COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
NO. SJC-11619

SUFFOLK, SS.

COMMONWEALTH,
Appellant

v.

ANGEL SANTIAGO,
Appellee

ON APPEAL FROM A PRETRIAL ORDER ALLOWING A MOTION TO SUPPRESS EVIDENCE BY THE HAMPDEN COUNTY SUPERIOR COURT

BRIEF AS *AMICUS CURIAE* ERKAN & ASSOCIATES, LLC, IN SUPPORT OF APPELLEE

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STATEMENT OF THE ISSUE

Whether Massachusetts should recognize "target standing" under art. 14 of the Massachusetts Constitution, such that an individual who is the target of a criminal investigation can challenge unconstitutional conduct toward a third person that is intended to yield evidence against the target.

INTEREST OF THE AMICUS CURIAE

Erkan & Associates, LLC is a private criminal defense law firm located in Andover, Massachusetts. After serving for eight years as an Assistant District Attorney in Essex County, Attorney Murat Erkan founded Erkan & Associates in 2006. Erkan & Associates, LLC is a law firm committed to preserving the constitutional guarantees and liberty interests of Massachusetts persons as well as advocating in defense of the accused. The present case centrally concerns the firm, as many of its own cases involve derogation of the constitutional rights of some for the purpose of generating evidence against others. This Honorable Court's acceptance of target standing principles will ensure that police obey the Declaration of Rights in all instances, and remove the existing incentive to sacrifice the constitutional rights of some in the

quest for evidence against others. The issue of target standing at the forefront of this case represents an opportunity to improve Massachusetts's standing doctrine and fortify constitutional rights under Article 14.

Amicus has no interest in any party to this litigation, nor does it have a stake in the outcome of this case other than its interest in the Court's interpretation of standing principles in the Article 14 context.

SUMMARY OF THE ARGUMENT

I. This Honorable Court should affirm the motion judge's ruling and recognize target standing under Article 14 of the Massachusetts Declaration of Rights. Massachusetts precedent supports its adoption in instances where law enforcement officers intentionally engaged in a violation of one individual's constitutional rights in order to obtain evidence against another individual. (Pgs. 4-10, infra).

II. While the United States Supreme Court has declined to adopt target standing under the Fourth Amendment, this Court should recognize such standing under state law, as Article 14 affords more protections to individuals than the Fourth Amendment. Additionally, other standing principles in Massachusetts currently surpass federal minimum standards. Recognition of target standing will further the Commonwealth's efforts to strengthen standing principles and ensure that the Constitution protects all persons in the Commonwealth. (Pgs. 10-14, infra).

III. This Court may look to other states that have adopted target standing for guidance and policy considerations underpinning the theory. Alaska

currently recognizes target standing under their state constitution, which is very similar to the applicable provision in the Massachusetts Declaration of Rights. In addition, Louisiana's Constitution explicitly grants standing to all persons aggrieved by illegal searches and seizures. (Pgs. 14-18, infra).

IV. This Court should adopt target standing in order to effectuate the underlying purposes of the exclusionary rule. Above all, the exclusionary rule is intended to deter police wrongdoing. Target standing will help to deter the intentional violation of constitutional rights, without which such violations will continue to occur in abundance. (Pgs. 18-27, infra). Additionally, target standing will further the goals of preserving both judicial integrity and public legitimacy. (Pgs. 27-32, infra).

ARGUMENT

I. THE MOTION JUDGE PROPERLY RECOGNIZED THIRD-PARTY OR "TARGET" STANDING, AS MASSACHUSETTS' PRECEDENT SUPPORTS ITS ADOPTION UNDER ARTICLE 14 OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

Generally in both the United States and Massachusetts, "persons not themselves the victims of illegal government conduct typically lack standing to assert the constitutional rights of others." LaFrance

v. Bohlinger, 499 F.2d 29, 34 (1st Cir. 1974), cert. denied sub nom. LaFrance v. Meachum, 419 U.S. 1080 (1974). There are exceptions to this restriction in Massachusetts, such as "automatic standing" in cases where possession of seized evidence is an element of the offense. Commonwealth v. Amendola, 406 Mass. 592 (1990). Over the past three decades, the Supreme Judicial Court previewed the acceptance of "target standing," which allows an individual who is the target of a criminal investigation to challenge unconstitutional conduct toward a third person that is designed to yield evidence against the target.

In Commonwealth v. Manning, 406 Mass. 425, 429 (1990), this Court opined, "[u]nconstitutional searches of small fish intentionally undertaken in order to catch big ones may have to be discouraged by allowing the big fish, when caught, to rely on the violation of the rights of the small fish, as to whose prosecution the police are relatively indifferent." While the Manning Court did not explicitly adopt the doctrine on the facts before the Court,[1] it recognized

[1] The court found that Manning was not a "special target" of the police investigation, and thus declined to apply or formally adopt target standing. Id. at 429-30.

the importance of providing a remedy when law enforcement manipulate loopholes within the exclusionary rule to circumvent the rights of Massachusetts citizens under the State and Federal Constitutions. Id.

The Court again in Commonwealth v. Scardamaglia, 410 Mass. 375, 379 (1991) declined to explicitly adopt target standing on the facts before the Court. The Court expressed reluctance in granting target standing a "wide scope," though the court did acknowledge that target standing may be necessary where police conduct is "distinctly egregious." Id. at 380.

This Court reiterated that position in Commonwealth v. Burgos, 462 Mass. 53, 66 (2012), where it held that even though individuals typically do not have standing when a third party's rights are violated, "[a] basis for excluding evidence does exist where it is derived from government misconduct that is 'distinctly egregious.'" Thus, this Court in Burgos recognized target standing, at least in circumstances where government conduct is "distinctly egregious." Id.; see also Commonwealth v. Waters, 420 Mass. 276, 278 (1995) ("The judge was correct in ruling that the police conduct was not serious, distinctly egregious

misconduct that might justify granting the defendant the right (under the 'target standing' theory) to challenge the allegedly unlawful search").

The Court later suggested that circumstances where "police had intentionally engaged in a violation of someone else's constitutional rights in order to obtain evidence against the defendants" would constitute "egregious" conduct. Commonwealth v. Price, 408 Mass. 668, 673 (1990), citing Manning, supra. Again, the court declined to apply target standing on facts that did not mirror the "big fish" and "little fish" analogy described in Manning. But by implying that such a scenario would warrant giving the "big fish" standing, the Price Court quite openly laid the groundwork for target standing, specifically in situations such as the one at issue in this appeal. Id.

Expanding upon the groundwork in Price, the Court most recently discussed but declined to rule upon the availability of target standing in Commonwealth v. Vacher, __ Mass. __, SJC-11220 (2014). In Vacher, the Court again touched upon the Manning decision's "big fish little fish" analogy, noting that at the time of the alleged misconduct, the police had not yet

determined the identity of the "big fish" or "big fishes."

Moreover, the subjects of alleged police misconduct were "not ostensibly 'small fish, as to whose prosecution the police [were] relatively indifferent,'" rather, they were also primary suspects in the investigation. Id., at __, quoting Manning at 429. The Court recognized, however, that in those instances where the "small fish" has no opportunity to challenge police misconduct and seek suppression, the appropriate remedy may be the Court "allowing a third party to assert their rights instead." Id., at __.

While the above cases did not explicitly recognize target standing, the precedent set forth has led several Massachusetts trial courts to apply target standing. In addition to the judge in this case, at least two other written suppression rulings in Massachusetts have adopted target standing. In Commonwealth v. Almeida, 2002 WL 31235489 (Mass. Super. 2002)[2], the judge held after a suppression hearing that the defendant had target standing where police officers illegally stopped and searched a third

[2] The Amicus attaches the Superior Court's decision in Almeida at RA 1.

party's vehicle in an attempt to collect evidence of the defendant's drug activity. The judge opined that this case, as Manning warned, involved "the unconstitutional search of a small fish intentionally undertaken to catch a big fish[.]" Id. at *16.

In another suppression ruling, Commonwealth v. Albanese, 2007 WL 4964342 (Mass. Dist. 2007)[3], another trial court judge ruled that the defendant had target standing. There, similar to the case before this Court, officers saw the defendant and another individual perform a hand-to-hand exchange, though they could not see what the two exchanged. Id. As in the present case, the officers stopped both parties, searched them, and found drugs on the third party. Likewise, following the motion to suppress, the judge ruled that the defendant had standing to challenge the search of the third party, as it was the most appropriate means of protecting that third party's rights and deterring such conduct. Id. at *2.

The Manning, Burgos, Scardamaglia, Price, and Vacher opinions, and the trial court cases that applied them, are logical stepping stones that have

[3] The Amicus attaches the District Court's decision in Albanese at RA 19.

paved the way for recognition of such standing in cases of egregious police conduct. Recognition of such a rule is particularly necessary when police purposefully attempt to evade the exclusionary rule by violating the privacy rights of someone near the target in hopes of gathering evidence against the target himself.

This doctrine has earned some level of acceptance in the Commonwealth through application by at least three different trial court judges and repeated acknowledgement by this Honorable Court. This implicit approval supports the notion that, until now, this Court simply has yet to have a factual scenario ripe for the issue's determination.

While the Court has not yet defined the "distinctly egregious" misconduct that would trigger target standing, the decisions thus far treating the issue at least suggest the contours of the definition. As thus far applied, the cases imply that the Court would deem sufficiently "egregious" a violation of a third party's protected rights, intentionally undertaken to yield evidence against another suspect. The Courts have not viewed these along a spectrum of constitutional violations, but have more evenly found

the intentional sacrifice of a "small fish" to land a "big fish" as justification for applying the rule.[4]

This approach is well counseled for reasons of simplicity and efficacy. The analysis is simple: in cases where police seek to introduce evidence obtained from the "small fish" in a prosecution against the "big fish," the motion judge merely considers whether police possessed the requisite degree of suspicion to justify the challenged search or seizure.

The remedy's effectiveness mirrors its simplicity. It gives full force to the exclusionary rule by removing the existing incentive for police to side-step the Constitution as to persons to whom they are "relatively indifferent" in pursuit of their true target. Manning, 406 Mass. at 429.

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[4] See e.g., Manning, supra at 429 (noting that "unconstitutional searches of small fish intentionally undertaken in order to catch big ones may have to be discouraged" but finding application not supported on the record for lack of evidence of "intentional wrongdoing"); Price, supra at 673 (noting rule's deterrent of "serious police misconduct," particularly the "big fish little fish" scenario described in Manning); Scardamaglia, supra at 379 (finding police conduct insufficiently egregious to trigger application of target standing where officer "may have" had probable cause to stop third party); Almeida, supra (finding stop of third party "blatantly lacking in any justification" undertaken specifically to obtain evidence against defendant).

Thus, this Court should seize this opportunity to expand the scope of standing to include targets of unconstitutional police misconduct in the interests of preventing a governmental end-run around the Constitution. The Court should hold this rule applicable to any case where a third party's rights are intentionally violated in order to gather evidence for use in another's prosecution. After all, it is difficult to conceive of a circumstance more "distinctly egregious" than the intentional violation of the rights of one person in the pursuit of evidence against another. The concept of sacrificing the constitution as a law enforcement tactic is sufficiently egregious to compel judicial action.

As articulated in Miranda v. Arizona, 384 U.S. 436, 443-44 (1966), quoting Weems v. United States, 217 U.S. 349, 373 (1910): "[o]ur contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."

Absent recognition of target standing, fundamental liberties granted by Article 14 will "be lost in reality" in a great many cases. As a result, this Court should adopt target standing under Article 14 of the Massachusetts Declaration of Rights.

II. FEDERAL PRECEDENT IS NOT DETERMINATIVE OF MASSACHUSETTS LAW IN REGARD TO STANDING ISSUES.

Opponents of "target standing," including the Appellant, base their argument on the United States Supreme Court decision of Rakas v. Illinois, 439 U.S. 128 (1978). The Court in Rakas explicitly rejected target standing, holding that Fourth Amendment rights are personal and cannot be vicariously asserted. Id. at 134-37. There, the Court found that the burdens associated with investigating police conduct and motives outweighed the need to deter law enforcement from encroaching on constitutional rights. Id.

But in various contexts, the Supreme Judicial Court has interpreted Article 14 of the Massachusetts Constitution, which served as the inspiration for its federal cognate, to more broadly protect civil liberties. The United States Constitution sets the floor for personal protections against the government, and the Massachusetts Declaration of Rights marks the

ceiling. Commonwealth v. Gonsalves, 429 Mass. 658 (1999). As the court stated in that case:

> That the drafters of the Fourth Amendment subsequently chose to replicate the words used in art. 14 cannot support a conclusion that we are compelled to act in lockstep with the United States Supreme Court when it interprets that amendment. Such a conclusion posits a serious misunderstanding of the authority of this court to interpret and enforce the various provisions of the Massachusetts Constitution, particularly those in the area of civil liberties. Id. at 688.

Thus, that federal law does not recognize target standing does not preclude this Court from adopting the protection. To the contrary, the instances in which Massachusetts has rejected federal curtailment of civil liberties suggest that Article 14 would commend the recognition of target standing.

For example, in United States v. Salvucci, 448 U.S. 83, 94-95 (1980), the Supreme Court held that individuals charged with possessory offenses do not have "automatic standing" to challenge a search or seizure when their own Fourth Amendment rights have not been violated. The Court reasoned, similarly to Rakas, that any deterrent or protection value of such standing was outweighed by the administrative burdens and cost of excluding probative evidence. Id. The

Court opined that in order to have standing, one must have a legitimate expectation of privacy in the place or thing that is searched or seized. Id.

However, this Honorable Court explicitly rejected that ruling in Commonwealth v. Amendola, 406 Mass. 592 (1990). Of the expectation-of-privacy requirement endorsed by the Court, this Court "recognize[d] the risks in over-emphasizing such a manipulable standard while losing sight of other important considerations, such as those which animate the automatic standing rule." Id. at 601.

This Court viewed the Salvucci rationale as shortsighted, affirming that Article 14 provides broader protections to its citizens, including automatic standing for possessory offenses. Amendola, supra at 600-601 and n. 3. Numerous rulings by this Honorable Court have afforded greater protections under Article 14 than the Fourth Amendment.[5]

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[5] For example, Massachusetts continues to use the two-prong Aguilar-Spinelli test for probable cause based on informant statements despite federal adoption of a more lax standard. Commonwealth v. Upton, 394 Mass. 363, 373-75 (1985). Contrary to federal law under Maryland v. Wilson, 519 U.S. 408, 415 (1997), Massachusetts requires officers to have a reasonable belief that their safety or the safety of others is at jeopardy before issuing an exit order during a routine traffic stop. Commonwealth v. Gonsalves, 429 Mass.

Given the Massachusetts precedent that favors the adoption of target standing noted above, coupled with this Court's historical effort to afford more rights to citizens under Article 14 than is required by the Fourth Amendment, Rakas should not serve as a basis for this Court's ruling. Instead, like in Amendola, this Court should focus on other important considerations, in this case the importance of protecting the rights of its citizens, deterring police misconduct, and preserving judicial integrity.

III. THIS COURT SHOULD LOOK TO STATES WITH TARGET STANDING FOR GUIDANCE IN CHOOSING TO RECOGNIZE THE DOCTRINE.

Because the recognition of target standing remains undecided in Massachusetts, it is helpful to look to other states for precedent. For example, the Supreme Court of Alaska held that "a defendant has standing to assert the violation of a co-defendant's fourth amendment rights if he or she can show (1) that a police officer obtained the evidence as a result of gross or shocking misconduct, or (2) that the officer

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658, 688 (1999). For other contexts, see Commonwealth v. Ford, 394 Mass. 421, 426-427 (1985); Commonwealth v. Madera, 402 Mass. 156, 159-60 (1988); Commonwealth v. Lyons, 409 Mass. 16, 18 (1990); Commonwealth v. Stoute, 422 Mass. 782, 784-85 (1996); Commonwealth v. Connolly, 454 Mass. 808, 822 (2009).

deliberately violated a co-defendant's rights." Waring v. State, 670 P.2d 357, 363 (Alaska 1983).

The Waring Court cited two reasons for recognizing target standing – deterrence of unlawful police conduct and upholding the integrity of the judiciary. The Court opined that, although it agreed with the United States Supreme Court in assuming that allowing standing to assert the violation of co-defendants' rights would not always deter police misconduct, deterrence overall would be significantly furthered by allowing target standing. Id. at 362.

The Court observed, "[i]f a defendant were not given standing to assert the knowing violation of a co-defendant's rights, police could be encouraged to intentionally violate the rights of persons who will not be prosecuted in the hopes that the illegally obtained evidence could eventually be used against another defendant." Id. at 362-63. With target standing in place, officers would know that evidence obtained in violation of any individual's rights would be inadmissible not only in that individual's case, but in the case of their ultimate target. Id. The Court believed that this penalty would successfully prevent a great deal of unlawful police conduct.

In regard to the second purpose, judicial integrity, the Court highlighted the judiciary's responsibility to condemn improper police conduct. The Court opined: "Refusing to permit standing would represent 'an open invitation to adopt such procedures as a standard method for the solution of particular crimes or for conducting generalized crime hunts.'" Id. at 363, quoting Dimmick v. State, 473 P.2d 616, 623 (Alaska 1970) (Rabinowitz, J., concurring in part, dissenting in part).

Importantly, Alaska's constitutional provision governing searches and seizures is no more expansive than Article 14 of the Massachusetts Constitution. Like the Fourth Amendment of the U.S. Constitution, it states: "The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See Alaska Const. art. I, § 14.

Thus, the Alaska Supreme Court's ruling stems solely from its interpretation of constitutional terms

virtually identical to our own,[6] [7] coupled with a realistic perspective of the tools necessary to effectively enforce constitutional guarantees. This Court should consider adopting Alaska's ruling, and the reasoning behind it, in deciding the instant case.

IV. RECOGNITION OF TARGET STANDING IS NECESSARY TO GIVE EFFECT TO THE UNDERLYING PURPOSES OF THE EXCLUSIONARY RULE.

A. Target Standing Deters Unlawful Police Action, Which Continues to be a Pervasive Problem Within the Criminal Justice System.

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[6] Article 14 of the Massachusetts Declaration of Rights reads:

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

[7] Louisiana has written target standing into its constitution. It states: "Any person adversely affected by a search or seizure conducted in violation of this section shall have standing to raise its illegality in the appropriate court." See Louisiana Const. art. I, § 5.

As the United States Supreme Court noted in Elkins v. U.S., 364 U.S. 206 (1960), "The [exclusionary] rule is calculated to prevent, not repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." While other purposes for the exclusionary rule exist, none is more important than the deterrence value occasioned by suppression of unconstitutionally seized evidence. Id. Without the deterrence safeguard of the exclusionary rule, the Fourth Amendment and Article 14 would be reduced to "a form of words." Mapp v. Ohio, 367 U.S. 643, 393 (1961), quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

The most efficient way to deter unlawful behavior and "compel respect for the constitutional guaranty" is to remove the incentive to disregard it. See Grasso, Suppression Matters Under Massachusetts Law §1-3[b][2] (2007). But existing standing limitations provide broad incentive for police to intentionally circumvent Article 14 by sacrificing the rights of lesser offenders to obtain evidence against their targets of choice.

Currently, without the force of target standing, police are free to violate the rights of individuals without consequence. As noted by Justice Brennan, "Whatever role [. . .] standing limitations may play, it is clear that they were never intended to be a sword to be used by the Government in its deliberate choice to sacrifice the constitutional rights of one person in order to prosecute another." United States v. Payner, 447 U.S. 727, 748 (1980) (Brennan, J., dissenting).

Many advocates of target standing appreciate the existing dangers inherent in refusing to recognize target standing. In essence:

> "[I]f law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified . . . . [S]uch a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of evidence illegally obtained against them."

Burkoff, The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine, 58 Or. L. Rev. 151, 176 n.95 (1979), quoting People v. Martin, 45 Cal. 2d 755, 760 (1955).

Cases such as the one currently before this Honorable Court are a pervasive problem in Massachusetts. Officers, such as the one in this case or those in Commonwealth v. Albanese, 2007 WL 4964342 (Mass. Dist. 2007), violate the rights of the "little fish" in order to obtain evidence against the "big fish," knowing that they lack probable cause or reasonable suspicion to do so. It has become an effective workaround for the police to ignore the protections of Article 14 while gathering evidence with impunity. Id. at *4.

This "investigative" trend alone signifies that the exclusionary rule is not serving its function in these cases. The exclusionary rule in its current form does not deter officers from acting unlawfully. Instead, standing limitations indulge police with the incentive to get creative with the Constitution by a tactical evisceration of civil liberties of some in the pursuit of others.

To make matters worse, officers are operating with the understanding that they are permitted to behave in this lawless fashion. This attitude pervades because, according to the Commonwealth, there is nothing that should be done. The current state of

Article 14 does not provide the prophylaxis necessary to keep the constitutional body healthy, allowing the behavior against which the exclusionary rule seeks to vaccinate to infect the procedures of the Commonwealth's police departments.

This very work-around invited the Internal Revenue Service in Payner to break into a man's home, hire a locksmith to pick the lock on his briefcase, and secretly copy his files in order to obtain evidence against a third party. Payner, supra at 730. In that case, the Court evinced awareness that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties." Id., at 730. However, the Court turned a blind eye to this lawlessness on the standing limitations which the Commonwealth herein advances. Id.

Opponents of target standing argue that the Supreme Court addressed the issue of deterrence in Rakas, where it opined "there is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample

motivation to move to suppress it." Rakas, supra at 134. They reason that the fact that the violated party would (or at least could) challenge the admissibility of evidence would be an adequate deterrent to such police activity. See e.g. Scardamaglia, supra at 378.

But upon what evidence or data did Justice Rehnquist in Rakas or the Appellant here rely to establish that the "little fish" in fact has "ample motivation" to challenge such a search? And what evidence or data suggests that suppression as to the "little fish" would deter police misconduct at all, where the "little fish" was never truly the trophy sought?

In cases where police never charge the "little fish," or care not for the outcome of his case, or otherwise dispose of his case in a trivial manner, the deterrent effect is in reality nil - absent this Court's acceptance of target standing.

This is so because the concept of target standing rests on the notion that the ultimate target of unlawful police activity is not the person who is searched, but the person against whom evidence is obtained during that search. The officers care about

the target of the search, and the ultimate prosecution of that target, not the person whose privacy rights fall victim to that effort. As such, there is no actual deterrent value to suppressing evidence in the case of the aggrieved party, because if it has any effect at all, the effect is limited to the prosecution of a person irrelevant to the government, if any such prosecution occurs at all.

The reality is that the constitution is daily sacrificed in the Commonwealth's quest for evidence against police-designated targets.[8] Not only is there no actual deterrence - contrary to the Supreme Court's theory - the current state of the law actually has the

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[8] In an attempt to generate data relevant to actual deterrence under existing law, on July 30, 2014 Amicus submitted to various district attorney's offices record requests for the calendar year 2009 pursuant to Mass. Gen. Laws Ch. 66, §10 (the Massachusetts Public Records Act). Amicus requested disposition records of cases involving co-defendants in which the Commonwealth charged one party with possession related offenses and another with distribution related offenses. Amicus selected the calendar year 2009 randomly, as representative of a time period which would be sufficiently recent but also likely to show disposition data. Amicus sent requests to the following jurisdictions: Barnstable, Boston, Brockton, Chelsea, Lawrence, Lowell, New Bedford, Quincy, Springfield and Worcester. Amicus has not yet received any records responsive to its request. A copy of a representative request is attached to the record appendix at RA 23.

paradoxical effect of encouraging law enforcement to investigate crimes in this manner. See Burkoff, 58 Or. L. Rev. at 175-177. There is no logical basis for the belief that police officers would not face a real deterrent under target standing when the target can do nothing about officers' obtaining evidence in blatant violation of a third person's rights. Id.

Additionally, not only is the aggrieved party's motion to suppress of little consequence, but in many of these cases, the aggrieved party is not even charged or does not take the opportunity to assert their rights. In such cases, there is no tangible or realistic mechanism to deter police misconduct.[9] Clearly the Supreme Court overestimated the deterrent value that currently exists in these target-standing cases.

In addition to suppression of evidence and the dismissal of cases against the aggrieved party, the Rakas Court also contemplated what would happen should the violated party not be charged with a crime: "Even

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[9] In the case at hand, co-defendant Ramos filed a motion to suppress that the Court never heard because Ramos and the Commonwealth reached a favorable plea agreement in which the Court merely assessed a fine in exchange for his guilty plea. Brief & Appendix for the Commonwealth, App. 83.

if such a person is not a defendant in the action, he may be able to recover damages for the violation of his Fourth Amendment rights, or seek redress under state law for invasion of privacy or trespass." Rakas, supra at 134.

This proposition is plainly unrealistic. First of all, claims brought pursuant to 42 U.S.C. § 1983 are incredibly hard to pursue successfully. Officers have qualified immunity in most cases. See e.g., Malley v. Briggs, 475 U.S. 335, 341 (1986). Damages can be difficult to prove. Filing fees, attorney fees, ignorance of legal rights, the institutional bias in credibility determinations favoring police witnesses over criminal defendants'[10] all create a vast inequality surrounding access to the courts, particularly in these cases where one individual is faced with taking on the government.

In a survey of all 2009 cases[11] filed in the United States District Court for the District of

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[10] David N. Dorfman, Proving the Lie: Litigating Police Credibility, 26 Am. J. Crim. L. 455, 469-474 (1999) (describing judicial bias in favor of police witnesses).

[11] See footnote 8, supra.

Massachusetts, only 82 cases involved § 1983 claims.[12] Of those 82 cases, only two involved a violation of the Fourth Amendment without any excessive or deadly force allegation. Neither of those two remaining cases involved the issues described in target standing cases or unlawful searches at all. Thus, not a single lawsuit was brought during the entire year on the issues contemplated by the Supreme Court. This research suggests that the deterrent effect of potential civil rights lawsuits is seemingly non-existent and further evidences the Court's ill-conceived rationales offered in Rakas.

Finally, the U.S. Supreme Court has suggested that the "marginal" deterrent value afforded by target standing would be outweighed by the administrative burdens of investigating law enforcement officers' motives in such cases. However, for the reasons noted above, the increased deterrence is far from marginal and is, in fact, quite significant. Moreover, the "burden" associated with the only effective means of enforcing the constitution is simply not a justifiable

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[12] Monthly civil docket reports for the District of Massachusetts returning results for 2009, under the search field "civil rights (other)" are appended to this brief beginning at RA 27.

reason for rejecting target standing. As inconvenient as the Declaration of Rights may be to law enforcement, the cost associated with weakening these core protections is a price too high for a free society to pay.

As articulated in Miranda v. Arizona, 384 U.S. 436, 491 (1966), "[w]here rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them." The Court has a duty to enforce the Constitution regardless of whether or not it is convenient. Moreover, it is entirely unclear how investigation into officers' motives would be burdensome, as it seems to entail no more than a narrow line of inquiry during a hearing on a motion to suppress evidence or a cursory review of the surrounding circumstances of the case.

Where the price of inquiry is so low and the cost to society is so high, this Honorable Court should disregard the Commonwealth's contentions to the contrary and should adopt the principles of target standing.

B. Judicial Integrity Requires Recognition of Target Standing.

The second purpose of the exclusionary rule, the "imperative of judicial integrity," is a broad principal that rests on one common theme – the law should not prohibit conduct yet simultaneously become complicit in that conduct by allowing its spoils into evidence. Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 Geo. L. J. 1361, (1981). As the Court made clear in Terry v. Ohio, 392 U.S. 1 (1968):

> Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus, in our system, evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial [...] has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Courts cannot sit idly by and watch law enforcement circumvent the exclusionary rule and willingly violate civil liberties. Courts cannot, and should not, become "accomplices in the willful disobedience of a Constitution they

are sworn to uphold." Elkins v. United States, 364 U.S. 206, 223 (1960).

The exclusionary rule evolved to protect the integrity of the judicial process against evidence procured by law enforcement through "tyrannous means." Ervin, The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment, 1983 Sup. Ct. Rev. 283, 395 n. 36 (1983). Here, and in innumerable other cases, it is clear that law enforcement officers intentionally side-step individuals' Article 14 rights by illegally seizing or searching someone deemed to be inconsequential to obtain evidence against their chosen target. Police know that this is the easiest way to gain admissible evidence, because their ultimate target is unable to challenge the unlawful behavior.

Acquiescence to this practice offends the fundamental purposes of the exclusionary rule and Article 14 itself. Where the Court would sanction the expedient of circumventing the Constitutional rights of some, with the objective of obtaining evidence against others, the

promises of Article 14 would be "impotent and lifeless" indeed. Weems, supra at 373.

The Framers conceived Article 14 to protect individuals from oppressive government intrusion. It was forged to stand sentinel against unjustified and oppressive searches and seizures. Article 14 was not intended to marginally inconvenience law enforcement officers and encourage them to look for short-cuts to bypass the privacy rights of individuals, when such methods violate the rights of others.

Refusing to invoke the exclusionary rule and permit target standing is essentially "affirm[ing] by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution[.]" Bennett, Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule, 20 UCLA L. Rev. 1129, 1137 (1973), quoting Weeks v. United States, 232 U.S. 384, 394 (1914).

Moreover, for this Court to set a definition of "distinctly egregious" as something more than the knowing violation of one individual's rights

in the pursuit of evidence against another is to create an unworkable and impotent standard. To require additional proof that a complained-of constitutional violation reached the nebulous height of "distinct[] egregious[ness]" would in reality encourage the courts to overlook police lawlessness in a great many cases.[13]

The judiciary, which is frequently without choice but to rely on law enforcement witnesses for its factual findings, would have to find exceptional that which has become unexceptional: that a constitutional violation must be somehow more "egregious" than another to apply the remedy of exclusion.

Nor would an inquiry into the degree of "egregiousness" of a given violation as predicate for application of the rule deter police misconduct.

A requirement that a Court find "distinctly egregious" conduct for target standing to attach necessarily implies that some constitutional

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[13] This is particularly so where trial courts are already predisposed to err on the side of the government and evaluate police testimony with deference. Dorfman, supra at 469-474.

violations would still be permissible. Worse, such an approach suggests that there could be something more "egregious," something more offensive to traditional notions of ordered liberty, than an intentional violation of an individual's constitutional rights.

Withholding protection under the target standing rule absent a showing of something more than a constitutional violation designed to generate evidence against a more important target incentivizes the problem that has given rise to the rule. Police would have nothing to deter continued use of suspicionless stops and searches without probable cause, trusting that a prosecutor could portray or a deferential motion judge could find that such stops are not so "egregious" as to warrant application of the rule.

Thus, rather than deterring the practice of violating the rights of a third person to gain evidence against a specific target, this formulation creates a broad spectrum of scenarios where the practice would continue. The "distinctly egregious" requirement creates an

exception that eclipses the rule, and for all practical purposes, makes target standing unattainable, a hollow constitutional gesture.

Where this Court's recognition of the violence done to Article 14 in cases such as the instant matter prompts it to consider adopting target standing, a solution allowing for the same problem to continue unabated is no solution at all. In order to preserve judicial integrity, this Court should recognize target standing and adopt a standard for exclusion applicable in any case where a police officer intentionally violates the rights of another, and not knowingly acquiesce to government wrongdoing.

C. Target Standing Is Necessary to Further Public Legitimacy of the Massachusetts Criminal Justice System.

The final reason for recognizing target standing is a matter of public legitimacy. "One purpose of the exclusionary rule is to assure the people – all potential victims of unlawful government conduct – that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." United

States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

A government functions most efficiently when it has earned the trust of its subjects. If the government knowingly violates the constitutional rights of its citizens, there is reason for the public to doubt its entire criminal justice system. Moreover, if the judiciary, the "check" and arbiter on the enforcement of laws, stands mute while people's rights are intentionally trampled, there is little reason for citizens to believe their government is concerned for their wellbeing. "The security of one's privacy against arbitrary intrusion by police – which is at the core of the Fourth Amendment – is basic to a free society." Wolf v. Colorado, 338 U.S. 25, 28 (1949).

As warned in Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting):

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds

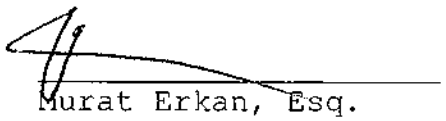
> contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution.

Thus, were this Honorable Court to decline to adopt target standing would invite and encourage lawless behavior on the part of law enforcement, and would seriously undermine public legitimacy in Massachusetts. This Honorable Court should take this occasion to fortify the public's belief in the solemnity of its constitutional rights.

CONCLUSION

For the foregoing reasons, this Honorable Court should affirm the trial judge's ruling and adopt target standing under Article 14 to the Massachusetts Declaration of Rights.

Respectfully submitted,



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