions from Fabiano.

Gero saw the second man standing next to the driver's door of the Volvo. He saw Barreto, who by now was again sitting upright in the driver's seat of the Volvo, turn his head and shoulders to the left, toward the man standing just outside his door. It appeared that the two men were speaking. At this time the police did not know the identity or anything else about the driver of the Volvo or the man standing next to the driver's door. Gero saw the pedestrian lean toward the Volvo, in a manner consistent with that man placing his hands on the Volvo door or reaching inside the Volvo. The Court does not credit Gero's testimony on direct examination that he actually saw the pedestrian reach his hands inside the Volvo. Instead, it credit's Gero's testimony on cross-examination that he could not actually see the pedestrian's hands inside the Volvo. From Gero's vantage point on the right side of Waverly Street some distance in front of the Volvo, Barreto's body would have blocked Gero's view of the driver's window in the Volvo that was parked on the left side of Waverly Street. There is no way that Gero could have known exactly what the pedestrian was doing with his hands. Gero could not see Barreto's hands either. Neither Gero nor any of the other officers ever saw Barreto and the pedestrian reach their hands toward each other, bring their hands together, or exchange any object. But Gero could tell that the pedestrian was moving one or both of his arms while he was standing next to the Volvo and facing Barreto, in a manner consistent with the two men exchanging something. The entire interaction between Barreto and the pedestrian lasted about 30 seconds, after which the pedestrian turned away from the Volvo and walked back into the same apartment building he had come out of a moment earlier. None of the police officers saw anything in the pedestrian's hands as he walked away from the Volvo. Nor did they see him putting anything into a pocket, or making any motion with his arm as if he had just put something into a pocket. The police never followed or identified the pedestrian.

Based on their training and experience with hand-to-hand drug transactions, Gero and Fabiano both suspected that the pedestrian had purchased some kind of illegal drugs from Barreto.

1.3. The Vehicle Stop, Exit Order, and Vehicle Search. After the pedestrian stepped away from the Volvo, Barreto pulled the vehicle away from the curb and continued to drive down Waverly Street. Fabiano instructed Fisher and Lopes by radio to follow the Volvo and to stop it when they could safely do so. They stopped the Volvo a short distance down Blue Hill Avenue, using their flashing lights. Gero and then Fabiano followed in their vehicles, and parked nearby.

Fisher got out of the unmarked police cruiser and walked up to the driver's side of the Volvo. He asked Barreto for his driver's license and motor vehicle registration. Barreto complied and asked in English why he had been stopped. Fisher asked Barreto to state his name and his date of birth. Barreto stated his name and the year he was born. Fisher then asked Barreto to state his full birth date. Barreto said that he did not understand. During this brief interaction Fisher noticed that Barreto was not making eye contact with him. Fisher thought Barreto seemed to be nervous.

At this point Gero walked up and joined Fisher near Barreto's seat in the Volvo. Gero observed that Barreto seemed to be breathing heavily, was looking in his rear view and side view mirrors at the various police officers and vehicles that had pulled up behind him, and was not making eye contact with Fisher or Gero.

Gero ordered Barreto to step out of the vehicle. Barreto complied.

As Barreto was getting out of the Volvo, Gero could see the inside of the driver's door. He noticed what appeared to be a roll of U.S. currency inside a clear plastic bag that had been placed in the storage compartment located on the inside of the driver's door. Based on his training and experience, his prior observations of Barreto before and during his brief interaction with the pedestrian on Waverly Street, and his observation of money on the inside of the driver's door, Gero believed that he had probably just seen Barreto sell illegal drugs for money that he stuck inside the driver's door.



Gero brought Barreto to the rear of the Volvo and tried to ask Barreto some questions. Barreto said that he did not speak English and did not understand Gero's questions, and kept looking at the Volvo. Gero pat frisked Barreto. He did not find any weapons or contraband. Fisher then moved Barreto to the sidewalk and stood with him there.

Gero walked back to the driver's door of the Volvo. He got into the vehicle. By this time Fabiano had arrived and was standing on the passenger's side of the vehicle. Gero opened the Volvo's center console, immediately to the right of the driver's seat. He saw a magnet inside the center console, and reported that observation to Fabiano. Based on their training and experience, both Gero and Fabiano knew that sellers of illegal drugs often had hidden compartments installed in their motor vehicles, and that such "hides" can often be opened by using a magnet like the one in the center console to trigger a hidden switch. Once Gero said that he had seen the magnet, Fabiano entered the Volvo on the front passenger side and saw a wire that appeared to run from the center console to somewhere underneath the front passenger seat. Fabiano pointed out the wire to Gero. Neither Gero nor Fabiano could see the magnet or this wire before they got into the Volvo. Once Fabiano pointed out the wire, Gero leaned over and pushed down on the front passenger seat. Gero felt the outline of a hard box. He and Fabiano assumed that this box was a hidden compartment used by Barreto to hide illegal drugs.

Fabiano called by radio for a drug sniffing K-9 unit to join them. Roughly 15 to 20 minutes later Officer Scannell and K-9 Hans arrived on the scene. Scannell had Hans sniff the exterior and interior of the Volvo. He reported that Hans had alerted or given a positive indication for narcotics on the front passenger seat.

Fabiano went back into the Volvo and peeled back the cushion of the front passenger seat. He could then see the top of a metal box hidden inside and under that seat.

The police towed the Volvo to the nearest police station. Fabiano and Gero search the vehicle at the station. They opened the metal box that had been hidden under the passenger seat. Inside they found a large amount of cocaine that was

inside a number of green plastic bags as well as several large stacks of United States currency bundled together with rubber bands.

2. Rulings of Law. For the reasons discussed below, the Court concludes that the stop of the Volvo, the police order that Barreto exit his vehicle, the search of the Volvo were all legal, and the arrest of Barreto.

2.1. Vehicle Stop. “An investigatory stop [of a motor vehicle] is justified if the police have ‘reasonable suspicion, based on specific, articulable facts and reasonable inferences therefrom, that an occupant of the ... motor vehicle had committed, was committing, or was about to commit a crime.’” *Commonwealth v. Anderson*, 461 Mass. 616, 621 (2012), quoting *Commonwealth v. Alvarado*, 423 Mass. 266, 268 (1996). “Seemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry.” *Commonwealth v. Gomes*, 453 Mass. 506, 511 (2009), quoting *Commonwealth v. Watson*, 430 Mass. 725, 729 (2000). Furthermore, “reasonable suspicion can develop while the specifics of the criminal activity remain unknown.” *Commonwealth v. Vazquez*, 74 Mass. App. Ct. 920, 923 (2009). Police officers do “not have to exclude all the possible innocent explanations for the facts in order to form a reasonable suspicion.” *Commonwealth v. Isaiah I.*, 450 Mass. 818, 823 (2008). “[R]easonable suspicion is a less demanding standard than probable cause,” *Commonwealth v. Overmyer*, 469 Mass. 16, 20 n.6 (2014), even though probable cause itself “is a relatively low threshold,” *Paquette v. Commonwealth*, 440 Mass. 121, 132 (2003).

In this case, the police legally stopped the Volvo because at that time they had reasonable suspicion that its driver (Mr. Barreto) had just participated in an illegal drug transaction. The police observed that: Barreto had stopped his vehicle on a public street; a second man immediately left the nearest building and walked to the driver’s door of Barreto’s vehicle, as the second man approached Barreto leaned down to his right as if he were reaching toward the floor by the front passenger seat; Barreto sat back up and interacted for no more than thirty seconds with the second man, who stood immediately outside the driver’s door of Barreto’s vehicle; during this interaction the second man leaned toward the Volvo as if he

were reaching into the vehicle; and after no more than 30 seconds Barreto drove off and the second man walked back into the residential building he had emerged from a moment earlier.

Taken together, these observations gave the police reasonable suspicion that Barreto had just sold illegal drugs. See *Commonwealth v. Stewart*, 469 Mass. 257, 264 (2014) (observation that defendant and two other people walk down sidewalk and huddle briefly together in doorway “is sufficient for reasonable suspicion” that defendant participated in illegal drug transaction, even though police never saw any actual exchange); *Commonwealth v. Levy*, 459 Mass. 1010, 1011-1012 (2011) (rescript) (observations that defendant made short phone call, drove three-quarters of a mile and stopped, waited a few minutes until a second vehicle arrived, got into the second vehicle, stayed in the second vehicle for only a short moment as it drove around the block, then got out of second vehicle and returned to his own car, “were more than sufficient for reasonable suspicion,” even though police detective “did not see an exchange of any item”). The “whole ‘silent movie’” watched by Ofc. Gero and Ofc. Fabiano as they observed Barreto by the side of the street “disclosed to the eyes of an experienced narcotics investigator” that Barreto had probably just sold illegal drugs to the second man. See *Commonwealth v. Kennedy*, 426 Mass. 703, 708 (1998), quoting *Commonwealth v. Santaliz*, 413 Mass. 238, 242 (1992).

**2.2. Exit Order.** The same reasonable suspicion that justified stopping the Volvo also justified ordering Barreto to get out of the vehicle. Since “[t]he police had reasonable suspicion to believe that” Barreto ... had recently engaged in criminal activity,” ... [t]he officers were permitted to take reasonable measures, such as ordering him out of the vehicle in which he was sitting, to ensure that he did not attempt to escape before they could conduct a threshold inquiry.” *Commonwealth v. Bostock*, 450 Mass. 616, 622 (2008).

**2.3. Search of Vehicle and Arrest of Barreto.** Once Barreto got out of the Volvo pursuant to the lawful exit order, Ofc. Gero could see in plain view a roll of some paper currency inside a clear plastic bag tucked into the storage compartment on the inside of the driver’s door. In combination with the prior

observations of what transpired between Barreto and the second man on Waverly Street, this now gave the police probable cause—and not mere reasonable suspicion—to believe that they had seen Barreto selling illegal drugs to the second man who had approached the Volvo and briefly interacted with Barreto. See *Commonwealth v. Stephens*, 451 Mass. 370, 385 (2008) (where police lawfully stopped vehicle based on reasonable suspicion that occupants had just participated in drug transaction, and then saw a “considerable amount of money” in driver’s lap, that gave them probable cause to arrest driver and search vehicle incident to that arrest).

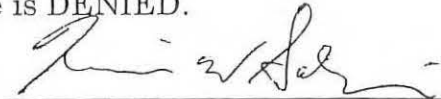
Thus, at that point the police could lawfully search the vehicle without a warrant because they had probable cause to believe that the vehicle may contain evidence that Barreto was committing the crime of possessing illegal drugs with the intent to distribute them and they knew that the Volvo was capable of being moved. See, e.g., *Commonwealth v. Gouse*, 461 Mass. 787, 792 (2012); *Commonwealth v. Johnson*, 461 Mass. 44, 48-50 (2011); *Commonwealth v. Motta*, 450 Mass. 616, 624 (1997). “[W]hen an automobile is stopped in a public place with probable cause” to believe that it contains contraband or evidence of a crime, “no more exigent circumstances are required ... beyond the inherent mobility of an automobile itself to justify a warrantless search of the vehicle.” *Commonwealth v. Motta*, 424 Mass. 117, 124 (1997); accord *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996).

The same probable cause gave the police lawful grounds to arrest Barreto without a warrant, because possessing illegal narcotics with the intent to distribute them is a felony. “A police officer may make a warrantless arrest of any person whom he reasonably believes has committed a felony,” so long as the officer is within his or her territorial jurisdiction or in the midst of a fresh pursuit of a felon who committed an offense within the officer’s jurisdiction. *Commonwealth v. Claiborne*, 423 Mass. 275, 279 (1996). That probable cause only became stronger once Gero and Fabiano discovered the hidden compartment under the front passenger seat and the drug-detection dog alerted on that same seat. See *Florida v. Harris*, 133 S.Ct. 1050, 1057 (2013) (alert by dog trained to detect drugs provides

probable cause for search where “all the facts surrounding a dog’s alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime”); *Commonwealth v. Mateo-German*, 453 Mass. 838, 845-846 (2009) (alert by dog trained to detect drugs provides probable cause to search interior of stopped motor vehicle).

ORDER

Defendant’s motion to suppress evidence is DENIED.

A handwritten signature in black ink, appearing to read "K. W. Salinger", written over a horizontal line.

Kenneth W. Salinger  
Justice of the Superior Court

October 28, 2015

Volume: I  
 Pages: 1-83  
 Exhibits: 10

COMMONWEALTH OF MASSACHUSETTS  
 SUFFOLK, S.S. SUPERIOR COURT DEPARTMENT  
 OF THE TRIAL COURT

\* \* \* \* \*  
 \*  
 COMMONWEALTH OF MASSACHUSETTS \* Docket No. 1484CR10751  
 \*  
 v. \*  
 \*  
 ONAXIS BARRETO \*  
 \*  
 \* \* \* \* \*

MOTION TO SUPPRESS EVIDENCE  
 BEFORE THE HONORABLE KENNETH SALINGER

APPEARANCES:

For the Plaintiff, Commonwealth of Massachusetts:  
 Suffolk County District Attorney  
 One Bullfinch Place  
 Suite 300  
 Boston, Massachusetts 02114  
 By: Kathleen Celio, ADA

For the Defendant, Onaxis Barreto:  
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 By: Eduardo A. Masferrer, Esq.

Boston, Massachusetts  
 Courtroom 713  
 October 14, 2015

Proceedings recorded by Court Personnel.  
 Transcript produced by Approved Court Transcriber  
 Michael Drake, eScribers, LLC.

## I N D E X

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
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JARED GERO

(By Ms. Celio)

6

(By Mr. Masferrer)

27

NICHOLAS FISHER

(By Ms. Celio)

43

(By Mr. Masferrer)

52

53

STEPHEN FABIANO

(By Ms. Celio)

54

(By Mr. Masferrer)

64

66

EXHIBITS:

1 Map of Warren Street

PAGE:

12

2 - 10 Photographs

25

CLOSING ARGUMENTS:

For the Defendant

PAGE

68

For the Plaintiff

76

1 (Court called to order.)

2 (Defendant Present.)

3 (10:52 a.m.)

4 THE COURT OFFICER: This honorable Court is back in  
5 session. Please be seated.

6 THE CLERK: May I proceed, your Honor?

7 THE COURT: Yes, please.

8 THE CLERK: For the record, this is number 2 on today's  
9 list, the Commonwealth v. Onaxis Barreto, 2014-10751. This  
10 matter is before the Court for an evidentiary hearing on a  
11 motion to suppress.

12 For the record, Spanish interpreter Maria Farias is  
13 present. She has been sworn.

14 Would the parties please state their name for the record?

15 MS. CELIO: Good morning, your Honor. Kathleen Celio on  
16 behalf of the Commonwealth.

17 THE COURT: Good morning.

18 MR. MASFERRER: Good morning, your Honor. Eduardo  
19 Masferrer on behalf of Mr. Barreto. And, your Honor, with the  
20 Court's permission, seated with me at counsel's table is  
21 Ms. Lily Axelrod.

22 THE COURT: Good morning, sir, and welcome.

23 And, Ms. Barreto, good morning to you.

24 THE DEFENDANT: Good morning.

25 THE COURT: I've taken a look at the papers, so I think I



1 have some sense of the issues.

2 Ms. Celio, what is the Commonwealth planning to present by  
3 way of witnesses today?

4 MS CELIO: Yes, your Honor. The Commonwealth is presenting  
5 three witnesses, though they shouldn't be super lengthy. They  
6 each did a different part in the stop. And so that's why I'm  
7 presenting all three.

8 It would be Officer Jarrod Gero would be my first witness.  
9 Officer Nicholas Fisher would be my second witness. And Officer  
10 Stephen Fabiano would be my last witness, your Honor.

11 THE COURT: You said that it shouldn't be very long on  
12 direct. How long do you expect the direct of each will take?

13 MS CELIO: I would think Officer Gero would probably be the  
14 longest and would be 20 or 25 minutes. The others would  
15 probably be 10 to 15.

16 THE COURT: Okay. And, Mr. Masferrer, at this point, are  
17 you expecting to present any additional witnesses?

18 MR. MASFERRER: Judge, I don't anticipate it. But having  
19 not heard the testimony, I'm not entirely sure. Thank you.

20 THE COURT: Let's proceed.

21 MS CELIO: Thank you, your Honor. And just one point  
22 prior to just presenting my witnesses. The testimony that you  
23 will hear is that the police received information from a  
24 confidential source, just certain information regarding that  
25 confidential source. I'm not seeking to establish Aguilar-

1 Spinelli with it, but to explain why the police were there and  
2 that they received the tip.

3 I let counsel know. Obviously, we remained to keep the  
4 source of that information confidential. And so I'll be  
5 objecting to any sort of questions regarding the -- I guess the  
6 source of that information that the police had. I don't think  
7 it's necessarily relevant.

8 THE COURT: So just to restate and be explicit, the  
9 Commonwealth will not be attempting in any way to rely upon  
10 information from that confidential source to justify the vehicle  
11 stop, the exit order, and the search of the vehicle, anything?

12 MS CELIO: Well, your Honor, I think --

13 THE COURT: As far as context.

14 MS CELIO: I'm providing context -- I think that it  
15 provides context and stuff can be corroborated. But I don't  
16 think based on the -- that information does not provide any sort  
17 of basis on its own for the police to -- for any legal  
18 justification.

19 THE COURT: So does that mean my restatement was accurate  
20 or inaccurate?

21 MS CELIO: Well, I -- it is -- an anonymous tip is  
22 where -- is what I'm relying it on for and that I guess I'm  
23 saying that I am taking a fact that it's anonymous that the law  
24 treats such an anonymous as that way so that I don't satisfy,  
25 you know what I mean, Aguilar-Spinelli because it is an

1 anonymous tip. And so I guess I would be objecting to anything  
2 having to do -- that would make that tip not an anonymous tip.  
3 You know what I'm saying?

4 THE COURT: We'll see what happens.

5 MS CELIO: Okay.

6 THE COURT: Proceed.

7 MS CELIO: Thank you, your Honor. The first witness would  
8 be Officer Jarrod Gero.

9 MR. MASFERRER: And I'm sorry, Judge. As the witness is  
10 taking the stand, ADA Celio did mention that to me.

11 MS CELIO: Okay.

12 MR. MASFERRER: My understanding of it was your Honor's  
13 sort of statement of how it would be -- play out under the law.  
14 Right. It's a statement for context only that's not being used  
15 because it doesn't satisfy Aguilar-Spinelli. For those  
16 purposes, I've agreed to not go into the -- who the source is,  
17 how is it that it came about, what were the exact details of the  
18 tip because we're not using it under Aguilar-Spinelli to support  
19 the stop or search.

20 THE COURT: Okay. Fair enough.

21 JARROD GERO, Sworn

22 THE WITNESS: I do. Good morning, your Honor.

23 DIRECT EXAMINATION

24 BY MS. CELIO:

25 Q Officer, could you please introduce yourself to the Court,

1 spelling your last name?

2 A Yes. Boston Police Officer Jarrod Gero. My last name is  
3 spelled G-e-r-o.

4 Q And where -- you said you're a Boston Police officer; is  
5 that correct?

6 A Yes.

7 Q And how long have you been a Boston Police officer?

8 A Just under 10 years.

9 Q And where are you currently assigned within the Boston  
10 Police Department?

11 A I am assigned to the Citywide Drug Control Unit.

12 Q And how long have you been with the Citywide Drug Control  
13 Unit?

14 A A little over two years.

15 Q And prior to joining the Citywide Drug Control Unit, where  
16 were you assigned?

17 A I was assigned to the Youth Violence Strike Force.

18 Q And how long were you in the -- assigned to the Youth  
19 Violence Strike Force?

20 A About three and a half years.

21 Q And then prior to that, were you assigned to a patrol of a  
22 certain area?

23 A Yes.

24 Q Okay. And what area would that be?

25 A I was assigned to area B2 which covers Roxbury and

1     Dorchester.

2     Q     Can you just briefly describe your duties and  
3     responsibilities as a member of the Citywide Drug Unit?

4     A     As a member of the Citywide Drug Unit, we mainly focus on  
5     gang members and street crimes involving drugs and firearms in  
6     the City of Boston and also street-level drug transactions.

7     Q     And in your career -- strike that.

8             Fair to say as a member of the Young Violence Strike Force,  
9     did you also investigate and be part of arrests having to do  
10    with narcotics?

11    A     Yes.

12    Q     And can you just -- if you could, just approximate how many  
13    arrests have you made for illegal narcotics in your career.

14    A     In my career? Over 300.

15    Q     And what are the sort of illegal narcotics that you've  
16    seized as part of those arrests and investigations in your  
17    career?

18    A     Everything from cocaine to heroin, methamphetamines,  
19    marijuana, various types of pills, just about -- steroids, just  
20    about everything you can possibly imagine.

21    Q     And have you received specific training in the area of  
22    illegal narcotics?

23    A     Yes.

24    Q     Can you just briefly describe that?

25    A     I received training from the Boston Police Academy. I also

1 received training from the Drug Enforcement Administration  
2 completing their basic narcotics investigative course. I've  
3 received training in the Alcohol, Tobacco, and Firearms Safe  
4 Neighborhood Initiative. I've also received training from the  
5 Pat McCarthy Street Crimes Course.

6 Q And, Officer Gero, I'll draw your attention to June 9th of  
7 2014. Were you working that day?

8 A Yes.

9 Q And were you working in your capacity as a member of the  
10 Citywide Drug Unit?

11 A Yes.

12 Q And specifically, who were you working with in your unit at  
13 that time?

14 A That day, Officer Stephen Fabiano.

15 Q And at approximately 5 p.m., where were you located?

16 A In the area of Warren Street and Copeland and Waverly  
17 Street, that intersection.

18 Q And when you said you were working with Officer Stephen  
19 Fabiano, was he in the area with you as well?

20 A Yes.

21 Q And can you describe the type of clothing and vehicle you  
22 were driving?

23 A I would be operating what's called a Boston Police  
24 Department soft car which is a normal car with no lights, no  
25 sirens, no markings that would blend in with normal motor

1 vehicle traffic and wearing plain clothes. Most likely in June,  
2 it was probably shorts and a t-shirt or something to that  
3 effect.

4 Q And were you and Officer Fabiano in communication?

5 A Yes.

6 Q And how were you communicating?

7 A By radio.

8 Q And could you also communicate with other members of the  
9 police department by radio as well?

10 A Yes.

11 Q And why were you in that area of Warren and Copeland  
12 Streets?

13 A Officer Fabiano had contacted me to assist him in that area  
14 looking for a motor vehicle with drugs -- specific amount of  
15 drugs inside of it.

16 Q And what type of motor vehicle was that?

17 A It was a green Volvo station wagon.

18 Q And were you familiar with that area?

19 A Yes.

20 Q And can you describe how you have been familiar with that  
21 area?

22 A In that specific area of Warren and Copeland is a -- Warren  
23 Garden is across the street. That area -- I've participated in  
24 numerous search warrants of the surrounding streets. I've made  
25 firearm arrests, drug arrests, arrests for breaking and area,

1 warrant arrests in that general area of the past 10 years.

2 Q And on that particular area in the time around 5 p.m.,  
3 where were you specifically located?

4 A I was parked on Warren Street, a little bit down from  
5 Waverly, facing Copeland Street, facing, I guess, inbound you  
6 would say.

7 MS CELIO: May I approach, your Honor?

8 THE COURT: Uh-huh.

9 BY MS CELIO:

10 Q I'm showing you a map. Do you recognize that map?

11 A Yes.

12 Q And what do you recognize that map to be?

13 A The area of Warren Street, Blue Hill Ave, and the streets  
14 that run in between it from it looks like Montrose to Woodbine.

15 Q And does that depict the area of where you were located on  
16 June 9th of 2014?

17 A Yes.

18 Q The areas of Warren, Copeland, Waverly Streets?

19 A Yes.

20 MS CELIO: I'd just ask it be introduced as the next  
21 exhibit -- the first exhibit.

22 THE COURT: Any objection?

23 MR. MASFERRER: No objection, your Honor.

24 THE COURT: Exhibit 1.

25 THE CLERK: 1 is so marked.



1 (The clerk marks the Map of Warren Street as Exhibit 1.)

2 BY MS CELIO:

3 Q If you could, Officer Gero, could you, just using this blue  
4 sharpie, just put a little rectangle box in the area where your  
5 car would have been positioned on June 9th of 2014.

6 Okay. And can you just draw an arrow next to the car  
7 indicating the way that you were facing?

8 And if you could look at Exhibit 1. You indicated in that  
9 area you had recently -- or I'm sorry, you had, in the past,  
10 participated in search warrants in which you recovered certain  
11 narcotics and firearms; is that correct?

12 A Yes.

13 Q And does that map depict certain areas where you had  
14 actually executed search warrants and recovered firearms and  
15 narcotics?

16 A Yes.

17 Q And where, particular streets, had you executed search  
18 warrants and recovered drugs?

19 A Clifford Street, Blue Hill Ave, Copeland Street, Warren  
20 Street by Dunreath, Catawba Street, Charlame Street.

21 Q And, Officer Gero, you indicated that you had received  
22 information about a certain green Volvo station wagon; is that  
23 correct?

24 A Yes.

25 Q And that was from Officer Fabiano?

1 A Correct.

2 Q And at approximately 5:15, did you make any observations of  
3 that motor vehicle?

4 A Yes.

5 Q And can you describe to the Court what you observed?

6 A I observed a green Volvo station wagon traveling on  
7 Copeland Street approaching Warren at the set of lights.

8 Q And what did you observe that car do?

9 A That car then made a left hand turn, a sharp left hand turn  
10 onto Waverly Street going towards Blue Hill Ave.

11 Q Did you make any further observations of that motor  
12 vehicle?

13 A Initially, that the motor vehicle used no turn signal to  
14 make that left hand turn and that there was one person inside  
15 the car, just the operator.

16 Q So what, if anything, did you do?

17 A At that point, I notified Officer Fabiano that -- or  
18 Officer Fabiano, I think, had notified me at the same time that  
19 I saw the car that the car was approaching. As it turned onto  
20 Waverly Street, I turned right from Warren Street onto Waverly  
21 Street in an attempt to follow the motor vehicle. And as I  
22 turned right, the motor vehicle had already pulled over and  
23 stopped on the left hand side of the street.

24 Q And were you -- after observing the green Volvo station  
25 wagon, were you in contact with any other officers?

1 A Officer Fabiano.

2 Q And you indicated that the Volvo pulled over to the left;  
3 is that correct?

4 A Correct.

5 Q How soon after it turned left did it pull over to the left?

6 A Almost immediately. By the time I had taken the right hand  
7 turn, it was already pulled over and stopped on the left hand  
8 side of the street.

9 Q So what, if anything, did you do?

10 A At that point, I decided to go past the motor vehicle  
11 because it was -- there was actually no place for me to stop  
12 behind it. And as I drove past the motor vehicle, I looked to  
13 my left, and I saw the operator reaching down with both hands  
14 towards, like, the floorboard area of the passenger side of the  
15 motor vehicle.

16 Q Could you see his hands?

17 A No.

18 Q Can you describe who that single occupant driver of the  
19 motor vehicle was?

20 A It was a Hispanic male at that point. That's all I could  
21 tell, a little bit older I would say. I know he wasn't -- I  
22 knew he wasn't young.

23 Q And what, if anything, did you do?

24 A At that point, I kept driving past the motor vehicle and  
25 pulled over a little bit further down the right hand side of the

1 street and also informed Officer Fabiano that the motor vehicle  
2 had pulled over and parked on the left hand side of the street.

3 Q And then what, if anything, did you observe?

4 A As I pulled over and parked and looked back at the motor  
5 vehicle, I then observed another Hispanic male at the driver's  
6 side window with both of his hands inside the window, inside the  
7 motor vehicle, appeared to be talking to the operator of the  
8 motor vehicle.

9 Q And where was the operator of the motor vehicle now  
10 situated within the car?

11 A He was still in the driver's seat. He was now sitting  
12 upright, you know, with his head turned to the left, engaging  
13 the person at the window.

14 Q And could you observe his hands?

15 A Not specifically his hands, no.

16 Q Okay. But what did you observe -- you indicated there was  
17 a Hispanic male at the window; is that correct?

18 A Correct.

19 Q And what did you -- what did it appear to you that was  
20 going on?

21 A He --

22 MR. MASFERRER: Objection as to his opinion. I want to  
23 hear what he saw, but not what it appeared to be --

24 MS CELIO: I'll rephrase.

25 THE COURT: Sustained as to that.

1 MS CELIO: Yeah.

2 BY MS CELIO:

3 Q What, if anything, did you see between the Hispanic male at  
4 the window and the operator of the car?

5 A I saw the Hispanic male at the window with both his hands  
6 inside the motor vehicle through the window. Appeared to be  
7 exchanging an item between the operator of the motor vehicle.  
8 His shoulders and upper arms were moving. And then this  
9 Hispanic male quickly pulled his hands back from the motor  
10 vehicle and started to turn and walk in the opposite direction.

11 Q So you couldn't see the operator's hands, but you could see  
12 his upper body; is that correct?

13 A Correct.

14 Q And the movements of his upper body and arms?

15 A Yes.

16 Q And how long did that interaction between the Hispanic male  
17 and the operator of the car last?

18 A Under a minute. I don't recall exactly a specific time,  
19 but it was definitely less than a minute.

20 Q And what, if anything, then did you observe?

21 A I then observed the green Volvo station wagon pull away  
22 from the curb, travel down Waverly Street towards Blue Hill Ave.

23 Q And did you observe anything specifically of the green  
24 Volvo as it was pulling away from the curb?

25 A As it pulled away from the curb, it did not use a

1 directional as a pull-in to traffic. Then again, as it reached  
2 the intersection of Blue Hill Ave, it turned right again without  
3 using a turn signal.

4 Q And where -- did you make any observations of the Hispanic  
5 male who was on foot at the driver's side window?

6 A I did not. When he turned and started walking in the  
7 direction of Warren Street and the car pulled off at about the  
8 same time, my focus was on the motor vehicle at that point.

9 Q And after the green Volvo continued on Waverly towards Blue  
10 Hill Ave, what, if anything, did you do?

11 A At that point, I continued to follow the motor vehicle.  
12 And Officer Fabiano requested assistance from Area B2. And the  
13 B -- I observed B2 Anti-Crime car perform a traffic stop of the  
14 green Volvo in the area of Blue Hill Ave and Clifford Street.

15 Q And fair to say neither your car nor Officer Fabiano's car  
16 could conduct a traffic stop at that point; is that correct?

17 A Correct.

18 Q What, if anything, then did you do?

19 A At that point, I had parked my motor vehicle off of Blue  
20 Hill Ave and started to approach the green Volvo station wagon  
21 on foot.

22 Q And what, if anything, did you observe?

23 A As I approached the driver's side of the motor vehicle,  
24 Officer Fisher was speaking to the operator of the motor  
25 vehicle. My initial observations of the operator was breathing

1 very heavily. I could actually see his shirt and chest rising  
2 and falling as he was speaking. And he appeared to be avoiding  
3 eye contact with the officer and kept looking in his mirrors and  
4 over his right shoulder and behind them.

5 Q And how -- at that point, how many officers were in the  
6 area of the green Volvo?

7 A Including myself, Officer Fabiano had also arrived either  
8 right after or right before me. I think there was four other  
9 plain clothes officer there from Area B2.

10 Q And how many individuals were at the driver's side window?

11 A I believe there was three. It was Officer Fabiano -- I'm  
12 sorry. Officer Fisher, another plain clothes officer, and  
13 myself.

14 Q So were Officer Fisher -- was Officer Fisher in uniform?

15 A No. He was in plain clothes also.

16 Q Were there other -- were there any uniformed officers?

17 A Initially at the traffic stop, no.

18 Q Could you hear any of the conversation that was going on  
19 between Officer Fisher and the operator?

20 A As I approached the window, yes.

21 Q And what, if anything, do you remember, a part of that  
22 conversation?

23 A The only part of the conversation I heard as I approached  
24 the window was that the operator was telling Officer Fisher that  
25 he didn't speak English.

1 Q Did you have any conversation with the operator?

2 A Initially, at that point, no.

3 Q So what, if anything, did you do?

4 A At that point, I informed the operator I wanted him to step  
5 out of the motor vehicle. And I believe I actually opened the  
6 door to tell him to step out of the motor vehicle, and he  
7 complied.

8 Q And then what, if anything did you observe?

9 A As soon as he stepped out of the motor vehicle and I looked  
10 down, I could see a large sum of money in the driver's side  
11 door, I guess you call it the cargo pocket area, like, on the  
12 bottom of the door, attached to the door of that area there.

13 Q And how was it wrapped?

14 A I believe it was in, like, one big bundle with an elastic  
15 band around it.

16 Q And in your training and experience, was that indicative of  
17 anything?

18 MR. MASFERRER: Objection.

19 THE COURT: Overruled.

20 A Based on my observations and the information we have, that  
21 it was indicative of a drug transaction had possibly occurred.

22 BY MS CELIO:

23 Q And specifically, when you said your observations, can you  
24 just inform the Court what observations led you to believe that  
25 it was indicative of a drug transaction?



1 A The car pulling over abruptly, a male approaching the car,  
2 having a very quick interaction with the operator inside the  
3 car, and a quick separation by both parties going in opposite  
4 directions.

5 Q And what did the money and its location and how it's  
6 wrapped have any -- did that have any indication based on your  
7 prior observations of the drug transaction? That's a poorly  
8 worded question. Let me just rephrase.

9 Did your prior -- did the observations of the money have  
10 any, I guess, import to your prior observations?

11 A Based on where the money was located and the large sum and  
12 the quick separation of the two parties before, at that point, I  
13 believed it had possibly been involved in the interaction  
14 between the two individuals I had just observed within the last  
15 two minutes.

16 Q Did you make any observations of the operator after he  
17 stepped out of the vehicle?

18 A Yes.

19 Q And what, if anything, did you observe?

20 A As he stepped out of the vehicle, he was brought to the  
21 rear of the motor vehicle. At that point, I went back and tried  
22 to have a conversation with him. He explained to me he didn't  
23 speak English. Officer Fisher was also there and was questioned  
24 that he was speaking English to him previously and then forgot  
25 how to speak English. I asked him if he was --

1 MR. MASFERRER: Judge, I'm going to object and move to  
2 strike. The witness has no personal knowledge of that.

3 THE COURT: Overruled. Hearsay is admissible for these  
4 purposes.

5 A I tried to converse with the operator and ask him why he  
6 was nervous, where he was coming from, who the individual at his  
7 motor vehicle was previously. And all those questions are met  
8 with basically a reply that he did not understand or speak  
9 English.

10 BY MS CELIO:

11 Q And how did he appear to you at that time?

12 A He appeared to me to be extremely nervous, focused on the  
13 motor vehicle, wouldn't take his eyes off the inside of the  
14 motor vehicle. We asked him to step out of the street and onto  
15 the sidewalk mainly because traffic was building up and trying  
16 to go around the car. He kept trying to peer over the officers  
17 and ask what was going on with his car in broken English, why we  
18 were stopping his car.

19 Q So what, if anything, did you do afterwards?

20 A At that point, I went back to the motor vehicle and went  
21 inside the motor vehicle in the driver's side, conducted more of  
22 a search for narcotics that we believe had taken place based on  
23 our investigation.

24 Q And so what, if anything, did you observe?

25 A Upon -- I enter the motor vehicle from the driver's side.

1 Officer Fabiano entered from the passenger's side. He almost  
2 immediately alerted me to a wire that was coming out of the  
3 center console toward the floorboard of the passenger's side of  
4 the motor vehicle. That's the best it can be described. I  
5 opened up the center console. I also saw a magnet inside the  
6 center console. And basically, that was all that was in the  
7 car.

8 Q In observing the wire and the magnet, did that have -- did  
9 those items have any import to you?

10 A Yes.

11 Q And what did they indicate?

12 A Specifically, based on my training and experience and also  
13 the recovery and -- discovery, I should say actually, of  
14 electronic hides, hidden compartments inside motor vehicles, a  
15 magnet is commonly used to trigger a sensor to open a hidden  
16 compartment. And the wire was an aftermarket wire added to the  
17 motor vehicle which is also an indication of a possible hidden  
18 compartment inside a motor vehicle.

19 Q And had you previously discovered hidden compartments in  
20 vehicles?

21 A Yes, numerous.

22 Q And had you encountered similar after -- what you called  
23 aftermarket configurations?

24 A Correct. They're all obviously different in how they're  
25 installed. Some of the wires are hidden better than others.

1 Some are -- some aren't hidden as well. And specifically to the  
2 hide inside of this motor vehicle, within the last 30 days, I  
3 had also discovered a hide in the passenger seat where you can  
4 tell by touching -- there's two seats of a motor vehicle, the  
5 front driver seat and the passenger seat. The cushion, soft  
6 material, was all removed from the passenger's side of the motor  
7 vehicle, and there was a hard metal box left in that area  
8 compared to the driver seat which was cushioning and soft and no  
9 metal structure was felt through that material.

10 Q Did you feel the seats in this green Volvo station wagon?

11 A Yes.

12 Q And how did they feel to you?

13 A They were indicative of that same hide that I had found  
14 within the last 30 days. All the foam and padding had been  
15 removed from the passenger's seat bottom side area, and it was  
16 not removed from the driver's side.

17 Q And so what, if anything, did you and/or Officer Fabiano  
18 do?

19 A At that point, I alerted Officer Fabiano to what I believed  
20 was a possible hide in that area. And at that point, I believe  
21 we called a drug K-9 dog to the scene.

22 Q And did the drug K-9 come to the scene?

23 A Yes.

24 Q And how soon after you called approximately did the K-9  
25 arrive?

1 A I'd say within 15 to 20 minutes.

2 Q And what did you observe when the K-9 arrived to the area  
3 where you were at on Blue Hill Ave before Clifford specifically  
4 with regards to the green Volvo?

5 A We observed Officer Scannell arrive with his K-9 dog. We  
6 observed him do his search of the motor vehicle. And Officer  
7 Scannell informed us that the dog had a positive indication on  
8 the passenger seat area of the motor vehicle.

9 Q So then what did you and Officer Fabiano then do with the  
10 motor vehicle?

11 A I was then alerted by Officer Fabiano that on the front of  
12 the seat, I guess facing the front of the car, he was able to  
13 locate the opening of the hide and had seen what he believed to  
14 be narcotics and a large amount of cash inside the front seat  
15 area of the motor vehicle.

16 Q And did you ultimately take that motor vehicle back to the  
17 station?

18 A Yes.

19 Q And were you or Officer Fabiano able to open that hide?

20 A Officer Fabiano was, yes.

21 Q And recovered a large amount of money and cocaine; is that  
22 correct?

23 A Correct.

24 MS CELIO: May I approach, your Honor?

25 THE COURT: You may.

1 BY MS CELIO:

2 Q Officer Gero, I'm showing you nine photographs. Do you  
3 recognize those photographs?

4 A Yes.

5 Q And what do you recognize those photographs to be?

6 A They are the green Volvo station wagon with a plate of 775-  
7 Victor-Alpha-6 and also pictures from the interior of the motor  
8 vehicle.

9 Q That you stopped on June 9th of 2014?

10 A Correct.

11 MS CELIO: I'd just ask that they be introduced as the next  
12 exhibits.

13 THE COURT: Any objection?

14 MR. MASFERRER: No objection to the photographs, your  
15 Honor.

16 THE COURT: Separately or all as Exhibit 2?

17 MS CELIO: Sorry on the clerk, but probably separately just  
18 so I can refer to it so the record is clear of what --

19 THE COURT: All right.

20 THE CLERK: Exhibit 2 so marked. 3 so marked. 4 so  
21 marked. 5 so marked. 6 so marked. Exhibit 7 so marked. 8 so  
22 marked. Exhibit 9 so marked. Exhibit 10 so marked.

23 (The clerk marks the photographs as Exhibits 2 through 10.)

24 BY MS CELIO:

25 Q And, Officer Gero, do you see the operator of that green

1 Volvo in this courtroom today?

2 A Yes.

3 Q And could you just describe an article of clothing he's  
4 wearing?

5 A He's sitting to my left wearing a plaid shirt.

6 MS CELIO: May the record reflect he identified the  
7 Defendant as the operator of that car.

8 THE COURT: And he's wearing a plaid shirt. He seems to be  
9 the only person in the courtroom wearing a plaid shirt.

10 BY MS CELIO:

11 Q Officer Gero, I'm showing you what has been marked as  
12 Exhibit 6. Can you just describe what is depicted in that  
13 photograph?

14 A It's a picture of the large sum of money that was in the  
15 cargo pocket area of the driver's side door.

16 Q And was the location or anything about that money moved  
17 before taking that photograph?

18 A No, it was not.

19 Q Is that -- so that is how you saw the money when -- after  
20 the Defendant exited the motor vehicle on June 9th of 2014?

21 A Correct.

22 Q I'm just showing you Exhibit 7 and 8. Can you just  
23 describe what is depicted in those exhibits?

24 A This is a picture of the aftermarket wire that was observed  
25 on the -- between the center console and the passenger front

1 seat area of the green Volvo station wagon.

2 Q And from the driver's side, could you observe the wires  
3 from where you were standing?

4 A No.

5 Q I'm showing you what is Exhibit 9. Could you describe  
6 what's depicted in that photograph?

7 A This is the center console of the green Volvo station  
8 wagon. Some elastic bands are in there. Mainly, there's a  
9 magnet located inside of that, black rectangular magnet.

10 Q Is it fair to say, Officer Gero, that Exhibit 10 depicts  
11 what you ultimately recovered from the hide on June 9th of 2014?

12 A Yes.

13 Q And does it depict any of the metal that you would have  
14 felt when you touched the seat that day?

15 A The top part where Officer -- where the hand is inside the  
16 picture with the glove on, that top part is the metal covering  
17 of the hidden compartment.

18 MS CELIO: I have no further questions.

19 THE COURT: All right. Cross-examination?

20 MR. MASFERRER: Thank you.

21 CROSS-EXAMINATION

22 BY MR. MASFERRER:

23 Q Good morning, Officer Gero.

24 A Good morning.

25 Q Officer, you didn't prepare the police report in this case,



1 correct?

2 A Correct.

3 Q That was prepared by your partner, Officer Fabiano?

4 A Yes.

5 Q You reviewed that police report prior to its submission to  
6 the Court?

7 A Prior to submission? Probably not, no.

8 Q After he wrote it, you didn't take a look at it to see what  
9 it said?

10 A I don't recall doing so, no.

11 Q Have you looked at it since then?

12 A Yes.

13 Q The police report makes no mention of a tip, correct?

14 A I don't believe so, no.

15 Q All right. Did you and Officer Fabiano have a discussion  
16 when the report was being prepared that you were going to leave  
17 out of the report the fact that there was some sort of tip that  
18 prompted you to be there?

19 A No, I did not.

20 Q The police reports as if it was just a random motor vehicle  
21 stop that the officers happened to come upon, correct?

22 A I didn't write the police report.

23 MS CELIO: Objection.

24 THE COURT: Overruled.

25 BY MR. MASFERRER:

1 Q You read it?

2 A I read it, yes.

3 Q You've written police reports yourself?

4 A Yes.

5 Q Police report reads as if it was a random motor vehicle  
6 stop that resulted in the discovery of drugs?

7 A This police report?

8 Q Yeah.

9 A In my opinion, no. I know what the actions were.

10 Q No. You know what really happened. But the police report,  
11 for example, begins off by talking about a -- just seeing the  
12 car commit a motor vehicle infraction?

13 A Correct. The police report is a brief summary of the facts  
14 producing probable cause for the arrest, yes.

15 Q Correct. So the police report indicates that there was a  
16 motor vehicle infraction, the police approached the car,  
17 correct?

18 A That's one of the reasons, yes.

19 Q The police report doesn't indicate any other?

20 A In my opinion, it does.

21 Q It says that there was a tip that there might be drugs  
22 inside a green Volvo?

23 A No. There was an interaction between a Hispanic male and  
24 the operator of the motor vehicle that was indicative  
25 of -- through our training and experience, of a possible drug

1 transaction occurring.

2 Q Let's talk about that. This neighborhood that we're  
3 talking about on Waverly Street --

4 A Yes.

5 Q -- I take it this is a neighborhood that does not have a  
6 lot of Hispanic individuals; is that right?

7 A I wouldn't say that, no.

8 Q It has a significant Hispanic population?

9 A I would say there's a significant black and Hispanic  
10 population, yes.

11 Q So if one Hispanic individual goes over to another Hispanic  
12 individual, they have a brief interaction, they shake hands,  
13 they meet for less than a minute and walk away, is that the drug  
14 deal that just went down?

15 A Depending on how it occurs, where it occurs, the  
16 information we have, possibly, yes.

17 Q Okay. So right there on Waverly Street, two Hispanic men  
18 meet for a short period of time and walk away, that means a drug  
19 transaction just occurred?

20 A In what you said, no.

21 Q So two Hispanic men meeting briefly doesn't mean that they  
22 conducted a drug transaction?

23 A It could possibly, depending on the circumstances, yes.

24 Q So if these two men meet and they shake their hands and  
25 they touch and they walk away from each other, if neither are

1 known to them, you would presume that there's -- a drug  
2 transaction just occurred and start approaching them?

3 A It depends on the circumstance and the information I have.  
4 I don't know how I can explain that to you better.

5 Q The interaction here that you saw, Mr. Barreto, was he  
6 known to you before this event?

7 A Specifically, no.

8 Q Okay. The Hispanic male that approached the car, was he  
9 known to you? Do you know who he is?

10 A No.

11 Q Okay. So you have two unknown Hispanic men meeting,  
12 correct?

13 A That's one thing, yes.

14 Q On Waverly Street, correct?

15 A Yes.

16 Q Were they in front of a particular house or building on  
17 Waverly Street?

18 A There was a building there, yes.

19 Q What was the building?

20 A It's the first building as you turn on to Waverly Street on  
21 the left hand side.

22 Q Okay. Is it a residential complex or a business?

23 A It was residential.

24 Q Have you conducted a search warrant at that residential  
25 complex?

1 A That one specifically, no.

2 Q What about the ones in the very -- you know, two houses  
3 down from where the Defendant pulled over?

4 A Yes. On Waverly Street, yes, on the second building  
5 complex at the corner of Perrin and Waverly.

6 Q And when did that occur?

7 A I would say between 2006 and 2008. I don't know exact.  
8 There was --

9 Q So six to eight years prior to the stop of the Defendant?

10 A I'm sorry. I said 2006. I said -- between 2010 and 2014  
11 were probably -- in those four years since I went to the Gang  
12 Unit and the Drug Unit, I've conducted two search warrants at  
13 that address.

14 Q On Waverly Street?

15 A Yes.

16 Q Was this in connection with that?

17 A No, it was not.

18 Q Okay. The other residence on Waverly Street right where  
19 the Defendant was pulled over, the fact that they lived so close  
20 to a location where you've conducted a search warrant, does that  
21 mean that they're engaged in criminal activity?

22 A In and by itself, no.

23 Q Are there regular residents that live on Waverly Street  
24 that are not involved in criminal activity?

25 A I'm sure there are, yes.

1 Q Are there people who drive their cars on Waverly Street  
2 that are not involved in criminal activity?

3 A I don't know.

4 Q You driver on Waverly Street?

5 A Yes.

6 Q You're not always involved in criminal activity?

7 A Usually when I drive on Waverly Street, I'm conducting some  
8 type of criminal investigation or policing or -- yes, I am.

9 Q So you're conducting criminal activity on Waverly Street?

10 A Investigating it, yes.

11 Q Okay. Everybody who drives on Waverly Street then is  
12 engaged in criminal activity besides you?

13 A That's not what I said. You asked if I was.

14 Q Right. I said --

15 A Yes.

16 Q -- do people drive down -- does everybody who drives down  
17 Waverly Street engage in criminal activity?

18 A I'm sure they don't, but I don't know specifically what  
19 every single person that drives on Waverly Street does or  
20 doesn't do.

21 Q Okay. So what is your basis? Do you start with the  
22 assumption that everybody who's on Waverly Street is engaged in  
23 criminal activity?

24 A No.

25 Q Okay. It's not that much of a hot bed of criminal

1 activity, correct?

2 A No. I would differ. I would say it is.

3 Q It is. So the vast majority of people who -- if you're  
4 just on Waverly Street, likely is you're engaging in criminal  
5 activity?

6 A No.

7 Q The Hispanic male that approached the car, you said you saw  
8 him reach into the car?

9 A Yes.

10 Q Like lean into the car?

11 A With both hands, correct.

12 Q Right. And communicate with the Defendant in the car?

13 A It appeared to me they were conversing, yes.

14 Q All right. Now, the person who was leaning in, you could  
15 not see his hands, correct?

16 A Not when they were inside the car, no.

17 Q Okay. And the Defendant, while he was inside the car, you  
18 couldn't see his hands?

19 A Correct.

20 Q But you saw the person who's outside the car, his shoulders  
21 move in an upward or forward direction?

22 A No. I couldn't remember his shoulders or anything. I saw  
23 the operator's shoulders kind of turn to the left and moving  
24 toward the -- like, he was engaging the person at the window.

25 Q Okay. Did you see Mr. Barreto, the Defendant -- did you

1 see his hands reach the hands of the person who was outside of  
2 the car?

3 A No.

4 Q So you didn't see an object leave Mr. Barreto's hands and  
5 go to that -- the other Hispanic male's hands outside the car?

6 A Not specifically, no.

7 Q And you didn't see any object leave the male who was  
8 outside the car go to Mr. Barreto's hands?

9 A Correct.

10 Q And you didn't see their hands touch?

11 A I did not, no.

12 Q So you never saw any exchange?

13 A I believe I just said that. I didn't see any objects  
14 switch hands, no.

15 Q So you what you saw was two people interacting, correct?

16 A Yes.

17 Q And it was a brief interaction?

18 A Very brief, yes.

19 Q Could that interaction have been hi, how are you, give me a  
20 call later, I'll see you later?

21 A I don't believe in that situation, no.

22 Q Sure. Could it have been that?

23 A I don't believe in that situation it was, no.

24 Q Okay. And when you say you don't believe it was, you  
25 didn't hear the interaction, you didn't hear them speak,



1 correct?

2 A I did not hear them speak, no.

3 Q Okay. And so when you say you don't believe it was, it's  
4 because of some unknown knowledge that we're not hearing about?

5 A I wouldn't say it's unknown, no.

6 Q Okay. So the fact that there's two Hispanic males meeting  
7 on Waverly Street tells you this is a drug deal going down?

8 A The fact that we were conducting a drug investigation on a  
9 specific motor vehicle that was in that area that then it  
10 stopped and performed similar techniques that have been involved  
11 in numerous drug transactions is what led me to believe that a  
12 possible drug transaction occurred.

13 Q Okay. Now, but that information, are you willing to give  
14 us the information so we can evaluate it the way you did?

15 MS. CELIO: Objection.

16 THE COURT: Grounds?

17 MS. CELIO: I guess he could answer the question, but I  
18 guess -- he can answer the question. He --

19 BY MR. MASFERRER:

20 Q Are you willing to give us the information so we can  
21 evaluate it the same way you did?

22 A I received information from Officer Fabiano that a green  
23 Volvo station wagon was in the area of Copeland, Waverly, and  
24 Warren Streets with a significant amount of narcotics inside the  
25 motor vehicle.

1 Q All right. Beyond -- was there a tip that there was going  
2 to be a drug transaction?

3 A No. I received specific information that a green Volvo  
4 station wagon was in the area of Warren, Waverly, and Copeland  
5 Street with a significant amount of drugs inside the motor  
6 vehicle.

7 THE COURT: I just want to be clear. When you say you  
8 received information, you mean from Officer Fabiano?

9 MR. MASFERRER: Fabiano.

10 THE WITNESS: Correct, your Honor.

11 BY MR. MASFERRER:

12 Q So beyond how he got it, you don't know?

13 A I got it from Officer Fabiano.

14 Q The Hispanic male who was walking away, did you stop him?

15 A No.

16 Q Did you see where he went?

17 A No.

18 Q When he left the car, was there anything in his hands?

19 A I could not tell.

20 Q After he left the car, did you see Mr. Barreto make any  
21 movements?

22 A The only movement I saw him make was he drove away.

23 Q You did indicate that at one point when you drove down the  
24 street before the interaction with the Hispanic male, you did  
25 see him lean toward the passenger floor?

1 A Yes.

2 Q You didn't see anything in his hands or what he was  
3 reaching for?

4 A No. I could only see his shoulder area and back of his  
5 head. He was leaned over at an angle with both hands down  
6 towards the floorboard area of the motor vehicle.

7 Q Eventually when you searched that area, did you find  
8 anything there?

9 A Yes.

10 Q What did you find?

11 A A large amount of cocaine and money.

12 Q In the -- on the floor of the passenger area?

13 A No. In a hide that was located directly in front of that  
14 floorboard area in the front of the passenger seat.

15 Q When you approached the car after it was stopped and the  
16 other officers were engaged to Mr. Barreto, could you see  
17 anything unusual from the outside of the car about that  
18 floorboard area?

19 A At what point?

20 Q When you were outside of the car trying to converse with  
21 Mr. Barreto.

22 A No.

23 Q After the Hispanic male leaves and Mr. Barreto starts to  
24 drive away, you requested that another car come and stop this  
25 car; is that correct?

1       A     No.

2       Q     Did somebody else request that another car stop

3       Mr. Barreto's car?

4       A     Yes.

5       Q     And the car that pulled over to stop him, was that a marked

6       cruiser?

7       A     No.

8       Q     Another unmarked cruiser?

9       A     It was an unmarked cruiser equipped with lights and sirens,

10      yes.

11      Q     So lights and sirens -- did you see the lights and sirens

12      go off?

13      A     Yes.

14      Q     Mr. Barreto pulled his car over?

15      A     Yes.

16      Q     And you saw those officers begin to engage with him?

17      A     I did not see the beginning of it, no.

18      Q     All right. Why not?

19      A     Again, I drive a soft motor vehicle that I don't want to be

20      seen by the public, so I pulled off of Blue Hill Ave I believe

21      into a parking lot and then approached on foot.

22      Q     You told us that when you arrived, what you heard was

23      Mr. Barreto trying to say that he didn't understand English.

24      A     Correct.

25      Q     And you ordered him out of the car?

1 A Yes.

2 Q And once he was ordered out of the car, you could see some  
3 amount of money in the driver's side door?

4 A Yes.

5 Q From when he exited the car and you were standing there,  
6 how much money could you see inside the driver's side door?

7 A It was just a large bundle of money folded over. I  
8 couldn't tell how much it was at that point.

9 Q Okay. Could you tell what any of the denominations were?

10 A Not specifically, no.

11 Q Okay. And could you tell how many were in this bundle?

12 A Again, not at the initial observation, no.

13 Q So what we see here in Exhibit Number 6, sort of the top of  
14 that money sticking out?

15 A Yes.

16 Q That was your perspective?

17 A Yes.

18 Q You brought Mr. Barreto to the back of the car?

19 A Yes.

20 Q Was he pat frisked?

21 A Eventually, yeah. I don't remember if it was right at the  
22 back of the car or on the sidewalk, but he was pat frisked.

23 Q Okay. Did you pat frisk him before you began your search  
24 of the car?

25 A Yes.

1 Q Okay. And when you pat frisked him before your search of  
2 the car, you didn't locate anything on him?

3 A I don't believe so, no.

4 Q At the time that you ordered him out of the car, certainly  
5 you were present, correct?

6 A Yes.

7 Q You told us that -- was it Officer Fisher that was present  
8 as well?

9 A Yes.

10 Q Officer Fabiano?

11 A Yes.

12 Q And did Officer Fisher have a partner who was there as  
13 well?

14 A Yeah. I believe there was about six officers total all in  
15 plain clothes at the onset of the stop --

16 Q Okay.

17 A -- and the exist order.

18 Q And when you're in plain clothes, are you still armed?

19 A Yes.

20 Q And when you're in plain clothes, are your badges still  
21 displayed?

22 A Yes.

23 Q And certainly by the time you interacted with Mr. Barreto,  
24 everybody had their badges displayed to alert him of who they  
25 were?

1 A Correct.

2 Q And again, there was one car that even had its lights and  
3 sirens -- not sirens, probably just lights flashing?

4 A Yes.

5 Q When you brought Mr. Barreto to the back of the car, there  
6 was still you said about six officers there?

7 A At the back of the car?

8 Q Yes.

9 A It wasn't -- there wasn't six officers at the back of the  
10 car, no.

11 Q Just you and someone else?

12 A I believe me myself, Officer Fisher, and one other officer.

13 Q Did Officer Fabiano already start the search of the car  
14 while you were talking to Mr. Barreto?

15 A No. He was, I believe, with another officer towards the  
16 front of the motor vehicle.

17 Q Okay. And while you were speaking with Mr. Barreto toward  
18 the back of the car, you indicated he either expressed an  
19 inability to understand English or was speaking broken English  
20 to you?

21 A Correct.

22 MR. MASFERRER: If I can have just one second, your Honor.

23 Thank you, your Honor.

24 Thank you, Officer. No further questions.

25 THE COURT: Any redirect?

1 MS. CELIO: No, your Honor.

2 THE COURT: Officer, thank you very much.

3 THE WITNESS: Thank you.

4 (Witness excused.)

5 THE COURT: Who is our next witness?

6 MS. CELIO: Officer Nicholas Fisher, your Honor.

7 NICHOLAS FISHER, Sworn

8 THE WITNESS: I do.

9 DIRECT EXAMINATION

10 BY MS. CELIO:

11 Q Can you please introduce yourself, spelling your last name  
12 for the Court?

13 A Good morning. My name is Nicholas Fisher, F-i-s-h-e-r.

14 Q And where are you employed?

15 A I'm a police officer for the City of Boston.

16 Q And how long have you been a Boston Police officer?

17 A Since June of 2011.

18 Q That's just a little over four years; is that correct?

19 A Yes, ma'am.

20 Q Okay. And where are you currently assigned?

21 A I'm currently assigned to the Citywide Drug Control Unit.

22 Q How long have you been with the Citywide Drug Control Unit?

23 A Since February of this year.

24 Q Were you part of the Citywide Drug Control Unit in June of  
25 2014?



1 A No, I was not.

2 Q And where were you assigned at that time?

3 A I was assigned to District B2.

4 Q And did you have a specific job within the area of B2

5 on -- in June of 2014?

6 A Yes.

7 Q And what was that?

8 A I was assigned to what we call the Anti-Crime Unit which is

9 a plain clothes district unit.

10 Q And did you have a partner at that time?

11 A Yes, I did.

12 Q And who was that?

13 A My regular partner was Officer Michael Burke, but I believe

14 on the afternoon in question, he was not working that day.

15 Q So on June 9th of 2014, were you paired with another

16 officer?

17 A Yes, I was.

18 Q And who was that?

19 A Officer Samora Lopes.

20 Q And what type of motor vehicle did you drive?

21 A We were in an unmarked Ford Crown Victoria with lights and

22 sirens but no traditional police markings.

23 Q On June 9th of 2014, as you indicated, you were working

24 that day; is that correct?

25 A Yes, ma'am.

1 Q And at approximately 5 p.m., where were you located/

2 A We were in the Roxbury area, the general area around the  
3 District B2 station in the Dudley triangle.

4 Q And what are those streets within -- by the B2 station?

5 A Dudley Street, Washington Street, Warren Street are the  
6 three main streets that are in that general area, Blue Hill Ave  
7 as well.

8 Q And how were you communicating with other members of the  
9 department on that day?

10 A Several different means of communication, both text  
11 messages and phone calls via cell phone and different channels  
12 on the Boston Police radio.

13 Q And at some point, were you contacted by Officer Fabiano?

14 A Yes.

15 Q And why were you contacted?

16 A We were contacted by him. And he indicated to us that he  
17 may need a motor vehicle stopped as part of some sort of drug  
18 investigation that he and the other members of the Citywide Drug  
19 Unit were involved in at that time.

20 Q So then what, if anything, did you do?

21 A We proceeded to the general area where those members of  
22 that unit were located just kind of on standby initially should  
23 they notify us that they actually did need a car stopped.

24 Q And when you say the areas, was that the area of Warren,  
25 Copeland, and Waverly Street?

1 A Yes, ma'am.

2 Q And which direction were you driving -- I'm sorry. Which  
3 street were you on as part of -- when you say general area,  
4 which street were you on?

5 A Warren Street.

6 Q Warren Street. And which way were you facing?

7 A We were facing towards Grove Hall, so what you would call  
8 the outbound side of Warren.

9 MS. CELIO: May I approach, your Honor?

10 THE COURT: You may.

11 BY MS. CELIO:

12 Q I'm showing you Exhibit 1. Do you see the areas of Warren,  
13 Copeland, and Waverly Street --

14 A Yes, ma'am.

15 Q -- on that map?

16 A Uh-huh.

17 Q If you were going on Warren Street the way you were  
18 driving, would Waverly and Copeland Streets be on your left or  
19 on your right?

20 A On the left.

21 Q And as you indicated, you were there to make a possible  
22 stop of a motor vehicle; is that correct?

23 A Yes, ma'am.

24 Q And did you know what type of motor vehicle you were there  
25 to possibly stop?

1 A It was described to us as a green Volvo station wagon.

2 Q Did you ever make observations of that green Volvo station  
3 wagon?

4 A Yes, ma'am.

5 Q And where did you see that vehicle?

6 A The motor vehicle turned left from Copeland onto Waverly  
7 Street.

8 Q Then what did -- if anything, did you do?

9 A Well, we had been alerted that the car was on the move and  
10 that they initially had requested a stop. At that time, they  
11 observed the vehicle pull over to the left. And we were  
12 informed that we were to hold off on that vehicle stop as they  
13 wanted to continue to make further observations of what the  
14 occupants of that car did.

15 Q So then what, if anything, did you do?

16 A We continued to drive -- we drove down Waverly Street. The  
17 car was pulled over to the left, so we drove passed the vehicle.  
18 And we then also pulled over on Waverly Street and awaited  
19 further instructions from the drug unit.

20 Q And how far away were you from that green Volvo when you  
21 pulled over?

22 A My best estimate would be maybe several hundred yards.

23 Q Could you observe anything regarding that motor vehicle as  
24 it was stopped on the side?

25 A No, ma'am.

1 Q So then what, if anything, did you do?

2 A Again, we just waited. And we were then instructed that  
3 they had observed that motor vehicle pull off on Waverly Street  
4 and that we were to stop it when we could safely do so.

5 Q And so did you see that motor vehicle, again, driving on  
6 Waverly Street?

7 A Yes, ma'am.

8 Q And then what, if anything, did you observe of the motor  
9 vehicle?

10 A We observed that there was one appeared to be Hispanic male  
11 occupant. The vehicle passed us on Waverly Street and took a  
12 right on Blue Hill Ave.

13 Q And what, if anything, did you do?

14 A We then conducted a motor vehicle stop in the area of Blue  
15 Hill Ave and Clifford Street.

16 Q And when did you -- so that involved turning on your lights  
17 and sirens; is that correct?

18 A Yes, ma'am.

19 Q And when did you turn on your lights and sirens?

20 A Once the vehicle made the right on Blue Hill Ave from  
21 Waverly Street.

22 Q And where, ultimately, was that car stopped?

23 A Directly in front of the liquor store which is on Blue Hill  
24 Ave just beyond Clifford Street.

25 Q What, if anything, did you do?

1 A I then approached the operator of the vehicle and then  
2 began engaging him in conversation.

3 Q Were there any other officers with you at that time?

4 A Initially, it was just Lopes and myself. I believe there  
5 was another what we called K-car, the plain clothes car, with  
6 two additional officers who were somewhere in that general  
7 vicinity. But initially, it was just the two of us that  
8 approached.

9 Q Can you then describe what, if anything, did you do when  
10 you approached the driver's side of that motor vehicle?

11 A Yes. I engaged in the driver in what I would call the  
12 routine conversations, requested his license and registration  
13 and began to engage him in every simple conversation.

14 Q And do you see the operator of that motor vehicle in this  
15 courtroom today?

16 A Yes, I do.

17 Q And could you just describe an article of clothing he's  
18 wearing?

19 A Red plaid shirt, sunglasses.

20 MS. CELIO: Okay. Let the record reflect he identified the  
21 Defendant.

22 BY MS. CELIO:

23 Q Can you -- did you have a conversation with the Defendant?

24 A I had a brief conversation with him. Yes, ma'am.

25 Q Can you describe what, if anything, did you -- strike that.

1 Did you ask him any questions?

2 A I did.

3 Q And what questions did you ask him?

4 A I asked for his license and registration which he was able  
5 to provide to me. He then asked me in English why we had  
6 stopped him. I asked what his name was. He provided the name  
7 that was listed on the driver's license. I asked him what his  
8 date of birth was. He replied 1984. And I asked again for his  
9 full date of birth, and he just continued to respond the year  
10 and not the day. And I believe at that time, Officer Gero was  
11 also approaching to speak to the operator.

12 Q Did you make any observations of the Defendant?

13 A He was -- seemed extremely nervous, very agitated, was not  
14 making eye contact with me during our conversation, just seemed  
15 very what I would describe as frazzled by the fact that he had  
16 been pulled over.

17 Q Did you make any observations of his body while you were  
18 talking to him?

19 A I could observe that he was breathing very heavily, labored  
20 breathing, certainly not how a person who's having just a casual  
21 conversation would ordinarily react to that situation.

22 Q Did you have further conversation with him?

23 A We initially began the conversation in English without any  
24 issue. And then it became that he only understood some English,  
25 and then that he understood no English.

1 Q And was that all while you were speaking to him at the  
2 driver's side window?

3 A Yes, ma'am.

4 Q And how long was that conversation with him?

5 A Brief. I would say maybe around a minute.

6 Q And then what, if anything, happened?

7 A Officer Gero and the other members of the drug unit  
8 approached the vehicle, and they asked the operator to step out.

9 Q And what, if anything, did you do?

10 A Once he came out of the vehicle, I believe that I just  
11 stayed with him on the sidewalk as they continued to do  
12 whatever -- the drug investigation that they had.

13 Q And did you have any further conversation with him?

14 A I attempted to, but at that point, he didn't speak English.

15 Q Okay. And did you make any observations of him on the  
16 sidewalk?

17 A Just that he was extremely interested in what the Drug  
18 Control guys were doing, very concerned about, in my opinion,  
19 you know, why they were in the car, what they were looking for,  
20 and things like that.

21 Q Did you ever go inside the car?

22 A I don't believe I did. No, ma'am.

23 Q So your purpose was to stop the car and have that  
24 conversation with the Defendant; is that correct?

25 A Basically just until they got there, yes, ma'am.



1 MS. CELIO: I have no further questions.

2 THE COURT: All right. Cross-examination?

3 MR. MASFERRER: Thank you, your Honor.

4 CROSS-EXAMINATION

5 BY MR. MASFERRER:

6 Q Good afternoon, Officer.

7 A Good afternoon, sir.

8 Q Officer, you didn't issue any motor vehicle citations,  
9 correct?

10 A Correct.

11 Q You didn't observe any motor vehicle infractions, correct?

12 A I personally did not.

13 Q The conversation that you've described, this was the  
14 conversation you had with the Defendant, correct?

15 A I'm not sure I understand the question.

16 Q What you've testified to, the license, registration --

17 A Yes, sir. Yes, sir.

18 Q There was no other conversation that the two of you had,  
19 correct?

20 A Correct.

21 Q And the decision to have the Defendant exit the car, that  
22 was Officer -- that wasn't your decision?

23 A That was made by the Drug Control guys, yes, sir.

24 Q Right when they came to the car, correct?

25 A Based upon whatever knowledge they had that I didn't, yes,

1 sir.

2 Q Sure. When Officer Gero came to the car, is that more or  
3 less when the Defendant had expressed to you an inability to  
4 understand English?

5 A Prior to that, yes, sir.

6 Q Did you pat frisk the Defendant?

7 A I did not.

8 Q Okay. And I think, as you said, you didn't engage in the  
9 search or anything like that?

10 A Correct.

11 MR. MASFERRER: Thank you. I have no further questions.

12 THE COURT: Any redirect? Ms. Celio, anything further?

13 MS. CELIO: Just briefly.

14 REDIRECT EXAMINATION

15 BY MS. CELIO:

16 Q Officer Fisher, what was your job to do that day in  
17 terms -- with respect with the green Volvo?

18 A It was exclusively to stop that guy for the drug unit.

19 Q Were you there to make any observations of the car?

20 A No, ma'am. There were observations that were relayed to me  
21 that they had made, but it was not my function to make  
22 additional observations as far as I knew.

23 MS. CELIO: I have no further questions.

24 THE COURT: Recross?

25 MS. CELIO: No, your Honor.

1 THE COURT: Officer Fisher, thank you very much.

2 THE WITNESS: Thank you, sir.

3 (Witness excused.)

4 THE COURT: And the last witness will be?

5 MS. CELIO: Officer Fabiano, your Honor.

6 STEPHEN FABIANO, Sworn

7 THE WITNESS: I do.

8 Good afternoon, your Honor.

9 DIRECT EXAMINATION

10 BY MS. CELIO:

11 Q Could you please introduce yourself to the Court, spelling  
12 your last name?

13 A Officer Stephen Fabiano. Last name is spelled F-a-b-i-a-n-  
14 o.

15 THE COURT: Stephen with a V or a p-h?

16 THE WITNESS: P-h, sir.

17 MS. CELIO: Sorry. Thank you, your Honor.

18 BY MS. CELIO:

19 Q And where are you currently employed?

20 A I'm employed with the Boston Police Department at the  
21 drug -- the Citywide Drug Control Unit.

22 Q And how long have you been with the Boston Police  
23 Department?

24 A Approximately 14 years.

25 Q How long have you been with the Citywide Drug Unit?

1 A Three years.

2 Q Where you were assigned prior to the Citywide Drug Control  
3 Unit?

4 A Prior to being assigned to the drug unit, I -- obviously, I  
5 came on the job in 2001, I went to the Boston Police Academy  
6 which is a six-month academy. From there, I went to District 3  
7 which is Mattapan section of Boston for approximately six years.  
8 And then I got transferred to the Youth Violence Strike Force,  
9 otherwise known as the Gang Unit, for approximately five years,  
10 at which time then I was transferred to the drug unit.

11 Q Can you approximate the amount of arrests that you've made  
12 for illegal narcotics in your career?

13 A Approximately 500 or more.

14 Q Can you just briefly describe your responsibilities within  
15 the Citywide Drug Control Unit?

16 A Our responsibilities are to investigate the obviously  
17 specific drug investigations throughout the city, street level,  
18 and sometimes to go higher level which is, you know, more -- the  
19 high scale drug deals with more weight.

20 Q And just -- fair to say in your career, you've been part of  
21 investigations and arrests in which you've seized numerous  
22 different types of illegal narcotics; is that correct?

23 A That's correct.

24 Q Could you just briefly describe the type of illegal  
25 narcotics that you've seized?

1 A From, you know -- from pills, powder cocaine, heroin, crack  
2 cocaine, again, various amounts from one plastic -- one small  
3 plastic bag of cocaine to 500 grams of cocaine.

4 Q And you've received specific training in the area of  
5 illegal narcotics?

6 A I have, yes.

7 Q Can you just briefly describe that?

8 A They send you to drug school which is located out in New  
9 Branch via State Police. It's a one-week drug school which  
10 introduces you to -- it's a brief introduction to street-level  
11 transactions, confidential informants, hides in vehicles, and  
12 the policies and procedures of drug work.

13 Q And I'll draw your attention to June 9th of 2014. Were you  
14 working in a capacity as a member of the Citywide Drug Unit?

15 A Yes, I was.

16 Q And who specifically were you working with on that day?

17 A Officer Jarrod Gero.

18 Q And were you and -- is it your practice for Officer -- for  
19 you to drive together or your own cars?

20 A We have our own vehicles. Sometimes we do drive together.  
21 Oftentimes, we drive our own vehicles which, you know, we all  
22 have.

23 Q And what type of clothing were you wearing?

24 A Plain clothes; t-shirt, jeans, shorts, sneakers.

25 Q And you have a badge --

1 A We do have a badge --

2 Q -- indicating you're a --

3 A -- indicating we are Boston Police officers, yes.

4 Q And how were you and Officer Gero communicating with each  
5 other that day?

6 A Probably via radio.

7 Q And could you also communicate with other members of the  
8 Boston Police Department via radio as well?

9 A We can, yes.

10 Q And tell me about 5 p.m., where specifically were you and  
11 Officer Gero?

12 A We were in the area of Warren Street, Copeland, Waverly  
13 Street intersection there.

14 Q And are you familiar with that area?

15 A I am familiar with that area.

16 Q How are you familiar with that area?

17 A I made arrests in the past in that area. Officer Gero, I  
18 Know, has made numerous arrests in that area being assigned to  
19 District 2.

20 Q And what -- and as you said, some of those arrests then are  
21 for illegal narcotics?

22 A Illegal narcotics, illegal firearms.

23 Q And if you could, Officer Fabiano, why specifically were  
24 you in the area of Warren, Waverly, and Copeland Street?

25 A We were in the area of Waverly, Copeland, and Warren.

1 Specifically, we have received information from a source that a  
2 green Volvo station wagon that had a large amount of narcotics  
3 was in that area.

4 Q Did you know anything about the driver of that car?

5 A No, we did not.

6 Q Did you know anything about the plate of that car?

7 A At that point, I believe no.

8 Q And at some point, did you observe any green Volvo station  
9 wagon in that specific area?

10 A I did. I observed a green Volvo station wagon traveling on  
11 Copeland Street towards that intersection of Waverly and Warren  
12 Street with one Hispanic male occupying in it.

13 Q And where were you parked -- where were you located when  
14 you made those observations?

15 A So I was on Warren Street looking directly at the  
16 intersection. I believe I was behind Officer Gero.

17 Q And so where were Copeland and Waverly Streets -- were they  
18 on your right or your left when you're making those  
19 observations?

20 A They're kind of directly to my front but slightly right.

21 Q And then what, if anything, did you observe that Volvo do?

22 A At that time, I was stopped at the stop light which I  
23 believe is right there at the intersection. I proceeded to take  
24 a sharp left down Waverly Street without signaling, at which  
25 time I had pulled out to further observe the vehicle. And it

1 had pulled over maybe 50 feet right up on Waverly Street  
2 immediately after the turn.

3 Q When you observed that car making a left, did you observe  
4 anything regarding the Volvo?

5 A Just that it was occupied by one Hispanic male and the  
6 plate. I think it was 775-Victor-Alpha-6. I think we had the  
7 plate at that time.

8 Q And then you took a right onto Waverly Street; is that  
9 correct?

10 A Correct.

11 Q And where did you go after the car pulled to the left?

12 A I actually passed the car on which now was pulled over to  
13 the left. And another Hispanic male had walked from one of the  
14 apartment buildings right there on the left over to the car and  
15 was now in the driver's side window.

16 Q Could you see anything between the Hispanic male and the  
17 driver of that car?

18 A It was too brief. I really couldn't -- I just know that he  
19 was leaning into the car, like, they look like they were having  
20 some type of interaction, conversation, or whatever.

21 Q Did you see Officer Gero on Waverly Street?

22 A Officer Gero at that time -- he was -- he had pulled over  
23 because he was in front of me, so he had pulled behind the car  
24 also. He was -- he had pulled over further up the street.

25 Q Then what, if anything, did you observe?



1 A At that time, I pulled over as well.

2 THE COURT: How far were you from where he pulled over?

3 THE WITNESS: Maybe 100 feet, your Honor, like, enough  
4 where I think I could still see the car in my side view mirror  
5 at which time I saw these -- the Hispanic male that was leaned  
6 into the window walk away from the vehicle towards one of the  
7 apartment buildings there. And then at the time, the green  
8 Volvo pulled back out into traffic, into the regular line of  
9 traffic. So I'd say probably 20, 30 seconds it was pulled over.

10 BY MS. CELIO:

11 Q And it pulled out onto traffic; is that correct?

12 A Pulled back out on Waverly Street, yes.

13 Q And then what, if anything, did you do?

14 A So I pulled back out. I got behind the vehicle and then at  
15 that time requested a vehicle to stop the car because we can't  
16 stop -- in our vehicle, there are no lights and sirens, so we  
17 cannot conduct a traffic stop in our vehicles.

18 Q And did you contact what you know as a K-car; is that  
19 correct?

20 A Yes.

21 Q Anti-crime car; is that correct?

22 A That's correct.

23 Q Had you been in communication prior to seeing the Volvo  
24 pull over with the -- an anti-crime car?

25 A I believe we were.

1 Q So then what, if anything, did you observe?

2 A The vehicle eventually pulled over. A traffic stop was  
3 conducted on Blue Hill Ave. Officer Fisher approached the  
4 vehicle. He was having conversation with the driver. I believe  
5 Officer Gero then joined Officer Fisher at the window, at the  
6 driver's side window.

7 Q Did you join them?

8 A I think at some point, I did come over I think when, you  
9 know -- maybe after he was asked to step out of the vehicle.

10 Q So you weren't there for the initial conversation with  
11 Officer Fisher; is that correct?

12 A I was not, no.

13 Q So -- and Officer Gero had approached the driver before you  
14 had?

15 A Correct.

16 Q So then what, if anything, did you do?

17 A I went over. And I believe Officer Gero had stated that he  
18 observed a large amount of money which was in the driver's side  
19 door console. So then I went onto the other side and looked  
20 into the vehicle, at which time I observed a wire, a large wire  
21 running from the middle console.

22 Q And so you were on the passenger side of the car; is that  
23 correct?

24 A Yes.

25 Q Okay. And where was Officer Gero at that time?

1 A He was on the driver's side.

2 Q And when did you first see that wire?

3 A I saw that after he told me -- you know, he observed a  
4 magnet in the middle console. He observed a large amount of  
5 money in the driver's side door console. And then I went on the  
6 other side to look in to see what else was inside the vehicle,  
7 and I observed the wire.

8 Q And fair to say through this whole interaction were you  
9 receiving -- were you communicating with Officer Gero?

10 A Yes.

11 Q And were you receiving any information from him, Officer  
12 Gero?

13 A Yes.

14 Q So then what, if anything, did you do?

15 A I think at that time, Officer Gero came on the left hand  
16 side of the vehicle. We took a look at the wire that was  
17 sticking out there. He pressed on the passenger side seat, and  
18 he felt a hard -- like, a hard box underneath it which is out of  
19 the ordinary. It's usually a soft cushion. And then at that  
20 time, I believe there was a possibility there was a hide in the  
21 vehicle based on the totality of information that we had at that  
22 point. And I requested a K-9, a drug K-9.

23 Q And did that K-9 come?

24 A They did come.

25 Q And did the K-9 alert to any possible presence of

1     narcotics?

2     A     I believe the -- yeah, Officer Scannell arrived with Hans,  
3     which was the dog. He indicated on that right passenger front  
4     seat the presence of narcotics.

5     Q     And so then what, if anything, did you do?

6     A     Well, then I took a close look at the seat, and I peeled  
7     back the cushion at which time I saw a metal box, like,  
8     underneath it, the top of a metal box.

9     Q     And then at some point, did you bring the car back to the  
10    station?

11    A     We did.

12    Q     And at some point, did you open up that metal box?

13    A     We did. We opened it up.

14    Q     And found a large amount of drugs and cash in that area; is  
15    that correct?

16    A     Correct.

17    Q     And, Officer Fabiano, do you see the operator of that car  
18    in this courtroom?

19    A     I do.

20    Q     Fair to say -- or can you just point out an article of  
21    clothing that he's wearing?

22    A     He's wearing a red multicolored striped dress shirt, and  
23    he's got glasses hanging from the collar.

24           MS. CELIO: Let the record reflect he identified the  
25    Defendant.

1 THE COURT: The record will so reflect.

2 MS. CELIO: Just one moment, your Honor.

3 I have no further questions.

4 THE COURT: Cross-examination?

5 MR. MASFERRER: Thank you.

6 CROSS-EXAMINATION

7 BY MR. MASFERRER:

8 Q Good afternoon, Officer Fabiano.

9 A Good afternoon, counsel.

10 Q Officer, the narcotics and the money that were located  
11 inside the hide, that hide was basically in the passenger seat,  
12 correct?

13 A Correct.

14 Q Not in the floor in front of the passenger seat, but  
15 actually, like, sort of built underneath the seat?

16 A Inside the seat, correct.

17 Q You're the officer who prepared the police report in this  
18 case, correct?

19 A Correct.

20 Q And you testified in front of the grand jury?

21 A I did.

22 Q In your police report, you left out any mention of the fact  
23 that there was a tip or --

24 A A source.

25 Q -- a source.

1 A Correct.

2 Q Likewise, when you testified in front of the grand jury,  
3 you sort of left that part out of your testimony?

4 A Correct.

5 Q You took out the complaint in this case?

6 A I believe I wrote -- either me or Officer Gero, yes.

7 Q Sure. Did you issue any citations?

8 A I don't believe so.

9 Q Again, you weren't present for any of the interactions  
10 between Mr. Barreto and either Officer Fisher or Officer Gero,  
11 correct?

12 A No.

13 Q By the time you conducted your search of the car, Officer  
14 Gero had already started a search and told you what he had seen  
15 and found?

16 A Well, he did tell me what he had saw, what he observed. I  
17 don't think we had went into the car at that point.

18 Q The magnet?

19 A The magnet, yes.

20 Q Right. So he had --

21 A And the cash and the -- yes.

22 Q So he had -- to see the magnet, you have to be in the car  
23 to see the magnet?

24 A No. I think I could see it from -- with the door open.

25 Q But you didn't see it?

1 A There was an open console. I didn't see it. He saw it  
2 from that end. I was on that side. I went to the other side,  
3 and I saw the wire. And he pointed out that he also observed  
4 the magnet.

5 Q So your memory is that you didn't see the magnet from the  
6 outside, he told you about the magnet?

7 A He did.

8 Q All right.

9 A I mean, he's the one who saw it first, yes.

10 Q So whether he saw it because he got into the car from  
11 outside of the car, I take it you don't know which one of those  
12 two?

13 A Correct.

14 MR. MASFERRER: I have no further questions. Thank you so  
15 much.

16 THE COURT: Any redirect?

17 MS. CELIO: Just briefly.

18 REDIRECT EXAMINATION

19 BY MS. CELIO:

20 Q Officer Fabiano, you were asked whether or not you issued  
21 any citations in this case; is that correct?

22 A That is correct.

23 Q Did you observe any motor vehicle infractions?

24 A I did.

25 Q And what did you observe?

1 A Failure to signal.

2 Q And when did you observe that?

3 A That was Copeland onto Waverly Street.

4 Q And you indicated that there's a light there?

5 A There was a light, yes

6 MS. CELIO: I have no further questions.

7 THE COURT: Anything further?

8 MR. MASFERRER: No, your Honor.

9 THE COURT: Officer Fabiano, thank you very much.

10 THE WITNESS: Thank you, your Honor.

11 (Witness excused.)

12 THE COURT: Does the Commonwealth have any other evidence?

13 MS. CELIO: We don't, your Honor.

14 THE COURT: And, Mr. Masferrer, do you have any other

15 evidence?

16 MR. MASFERRER: No, your Honor. Thank you.

17 THE COURT: Mr. Masferrer, would you like to make a closing

18 argument?

19 MR. MASFERRER: Yes, your Honor. And if I could -- the

20 Commonwealth provided to me today their memorandum. I can

21 provide one to the Court in a few days if the Court wants me to.

22 THE COURT: I'll set a date for that. And whatever you'd

23 like to share with me today, I'm happy to hear it.

24 MR. MASFERRER: Sure. Thank you, Judge. And so that can

25 be at some point next week if your Honor would like a memo.



1 THE COURT: The sooner it is, the better. Let's set a firm  
2 date that works for you though.

3 MR. MASFERRER: Yes, your Honor.

4 THE COURT: The 14th -- within a week, by -- next week is  
5 the 21st.

6 MR. MASFERRER: Yes. That would be fine, Judge.

7 THE COURT: And why don't you bring it in straight to  
8 Mr. Cole so that it gets to me right away as opposed to making  
9 its way slowly through the system?

10 MR. MASFERRER: I'll provide two copies, one to the clerk's  
11 office --

12 THE COURT: Great.

13 MR. MASFERRER: -- and one to Mr. Cole.

14 DEFENDANT'S CLOSING ARGUMENT

15 MR. MASFERRER: So, Judge -- and I can tell the Court, the  
16 reality of this case is that it's a pretty straightforward case.  
17 It's not even a close case. The officers in this case, while  
18 experienced drug control units, apparently elected to completely  
19 disregard the Fourth Amendment of the Constitution of the United  
20 States.

21 They don't have anything under Aguilar-Spinelli to  
22 demonstrate the tip. The vague information they have is really  
23 of no import to the Court where it can evaluate the tip in any  
24 way, shape, or form. The tip is there's going to be a car with  
25 drugs. There's no way to corroborate that until you search the

1 car to find narcotics. So what other observations about seeing  
2 a green Volvo on a particular street don't assist them in any  
3 way.

4 Officer Gero's assumptions about two Hispanic men  
5 interacting and indicating to him that it's a drug transaction,  
6 with all due respect to Officer Gero, is racist for no other  
7 words. There are Hispanic men in this neighborhood. There is  
8 no reason to think that two Hispanic men who you don't even see  
9 their hands touching each other have engaged in a drug  
10 transaction. There is no difference between two people  
11 approaching a car saying hello and leaving and the drug  
12 transaction. If we had a tip that said there was going to be a  
13 drug transaction or going to be an encounter outside the street,  
14 I could understand the inference that the officer is making.  
15 But there isn't any. The only tip is -- the tip is irrelevant.  
16 The only thing they see is two Hispanic men interaction.

17 THE COURT: What if I were to hypothetically credit Officer  
18 Fabiano's testimony that he saw the second man come out of the  
19 park and go up to the vehicle, seemed to have some brief  
20 interaction with Mr. Barreto, and then walk away, go back to the  
21 apartment? Does that change anything?

22 MR. MASFERRER: It does not.

23 THE COURT: Why not?

24 MR. MASFERRER: Because there is no testimony that the  
25 apartment building that he walked out of was either known to the

1 police, a drug situation. There's no information that either  
2 individual is known to the police. So the two sort of older but  
3 more better off cases in this area would be Santalese  
4 (phonetic), right? You have the silent movie, but Santalese  
5 (phonetic), you have an exchange. You have something being  
6 delivered to somebody else. And the silent movie tells  
7 you -- or hints that that something being given is drugs or  
8 money. Acdtually, I'm sorry. I think in Santalese (phonetic),  
9 they see the money. They don't see what goes back. So there's  
10 that inference.

11 Or you go to Kennedy which says I don't see what happened,  
12 but I know somebody is a drug dealer and it's a high crime  
13 neighborhood and we add the other facts. The problem is they  
14 have either the exchange nor that any party is known to them.  
15 So in the absence of both of those things, then you have two  
16 Hispanic men saying hi to each other on the street for a very  
17 brief period of time.

18 The police don't even see -- I asked this specifically of  
19 Officer Gero, did you see one bring something to the car or take  
20 something away from the car. There was no testimony that, upon  
21 backing away from the car, he put something in his pocket or  
22 took something out of his pocket, something that would indicate  
23 something was taken. And you have the shoulder movement, so you  
24 would see if, you know, a hand comes out, I see him reach  
25 towards his pocket, or something of that nature. There's

1 nothing of that nature.

2 I asked about Mr. Barreto. At the end of the interaction,  
3 did you see him perhaps reach down toward the driver's side  
4 window perhaps, place that money there, I didn't use the money  
5 comment, but make that movement in order to make that logical  
6 inference. And again, nobody saw that either.

7 So you really have a completely and wholly innocent  
8 interaction of which there's not even a tip about the  
9 interaction to make the interaction look suspicious. And then  
10 Mr. Barreto drives away.

11 When he is pulled over, he is not pulled over for a motor  
12 vehicle violation. I don't know if there was a motor vehicle  
13 violation. Officer Fabiano claims there was. Officer Gero  
14 claims there was. Neither one of them issued any citations for  
15 motor vehicle violation.

16 Officer Fisher who's our officer who's going to pull the  
17 car over does not pull the car over to give a motor vehicle  
18 citation. In other words, he is not informed that a motor  
19 vehicle violation occurred and therefore the person should be  
20 pulled over so that way a citation can be issued. So he's not  
21 even engaging in the motions, if nothing else, to start to issue  
22 the citation and do that. He says, quite candidly, I'm stopping  
23 the car because the Drug Control Unit told me to stop the car,  
24 and I'm stalling, right, for them to get here. I go over. I  
25 ask for license and registration. So he has no idea of what it

1 is.

2 And the Commonwealth wants to rely on a motor vehicle  
3 citation as the grounds for the stop. It's questionable if it  
4 even occurred. But if it did occur, they're not engaging in the  
5 process of issuing the citation which would justify the duration  
6 of the stop. All right. So the scope of the stop would be  
7 limited to the motor vehicle citation, get license and  
8 registration, and the time period necessary to issue the  
9 citation. Nobody is engaging in this conduct. Nobody issues a  
10 citation. So the scope is exceeded, I would submit to the  
11 Court, almost at inception.

12 Mr. Barreto's responses are to provide a license and  
13 registration. There was no testimony that it was invalid. That  
14 he provided his -- the registration of the car in his own name.  
15 Again, nothing to indicate that it was not valid.

16 The question that gets asked about his date of birth, he  
17 gives a year. And then his next response is he doesn't  
18 understand English. So that's the extent of the conversation.  
19 There isn't some big conversation where he speaks English and  
20 then changes because he doesn't like the types of questions he's  
21 being asked to say that he doesn't speak English. That sort of  
22 was the impression I think Officer Gero was attempting to give  
23 the Court. But Officer Fisher's interaction with him, candidly,  
24 doesn't reach to that level.

25 Officer Fisher doesn't indicate that he sees any furtive

1 movements from Mr. Barreto or anything to indicate that he's  
2 armed or dangerous. Officer Gero and Officer Fabiano, for as  
3 much as the tip wants to be credited or used at all -- there's  
4 nothing to indicate that he'd be armed or with a weapon of some  
5 sort. And the Supreme Judicial Court has stated at least  
6 through Gomes and Cabrera and Martin that they're not going to  
7 assume it just because there's a tip about a drug transaction.  
8 Drug dealing does not automatically mean somebody is armed.  
9 There has to be some other plus factor. In here, the only plus  
10 factor is that he's nervous. And the Court has also said  
11 repeatedly that nervousness does not suffice to issue an exit  
12 order.

13 THE COURT: And what about the testimony that at the time  
14 the Volvo was stopped on Waverly Street, that Officer Gero saw  
15 the driver lean forward and to the right? What does that add to  
16 the justification for the exit order?

17 MR. MASFERRER: It doesn't add anything because it didn't  
18 occur after the police engaged -- if they had thrown on their  
19 lights and then he reaches forward, that's the furtive movement.  
20 That's the indication that he's hiding or could be armed. Where  
21 he pulls over and then reaches over -- and that occurs -- I  
22 think Officer Gero is the only one who actually even sees that.

23 There's nothing to indicate that that would be an armed or  
24 dangerous issue. It was to the front passenger area which is  
25 exposed to the officers. It's not late at night. It's five

1 o'clock in the afternoon. So they would be able to see it.

2 The officers outnumbered him very quickly. It was at least  
3 two to one when Fisher is there, three to one when Gero is  
4 there. I think Officer Gero says that more officers come, so it  
5 becomes six to one, and we're doing an exit order. So there is  
6 nothing that would raise this to the point of we need to conduct  
7 the exit order for our safety.

8 Officer Gero doesn't even say he orders the exit order for  
9 safety, not that -- there would have to be at least some  
10 indication that he had some concern. He doesn't say that. He  
11 says he sees that he's nervous, he hears him say he doesn't  
12 speak English, and he has him step out of the car. SO there's  
13 not even a sufficient interaction with him to really raise any  
14 facts that would make you think that he's armed or dangerous.

15 When he's exited from the car, it's not that the officers  
16 immediately go to look to the car to see because they were  
17 concerned about a weapon of some sort. They bring him to the  
18 back. Officer Gero recalls at some point pat frisking him.  
19 There's nothing on him. And Mr. Barreto is continuously saying  
20 he doesn't speak English. So we don't have any new fact to add  
21 to the analysis that would make the officers think that he is  
22 armed or dangerous in order to start doing a pat frisk  
23 of -- either of him, frankly, or of the car.

24 The Court can see -- I think it's great that the Court has  
25 that photograph to see how much money can be seen. It's hard to

1 tell how much money is in that car. But certainly, just seeing  
2 the money without seeing a movement toward it before it is seen  
3 doesn't assist the officers in determining that that money came  
4 from whatever the interaction was with the other unknown  
5 Hispanic male.

6 And then once he's pat frisked, he doesn't -- they don't  
7 find anything on him. He says he doesn't speak English.  
8 Officer Gero starts searching the car. And I think candidly, he  
9 says he's searching the car for drugs. You would need probable  
10 cause at this point to get into the car to search it for drugs.  
11 And they don't have it. There's nothing besides the informant  
12 or whoever the tip is which is not specified to even support  
13 that there are drugs in the car.

14 Even if they thought that a drug transaction just went  
15 down, which there's no evidence of that, then maybe the drugs  
16 are now out of the car and they're with the other Hispanic male.  
17 There's nothing that adds to this analysis that makes  
18 them -- that gives them probable cause to search the car.

19 The magnet, Officer Gero says candidly, he finds once he's  
20 inside the car. That would make sense, given the photographs.  
21 The magnet is inside the center console in a position that you  
22 would not have been able to see from outside the car. And then  
23 we heard from Officer Fabiano that he sees the wire once he gets  
24 inside the car. So the stop that -- the entire encounter is bad  
25 at every single level.



1 I would submit to the Court there is no reasonable basis to  
2 assume that the car was stopped for a traffic violation even if  
3 one was allegedly seen by the way that the Officer Fisher  
4 stopped the car and his conduct. There was certainly nothing to  
5 issue the exit order or to get him out of the car because  
6 there's no reason to believe he was armed or dangerous. And  
7 lastly, even with the seeing of the money and his not  
8 understanding of English, there is nothing to give them probable  
9 cause to search the car for narcotics.

10 And so I will provide the Court with some memorandum with  
11 cites for what I've argued to the Court.

12 THE COURT: All right.

13 MR. MASFERRER: Thank you, your Honor.

14 THE COURT: Ms. Celio?

15 MS. CELIO: Thank you, your Honor. Just briefly.

16 COMMONWEALTH'S CLOSING ARGUMENT

17 MS. CELIO: I submitted the memorandum, and it would  
18 outline my basic argument.

19 I just want to address a couple of issues. First, this is  
20 a close case. It involves whether they can stop the car,  
21 whether they could get the Defendant out, whether or not they  
22 could search the car. And I think that all of their level of  
23 intrusion was proportional to the information that they needed.  
24 But that they are somehow racist in their actions or  
25 their -- what they observed, quite frankly, I just think that's

1 an egregious claim against these officers. We don't need to  
2 debate that, but I just have to get up and say that.

3 What they saw here, based on their training and experience,  
4 Officer Gero said based on his training and experience,  
5 irrespective of what information they knew about this car, that  
6 adds -- I argue it could be corroborated. It's an anonymous tip  
7 that a green Volvo station wagon has drugs in it. That, in and  
8 of itself, couldn't have provided any justification if that was  
9 just the information that they had. I state that candidly.

10 But what they observed, even without that  
11 information -- these are experienced drug investigators. In  
12 that area, Officer Gero specified just, I guess, how prevalent  
13 drugs are in the area, drugs and guns. And I think that when he  
14 observes the Defendant leaning down to the right and then back  
15 up, meeting with the Hispanic male, that Officer Gero candidly  
16 said I couldn't see where it came from. He had already driven  
17 past and parked. And when he turned back, he couldn't see the  
18 Hispanic male.

19 But Fabiano, who was behind him, could see where the  
20 Hispanic male had come from, that he leaves the house, comes  
21 through the window, and has what Officer Gero said would be a  
22 curious handshake of two hands. What Officer Gero could observe  
23 was two hands inside the car and the Defendant's arms and  
24 upper -- and shoulders move towards that individual after he had  
25 just reached in --

1           THE COURT: Help me understand the Commonwealth's theory of  
2 how Officer Gero could actually have seen the second man's hands  
3 inside the car from where Officer Gero was stopped. Wasn't he  
4 stopped on the right side of the street and the fellow was on  
5 the left?

6           MS. CELIO: Correct. But he could see the -- it is his  
7 testimony that he could see from his perspective the  
8 individual's hands inside the car. I think that Officer Fabiano  
9 even credits that because he says that he can see him leaning in  
10 towards the car from this perspective. I think the combination  
11 of their perspectives definitely warrant the finding that that  
12 individual's hands were inside the car. I mean, Gero was  
13 candid. If he wanted to make that up, he could say I saw the  
14 Defendant's come hands come up as well. He didn't say that. He  
15 said he couldn't -- he only told you what he could see. And  
16 what he could see was some of the Defendant's shoulders. And he  
17 could see that individual and his -- what he said, his arms were  
18 in the car, that he believed that there was some exchange that  
19 occurred. This was based on his training and experience and  
20 then the brevity of that stop, especially where someone is  
21 coming from, which Officer Fabiano said, the apartment building.

22           After then, the car pulled out into the street. It turned  
23 right. And it was stopped. Your Honor, this -- you heard the  
24 testimony of Officer Fisher. You know, he was called in to make  
25 aa stop of the car based on drugs. The officers were there

1 addressing a drug investigation. But that's actually legally  
2 irrelevant to whether or not the Defendant then actually turned  
3 without a signal which was a motor vehicle violation. The  
4 courts are very clear about that. He did so. The officers just  
5 observed him. Officer Fisher's job wasn't to observe any motor  
6 vehicle infractions. It was to stop the car when he got the  
7 okay to stop the car.

8 I think though the basis -- as I outline, the basis for the  
9 exit order can be reasonable suspicion and fear for safety. I  
10 think some --

11 THE COURT: Is the Commonwealth still arguing the latter  
12 point, given the testimony of testimony of the police officers?  
13 Are you still arguing that the exit order was justified by a  
14 reasonable fear for officer safety?

15 MS. CELIO: I'm not going to detract from it. I think that  
16 the reasonable suspicion argument is -- flows from what  
17 everything -- I mean, it flows, but I think that the case law  
18 shows that some of the behavior of the Defendant was  
19 indicative -- obviously, he's making reaching movements. I  
20 understand a lot of the case law is based on when he's doing it  
21 before the Court, I don't -- I mean, before the Court -- before  
22 the officer. But I don't -- this was a defendant who wasn't  
23 making eye contact, was extremely nervous. The court says you  
24 don't have to see a weapon, but it doesn't take much for it to  
25 get --

1 THE COURT: Right. But let me be more specific with my  
2 question. I don't recall hearing any of the witnesses say they,  
3 in fact, had suggested fear for their safety.

4 MS. CELIO: Oh, that's -- oh, sorry, your Honor, I didn't  
5 mean to -- I think that's legally irrelevant. I mean, the case  
6 law has said that, that the officers don't have to testify that  
7 they're in fear for safety. It's an objective standard.

8 THE COURT: All right.

9 MS. CELIO: I mean, that would be my -- I don't -- they  
10 don't need to testify to that. And the case law is very clear  
11 about that.

12 And so you have all the facts as I outlined what they  
13 believe was -- based on their training and experience was a drug  
14 transaction that occurred on Waverly, the Defendant's  
15 nervousness, that the Defendant -- as you heard Officer Fisher  
16 say, at first, understood English. And then as he started to  
17 speak with him, and it -- in their conversation, it became to  
18 show that he couldn't understand. I think that is probative  
19 because he's -- he, at first, could communicate with them  
20 effectively. I think it bears to his nervousness really and to  
21 the demeanor which he's showing indicative that he doesn't -- I  
22 think that kind of corroborates and supports their reasonable  
23 suspicion and also a fear for safety.

24 I do think once they get out of the car and they see the  
25 money, that confirms to them giving the probable cause to get

1 into the car. I think the testimony, Gero said he only saw the  
2 magnet when he got in. Fabiano said I think he believed he had  
3 that information before he saw the wire, so I think it would be  
4 based on the observation of the money which provided the  
5 probable cause for them to search. Everything after that was  
6 justified because of the probable cause that they had.

7 THE COURT: I understand the arguments.

8 MS. CELIO: Thank you, your Honor.

9 THE COURT: Thank you all. I will await Mr. Masferrer's  
10 memo next week. And I'll get you all a decision as soon as I  
11 can.

12 Have we already -- a trial assignment date?

13 MS. CELIO: No. We actually need one. Right. Thank you.

14 THE COURT: You don't have next dates?

15 MS. CELIO: No. No.

16 THE CLERK: I have a trial assignment date for a Tuesday  
17 afternoon at 2 p.m., courtroom 815. That's going to be your  
18 next court date.

19 MS. CELIO: 2 p.m. --

20 THE CLERK: It's going to be in courtroom 815 for trial  
21 assignment.

22 MS. CELIO: On a Tuesday.

23 THE CLERK: Tuesday, two o'clock.

24 MR. MASFERRER: Do you want to go, like, December 1st? Is  
25 that enough time for the Court? December 1st? It's a Tuesday.

1 THE COURT: Sure.

2 THE CLERK: That's a Tuesday?

3 MR. MASFERRER: Yeah.

4 MS. CELIO: That's fine.

5 MR. MASFERRER: Unless you want to do it the Tuesday before  
6 Thanksgiving.

7 THE CLERK: That'll be December 1, 2015 for trial  
8 assignment. That'll be in the fourth criminal session,  
9 courtroom 815, at 2 p.m.

10 MR. MASFERRER: Thank you.

11 MS. CELIO: Thank you, your Honor.

12 THE CLERK: Thank you, counsel.

13 THE COURT: Thank you all.

14 (Hearing concluded at 12:33 p.m.)  
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<b>A</b>	<b>agitated (1)</b> 50:13	<b>13:7,19;20:1;31:2; 50:11;69:11</b>	<b>55:2,4;57:18</b>	<b>badges (2)</b> 41:20,24
	<b>agreed (1)</b> 6:16	<b>approximate (2)</b> 8:12;55:11	<b>assignment (4)</b> 81:12,16,21;82:8	<b>bag (1)</b> 56:3
<b>aa (1)</b> 78:25	<b>Aguilar- (1)</b> 4:25	<b>approximately (8)</b> 9:15;13:2;23:24; 45:1;54:24;55:7,9,13	<b>assist (3)</b> 10:13;69:2;75:3	<b>band (1)</b> 19:15
<b>able (5)</b> 24:12,19;50:4; 74:1;75:22	<b>Aguilar-Spinelli (4)</b> 5:25;6:15,18;68:21	<b>area (67)</b> 7:22,24,25;8:21; 9:16,19;10:11,13,18, 21,22,23,25;11:1,2, 13,15;12:4,9;14:14; 17:12,14;18:6,9; 19:11,12;23:7,15,20; 24:2,8,15;26:15; 27:1;36:9,23;37:4; 38:4,6,7,12,14,18; 44:4;45:2,6,21,24; 46:3;48:14;56:4; 57:12,14,15,16,17,18, 24,25;58:3,9;63:14; 70:3;73:24;77:12,13	<b>assistance (1)</b> 17:12	<b>bands (1)</b> 27:8
<b>abruptly (1)</b> 20:1	<b>Alcohol (1)</b> 9:3	<b>areas (4)</b> 11:18;12:13;45:24; 46:12	<b>assume (2)</b> 73:7;76:2	<b>Barreto (22)</b> 3:9,19,23;31:5; 34:25;37:20;38:16, 21,23;39:14,23; 40:18;41:23;42:5,14, 17;65:10;69:20;71:2, 10;73:1;74:19
<b>absence (1)</b> 70:15	<b>alert (2)</b> 41:24;62:25	<b>argue (1)</b> 77:6	<b>assumption (1)</b> 33:22	<b>Barreto's (4)</b> 35:4,8;39:3;72:12
<b>Academy (3)</b> 8:25;55:5,6	<b>alerted (4)</b> 22:2;23:19;24:11; 47:9	<b>argued (1)</b> 76:11	<b>assumptions (1)</b> 69:4	<b>based (15)</b> 5:16;19:20;20:6, 11;21:22;22:12; 52:25;62:21;77:3,4; 78:19,25;79:20; 80:13;81:4
<b>accurate (1)</b> 5:19	<b>allegedly (1)</b> 76:3	<b>arguing (2)</b> 79:11,13	<b>attached (1)</b> 19:12	<b>basic (2)</b> 9:2;76:18
<b>Acddually (1)</b> 70:8	<b>Almost (3)</b> 14:6;22:1;72:11	<b>argument (5)</b> 67:18;68:14;76:16, 18;79:16	<b>attempt (1)</b> 13:21	<b>basically (4)</b> 21:8;22:6;51:25; 64:11
<b>across (1)</b> 10:23	<b>always (1)</b> 33:6	<b>arguments (1)</b> 81:7	<b>attempted (1)</b> 51:14	<b>basis (5)</b> 5:17;33:21;76:1; 79:8,8
<b>actions (2)</b> 29:9;76:24	<b>Amendment (1)</b> 68:19	<b>armed (9)</b> 41:18;73:2,4,8,20, 23;74:14,22;76:6	<b>attempting (2)</b> 5:9;72:22	<b>bears (1)</b> 80:20
<b>activity (10)</b> 32:21,24;33:2,6,9, 12,17,23;34:1,5	<b>amount (12)</b> 10:14;24:14,21; 36:24;37:5;38:11; 40:3;55:11;58:2; 61:18;62:4;63:14	<b>arms (4)</b> 16:8,14;77:23; 78:17	<b>attention (2)</b> 9:6;56:13	<b>became (2)</b> 50:24;80:17
<b>actually (13)</b> 12:14;14:11;18:1; 19:5;22:13;45:23; 59:12;64:15;73:22; 78:2;79:1,2;81:13	<b>amounts (1)</b> 56:2	<b>around (5)</b> 11:2;19:15;21:16; 45:2;51:5	<b>avoiding (1)</b> 18:2	<b>becomes (1)</b> 74:5
<b>ADA (1)</b> 6:10	<b>analysis (2)</b> 74:21;75:17	<b>arrest (1)</b> 29:14	<b>await (1)</b> 81:9	<b>bed (1)</b> 33:25
<b>add (4)</b> 70:13;73:15,17; 74:20	<b>and/or (1)</b> 23:17	<b>arrests (12)</b> 8:9,13,16;10:25,25, 25;11:1;55:11,21; 57:17,18,20	<b>awaited (1)</b> 47:18	<b>began (4)</b> 40:23;49:2,13; 50:23
<b>added (1)</b> 22:16	<b>angle (1)</b> 38:5	<b>arrive (2)</b> 23:25;24:5	<b>away (16)</b> 16:21,24,25;30:13, 18,25;37:14,22; 38:24;47:20;60:6; 68:8;69:20;70:20,21; 71:10	<b>begin (1)</b> 39:16
<b>additional (3)</b> 4:17;49:6;53:22	<b>anonymous (6)</b> 5:21,23,24;6:1,2; 77:6	<b>arrived (4)</b> 18:7;24:2;39:22; 63:2	<b>Axelrod (1)</b> 3:21	<b>beginning (1)</b> 39:17
<b>address (2)</b> 32:13;76:19	<b>anticipate (1)</b> 4:18	<b>arrow (1)</b> 12:6	<b>B</b>	<b>begins (1)</b> 29:11
<b>addressing (1)</b> 79:1	<b>Anti-Crime (4)</b> 17:13;44:8;60:21, 24	<b>article (3)</b> 26:3;49:17;63:20		<b>behalf (2)</b> 3:16,19
<b>adds (2)</b> 75:17;77:6	<b>apartment (5)</b> 59:14;60:7;69:21, 25;78:21	<b>assigned (15)</b> 7:9,11,16,17,18,21, 25;43:20,21;44:2,3,8;	<b>B2 (8)</b> 7:25;17:12,13; 18:9;44:3,4;45:3,4	<b>behavior (1)</b> 79:18
<b>Administration (1)</b> 9:1	<b>apparently (1)</b> 68:18		<b>back (23)</b> 3:4;15:4;16:9; 20:21;21:20;24:16; 38:4;40:18,22;42:5,7, 9,18;60:8,12,14;63:7, 9;69:20;70:9;74:18; 77:14,17	<b>behind (6)</b> 14:12;18:4;58:16; 59:23;60:14;77:19
<b>admissible (1)</b> 21:3	<b>appear (2)</b> 15:19;21:11		<b>backing (1)</b> 70:21	<b>besides (2)</b> 33:12;75:11
<b>aftermarket (3)</b> 22:16,23;26:24	<b>appeared (7)</b> 15:7,23;16:6;18:2; 21:12;34:13;48:10		<b>bad (1)</b> 75:24	<b>best (2)</b> 22:4;47:22
<b>afternoon (8)</b> 44:14;52:6,7;54:8; 64:8,9;74:1;81:17	<b>approach (4)</b> 11:7;17:20;24:24; 46:9		<b>badge (2)</b> 56:25;57:1	<b>better (4)</b> 22:25;31:4;68:1; 70:3
<b>afterwards (1)</b> 21:19	<b>approached (14)</b> 17:23;18:20,23; 29:16;31:8;34:7; 38:15;39:21;49:1,8, 10;51:8;61:3,13			<b>Beyond (3)</b>
<b>again (12)</b> 17:1,2;39:19; 40:12;42:2;48:2,5; 50:8;56:2;65:9;71:6; 72:15	<b>approaching (6)</b>			
<b>against (1)</b> 77:1				

37:1,12;48:24 <b>big (2)</b> 19:14;72:19 <b>birth (3)</b> 50:8,9;72:16 <b>bit (3)</b> 11:4;14:21,25 <b>black (2)</b> 27:9;30:9 <b>blend (1)</b> 9:25 <b>Blue (17)</b> 11:13;12:3,19; 13:10;16:22;17:2,9, 14,19;24:3;39:20; 45:6;48:12,14,20,23; 61:3 <b>body (3)</b> 16:12,14;50:17 <b>Boston (16)</b> 7:2,4,7,9;8:6,25; 9:23;43:15,16;45:12; 54:20,22;55:5,7;57:3, 8 <b>both (8)</b> 14:13;15:6;16:5; 20:3;34:11;38:5; 45:10;70:15 <b>bottom (2)</b> 19:12;23:15 <b>box (6)</b> 12:4;23:7;62:18; 63:7,8,12 <b>Branch (1)</b> 56:9 <b>breaking (1)</b> 10:25 <b>breathing (3)</b> 17:25;50:19,20 <b>brevity (1)</b> 78:20 <b>brief (10)</b> 29:13;30:12;35:17, 18;49:24;51:5;56:10; 59:18;69:19;70:17 <b>briefly (9)</b> 8:2,24;30:21; 53:13;55:14,24;56:7; 66:17;76:15 <b>bring (4)</b> 63:9;68:7;70:19; 74:17 <b>broken (2)</b> 21:17;42:19 <b>brought (3)</b> 20:20;40:18;42:5 <b>building (8)</b> 21:15;31:16,18,19, 20;32:4;69:25;78:21 <b>buildings (2)</b> 59:14;60:7 <b>built (1)</b> 64:15	<b>bundle (3)</b> 19:14;40:7,11 <b>Burke (1)</b> 44:13 <b>business (1)</b> 31:22  <b>C</b>  <b>Cabrera (1)</b> 73:6 <b>call (5)</b> 19:11;35:20;44:8; 46:7;49:11 <b>called (7)</b> 3:1;9:23;22:22; 23:21,24;49:5;78:24 <b>calls (1)</b> 45:11 <b>came (8)</b> 6:17;51:10;52:24; 53:2;55:5;62:15; 75:3;77:16 <b>can (41)</b> 5:15;8:2,12,20,24; 9:21;10:20;12:6; 13:5;14:18;19:23; 22:4;23:3;25:18; 26:12,22;31:4;36:14, 18,20;42:22;43:11; 49:9,23,25;55:11,14; 56:7;57:9;63:20; 67:20,24;68:15,23; 71:20;74:24,25; 76:20;78:9;79:9; 81:11 <b>candid (1)</b> 78:13 <b>candidly (6)</b> 71:22;72:23;75:8, 19;77:9,15 <b>capacity (2)</b> 9:9;56:14 <b>car (141)</b> 9:24,24;12:5,6; 13:8,9,15,19,19; 15:10;16:4,17;17:7, 13,15,15;20:1,1,3; 21:16,17,18,22:7; 24:12;26:7;29:12,16; 31:8;34:7,8,10,12,16, 17,20;35:2,5,8;37:18, 20;38:15,17,20,24, 25;39:2,3,5,14,25; 40:2,5,18,22,24;41:2, 4;42:2,5,7,10,13,18; 45:23;47:9,14,17; 48:22;49:5;51:19,21, 23;52:21,24;53:2,19; 58:4,6;59:3,11,12,14, 17,19,23;60:4,15,21, 24;61:22;63:9,17; 65:13,17,22;66:10,	11;68:24;69:1,11; 70:19,20,21;71:17, 17,23,23;72:14; 74:12,15,16,23;75:1, 8,9,10,13,16,18,20, 22,24;76:2,4,5,9,20, 22;77:5,23;78:3,8,10, 12,18,22,25;79:6,7; 80:24;81:1 <b>career (6)</b> 8:7,13,14,17;55:12, 20 <b>cargo (2)</b> 19:11;26:15 <b>cars (2)</b> 33:1;56:19 <b>case (13)</b> 27:25;64:18;65:5; 66:21;68:16,16,17, 17;76:20;79:17,20; 80:5,10 <b>cases (1)</b> 70:3 <b>cash (3)</b> 24:14;63:14;65:21 <b>casual (1)</b> 50:20 <b>Catawba (1)</b> 12:20 <b>cause (7)</b> 29:14;75:10,18; 76:9;80:25;81:5,6 <b>CELIO (72)</b> 3:15,15;4:2,4,13, 21;5:12,14,21;6:5,7, 10,11,24;11:7,9,20; 12:2;15:24;16:1,2; 19:22;21:10;24:24; 25:1,11,17,24;26:6, 10;27:18;28:23; 36:15,17;43:1,6,10; 46:9,11;49:20,22; 52:1;53:12,13,15,23, 25;54:5,10,17,18; 60:10;63:24;64:2; 66:17,19;67:6,13; 76:14,15,17;78:6; 79:15;80:4,9;81:8,13, 15,19,22;82:4,11 <b>cell (1)</b> 45:11 <b>center (6)</b> 22:3,5,6;26:25; 27:7;75:21 <b>certain (5)</b> 4:24;7:22;12:10, 13,22 <b>certainly (5)</b> 41:4,23;50:20; 75:1;76:4 <b>change (1)</b> 69:21 <b>changes (1)</b>	72:20 <b>channels (1)</b> 45:11 <b>Charlame (1)</b> 12:20 <b>chest (1)</b> 18:1 <b>circumstance (1)</b> 31:3 <b>circumstances (1)</b> 30:23 <b>citation (8)</b> 71:18,20,22;72:3,5, 7,9,10 <b>citations (4)</b> 52:8;65:7;66:21; 71:14 <b>cites (1)</b> 76:11 <b>City (3)</b> 8:6;43:15;55:17 <b>Citywide (15)</b> 7:11,12,15;8:3,4; 9:10;43:21,22,24; 45:18;54:21,25;55:2, 15;56:14 <b>claim (1)</b> 77:1 <b>claims (2)</b> 71:13,14 <b>clear (4)</b> 25:18;37:7;79:4; 80:10 <b>CLERK (13)</b> 3:6,8;11:25;12:1; 25:17,20,23;81:16, 20,23;82:2,7,12 <b>clerk's (1)</b> 68:10 <b>Clifford (5)</b> 12:19;17:14;24:3; 48:15,24 <b>close (4)</b> 32:19;63:6;68:17; 76:20 <b>closing (3)</b> 67:17;68:14;76:16 <b>clothes (10)</b> 10:1;18:9,12,15; 41:15,18,20;44:9; 49:5;56:24 <b>clothing (5)</b> 9:21;26:3;49:17; 56:23;63:21 <b>cocaine (7)</b> 8:18;24:21;38:11; 56:1,2,3,3 <b>Cole (2)</b> 68:8,13 <b>collar (1)</b> 63:23 <b>combination (1)</b> 78:10	<b>coming (3)</b> 21:6;22:2;78:21 <b>comment (1)</b> 71:5 <b>commit (1)</b> 29:12 <b>commonly (1)</b> 22:15 <b>Commonwealth (9)</b> 3:9,16;4:2,4;5:9; 67:12,20;72:2;79:11 <b>COMMONWEALTH'S (2)</b> 76:16;78:1 <b>communicate (4)</b> 10:8;34:12;57:7; 80:19 <b>communicating (4)</b> 10:6;45:8;57:4; 62:9 <b>communication (3)</b> 10:4;45:10;60:23 <b>compared (1)</b> 23:8 <b>compartment (3)</b> 22:16,18;27:17 <b>compartments (2)</b> 22:14,19 <b>complaint (1)</b> 65:5 <b>completely (2)</b> 68:18;71:7 <b>completing (1)</b> 9:2 <b>complex (3)</b> 31:22,25;32:5 <b>complied (1)</b> 19:7 <b>concern (1)</b> 74:10 <b>concerned (2)</b> 51:18;74:17 <b>concluded (1)</b> 82:14 <b>conduct (5)</b> 17:16;60:17;72:9; 74:6;76:4 <b>conducted (8)</b> 21:21;30:22;31:24; 32:12,20;48:14;61:3; 65:13 <b>conducting (3)</b> 33:7,9;36:8 <b>confidential (5)</b> 4:24,25;5:4,10; 56:11 <b>configurations (1)</b> 22:23 <b>confirms (1)</b> 80:25 <b>connection (1)</b> 32:16 <b>console (11)</b> 22:3,5,6;26:25;
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27:7;61:19,21;62:4; 5;66:1;75:21 <b>Constitution (1)</b> 68:19 <b>contact (5)</b> 13:25;18:3;50:14; 60:18;79:23 <b>contacted (4)</b> 10:13;45:13,15,16 <b>context (4)</b> 5:13,14,15;6:14 <b>continue (1)</b> 47:13 <b>continued (5)</b> 17:9,11;47:16; 50:9;51:11 <b>continuously (1)</b> 74:19 <b>Control (13)</b> 7:11,12,15;43:21, 22,24;51:18;52:23; 54:21;55:2,15;68:18; 71:23 <b>conversation (25)</b> 18:18,22,23;19:1; 20:22;49:2,13,23,24; 50:14,21,22,23;51:4, 13,24;52:13,14,18; 59:20;61:4,10;72:18, 19;80:17 <b>conversations (1)</b> 49:12 <b>converse (2)</b> 21:5;38:20 <b>conversing (1)</b> 34:13 <b>Copeland (19)</b> 9:16;10:11,22; 11:5,18;12:19;13:7; 36:23;37:4;45:25; 46:13,18;47:6;57:12, 24,25;58:11,17;67:3 <b>copies (1)</b> 68:10 <b>corner (1)</b> 32:5 <b>corroborate (1)</b> 68:25 <b>corroborated (2)</b> 5:15;77:6 <b>corroborates (1)</b> 80:22 <b>counsel (3)</b> 5:3;64:9;82:12 <b>counsel's (1)</b> 3:20 <b>couple (1)</b> 76:19 <b>course (2)</b> 9:2,5 <b>Court (94)</b> 3:1,4,4,7,10,17,22, 25;4:11,16,20;5:8,13,	19;6:4,6,20,25;11:8, 22,24;13:5;15:25; 19:19,24;21:3;24:25; 25:13,16,19;26:8; 27:19;28:6,24;36:16; 37:7;42:25;43:2,5, 12;46:10;52:2;53:12, 24;54:1,4,11,15;60:2; 64:1,4;66:16;67:7,9, 12,14,17,21,21,22; 68:1,4,7,12,15,23; 69:17,23;72:11,23; 73:5,10,13;74:24,24; 76:1,10,11,12,14; 78:1;79:11,21,21,23; 80:1,8;81:7,9,14,18, 25;82:1,13 <b>courtroom (7)</b> 26:1,9;49:15; 63:18;81:17,20;82:9 <b>courts (1)</b> 79:4 <b>Court's (1)</b> 3:20 <b>covering (1)</b> 27:16 <b>covers (1)</b> 7:25 <b>crack (1)</b> 56:1 <b>credit (1)</b> 69:17 <b>credited (1)</b> 73:3 <b>credits (1)</b> 78:9 <b>crime (1)</b> 70:12 <b>crimes (2)</b> 8:5;9:5 <b>criminal (12)</b> 32:21,24;33:2,6,8, 9,12,17,23,25;34:4; 82:8 <b>Cross-examination (6)</b> 27:19,21;52:2,4; 64:4,6 <b>Crown (1)</b> 44:21 <b>cruiser (3)</b> 39:6,8,9 <b>curb (3)</b> 16:22,24,25 <b>curious (1)</b> 77:22 <b>currently (4)</b> 7:9;43:20,21;54:19 <b>cushion (3)</b> 23:5;62:19;63:7 <b>cushioning (1)</b> 23:8	<b>D</b> <b>dangerous (5)</b> 73:2,24;74:14,22; 76:6 <b>date (8)</b> 50:8,9;67:22;68:2; 72:16;81:12,16,18 <b>dates (1)</b> 81:14 <b>day (10)</b> 9:7,14;27:14; 44:14,24;45:9;50:10; 53:16;56:16;57:5 <b>days (3)</b> 23:2,14;67:21 <b>deal (2)</b> 30:14;36:7 <b>dealer (1)</b> 70:12 <b>dealing (1)</b> 73:8 <b>deals (1)</b> 55:19 <b>debate (1)</b> 77:2 <b>December (3)</b> 81:24,25;82:7 <b>decided (1)</b> 14:10 <b>decision (3)</b> 52:21,22;81:10 <b>Defendant (25)</b> 3:2,24;26:7,20; 32:3,9,19;34:12,17, 25;49:21,23;50:12; 51:24;52:14,21;53:3, 6;63:25;76:21;77:14; 79:2,18,22;80:15 <b>DEFENDANT'S (5)</b> 68:14;77:23;78:14, 16;80:14 <b>definitely (2)</b> 16:19;78:11 <b>delivered (1)</b> 70:6 <b>demeanor (1)</b> 80:21 <b>demonstrate (1)</b> 68:22 <b>denominations (1)</b> 40:9 <b>Department (7)</b> 7:10;9:24;10:9; 45:9;54:20,23;57:8 <b>Depending (2)</b> 30:15,23 <b>depends (1)</b> 31:3 <b>depict (3)</b> 11:15;12:13;27:13 <b>depicted (3)</b>	26:12,23;27:6 <b>depicts (1)</b> 27:10 <b>describe (17)</b> 8:2,24;9:21;10:20; 13:5;14:18;26:3,12, 23;27:5;49:9,17,25; 50:15;55:14,24;56:7 <b>described (3)</b> 22:4;47:1;52:13 <b>details (1)</b> 6:17 <b>determining (1)</b> 75:3 <b>detract (1)</b> 79:15 <b>differ (1)</b> 34:2 <b>difference (1)</b> 69:10 <b>different (5)</b> 4:6;22:24;45:10, 11;55:22 <b>direct (5)</b> 4:12,12;6:23;43:9; 54:9 <b>direction (4)</b> 16:10;17:7;34:21; 46:2 <b>directional (1)</b> 17:1 <b>directions (1)</b> 20:4 <b>directly (4)</b> 38:13;48:23;58:15, 20 <b>discovered (2)</b> 22:19;23:3 <b>discovery (2)</b> 22:13;29:6 <b>discussion (1)</b> 28:15 <b>displayed (2)</b> 41:21,24 <b>disregard (1)</b> 68:19 <b>District (5)</b> 44:3,9;45:3;55:6; 57:19 <b>dog (4)</b> 23:21;24:5,7;63:3 <b>door (10)</b> 19:6,11,12,12; 26:15;40:3,6;61:19; 62:5;65:24 <b>Dorchester (1)</b> 8:1 <b>down (17)</b> 11:4;14:13,25; 16:22;19:10;30:14; 32:3;33:16,16;36:7; 37:23;38:5;47:16; 58:24;71:3;75:15;	77:14 <b>draw (3)</b> 9:6;12:6;56:13 <b>dress (1)</b> 63:22 <b>drive (10)</b> 33:1,7,16;38:24; 39:19;44:20;47:16; 56:19,20,21 <b>driven (1)</b> 77:16 <b>driver (10)</b> 14:18;23:5,8;33:4; 49:11;58:4;59:17; 61:4,13;73:15 <b>driver's (22)</b> 15:5,11;17:5,23; 18:10;19:10;21:21, 25;23:16;26:15;27:2; 40:3,6;49:10;50:7; 51:2;59:15;61:6,18; 62:1,5;71:3 <b>drives (4)</b> 33:11,16,19;71:10 <b>driving (5)</b> 9:22;14:24;46:2, 18;48:5 <b>drove (5)</b> 14:12;37:22,23; 47:16,17 <b>Drug (64)</b> 7:11,12,15;8:3,4,6; 9:1,10;10:25;19:21, 25;20:7;23:21,22; 29:25;30:13,18,22; 31:1;32:12;36:7,8,11, 12;37:2;43:21,22,24; 45:17,18;47:19;51:7, 12,17;52:23;53:18; 54:21,21,25;55:2,4, 10,15,17,19;56:8,9, 12,14;62:22;68:18; 69:5,9,11,13;70:1,12; 71:23;73:7,8;75:14; 77:11;79:1;80:13 <b>drugs (18)</b> 8:5;10:14,15; 12:18;29:6,21;37:5; 63:14;68:25;70:7; 75:9,10,13,15;77:7, 13,13;78:25 <b>Dudley (2)</b> 45:3,5 <b>due (1)</b> 69:6 <b>Dunreath (1)</b> 12:20 <b>duration (1)</b> 72:5 <b>during (1)</b> 50:14 <b>duties (1)</b> 8:2
---	---	--	--	---

<b>E</b>	<b>equipped (1)</b> 39:9	4:12	27:10;55:20;62:8;	<b>floorboard (5)</b> 14:14;22:3;38:6,
	<b>especially (1)</b> 78:20	<b>expecting (1)</b> 4:17	63:20	14,18
<b>Eduardo (1)</b> 3:18	<b>establish (1)</b> 4:25	<b>experience (7)</b> 19:16;22:12;29:25;	<b>falling (1)</b> 18:2	<b>flows (2)</b> 79:16,17
<b>effect (1)</b> 10:3	<b>estimate (1)</b> 47:22	77:3,4;78:19;80:13	<b>familiar (5)</b> 10:18,20;57:14,15,	<b>foam (1)</b> 23:14
<b>effectively (1)</b> 80:20	<b>evaluate (3)</b> 36:14,21;68:23	<b>experienced (2)</b> 68:18;77:11	16	<b>focus (2)</b> 8:4;17:8
<b>egregious (1)</b> 77:1	<b>even (16)</b> 42:2;68:17;69:8;	<b>explain (2)</b> 5:1;31:4	<b>far (4)</b> 5:13;47:20;53:22;	<b>focused (1)</b> 21:12
<b>eight (1)</b> 32:9	70:18;71:8,21;72:4;	<b>explained (1)</b> 20:22	60:2	<b>folded (1)</b> 40:7
<b>either (9)</b> 18:7;42:18;65:6,	73:22;74:8,13;75:12,	<b>explicit (1)</b> 5:8	<b>Farias (1)</b> 3:12	<b>follow (2)</b> 13:21;17:11
10:69;25;70:1,14;	14:76;2,7;77:10;78:9	<b>exposed (1)</b> 73:25	<b>fear (5)</b> 79:9,14;80:3,7,23	<b>foot (3)</b> 17:5,21;39:21
71:6;74:23	<b>event (1)</b> 31:6	<b>expressed (2)</b> 42:18;53:3	<b>February (1)</b> 43:23	<b>Force (4)</b> 7:17,19;8:8;55:8
<b>elastic (2)</b> 19:14;27:8	<b>Eventually (3)</b> 38:7;40:21;61:2	<b>extent (1)</b> 72:18	<b>feel (2)</b> 23:10,12	<b>Ford (1)</b> 44:21
<b>elected (1)</b> 68:18	<b>Everybody (4)</b> 33:11,16,22;41:24	<b>extremely (4)</b> 21:12;50:13;51:17;	<b>feet (2)</b> 59:1;60:3	<b>forgot (1)</b> 20:24
<b>electronic (1)</b> 22:14	<b>evidence (3)</b> 67:12,15;75:15	79:23	<b>fellow (1)</b> 78:4	<b>form (1)</b> 68:24
<b>else (5)</b> 39:2;42:11;62:6;	<b>evidentiary (1)</b> 3:10	<b>eye (3)</b> 18:3;50:14;79:23	<b>felt (3)</b> 23:9;27:14;62:18	<b>forward (3)</b> 34:21;73:15,19
70:6;71:21	<b>exact (2)</b> 6:17;32:7	<b>eyes (1)</b> 21:13	<b>few (1)</b> 67:21	<b>found (3)</b> 23:13;63:14;65:15
<b>employed (3)</b> 43:14;54:19,20	<b>exactly (1)</b> 16:18	<b>F</b>	<b>find (4)</b> 38:7,10;69:1;75:7	<b>four (3)</b> 18:8;32:11;43:18
<b>encounter (2)</b> 69:13;75:24	<b>EXAMINATION (5)</b> 6:23;43:9;53:14;		<b>finding (1)</b> 78:11	<b>Fourth (2)</b> 68:19;82:8
<b>encountered (1)</b> 22:22	54:9;66:18	<b>F-a-b-i-a-n- (1)</b> 54:13	<b>finds (1)</b> 75:19	<b>frankly (2)</b> 74:23;76:25
<b>end (2)</b> 66:2;71:2	<b>example (1)</b> 29:11	<b>Fabiano (44)</b> 4:10;9:14,19;10:4,	<b>fine (2)</b> 68:6;82:4	<b>frazzled (1)</b> 50:15
<b>Enforcement (1)</b> 9:1	<b>exceeded (1)</b> 72:10	13:12;25;13:17,18;	<b>firearm (1)</b> 10:25	<b>frisk (3)</b> 40:23;53:6;74:22
<b>engage (4)</b> 33:17;39:16;49:13;	<b>exchange (4)</b> 35:12;70:5,14;	14:1;15:1;17:12;	<b>firearms (5)</b> 8:5;9:3;12:11,14;	<b>frisked (4)</b> 40:20,22;41:1;75:6
53:8	78:18	18:7,11;22:1;23:17,	57:22	<b>frisking (1)</b> 74:18
<b>engaged (7)</b> 32:21;33:12,22;	<b>exchanging (1)</b> 16:7	19:24;9,11,19,20;	<b>firm (1)</b> 68:1	<b>front (17)</b> 23:5;24:11,12,14;
38:16;49:11;69:9;	<b>exclusively (1)</b> 53:18	28:3,15;36:22;37:8,9,	<b>first (9)</b> 4:8;6:7;11:21;	26:25;31:16;38:13,
73:18	<b>excused (3)</b> 43:4;54:3;67:11	13:41;10;42:13;	31:20;62:2;66:9;	14:42;16;48:23;
<b>engaging (7)</b> 15:12;34:4,24;	<b>executed (2)</b> 12:14,17	45:13;54:5,6,13;	76:19;80:16,19	58:20;59:23;63:3;
49:2;71:21;72:4,9	<b>exhibit (16)</b> 11:21,21,24;12:1,	57:23;63:17;64:8;	<b>Fisher (26)</b> 4:9;17:24;18:12,	64:14,20;65:2;73:24
<b>English (23)</b> 18:25;20:23,24,25;	8:25;16,20,21,22,22;	66:20;67:9;71:13;	14,14,19,24;20:23;	<b>full (1)</b> 50:9
21:9,17;39:23;42:19,	26:12,22;27:5,10;	73:2;75:23;77:19;	41:7,12;42:12;43:6,7,	<b>function (1)</b> 53:21
19:50;5,23,24,25;	40:13;46:12	78:8,21;81:2	13;53:16;54:1;61:3,	<b>further (18)</b> 13:11;14:25;27:18;
51:14;53:4;72:18,19,	<b>exhibits (3)</b> 25:12,23;26:23	<b>Fabiano's (2)</b> 17:15;69:18	5,11;65:10;71:16;	42:24;47:13,19;
21;74:12,20;75:7;	<b>exist (1)</b> 41:17	<b>facing (6)</b> 11:5,5;12:7;24:12;	72:25;74:3;76:3;	50:22;51:13;52:1;
76:8;80:16	<b>exit (10)</b> 5:11;52:21;73:11,	46:6,7	78:24;80:15	53:11,12,23;58:25;
<b>enough (3)</b> 6:20;60:3;81:25	16;74:5,7,8;76:5;	<b>fact (9)</b> 5:23;28:17;32:19;	<b>F-i-s-h-e-r (1)</b> 43:13	59:24;64:3;66:14;
<b>enter (1)</b> 21:25	79:9,13	36:6,8;50:15;64:22;	<b>Fisher's (2)</b> 72:23;79:5	67:6,7
<b>entered (1)</b> 22:1	<b>exited (3)</b> 26:20;40:5;74:15	74:20;80:3	<b>five (2)</b> 55:9;73:25	<b>furtive (2)</b> 72:25;73:19
<b>entire (1)</b> 75:24	<b>expect (1)</b>	<b>factor (2)</b> 73:9,10	<b>flashing (1)</b> 42:3	
<b>entirely (1)</b> 4:19		<b>facts (4)</b> 29:13;70:13;74:14;	<b>floor (3)</b> 37:25;38:12;64:14	
		80:12		
		<b>Failure (1)</b> 67:1		
		<b>Fair (7)</b> 6:20;8:8;17:15;		

<b>G</b>	<b>Grounds (2)</b> 36:16;72:3	<b>heavily (2)</b> 18:1;50:19	32:2	<b>inform (1)</b> 19:24
	<b>Grove (1)</b> 46:7	<b>hello (1)</b> 69:11	<b>hundred (1)</b> 47:22	<b>informant (1)</b> 75:11
<b>gang (3)</b> 8:5;32:11;55:9	<b>guess (10)</b> 5:5,22;6:1;11:5; 19:11;20:10;24:12; 36:17,18;77:12	<b>Help (1)</b> 78:1	<b>hypothetically (1)</b> 69:17	<b>informants (1)</b> 56:11
<b>Garden (1)</b> 10:23	<b>guns (1)</b> 77:13	<b>heroin (2)</b> 8:18;56:1	<b>I</b>	<b>information (26)</b> 4:23,24;5:4,6,10, 16;12:22;19:20; 30:16;31:3;36:13,14, 20,22;37:3,8;58:1; 62:11,21;68:22;70:1; 76:23;77:5,9,11;81:3
<b>general (6)</b> 11:1;45:2,6,21; 46:3;49:6	<b>guy (1)</b> 53:18	<b>hi (2)</b> 35:19;70:16		<b>informed (5)</b> 15:1;19:4;24:7; 47:12;71:18
<b>Gero (55)</b> 4:8,13;6:8,21;7:2; 9:6;12:3,21;25:2,25; 26:11;27:10,23; 50:10;51:7;53:2; 56:17;57:4,11,17; 58:16;59:21,22;61:5, 13,17,25;62:9,12,15; 65:6,10,14;69:6; 70:19;71:13;72:22; 73:2,14,22;74:3,4,8, 18;75:8,19;77:4,12, 15,21,22;78:2,3,12; 81:1	<b>guys (2)</b> 51:18;52:23	<b>hidden (7)</b> 22:14,15,17,19,25; 23:1;27:17	<b>idea (1)</b> 71:25	<b>infraction (2)</b> 29:12,16
<b>G-e-r-o (1)</b> 7:3	<b>H</b>	<b>hide (11)</b> 23:2,3,13,20;24:13, 19;27:11;38:13; 62:20;64:11,11	<b>identified (3)</b> 26:6;49:20;63:24	<b>infractions (3)</b> 52:11;66:23;79:6
<b>Gero's (1)</b> 69:4		<b>hides (2)</b> 22:14;56:11	<b>illegal (10)</b> 8:13,15,22;55:12, 22,24;56:5;57:21,22, 22	<b>initial (3)</b> 17:25;40:12;61:10
<b>gets (3)</b> 68:8;72:16;75:23	<b>half (1)</b> 7:20	<b>hiding (1)</b> 73:20	<b>imagine (1)</b> 8:20	<b>Initially (8)</b> 13:13;18:17;19:2; 45:22;47:10;49:4,7; 50:23
<b>given (3)</b> 70:7;75:20;79:12	<b>Hall (1)</b> 46:7	<b>high (2)</b> 55:19;70:12	<b>immediately (4)</b> 14:6;22:2;59:2; 74:16	<b>Initiative (1)</b> 9:4
<b>gives (2)</b> 72:17;75:18	<b>hand (12)</b> 13:9,9,14,23;14:6, 7,25;15:2;27:15; 31:21;62:15;70:24	<b>higher (1)</b> 55:18	<b>import (3)</b> 20:10;22:9;68:23	<b>innocent (1)</b> 71:7
<b>giving (1)</b> 80:25	<b>hands (30)</b> 14:13,16;15:6,14, 15;16:5,9,11;30:12, 24;34:11,15,18;35:1, 1,4,5,8,10,14;37:18; 38:2,5;69:9;77:22, 23;78:2,8,12,14	<b>Hill (16)</b> 11:13;12:19;13:10; 16:22;17:2,10,14,20; 24:3;39:20;45:6; 48:12,15,20,23;61:3	<b>impression (1)</b> 72:22	<b>inside (32)</b> 10:15;13:14;15:6, 6;16:6;20:2;21:13, 21;22:5,14,18;23:2; 24:14;27:9,15;29:22; 34:16,17;36:24;37:5; 40:6;51:21;62:6; 64:11,16;75:20,21, 24;77:23;78:3,8,12
<b>glasses (1)</b> 63:23	<b>handshake (1)</b> 77:22	<b>hints (1)</b> 70:7	<b>inability (2)</b> 42:19;53:3	<b>installed (1)</b> 22:25
<b>glove (1)</b> 27:16	<b>hanging (1)</b> 63:23	<b>Hispanic (40)</b> 14:20;15:5,17; 16:3,5,9,16;17:4; 29:23;30:6,8,9,11,11, 17,21;31:8,11;34:7; 35:5;36:6;37:14,24; 38:23;48:10;58:12; 59:5,13,16;60:5;69:4, 7,8,16;70:16;75:5,16; 77:15,18,20	<b>inaccurate (1)</b> 5:20	<b>instructed (1)</b> 48:2
<b>goes (2)</b> 30:11;70:9	<b>Hans (1)</b> 63:2	<b>hold (1)</b> 47:12	<b>inbound (1)</b> 11:5	<b>instructions (1)</b> 47:19
<b>Gomes (1)</b> 73:6	<b>happened (4)</b> 28:21;29:10;51:6; 70:11	<b>Honor (40)</b> 3:6,15,18,19;4:4, 10,21;5:12;6:7,22; 11:7,23;24:24;25:15; 37:10;42:22,23;43:1, 6;46:9;52:3;53:25; 54:5,8,17;60:3;64:2; 67:8,10,13,16,19,25; 68:3;76:13,15;78:23; 80:4;81:8;82:11	<b>inception (1)</b> 72:11	<b>interactdions (1)</b> 65:9
<b>Good (15)</b> 3:15,17,18,22,23, 24;6:22;27:23,24; 43:13;52:6,7;54:8; 64:8,9	<b>happy (1)</b> 67:23	<b>honorable (1)</b> 3:4	<b>Including (1)</b> 18:7	<b>interacted (1)</b> 41:23
<b>grams (1)</b> 56:3	<b>hard (4)</b> 23:7;62:18,18; 74:25	<b>Honor's (1)</b> 6:12	<b>indicate (9)</b> 22:11;29:19;37:23; 70:22;72:15,25;73:1, 4,23	<b>interacting (2)</b> 35:15;69:5
<b>grand (2)</b> 64:20;65:2	<b>head (2)</b> 15:12;38:5	<b>hot (1)</b> 33:25	<b>indicated (10)</b> 12:8,21;14:2; 15:16;42:18;44:23; 45:16;46:21;63:3; 67:4	<b>interaction (21)</b> 16:16;20:2,13; 29:23;30:12;31:5; 35:17,19,25;37:24; 59:20;62:8;69:16,20; 71:2,8,9,9;72:23; 74:13;75:4
<b>Great (2)</b> 68:12;74:24	<b>hear (7)</b> 4:23;15:23;18:18; 35:25,25;36:2;67:23	<b>house (2)</b> 31:16;77:20	<b>inability (2)</b> 42:19;53:3	<b>interested (1)</b> 51:17
<b>green (29)</b> 10:17;12:22;13:6, 24;16:21,23;17:9,14, 20;18:6;23:10;24:4; 25:6,25;27:1,7; 29:22;36:22;37:3; 47:1,2,20;53:17;58:2, 8,10;60:7;69:2;77:7	<b>heard (6)</b> 4:19;18:23;39:22; 75:23;78:23;80:15	<b>houses (1)</b>	<b>inaccuracy (1)</b> 5:20	<b>interior (1)</b> 25:7
	<b>hearing (4)</b> 3:10;36:4;80:2; 82:14		<b>inbound (1)</b> 11:5	<b>interpreter (1)</b>
	<b>hears (1)</b> 74:11		<b>inception (1)</b> 72:11	
	<b>Hearsay (1)</b> 21:3		<b>including (1)</b> 18:7	
			<b>indicate (9)</b> 22:11;29:19;37:23; 70:22;72:15,25;73:1, 4,23	
			<b>indicated (10)</b> 12:8,21;14:2; 15:16;42:18;44:23; 45:16;46:21;63:3; 67:4	
			<b>indicates (1)</b> 29:15	
			<b>indicating (4)</b> 12:7;57:2,3;69:5	
			<b>indication (5)</b> 20:6;22:17;24:7; 73:20;74:10	
			<b>indicative (7)</b> 19:16,21,25;23:13; 29:24;79:19;80:21	
			<b>individual (6)</b> 21:6;30:11,12; 70:2;77:24;78:17	
			<b>individuals (3)</b> 18:10;20:14;30:6	
			<b>individual's (2)</b> 78:8,12	
			<b>inference (3)</b> 69:14;70:10;71:6	

3:12 <b>intersection (6)</b> 9:17;17:2;57:13; 58:11,16,23 <b>into (14)</b> 6:16;34:8,10; 39:21;59:19;60:6,8, 8;61:20;65:17;66:10; 75:10;78:22;81:1 <b>introduce (3)</b> 6:25;43:11;54:11 <b>introduced (2)</b> 11:20;25:11 <b>introduces (1)</b> 56:10 <b>introduction (1)</b> 56:10 <b>intrusion (1)</b> 76:23 <b>invalid (1)</b> 72:13 <b>investigate (2)</b> 8:9;55:16 <b>Investigating (1)</b> 33:10 <b>investigation (6)</b> 21:23;33:8;36:8; 45:18;51:12;79:1 <b>investigations (3)</b> 8:16;55:17,21 <b>investigative (1)</b> 9:2 <b>investigators (1)</b> 77:11 <b>involved (7)</b> 20:13;32:24;33:2, 6;36:10;45:19;48:16 <b>involves (1)</b> 76:20 <b>involving (1)</b> 8:5 <b>irrelevant (3)</b> 69:15;79:2;80:5 <b>irrespective (1)</b> 77:5 <b>issue (8)</b> 50:24;52:8;65:7; 71:21;72:8;73:11,24; 76:5 <b>issued (3)</b> 66:20;71:14,20 <b>issues (3)</b> 4:1;72:9;76:19 <b>issuing (1)</b> 72:5 <b>item (1)</b> 16:7 <b>items (1)</b> 22:9	4:8;6:8,21;7:2; 56:17 <b>jeans (1)</b> 56:24 <b>job (4)</b> 44:4;53:16;55:5; 79:5 <b>join (1)</b> 61:7 <b>joined (1)</b> 61:5 <b>joining (1)</b> 7:15 <b>Judge (6)</b> 4:18;6:9;21:1; 67:24;68:6,15 <b>Judicial (1)</b> 73:5 <b>June (13)</b> 9:6;10:1;11:16; 12:5;25:9;26:20; 27:11;43:17,24;44:5, 15,23;56:13 <b>jury (2)</b> 64:20;65:2 <b>justification (3)</b> 5:18;73:16;77:8 <b>justified (2)</b> 79:13;81:6 <b>justify (2)</b> 5:10;72:5	19:10;20:11;24:14, 21;26:14;38:11;40:7; 58:2;61:18,20;62:4; 63:14 <b>last (11)</b> 4:10;7:1,2;16:17; 20:14;23:2,14;43:11; 54:4,12,13 <b>lastly (1)</b> 76:7 <b>late (1)</b> 73:25 <b>later (2)</b> 35:20,20 <b>latter (1)</b> 79:11 <b>law (6)</b> 5:23;6:13;79:17, 20;80:6,10 <b>lean (3)</b> 34:10;37:25;73:15 <b>leaned (2)</b> 38:5;60:5 <b>leaning (4)</b> 34:14;59:19;77:14; 78:9 <b>least (3)</b> 73:5;74:2,9 <b>leave (3)</b> 28:16;35:4,7 <b>leaves (2)</b> 38:23;77:20 <b>leaving (1)</b> 69:11 <b>led (2)</b> 19:24;36:11 <b>left (32)</b> 13:9,9,14,23;14:2, 5,5,7,13;15:2,12; 23:7;26:5;31:21; 34:23;37:18,20; 46:18,20;47:6,11,17; 58:18,24;59:3,11,13, 14;62:15;64:22;65:3; 78:5 <b>legal (1)</b> 5:17 <b>legally (2)</b> 79:1;80:5 <b>lengthy (1)</b> 4:5 <b>less (3)</b> 16:19;30:13;53:3 <b>level (5)</b> 55:17,18;72:24; 75:25;76:22 <b>license (7)</b> 49:12;50:4,7; 52:16;71:25;72:7,12 <b>light (3)</b> 58:22;67:4,5 <b>lights (12)</b> 9:24;13:7;39:9,11,	11;42:2,3;44:21; 48:16,19;60:16; 73:19 <b>likely (2)</b> 10:1;34:4 <b>Likewise (1)</b> 65:2 <b>Lily (1)</b> 3:21 <b>limited (1)</b> 72:7 <b>line (1)</b> 60:8 <b>liquor (1)</b> 48:23 <b>list (1)</b> 3:9 <b>listed (1)</b> 50:7 <b>little (6)</b> 7:14;11:4;12:4; 14:21,25;43:18 <b>live (1)</b> 32:23 <b>lived (1)</b> 32:19 <b>locate (2)</b> 24:13;41:2 <b>located (10)</b> 9:15;11:3,15; 20:11;27:9;38:13; 45:22;56:8;58:13; 64:10 <b>located/ (1)</b> 45:1 <b>location (3)</b> 20:5;26:16;32:20 <b>logical (1)</b> 71:5 <b>long (11)</b> 4:11,12;7:7,12,18; 16:16;43:16,22;51:4; 54:22,25 <b>longest (1)</b> 4:14 <b>look (9)</b> 3:25;12:8;28:8; 59:19;62:6,16;63:6; 71:9;74:16 <b>looked (5)</b> 14:12;15:4;19:9; 28:11;61:19 <b>looking (4)</b> 10:14;18:3;51:19; 58:15 <b>looks (1)</b> 11:14 <b>Lopes (2)</b> 44:19;49:4 <b>lot (3)</b> 30:6;39:21;79:20	<b>M</b> <b>ma'am (14)</b> 43:19;44:25;46:1, 14,23;47:4,25;48:7, 18;49:24;51:3,22,25; 53:20 <b>magnet (16)</b> 22:5,8,15;27:9,9; 62:4;65:18,19,22,23; 66:4,5,6;75:19,21; 81:2 <b>main (1)</b> 45:6 <b>mainly (3)</b> 8:4;21:15;27:8 <b>majority (1)</b> 34:3 <b>makes (2)</b> 28:13;75:17 <b>making (7)</b> 50:14;58:18;59:3; 68:8;69:14;79:19,23 <b>male (27)</b> 14:20;15:5,17; 16:3,5,9,16;17:5; 20:1;29:23;31:8; 34:7;35:7;37:14,24; 38:23;48:10;58:12; 59:5,13,16;60:5;75:5, 16;77:15,18,20 <b>males (1)</b> 36:6 <b>male's (1)</b> 35:5 <b>man (1)</b> 69:18 <b>man's (1)</b> 78:2 <b>many (4)</b> 8:12;18:5,10;40:11 <b>map (6)</b> 11:10,10,12;12:1, 13;46:15 <b>Maria (1)</b> 3:12 <b>marijuana (1)</b> 8:19 <b>marked (12)</b> 11:25;25:20,20,21, 21,21,21,22,22,22; 26:11;39:5 <b>markings (2)</b> 9:25;44:22 <b>marks (2)</b> 12:1;25:23 <b>Martin (1)</b> 73:6 <b>MASFERRER (43)</b> 3:18,19;4:16,18; 6:9,12;11:23;15:22; 19:18;21:1;25:14;
<b>J</b>	<b>K</b>			
	<b>K-9 (9)</b> 23:21,22,24;24:2, 5;62:22,22,23,25 <b>Kathleen (1)</b> 3:15 <b>K-car (2)</b> 49:5;60:18 <b>keep (1)</b> 5:3 <b>Kennedy (1)</b> 70:11 <b>kept (3)</b> 14:24;18:3;21:16 <b>kind (4)</b> 34:23;45:22;58:20; 80:22 <b>knew (3)</b> 14:22;53:22;77:5 <b>knowledge (3)</b> 21:2;36:4;52:25 <b>known (7)</b> 31:1,6,9;55:9; 69:25;70:2,14			
	<b>L</b>			
<b>Jarrod (5)</b>	<b>labored (1)</b> 50:19 <b>large (12)</b>			

27:20,22;28:25; 36:19;37:9,11;42:22; 52:3,5;53:11;64:5,7; 66:14;67:8,14,16,17, 19,24;68:3,6,10,13, 15;69:22,24;73:17; 76:13;81:24;82:3,5, 10 <b>Masferrer's (1)</b> 81:9 <b>material (2)</b> 23:6,9 <b>Mattapan (1)</b> 55:7 <b>matter (1)</b> 3:10 <b>May (8)</b> 3:6;11:7;24:24,25; 26:6;45:17;46:9,10 <b>maybe (6)</b> 47:22;51:5;59:1; 60:3;61:9;75:15 <b>McCarthy (1)</b> 9:5 <b>mean (13)</b> 5:19,25;30:21; 32:21;37:8;66:9; 73:8;78:12;79:17,21; 80:5,5,9 <b>means (2)</b> 30:18;45:10 <b>meet (3)</b> 30:13,18,24 <b>meeting (4)</b> 30:21;31:11;36:6; 77:15 <b>member (5)</b> 8:3,4,8;9:9;56:14 <b>members (7)</b> 8:5;10:8;45:8,18, 21;51:7;57:7 <b>memo (2)</b> 67:25;81:10 <b>memorandum (3)</b> 67:20;76:10,17 <b>memory (1)</b> 66:5 <b>men (9)</b> 30:17,21,24;31:11; 69:4,7,8,16;70:16 <b>mention (3)</b> 6:10;28:13;64:22 <b>messages (1)</b> 45:11 <b>met (1)</b> 21:7 <b>metal (7)</b> 23:7,9;27:13,16; 63:7,8,12 <b>methamphetamines (1)</b> 8:18 <b>Michael (1)</b> 44:13	<b>middle (2)</b> 61:21;62:4 <b>might (1)</b> 29:21 <b>minute (4)</b> 16:18,19;30:13; 51:5 <b>minutes (3)</b> 4:14;20:15;24:1 <b>mirror (1)</b> 60:4 <b>mirrors (1)</b> 18:3 <b>moment (1)</b> 64:2 <b>money (27)</b> 19:10;20:5,9,11; 24:21;26:14,16,19; 38:11;40:3,6,7,14; 61:18;62:5;64:10; 70:8,9;71:4,4;74:25; 75:1,2,3;76:7;80:25; 81:4 <b>Montrose (1)</b> 11:14 <b>more (8)</b> 21:21;53:2;55:13, 18,19;70:3;74:4;80:1 <b>morning (10)</b> 3:15,17,18,22,23, 24;6:22;27:23,24; 43:13 <b>Most (1)</b> 10:1 <b>motion (1)</b> 3:11 <b>motions (1)</b> 71:21 <b>motor (85)</b> 9:25;10:14,16; 13:3,11,13,21,22; 14:10,12,15,19,24; 15:1,4,7,8,9;16:6,7,9; 17:8,11,19,23,24; 19:5,6,9;20:21;21:7, 13,14,20,21,25;22:4, 14,17,18;23:2,4,6; 24:6,8,10,15,16;25:7; 26:20;28:20;29:5,12, 16,24;36:9,25;37:5; 38:6;39:19;42:16; 44:20;45:17;46:22, 24;47:6,23;48:3,5,8, 14;49:10,14;52:8,11; 66:23;71:11,12,15, 17,18;72:2,7;79:3,5 <b>move (4)</b> 21:1;34:21;47:9; 77:24 <b>moved (1)</b> 26:16 <b>movement (5)</b> 37:22;70:23;71:5;	73:19;75:2 <b>movements (4)</b> 16:14;37:21;73:1; 79:19 <b>movie (2)</b> 70:4,6 <b>moving (2)</b> 16:8;34:23 <b>much (11)</b> 33:25;40:6,8;43:2; 54:1;66:15;67:9; 73:3;74:25;75:1; 79:24 <b>multicolored (1)</b> 63:22 <b>myself (4)</b> 18:7,13;42:12;49:4	<b>nine (1)</b> 25:2 <b>nobody (3)</b> 71:6;72:9,9 <b>nor (2)</b> 17:15;70:14 <b>normal (2)</b> 9:24,25 <b>notified (2)</b> 13:17,18 <b>notify (1)</b> 45:23 <b>number (2)</b> 3:8;40:13 <b>numerous (5)</b> 10:24;22:21;36:11; 55:21;57:18	<b>occupant (2)</b> 14:18;48:11 <b>occupants (1)</b> 47:14 <b>occupied (1)</b> 59:5 <b>occupying (1)</b> 58:12 <b>occur (3)</b> 32:6;72:4;73:18 <b>occurred (8)</b> 19:21;30:19;31:2; 36:12;71:19;72:4; 78:19;80:14 <b>occurring (1)</b> 30:1 <b>occurs (3)</b> 30:15,15;73:21 <b>o'clock (2)</b> 74:1;81:23 <b>off (9)</b> 17:7,19;21:13; 29:11;39:12,20; 47:12;48:3;70:3 <b>office (1)</b> 68:11 <b>OFFICER (150)</b> 3:4;4:8,9,13;6:8, 25;7:2,4,7;9:6,14,18; 10:4,13;12:3,21,25; 13:17,18;14:1;15:1; 17:12,15,24;18:3,7,9, 11,12,12,14,14,19,24; 20:23;22:1;23:17,19; 24:5,6,9,11,19,20; 25:2,25;26:11;27:10, 15,23,25;28:3,15; 36:22;37:8,13;41:7, 10,12;42:12,12,13, 15,24;43:2,6,15,16; 44:13,16,19;45:13; 50:10;51:7;52:6,8, 22;53:2,16;54:1,5,13; 56:17,18;57:4,11,17, 23;58:16;59:21,22; 61:3,5,5,11,13,17,25; 62:9,11,15;63:2,17; 64:8,10,17;65:6,10, 10,13;66:20;67:9; 69:4,6,14,17;70:19; 71:13,13,16,16; 72:22,23,25;73:2,2, 14,22;74:4,8,18;75:8, 19,23;76:3;77:4,12, 15,21,22;78:2,3,8,21, 24;79:5,14,22;80:15 <b>officers (25)</b> 13:25;18:5,16; 21:16;28:21;38:16; 39:16;41:14;42:6,9; 49:3,6;57:3;68:17; 73:25;74:2,4,15,21; 75:3;77:1;78:25;
		<b>N</b>	<b>O</b>	
		<b>name (10)</b> 3:14;7:1,2;43:11, 13;50:6,6;54:12,13; 72:14 <b>narcotics (22)</b> 8:10,13,15,22;9:2; 12:11,15;21:22; 24:14;36:24;55:12, 22,25;56:5;57:21,22; 58:2;63:1,4;64:10; 69:1;76:9 <b>nature (2)</b> 70:25;71:1 <b>necessarily (1)</b> 5:7 <b>necessary (1)</b> 72:8 <b>need (7)</b> 45:17,23;74:6; 75:9;77:1;80:10; 81:13 <b>needed (1)</b> 76:23 <b>Neighborhood (5)</b> 9:4;30:2,5;69:7; 70:13 <b>neither (3)</b> 17:15;30:25;71:14 <b>nervous (6)</b> 21:6,12;50:13; 73:10;74:11;79:23 <b>nervousness (3)</b> 73:11;80:15,20 <b>New (2)</b> 56:8;74:20 <b>next (10)</b> 11:20;12:6;25:11; 43:5;67:25;68:4; 72:17;81:10,14,18 <b>Nicholas (4)</b> 4:9;43:6,7,13 <b>night (1)</b> 73:25	<b>object (3)</b> 21:1;35:4,7 <b>objecting (2)</b> 5:5;6:1 <b>objection (8)</b> 11:22,23;15:22; 19:18;25:13,14; 28:23;36:15 <b>objective (1)</b> 80:7 <b>objects (1)</b> 35:13 <b>observation (2)</b> 40:12;81:4 <b>observations (22)</b> 13:2,11;17:4,25; 19:20,23,24;20:7,9, 10,16;47:2,13;50:12, 17;51:15;53:19,20, 22;58:14,19;69:1 <b>observe (27)</b> 13:8;15:3,14,16; 16:20,23;17:22;19:8; 20:19;21:24;24:2; 27:2;47:23;48:8; 50:19;52:11;58:8,21, 25;59:3,25;61:1; 66:23,25;67:2;77:22; 79:5 <b>observed (24)</b> 13:5,6;15:5;16:21; 17:13;20:14;24:5,6; 26:24;47:11;48:3,10; 58:10;59:3;61:18,20; 62:3,4,7;65:16;66:3; 76:25;77:10;79:5 <b>observes (1)</b> 77:14 <b>observing (2)</b> 13:24;22:8 <b>Obviously (5)</b> 5:3;22:24;55:4,16; 79:19	



79:4,12;80:6 <b>Oftentimes (1)</b> 56:21 <b>older (2)</b> 14:21;70:2 <b>Onaxis (1)</b> 3:9 <b>once (7)</b> 40:2;48:20;51:10; 75:6,19,23;80:24 <b>one (32)</b> 4:21;13:14;19:14; 29:18;30:11;31:13; 32:1;37:23;42:2,12, 22;48:10;56:2,2; 58:12;59:5,13;60:6; 64:2;66:9,11;67:21; 68:10,13;70:19; 71:14;73:22;74:3,3, 5;76:3;81:13 <b>ones (1)</b> 32:2 <b>one-week (1)</b> 56:9 <b>only (12)</b> 6:14;18:23;26:9; 37:22;38:4;50:24; 69:15,16;73:9,22; 78:15;81:1 <b>onset (1)</b> 41:15 <b>onto (9)</b> 13:10,19,20;21:14; 47:6;59:8;60:11; 61:19;67:3 <b>open (5)</b> 22:15;24:19;63:12; 65:24;66:1 <b>opened (3)</b> 19:5;22:5;63:13 <b>opening (1)</b> 24:13 <b>operating (1)</b> 9:23 <b>operator (24)</b> 13:15;14:13;15:7, 9;16:4,7,17;17:24,25; 18:19,24;19:1,4;20:2, 16;21:5;25:25;26:7; 29:24;49:1,14;50:11; 51:8;63:17 <b>operator's (2)</b> 16:11;34:23 <b>opinion (4)</b> 15:22;29:9,20; 51:18 <b>opposed (1)</b> 68:8 <b>opposite (2)</b> 16:10;20:3 <b>order (13)</b> 3:1;5:11;41:17; 71:5;73:12,16;74:5,7,	8,22;76:5;79:9,13 <b>ordered (3)</b> 39:25;40:2;41:4 <b>orders (1)</b> 74:8 <b>ordinarily (1)</b> 50:21 <b>ordinary (1)</b> 62:19 <b>others (2)</b> 4:14;22:25 <b>otherwise (1)</b> 55:9 <b>out (39)</b> 6:13;19:5,6,9; 20:17,20;21:14;22:2; 28:17;39:25;40:2,14; 41:4;51:8,10;56:8; 58:25;60:8,11,12,14; 61:9;62:17,18;63:20; 64:22;65:3,5;66:3; 69:18,25;70:22,24; 74:12;75:16;76:5,21; 78:22;80:24 <b>outbound (1)</b> 46:8 <b>outline (2)</b> 76:18;79:8 <b>outlined (1)</b> 80:12 <b>outnumbered (1)</b> 74:2 <b>outside (10)</b> 34:20;35:1,5,8; 38:17,20;66:6,11; 69:13;75:22 <b>over (45)</b> 7:14;8:14;13:22; 14:2,5,7,25;15:2,4; 18:4;20:1;21:16; 30:11;32:3,19;38:5; 39:5,14;40:7;43:18; 47:11,17,18,21; 50:16;59:1,12,14,22, 24;60:1,2,9,24;61:2, 8,17;71:11,11,17,17, 20,24;73:21,21 <b>Overruled (3)</b> 19:19;21:3;28:24 <b>own (5)</b> 5:17;56:19,20,21; 72:14	<b>parked (6)</b> 11:4;15:2,4;17:19; 58:13;77:17 <b>parking (1)</b> 39:21 <b>part (12)</b> 4:6;8:9,16;18:21, 23;27:15,16;43:24; 45:17;46:3;55:20; 65:3 <b>participated (2)</b> 10:23;12:10 <b>particular (4)</b> 11:2;12:17;31:16; 69:2 <b>parties (3)</b> 3:14;20:3,12 <b>partner (4)</b> 28:3;41:12;44:10, 13 <b>party (1)</b> 70:14 <b>passed (3)</b> 47:17;48:11;59:12 <b>passenger (14)</b> 14:14;23:3,5;24:8; 26:25;37:25;38:12, 14;61:22;62:17;63:3; 64:11,14;73:24 <b>passenger's (4)</b> 22:1,3;23:6,15 <b>past (7)</b> 11:1;12:9;14:10, 12,24;57:17;77:17 <b>Pat (9)</b> 9:5;40:20,22,23; 41:1;53:6;74:18,22; 75:6 <b>patrol (1)</b> 7:21 <b>peeled (1)</b> 63:6 <b>peer (1)</b> 21:16 <b>people (5)</b> 33:1,16;34:3; 35:15;69:10 <b>perform (1)</b> 17:13 <b>performed (1)</b> 36:10 <b>perhaps (2)</b> 71:3,4 <b>period (3)</b> 30:18;70:17;72:8 <b>permission (1)</b> 3:20 <b>Perrin (1)</b> 32:5 <b>person (10)</b> 13:14;15:13;26:9; 33:19;34:14,20,24; 35:1;50:20;71:19	<b>personal (1)</b> 21:2 <b>personally (1)</b> 52:12 <b>perspective (3)</b> 40:16;78:7,10 <b>perspectives (1)</b> 78:11 <b>p-h (2)</b> 54:15,16 <b>phone (2)</b> 45:11,11 <b>phonetic (3)</b> 70:4,5,8 <b>photograph (4)</b> 26:13,17;27:6; 74:25 <b>photographs (6)</b> 25:2,3,5,14,23; 75:20 <b>picture (3)</b> 26:14,24;27:16 <b>pictures (1)</b> 25:7 <b>pills (2)</b> 8:19;56:1 <b>place (3)</b> 14:11;21:22;71:4 <b>plaid (4)</b> 26:5,8,9;49:19 <b>plain (10)</b> 10:1;18:9,12,15; 41:15,18,20;44:9; 49:5;56:24 <b>planning (1)</b> 4:2 <b>plastic (2)</b> 56:2,3 <b>plate (4)</b> 25:6;58:6;59:6,7 <b>play (1)</b> 6:13 <b>Please (6)</b> 3:5,7,14;6:25; 43:11;54:11 <b>plus (2)</b> 73:9,9 <b>pm (8)</b> 9:15;11:2;45:1; 57:10;81:17,19;82:9, 14 <b>pocket (5)</b> 19:11;26:15;70:21, 22,25 <b>point (36)</b> 4:16,21;13:17; 14:10,20,24;17:8,11, 16,19;18:5;19:2,4; 20:12,21;21:20; 23:19,20;37:23; 38:19;40:8;45:13; 51:14;58:7,8;61:8; 62:22;63:9,12,20;	65:17;67:25;74:6,18; 75:10;79:12 <b>pointed (1)</b> 66:3 <b>police (41)</b> 4:23;5:1,6,17;7:2, 4,7,10;8:25;9:23; 10:9;27:25;28:5,13, 20,22;29:3,5,7,10,13, 15,16,19;43:15,16; 44:22;45:12;54:20, 22;55:5;56:9;57:3,8; 64:17,22;70:1,2,18; 73:18;79:12 <b>policies (1)</b> 56:12 <b>policing (1)</b> 33:8 <b>poorly (1)</b> 20:7 <b>population (2)</b> 30:8,10 <b>position (1)</b> 75:21 <b>positioned (1)</b> 12:5 <b>positive (1)</b> 24:7 <b>possibility (1)</b> 62:20 <b>possible (6)</b> 22:17;23:20;29:25; 36:12;46:21;62:25 <b>possibly (6)</b> 8:20;19:21;20:13; 30:16,23;46:25 <b>powder (1)</b> 56:1 <b>practice (1)</b> 56:18 <b>prepare (1)</b> 27:25 <b>prepared (3)</b> 28:3,16;64:17 <b>presence (2)</b> 62:25;63:4 <b>Present (7)</b> 3:2,13;4:2,17;41:5, 7;65:9 <b>presenting (3)</b> 4:4,7,22 <b>pressed (1)</b> 62:17 <b>presume (1)</b> 31:1 <b>pretty (1)</b> 68:16 <b>prevalent (1)</b> 77:12 <b>previously (3)</b> 20:24;21:7;22:19 <b>prior (13)</b> 4:22;7:15,21;20:7,
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9,10;28:5,7;32:9; 53:5;55:2,4;60:23 <b>probable (7)</b> 29:14;75:9,18; 76:8;80:25;81:5,6 <b>probably (9)</b> 4:13,15;10:2; 25:17;28:7;32:11; 42:3;57:6;60:9 <b>probative (1)</b> 80:18 <b>problem (1)</b> 70:13 <b>procedures (1)</b> 56:12 <b>proceed (3)</b> 3:6;4:20;6:6 <b>proceeded (2)</b> 45:21;58:23 <b>process (1)</b> 72:5 <b>producing (1)</b> 29:14 <b>prompted (1)</b> 28:18 <b>proportional (1)</b> 76:23 <b>provide (6)</b> 5:16;50:5;67:21; 68:10;72:12;76:10 <b>provided (5)</b> 50:6;67:20;72:14; 77:8;81:4 <b>provides (1)</b> 5:15 <b>providing (1)</b> 5:14 <b>public (1)</b> 39:20 <b>pull (7)</b> 14:5;16:21;47:11; 48:3;60:24;71:16,17 <b>pulled (37)</b> 13:22;14:2,7,25; 15:2,4;16:9,25;17:7; 32:3,19;39:5,14,20; 47:17,18,21;50:16; 58:25;59:1,11,12,22, 23,24;60:1,2,8,9,11, 12,14;61:2;71:11,11, 20;78:22 <b>pull-in (1)</b> 17:1 <b>pulling (2)</b> 16:24;20:1 <b>pulls (1)</b> 73:21 <b>purpose (1)</b> 51:23 <b>purposes (2)</b> 6:16;21:4 <b>put (2)</b> 12:4;70:21	<b>Q</b> <b>questionable (1)</b> 72:3 <b>quick (3)</b> 20:2,3,12 <b>quickly (2)</b> 16:9;74:2 <b>quite (2)</b> 71:22;76:25 <b>R</b> <b>racist (2)</b> 69:6;76:24 <b>radio (5)</b> 10:7,9;45:12;57:6, 8 <b>raise (2)</b> 74:6,13 <b>random (2)</b> 28:20;29:5 <b>reach (5)</b> 34:8;35:1;70:24; 71:3;72:24 <b>reached (2)</b> 17:1;77:25 <b>reaches (2)</b> 73:19,21 <b>reaching (3)</b> 14:13;38:3;79:19 <b>react (1)</b> 50:21 <b>read (2)</b> 29:1,2 <b>reads (1)</b> 29:5 <b>reality (1)</b> 68:16 <b>really (6)</b> 29:10;59:18;68:22; 71:7;74:13;80:20 <b>rear (1)</b> 20:21 <b>reason (2)</b> 69:8;76:6 <b>reasonable (5)</b> 76:1;79:9,14,16; 80:22 <b>reasons (1)</b> 29:18 <b>recall (3)</b> 16:18;28:10;80:2 <b>recalls (1)</b> 74:18 <b>received (13)</b> 4:23;5:2;8:21,25; 9:1,3,4;12:21;36:22; 37:3,8;56:4;58:1 <b>receiving (2)</b> 62:9,11 <b>recently (1)</b>	12:9 <b>recognize (4)</b> 11:10,12;25:3,5 <b>record (8)</b> 3:8,12,14;25:18; 26:6;49:20;63:24; 64:1 <b>recovered (5)</b> 12:10,14,18;24:21; 27:11 <b>recovery (1)</b> 22:13 <b>Recross (1)</b> 53:24 <b>rectangle (1)</b> 12:4 <b>rectangular (1)</b> 27:9 <b>Red (2)</b> 49:19;63:22 <b>redirect (5)</b> 42:25;53:12,14; 66:16,18 <b>refer (1)</b> 25:18 <b>reflect (4)</b> 26:6;49:20;63:24; 64:1 <b>regarding (4)</b> 4:24;5:5;47:23; 59:4 <b>regards (1)</b> 24:4 <b>registration (7)</b> 49:12;50:4;52:16; 71:25;72:8,13,14 <b>regular (3)</b> 32:23;44:13;60:8 <b>relayed (1)</b> 53:20 <b>relevant (1)</b> 5:7 <b>rely (2)</b> 5:9;72:2 <b>relying (1)</b> 5:22 <b>remained (1)</b> 5:3 <b>remember (3)</b> 18:21;34:22;40:21 <b>removed (3)</b> 23:6,15,16 <b>repeatedly (1)</b> 73:11 <b>rephrase (2)</b> 15:24;20:8 <b>replied (1)</b> 50:8 <b>reply (1)</b> 21:8 <b>report (14)</b> 27:25;28:5,13,16, 17,22;29:5,7,10,13,	15,19;64:17,22 <b>reports (2)</b> 28:20;29:3 <b>request (1)</b> 39:2 <b>requested (6)</b> 17:12;38:24;47:10; 49:12;60:15;62:22 <b>residence (1)</b> 32:18 <b>residential (3)</b> 31:22,23,24 <b>residents (1)</b> 32:23 <b>respect (2)</b> 53:17;69:6 <b>respond (1)</b> 50:9 <b>response (1)</b> 72:17 <b>responses (1)</b> 72:12 <b>responsibilities (3)</b> 8:3;55:14,16 <b>restate (1)</b> 5:8 <b>restatement (1)</b> 5:19 <b>resulted (1)</b> 29:6 <b>reviewed (1)</b> 28:5 <b>Right (47)</b> 6:14;13:20,22; 14:6,25;17:2;18:4,8, 8;25:19;27:19;28:15; 30:6,17;32:18;33:14; 34:12,14;37:1;39:18; 40:21;46:19;48:12, 20;52:2,24;58:18,20, 23;59:1,8,14;63:3; 65:20;66:8;68:8; 70:4;71:24;72:6; 73:15;76:12;77:14; 78:4,23;80:1,8;81:13 <b>rising (1)</b> 18:1 <b>routine (1)</b> 49:12 <b>Roxbury (2)</b> 7:25;45:2 <b>run (1)</b> 11:14 <b>running (1)</b> 61:21 <b>S</b> <b>Safe (1)</b> 9:3 <b>safely (1)</b> 48:4 <b>safety (7)</b>	74:7,9;79:9,14; 80:3,7,23 <b>same (4)</b> 13:18;17:8;23:13; 36:21 <b>Samora (1)</b> 44:19 <b>Santalese (3)</b> 70:3,4,8 <b>satisfy (2)</b> 5:24;6:15 <b>saw (29)</b> 13:19;14:13;15:23; 16:5;22:5;26:19; 31:5;34:7,20,22; 35:12,15;37:22; 39:16;60:5;62:3; 63:7;65:16;66:1,3,9, 10;69:18;71:6;73:14; 77:3;78:13;81:1,3 <b>saying (5)</b> 5:23;6:3;69:11; 70:16;74:19 <b>scale (1)</b> 55:19 <b>Scannell (3)</b> 24:5,7;63:2 <b>scene (2)</b> 23:21,22 <b>school (2)</b> 56:8,9 <b>scope (2)</b> 72:6,10 <b>search (23)</b> 5:11;6:19;10:24; 12:10,14,17;21:22; 24:6;31:24;32:12,20; 40:23;41:1;42:13; 53:9;65:13,14;68:25; 75:10,18;76:9,22; 81:5 <b>searched (1)</b> 38:7 <b>searching (2)</b> 75:8,9 <b>seat (19)</b> 15:11;23:3,5,5,8, 15;24:8,12,14;27:1, 14;38:14;62:17;63:4, 6;64:11,14,15,16 <b>seated (2)</b> 3:5,20 <b>seats (2)</b> 23:4,10 <b>second (5)</b> 4:9;32:4;42:22; 69:18;78:2 <b>seconds (1)</b> 60:9 <b>section (1)</b> 55:7 <b>seeing (6)</b> 29:11;60:23;69:1;
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75:1,2;76:7 <b>seeking (1)</b> 4:25 <b>seemed (3)</b> 50:13,14;69:19 <b>seems (1)</b> 26:8 <b>sees (4)</b> 72:25;73:22;74:11; 75:23 <b>seized (3)</b> 8:16;55:21,25 <b>send (1)</b> 56:8 <b>sense (2)</b> 4:1;75:20 <b>sensor (1)</b> 22:15 <b>Separately (2)</b> 25:16,17 <b>separation (2)</b> 20:3,12 <b>session (2)</b> 3:5;82:8 <b>set (3)</b> 13:7;67:22;68:1 <b>Several (2)</b> 45:10;47:22 <b>shake (2)</b> 30:12,24 <b>shape (1)</b> 68:24 <b>share (1)</b> 67:23 <b>sharp (2)</b> 13:9;58:24 <b>sharpie (1)</b> 12:4 <b>shirt (6)</b> 18:1;26:5,8,9; 49:19;63:22 <b>short (1)</b> 30:18 <b>shorts (2)</b> 10:2;56:24 <b>shoulder (3)</b> 18:4;38:4;70:23 <b>shoulders (6)</b> 16:8;34:20,22,23; 77:24;78:16 <b>show (1)</b> 80:18 <b>showing (7)</b> 11:10;25:2;26:11, 22;27:5;46:12;80:21 <b>shows (1)</b> 79:18 <b>side (41)</b> 13:23;14:8,14,25; 15:2,6;17:5,23; 18:10;19:10;21:21, 25;22:1,3;23:6,15,16; 26:15;27:2;31:21;	40:3,6;46:8;47:24; 49:10;51:2;59:15; 60:4;61:6,18,19,22; 62:1,5,6,16,17;66:2, 2;71:3;78:4 <b>sidewalk (4)</b> 21:15;40:22;51:11, 16 <b>signal (4)</b> 13:13;17:3;67:1; 79:3 <b>signaling (1)</b> 58:24 <b>significant (4)</b> 30:8,9;36:24;37:5 <b>silent (2)</b> 70:4,6 <b>similar (2)</b> 22:22;36:10 <b>simple (1)</b> 49:13 <b>single (3)</b> 14:18;33:19;75:25 <b>sirens (10)</b> 9:25;39:9,11,11; 42:3,3;44:22;48:17, 19;60:16 <b>sitting (2)</b> 15:11;26:5 <b>situated (1)</b> 15:10 <b>situation (4)</b> 35:21,23;50:21; 70:1 <b>six (6)</b> 32:9;41:14;42:6,9; 55:7;74:5 <b>six-month (1)</b> 55:6 <b>slightly (1)</b> 58:20 <b>slowly (1)</b> 68:9 <b>small (1)</b> 56:2 <b>sneakers (1)</b> 56:24 <b>soft (5)</b> 9:24;23:5,8;39:19; 62:19 <b>somebody (4)</b> 39:2;70:6,12;73:8 <b>somehow (1)</b> 76:24 <b>someone (2)</b> 42:11;78:20 <b>sometimes (2)</b> 55:18;56:20 <b>somewhere (1)</b> 49:6 <b>soon (4)</b> 14:5;19:9;23:24; 81:10	<b>sooner (1)</b> 68:1 <b>sorry (9)</b> 6:9;12:9;18:12; 25:17;32:10;46:2; 54:17;70:8;80:4 <b>sort (13)</b> 5:5,16;6:13;8:15; 28:17;40:13;45:17; 64:15;65:3;70:2; 72:21;73:5;74:17 <b>source (9)</b> 4:24,25;5:4,6,10; 6:16;58:1;64:24,25 <b>Spanish (1)</b> 3:12 <b>speak (13)</b> 18:25;20:23,25; 21:8;35:25;36:2; 50:11;51:14;72:21; 74:12,20;75:7;80:17 <b>speaking (6)</b> 17:24;18:2;20:24; 42:17,19;51:1 <b>speaks (1)</b> 72:19 <b>specific (11)</b> 8:21;10:14,22; 16:18;36:9;37:3; 44:4;55:17;56:4; 58:9;80:1 <b>specifically (18)</b> 9:12;11:3;15:15; 16:23;19:23;22:12; 23:1;24:3;31:7;32:1; 33:18;35:6;40:10; 56:16;57:10,23;58:1; 70:18 <b>specified (2)</b> 75:12;77:12 <b>spelled (2)</b> 7:3;54:13 <b>spelling (3)</b> 7:1;43:11;54:11 <b>Spinelli (1)</b> 5:1 <b>stalling (1)</b> 71:24 <b>stand (1)</b> 6:10 <b>standard (1)</b> 80:7 <b>standby (1)</b> 45:22 <b>standing (2)</b> 27:3;40:5 <b>start (5)</b> 31:2;33:21;42:13; 71:21;74:22 <b>started (5)</b> 16:10;17:6,20; 65:14;80:16 <b>starts (2)</b>	38:23;75:8 <b>state (3)</b> 3:14;56:9;77:9 <b>stated (2)</b> 61:17;73:5 <b>statement (2)</b> 6:13,14 <b>States (1)</b> 68:20 <b>station (22)</b> 10:17;12:22;13:6, 24;16:21;17:20; 23:10;24:17;25:6; 27:1,7;36:23;37:4; 45:3,4;47:1,2;58:2,8, 10;63:10;77:7 <b>stayed (1)</b> 51:11 <b>step (6)</b> 19:4,6;21:14;51:8; 61:9;74:12 <b>Stephen (6)</b> 4:10;9:14,18;54:6, 13,15 <b>stepped (3)</b> 19:9;20:17,20 <b>steroids (1)</b> 8:19 <b>sticking (2)</b> 40:14;62:17 <b>still (7)</b> 15:11;41:18,20; 42:6;60:4;79:11,13 <b>stop (38)</b> 4:6;5:11;6:19; 14:11;17:13,16; 18:17;28:21;29:6; 32:9;37:14;38:24; 39:2,5;41:15;46:22, 25;47:10,12;48:4,14; 51:23;53:18;58:22; 60:15,16,17;61:2; 71:23;72:3,6,6; 75:24;76:20;78:20, 25;79:6,7 <b>stopped (17)</b> 13:23;14:7;25:9; 36:10;38:15;45:17, 23;47:24;48:22;50:6; 58:22;73:14;76:2,4; 78:3,4,23 <b>stopping (2)</b> 21:18;71:22 <b>store (1)</b> 48:23 <b>straight (1)</b> 68:7 <b>straightforward (1)</b> 68:16 <b>street (87)</b> 8:5;9:5,16,17; 10:23;11:4,5,13;12:1, 19,19,20,20,20;13:7,	10,20,20,21,23;14:8; 15:1,2;16:22;17:7, 14;21:14;30:3,17; 31:14,17,20;32:4,14, 18,23;33:1,4,7,9,11, 17,19,22;34:4;36:7; 37:5,24;45:5,5,5,25; 46:3,4,5,6,13,17; 47:7,16,18;48:3,6,11, 15,21,24;55:17; 57:12,13,24;58:11, 12,15,24;59:1,8,21, 24;60:12;67:3;69:2, 13;70:16;73:14;78:4, 22 <b>street-level (2)</b> 8:6;56:10 <b>Streets (10)</b> 10:12,24;11:13,18; 12:17;36:24;45:4,6; 46:18;58:17 <b>Strike (7)</b> 7:17,19;8:7,8;21:2; 49:25;55:8 <b>striped (1)</b> 63:22 <b>structure (1)</b> 23:9 <b>stuff (1)</b> 5:15 <b>submission (2)</b> 28:5,7 <b>submit (2)</b> 72:10;76:1 <b>submitted (1)</b> 76:17 <b>suffice (1)</b> 73:11 <b>sufficient (1)</b> 74:13 <b>suggested (1)</b> 80:3 <b>sum (3)</b> 19:10;20:11;26:14 <b>summary (1)</b> 29:13 <b>sunglasses (1)</b> 49:19 <b>super (1)</b> 4:5 <b>suppor (1)</b> 6:18 <b>support (1)</b> 75:12 <b>supports (1)</b> 80:22 <b>suppress (1)</b> 3:11 <b>Supreme (1)</b> 73:5 <b>sure (9)</b> 4:19;32:25;33:18; 35:22;52:15;53:2;
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65:7;67:24;82:1 <b>surrounding (1)</b> 10:24 <b>suspicion (3)</b> 79:9,16;80:23 <b>suspicious (1)</b> 71:9 <b>Sustained (1)</b> 15:25 <b>switch (1)</b> 35:14 <b>sworn (4)</b> 3:13;6:21;43:7; 54:6 <b>system (1)</b> 68:9	5:2,21;6:1,2,2,18; 28:13,17;29:21;37:1; 64:23;68:22,23,24; 69:12,15,15;71:8; 73:3,7;75:12;77:6 <b>Tobacco (1)</b> 9:3 <b>today (5)</b> 4:3;26:1;49:15; 67:20,23 <b>today's (1)</b> 3:8 <b>together (2)</b> 56:19,20 <b>told (7)</b> 39:22;41:7;62:3; 65:14;66:6;71:23; 78:15 <b>took (6)</b> 48:11;59:8;62:16; 63:6;65:5;70:22 <b>top (4)</b> 27:15,16;40:13; 63:8 <b>total (1)</b> 41:14 <b>totality (1)</b> 62:21 <b>touch (2)</b> 30:25;35:10 <b>touched (1)</b> 27:14 <b>touching (2)</b> 23:4;69:9 <b>toward (6)</b> 22:3;34:24;37:25; 42:17;71:3;75:2 <b>towards (12)</b> 13:10;14:14;16:22; 17:9;38:6;42:15; 46:7;58:11;60:6; 70:25;77:24;78:10 <b>traditional (1)</b> 44:22 <b>traffic (12)</b> 10:1;17:1,13,16; 18:17;21:15;60:8,9, 11,17;61:2;76:2 <b>training (13)</b> 8:21,25;9:1,3,4; 19:16;22:12;29:25; 56:4;77:3,4;78:19; 80:13 <b>transaction (16)</b> 19:21,25;20:7; 30:1,19,22;31:2; 36:12;37:2;69:5,10, 12,13;73:7;75:14; 80:14 <b>transactions (3)</b> 8:6;36:11;56:11 <b>transferred (2)</b> 55:8,10	<b>travel (1)</b> 16:22 <b>traveling (2)</b> 13:6;58:10 <b>treats (1)</b> 5:24 <b>trial (4)</b> 81:12,16,20;82:7 <b>triangle (1)</b> 45:3 <b>tried (2)</b> 20:21;21:5 <b>trigger (1)</b> 22:15 <b>trying (4)</b> 21:15,16;38:20; 39:23 <b>t-shirt (2)</b> 10:2;56:24 <b>Tuesday (6)</b> 81:16,22,23,25; 82:2,5 <b>turn (11)</b> 13:9,9,13,14;14:7; 16:10;17:3;31:20; 34:23;48:19;59:2 <b>turned (11)</b> 13:19,20,22;14:5; 15:12;17:2,6;47:6; 77:17;78:22;79:2 <b>turning (1)</b> 48:16 <b>two (28)</b> 7:14;20:12,14,15; 23:4;30:17,21,24; 31:11;32:2,12;35:15; 36:6;49:6,7;52:18; 66:12;68:10;69:4,8, 10,16;70:2,15;74:3; 77:22,23;81:23 <b>type (8)</b> 9:21;10:16;33:8; 44:20;46:24;55:24; 56:23;59:20 <b>types (3)</b> 8:19;55:22;72:20	7:11,13,15;8:3,4; 9:10,12;32:12,12; 43:21,22,24;44:8,9; 45:19,22;47:19;51:7; 53:18;54:21,25;55:3, 4,9,10,15;56:14; 71:23 <b>United (1)</b> 68:19 <b>units (1)</b> 68:18 <b>unknown (4)</b> 31:11;36:4,5;75:4 <b>Unless (1)</b> 82:5 <b>unmarked (3)</b> 39:8,9;44:21 <b>unusual (1)</b> 38:17 <b>up (11)</b> 21:15;22:5;59:1, 24;63:12,13;69:19; 77:2,15;78:13,14 <b>upon (5)</b> 5:9;21:25;28:21; 52:25;70:20 <b>upper (4)</b> 16:8,12,14;77:24 <b>upright (1)</b> 15:12 <b>upward (1)</b> 34:21 <b>use (2)</b> 16:25;71:4 <b>used (4)</b> 6:14;13:13;22:15; 73:3 <b>using (3)</b> 6:18;12:3;17:3 <b>Usually (2)</b> 33:7;62:19	29:5,12,16,24;36:9; 25;37:6;38:6;39:19; 42:16;44:20;45:17; 46:22,24;47:5,6,11, 12,17,23;48:3,5,9,11, 14,20;49:1,10,14; 51:8,10;52:8,11; 58:25;60:6,14,15,16; 61:2,4,9,20;62:6,16, 21;66:23;69:19; 71:12,12,15,17,19; 72:2,7;79:3,6 <b>vehicles (6)</b> 22:14,20;56:11,20, 21;60:17 <b>via (4)</b> 45:11;56:9;57:6,8 <b>vicinity (1)</b> 49:7 <b>Victor-Alpha-6 (1)</b> 25:7 <b>Victoria (1)</b> 44:21 <b>view (1)</b> 60:4 <b>violation (6)</b> 71:12,13,15,19; 76:2;79:3 <b>Violence (4)</b> 7:17,19;8:8;55:8 <b>Volvo (34)</b> 10:17;12:22;13:6, 24;14:2;16:21,24; 17:9,14,20;18:6; 23:10;24:4;25:6; 26:1;27:1,7;29:22; 36:23;37:3;47:1,2, 20;53:17;58:2,8,10, 21;59:4;60:8,23; 69:2;73:14;77:7
<b>T</b>				<b>W</b>
<b>table (1)</b> 3:20 <b>talk (1)</b> 30:2 <b>talking (5)</b> 15:7;29:11;30:3; 42:14;50:18 <b>techniques (1)</b> 36:10 <b>telling (1)</b> 18:24 <b>tells (2)</b> 36:7;70:6 <b>terms (1)</b> 53:17 <b>testified (3)</b> 52:16;64:20;65:2 <b>testify (2)</b> 80:6,10 <b>testimony (13)</b> 4:19,22;65:3; 69:18,24;70:20; 72:13;73:13;78:7,24; 79:12,12;81:1 <b>Thanksgiving (1)</b> 82:6 <b>That'll (2)</b> 82:7,8 <b>theory (1)</b> 78:1 <b>therefore (1)</b> 71:19 <b>though (3)</b> 4:5;68:2;79:8 <b>thought (1)</b> 75:14 <b>three (7)</b> 4:5,7;7:20;18:11; 45:6;55:1;74:3 <b>throughout (1)</b> 55:17 <b>thrown (1)</b> 73:18 <b>tip (22)</b>	<b>took (6)</b> 48:11;59:8;62:16; 63:6;65:5;70:22 <b>top (4)</b> 27:15,16;40:13; 63:8 <b>total (1)</b> 41:14 <b>totality (1)</b> 62:21 <b>touch (2)</b> 30:25;35:10 <b>touched (1)</b> 27:14 <b>touching (2)</b> 23:4;69:9 <b>toward (6)</b> 22:3;34:24;37:25; 42:17;71:3;75:2 <b>towards (12)</b> 13:10;14:14;16:22; 17:9;38:6;42:15; 46:7;58:11;60:6; 70:25;77:24;78:10 <b>traditional (1)</b> 44:22 <b>traffic (12)</b> 10:1;17:1,13,16; 18:17;21:15;60:8,9, 11,17;61:2;76:2 <b>training (13)</b> 8:21,25;9:1,3,4; 19:16;22:12;29:25; 56:4;77:3,4;78:19; 80:13 <b>transaction (16)</b> 19:21,25;20:7; 30:1,19,22;31:2; 36:12;37:2;69:5,10, 12,13;73:7;75:14; 80:14 <b>transactions (3)</b> 8:6;36:11;56:11 <b>transferred (2)</b> 55:8,10	<b>travel (1)</b> 16:22 <b>traveling (2)</b> 13:6;58:10 <b>treats (1)</b> 5:24 <b>trial (4)</b> 81:12,16,20;82:7 <b>triangle (1)</b> 45:3 <b>tried (2)</b> 20:21;21:5 <b>trigger (1)</b> 22:15 <b>trying (4)</b> 21:15,16;38:20; 39:23 <b>t-shirt (2)</b> 10:2;56:24 <b>Tuesday (6)</b> 81:16,22,23,25; 82:2,5 <b>turn (11)</b> 13:9,9,13,14;14:7; 16:10;17:3;31:20; 34:23;48:19;59:2 <b>turned (11)</b> 13:19,20,22;14:5; 15:12;17:2,6;47:6; 77:17;78:22;79:2 <b>turning (1)</b> 48:16 <b>two (28)</b> 7:14;20:12,14,15; 23:4;30:17,21,24; 31:11;32:2,12;35:15; 36:6;49:6,7;52:18; 66:12;68:10;69:4,8, 10,16;70:2,15;74:3; 77:22,23;81:23 <b>type (8)</b> 9:21;10:16;33:8; 44:20;46:24;55:24; 56:23;59:20 <b>types (3)</b> 8:19;55:22;72:20	7:11,13,15;8:3,4; 9:10,12;32:12,12; 43:21,22,24;44:8,9; 45:19,22;47:19;51:7; 53:18;54:21,25;55:3, 4,9,10,15;56:14; 71:23 <b>United (1)</b> 68:19 <b>units (1)</b> 68:18 <b>unknown (4)</b> 31:11;36:4,5;75:4 <b>Unless (1)</b> 82:5 <b>unmarked (3)</b> 39:8,9;44:21 <b>unusual (1)</b> 38:17 <b>up (11)</b> 21:15;22:5;59:1, 24;63:12,13;69:19; 77:2,15;78:13,14 <b>upon (5)</b> 5:9;21:25;28:21; 52:25;70:20 <b>upper (4)</b> 16:8,12,14;77:24 <b>upright (1)</b> 15:12 <b>upward (1)</b> 34:21 <b>use (2)</b> 16:25;71:4 <b>used (4)</b> 6:14;13:13;22:15; 73:3 <b>using (3)</b> 6:18;12:3;17:3 <b>Usually (2)</b> 33:7;62:19	29:5,12,16,24;36:9; 25;37:6;38:6;39:19; 42:16;44:20;45:17; 46:22,24;47:5,6,11, 12,17,23;48:3,5,9,11, 14,20;49:1,10,14; 51:8,10;52:8,11; 58:25;60:6,14,15,16; 61:2,4,9,20;62:6,16, 21;66:23;69:19; 71:12,12,15,17,19; 72:2,7;79:3,6 <b>vehicles (6)</b> 22:14,20;56:11,20, 21;60:17 <b>via (4)</b> 45:11;56:9;57:6,8 <b>vicinity (1)</b> 49:7 <b>Victor-Alpha-6 (1)</b> 25:7 <b>Victoria (1)</b> 44:21 <b>view (1)</b> 60:4 <b>violation (6)</b> 71:12,13,15,19; 76:2;79:3 <b>Violence (4)</b> 7:17,19;8:8;55:8 <b>Volvo (34)</b> 10:17;12:22;13:6, 24;14:2;16:21,24; 17:9,14,20;18:6; 23:10;24:4;25:6; 26:1;27:1,7;29:22; 36:23;37:3;47:1,2, 20;53:17;58:2,8,10, 21;59:4;60:8,23; 69:2;73:14;77:7
		<b>U</b>	<b>V</b>	
		<b>ultimately (3)</b> 24:16;27:11;48:22 <b>under (5)</b> 6:13,18;7:8;16:18; 68:21 <b>underneath (3)</b> 62:18;63:8;64:15 <b>understood (3)</b> 50:24,25;80:16 <b>uniform (1)</b> 18:14 <b>uniformed (1)</b> 18:16 <b>Unit (28)</b>	<b>vague (1)</b> 68:22 <b>valid (1)</b> 72:15 <b>various (2)</b> 8:19;56:2 <b>vast (1)</b> 34:3 <b>vehicle (111)</b> 5:10,11;9:21;10:1, 14,16;13:3,12,13,21, 22;14:10,12,15,19, 24;15:1,5,7,8,9;16:6, 7,10;17:8,11,19,23, 25;19:5,6,9;20:17,20, 21;21:7,13,14,20,21, 25;22:4,17,18;23:2,4, 7;24:6,8,10,15,16; 25:8;26:20;28:20;	<b>wagon (18)</b> 10:17;12:22;13:6, 25;16:21;17:20; 23:10;25:6;27:1,8; 36:23;37:4;47:1,3; 58:2,9,10;77:7 <b>waited (1)</b> 48:2 <b>walk (6)</b> 16:10;30:13,18,25; 60:6;69:20 <b>walked (2)</b> 59:13;69:25 <b>walking (2)</b> 17:6;37:14 <b>wants (3)</b> 67:21;72:2;73:3 <b>warrant (4)</b> 11:1;31:24;32:20; 78:11

<b>warrants (5)</b> 10:24;12:10,14,18; 32:12	26:24;61:20,20;62:2; 7,16;66:3;75:23;81:3	<b>10:52 (1)</b> 3:3	
<b>Warren (26)</b> 9:16;10:11,22,22; 11:4,13,18;12:1,19; 13:7,20;17:7;36:24; 37:4;45:5,24;46:5,6, 8,12,17;57:12,24,25; 58:11,15	<b>wires (2)</b> 22:25;27:2	<b>100 (1)</b> 60:3	<b>5</b>
<b>Washington (1)</b> 45:5	<b>within (10)</b> 7:9;15:10;20:14; 23:2,14;24:1;44:4; 45:4;55:14;68:4	<b>12:33 (1)</b> 82:14	<b>5 (5)</b> 9:15;11:2;25:21; 45:1;57:10
<b>Waverly (53)</b> 9:16;11:5,18; 13:10,20,20;16:22; 17:9;30:3,17;31:14, 17,20;32:4,5,14,18, 23;33:1,4,7,9,11,17, 19,22;34:4;36:7,23; 37:4;45:25;46:13,18; 47:6,16,18;48:3,6,11, 21;57:12,24,25; 58:11,17,24;59:1,8, 21;60:12;67:3;73:14; 80:14	<b>without (6)</b> 17:2;50:23;58:24; 75:2;77:10;79:3	<b>14 (1)</b> 54:24	<b>5:15 (1)</b> 13:2
<b>way (14)</b> 4:3;5:9,24;12:7; 36:14,21;46:6,17; 68:9,24,25;69:3; 71:20;76:3	<b>witness (20)</b> 4:8,9,10;6:7,9,22; 21:2;37:10;43:3,4,5, 8;54:2,3,4,7,16;60:3; 67:10,11	<b>14th (1)</b> 68:4	<b>50 (1)</b> 59:1
<b>weapon (3)</b> 73:4;74:17;79:24	<b>witnesses (5)</b> 4:3,5,17,22;80:2	<b>15 (2)</b> 4:15;24:1	<b>500 (2)</b> 55:13;56:3
<b>wearing (9)</b> 10:1;26:4,5,8,9; 49:18;56:23;63:21, 22	<b>Woodbine (1)</b> 11:14	<b>1984 (1)</b> 50:8	<b>6</b>
<b>week (4)</b> 67:25;68:4,4;81:10	<b>worded (1)</b> 20:8	<b>1st (2)</b> 81:24,25	<b>6 (3)</b> 25:21;26:12;40:13
<b>weight (1)</b> 55:19	<b>words (2)</b> 69:7;71:18	<b>2</b>	<b>7</b>
<b>welcome (1)</b> 3:22	<b>work (1)</b> 56:12	<b>2 (8)</b> 3:8;25:16,20,23; 57:19;81:17,19;82:9	<b>7 (2)</b> 25:21;26:22
<b>weren't (2)</b> 61:10;65:9	<b>working (8)</b> 9:7,9,12,18;44:14, 23;56:14,16	<b>20 (3)</b> 4:14;24:1;60:9	<b>775- (1)</b> 25:6
<b>what's (2)</b> 9:23;27:6	<b>works (1)</b> 68:2	<b>2001 (1)</b> 55:5	<b>775-Victor-Alpha-6 (1)</b> 59:6
<b>whole (1)</b> 62:8	<b>wrapped (2)</b> 19:13;20:6	<b>2006 (2)</b> 32:7,10	<b>8</b>
<b>wholly (1)</b> 71:7	<b>write (1)</b> 28:22	<b>2008 (1)</b> 32:7	<b>8 (2)</b> 25:21;26:22
<b>who's (5)</b> 33:22;34:20;50:20; 71:16,16	<b>written (1)</b> 29:3	<b>2010 (1)</b> 32:10	<b>815 (3)</b> 81:17,20;82:9
<b>willing (2)</b> 36:13,20	<b>wrote (2)</b> 28:8;65:6	<b>2011 (1)</b> 43:17	<b>9</b>
<b>window (19)</b> 15:6,6,13,17;16:4, 5,6;17:5;18:10,20,24; 34:24;51:2;59:15; 60:6;61:5,6;71:4; 77:21	<b>Y</b>	<b>2014 (12)</b> 9:7;11:16;12:5; 25:9;26:20;27:11; 32:10;43:25;44:5,15, 23;56:13	<b>9 (2)</b> 25:22;27:5
<b>wire (13)</b> 22:2,8,16,16;	<b>yards (1)</b> 47:22	<b>2014-10751 (1)</b> 3:9	<b>9th (9)</b> 9:6;11:16;12:5; 25:9;26:20;27:11; 44:15,23;56:13
	<b>year (3)</b> 43:23;50:9;72:17	<b>2015 (1)</b> 82:7	
	<b>years (11)</b> 7:8,14,20;11:1; 32:9,11;43:18;54:24; 55:1,7,9	<b>21st (1)</b> 68:5	
	<b>Young (2)</b> 8:8;14:22	<b>25 (1)</b> 4:14	
	<b>Youth (3)</b> 7:17,18;55:8	<b>3</b>	
	<b>1</b>	<b>3 (2)</b> 25:20;55:6	
	<b>1 (6)</b> 11:24,25;12:1,8; 46:12;82:7	<b>30 (3)</b> 23:2,14;60:9	
	<b>10 (6)</b> 4:15;7:8;11:1; 25:22,23;27:10	<b>300 (1)</b> 8:14	
		<b>4</b>	
		<b>4 (1)</b> 25:20	

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have today made service on the defendant by directing that a copy of the attached motion be sent by first-class mail, postage prepaid, to his attorney:

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For The Suffolk District

November 15, 2018

No. FAR-\_\_\_\_\_  
2017-P-1045

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COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

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COMMONWEALTH OF MASSACHUSETTS,  
Appellant,

V.

ONAXIS BARRETO,  
Defendant-Appellee

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COMMONWEALTH'S APPLICATION FOR  
LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

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SUFFOLK COUNTY