

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT  
NO. SJC-11893

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COMMONWEALTH  
Appellee

v.

JOHN C. DEPIERO  
Defendant-Appellant

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ON APPEAL FROM A JUDGMENT OF  
THE CAMBRIDGE DISTRICT COURT

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BRIEF OF AMICUS CURIAE FILED BY THE  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
IN SUPPORT OF DEFENDANT-APPELLANT

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Respectfully submitted,

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**INTEREST OF THE AMICUS CURIAE**

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 40,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights.

The issue presented before the Court in the above-captioned matter concerns the importance of extending the *Aguilar-Spinelli Test* to an individual's protection from insufficiently corroborated anonymous 911 calls resulting in motor vehicle stops by Massachusetts law enforcement alleging reasonable suspicion.

### ISSUE PRESENTED

Whether, and if so how, the Supreme Court's decision in *Navarette v. California*, 134 S.Ct. 1684 (2014) - that an anonymous tipster's "use of the 911 system is . . . one of the relevant circumstances that, taken together . . . [can justify an] officer's reliance on the information reported in the 911 call" - will apply in Massachusetts, where, under the Federal Constitution, the reliability of a tip is measured by the totality of circumstances test, whereas Massachusetts employs the more stringent *Aguilar-Spinelli Test*.

### SUMMARY OF THE ARGUMENT

The Massachusetts Declaration of Rights provides more substantive protection to defendants than the Fourth Amendment to the United States Constitution when determining whether reasonable suspicion exists to stop a motor vehicle, and therefore, anonymous 911 telephonic tips to law enforcement should not be found *per se* reliable as a matter of law when applying the legal standards of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), known as the "Aguilar-Spinelli Test."

## ARGUMENT

### I. **When The Basis For A Motor Vehicle Stop Is A Stand-Alone Anonymous 911 Telephone Call The Aguilar-Spinelli Test Should Apply To The Reasonable Suspicion Determination.**

The instant case concerns an investigatory automobile stop, which according to this Court, requires "reasonable suspicion" that the occupants have "...committed, are committing, or are about to commit a crime." See Commonwealth v. Wren, 391 Mass. 705, 707, 463 N.E.2d 344 (1984). The Massachusetts Appeals Court in this matter noted that in *Navarette v. California*, 134 S. Ct. 1683, 1686, 188 L. Ed. 2d 680 (2014), the United States Supreme Court concluded that while 911 calls are not per se reliable, a "caller's use of the 911 system is ... one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call." See Commonwealth v. Depiero, supra, 87 Mass. App. Ct. 105, 110 (2015).

The threshold issue, however, is whether an anonymous 911 call--like the one received by police in the instant matter--is enough to trigger reasonable suspicion. The following text extracted from the Massachusetts Appeals Court opinion in the present matter is particularly significant:

**...We now turn to the veracity test. The question whether the police had an adequate basis for concluding the caller was reliable is a close one.** Although the initial 911

call was recorded, the Commonwealth presented no evidence to establish that the caller was identifiable. There was no evidence that the telephone number used by the caller could be identified or that the caller otherwise knew the number could be traced. As the defendant points out, the absence of evidence demonstrating that the caller's anonymity was at risk has resulted in a finding of unreliability in a number of cases. **(emphasis added.)** See *Commonwealth v. Depiero*, supra, 87 Mass. App. at 110-11 (2015).

*...Here, although Trooper Dwyer's observations of the defendant's vehicle did corroborate some of the information provided by the 911 caller, he did not observe any suspicious behavior. However, even without sufficient corroboration, we conclude that the Commonwealth met its burden because it can be inferred that the 911 call was made contemporaneously with the caller's observation of apparent criminal activity, namely driving while intoxicated, and therefore, the caller was under the stress or excitement of a "startling or shocking event." Commonwealth v. Depina, 456 Mass. 238, 244, 922 N.E.2d 778 (2010). (emphasis added.) See Commonwealth v. Depiero, 87 Mass. App. Ct. at 111-12 (2015).*

The *Aguilar-Spinelli* Test provides that police may rely on informant's tips (or hearsay) when submitting an affidavit in support of a search warrant application so long as the magistrate issuing the warrant is provided "some of the underlying circumstances" from which the informant derived the information in the affidavit; and that "some of the underlying circumstances from which the officer concluded that the



informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable.'" See *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723 (1964).

In the present matter, the Massachusetts Appeals Court concluded it could "infer" that the anonymous call was made contemporaneously with "apparent criminal activity." See *Commonwealth v. Depiero*, 87 Mass. App. Ct. at 111-12 (2015). This may be the case when applying the "Totality of the Circumstances Test" under *Illinois v. Gates*; however, the application of *Aguilar-Spinelli* Test does not reach the same conclusion.

If an informant's tip alone is insufficiently reliable under the *Aguilar* test, then additional independent allegations contained in the affidavit corroborating a tip should be considered. See *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 27 L.Ed.2d 637 (1969). Therefore, as the Massachusetts Appeals Court held in the instant matter from which this Court granted review, in order "[t]o establish the reliability of the information under art. 14 . . . the Commonwealth must show the basis of knowledge of the source of the information (the basis of knowledge test) and the underlying circumstances demonstrating that the source of the information was credible or the information reliable (the veracity test)."

See *Commonwealth v. Depiero*, 87 Mass. App. Ct. 105, 109-10, 25 N.E.3d 896, 900 review granted, 35 N.E.3d 720 (Mass. 2015).

Alternatively, in *Illinois v. Gates*, 462 U.S. 213, 233, 103 S.Ct. 2317, 2329, 76 L.Ed.2d 527 (1983), the United States Supreme Court abandoned that *Aguilar-Spinelli Test* for one based on a "totality of the circumstances." Under the Totality of the Circumstances Test, a deficiency in one of the prongs in the *Aguilar-Spinelli Test* may be compensated for when assessing the reliability of an anonymous tip. See 14A Mass. Prac., Summary Of Basic Law § 7.54 (4th ed.)

The Massachusetts Appeals Court, respectfully, misapplied *Navarette* to the instant case. *Navarette v. California*, 134 S. Ct. 1683, 1686, 188 L. Ed. 2d 680 (2014). This Court has previously held that "[t]he Federal [totality of the circumstances] test lacks the precision that we believe can and should be articulated in stating a test for determining probable cause...The 'totality of the circumstances' test ... has been applied where no more definite, universal standard could reasonably be developed." *Commonwealth v. Upton*, 394 Mass. 363, 373, 476 N.E.2d 548 (1985). This Court further stated in *Upton* that it would "...likewise see no reason to use that test in evaluating reasonable suspicion." See *Commonwealth v. Lyons*, 409 Mass. 16, 18, 564 N.E.2d 390, 392 (1990) citing *Commonwealth v. Upton*, 394 Mass. 363, 373, 476 N.E.2d 548 (1985). It is

crucial that an anonymous tip resulting in a motor vehicle stop based on reasonable suspicion be analyzed under *Aguilar-Spinelli* just as it would if the question was one of probable cause.

Amicus respectfully submits this Court should adhere to the *Aguilar-Spinelli Test* to determine whether an anonymous 911 call amounts to reasonable suspicion—which in the instant case—did not. Notably, *Navarette v. California*, 134 S. Ct. 1683, 1686, 188 L. Ed. 2d 680 (2014), is distinguishable from the instant case inasmuch as the anonymous caller reported the startling event of having been run off the road.

This Court has held that “[i]nformation related by a reliable person can be sufficient to establish a reasonable suspicion.” See *Commonwealth v. Wren*, 391 Mass. 705, 707, 463 N.E.2d 344, 345 (1984). To meet the “reasonable suspicion” standard in this Commonwealth, police action must be “based on specific, articulable facts and reasonable inferences therefrom” rather than on a “hunch.” *Commonwealth v. Lyons*, *supra*, 409 Mass. at 19 (1990).

An anonymous 911 call should not provide *per se* “reasonable suspicion” without corroborating reliable articulable facts warranting an investigatory motor vehicle stop. See *Commonwealth v. Alvarado*, 423 Mass. 266, 268, 667 N.E.2d 856, 858 (1996) (investigatory stop is justified if the Commonwealth can prove a reasonable suspicion, based on specific, articulable

facts and reasonable inferences therefrom, that an occupant had committed, was committing, or was about to commit a crime.) This court held in *Commonwealth v. Couture*, 407 Mass. 178, 183, 552 N.E.2d 538, cert. denied, 498 U.S. 951, 111 S.Ct. 372, 112 L.Ed.2d 334 (1990), that, under the Fourth Amendment, "[t]he mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun." An anonymous tip that a person is carrying a gun, standing alone, does not give rise to reasonable suspicion. See *Commonwealth v. Alvarado*, 423 Mass. 266, 268, 667 N.E.2d 856, 858 (1996) citing *Commonwealth v. Toole*, 389 Mass. 159, 163-164, 448 N.E.2d 1264 (1983) ("carrying a .45 caliber revolver is not necessarily a crime" and thus there was no probable cause to search vehicle).

This Court has held that "[U]nder art. 14, the legality of the stop, that is, the existence of reasonable suspicion, is not determined by the imprecise Federal totality of the circumstances standard but rather by application of the principles stated in determining the existence of probable cause in *Commonwealth v. Upton*, 394 Mass. 363, 373-375, 476 N.E.2d 548 (1985) (reliability of informant and basis of his or her knowledge)." *Commonwealth v. Alvarado*, 423 Mass. 266, 268, 667 N.E.2d 856, 858-59 (1996).

Operating a motor vehicle after consuming alcohol is not a crime, but rather doing so with a diminished ability to drive as a result of alcohol consumption is unlawful. See M.G.L. c. 90 s. 24; *Commonwealth v. Connolly*, 394 Mass. 169, 173 (1985). Notably, law enforcement officials in Massachusetts receive formal training for detecting whether an individual is operating under the influence of alcohol (or other substance). See *DWI Detection and Standardized Field Sobriety Testing (March 2013 Edition)* (<http://www.mass.gov/eopss/images/msp/crimelab/oat/sfst-train-manuals/2013-manual.pdf>).

Police officers are professionally trained to detect impaired motor vehicle operation. See *Id.* Given this fact, and that a motor vehicle stop must be based on reliable, articulable facts, Amicus respectfully submits that this Court should conclude that an anonymous allegation that one may be driving erratically, in and of itself, should not be deemed *per se* reasonable suspicion of criminal activity under the heightened protection of Article 14 of the Massachusetts Declaration of Rights given this Court's adoption of the *Aguilar-Spinelli Test*.

**II. Anonymous 911 Calls Are Not Inherently Self-Verifying And Evolving Technology Requires The Modernization of How The Reliability of Anonymous Calls Is Determined.**

In the instant matter, the Massachusetts Appeals Court concluded that although the police observations of the