SJC-12890

COMMONWEALTH vs. NELSON MORA
(and two companion cases[1]).

Essex. May 5, 2020. - August 6, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Electronic Surveillance. Privacy. Constitutional Law, Search and seizure, Privacy. Search and Seizure, Electronic surveillance, Expectation of privacy. Practice, Criminal, Motion to suppress, Interlocutory appeal.

Indictments found and returned in the Superior Court Department on August 30, 2018, and September 13, 2018.

Pretrial motions to suppress evidence were heard by Timothy Q. Feeley, J.

An application for leave to prosecute an interlocutory appeal was allowed by Lenk, J., in the Supreme Judicial Court for the county of Suffolk, and the case was reported by her.

Stephen D. Judge for the defendants.
Anna Lumelsky, Assistant Attorney General, for the Commonwealth.
Jennifer Lynch & Andrew Crocker, of California, Gregory T. Nojeim, of the District of Columbia, & Matthew R. Segal, Jessie

[1] Commonwealth vs. Randy Suarez and Commonwealth vs. Lymbel Guerrero.

J. Rossman, Kristin M. Mulvey, & Nathan Freed Wessler, for American Civil Liberties Union & others, amici curiae, submitted a brief.

LENK, J. Over a period of seven months, the Attorney General investigated an alleged drug distribution network based in Essex County. At different times during the course of the investigation, officers installed a total of five hidden video cameras on public telephone and electrical poles. Three of these cameras were aimed towards homes of alleged members of the drug conspiracy. Using the video footage collected by these "pole cameras," in addition to other evidence, the Commonwealth secured indictments against twelve defendants, including the defendants Nelson Mora, Ricky Suarez, and Lymbel Guerrero. Eight defendants moved to suppress the pole camera footage, and evidence derived from that footage, as the fruits of an unreasonable search, in violation of the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. A Superior Court judge denied their motions on the ground that the pole camera surveillance did not constitute a search in the constitutional sense.

We conclude that the continuous, long-term pole camera surveillance targeted at the residences of Mora and Suarez well may have been a search within the meaning of the Fourth Amendment, a question we do not reach, but certainly was a

search under art. 14. We remand for further findings as to whether investigators had probable cause to conduct these searches when the cameras targeted at Mora's and Suarez's houses were first installed.

1. Background. The parties stipulated to the essential facts relevant to the motion to suppress.[2]

In November of 2017, a confidential informant (CI) identified Mora as a large-scale drug distributor. The CI introduced an undercover officer to Mora for the purposes of arranging controlled drug purchases. Over the course of the investigation, the officer made ten controlled purchases of oxycodone and fentanyl from Mora.[3]

Shortly after the first controlled purchase, on December 6, 2017, investigators installed a pole camera near Mora's house in Lynn. This camera afforded a view of a portion of the front of his house, the sidewalk next to it, and the adjacent street. On March 23, 2018, investigators set up a second camera near

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[2] In addition to hearing the defendants' motions to suppress the pole camera evidence, the motion judge also allowed several applications for search warrants and issued the requested warrants during the course of this investigation. The judge incorporated information contained in those search warrant affidavits in his decision denying the motions to suppress the pole camera evidence at issue here.

[3] While the record reflects that Mora completed what were alleged to be drug transactions at multiple locations, it is not clear whether any of the controlled purchases occurred at or near his residence.

Suarez's residence in Peabody, which provided a similar view of his home. The cameras directed at Mora's and Suarez's homes provided investigators with a view of their front doorways. Investigators later installed pole cameras in three other locations; one was directed along a street allegedly used by Mora to conduct his drug business, one was directed at the home of another defendant, and the final one near the home of another individual who is not a defendant. All of the cameras recorded uninterruptedly, twenty-four hours a day, seven days a week, until May 23, 2018. In total, the camera positioned near Mora's home captured 169 days of footage; the camera near Suarez's house captured sixty-two days.

The pole cameras used in the investigation shared the same technical capabilities. Each camera was able to make video but not audio recordings. None of the cameras had infrared or night vision capabilities, nor could they view inside any residence. Investigators also could, however, remotely zoom and angle the cameras in real time. On occasion, these features permitted investigators to read the license plate on a vehicle. These cameras captured without limitation all persons coming and going from the targeted residences.

While the cameras were operating, investigators could view the footage remotely using a web-based browser. The footage also was saved in a searchable format, allowing officers to

review particular previously-recorded events. All of the data gathered through this surveillance was stored on a State police server, and later preserved on a removable computer hard drive.

Beginning in March of 2018, while the pole camera surveillance was underway, investigators sought and secured warrants for other forms of surveillance, including wiretaps of Mora's and other defendants' cellular telephones, as well as global positioning system (GPS) monitoring. On May 21, 2018, in conjunction with the arrests of the twelve defendants, investigators obtained search warrants for several locations, including the residences of Mora, Suarez, and Guerrero. The subsequent residential searches uncovered substantial quantities of heroin, cocaine, and other illicit substances, along with approximately $415,000 in United States currency.

Mora, Suarez, and Guerrero moved to suppress the pole camera footage, as well as other evidence derived from that footage.[4] The five remaining[5] defendants joined their motions. In October of 2019, the motion judge held an evidentiary hearing on these consolidated motions.

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[4] Mora also moved to suppress the evidence collected pursuant to wiretap warrants. A different Superior Court judge denied this motion after a nonevidentiary hearing. The denial of this motion is not before us.

[5] By the time the motion to suppress the pole camera evidence was filed, four of the twelve defendants had pleaded guilty to drug-related offenses.

In a detailed memorandum and decision, the judge denied the motions to suppress on the ground that the pole camera surveillance did not violate the defendants' "reasonable expectation[s] of privacy." See Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). He concluded that the defendants whose homes were not captured by pole cameras, including Guerrero's, experienced only a de minimis invasion of their privacy. The judge acknowledged that the defendants whose residences were targeted, including Mora and Suarez, presented stronger arguments. Nonetheless, he determined that, because the pole camera surveillance in this case captured only information that was otherwise visible to the public, it was not so invasive that it constituted a "search" in the constitutional sense.

The judge distinguished the video footage collected by the pole cameras from location tracking data such as GPS monitoring and cell site location information (CSLI) gathered from cellular telephones. See, e.g., Commonwealth v. Augustine, 467 Mass. 230, 255 (2014), S.C., 470 Mass. 837 and 472 Mass. 448 (2015) (accessing multiple weeks of historical CSLI was "search" under art 14). The judge noted that the pole cameras covered only a fixed point; thus, he concluded, they did not track the defendants through public and private spaces, thereby revealing details about their private associations. Because, in his view,

this surveillance did not expose the same degree of associational information as novel tracking technologies, such as CSLI, the judge determined that pole cameras remain a traditional surveillance technique that may be employed without a warrant.[6]

Three of the defendants -- Mora, Suarez, and Guerrero -- filed a petition in the county court for leave to pursue an interlocutory appeal of the denial of their motions to suppress; the single justice allowed the consolidated petitions and ordered that the appeal proceed in this court.

2. Discussion. a. Standard of review. Typically, "[w]hen reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of his ultimate findings and conclusions of law" (quotations and citation omitted). Commonwealth v. Almonor, 482 Mass. 35, 40 (2019). Because the

[6] In reaching this determination, the judge expressly disagreed with both the reasoning and the holding of United States v. Moore-Bush, 381 F. Supp. 3d 139 (D. Mass. 2019), where a Federal District Court judge concluded that similar use of a pole camera was a search under the Fourth Amendment. The United States Court of Appeals for the First Circuit since has reversed that District Court decision; the court concluded that the District Court was bound by circuit precedent that pole camera surveillance of a home is not a search, and that this precedent was not undermined by subsequent decisions by the United States Supreme Court. See United States v. Moore, 963 F.3d 29, 31-32 (1st Cir. 2020).

judge's findings were based entirely on documentary evidence,[7] however, we review both his findings of fact and his conclusions of law de novo. See Commonwealth v. Johnson, 481 Mass. 710, 714-715, cert. denied, 140 S. Ct. 247 (2019).

b. Whether the pole camera footage should have been suppressed. On appeal, the central question remains whether the pole camera surveillance of Mora, Suarez, and Guerrero was a warrantless search in violation of the Fourth Amendment or art. 14, such that the evidence gathered through that surveillance should be suppressed. We first must decide whether any of the surveillance in this case was a "search" in the constitutional sense. Commonwealth v. Magri, 462 Mass. 360, 366 (2012). "Under both the Federal and Massachusetts Constitutions, a search in the constitutional sense occurs when the government's conduct intrudes on a person's reasonable expectation of privacy." Augustine, 467 Mass. at 241.

Most courts to have addressed pole camera surveillance have concluded that it does not infringe on any reasonable expectation of privacy. The recent decision in United States v. Moore-Bush, 963 F.3d 29 (1st Cir. 2020), typifies these courts' approach. There, the United States Court of Appeals for the

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[7] At this hearing, the parties submitted a joint stipulation of facts regarding the pole camera surveillance, along with photographs depicting the views afforded by each camera. The judge did not receive any testimonial evidence.

First Circuit determined that pole camera surveillance is not a search because it falls under the "public view" principle that an individual does not have an expectation of privacy in items or places he exposes to the public. See id. at 32. See id. at 42, quoting California v. Ciraolo, 476 U.S. 207, 213 (1986) ("[a]ny home located on a busy public street is subject to the unrelenting gaze of passersby, yet '[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares'"). See also United States v. Bucci, 582 F.3d 108, 116–117 (1st Cir. 2009); United States v. Jackson, 213 F.3d 1269, 1280–1281 (10th Cir.), judgment vacated on other grounds, 531 U.S. 1033 (2000); United States vs. Aguilera, U.S. Dist. Ct., No. 06-CR-336 (E.D. Wis. Feb. 11, 2008).

Following the United States Supreme Court's decisions in United States v. Jones, 565 U.S. 400, 404 (2012), and Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018), which discussed how extended GPS vehicle tracking and CSLI surveillance can intrude on reasonable expectations of privacy, several courts have reassessed prolonged pole camera surveillance. See, e.g. United States vs. Vargas, U.S. Dist. Ct., No. CR-13-6025, slip op. at 27 (E.D. Wash. Dec. 15, 2014) (six weeks of pole camera surveillance was search); State v. Jones, 2017 SD 59, ¶ 43 (two months of pole camera surveillance was search); People v.

Tafoya, 2019COA176 ¶ 51 (three months of pole camera surveillance constituted search). The defendants urge us to follow in the footsteps of these courts, and to apply the "mosaic theory," which we adopted in Commonwealth v. McCarthy, 484 Mass. 493, 504-505 (2020), to conclude that the extended and targeted pole camera surveillance of the defendants violated their reasonable expectations of privacy. Neither we, nor the United States Supreme Court, have considered the constitutional implications of the long-term and targeted video surveillance at issue in this case. Because the status of pole camera surveillance "remains an open question as a matter of Fourth Amendment jurisprudence," we will not "wade into these Fourth Amendment waters." See Almonor, 482 Mass. at 42 n.9. "Instead we decide the issue based on our State Constitution, bearing in mind that art. 14 . . . does, or may, afford more substantive protection to individuals than that which prevails under the Constitution of the United States" (quotations and citation omitted). Id.

To show that the use of pole cameras in this case was a "search" under art. 14, the defendants bear the burden of establishing that (1) they "manifested a subjective expectation of privacy in the object of the search," and (2) "society is willing to recognize that expectation as reasonable."

Augustine, 467 Mass. at 242, quoting Commonwealth v. Montanez, 410 Mass. 290, 301 (1991).

i. Subjective expectation of privacy. For the reasons to be discussed, we conclude that Mora and Suarez have established that they manifested a subjective expectation of privacy in the aggregate of their activities captured by the security cameras. Guerrero, however, has not.

Guerrero does not challenge the use of any pole camera near his own home, but, rather, the surveillance of his movements in other spaces. Although he filed an affidavit in support of his motion to suppress, he did not explicitly state within it that he expected his movements to go unobserved. Accordingly, defendant Guerrero has presented no direct evidence that he manifested a subjective expectation of privacy. Nor can we extrapolate such an expectation from this record. While we have sometimes inferred an expectation of privacy where a defendant repeatedly "cho[se] to meet his codefendant in a quiet residential area," McCarthy, 484 Mass. at 497 n.5, there is no indication how often Guerrero met his codefendants in these less-traveled settings. Guerrero therefore cannot establish that his professed expectation of privacy applies to anything more than a handful of observations of his activities in spaces visible to the public. We will not infer that he manifested a subjective expectation of privacy on this basis alone.

Both Mora and Suarez, however, filed affidavits in which they stated that they did not expect to be surveilled coming and going from their homes over an extended period. Cf. Augustine, 467 Mass. at 255 n.38 ("In support of his motion to suppress, the defendant submitted an affidavit stating that he acquired his cellular telephone for his own personal use, never permitting the police or other law enforcement officials access to his telephone records"). Considering the two months and five months for which Suarez and Mora's residences, respectively, were the targets of video surveillance, these affidavits are sufficient.

We reject the Commonwealth's contention that the absence of fencing or other efforts to shield Mora's and Suarez's residences from view shows that they lacked any subjective expectation of privacy in those areas. The traditional barriers to long term surveillance of spaces visible to the public have not been walls or hedges -- they have been time and police resources. See Jones, 565 U.S. at 429 (Alito, J. concurring). While people subjectively may lack an expectation of privacy in some discrete actions they undertake in unshielded areas around their homes, they do not expect that every such action will be observed and perfectly preserved for the future. See, e.g., United States v. Anderson-Bagshaw, 509 Fed. Appx. 396, 405 (6th Cir. 2012) ("Few people, it seems, would expect that the

government can constantly film their backyard for over three weeks using a secret camera that can pan and zoom and stream a live image to government agents").

Moreover, requiring defendants to erect physical barriers around their residences before invoking the protections of the Fourth Amendment and art. 14 would make those protections too dependent on the defendants' resources. In Commonwealth v. Leslie, 477 Mass. 48, 54 (2017), we noted that affording different levels of protection to different kinds of residences "is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity" (quotation and citation omitted). Similarly, the capacity to build privacy fences and other similar structures likely would correlate closely with land ownership and wealth.[8]

A resource-dependent approach thus would be contrary to the history and spirit of art. 14. As Eighteenth Century British Prime Minister William Pitt said when opposing warrantless searches,

> "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of

[8] It is not clear from this record whether any of the defendants owned his home, such that he could have erected privacy fences if he had desired to and been able to afford to do so.

> England may not enter; all his force dares not cross the threshold of the ruined tenement."

Donohue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1238 (2016) (Donohue).

We will not undermine these long-held egalitarian principles by making the protections of art. 14 contingent upon an individual's ability to afford to install fortifications and a moat around his or her castle.[9]

ii. Reasonable expectation of privacy. Whether Mora and Suarez's expectation of privacy is one that society would regard as "'reasonable,' 'justifiable,' or 'legitimate'" is a more difficult question (citation omitted). See Commonwealth v. One 1985 Ford Thunderbird Auto., 416 Mass. 603, 607 (1993). "The inquiry is one highly dependent on the particular facts and circumstances of the case." Id. Among the factors this court has considered are "whether the public had access to, or might be expected to be in, the area from which the surveillance was undertaken; the character of the area (or object) that was the subject of the surveillance; and whether the defendant has taken

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[9] Placing dispositive weight on efforts to shield a place from public view also would be in tension with the United States Supreme Court's observation in Ciraolo, 476 U.S. at 213, that "the mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observation from a public vantage point where he [or she] has a right to be and which renders the activities clearly visible."

normal precautions to protect his or her privacy." Almonor, 482 Mass. at 42 n.10.

In Commonwealth v. Rousseau, 465 Mass. 372, 382 (2013), this court considered whether "contemporaneous electronic monitoring of one's comings and goings in public places invades one's reasonable expectation of privacy." For the first time, we recognized that "under art. 14, a person may reasonably expect not to be subjected to extended GPS electronic surveillance by the government, targeted at his [or her] movements, without judicial oversight and a showing of probable cause." Id.

Recently, we adapted the reasonable expectation of privacy analysis of Rousseau to automatic license plate reader (ALPR) cameras by adopting the "mosaic theory." McCarthy, 484 Mass. at 503-504. As we explained, "[a] detailed account of a person's movements, drawn from electronic surveillance, encroaches upon a person's reasonable expectation of privacy because the whole reveals far more than the sum of the parts." Id. at 504. Extended surveillance "reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble" (citation omitted). Id. We ultimately held, on the limited record before us, that the "four cameras at fixed locations on the ends of two bridges" did not reveal this kind of

constitutionally-sensitive information, and, thus, the automatic ALPR surveillance employed in McCarthy did not rise to the level of a search. Id. at 509.

In this case, as in McCarthy, we are considering the import of a relatively small number of cameras, here, five. Only two of these cameras were targeted at Mora's and Suarez's residences. The defendants nonetheless argue that all footage from any of the five cameras that captures their comings and goings must be suppressed under the mosaic theory. We do not agree. Rather, we conclude that the cameras installed to surveil the defendants' homes were of greater constitutional significance than those, as in McCarthy, that were directed at a public highway.

A. Surveillance away from the defendants' home. To the extent that the pole cameras in this case surveilled the defendants away from their own homes, we conclude that this surveillance, like the ALPR use in McCarthy, was not a search in the constitutional sense. At most, it appears that Mora, Suarez, and Guerrero were each captured, on a few occasions, by two cameras directed at a different codefendant's residence. Such short-term, intermittent, and nontargeted video recording of a person away from his or her own home is little different from being captured by the security cameras that proliferate in public spaces. The United States Supreme Court recognized this

traditional nontargeted use of video cameras when it referred to "security cameras" as among the "conventional surveillance techniques and tools" that were not called into question by its holding in Carpenter, 138 S. Ct. at 2220. Law enforcement officers appropriately have relied on security cameras, and other forms of nontargeted video surveillance, to identify and apprehend suspects, particularly in emergency situations.[10] See, e.g., United States v. Tsarnaev, 53 F. Supp. 3d 450, 458 (D. Mass. 2014) (describing evidence obtained from privately-owned surveillance camera in investigation of Boston Marathon bombing). See also Commonwealth v. Leiva, 484 Mass. 766, 770 &

[10] Of course, "Fourth Amendment [and art. 14] cases must be decided on the facts of each case, not by extravagant generalizations." Commonwealth v. McCarthy, 484 Mass. 493, 508 (2020), quoting Dow Chem. Co. v. United States, 476 U.S. 227, 238 n.5 (1986). Merely labeling a video camera as a security camera rather than a pole camera is not dispositive under art. 14. Instead, each instance of warrantless police surveillance, particularly considering the rapid advancement of technology, is likely to contribute different variables to our basic constitutional equation for determining whether a surveillance effort amounts to a search, i.e., whether it was so targeted and extensive that the data amassed thereby enabled police to expose otherwise unknowable details of an individual's life. Relevant factors may include, without limitation, the duration of the surveillance; whether it was continuous or episodic in nature; whether the mechanism was or was not able to be monitored or manipulated remotely in real time; the relationship between the targeted persons and the place surveilled; whether there is a possibility of aggregating massive amounts of data electronically that otherwise would be difficult, if not impossible, for a human to compile and analyze; and the level of visual or other sensory detail the chosen surveillance medium captured.

n.5 (2020); Commonwealth v. Ferreira, 481 Mass. 641, 645 (2019); Commonwealth v. Boswell, 374 Mass. 263, 265-267 (1978).

In the circumstances here, the limited pole camera surveillance of Mora and Suarez away from their homes did not collect aggregate data about the defendants over an extended period. Without such data, the cameras similarly did not allow investigators to generate a mosaic of the defendants' private lives that otherwise would have been unknowable. Cf. McCarthy, 484 Mass. at 502. Therefore, as we held in McCarthy, this limited surveillance falls within the general rule that a person has no reasonable expectation of privacy in what he or she knowingly exposes to the public.

B. Targeted surveillance of the defendants' home. The long-term and continuous surveillance of Mora's and Suarez's homes, however, calls for a different analysis. As we have assessed the constitutional significance of surveillance technologies, we have not lost sight of the traditional protections afforded to constitutionally sensitive areas such as the home. See Augustine, 467 Mass. at 249 (CSLI may implicate greater privacy concerns than GPS vehicle tracking because it "clearly has the potential to track a cellular telephone user's location in constitutionally protected areas"). As we noted in McCarthy, 484 Mass. at 506, cameras placed "near constitutionally sensitive locations -- the home, a place of

worship, etc. -- reveal more of an individual's life and associations than does an ALPR trained on an interstate highway." Of all these protected locations, "the home is first among equals." Florida v. Jardines, 569 U.S. 1, 6 (2013).

Protecting the home from arbitrary government invasion always has been a central aim of both art. 14 and the Fourth Amendment. See Almonor, 482 Mass. at 43 (interpretation of art. 14 is "informed by historical understandings of what was deemed an unreasonable search and seizure when [the Constitutions were] adopted" [citation omitted]). These constitutional provisions were enacted, in large part, in "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity" (citation omitted).[11] Carpenter, 138 S. Ct. at 2213. For

[11] Legal challenges to these general warrants recognized the privacy interests that were threatened by such arbitrary invasions of the home. In the foundational case of Wilkes v. Wood, 98 Eng. Rep. 489, 490 (1763), counsel for the aggrieved Wilkes noted, "[O]f all offences that of a seizure of papers was the least capable of reparation; that, for other offences, an acknowledgement might make amends; but that for the promulgation of our most private concerns, affairs of the most secret personal nature, no reparation whatsoever could be made". Similarly, in Entick v. Carrington, 2 Wils. K.B. 275, 283 (1765), counsel for the plaintiff objected, "[H]as a Secretary of State a right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed; and if it were lawful, no man could endure to live in this country."

opponents of these hated practices, "[t]he right to be secure in one's home was one of the principal concerns, accompanied by the right to a private sphere within which thoughts, beliefs, writings, and intimate relations were protected from outside inspection." Donohue, supra at 1195.[12]

While the drafters of the Fourth Amendment and art. 14 undoubtedly were concerned with the physical integrity of persons, homes, papers, and effects for their own sake, they also sought to preserve the people's security to forge the private connections and freely exchange the ideas that form the bedrock of a civil society. "Article 14, like the Fourth Amendment, was intended by its drafters not merely to protect the citizen against the breaking of his doors, and the rummaging of his drawers, . . . but also to protect Americans in their beliefs, their thoughts, their emotions and their sensations by conferring, as against the government, the right to be let alone —- the most comprehensive of rights and the right most valued by civilized [people]" (quotations and citations omitted). Commonwealth v. Blood, 400 Mass. 61, 69 (1987).

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[12] "The principal dictionary definitions of the word ["secure"] have changed little in the past two hundred years. Samuel Johnson's dictionary offered several definitions of the word, including: 'free from fear'; 'sure, not doubting'; and 'free from danger, that is, safe.'" Clancy, What Does the Fourth Amendment Protect: Property, Privacy, or Security?, 33 Wake Forest L. R. 307, 350 (1998).

Like CSLI or GPS person tracking, targeted long-term pole camera surveillance of the area surrounding a residence has the capacity to invade the security of the home. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" See Kyllo v. United States, 533 U.S. 27, 31 (2001), quoting Silverman v. United States, 365 U.S. 505, 511 (1961). This "right [to be free of unreasonable government intrusion] would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity." Commonwealth v. Leslie, 477 Mass. 48, 54 (2017), quoting Jardines, 569 U.S. at 6. Similarly, even when pole cameras do not see into the home itself, by tracking who comes and goes over long periods of time, investigators are able to infer who is in the home, with whom the residents of the home meet, when, and for how long. If the home is a "castle," a home that is subject to continuous, targeted surveillance is a castle under siege. Although its walls may never be breached, its inhabitants certainly could not call themselves secure.

Without the need to obtain a warrant, investigators could use pole cameras to target any home, at any time, for any reason. In such a society, the traditional security of the home would be of little worth, and the associational and expressive freedoms it protects would be in peril. See Blood, 400 Mass.

at 69 ("it is not just the right to a silent, solitary autonomy which is threatened by electronic surveillance: It is the right to bring thoughts and emotions forth from the self in company with others doing likewise, the right to be known to others and to know them, and thus to be whole as a free member of a free society"); Jones, 565 U.S. at 416 (Sotomayor, J., concurring) ("Awareness that the government may be watching chills associational and expressive freedoms"). Such invasive and arbitrary government action spurred John Adams to draft art. 14 more than two hundred years ago, and "raises the spectre of the Orwellian state" today. See United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987).

Despite recognizing the protected status of the home under art. 14, the Commonwealth nevertheless contends that pole camera surveillance of a single location, even a residence, cannot violate a reasonable expectation of privacy, because it does not provide the same detailed picture of a person's movements in public as GPS or CSLI. To the contrary, we already have recognized that targeted, private video surveillance of an individual's home may intrude on that individual's reasonable expectation of privacy. See Polay v. McMahon, 468 Mass. 379, 384-385 (2014). As we noted in that case, "even where an individual's conduct is observable by the public, the individual still may possess a reasonable expectation of privacy against

the use of electronic surveillance that monitors and records such conduct for a continuous and extended duration." Id. at 384.

The Commonwealth's argument also misapprehends the reasonable expectation of privacy under art. 14 that is implicated by location tracking technologies. The relevant privacy interest is not in a person's movements themselves, but, rather, "a highly detailed profile, not simply of where we go, but by easy inference, of our associations -- political, religious, amicable and amorous, to name only a few -- and of the pattern of our professional and avocational pursuits." Commonwealth v. Connolly, 454 Mass. 808, 834 (2009) (Gants, J., concurring), quoting People v. Weaver, 12 N.Y.3d 433, 441–442 (2009).

Rather than focus solely on whether a surveillance technology tracks a person's public movements, our analysis under art. 14 turns on whether the surveillance was so targeted and extensive that the data it generated, in the aggregate, exposed otherwise unknowable details of a person's life. See McCarthy, 484 Mass. at 503-504 (describing aggregation approach); Rousseau, 465 Mass. at 382 (concluding that thirty-one days of GPS monitoring intruded on reasonable expectation of privacy). Cf. Commonwealth v. Lugo, 482 Mass. 94, 108 (2019) (no reasonable expectation of privacy where defendant was never

targeted). This combination of duration and aggregation in the targeted surveillance here is what implicates a person's reasonable expectation of privacy.[13]

Indeed, compared to the GPS vehicle tracking in Rousseau, prolonged and targeted video surveillance of a home has the potential to generate far more data regarding a person's private life. Rather than a dot on a map, video surveillance reveals how a person looks and behaves, with whom the residents of the home meet, and how they interact with others. Pole camera surveillance of the home captures these revealing interactions at the threshold of a person's private and public life. The longer the surveillance goes on, the more the boundary between that which is kept private, and that which is exposed to the public, is eroded.

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[13] In this respect, our analysis under art. 14 differs substantially from the Fourth Amendment analysis in Moore-Bush. There, the court concluded that there was no difference between defendants' privacy interests "in the whole of their movements over the course of eight months from continuous video recording with magnification and logging features in the front of their house," and the defendant's interest "in the front of his home." Moore-Bush, 963 F.3d at 38 n.8. The court also rejected the notion that the "unrelenting, 24/7, perfect" nature of the pole camera surveillance altered its constitutional analysis. See id. at 42. Conversely, we have held that "when the duration of digital surveillance drastically exceeds what would have been possible with traditional law enforcement methods, that surveillance constitutes a search under art. 14." McCarthy, 484 Mass. at 500.

In this case, for uninterrupted periods of five months and two months, respectively, pole cameras were targeted at Mora's and Suarez's residences. These cameras videotaped not only Mora and Suarez, but also every person who visited their homes, and every activity that took place in the immediate vicinity. Because of the focused and prolonged nature of this pole camera surveillance, investigators were able to uncover the defendants' private behaviors, patterns and associations. Indeed, beginning with Mora, investigators used pole camera surveillance footage, in combination with other information, to identify the codefendants allegedly engaged in his drug-distribution network.

We are not swayed by the Commonwealth's argument that this same aggregate data could have been collected by an officer conducting direct surveillance. When considering the capabilities of the police to conduct such surveillance, our "overarching goal is to assure [the] preservation of that degree of privacy against government that existed when the Fourth Amendment [and art. 14] were adopted" (quotations and citation omitted). McCarthy, 484 Mass. at 498. As with the GPS tracking in Jones, "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case." 565 U.S. at 420 (Alito, J., concurring). In a literal sense, replicating pole camera surveillance "would have required either a very large [pole], a very tiny constable, or both -- not to

mention a constable with incredible fortitude and patience." See id. at 420 n.3.

Even if "[p]hysical surveillance, in theory, could gather the same information as the pole cameras," it remains the case that "physical surveillance is difficult to perform." United States vs. Garcia-Gonzalez, U.S. Dist. Ct., No. CR 14-10296-LTS, slip op. at 6 (D. Mass. Sept. 1, 2015). Further, it seems unlikely that investigators could have maintained in-person observation over the course of multiple months without the defendants becoming aware of their presence. See McCarthy, 484 Mass at 500 ("the surreptitious nature of digital surveillance removes a natural obstacle to too permeating a police presence by hiding the extent of that surveillance"). And replacing officers on the ground with a single, automatic, remotely-operated surveillance camera eliminated resource constraints that otherwise may have rendered this surveillance unfeasible. See McCarthy, 484 Mass. at 499-500, quoting Jones, 565 U.S. at 429 (Alito, J., concurring) ("Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken"). Unlike a police officer, a pole camera does not need to eat or sleep, nor does it have family or professional concerns to pull its gaze away from its target. The "continuous, twenty-four hour nature of the surveillance" is

an "enhancement[] of what reasonably might be expected from the police." McCarthy, 484 Mass. at 508.

Thus, the pole cameras here allowed investigators to overcome several practical challenges to pervasive human surveillance. See McCarthy, supra at 499, quoting Jones, supra at 429 (Alito, J., concurring) ("In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical").

Even assuming that investigators otherwise could have conducted months of human surveillance without being discovered, these pole cameras captured information that a police officer conducting in-person surveillance could not. All of the footage collected by the cameras was stored digitally, in a searchable format, such that investigators later could comb through it at will. The pole cameras thereby gave investigators the ability to "pick out and identify individual, sensitive moments that would otherwise be lost to the natural passage of time." Levinson-Waldman, Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public, 66 Emory L.J. 527, 603 (2017). See McCarthy, 484 Mass. at 500 (noting that camera surveillance allows police to "travel back in time" [citation omitted]). "Far more so than watching in real time, creating a recording enables the extraction of a host of interconnected inferences about an individual's associations,

proclivities, and more. Indeed, recording often will be the only way to create a mosaic, since the ability to construct a mosaic depends on the compilation of enough data points -- more than human memory can hold --to yield the big picture." See Levinson-Waldman, supra at 568. The resulting mosaic is "a category of information that never would be available through the use of traditional law enforcement tools of investigation." Augustine, 467 Mass. at 254.

All told, the targeted, long-duration pole camera surveillance of Mora's and Suarez's homes provided the police with a far richer profile of those defendants' lives than would have been possible through human surveillance. A reasonable person must anticipate that a neighbor could observe some of the comings and goings from his or her residence. Even the prototypical nosey neighbor, Gladys Kravitz from the 1960s television show, "Bewitched," however, occasionally put down her binoculars and abandoned her post at the window to eat and sleep.[14] We do not believe that a resident would expect that every activity would be taped, stored, and later analyzed as part of a months-long pattern of behavior. A briefer period of pole camera use, or one that is not targeted at a home, might

[14] Bewitched: Be it Ever So Mortgaged (ABC television broadcast Sept. 24, 1964).

not implicate the same reasonable expectation of privacy.[15] We need not decide in this case where that boundary lies. It is enough to conclude that the warrantless surveillance of Mora's and Suarez's residences for more than two months was a "search" under art. 14. In the future, before engaging in this kind of prolonged surveillance, investigators must obtain a warrant based on probable cause.

As we announce this new rule, we also recognize that police departments across the country have used pole cameras, without the need for a warrant, for at least three decades. See Cuevas-Sanchez, 821 F.2d at 251-252 (describing pole camera surveillance). At the time of the investigation here, the majority of courts that had assessed pole camera surveillance had concluded that it did not violate a reasonable expectation of privacy. See, e.g. Tafoya, 2019COA176 at ¶ 33 (summarizing prior decisions). Indeed, in the closest decision on point at that time, Bucci, 582 F.3d at 116–117, the United States Court of Appeals for the First Circuit held that the pole camera surveillance of the home there was not a search under the Fourth Amendment.

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[15] Of course, exceptions to the warrant requirement, such as exigent circumstances, apply with full force to pole camera surveillance that otherwise would be an unreasonable search.

In Augustine, 467 Mass. at 256, when announcing a new rule regarding the warrant requirement for extended CSLI surveillance, we did not hold that the CSLI gathered in that case automatically was subject to the exclusionary rule. Rather, we recognized that the Commonwealth had obtained a court order authorizing the compelled product of the CSLI pursuant to 18 U.S.C. § 2703(d) of the Stored Communications Act, and consistently had maintained that the "affidavit submitted in support of the Commonwealth's application for a § 2703(d) order demonstrated the requisite probable cause." See Augustine, supra. In light of these circumstances, the Commonwealth was accorded an opportunity to establish that the warrantless government-compelled production of data in that case was supported by probable cause. See id. at 255-256. Because of the long-standing use and judicial approval of pole camera surveillance, we conclude that remand similarly is appropriate here to determine "whether, in the particular circumstances of this case, the Commonwealth is able to meet that warrant requirement through a demonstration of probable cause." Commonwealth v. Augustine, 472 Mass. 448, 449 (2015).

On remand, the motion judge, at an appropriate hearing, must consider whether, at the time the pole camera surveillance began, the Commonwealth had "probable cause to believe that a particularly described offense has been, is being, or is about to be committed, and that [pole camera footage sought] will produce

evidence of such offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit such offense" (quotations and citation omitted). Augustine, 467 Mass. at 255–256. Although, unlike in Augustine, supra, the Commonwealth did not submit applications, supported by affidavits, to conduct the electronic surveillance at issue in this case, it nonetheless may be able to establish probable cause through affidavits submitted in support of warrants it did obtain during the course of the investigation, such as for wiretaps. Alternatively, the Commonwealth may meet its burden through supplemental affidavits and other relevant evidence it may seek to proffer at a new evidentiary hearing. If the Commonwealth can show that investigators had probable cause when each of the pole cameras was installed, and thus were not acting in a wholly arbitrary manner, the motions to suppress should be denied in their entirety. If not, the motions should be allowed only as to the surveillance of Mora and Suarez by the cameras targeted at their residences.

3. Conclusion. The matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.