

SJC10697

FAR: 1854E

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPREME JUDICIAL COURT  
NO. FAR-

MASSACHUSETTS APPEALS COURT  
NO. 2008-P-1985

COMMONWEALTH OF MASSACHUSETTS,  
Plaintiff, Appellant

v.

DANIEL CARR and JOHN SHERMAN  
Defendants, Appellees.

ON INTERLOCUTORY APPEAL FROM ALLOWANCE OF MOTIONS TO  
SUPPRESS BY THE SUPERIOR COURT

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JOINT APPLICATION FOR FURTHER APPELLATE REVIEW OF  
DEFENDANTS-APPELLEES

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Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, defendants-appellees Daniel Carr and John Sherman apply for leave to obtain further appellate review of the Massachusetts Appeals Court's reversal of the trial court's suppression of evidence seized during a search of their dormitory room by Boston College Police. The Appeals Court's decision struggles to draw a line between the rights of special police officers employed by private colleges to serve their employer's interests, and the rights of college students to constitutional privacy in their dormitory rooms, when those police officers perform functions traditionally reserved to law enforcement officers. This Court should accept further review in this case in order to offer guidance to the many colleges, universities, and students affected by this case. As such, there are "substantial reasons affecting the public interest." In addition, the interests of justice require that the Court correct the Appeals Court's erroneous application of this Court's precedent, the Appeals Court's setting aside factual findings by the motion judge that were not clearly erroneous, and the Appeals Court's consideration and adoption of an argument

proffered by the Commonwealth for the first time on appeal.

#### **STATEMENT OF PRIOR PROCEEDINGS**

In February of 2007, the defendants were students at Boston College, a private college located in Newton, Massachusetts. The campus police entered their dormitory room, searched the room, and seized illegal drugs. A Middlesex grand jury returned indictments against the defendants for trafficking in cocaine, possession of psilocybin with intent to distribute, and possession of marijuana with intent to distribute.

The defendants moved to suppress the fruits of the search and statements made to the campus police. On February 12, 2008, after a hearing, the Superior Court (Giles, J.) allowed the motions to suppress. It concluded that the campus police's entry into the defendants' dorm room did not fall under any of the exceptions to the warrant requirement, and that the subsequent search was not undertaken with the defendants' free and voluntary consent.

A single justice of the Supreme Judicial Court allowed the Commonwealth's application for an

interlocutory appeal. On appeal, the Commonwealth argued that the campus police's entry into the dorm room was either a lawful "threshold inquiry" or supported by probable cause and exigent circumstances, and that the subsequent search was consensual. It also made an argument that had not been presented below: that the campus police's warrantless entry was authorized by the College's Residency Conditions governing dormitory searches.

On December 23, 2009, the Massachusetts Appeals Court issued a decision reversing the Superior Court's allowance of the motion to suppress. It held that campus police lawfully entered to enforce a residency condition relating to health and safety, and that the subsequent search also was lawful. None of the parties is seeking a rehearing in the Appeals Court. Issuance of the rescript was stayed until February 19, 2010.

## **STATEMENT OF FACTS**

### **INTRODUCTION**

In this case, in allowing the motions to suppress, the motion judge found the following facts: Resident advisers reported to campus police that a

student had been bullying people with a knife and that an unidentified student had seen (at some unknown time in the past) what might have been the butt of a gun, possibly a toy gun. Three armed, uniformed police officers went to the student's dormitory room, intending to get the gun if it was there. They knocked on the door. When it was opened, one police officer entered the room without saying a word and without permission. The other two police officers blocked the only doorway. A visitor was ordered to leave the room - ". . . Sgt. Derick said, 'Okay. You're out of here.'" Tr. 2/25. Sgt. Derick asked one of the remaining students about the report of a toy gun and when the student said that he had thrown it away, Sgt. Derick administered *Miranda* warnings. After the student told Sgt. Derick that the toy gun was under the bed, and the gun was retrieved, the other two officers entered the room as well. Sgt. Derick told the defendants they needed to fill out a consent form. Tr. 2/30.

The motion judge found the initial entry to be unlawful. She also found that the Commonwealth had not sustained its burden to prove that any consent to search was given freely and voluntarily.

The Appeals Court held that none of this mattered, because the police were merely enforcing the health and safety regulations of a private college. Thus, their conduct did not have to comply with Fourth Amendment and Article 14 protections. Of course, the Commonwealth had not raised this issue below. Thus, there was no evidence that the police were in fact doing anything other than investigating a report of possible criminal activity.

**I. The report to the Boston College Police**

On February 14, 2007, Boston College Police<sup>1</sup> received a phone call from a resident director of Gonzaga Hall, who said that two students wanted to report a gun in a dorm room. Tr. 1/11; R.A. 63. The two students came to the Boston College Police station and claimed that a student named Daniel Carr had been bullying unidentified people and "bragging about having a knife." Tr. 1/16; R.A. 63. In addition, the students reported that a third, unidentified student said he saw what he thought was possibly a toy gun.

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<sup>1</sup> Because the issue was not raised below, there was no evidence whether the three officers were special state police officers, appointed pursuant to Gen. Laws ch. 22C, § 63, or were regular police officers.

Tr. 2/8, 1/16-17; R.A. 63. The police officers never learned the identity of this third student, nor when the student had allegedly seen the gun. Tr. 1/17; R.A. 63.

Sergeant John Derick, the supervising officer, decided to go to Mr. Carr's room at 114 Gonzaga Hall, accompanied by two other officers, Officer Sean Daley and Sergeant Tony Cadogan. Tr. 1/22-23; R.A. 64. Sgt. Derick's decision was based solely on the anonymous tip about the gun. Tr. 1/114; R.A. 64. The plan developed by the police officers was that the three officers were going to see if they could get the gun that might be in the room. Tr. 2/22.

## **II. The initial entry into the dorm room**

Accompanied by residential staff, the three officers went to 114 Gonzaga Hall and knocked and announced their presence as Boston College police. Tr. 1/23; R.A. 64. They each were in uniform, with their weapons visible. Tr. 1/54; R.A. 64.

When the door opened, there were three males standing inside the dorm room. Tr. 1/24; R.A. 64. Sgt. Derick entered the room; the other two officers stood just outside the doorway and completely blocked

the only exit. R.A. 64, 70. Sgt. Derick immediately demanded the occupants' identities, and ordered the individual who was not a resident to leave the room. Tr. 1/24, 2/25; R.A. 64, 70. The other two men identified themselves as Daniel Carr and John Sherman. Tr. 1/25.

After the non-resident left the room, Sgt. Derick informed Mr. Carr and Mr. Sherman that the police officers were there "on a report of a gun or weapon in the room." Tr. 1/28; R.A. 64. After Mr. Carr responded that he had previously possessed a fake gun, Sgt. Derick read him his *Miranda* rights. Tr. 1/28, 1/61; R.A. 64. Sgt. Derick then asked Mr. Carr where the gun was, and he responded, "I think it's under the bed." Tr. 1/29; R.A. 64. Sgt. Derick reached under the bed and retrieved a replica gun. Tr. 1/29; R.A. 64.<sup>2</sup> At this point, the other two officers entered the room. R.A. 65.

Sgt. Derick asked Mr. Carr if there were any more

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<sup>2</sup> Sgt. Derick testified that his first impression of the gun was that "it did not look real." Tr. 1/30. When he picked it up, he observed that the gun was lightweight and appeared to be made of plastic. Tr. 1/60-61. No pellets or other projectiles of the kind that he thought might be used in the gun were found near it or in the subsequent search of the room. Tr. 1/82.

weapons. *Tr.* 1/64-65; R.A. 65. Mr. Sherman produced a folding, buck-type weapon from his waistband, and the police recovered a smaller knife from a drawer as well as a kubotan, a martial arts weapon. *Tr.* 1/65; R.A. 65. There was no evidence that possession of any of these items constituted an arrestable offense. R.A. 65.

### III. The search of the room

Sgt. Derick told the defendants that he would like to search the room. *Tr.* 1/32; R.A. 65. According to Sgt. Cadogan, Sgt. Derick told the students "we need you to fill out a consent form." *Tr.* 2/30. The hearing testimony as to whether the defendants verbally consented to a search was "discrepant,"<sup>4</sup> according to the motion judge. R.A. 69.

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<sup>4</sup> Sgt. Derick testified, "I told them that I would like to search the room, and I would like to fill out a consent to search form." *Tr.* 1/32. Sgt. Derick did not specify how the defendants indicated that they assented to the search. *Tr.* 1/33; R.A. 69-70. Sgt. Cadogan equivocated: at first he indicated there was no verbal response to Sgt. Derick's statement that he wanted to search the room; then he testified that Mr. Sherman expressed consent verbally but that Mr. Carr acquiesced by filling out the form; then he retreated from this position. *Tr.* 2/62-63, 67-69; R.A. 69. Officer Daley offered yet a third account: he testified that he asked for Mr. Sherman's consent to search and that Sgt. Derick asked for Mr. Carr's consent to search, and that both defendants said yes.

Sgt. Cadogan gave the defendants a form: the top part read "Miranda Waiver," and the bottom read "Consent to Search." R.A. 65, 95-96.<sup>5</sup> The forms indicate that Mr. Carr signed the *Miranda* waiver at 12:38 a.m. and Mr. Sherman signed the *Miranda* waiver at 12:45 a.m. R.A. 65, 95-96. While the names of each defendant are filled into the blanks in the middle of the language on each consent-to-search form, no signature appears on the bottom part of either form. *Id.*

The officers proceeded to search the room and found, *inter alia*, quantities of cocaine, marijuana, and psilocybin; a knife; prescription drugs; and assorted drug paraphernalia. *Tr.* 1/39-44; R.A. 65-66. During the search, the officers opened a footlocker, which contained a locked box. *Tr.* 1/78-79; R.A. 66. According to Sgt. Derick, Officer Daley requested permission to open the locked box. *Tr.* 1/79.<sup>6</sup> Officer Derick testified that in response to this request, Mr.

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*Tr.* 2/78-79; R.A. 69-70.

<sup>5</sup> The *Miranda* form failed to advise the defendants that if they could not afford an attorney, one would be provided to them at government expense.

<sup>6</sup> Officer Daley's testimony about the search of the lockbox differed from the two sergeants'. Officer Daley testified he asked Mr. Carr if he could look inside, and Mr. Carr answered that yes, he could. *Tr.* 2/90.

Carr "said that it was locked and he didn't know where the keys were." *Tr.* 1/79; R.A. 66. Sgt. Derick then noticed a set of keys in a desk drawer and used them to open the box. *Tr.* 1/79; R.A. 66. There he found a quantity of marijuana. *Tr.* 1/79-80; R.A. 66.

**Statement Of The Issues With Respect To Which The  
Defendants Seek Further Appellate Review**

- I. Did the Appeals Court err in permitting private college police officers to exercise law enforcement duties by entering a dormitory room without permission, detaining defendants, and searching their room without complying with the Fourth Amendment and Article 14, because it found that they were exercising powers granted the college by its residency conditions?
  
- II. Did the Appeals Court err in reversing the motion judge's well-reasoned and fully supported conclusion that the defendants did not voluntarily consent to the search of their dorm room?
  
- III. Did the Appeals Court err in reversing the motion judge's decision on the ground that the Residency Conditions legitimized the campus police's warrantless entry into the defendants' dorm room, where the Commonwealth had failed to present that argument below?

## ARGUMENT

I. **This Court Should Grant Further Appellate Review To Clarify the Constitutional Limits to which Campus Police Officers Employed by Private Colleges and Universities Are Subject.**

A. **The constitutional parameters of campus police searches of private college student dormitories is an issue of great public importance.**

In *Commonwealth v. Leone*, 386 Mass. 329, 334-35 (1982), the Court held that there are lines to be drawn when special police officers work for private employers. The Appeals Court in this case eviscerated any constitutional protection for students living in private college dormitories, so long as some residency condition regarding the safety and health of dormitory residents is at stake.

In *Commonwealth v. Neilson*, 423 Mass. 75, 78 (1996), the Court recognized that Fourth Amendment protections apply to campus police officers employed by public colleges. In *Leone*, the Court held that the Fourth Amendment applies to special police officers who are employed by private companies, but that the reasonableness of a search must depend in part on analysis of the private employer's needs.

Applying this caselaw to private colleges and universities is a particularly pressing concern in

Massachusetts, with nearly 250,000 students in private institutions of higher education<sup>7</sup>, and is of consequence to every student living on campus. "[A] student's dormitory room is his house and home for all practical purposes, and he has the same interest in the privacy of his room as any adult has in the privacy of his home." LaFave, *Search and Seizure*, at § 10.11(d).

**B. The Appeals Court's decision unnecessarily expands private police power by allowing college police officers to enter a dormitory room without permission or a warrant to investigate a report of a gun, diminishing constitutional protections for private college students living in dormitories.**

Under Neilson's straightforward analysis, dorm rooms have the same constitutional protections against law enforcement intrusion as any other residences. *Id.* at 77.<sup>8</sup> While college officials may be able to

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[http://www.masscolleges.org/index.php?option=com\\_content&task=view&id=94&Itemid=191](http://www.masscolleges.org/index.php?option=com_content&task=view&id=94&Itemid=191)

<sup>8</sup> Other courts and commentators agree. See, e.g., *People v. Superior Court of Santa Clara County*, 143 Cal. App. 4th 1183, 1200-04 (Ct. App. 2006) (collecting cases); *State v. Ellis*, 2006-Ohio-1588, 2006 WL 827376, \*4 (Ct. App. 2006); *State v. Houvener*, 145 Wash. App. 408, 416, 186 P.3d 370 (Ct. App. 2008); 5 W.R. LaFave, *Search and Seizure* § 10.11(d) (4th ed. 2004) ("it is abundantly clear that there is no basis consistent with established Fourth Amendment doctrine upon which to uphold these [dorm] searches when made

enter under certain circumstances, entry by the police for law enforcement purposes -- whether state police or private campus police -- requires probable cause and a warrant, or an exception to the warrant requirement.

In this case, the Appeals Court applied an ill-defined and easily manipulated standard.<sup>9</sup> Under the Appeals Court's analysis, entry by campus police officers is acceptable because, for legal purposes, those officers are not really police. The inquiry evidently involves considering whether the police are acting "under the control" of the college; whether the police actions are "unquestionably related" to the college's private purpose of "provid[ing] a safe

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upon less than a full showing of probable cause"); Note, "The Fourth Amendment and Dormitory Searches," 33 J.C. & U.L. 597 (2007).

<sup>9</sup> In justifying this decision, the Appeals Court misapplied *Leone*. There, an officer was privately employed by General Electric and tasked with inspecting company vehicles leaving the factory; in one such inspection, he found a stolen firearm. The Court noted that such searches may be permissible if done "on behalf of the private employer, in a manner that is reasonable and necessary for protection of the employer's property." *Id.* at 336. *Leone's* treatment of loss-prevention inspections of a factory is singularly inapposite to intrusions into living quarters, the core concern of Article 14 and the Fourth Amendment. *Leone* does not remotely require the result rendered in this case.

environment for its residents"; and whether officers "acted reasonably" in interacting with the students (i.e., whether their methods were "offensive to the individual dignity of the students").

Here, the Appeals Court applied this new analysis to hold that armed, uniformed campus police officers were merely performing "private" duties when they entered the defendants' dorm room without consent, blocked the exit, interrogated the occupants, ejected a visitor, and - in a remarkable gesture as private actors - gave *Miranda* warnings. This conclusion represents an unprecedented and unlawful expansion of campus police powers that must be redressed.

To be sure, the police were acting with a mixed purpose -checking to see if Carr had a real gun was a legitimate health and safety concern, but it is also a law enforcement concern, since possession of a firearm is an arrestable offense, and the manner in which the police approached and entered the room was certainly consistent with a law enforcement purpose. Under the Appeals Court's analysis, it would seem that any entry by private college police into a dorm room to search for weapons, drugs, or contraband would be legitimate because it could be construed as an entry to enforce a

residency condition relating to the health and safety of the dormitory occupants.

While perhaps appropriate to treat campus police officers as non-state actors in some contexts, it is not appropriate when they are using law enforcement techniques to investigate possible criminal activity.

**C. The Appeals Court's Decision Is Pragmatically Unworkable and Constitutionally Unsound.**

The Appeals Court's approach presumes that campus police are always acting as either only private employees or only state actors, when the reality of the role of police in an academic institution is considerably more complex. Campus police are of course "real" police, with "real" police powers, albeit ones that must be exercised in a particular environment. The Appeals Court's approach is unfortunately predicated on a complete fiction, and officers certainly will struggle in guessing how their actions will be perceived by the courts.<sup>10</sup>

The Appeals Court's approach allows colleges to eviscerate students' constitutional rights. Under this ruling, a college could assert that it has the

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<sup>10</sup> The decision has generated some controversy. Exhibit A is a letter to the Editor in *Massachusetts Lawyers Weekly* from the Chief of the Bridgewater State College Police Department.

purpose for its dormitories of providing a safe environment for learning entirely free of criminal activity, and then direct campus police to investigate aggressively any report of criminal activity in the dorms that college officials forward to them. By this simple expedient, any resulting police action -- including extensive searches by armed and uniformed campus police in response to uncorroborated, anonymous tips made to college authorities -- could be considered to be "under the control" of the college and "related" to the college's private purposes. Officers would be able to search and seize evidence of crimes, and build prosecutable cases, in the guise of their duties as college employees to maintain a safe living environment for students. Further appellate review is essential, both to reverse the unjust result in the defendants' case as well as to protect the rights of the thousands of college students in the Commonwealth.

The Appeals Court has, until *Carr*, had no difficulty recognizing that special, private police officers are subject to the same constitutional obligations as ordinary state police officers. *Young v. Boston University*, 64 Mass. App. Ct. 586, 588-89

(2005) (requiring probable cause for arrest to enforce 209A restraining order); *Commonwealth v. Jean-Jacques*, 74 Mass. App. Ct. 1117 (June 12, 2009) (unreported) (finding reasonable suspicion for stop of three persons who had been asked to leave campus but remained, due to their furtive movements, agitation, presence late at night and additional information that some had outstanding charges). As a panel of the same Court noted six months before the decision in *Carr*, "The fact that an officer has a private employer does not mean that constitutional requirements are inapplicable in the context of a search and seizure." *Id.*

Of course campus police must often tread a delicate line between safeguarding an educational community and investigating possible violations of, and enforcing, criminal law. Their authority may need to be extended, for example "to the environs surrounding the campus when the 'special vigilance of an officer might be required to keep the peace and preserve order amongst those frequenting the [university and] those carrying persons to and from it.'" *Young, id.* at 588, citing *Commonwealth v. Hastings*, 50 Mass. 259, 9 Met. 259, 262 (1845). But in

these much less constitutionally significant intrusions than a residential search, such as traffic stops and brief pedestrian encounters in places open to the public, the Appeals Court has routinely applied the same basic constitutional requirements to state police.

**II. This Court Should Accept Further Appellate Review To Restore The Motion Judge's Well-Reasoned And Fully Supported Conclusion That The Defendants Did Not Voluntarily Consent To The Search Of Their Dorm Room.**

Further appellate review also is warranted to redress the Appeals Court's unjustified reversal of the motion judge's ruling that the Commonwealth failed to meet its burden to establish that the defendants voluntarily consented to the police search of their dorm room. Nothing in the motion judge's findings was clearly erroneous, and the Appeals Court should not have substituted its own judgment. As explained in the defendants' brief below, the motion judge correctly found that the Commonwealth's evidence at the suppression hearing as to whether the defendants manifested consent was "discrepant": each of the three officers gave a different account of whether the defendants verbally acquiesced or signed the correct form. R.A. 69. The Commonwealth must provide "more

than an ambiguous set of facts that leaves [the court] guessing about the meaning of this interaction and, ultimately, the occupant's words or actions." *Commonwealth v. Rogers*, 444 Mass. 234, 238 (2005).

Furthermore, the motion judge correctly concluded that any apparent consent was vitiated by the officers' show of authority. R.A. 70. This show of authority - intrusion into the room with weapons on display, obstruction of the doorway, commands to the room's occupants - rendered any manifested consent involuntary. The motion judge properly considered whether or not the defendants were advised of their right to refuse to consent (no); whether or not the defendants were in custody (yes, as evidenced by the Miranda warnings and blocked door); whether the defendants' consent was obtained by submission to authority or fear (yes, as demonstrated by the show of authority, *supra*); and the defendants' personal characteristics (teenagers). See *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973); *Commonwealth v. Heath*, 12 Mass. App. Ct. 677, 682 (1981).

**III. This Court Should Accept Further Appellate Review To Preclude The Appeals Court From Ruling On A Ground That The Commonwealth Failed To Present Below.**

The Appeals Court's reversal was substantially premised on the idea that the campus police were entitled to enter the defendants' dorm room in their private capacity pursuant to the Residency Conditions. The Appeals Court should not have reversed the motion judge based on an argument that the Commonwealth did not present below.

In *Commonwealth v. Bettencourt*, 447 Mass. 631, 633 (2006), the defendant was charged with cocaine trafficking and successfully moved to suppress evidence. The single justice allowed the Commonwealth to file an interlocutory appeal, in which it contended for the first time that the search was justified under the community caretaking exception; the Appeals Court reversed on that ground. On further appellate review, this Court affirmed the order allowing the motion to suppress, holding that it was improper for the Appeals Court to have considered community caretaking:

It has long been our rule that we need not consider an argument that urges reversal of a trial court's ruling when that argument is raised for the first time on appeal. . . . Although we occasionally exercise our discretion and consider an issue first raised on appeal, we do so where "the questions presented are of some public importance" **and the outcome of the case is not changed by our consideration of them.**

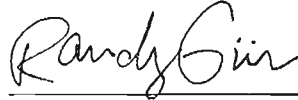
*Id.* (internal citations omitted) (emphasis added).

As in *Bettencourt*, here the outcome of the case undoubtedly was changed by consideration of the Commonwealth's belated argument that the entry was authorized under the Residency Conditions. "Trial judges cannot be expected to rule, and indeed should not, on theories not presented to them, and defendants cannot respond to arguments not made at the trial level." *Id.* at 633. A sweeping change to search and seizure law that will affect thousands of students in the Commonwealth should not be rendered on a theory never presented below.

**CONCLUSION**

For the foregoing reasons, the defendants urge this Court to grant further appellate review.

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### CERTIFICATION OF COUNSEL

Undersigned counsel hereby certifies that this pleading complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to briefs); Mass. R. A. P. 20 (form of briefs, appendices, and other papers), and 27.1(b) (form of applications for leave to obtain further appellate review).



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**H**

Appeals Court of Massachusetts,  
 Middlesex.  
 COMMONWEALTH  
 v.  
 Daniel CARR (and a companion case <sup>FN1</sup>).

FN1. Commonwealth vs. John Sherman.

**No. 08-P-1985.**


Argued Nov. 3, 2009.  
 Decided Dec. 23, 2009.

**Background:** Defendants, who had been charged with trafficking in cocaine, possession of psilocybin with intent to distribute, and possession of marijuana with intent to distribute, filed a motion to suppress evidence. The Superior Court Department, Middlesex County, Linda E. Giles and John M. Greaney, JJ., granted the motion. The Commonwealth filed an interlocutory appeal.


**Holdings:** The Appeals Court, Grasso, J., held that: (1) college police officers' warrantless entry into students' dormitory room did not violate state or federal constitutional requirements, and (2) evidence supported finding that defendant voluntarily consented to search of his dormitory room.

Reversed.

West Headnotes

**[1] Criminal Law 110**  **1134.27**

110 Criminal Law  
 110XXIV Review  
 110XXIV(L) Scope of Review in General  
 110XXIV(L)4 Scope of Inquiry  
 110k1134.27 k. In general. Most Cited Cases

**Criminal Law 110**  **1158.1**

110 Criminal Law  
 110XXIV Review  
 110XXIV(O) Questions of Fact and Findings  
 110k1158.1 k. In general. Most Cited Cases  
 The Appeals Court accepts the judge's subsidiary findings of fact absent clear error but conducts an independent review of her ultimate findings and conclusions of law.

**[2] Criminal Law 110**  **1134.29**

110 Criminal Law  
 110XXIV Review  
 110XXIV(L) Scope of Review in General  
 110XXIV(L)4 Scope of Inquiry  
 110k1134.29 k. Constitutional issues in general. Most Cited Cases  
 The Appeals Court's duty is to make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found.

**[3] Colleges and Universities 81**  **9.30(3)**

81 Colleges and Universities  
 81k9 Students  
 81k9.30 Regulation of Conduct in General  
 81k9.30(3) k. Dormitories or other accommodations. Most Cited Cases  
 College police officers' warrantless entry into students' dormitory room did not violate state or federal constitutional requirements; the entry was not made in furtherance of a criminal investigation, rather, the entry was to address a violation of the college's policy that prohibited weapons in the dormitory and authorized confiscation of such items in plain view, the police acted on reasonable information provided by two students, and they knocked on the door, awaited a response, and then entered. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

**[4] Colleges and Universities 81**  **9.30(3)**

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## 31 Colleges and Universities

## 81k9 Students

## 81k9.30 Regulation of Conduct in General

## 81k9.30(3) k. Dormitories or other accommodations. Most Cited Cases

Evidence supported finding that defendant voluntarily consented to search of his dormitory room; college police officers' initial entry into dormitory room was lawful, and thus did not taint defendant's later consent to search, officers did not display their weapons or employ force, officers requested consent to conduct a search after confiscating weapons that were in room in violation of college policy, and officer allowed defendant to call his father and speak with him when deciding whether to consent to search. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

## [5] Searches and Seizures 349 ↪194

## 349 Searches and Seizures

## 349VI Judicial Review or Determination

## 349k192 Presumptions and Burden of Proof

## 349k194 k. Consent, and validity thereof.

## Most Cited Cases

The Commonwealth bears the burden of proving that consent to search was given freely and voluntarily. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

## [6] Searches and Seizures 349 ↪180

## 349 Searches and Seizures

## 349V Waiver and Consent

## 349k179 Validity of Consent

## 349k180 k. Voluntary nature in general.

## Most Cited Cases

Whether consent to search is voluntary depends on the nature of the interaction between the police and the occupant. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

## [7] Searches and Seizures 349 ↪183

## 349 Searches and Seizures

## 349V Waiver and Consent

## 349k179 Validity of Consent

## 349k183 k. Knowledge of rights; warnings and advice. Most Cited Cases

The failure of the police to advise the defendants orally that they could refuse consent to search does not vitiate the consent given. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

**\*\*848** Casey E. Silvia, Assistant District Attorney, for the Commonwealth.

Charles W. Rankin, Boston (Randy Gioia with him) for the defendants.

Present: GRASSO, BERRY, & MEADE, JJ.

GRASSO, J.

**\*41** We consider whether a warrantless entry of a dormitory room and seizure of weapons by Boston College campus police pursuant to the college's "Conditions of Residency" **\*42** requires suppression of drugs discovered during a subsequent search conducted with the consent of the room's occupants, Daniel Carr and John Sherman. A grand jury returned indictments against them for trafficking in cocaine, possession of psilocybin with intent to distribute, and possession of marijuana with intent to distribute.

After an evidentiary hearing, a judge of the Superior Court allowed the defendants' motions to suppress the drugs and other evidence seized. The judge concluded that the initial entry into the defendants' room was unlawful and that the subsequent search was not undertaken with the defendants' free and voluntary consent. A single justice of the Supreme Judicial Court allowed the Commonwealth's application for an interlocutory appeal. For the reasons that follow, we reverse the orders of suppression.

1. *The motion to suppress.* We summarize the facts found by the motion judge. Where relevant, we supplement the judge's factual findings "with untested testimony from the suppression hearing,

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mindful that assessment of witness credibility is the province of the motion judge." *Commonwealth v. Murphy*, 63 Mass.App.Ct. 11, 12, 822 N.E.2d 320 (2005) (citation omitted).

On February 14, 2007, at around midnight, April Wynn, a resident director at Boston College with oversight responsibility for Gonzaga Hall, contacted the campus police.<sup>FN2</sup> Wynn spoke with Sergeant John Derick, a twenty-year member of the campus police department. Wynn told Derick that two students who lived in Gonzaga Hall wanted to report a weapon inside a dormitory room.

FN2. The parties do not dispute that pursuant to G.L. c. 22C, § 63, the Boston College campus police are special State police officers and "have the same power to make arrests as regular police officers for any criminal offense committed in or upon lands or structures owned, used or occupied by [the] college."

Because the students feared that their identity would become known, Wynn accompanied them from Gonzaga Hall to the campus police office. The students told Derick that Daniel Carr had been bullying students and bragging about beating people up and having a knife. Both students \*\*849 had seen Carr waving a knife around. They also told Derick that a third student, whom they did not want to identify, had seen the butt of a gun, possibly fake, inside Carr's dormitory room. Derick confirmed that Carr lived in room 114 Gonzaga Hall.

\*43 Pursuant to Boston College's "Conditions for Residency" all weapons of any kind, whether licensed or unlicensed and whether real, counterfeit, or toy, are prohibited and subject to confiscation.<sup>FN3</sup> All students who reside in a dormitory must read these rules and signify their assent to abide by them in order to reside in a dormitory.<sup>FN4</sup>

FN3. The pertinent section of the Conditions for Residency 2007-2008 provides:

#### "WEAPONS, FIREARMS, AND EXPLOSIVES

"Civil statutes prohibit the possession of firearms, fireworks or any other device of an explosive nature in the residence halls. University policy strictly prohibits the possession on University premises of any handgun, rifle, shotgun, bow and arrow, sling shot, BB gun, paintball gun, air rifle or other device of a physically harmful nature or which resemble actual items. Bomb threats are also a serious violation of policy as well as state and federal statutes.

"Students are advised that Massachusetts General Statutes, Chapter 269, Section 10, 'Dangerous Weapons' also prohibits knives, swords, nunchucks, and the like. Knives of any type, guns (firearms), real, counterfeit, or toy, or any weapon or object that could be used as a weapon is also prohibited and subject to confiscation by University authorities. All violations will be subject to University disciplinary action and will be referred to law enforcement authorities."

FN4. Boston College's Conditions for Residency 2007-2008 also provides:

#### "RIGHT OF ENTRY

"The University reserves the right to enter resident student rooms and conduct a plain view search for reasons of health, maintenance, upholding community standards (including safety and discipline) or inspections. Regular inspections will be conducted by staff in all areas. Except in cases of an emergency, a complete search of the contents of a student's room will only be made with: (a) his/her consent; (b) with a University Search Warrant issued by the

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Vice President for Student Affairs or his/her designee; or (c) with a duly authorized search warrant from a local court.”

After speaking with the students, Derick met in Wynn's office with Boston College police Sergeant Anthony Cadogan, Officer Sean Daley, and Austin Ash, another resident director. The three police officers proceeded to 114 Gonzaga Hall together with the two resident directors. There, Derick knocked and identified himself as a campus police officer.

A male voice on the other side of the door replied, “Hold on. I've got to get my pants on.” After thirty seconds elapsed with no response, Derick knocked again. The door opened a few seconds \*44 later, and Derick entered the room. Cadogan and Daley remained outside with Wynn and Ash. The officers were dressed in full uniform with holstered firearms.

Inside, Derick encountered three individuals. At Derick's request, Carr and Sherman identified themselves and indicated that they lived there. The third male, Zachary Taylor, said that he did not live there, and Derick asked him to leave. The room contained a set of bunk beds, two desks, two closets, a small futon type chair, and a large footlocker in the middle of the room.

Derick explained to Carr and Sherman that he was responding to a report of a gun in the room. Carr told Derick that he previously had a toy gun but had thrown it out. Derick did not believe this and read Carr his Miranda rights. Carr acknowledged that he understood them. Derick asked him where the gun was, and Carr replied by pointing to the bed and saying, “I think it's under the bed.”

\*\*850 Derick reached under the bed and retrieved a light, hard plastic replica gun that closely resembled a .45 caliber handgun with a clip. The gun was missing a red tip that is characteristic of replicas, and Derick believed that it was capable of shooting some type of projectile.

After Derick discovered the gun, Cadogan and Daley entered the room. Derick asked Carr if there were any more weapons, and Sherman produced a folding buck knife from his waistband. In short order, the police also confiscated a smaller folding knife and a kubotan, a spiked martial arts weapon. Although the items violated the college's “Conditions of Residency,” none appeared to be unlawful.

Derrick told the defendants that he would like to do a search of the room because, based upon his experience, he believed he would find more. Cadogan handed each a form, the top part of which is captioned “Miranda Waiver” and the bottom, “Consent to Search.” Before signing, Carr asked if he could make a telephone call. Upon being told that he could, he made a call to his father from a nearby desk telephone. Carr was overheard telling his father, “It's no big deal. It's a fake gun. I don't know why they're here.” Carr then handed the telephone to Derick. Carr's father asked Derick what was going on and why they were searching the room. Derick explained that they had found a weapon, \*45 and that was prohibited on campus. Carr's father kept repeating to Derick, “It's just a fake gun ... a toy gun. What's the big deal?”

Both defendants consented to a search of their room and inserted their names on the appropriate lines in the top and bottom portions of “Waiver” and “Consent” forms.<sup>FN5</sup> In the “Miranda Waiver” part of the form, the defendants inserted their names and responded to questions signifying that they had the ability to speak and understand English, that they had not consumed drugs or alcohol, and that no threats or promises had been made to them. Each signed the “Miranda Waiver.” In the “Consent to Search” portion, each defendant entered his name in two places, the latter of which stated that he was “signing the form voluntarily, without threats or promises of any kind.”<sup>FN6</sup> In the course of the search that followed, Daley inadvertently discovered a bag of psilocybin\*\*851 mushrooms underneath a backpack on the floor and a baggie filled

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with marijuana underneath the futon cushion. Twelve small bags of a white powdery substance believed to be cocaine \*46 fell out of a winter jacket, and two more baggies of cocaine were located under the bunkbeds. A pipe with marijuana residue was found in a coat hanging on the back of the door. After discovering these items, the police arrested the defendants and handcuffed them.

FN5. The judge declined to decide whether the defendants gave their verbal consent to search. We consider this question to have been conceded prior to the motion hearing. In his affidavit in support of his motion to suppress, the defendant Carr acknowledged that after speaking with his father on the telephone he “gave the police permission to search” the room. At issue was whether his consent was voluntary.

For his part, the defendant Sherman did not assert in his affidavit or otherwise that he objected to the police search notwithstanding Carr’s consent. See *Georgia v. Randolph*, 547 U.S. 103, 121, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006); *Commonwealth v. Ocasio*, 71 Mass.App.Ct. 304, 308-309, 882 N.E.2d 341 (2008).

FN6. The completed “Consent to Search” form reads:

“I (defendant’s name) have been informed by *Sgt. Cadogan* of the Boston College Police that I may have the Constitutional right to refuse to allow a search be made of my living quarters, property, car, and/or person without a search warrant. I understand this right and I hereby waive the necessity of a search warrant and do authorize \_\_\_\_\_ of the Boston College Police to conduct a search of my living quarters, property, car and/or person without a search warrant and to take possession

of any material which is connected in any way with the investigation they are making.

“I [defendant’s name] am signing this form voluntarily without threats or promises of any kind.”

There is no dispute that the police did *not* orally advise the defendants that they had a constitutional right to refuse a search.

Inside the footlocker in the middle of the floor, the officers found a locked box that emanated a pungent odor of marijuana. Carr stated that he did not know where the key was, but Derick observed a set of keys nearby, and one opened the box.<sup>FN7</sup> Inside, Derrick found individually packaged baggies of marijuana, ten marijuana cigarettes, rolling papers, seeds, and the defendants’ passports. In Sherman’s desk, the police located a piece of paper containing names, amounts of money, and marijuana residue.

FN7. While disclaiming knowledge of the key, Carr did not object to the police opening the box.

[1][2] 2. *Discussion*. “[W]e accept the judge’s subsidiary findings of fact absent clear error ‘but conduct an independent review of [her] ultimate findings and conclusions of law.’ ” <sup>FN8</sup> *Commonwealth v. Costa*, 65 Mass.App.Ct. 227, 229-230, 838 N.E.2d 592 (2005), quoting from *Commonwealth v. Scott*, 440 Mass. 642, 646, 801 N.E.2d 233 (2004). “[O]ur duty is to make an independent determination of the correctness of the judge’s application of constitutional principles to the facts as found.” *Commonwealth v. Scott*, *supra*, quoting from *Commonwealth v. Mercado*, 422 Mass. 367, 369, 663 N.E.2d 243 (1996).

FN8. There is no record support for the judge’s finding that Derick’s request, “I would like to search the room,” sounded more like an order than a request. Nothing

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in direct or cross-examination addresses the tone in which Derick made his request or supports a finding that the request amounted to a command.

The judge concluded that because Derick entered the room immediately, without awaiting invitation, the initial entry was an unlawful intrusion under the Federal and State Constitutions, and that any consent, whether to enter or search, was not voluntarily given.<sup>FN9</sup> We disagree. We conclude that the initial entry into the defendants' room to investigate a credible report of a weapon in the room was authorized under the college's "Conditions of Residency" and did not require a search warrant or consent. We <sup>47</sup> also conclude that the subsequent permission to search was not the fruit of a prior unlawful entry and was freely and voluntarily given.

FN9. We agree with the judge that at the time of entry the police lacked probable cause to believe that evidence of criminal activity would be found in the room or that exigent circumstances justified dispensing with the warrant requirement in such event.

[3] (a) *The warrantless entry.* It cannot be gainsaid that Boston College is a private actor not subject to the constraints of the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. See *Commonwealth v. Considine*, 448 Mass. 295, 299-300, 860 N.E.2d 673 (2007) (search of students' rooms by private school officials is not State action for Fourth Amendment or art. 14 purposes). See also *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); *Commonwealth v. Richmond*, 379 Mass. 557, 561-562, 399 N.E.2d 1069 (1980) (Fourth Amendment and exclusionary rule apply only to State action). Nor is there any question that under the college's "Conditions of Residency," Wynn and Ash possessed <sup>852</sup> the right to enter the defendants' room and make a "plain view search" <sup>FN10</sup> for prohibited items without implicating the Fourth Amendment or art. 14.<sup>FN11</sup>

FN10. We construe the term "plain view search" in the "Conditions of Residency" as encompassing and permitting college officials to make both plain view observations of prohibited items and plain view seizures of those prohibited items that are in plain view. See *Commonwealth v. Ciaramitaro*, 51 Mass.App.Ct. 638, 644-645 & n. 11, 747 N.E.2d 1253 (2001).

FN11. Even in a public college, the search of students' dormitory rooms by college officials is proper when the student has consented to reasonable searches to enforce the college's health and safety regulations by signing a residence contract. *Commonwealth v. Neilson*, 423 Mass. 75, 79, 666 N.E.2d 984 (1996), discussed *infra*.

Not so easily resolved is whether enlisting the assistance of the campus police to accomplish what Wynn or Ash clearly could have accomplished on their own transforms the encounter into a search and seizure that violates the requirements of the Fourth Amendment and art. 14. Specially commissioned officers formally affiliated with the sovereign and possessing authority beyond that of an ordinary citizen such as arrest and use of weapons are treated as State agents subject to constitutional constraints as to search and seizure. See *Commonwealth v. Leone*, 386 Mass. 329, 334-335, 435 N.E.2d 1036 (1982). However, the constitutional constraints upon such special police officers performing investigatory duties "does not mean that the bounds of permissible conduct are the same for the privately employed special officer as they would be for an ordinary police officer." *Id.* at 335, 435 N.E.2d 1036. The private function adds a <sup>48</sup> new aspect to his activities that is relevant to proper application of constitutional protections against search and seizure. *Ibid.* "The action he takes on behalf of his employer may be a lawful and necessary means of protecting the employer's property, although it would be impermissible if taken on behalf of the State in pursuit of evidence. When the

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guard's conduct is justified by his legitimate private duties, it should not be treated as lawless, or 'unreasonable' search and seizure." *Id.* at 335-336, 435 N.E.2d 1036 (internal citations omitted).

Applying the principles set forth in *Leone* to the circumstances here, we hold that while the Fourth Amendment and art. 14 apply to the conduct of Boston College's campus police, in this circumstance the officers' private function affects the constitutionality of their conduct and renders it reasonable. See *Commonwealth v. Leone*, 386 Mass. at 334-338, 435 N.E.2d 1036 (decided solely on Fourth Amendment grounds). See also *Commonwealth v. Considine*, 448 Mass. at 301, nn. 13-14, 860 N.E.2d 673 (2007) (suggesting in dictum that any search or seizure of contraband by State police officer acting on invitation of private school officials is permissible). The initial entry into the defendants' room and the discovery and seizure of the facsimile handgun and other weapons were actions reasonably undertaken by the police on behalf of the legitimate interests of their employer Boston College, a private institution and not a State actor. See *Commonwealth v. Leone*, 386 Mass. at 335-336, 435 N.E.2d 1036. In consequence, their entry into the room without a search warrant does not offend Federal or State constitutional requirements.

The entry was not in furtherance of a criminal investigative function, but to address a violation of Boston College's policy that prohibited weapons in the dormitory (whether lawful or unlawful, real or counterfeit) and authorized confiscation of such \*\*853 items found in plain view. The police acted on reliable information from two identified students that Carr, who resided in room 114 Gonzaga Hall, possessed a knife. Adding to the concern was the report that another student had seen a gun or the butt of a gun inside Carr's room. Although the report of the gun, being anonymous, lacked the reliability of that regarding the knife, the fact that the police harbored concern of an even more serious infraction is immaterial. See *Commonwealth v. Blev-*

*ines*, 438 Mass. 604, 608, 782 N.E.2d 491 (2003) (officer's subjective purpose not relevant when search permissible on objective standard).

\*49 Measured against the factors set forth in *Leone* for assessing the constitutional propriety of a special police officer's actions, the actions of the Boston College campus police pass constitutional muster. See *Leone, supra* at 337-338, 435 N.E.2d 1036. First, at the time they went to room 114, the police were acting under the control of their private employer, Boston College. The resident director enlisted police assistance, not vice versa. <sup>FN12</sup> Second, the officers' actions were unquestionably related to the college's private purposes of ascertaining that weapons, whether real or counterfeit, were not present in the dormitories. The investigation was a legitimate means of protecting the college's property and fulfilling its obligation to provide a safe environment for its residents. Third, the officers acted reasonably. They went to the room, knocked on the door, awaited response from the occupants, entered, arranged to speak only with the residents, asked them whether they had such weapons, and confiscated the weapons that the defendants acknowledged having. We discern nothing offensive to the individual dignity of the students in the manner and methods employed by the police to locate and seize the prohibited items. When Carr acknowledged that the gun was under the bed, the police were not required to let him retrieve it rather than retrieving it themselves. See *Commonwealth v. Guthrie G.*, 66 Mass.App.Ct. 414, 418-419, 848 N.E.2d 787 (2006). See also *Commonwealth v. Voisine*, 414 Mass. 772, 783, 610 N.E.2d 926 (1993); *Commonwealth v. Hill*, 57 Mass.App.Ct. 240, 243-245, 782 N.E.2d 35 (2003).

FN12. Indeed, it would make little sense to require private college officials seeking to enforce the college's policies against weapons to do so personally rather than utilizing the expertise of the campus police, the college's employees with the most experience in dealing with objects that

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might prove dangerous.

Nothing in *Commonwealth v. Neilson*, 423 Mass. 75, 666 N.E.2d 984 (1996), is to the contrary. There, officials of Fitchburg State College, a public actor, entered a dormitory room to investigate the prohibited keeping of a pet. The college had expressly reserved the right to inspect dormitory rooms. In the course of investigation, the officials inadvertently discovered marijuana being cultivated. Rather than seizing the marijuana and turning it over to the police, or providing information to the police with which a search warrant could be obtained, the officials invited the police to enter. The court in *Neilson* concluded that the constitutional violation \*50 occurred not when the college officials entered to enforce the college's health and safety regulations, but when the police entered the room, searched, and seized evidence without a search warrant, consent, or exigent circumstances. See *id.* at 79, 666 N.E.2d 984. As observed in *Neilson*, the defendant's consent was given not to the police, but to the college officials, who "had no authority to consent to or join in a police search for evidence of crime." *Ibid.*, quoting from \*\*854 *Piazzola v. Watkins*, 442 F.2d 284, 290 (5th Cir.1971). In contrast to *Neilson*, here the police entered to enforce a residency condition relating to the health and safety of all the dormitory occupants, not in furtherance of a criminal investigation.

[4][5] (b) *Voluntariness of consent to search*. While the initial entry and discovery of weapons did not require a search warrant or consent of the defendants, the search leading to the discovery of the drugs stands on different footing. Whether done in furtherance of Boston College's policies or for criminal investigative purposes, such a search required the consent of the defendants.<sup>FN13</sup> The Commonwealth bears the burden of proving that such consent was given freely and voluntarily. *Commonwealth v. Rogers*, 444 Mass. 234, 237-238, 327 N.E.2d 669 (2005). Whether consent is free and voluntary is to be determined from all the circumstances. *Commonwealth v. Yehudi Y.*, 56

Mass.App.Ct. 812, 816-817, 780 N.E.2d 150 (2002). See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

FN13. To perform a search such as that which led to the discovery of the drugs, under the "Conditions of Residency" even Boston College officials would have required consent, a "University Search Warrant," or a search warrant from a court.

Upon the facts, the motion judge erred in ruling that the Commonwealth failed to meet that burden. To the contrary, the facts establish that the defendants' consent was freely and voluntarily given. See *Commonwealth v. Guthrie G.*, *supra* at 418, 848 N.E.2d 787 (juvenile's consent to three officers free and voluntary). The judge's conclusion that the unlawful entry by the police rendered invalid the defendants' consent to a search of the room fails as matter of law. Because the initial entry and discovery of the prohibited weapons was lawful, the entry does not render any subsequent consent involuntary. Compare *Commonwealth v. Midi*, 46 Mass.App.Ct. 591, 595, 708 N.E.2d 124 (1999) (prior invalid entry taints subsequent consent to search); *Commonwealth v. Allen*, 54 Mass.App.Ct. 719, 721-722, 767 N.E.2d 1086 (2002).

[6] \*51 Similarly, the judge erred in concluding that the Commonwealth failed to meet its burden of proving that the defendants' consent was free and voluntary. See *Commonwealth v. Wallace*, 70 Mass.App.Ct. 757, 762-764, 877 N.E.2d 260 (2007) (consent to search free and voluntary where no prior illegality, defendant free to leave, and understood he had right to refuse). "Whether consent is voluntary depends on the nature of [the] interaction between the police and the occupant." *Commonwealth v. Rogers*, 444 Mass. at 238, 827 N.E.2d 669. Contrary to the motion judge's view, neither the officers' request to search nor the defendants' responses are ambiguous. As noted earlier, the defendants did not place in issue whether consent was given but only whether the consent was given freely and voluntarily.<sup>FN14</sup>

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FN14. See note 6, *supra*.

While the judge appears to have concluded that the defendants' consent was not free and voluntary because they may not have felt free to refuse the officer's request or leave the room, the facts found point the other way. That the police were armed, in uniform, and represented an "institutional presence" is a characteristic common to most, if not all, police encounters. More importantly, the police did not display their weapons or otherwise employ force. They knocked on the door and announced their presence to obtain entry, entered lawfully only after Carr opened \*\*855 the door, and explained their presence and purpose. Upon locating prohibited weapons, Derick explained his reason for wanting to conduct a more extensive search and his request for the defendants' consent. Prior to giving his consent, Carr asked to confer with his father and did so. Carr's father also spoke with Derick. Neither defendant was in custody at the time consent was given, and they were not arrested until after drugs were found in the course of the search. See *Commonwealth v. Cantalupo*, 380 Mass. 173, 178, 402 N.E.2d 1040 (1980). The defendants placed no limitation on their consent, expressly or by implication. See *Commonwealth v. Gaynor*, 443 Mass. 245, 254, 820 N.E.2d 233 (2005).

Nothing in the facts supports the conclusion that the request to search and the accompanying "Consent to Search" form were commands to which the defendants meekly acquiesced. The defendants were college students whose age and level of education equipped them to understand what was being asked of them \*52 and that they had an option to refuse. See *Commonwealth v. Burgess*, 434 Mass. 307, 309-311, 749 N.E.2d 112 (2001) (consent to search validly given by eighteen year old with limited education and history of substance abuse); *Commonwealth v. LeBeau*, 451 Mass. 244, 258-260, 884 N.E.2d 956 (2008) (consent to search free and voluntary and made with knowledge that he could refuse); *Commonwealth v. Guthrie G.*, *supra*. They were not unusually susceptible or impressionable.

[7] The failure of the police to advise the defendants orally that they could refuse does not vitiate the consent given. See *Commonwealth v. Sanna*, 424 Mass. 92, 97-98 & n. 10, 674 N.E.2d 1067 (1997); *Commonwealth v. Costa*, 65 Mass.App.Ct. at 231-232, 838 N.E.2d 592 (Miranda type warning not necessary prerequisite to valid consent to search). Moreover, the written consent form advised the defendants that they "may have a constitutional right to refuse." See *Commonwealth v. Sanna*, *supra*. Indeed, the very fact that the police sought the defendants' *written* consent to search demonstrates that the police were not claiming the right to search further, but seeking permission to do so. A person of average intelligence would necessarily comprehend that refusal was an option.

In sum, despite the result reached by a conscientious motion judge, we conclude as a matter of our independent judgment that the facts and circumstances establish that the consent was free and voluntary and neither coerced nor mere acquiescence to a claim of lawful authority. See *Commonwealth v. Voisine*, 414 Mass. at 783, 610 N.E.2d 926; *Commonwealth v. Heath*, 12 Mass.App.Ct. 677, 684-685, 428 N.E.2d 353 (1981).

*Orders allowing motions to suppress reversed.*

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## EXHIBIT "A"

### Appeals Court ruling on college police comes to the detriment of public safety

Published: January 18, 2010

To the editor:

The recent Appeals Court decision in *Commonwealth v. Carr* reflects society's ambivalence toward college police officers: Are they really police or just "campus security?"

*Carr* seems to stand for the disturbing proposition that "special" college officers can enter a student's "home away from home" acting merely as security officers, i.e., private actors on behalf of the college. When it suits their purposes, however, they can flip an invisible switch, leaving "security mode" midstream in their investigation and becoming full-fledged law enforcers and agents of the state.

But the Appeals Court, like society, cannot have it both ways. College police officers are either police officers in all circumstances, all of the time, or they are not really police. They either can or cannot make arrests, can or cannot carry guns, and can or cannot conduct warrantless searches of dwellings.

The point is, particularly in a post-Virginia Tech world, there is no room for misapprehending or qualifying the law enforcement authority of college police officers. To do so is potentially dangerous and irresponsible.

Ambiguity as to the status of college police officers as real law enforcers benefits no one - the courts, law enforcement or the citizenry - and ultimately results in the diminishment of student safety. History repeatedly has shown that a lack of clarity as to the proper mission and role of college police results in manifold unintended, negative consequences.

Indeed, in *Carr* it appears that the court has sharply curtailed rights for students at private colleges vis-à-vis their peers at state colleges. At the same time, the court has created confusion as to the proper role of college police and reinforced an already entrenched law enforcement caste system, with "ordinary" police on top (as the *Carr* court termed them) and college police at the bottom of the barrel.

When the Supreme Judicial Court decided in 2006 (in *The Harvard Crimson* case, which surely must have influenced the outcome in *Carr*) that the Harvard University police did not have to release police reports to the public, as all state and municipal police departments are legally required to do, the court latched on to the dubious distinction of college police officers as "special." In effect, the court reversed years of progress toward the professionalization of college law enforcement and put us further down the road to having real police and "other" police.

The putative "special" status of college police officers, of course, cuts two ways, and the further we get from being viewed in the same fashion as state and municipal police officers, the more we will be treated differently - and more negatively - in terms of decreased authority and jurisdiction, lessened training and funding opportunities, and reduced professional recognition.

The *Carr* decision only worsens the problem. The court seems to be saying, with a figurative wink we all implicitly understand, "Well, they're not really police, so of course they can search without a warrant."

While at first *Carr* looks like a big win for law enforcement, in the end it will serve only to heighten the artificial distinctions between state and municipal police and their college counterparts, to the overall detriment of public safety.

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