S.J.C. No. DAR-_____
App. Ct. No. 18-P-934

Commonwealth of Massachusetts

Supreme Judicial Court

COMMONWEALTH

vs.

WILSON GONCALVES-MENDES

ON THE COMMONWEALTH'S INTERLOCUTORY APPEAL
FROM AN ORDER OF THE BOSTON MUNICIPAL COURT

DEFENDANT'S APPLICATION FOR DIRECT APPELLATE REVIEW

PATRICK LEVIN
BBO #682927

ATTORNEY FOR WILSON GONCALVES-MENDES

COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
44 Bromfield Street, Suite 301
Boston, Massachusetts 02108
(617) 482-6212
plevin@publiccounsel.net

March 28, 2019

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REQUEST FOR DIRECT APPELLATE REVIEW

During a routine traffic stop, defendant Wilson Goncalves-Mendes was arrested on an outstanding warrant. The car he was driving, of which he was the registered owner, was impounded and searched by police, resulting in the discovery of a firearm. A judge of the Boston Municipal Court suppressed the gun, holding that the failure of the officer who conducted the stop to consider turning the car over to its passenger rather than impounding it was unreasonable, rendering the impoundment and subsequent inventory search unconstitutional. The Commonwealth has appealed, contending that the officer was not required to consider this reasonable, readily available alternative to impoundment in the absence of an affirmative request from the defendant.

Pursuant to MASS. R.A.P. 11(a), the defendant now requests that this Court allow direct appellate review and hold that "where the police are considering impoundment of a motor vehicle whose driver is its owner or a person clearly authorized by the owner to drive the vehicle, the police must (1) inform the driver that the vehicle will be taken to a police facility or private storage facility for safekeeping unless the driver directs the officer to dispose of it in some lawful manner, and (2) comply with an alternative disposition if that alternative is reasonable." *Commonwealth v. Eddington*, 459 Mass. 102, 112 (2011) (Gants, J., concurring).

PRIOR PROCEEDINGS

On August 4, 2016, Wilson Goncalves-Mendes was charged in the Roxbury Division of the Boston Municipal Court with car-

rying a loaded firearm without a license, in violation of G. L. c. 269, § 10(n); carrying a firearm without a license, in violation of G. L. c. 269, § 10(a); and possession of ammunition without a license, in violation of G. L. c. 269, § 10(h)(1). The defendant pleaded not guilty, and the case was subsequently transferred to the Central Division of the Boston Municipal Court.

The defendant filed a motion to suppress on April 21, 2017, and an evidentiary hearing was held before the Honorable Catherine Byrne on October 26, 2017. On December 15, 2017, the judge issued a written memorandum and order allowing the motion. The Commonwealth filed a notice of appeal on January 18, 2018, which was accepted as timely, and filed an application for leave to appeal on March 28, 2018. On May 21, 2018, Chief Justice Gants allowed the application and ordered the appeal to proceed in the Appeals Court. The case was entered in that court on June 28, 2018, as No. 18-P-934. The Commonwealth eventually filed a brief on March 13, 2019.

STATEMENT OF FACTS

Around eleven o'clock on the night of August 4, 2016, Boston police officer Zachary Crossen was on patrol on Columbia Road in Dorchester. He saw a black Honda Accord that appeared to have a defective brake light. When he ran the car's registration through the Criminal Justice Information System, he learned that its registered owner, nineteen-year-old Wilson Goncalves-Mendes, had an outstanding misdemeanor warrant out of Dorchester District Court on a charge of possession of marijuana with intent to

distribute. He therefore signaled for the Accord to stop, which it immediately did in the lefthand travel lane of Columbia Road. Rather than directing the car to the shoulder, Officer Crossen stopped his cruiser behind it in the travel lane with blue lights flashing and proceeded to conduct the traffic stop.

Officer Crossen approached the driver's side window and recognized the car's driver as Mr. Goncalves-Mendes. He also observed that there was a person in the front passenger seat of the car, and that neither driver nor passenger was wearing a seatbelt. He asked both men for identification. The driver confirmed his identity, and the passenger produced a driver's license. Officer Crossen ran the passenger's information and discovered that his license was valid and that he had no warrants and was not a suspect in any crimes. After confirming the two men's identification, Officer Crossen told the defendant that he was under arrest and that his car would be impounded and towed away. Officer Crossen did not give the defendant an opportunity to suggest any alternative to impoundment, and never considered the possibility of releasing the car to the passenger, because he believed that the Boston police department's inventory search policy required impoundment any time a car's driver was arrested and the car was not legally parked.

Officer Crossen conducted an inventory search of the car and discovered a loaded gun under the driver's seat. The defendant acknowledged that the gun was his, and was brought back to the police station for booking. The passenger was permitted to leave the scene of the stop without further ado.

ISSUE PRESENTED

Whether it is reasonable for a police officer to seize a car, search it without probable cause, and tow it away to an impound lot, without considering obvious, readily available alternatives to impoundment. This was the issue presented to the motion judge and upon which she rested her decision, and it is therefore fully preserved for this Court's review.

ARGUMENT

THE IMPOUNDMENT OF THE DEFENDANT'S CAR VIOLATED ART. 14 BECAUSE IT OCCURRED WITHOUT ANY CONSIDERATION OF REASONABLE, READILY AVAILABLE ALTERNATIVES.

Article 14 of the Massachusetts Declaration of Rights prohibits "all unreasonable searches, and seizures, of [an individual] and all his possessions." Evidence obtained in violation of this provision must be suppressed. *See Commonwealth v. Ford*, 394 Mass. 421, 426-427 (1985). "The lawfulness of an inventory search turns on the threshold propriety of the vehicle's impoundment, and the Commonwealth bears the burden of proving the constitutionality of both." *Commonwealth v. Ehiabhi*, 478 Mass. 154, 164-165 (2017), *citing Commonwealth v. Eddington*, 459 Mass. 102, 108 (2011), *and Commonwealth v. Ellerbe*, 430 Mass. 769, 772-773 (2000).

In evaluating the impoundment of a vehicle whose driver has been arrested, this Court asks "whether the seizure was reasonably necessary based on the totality of the evidence." *Commonwealth v. Oliveira*, 474 Mass. 10, 14 (2016). This determination is "fact driven, with the overriding concern being the guiding touchstone of 'reasonableness.'" *Eddington*, 459 Mass. at 108, *quoting*

Ellerbe, 430 Mass. at 776. That guiding touchstone "necessitates a case-by-case analysis that takes into account the numerous and varied situations in which decisions to impound are made." *Eddington*, 459 Mass. at 109 n.12. All the facts and circumstances surrounding the officer's decision to impound the car are relevant to the ultimate determination of whether the impoundment was "reasonably necessary" under the circumstances. *Oliveira*, *supra*.

Here, those facts and circumstances included the presence in the car of a passenger who had a valid driver's license, was not under the influence of any substances, was not suspected of any wrongdoing, and was not being arrested. In other words, there was an obvious, readily available alternative to seizing the defendant's car and towing it to an impound lot where he later would have to pay to retrieve it: it could have been released to the passenger, either to park it in a safe location nearby or to drive it away himself. The motion judge concluded that Officer Crossen acted unreasonably when he failed even to consider this readily available alternative to impoundment.

The Commonwealth concedes that had the defendant *requested* that the car be released to his passenger, the police would have been constitutionally obligated to honor that request. *See Oliveira*, 474 Mass. at 11. In other words, the Commonwealth agrees that releasing the car to the passenger was "a lawful and practical alternative" to impoundment. *Id.* at 15. Nevertheless, the Commonwealth insists that Officer Crossen was not required to consider this readily available alternative because the defendant

never *requested* that the police permit the passenger to take control of the vehicle instead of towing it. This argument must be rejected.

Almost thirty years ago, this Court noted that "some State courts have indicated that the police must respond to a reasonable request for an alternative disposition of [a] vehicle," and "[o]thers have placed the burden on the police to initiate consideration of obvious reasonable alternatives." *Commonwealth v. Caceres*, 413 Mass. 749, 751 n.1 (1992), *citing* 3 LAFAVE, SEARCH AND SEIZURE § 7.3(c), at 89-91 (2d ed. 1987). In recent years, this Court has come to embrace the former proposition. *See Oliveira*, 474 Mass. at 14-15 (holding impoundment unreasonable where driver "offered the police a lawful and practical alternative"). The extent of an officer's obligation to consider reasonable alternatives to impoundment in the absence of an affirmative request from the driver remains unclear, although at least one member of the Court has expressed the view that some reasonable inquiry may be necessary. *See Eddington*, 459 Mass. at 112 (Gants, J., concurring) (suggesting that police should be required to "inform the driver that the vehicle will be [impounded] *unless the driver directs the officer to dispose of it in some lawful manner*" [emphasis added]). The Court should now adopt then-Justice Gants's view of art. 14's requirements.

The requirement for police to honor "a lawful and practical alternative to impoundment of the vehicle," *Oliveira*, 474 Mass. at 15, would be rendered meaningless if police were permitted simply to impound the vehicle without inquiring into whether any such alternative exists. *Cf. People v. Young*, 363 Ill. App. 3d 268, 271

(2006) ("If officers do not query other occupants of the vehicle, the policy [permitting impoundment only in absence of licensed driver to take it] would have little meaning"). As the motion judge noted, "[t]he logical extension of [the Commonwealth's] argument is if the police arrest the owner and inform him the car *will be towed*, as here, the owner is then required to confront the police about their decision to tow, and argue with them for an alternative. Further, this would mean even where police know a licensed driver with authority to take the car is present and available, unless the owner knows enough to ask, and is given the opportunity to do so, the police are not required to even consider this reasonable alternative." Article 14 should not be construed to require an arrestee to confront the police when they inform him that he is being placed under arrest and his car will be towed. Instead, it must place the minimal burden upon police to make a reasonable inquiry as to the arrestee's wishes when he is also the owner of the car and alternatives to impoundment are readily apparent at the scene. *See Eddington*, 459 Mass. at 112 (Gants, J., concurring).[1]

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[1] *Accord, e.g.*, *United States v. Duguay*, 93 F.3d 346, 353 (7th Cir. 1996); *State v. Ingram*, 914 N.W.2d 794, 820 (Iowa 2018); *State v. Tyler*, 177 Wash. 2d 690, 698-699 (2013); *Taylor v. State*, 842 N.E.2d 327, 333 (Ind. 2006); *Gords v. State*, 824 S.W.2d 785, 788 (Tex. Crim. App. 1992); *State v. Teeter*, 249 Kan. 548, 552 (1991); *State v. Perry*, 174 W. Va. 212, 217 (1984); *State v. Slockbower*, 79 N.J. 1, 11-12 (1979); *Drinkard v. State*, 584 S.W.2d 650, 653-654 (Tenn. 1979); *Arrington v. United States*, 382 A.2d 14, 18 (D.C. 1978); *State v. Gaut*, 357 So. 2d 513, 516 (La. 1978); 3 LaFave, Search and Seizure § 7.3(c), at 820 (5th ed. 2012).

Cases from both this Court and the Appeals Court since *Oliveira* suggest that art. 14 is properly read to require that police consider readily available alternatives to impoundment regardless of whether an arrestee proactively requests them. In analyzing the seizure of an arrestee's backpack, for example, this Court has held that where police knew "there was a third party present who was willing to take possession of the defendant's belongings," it was unreasonable for them to seize the backpack even in the absence of an explicit request from the defendant that it be left with the third party. *Commonwealth v. Abdallah*, 475 Mass. 47, 52-53 (2016). The Appeals Court has suggested that "in the context of motor vehicles, *Abdallah* stands for the proposition that [a] reasonable inquiry must be undertaken … in deciding whether the car must be impounded." *Commonwealth v. Nicoleau*, 90 Mass. App. Ct. 518, 522 n.2 (2016). This Court should affirm that under art. 14, before a defendant's car is impounded, he "should be asked his preference as to the disposition of his property. If there is a practical and available alternative that the defendant expressly or impliedly approves, the police must choose it." *Id.*, *citing Abdallah*, 475 Mass. at 52-53. *Accord Eddington*, 459 Mass. at 112 (Gants, J., concurring).

REASONS FOR DIRECT APPELLATE REVIEW

This appeal presents a "question[] of first impression … concerning the Constitution of the Commonwealth," MASS. R.A.P. 11(a)(1)-(2), that should be submitted to this Court for resolution. No vehicle impoundment case has yet presented the situation at issue here: an obvious, readily available alternative to im-

poundment that was disregarded by police because the defendant failed to affirmatively request it. *See Nicoleau*, 90 Mass. App. Ct. at 522 (noting that "the more common scenario" is where "the driver is under arrest and no one is available to take possession"). While *Abdallah* and *Nicoleau* address somewhat similar issues, they do so in the context of personal effects, and do not clearly impose an obligation on police to investigate obvious, readily available alternatives to impounding a car that is not lawfully parked at the time its owner is arrested. The Commonwealth's position in the instant litigation makes plain that the extent of an officer's obligation to consider reasonable alternatives to vehicle impoundment remains unsettled, in spite of the substantial burden such impoundment imposes upon an individual, who will be required to go to the impound lot and pay for his car's release. This Court should grant review and adopt then-Justice Gants's *Eddington* concurrence as the law of this Commonwealth.

Respectfully submitted,

WILSON GONCALVES-MENDES

By his attorney,

/s/ Patrick Levin

Patrick Levin, BBO #682927
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
44 Bromfield Street, Suite 301
Boston, Massachusetts 02108
(617) 482-6212
plevin@publiccounsel.net

March 28, 2019

CRTR2709-CR

MASSACHUSETTS
BMC ROXBURY
Docket Report

1602CR002134-FR Commonwealth vs. Goncalves-Mendez, Wilson

CASE TYPE:	Criminal Cross Site	**FILE DATE:**	08/04/2016
ACTION CODE:	269/10/EE-0	**CASE TRACK:**	
DESCRIPTION:	FIREARM, CARRY WITHOUT LICENSE LOADED c269 s.10(n)		
CASE DISPOSITION DATE	02/28/2018	**CASE STATUS:**	Filed
CASE DISPOSITION:	Pending	**STATUS DATE:**	08/04/2016
CASE JUDGE:		**CASE SESSION:**	

LINKED CASE

PARTIES

Defendant
Goncalves-Mendez, Wilson
24 E Cottage Street
Boston, MA 02125

Appointed - Indigent Defendant **541888**
Todd T Fronk
Massachusetts Bar
891 Centre St
Suite 200
Jamaica Plain, MA 02130
Work Phone (617) 763-1695
Added Date: 08/04/2016

Surety
Cabral-Goncalves, Damascena
24E Cottage St
Boston, MA 02121

PARTY CHARGES

#	Offense Date/ Charge	Code	Town	Disposition	Disposition Date
1	08/03/2016	269/10/EE-0	Boston		
	FIREARM, CARRY WITHOUT LICENSE LOADED c269 s.10(n)				
2	08/03/2016	269/10/J-1	Boston		
	FIREARM, CARRY WITHOUT LICENSE c269 s.10(a)				
3	08/03/2016	269/10/TT	Boston		
	AMMUNITION WITHOUT FID CARD, POSSESS c269 §10(h)(1)				
4	08/03/2016	90/7/D-0	Boston		
	EQUIPMENT VIOLATION, MISCELLANEOUS MV * c90 §7				
5	08/03/2016	90/11/A-0	Boston		
	LICENSE NOT IN POSSESSION * c90 §11				
6	08/03/2016	90/13A-0	Boston		
	SEAT BELT, FAIL WEAR * c90 §13A				

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MASSACHUSETTS
BMC ROXBURY
Docket Report

EVENTS

Date	Session	Event	Result	Resulting Judge
08/04/2016	1st (Arraignment) Session	Arraignment	Held-Arraignment/58A Danger Request	Breen
08/05/2016	Firearm Session - Courtroom 12, 5th Flr	Hearing to Review Status	Held	Horgan
08/18/2016	Firearm Session - Courtroom 12, 5th Flr	Motion Hearing (CR)	Held	Lyons
08/26/2016	Firearm Session - Courtroom 12, 5th Flr	Pretrial Hearing	Held	Lyons
08/30/2016	Firearm Session - Courtroom 12, 5th Flr	Pretrial Hearing	Held	Byrne
10/03/2016	Firearm Session - Courtroom 18, 5th Flr.	Discovery Compliance & Jury Election	Held	Lyons
10/14/2016	1st (Arraignment) Session	Hearing to Review Status	Event Continued	Weingarten
10/17/2016	1st (Arraignment) Session	Hearing to Review Status	Held	Neighbors
11/02/2016	Firearm Session - Courtroom 18, 5th Flr.	Hearing to Review Status	Held	Lyons
11/28/2016	Arraignment - Rm 17, 5th Flr	Hearing to Review Status	Defendant Failed To Appear	Coyne
12/01/2016	Arraignment - Rm 17, 5th Flr	Default Removal Hearing	Held	Grant
12/08/2016	Firearm Session - Courtroom 18, 5th Flr.	Hearing to Review Status	Held	Byrne
12/22/2016	Firearm Session - Courtroom 18, 5th Flr.	Motion Hearing (CR)	Held	Lyons
01/25/2017	Firearm Session - Courtroom 18, 5th Flr.	Motion Hearing (CR)	Brought Forward	Lyons
01/25/2017	Firearm Session - Courtroom 18, 5th Flr.	Hearing to Review Status	Held	Summerville
05/01/2017	Motions & Trials - Courtroom 15, 5th Flr	Motion Hearing (CR)	Brought Forward	Summerville
05/01/2017	Firearm Session - Courtroom 18, 5th Flr.	Motion Hearing (CR)	Held	Summerville

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10/16/2017	Firearm Session - Courtroom 18, 5th Flr.	Motion Hearing (CR)	Held - under advisement	Byrne
10/26/2017	Firearm Session - Courtroom 18, 5th Flr.	Motion Hearing (CR)	Held - Motion allowed	Byrne
12/14/2017	Firearm Session - Courtroom 18, 5th Flr.	Hearing to Review Status	Review Completed	Byrne
01/23/2018	Firearm Session - Courtroom 18, 5th Flr.	Hearing to Review Status	Review Completed	Byrne
02/28/2018	Firearm Session - Courtroom 18, 5th Flr.	Hearing to Review Status	Reschedule of Hearing	Byrne
03/27/2018	Firearm Session - Courtroom 18, 5th Flr.	Hearing to Review Status		

FINANCIAL DETAILS

Date	Fees/Fines/Costs	Assessed	Paid	Dismissed	Balance
08/04/2016	Counsel Fee assessed. $150.00 Applies To: Goncalves- Mendes, Wilson (Defendant) *Ordered by: Honorable David J Breen*	150.00	0.00	0.00	150.00
	Total	**150.00**	**0.00**	**0.00**	**150.00**

Date	Money on Deposit	Assessed	Paid	Dismissed	Balance
10/17/2016	Cash bail posted by Damascena Cabral-Goncalves Receipt: 36792 Date: 10/17/2016	5,000.00	5,000.00	0.00	0.00
	Total	**5,150.00**	**5,000.00**	**0.00**	**150.00**

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
BAIL	5,000.00			5,000.00
Total	**5,000.00**			**5,000.00**

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MASSACHUSETTS
BMC ROXBURY
Docket Report

INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
08/04/2016		Criminal Complaint issued from Electronic Application: Originating Court: BMC Roxbury Posting Case Number: 1602AC002320-AR Receiving Court: BMC Roxbury Posting ;	
08/04/2016	1	Appearance filed On this date Todd T Fronk, Esq. added as Appointed - Indigent Defendant for Defendant Wilson Goncalves- Mendes	
08/04/2016		Event Resulted The following event: Arraignment scheduled for 08/04/2016 09:00 AM has been resulted as follows: Result: Held - Arraignment/58A Hearing	Breen
08/04/2016	2	Reasons for ordering bail.	Breen
08/04/2016		Defendant is ordered committed to Suffolk County Jail in lieu of having posted bail in the amount ordered: ($0.00 Bond; $5,000.00 Cash), returnable for 08/26/2016 09:00 AM Pretrial Hearing; mittimus issued. Court location of next event (if not your court): BMC - Central Further Orders: ***DEFENDANT TO BE PLACED ON GPS PRIOR TO RELEASE!!!*** Applies To: Goncalves- Mendes, Wilson (Defendant)	Breen
08/04/2016		Application related information	Breen
08/04/2016		Additional Information	Breen
08/05/2016		Event Resulted The following event: Status Review (CR) scheduled for 08/05/2016 09:00 AM has been resulted as follows: Result: Held as scheduled	Horgan
08/18/2016		Event Resulted The following event: Motion Hearing (CR) scheduled for 08/18/2016 09:00 AM has been resulted as follows: Result: Held as scheduled	Lyons
08/19/2016		Event Resulted The following event: Pretrial Hearing scheduled for 08/26/2016 09:00 AM has been resulted as follows: Result: Held as scheduled	Lyons
08/19/2016		Defendant is ordered committed to Suffolk County Jail in lieu of having posted bail in the amount ordered: ($0.00 Bond; $5,000.00 Cash), returnable for 08/30/2016 09:00 AM Pretrial Hearing; mittimus issued. Court location of next event (if not your court): Further Orders: GPS TO BE INSTALLED PRIOR TO BEING BAILED REVISED MITTIMUS, PLEACE CANCEL MITTIMUS FOR 8/26/2016	Byrne

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BMC ROXBURY
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08/30/2016	Event Resulted The following event: Pretrial Hearing scheduled for 08/30/2016 09:00 AM has been resulted as follows: Result: Held as scheduled	Byrne
08/30/2016	Defendant is ordered committed to Suffolk County Jail in lieu of having posted bail in the amount ordered: ($0.00 Bond; $5,000.00 Cash), returnable for 10/03/2016 09:00 AM Discovery Compliance & Jury Election; mittimus issued. Court location of next event (if not your court): BMC - Central Further Orders: GPS TO BE INSTALLED PRIOR TO BEING BAILED ....CURFEW OF 8PM TO 8AM...STAY IN MASS ....S/A FROM FERNANDEZ RODRIQUEZ Attorney: Fronk, Esq., Todd T	Byrne
10/03/2016	Event Resulted The following event: Discovery Compliance & Jury Election scheduled for 10/03/2016 09:00 AM has been resulted as follows: Result: Held as scheduled	Lyons
10/03/2016	Defendant is ordered committed to Suffolk County Jail in lieu of having posted bail in the amount ordered: ($0.00 Bond; $5,000.00 Cash), returnable for 11/02/2016 09:00 AM Status Review (CR); mittimus issued. Court location of next event (if not your court): Further Orders: GPS TO BE FITTED PRIOR TO RELEASE	Lyons
10/13/2016	Habeas Corpus for prosecution issued to Suffolk County Jail returnable for 10/14/2016 09:00 AM Status Review (CR): Further Orders: ***PLEASE BRING DEFENDANT IN TO BE BAILED AND FITTED W/ GPS!!!***	Weingarten
10/14/2016	Habeas Corpus for prosecution issued to Suffolk House of Correction (South Bay) returnable for 10/17/2016 09:00 AM Status Review (CR): Further Orders:	Weingarten
10/17/2016	Event Resulted The following event: Status Review (CR) scheduled for 10/17/2016 09:00 AM has been resulted as follows: Result: Held as scheduled	Neighbors
11/02/2016	Event Resulted The following event: Status Review (CR) scheduled for 11/02/2016 09:00 AM has been resulted as follows: Result: Held as scheduled	Lyons
11/28/2016	Alert Issued Straight Warrant issued on 11/28/2016 for Goncalves- Mendes, Wilson	
12/01/2016	Event Resulted The following event: Default Removal Hearing scheduled for 12/01/2016 09:00 AM has been resulted as follows: Result: Held as scheduled	Grant

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BMC ROXBURY
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12/08/2016	Event Resulted The following event: Status Review (CR) scheduled for 12/08/2016 09:00 AM has been resulted as follows: Result: Held as scheduled	Byrne
12/22/2016	Called ahead at the request of the Commonwealth.	
12/22/2016	Event Resulted The following event: Motion Hearing (CR) scheduled for 12/22/2016 09:00 AM has been resulted as follows: Result: Held as scheduled	Lyons
01/25/2017	Event Resulted The following event: Status Review (CR) scheduled for 01/25/2017 09:00 AM has been resulted as follows: Result: Held as scheduled	Summerville
05/01/2017	Event Resulted The following event: Motion Hearing (CR) scheduled for 05/01/2017 09:00 AM has been resulted as follows: Result: Held as scheduled	Summerville
10/16/2017	Event Resulted Judge: Byrne, Hon. Catherine K. The following event: Motion Hearing (CR) scheduled for 10/16/2017 09:00 AM has been resulted as follows: Result: Held - under advisement	Byrne
10/26/2017	Event Resulted Judge: Byrne, Hon. Catherine K. The following event: Motion Hearing (CR) scheduled for 10/26/2017 09:00 AM has been resulted as follows: Result: Held - Motion allowed	Byrne
12/14/2017	Event Resulted Judge: Byrne, Hon. Catherine K. The following event: Hearing to Review Status scheduled for 12/14/2017 09:00 AM has been resulted as follows: Result: Review Completed	Byrne
12/15/2017	Motion to Suppress is Allowed Judge: Byrne, Hon. Catherine K.	Byrne
01/23/2018	Event Resulted Judge: Byrne, Hon. Catherine K. The following event: Hearing to Review Status scheduled for 01/23/2018 09:00 AM has been resulted as follows: Result: Review Completed	Byrne
02/28/2018	Event Resulted Judge: Byrne, Hon. Catherine K. The following event: Hearing to Review Status scheduled for 02/28/2018 09:00 AM has been resulted as follows: Result: Reschedule of Hearing Reason: Defendant's request without objection	Byrne
02/28/2018	Defendant's and Atty. Fronk presence excused on next date...3/27/18 Judge: Byrne, Hon. Catherine K.	Byrne

SUFFOLK, ss.

BOSTON MUNICIPAL COURT
CENTRAL DIVISION
DOCKET NO: 1602CR2134-FR

COMMONWEALTH

v.

WILSON GONCALVES-MENDES

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

Defendant Wilson Goncalves-Mendes is charged with carrying a loaded firearm. Defendant seeks to suppress all evidence seized from his vehicle on August 4, 2016, on the grounds that the search was unlawful and conducted in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article 14 of the Massachusetts Declaration of Rights. Defendant also moves to suppress statements on the grounds they were involuntary and in violation of *Miranda*.

The Commonwealth called two witnesses, Boston Police Officers Zachary Crossen and Patrick Browning. After hearing, the motion to suppress is ALLOWED.

FINDINGS OF FACT

Based on the credible evidence presented at the hearing, which is limited to the facts below, the court finds the following. If relevant facts are not mentioned it is because I do not credit them.

On the night of August 4, 2017, Officers Zachary Crossen and Michael Ridge, members of the Boston Police Department (BPD), were working in uniformed patrol in a marked cruiser on Columbia Road in Dorchester. At approximately 11:00 p.m. they observed a black Honda Accord with a defective third brake light. Using the mobile data terminal the officers ran a query of the registration number through CJIS (Criminal Justice Information System) and learned the registered owner of the Accord, a 19 year old black male named Wilson Goncalves-Mendes, had

a misdemeanor default warrant from Dorchester District Court in a case charging him with possession with intent to distribute marijuana. The officers conducted a traffic stop on Columbia Road without incident. The Accord was stopped in the left travel lane with the cruiser parked behind with blue lights flashing. When the officers approached the car they learned that the rear tail light was not actually broken only inadvertently blocked by a piece of cardboard that had slipped down in the rear window. The officers observed that neither driver nor passenger were wearing seatbelts. They recognized defendant from his CJIS photograph as the registered owner of the car who had a valid driver's license but also had a default warrant. They asked both men for identification. The passenger, Mr. Rodriguez provided his driver's license and the police ran his information through CJIS. The police learned the following about defendant's companion Mr. Rodriguez; (1) he provided his true name, (2) he had a valid active driver's license, (3) he had no warrants and was not a suspect in any crimes, (4) he was not under the influence of any substances, and, (5) he was polite and cooperative with the police. After confirming their identification information, Crossen told defendant the following, "[G]et out. Due to the active warrant...*we [will] be towing the car*." Crossen testified, "Because the vehicle was in travel lane *it would be towed*." He further testified, the BPD written Motor Vehicle Inventory Search Policy is "the policy for a tow" and "because the vehicle was in the travel lane [it] would be towed." See Exhibit 4. The police removed defendant and Mr. Rodriguez pat-frisked them and began to search the Accord in preparation for the tow company. Officer Crossen understood the inventory policy to require impoundment where the registered owner (defendant) is under arrest and therefore not able to himself drive the vehicle. He believed he was properly following the policy. During the search, the firearm was located under the driver's seat.

After locating the firearm, Crossen read Miranda warnings to defendant and Mr. Rodriguez who were detained on the sidewalk. Defendant stated, "It's mine. It's mine." The

passenger was not arrested, and defendant said, "It's mine. It's mine." The passenger was not arrested and was ultimately allowed to leave.

Prior to impounding his vehicle, defendant was not asked whether he would like to his friend to take custody of his car, and he was not given any opportunity to make such a request. Defendant was stopped for a motor vehicle infraction, then arrested for a misdemeanor warrant. He was therefore unable to drive. However, there was no evidence that defendant's companion was unwilling or unable to take custody his car or, at a minimum, drive the car a few yards across the road and park it legally until it could be recovered.

There was no emergency. Traffic was light. There were multi-level residences located along Columbia Road and parking was available all along the street. See Exhibit 2. Although the stop was only for a broken tail-light, the police chose to stop the car in the far travel lane on Columbia Road instead of ordering the driver to pull to the side. Even so, the location was well lit, the blue lights on the cruiser were flashing, the road was wide, and there was sufficient room for cars to safely pass the stopped vehicles. See exhibits 2 and 6.

Officer Crossen testified, and I credit, he did not consider permitting Mr. Rodriguez, to take custody of the car or move it and Officer Crossen did not understand that less invasive options must be considered before seizing and searching someone's vehicle.park it legally. He was "trained to request [a] car be towed" where the car was not lawfully parked and could not be left where it was. For that reason, once defendant and Mr. Rodriguez were removed, he prepared to tow the car by conducting a search.

Turning to facts relevant to defendant's motion to suppress statements. It was clear to the police defendant's first language was not English. Officer Crossen thought he spoke "Creole or Cape Verdean." However, it is apparent from the video-taped interview, defendant understood English and spoke it reasonably well. See Exhibit 7.

The following is a summary of the relevant events captured on the video. Exhibit 7. At approximately 12:00 a.m., defendant was handcuffed and brought to an interview room for questioning. At about 12:18 a.m., two detectives enter and remove defendant's handcuffs. At 12:19 a.m., Detective Sheehan begins; "Before we get into anything else I gotta go through Miranda with you. Ok. I'm going to read through and you can follow along." Defendant is not provided a copy to follow along, and, due to the location of the document, he could not see it to read along with Det. Sheehan. After Sheehan states the Miranda rights once, he hands the paper to defendant and says; "Put your initials next to each right if you understand them, print your name and sign your name." It took approximately 26 seconds for Sheehan to go through defendant's Miranda warnings. Defendant appears to look at the document for 10-12 seconds, then asks Sheehan; "Put my initial?" Det. Sheehan tells him "put your initials here indicating," but never completes his sentence. Det. Sheehan observes defendant write something on the paper then says, "Put your first and last initial." Then, "Just sign your name right there [pointing]." He asks defendant, "You read, write and understand English?" Defendant, who is 20, says something like, he is (or should be) in 12th grade but he need (or needs) to do the MCAS. Defendant seems to understand Detective Sheehan's questions and only occasionally misunderstands a question. Defendant's spoken English is at times difficult to understand and Sheehan asks him to repeat or clarify a few of his answers. Throughout the interview, Detective Sheehan treats defendant with respect. He is polite, calm, and not aggressive. Defendant seems comfortable speaking with him.

Essentially, defendant tells Sheehan he has had the gun in his car for four days. The reason he had the gun is because he works at Dominoes and makes deliveries at 3:00 or 4:00 in the morning. The gun is a "deuce, deuce," which he keeps in his car because he has two little brothers inside the house. He missed court because he had to work. The court case involves

40.00 of marijuana that he bought, two bags worth 20.00 each. That case was the only time he was ever arrested. He has never been to jail. He came to the United States "right from Cape-Verde" four years ago. "All I do is work 'cause I got two little brothers me and my Mom."

Detective Sheehan testified at the hearing and I credit, the document is seen using in the video, the "Miranda form," has been lost.

RULINGS OF LAW

1. Impoundment and Search

In the present case, the BPD officers stopped the Accord for a defective "third" tail light, a civil traffic violation. See *Commonwealth v. Bacon*, 381 Mass. 642, 644 (1980) (officer may validly stop a vehicle committing a traffic violation). Under the circumstances the officers were justified in asking defendant, the driver and owner, to exit to be placed under arrest for an open warrant. The issue to be determined here is whether the warrantless search of the vehicle was justified and constitutional. M.G.L.A. 159B § 6B

An inventory search is lawful under the United States Constitution and art. 14 of the Massachusetts Declaration of Rights only if (1) the impoundment of the vehicle was reasonable, and (2) the search of the vehicle following impoundment was conducted in accord with standard police written procedures. *Commonwealth v. Oliveira*, 474 Mass. 10, 13 (2016); *Commonwealth v. Nicoleau*, 90 Mass. App ct. 518, 520 (2016). See *Commonwealth v. Ellerbe*, 430 Mass. 769, 776 (2000); *Commonwealth v. Brinson*, 440 Mass. 609, 612, (2003). "The propriety of the impoundment of the vehicle is a threshold issue in determining the lawfulness of [an] inventory search." *Commonwealth v. Eddington*, 459 Mass. 102, 108 (2011), quoting from *Commonwealth v. Garcia*, 409 Mass. 675, 678 (1991). Because an inventory search of an impounded vehicle is conducted without a warrant, the Commonwealth bears the burden of proving the search was

lawful. *Oliveira, supra* at 13.

The question is whether impoundment "was reasonably necessary based on the totality of the evidence." *Commonwealth v. Crowley-Chester*, 476 Mass. 1030, 1031 (2017); *Commonwealth v. Oliveira*, supra at 14, citing *Commonwealth v. Eddington*, supra at 108–110. While here, the car clearly could not be left where it was in a travel lane on Columbia Road because it would obstruct traffic and pose a public safety risk, the police did not even consider practical alternatives to seizing and towing the car.

The Court has considered "whether the owner of the vehicle or a person clearly authorized by the owner to drive the vehicle was present and lawfully able to drive the vehicle away, that is, whether the vehicle was properly registered and the person was licensed to drive and neither under arrest nor under the influence of drugs or alcohol." *Id.* Where the owner or authorized driver was unable to drive the vehicle away, "we consider whether the owner or authorized driver offered the police a lawful and practical alternative to impoundment of the vehicle." *Oliveira* at 15. See *Ellerbe,* 430 Mass. at 774 ("the police had no practical available alternative to towing the vehicle, and thus no discretion to exercise"); *Commonwealth v. Caceres,* 413 Mass. 749, 751 (1992) (there was no practical available alternative to the removal of the vehicle and to an inventory search of it).

It is clear that the police have "no obligation to locate or telephone the registered owner to determine his or her wishes," *Eddington,* 459 Mass. at 109, or to wait with the vehicle until a licensed driver can be located, *Ellerbe,* 430 Mass. at 776, however, the police *are* required to consider a practical available alternative. Here, the registered owner was present so the police could inquire what he would like them to do with the car. They did not. Defendant's companion was also present and licensed to drive and the police did not even consider letting him move the car to the side of the road.

The nature of the impoundment decision, which results in a warrantless search and seizure, requires the police to act reasonably and "necessitates a case by case analysis that takes into account the numerous and varied situations in which decisions to impound are made." *Oliveira* at 15. A written inventory policy is required to minimize police discretion in such searches and seizures. The law requires police departments to have written inventory policies to instruct officers when it is legal to impound and/or search a vehicle, and how to perform these tasks in a way which is constitutional. The law is clear that a person's vehicle may not be seized or searched unless there is no other reasonable practical alternative.

Here, Crossen testified he did not even consider the option of letting the front seat passenger take the car. Impoundment was not reasonably necessary based upon the totality of the evidence. *Cf. Commonwealth v. Crowley-Chester*, 476 Mass. 1030, 1031 (2017) (where car legally parked on city street in location selected by driver impoundment improper); *Commonwealth v. Mallabre*, 91 Mass. App. Ct. 1126 (2017) (where car legally parked impoundment was not reasonably necessary).

The Commonwealth argues that the police need only consider an alternative disposition of the car, such as allowing an available licensed driver to take it or move it, where the owner proposes the alternate disposition. The logical extension of this argument is if the police arrest the owner and inform him the car *will be towed*, as here, the owner is then required to confront the police about their decision to tow, and argue with them for an alternative. Further, this would mean even where the police know a licensed driver with authority to take the car is present and available, unless the owner knows enough to ask, and is given the opportunity to do so, the police are not required to even consider this reasonable alternative. Here, all the police needed to do was ask defendant if he would like his friend to take or move the car. Not to do so under the circumstances of this case was unreasonable and the impoundment and concomitant search of

defendant's car was unlawful.[1]

II. Defendant's Statement

In *Miranda v. Arizona*,384 U.S. 436 (1966), the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. Once the defendant establishes that he was in custody during an interrogation, the Commonwealth bears the heavy burden of proving that the defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights before being subjected to custodial interrogation. *Commonwealth v. Mejia*, 461 Mass. 389, 390 (2012); *Commonwealth v. Edwards*, 420 Mass. 666, 669 (1995). The Commonwealth must prove the validity of the defendant's waiver beyond a reasonable doubt. *Commonwealth v. Seng*, 436 Mass. 537, 543–44 (2002); *Commonwealth v. Silanskas*, 433 Mass. 678, 685 (2001). On the basis of the record before me, the Commonwealth has not met that burden.

In setting forth the procedural safeguards for custodial interrogation the Court stated, "the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v.*

[1] Under See 3 W.R. LaFave, Search and Seizure § 7.3(c), at 92 (2d ed. 1987) ("if the driver asks that his car be turned over to a passenger, this should be done if the passenger is not under arrest or otherwise incapacitated and displays a valid operator's license"). At least, if the owner of the vehicle is present and makes such a proposal, this principle seems appropriate. Pursuant to the motor vehicle inventory procedure, no inventory is to be taken (1) if the vehicle is legally parked and locked, (2) removed by a third party, (3) disabled and towed at the owner's or operator's request, or (4) special conditions requiring prompt removal prevent the taking of an inventory before the vehicle is removed. *Com. v. Caceres*, 413 Mass. 749, 752 (1992)

Arizona, supra at 444. "The defendant may waive these rights, provided that the waiver is made voluntarily, knowingly, and intelligently but 'unless and until such warnings and waiver are demonstrated by the prosecution . . . no evidence obtained as a result of interrogation can be used against him.' " *Com. v. Seng*, 436 Mass. 537, 543–44 (2002); *Commonwealth v. Adams*, 389 Mass. 265, 268 (1983), quoting *Miranda v. Arizona, supra* at 479. *Miranda* requires "meaningful advice to the unlettered and unlearned in language which they can comprehend and on which they can knowingly act." *Com. v. Seng*, 436 Mass. at 544; *Coyote v. United States*, 380 F.2d 305, 308 (10th Cir.), cert. denied, 389 U.S. 992.

"In determining whether a waiver of *Miranda* rights was made voluntarily, "the court must examine the totality of the circumstances surrounding the making of the waiver." *Edwards*, 420 Mass. at 670. "The question is not one of form, but rather whether the defendant *in fact* knowingly and voluntarily waived the rights delineated in the *Miranda* case" (emphasis supplied). *Com. v. Hoyt*, 461 Mass. 143, 153 (2011); *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755 (1979). "A confession can be voluntary in the legal sense only if the suspect actually understands the import of each Miranda warning," *Commonwealth v. Garcia*, 379 Mass. 422, 429 (1980). In deciding whether a defendant's waiver of the rights described in the Miranda warning is valid, "a court must examine the totality of the circumstances, including the characteristics of the accused and the details of the interrogation." *Id.* at 845; quoting *Commonwealth v. Silva*, 388 Mass. 495, 501 (1983).

In the present case, there is no question that defendant was in the custody of the BPD and was subject to interrogation (placed in interview room in handcuffs, removed only during questioning, and questioned about criminal activity by two Boston Police officers). Under these circumstances, defendant had a privilege against self-incrimination and was entitled to *Miranda* warnings. The Boston Police were required to inform defendant of his *Miranda* rights and obtain

a valid waiver before he could be questioned and before any of his statements can be used against him.

Here, the Commonwealth has not met its "heavy burden" of demonstrating that the defendant knowingly and voluntarily waived his *Miranda* rights after being advised of his rights correctly, in a meaningful way, that he could comprehend. See *Commonwealth v. Boncore*, 412 Mass. 1013, 1015 (1992), and, *Com. v. Seng*, 436 Mass. at 544.

While Detective Sheehan treated defendant with respect and there was no improper pressure by the officers, the evidence does not show beyond a reasonable doubt that the *Miranda* rights were administered, understood, and knowingly and voluntarily relinquished by defendant before the questioning began. The Commonwealth has not met its burden of showing defendant "actually underst[ood] the import of each Miranda warning." First, the defendant was born in Cape Verde, was 20 years old, lived in the U.S. for only four years and had never been given Miranda warnings before. Detective Sheehan tells him he is going to "read these" and you can "follow along." But defendant is not permitted to follow along because he is not given a copy or an opportunity to see the document while Sheehan appears to be reading out loud.

The problem is compounded by the disappearance of the document referred to as the written Miranda waiver. Detective Sheehan testified and I credit the document "has been lost." While it is not required that defendant be provided the warnings in written form, having done so, the fact that the signed document which in critical in this case as it would be the only evidence of defendant having understood and knowingly, intelligently waived his rights was lost raises grave concern. Based upon the evidence including the testimony and the video, I do not credit the "form" seen in the video contains valid Miranda warnings, or contains the rights which were stated orally by Sheehan. I do not credit defendant placed his initials or signature on "the form." Exactly what was stated on the document and what defendant may, or may not, have written on

the form is especially important where Sheehan gave only a cursory one-time read through of the required warnings, without allowing defendant to follow along, never asked defendant if he understood, and never asked him if he wished to waive his rights.[2] While not required, it is well settled that it is the better practice for the police to conclude their warnings with the question, "Now understanding these rights, do you wish to speak to us?" That did not happen here, orally or in writing.

Further, the court must consider the particular circumstances surrounding this interrogation as well as defendant's background and lack of experience with the criminal justice system. *Commonwealth v. Magee*, 423 Mass. 381, 386-389 (1996). Defendant was, at that time, a 20 year old Cape Verdean who had lived in the United States for four years. He lived with his mother and two younger brothers and worked "all the time" at Dominoes. Although he appeared to have an understanding of spoken English, there was no credible evidence about his reading or writing skills, or that he had any familiarity with the interview process or his constitutional rights. This young man's important rights were given perfunctorily and no effort was made to ensure he actually understood and waived them. Since defendant was never asked if he understood, had any questions, or wished to waive his rights and speak with the police, the document would have been the only such evidence.

Under the circumstances of this case, the Commonwealth has not met their burden of proving beyond a reasonable doubt that the defendant understood his *Miranda* rights and knowingly and voluntarily waived them.

CONCLUSION

[2] While asking a defendant whether he wished to waive his rights is not required it is preferred, especially in circumstances such as this.

Therefore, under the totality of the circumstances in this case, I find that the search of defendant's motor vehicle was not was justified. All evidence flowing from the illegal search is suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963).

I further find, defendant's statements at the police station were made in violation of *Miranda*.

For all of the reasons stated above, the defendant's Motion to Suppress is ALLOWED.

DATED: December 15, 2017

Catherine K. Byrne
Associate Justice Boston Municipal Court

Certificate of Compliance

I hereby certify that this application complies with Rules 11 and 20 of the Massachusetts Rules of Appellate Procedure. The application is set in 14-point Calisto MT and its argument contains 1,229 non-excluded words, as determined through use of the "Word Count" feature in Microsoft Word 2010.

/s/ Patrick Levin
Patrick Levin

Certificate of Service

I hereby certify that I have today made service of defendant Wilson Goncalves-Mendes's Application for Direct Appellate Review on the Commonwealth by directing a copy through the electronic filing service provider to:

Julianne Campbell
Suffolk County DA's Office
One Bulfinch Place
Boston, MA 02114
(617) 619-4070
julianne.campbell@state.ma.us

/s/ Patrick Levin
Patrick Levin, BBO #682927
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
44 Bromfield Street, Suite 301
Boston, Massachusetts 02108
(617) 482-6212
plevin@publiccounsel.net

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