

**MIRSKY & PETITO**

**Attorneys at Law**

P.O. Box 1063

Exeter, NH 03833

Tel

/Fax (603) 580-2132

*Admitted in Massachusetts and New Hampshire*

David H. Mirsky

Joanne T. Petito

January 3, 2025

The Honorable Ketanji Brown Jackson, Associate Justice  
Supreme Court of the United States  
1 First Street, NE  
Washington, DC 20543

RE: Mark Tomas Regan, Applicant v. Commonwealth of Massachusetts, Respondent;  
Application for Extension of Time to File Petition for Certiorari to March 15, 2025.

Dear Justice Jackson:

Pursuant to the provisions of U.S. Supreme Court Rule 22 and Rule 30, the petitioner, Mark Tomas Regan, hereby applies for an extension of time to March 15, 2025, to file the petitioner's petition for certiorari pertaining to his appeal from his convictions affirmed in Commonwealth v. Mark Tomas Regan, Massachusetts Appeals Court No. 2021-P-1129 (August 23, 2024), application for further appellate review denied, Commonwealth v. Mark Tomas Regan, Massachusetts Supreme Judicial Court No. FAR-30007 (October 16, 2024). The petition is currently due on January 14, 2025.

Jurisdiction in this Court is conferred by 28 U.S.C. § 1257(a). The principal question presented by this petition would be:

Whether the right to keep and bear arms protected by the Second Amendment; the right to be free from conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged crime, guaranteed by the due process clause of the 14<sup>th</sup> Amendment; and the Fifth Amendment protection against double jeopardy prohibit retrial of a defendant on charges of unlawful possession of firearms and ammunition where the prosecution failed to prove beyond a reasonable doubt the essential element of absence of licensure at the defendant's trial.

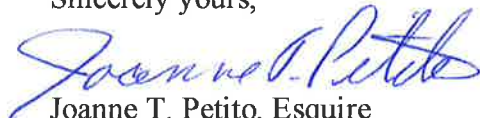
I am requesting additional time for the following reasons:

1. My time to work on this case was decreased by the need to assist my law partner in preparing a petition for certiorari in a separate case, which was filed

in this Court on December 4, 2024, U.S. Supreme Court No. 24-6098; and Application No. 24A540, filed on November 26, 2024. Assistance was required by my law partner due to medical issues which impacted his preparation of that petition.

2. I was appointed by the Massachusetts Committee for Public Counsel Services to represent Mr. Regan, who is indigent, in the Massachusetts Appeals Court and on further appellate review in the Massachusetts Supreme Judicial Court. In order to represent Mr. Regan on a petition for a writ of certiorari in this Court, additional authorization and appointment by the Committee for Public Counsel Services was necessary. Such authorization required the preparation of a detailed memorandum of law outlining the basis for the petition. I received authorization and appointment to represent Mr. Regan on a petition for a writ of certiorari on December 23, 2024.
3. I am not a member of the Bar of the Supreme Court of the United States, which is required to file a petition for writ of certiorari as counsel of record. The additional time requested would allow me to complete the application procedure for admission to the Bar of this Court before filing the petition. In my opinion, Mr. Regan would be best served by filing the petition myself, rather than requiring consultation with another attorney who is a Bar member and who would require additional time to take on the role of counsel of record in this case.
4. I have completed most of the research for the anticipated petition and I have completed a rough draft; however, further development and editing remains to be completed. In addition, significant time will be required for appendix assembly and indexing of the petition.

Sincerely yours,



Joanne T. Petito, Esquire  
MA B.B.O. #559773; NH Bar #10045  
Counsel for Applicant  
Mirsky & Petito  
Attorneys at Law  
P.O. Box 1063  
Exeter, NH 03833  
Tel. (603) 580-2132  
[Joanne.petito@gmail.com](mailto:Joanne.petito@gmail.com)

Cc: Mark Tomas Regan; Jennifer Zalnasky, Deputy Chief, Criminal Appeals Division, Office of the Massachusetts Attorney General, One Ashburton Place, Boston, MA 02108.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024-2025

MARK TOMAS REGAN,  
Applicant

-v-

COMMONWEALTH OF MASSACHUSETTS  
Respondent

ON APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF  
CERTIORARI TO THE APPEALS COURT FOR THE COMMONWEALTH OF  
MASSACHUSETTS

**AFFIDAVIT OF TIMELY FILING BY MAIL**

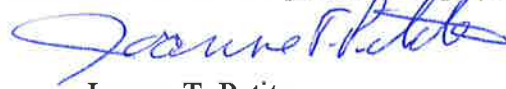
Joanne T. Petito, on oath, deposes and says:

1. I submit this affidavit in accordance with Rule 29 of this Court;
2. The Motion for Extension of Time to File Petition for Writ of Certiorari enclosed herewith is being mailed today, January 3, 2025, by United States mail, first class, postage prepaid, delivered to the United States Post Office in Exeter, New Hampshire 03833 and addressed to:

Scott S. Harris, Clerk  
Supreme Court of the United States  
1 First Street NE  
Washington, DC 20543

3. The mailing is within the permitted time for filing an application for extension of time to file a petition for a writ of certiorari.

Made this 3<sup>rd</sup> day of January, 2025, at Exeter, NH under the penalties of perjury.



Joanne T. Petito

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024-2025

MARK TOMAS REGAN,  
Applicant

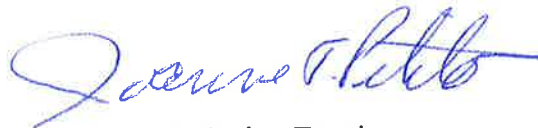
-v-

COMMONWEALTH OF MASSACHUSETTS  
Respondent

ON APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF  
CERTIORARI TO THE APPEALS COURT FOR THE COMMONWEALTH OF  
MASSACHUSETTS

**CERTIFICATE OF SERVICE**

I, Joanne T. Petito, hereby certify that on this 3<sup>rd</sup> day of January, 2025, I served the foregoing Application for Extension of Time to File Petition for Writ of Certiorari to March 15, 2025 on all parties to be served. In accordance with Rule 29 (3) of the Supreme Court Rules, service has been made on Jennifer Zalnasky, Deputy Chief, Criminal Appeals Division, Office of the Massachusetts Attorney General, One Ashburton Place, Boston, MA 02108. I also certify that I mailed a copy to the applicant Mark Tomas Regan.



Joanne T. Petito, Esquire  
MA B.B.O. #559773; NH Bar #10045  
Counsel for Applicant  
Mirsky & Petito  
Attorneys at Law  
P.O. Box 1063  
Exeter, NH 03833  
Tel. (603) 580-2132  
[Joanne.petito@gmail.com](mailto:Joanne.petito@gmail.com)



Joanne Petito <joanne.petito@gmail.com>

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**FAR-30007 - Notice: FAR denied**

1 message

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**SJC Full Court Clerk** <SJCCommClerk@sjc.state.ma.us>

Thu, Oct 17, 2024 at 10:17 AM

To: joanne.petito@gmail.com, dmirsky@comcast.net

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: Docket No. FAR-30007

COMMONWEALTH

vs.

MARK TOMAS REGAN

Suffolk Superior Court No. 1484CR10420

A.C. No. 2021-P-1129

**NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW**

Please take note that on October 16, 2024, the application for further appellate review was denied.

Very truly yours,  
The Clerk's Office

Dated: October 16, 2024

To: Paul B. Linn, A.D.A.  
David D. McGowan, A.D.A.  
Joanne T. Petito, Esquire

SUPREME JUDICIAL COURT  
for the Commonwealth  
Case Docket

COMMONWEALTH vs. MARK TOMAS REGAN  
PARTIALLY SEALED  
FAR-30007

CASE HEADER

Case Status	FAR denied
Status Date	10/16/2024
Nature	Murder2
Entry Date	09/12/2024
Appeals Ct Number	<a href="#">2021-P-1129</a>
Response Date	09/26/2024
Appellant	Defendant
Applicant	Defendant
Citation	494 Mass. 1109
Case Type	Criminal
Full Ct Number	
TC Number	
Lower Court	Suffolk Superior Court
Lower Ct Judge	Jeffrey A. Locke, J.

INVOLVED PARTY

Commonwealth  
Plaintiff/Appellee

Mark Tomas Regan  
Defendant/Appellant

ATTORNEY APPEARANCE

[Cailin M. Campbell, A.D.A.](#) - Inactive  
[Craig Iannini, A.D.A.](#) - Inactive  
[Paul B. Linn, A.D.A.](#)  
[David D. McGowan, A.D.A.](#)

[Joanne T. Petito, Esquire](#)  
[Lorenzo Perez, Esquire](#) - Inactive

DOCKET ENTRIES

Entry Date	Paper	Entry Text
09/12/2024		Docket opened.
09/12/2024	#1	FAR APPLICATION filed for Mark Tomas Regan by Attorney Joanne Petito.
10/16/2024	#2	DENIAL of FAR application.

As of 10/23/2024 2:20pm



Neutral

As of: December 31, 2024 3:43 PM Z

## Commonwealth v. Regan

Appeals Court of Massachusetts

May 6, 2024, Argued; August 23, 2024, Decided

No. 21-P-1129.

### Reporter

104 Mass. App. Ct. 623 \*; 242 N.E.3d 631 \*\*; 2024 Mass. App. LEXIS 114 \*\*\*; 2024 WL 3908443

### COMMONWEALTH vs. MARK TOMAS REGAN.

**Subsequent History:** Appeal denied by Commonwealth v. Regan., 2024 Mass. LEXIS 429 (Mass., Oct. 16, 2024)

**Prior History:** [\*\*\*1] Suffolk. INDICTMENTS found and returned in the Superior Court Department on May 15, 2014.

A pretrial motion to suppress evidence was heard by *Mary K. Ames, J.*, and the cases were tried before *Jeffrey A. Locke, J.*

### Core Terms

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fingerprint, emergency aid, caretaking, firearms, firearm and ammunition, suppress, latent, objectively reasonable, unlawful possession, warrant requirement, warrantless entry, emergency, neighbor, revolver, matched, morning, print

### Case Summary

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#### Overview

**HOLDINGS:** [1]-The officers' entry into the victim's house satisfied the requirements for application of the emergency aid doctrine because the facts established an objectively reasonable basis for the officers to believe the victim was in his house and in need of

emergency assistance. The victim's failure to show up at work or answer his cell phone was so unusual that the police received separate requests to conduct a wellness check and they were informed that the victim was sixty-six years old and had unspecified medical issues; [2]-Because the Commonwealth conceded that it did not present evidence at trial that defendant lacked a license for the firearm or the ammunition and the trial court did not instruct the jury that non-licensure was an essential element of the charges, defendant's convictions for unlawful possession of a firearm and ammunition were vacated and set aside.

### Outcome

We affirm the defendant's conviction of murder in the second degree.

### LexisNexis® Headnotes

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Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Community Caretaking

Criminal Law & Procedure > ... > Warrantless Searches > Exigent Circumstances > Protection of Officers & Others

**HN1 [↓] Warrantless Searches, Community Caretaking**

Although the police may no longer rely on the community caretaking doctrine as a standalone justification to enter a home without a warrant, the emergency aid doctrine remains a valid exception to the warrant requirement.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions to Suppress

**HN2 [↓] Clearly Erroneous Review, Findings of Fact**

Reviewing a ruling on a motion to suppress evidence, an appellate court accepts a motion judge's findings of fact absent clear error and defers to her assessment of the credibility of the testimony taken at the evidentiary hearing. The court reviews de novo the application of constitutional principles to the facts as found.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Community Caretaking

Constitutional Law > ... > Fundamental

Rights > Search & Seizure > Warrants

**HN3 [↓] Search & Seizure, Scope of Protection**

The United States Supreme Court has held that police officer's exercise of their duties as community caretakers is not sufficient to excuse the Fourth Amendment's warrant requirements for entry into a home.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Community Caretaking

Constitutional Law > State Constitutional Operation

**HN4 [↓] Search & Seizure, Scope of Protection**

Because the Massachusetts Constitution may not provide less protection to defendants than the Federal Constitution, the community caretaking doctrine is insufficient after to justify a warrantless entry into a home under either the Fourth Amendment or Mass. Const. Decl. Rights art. 14.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exigent Circumstances

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Community Caretaking

Criminal Law & Procedure > ... > Warrantless Searches > Exigent Circumstances > Protection of Officers &



Others

Criminal Law &  
 Procedure > ... > Warrantless  
 Searches > Exigent  
 Circumstances > Reasonable & Prudent  
 Standard

Constitutional Law > ... > Fundamental  
 Rights > Search & Seizure > Scope of  
 Protection

### **HN5 [↓] Search & Seizure, Exigent Circumstances**

Under the emergency aid doctrine, the police may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. Because the ultimate touchstone of the Fourth Amendment and *Mass. Const. Decl. Rights art. 14* is reasonableness, the warrant requirement is subject to certain exceptions, and the emergency aid exception allows for warrantless entry in an exigency or emergency when there is a need to protect or preserve life or avoid serious injury.

Constitutional Law > ... > Fundamental  
 Rights > Search & Seizure > Exigent  
 Circumstances

Criminal Law &  
 Procedure > ... > Exclusionary  
 Rule > Exceptions to Exclusionary  
 Rule > Exigent Circumstances

Criminal Law &  
 Procedure > ... > Warrantless  
 Searches > Exigent  
 Circumstances > Protection of Officers &  
 Others

### **HN6 [↓] Search & Seizure, Exigent Circumstances**

In *Caniglia*, the United States Supreme Court noted that it had earlier held that law enforcement officers may enter private property without a warrant when certain exigent circumstances exist, including the need to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.

Constitutional Law > ... > Fundamental  
 Rights > Search & Seizure > Exigent  
 Circumstances

Criminal Law &  
 Procedure > ... > Warrantless  
 Searches > Exigent  
 Circumstances > Absence of Probable  
 Cause

Criminal Law & Procedure > Search &  
 Seizure > Warrantless  
 Searches > Community Caretaking

Criminal Law &  
 Procedure > ... > Warrantless  
 Searches > Exigent  
 Circumstances > Officer Knowledge

Criminal Law &  
 Procedure > ... > Warrantless  
 Searches > Exigent  
 Circumstances > Reasonable & Prudent  
 Standard

### **HN7 [↓] Search & Seizure, Exigent Circumstances**

Unlike the community caretaking exception, the emergency aid exception applies only when there are exigent circumstances or an emergency. Because the purpose of police entry is not to investigate criminal activity, a showing of probable cause is not necessary to invoke the exception. Instead, the warrantless entry must satisfy two strict requirements. First, there must be objectively reasonable grounds

to believe that an emergency exists. Second, the conduct of the police following the entry must be reasonable under the circumstances. Under the first requirement, reasonableness must be evaluated in relation to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis. For there to be reasonable grounds to believe that an emergency exists, the injury sought to be avoided must be immediate and serious, and the mere existence of a potentially harmful circumstance is not sufficient. On the other hand, officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the exception.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > ... > Warrantless Searches > Exigent Circumstances > Protection of Officers & Others

### **HN8[\[↓\]](#) Search & Seizure, Scope of Protection**

Even though performing wellness checks on vulnerable members of the community is among police officers' most important duties, the mere fact that a concerned friend, family member, or neighbor has requested a wellness check does not automatically justify warrantless entry into a home. Instead, the facts known by the police at the time must establish an objectively reasonable basis to believe that entering a home is warranted to address an emergency.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope

of Protection

Criminal Law & Procedure > ... > Warrantless Searches > Exigent Circumstances > Protection of Officers & Others

### **HN9[\[↓\]](#) Procedural Due Process, Scope of Protection**

In Gallagher, it was discussed that State law and regulations establish detailed procedures for addressing emergency care for an elder at risk of abuse or neglect, with substantial due process protections and protection from unwarranted entry and treatment without consent.

Evidence > ... > Scientific Evidence > Crime Scenes > Fingerprints & Footprints

### **HN10[\[↓\]](#) Crime Scenes, Fingerprints & Footprints**

Testimony to the effect that a latent print matches, or is individualized to, a known print, if it is to be offered, should be presented as an opinion, not a fact, and opinions expressing absolute certainty about, or the infallibility of, an individualization of a print should be avoided. Fingerprint expert witnesses must clearly frame their findings in the form of an opinion to avoid improper testimony.

Evidence > ... > Scientific Evidence > Crime Scenes > Fingerprints & Footprints

Evidence > ... > Testimony > Expert Witnesses > Qualifications

### **HN11[\[↓\]](#) Crime Scenes, Fingerprints & Footprints**

Clarifying the mechanics of fingerprint testimony, the Supreme Judicial Court has stated that an expert testifying to a fingerprint match must state expressly that the match constitutes the expert's opinion based on the expert's education, training, and experience. If the expert does not so testify, the prosecutor must elicit this clarification even if the defendant does not object by, for instance, clarifying that a subjective opinion is being sought and then asking whether the witness has an opinion to a reasonable degree of fingerprint analysis certainty. Mass. G. Evid. § 702.

Criminal Law &  
 Procedure > Counsel > Effective  
 Assistance of Counsel > Tests for  
 Ineffective Assistance of Counsel

Criminal Law &  
 Procedure > Counsel > Effective  
 Assistance of Counsel > Trials

### **HN12[↓] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

To prevail on a claim of ineffective assistance of counsel, a defendant also must show that counsel's deficiency resulted in prejudice, which, in the circumstances of counsel's failure to object to an error at trial, is essentially the same as the substantial risk standard an appellate court applies to unpreserved errors.

Criminal Law &  
 Procedure > Trials > Motions for Acquittal

Evidence > Burdens of Proof > Allocation

Criminal Law &  
 Procedure > Trials > Burdens of  
 Proof > Prosecution

Criminal Law & Procedure > ... > Weapons  
 Offenses > Possession of

Weapons > Unregistered Firearm

### **HN13[↓] Trials, Motions for Acquittal**

The Supreme Judicial Court has ruled that the Commonwealth bears the burden of proving that a defendant lacks a license for firearms and ammunition, and that a judge must instruct jurors as to this burden. The court clarified that the appropriate remedy for failing to properly instruct the jury on this issue is a new trial, as opposed to a judgment of acquittal.

## **Headnotes/Summary**

### **Headnotes**

#### **MASSACHUSETTS OFFICIAL REPORTS HEADNOTES**

*Homicide > Firearms > Evidence > Firearm > Fingerprints > Expert opinion > Witness > Expert > Constitutional Law > Search and seizure > Search and Seizure > Emergency > Warrant > Practice, Criminal > Instructions to jury > Motion to suppress*

A Superior Court judge properly denied a criminal defendant's pretrial motion to suppress evidence obtained from the victim's home, where the police's warrantless entry into the home was justified under the emergency aid doctrine, in that the facts known by the police at the time established an objectively reasonable basis for them to believe that the victim was in his house and in need of emergency assistance; and where there was no dispute that the police acted reasonably under the circumstances following their entry into the house. [626-629]

At a criminal trial, certain unobjected-to statements by the Commonwealth's fingerprint expert witness that, considered in isolation,

could be interpreted as overstating the accuracy of forensic fingerprint science, did not give rise to a substantial risk of a miscarriage of justice, where the witness did not describe his methodology as infallible and properly framed his findings as an opinion; where the judge instructed the jury that they were not bound to accept the statements; and where, given the strength of the evidence linking the defendant to the crime, there was no uncertainty that the defendant's guilt had been fairly adjudicated. [630-631]

This court vacated the defendant's convictions of unlawful possession of a firearm and unlawful possession of ammunition, where the defendant was entitled to a new rule announced while his appeal was pending requiring that the Commonwealth prove the absence of licensure as an essential element of the offenses. [631-632]

**Counsel:** *Joanne T. Petito* for the defendant.

*Paul B. Linn*, Assistant District Attorney, for the Commonwealth.

**Judges:** Present: MILKEY, HODGENS, & TOONE, JJ.

**Opinion by:** TOONE

## Opinion

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[\*\*635] TOONE, J. Because the victim, Mark Regan, Sr., never missed work, his coworkers were alarmed when he did not show up one [\*624] morning. Calls to his phone went unanswered, and snow and ice on his car went uncleared. After family and neighbors raised additional concerns about his age and health, police officers entered his house through a second-floor window and found his bloodstained body on the floor. They also encountered the defendant, the victim's son,

who shares his name. After obtaining a warrant, the officers searched the house and found a loaded revolver with latent fingerprints that, according to the Commonwealth's expert, matched those of the defendant.

A Superior Court jury found the defendant guilty of murder in the second degree, unlawful possession [\*\*\*2] of a firearm, and unlawful possession of ammunition. On appeal, the defendant argues that (1) the motion judge erred by denying his motion to suppress the evidence obtained from the home because the officers' warrantless entry violated the *Fourth Amendment to the United States Constitution* and *art. 14 of the Massachusetts Declaration of Rights*, (2) the trial judge erred by allowing certain unobjected-to testimony by the Commonwealth's fingerprint expert, and (3) the Commonwealth did not meet its burden of proof for the unlicensed firearm and ammunition charges.

On the first issue, we conclude that the officers had an objectively reasonable basis to believe that the victim was in his house and in need of emergency assistance. *HN1*[†] Although the police may no longer rely on the community caretaking doctrine as a standalone justification to enter a home without a warrant, see *Caniglia v. Strom*, 593 U.S. 194, 196, 141 S. Ct. 1596, 209 L. Ed. 2d 604 (2021), the emergency aid doctrine remains a valid exception to the warrant requirement. On the second issue, we conclude that while certain statements by the expert may have overstated the accuracy of fingerprint comparisons, they did not result in a substantial risk of a miscarriage of justice. Accordingly, we affirm the defendant's conviction of murder. On the third issue, we vacate the defendant's firearm and ammunition [\*\*\*3] convictions pursuant to the Supreme Judicial Court's decisions in *Commonwealth v. Guardado*, 491 Mass. 666, 206 N.E.3d 512 (2023) (*Guardado I*), and *Commonwealth v. Guardado*, 493 Mass. 1, 220



N.E.3d 102 (2023) (Guardado II), cert. denied, U.S. Supreme Ct., No. 23-886 (June 24, 2024).

*Background.* We first summarize the facts found by the motion judge in her memorandum of decision denying the defendant's motion to suppress. The victim worked at FedEx in Needham and never missed work or failed to answer his cell phone. After he did not arrive for his morning shift on March 12, 2014, coworkers [\*625] called him repeatedly, but there was no answer. After the victim failed to arrive for his afternoon shift, his supervisor called 911. He informed the police that the victim was sixty-six years old and his absence was "out of character," expressed concern that the victim might be ill although he was not aware of specific medical problems, and asked them to perform a wellness check.

[\*\*636] On the morning of March 14, Boston police Officer Stephen Parenteau received a radio call asking him to conduct a wellness check at the victim's home after an off-duty officer, whose brother was another of the victim's colleagues, raised concerns about his absence and unspecified medical issues. Two other police officers were outside the victim's house when Parenteau arrived. One neighbor told the officers that he [\*\*\*4] had not seen the victim in a couple of days. Another neighbor reported that over the past few nights she had not seen lights or other signs of activity in the house. The officers knocked and rang the doorbell but received no answer. Inspecting the perimeter of the house, they did not see any unlocked or damaged doors, but there was a pile of mail between the storm and main front doors. The victim's car was parked in front of the house and covered with snow and ice from a storm that had ended the morning before.

The victim's brother arrived around 8:30 A.M. The brother was concerned about the victim's health, but did not recall whether he discussed those concerns with the officers outside the house. The brother urged the officers to enter

the home, but he did not have a key. The officers waited until their patrol supervisor authorized them to enter, and then used a ladder on the side of the house to enter through an unlocked second-floor window. They saw the victim's body in the hall, partially wrapped in a bed sheet, with bloodstains on his body and the floor. After they called for emergency medical services, the defendant appeared. Wearing a T-shirt and underwear, he identified himself [\*\*\*5] as the homeowner's son and said he had been in the attic because he was frightened. The officers took the defendant to police headquarters and sealed the scene until a search warrant was approved.

At trial, evidence was presented that only two of the four bedrooms appeared to be lived in, and in one of those bedrooms the police found live .22 caliber cartridges, spent .38 caliber cartridge casings, and papers showing the defendant's name. They also found a .38 caliber Charter Arms revolver hidden in the insulation under the floorboards of the attic. A ballistics expert testified that a bullet fired from the revolver matched the projec- [\*626] tiles recovered from the victim's body. A police criminologist testified that three latent fingerprints were found on the revolver and two of them matched the defendant's fingerprints.

[↑] HN2[↑] *Discussion.* 1. *Motion to suppress.* Reviewing a ruling on a motion to suppress evidence, we accept the motion judge's findings of fact absent clear error and defer to her assessment of the credibility of the testimony taken at the evidentiary hearing. See Commonwealth v. Scott, 440 Mass. 642, 646, 801 N.E.2d 233 (2004). We review de novo the application of constitutional principles to the facts as found. See Commonwealth v. Mercado, 422 Mass. 367, 369, 663 N.E.2d 243 (1996).

In denying the defendant's [\*\*\*6] motion to suppress, the judge concluded that the entry

“was justified pursuant to the responsibility police have as community caretakers and the emergency aid doctrine.” **HN3** [↑] Two years later, the United States Supreme Court held that the police's exercise of their duties as community caretakers is not sufficient to excuse the *Fourth Amendment's* warrant requirements for entry into a home. *Caniglia*, 593 U.S. at 196. In *Caniglia*, the petitioner got a handgun, put it on the table, and asked his wife to “shoot [him] now and get it over with.” *Id.* The next morning, the wife asked the police to conduct a welfare check on her husband. *Id.* Officers encountered him on the porch, and he agreed to be **[\*\*637]** transported to a hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms. *Id.* at 196-197. After the ambulance left, the officers entered his home and seized the firearms. *Id.* at 197. The Court ruled that the decision to remove the petitioner and the firearms from the premises was not justified by a community caretaking exception to the warrant requirement. *Id.* at 197-198. Although it had in an earlier case sustained the warrantless search of an automobile in police custody for a firearm, see *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), the Court explained that there is a “constitutional **[\*\*7]** difference” between vehicles and homes, and while officers are frequently called on to perform noncriminal community caretaking functions on public highways, the recognition of those tasks is “not an open-ended license to perform them anywhere.” *Caniglia*, *supra* at 199.

**HN4** [↑] Because “the Massachusetts Constitution may not provide less protection to defendants than the Federal Constitution,” *Commonwealth v. DeJesus*, 489 Mass. 292, 296, 182 N.E.3d 280 (2022), the community caretaking doctrine is insufficient after *Caniglia*

to justify a warrantless entry into a home under either the *Fourth Amendment* or *art. 14 of the Massachusetts Declaration of Rights*. See **[\*627]** *Gallagher v. South Shore Hosp., Inc.*, 101 Mass. App. Ct. 807, 823, 197 N.E.3d 885 & n.28 (2022). We therefore consider whether the other ground cited by the judge, the emergency aid doctrine, justified the officers' entry into the victim's house.<sup>1</sup>

**HN5** [↑] Under the emergency aid doctrine, the police “may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” *Commonwealth v. Townsend*, 453 Mass. 413, 425, 902 N.E.2d 388 (2009), quoting *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). Because the ultimate touchstone of the *Fourth Amendment* and *art. 14* is reasonableness, the warrant requirement is subject to certain exceptions, and the emergency aid exception allows for warrantless entry in “an exigency or emergency” when there is a “need to protect or preserve life or avoid serious injury.” *Townsend*, *supra*, quoting *Commonwealth v. Knowles*, 451 Mass. 91, 96, 883 N.E.2d 941 (2008).

The emergency aid exception to the warrant requirement **[\*\*8]** remains valid after *Caniglia*. **HN6** [↑] In *Caniglia*, 593 U.S. at 198, quoting *Kentucky v. King*, 563 U.S. 452, 460, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011), the Supreme Court noted that it had earlier held that “law enforcement officers may enter private property without a warrant when certain exigent circumstances exist, including the need to ‘render emergency assistance to an injured occupant or to protect an occupant from imminent injury.’” Concurring opinions by Chief Justice Roberts and Justice Kavanaugh confirmed that this exception survived the

<sup>1</sup>We assume without deciding that the defendant had a reasonable expectation of privacy in the victim's house. See

*DeJesus*, 489 Mass. at 296. The issue was not raised at the hearing, and there was evidence that the defendant slept at the house several times per week.

Court's new ruling.<sup>2</sup> Accordingly, **[\*\*638]** courts in other jurisdictions have continued to apply the emergency aid exception after *Caniglia*. See, e.g., *State v. Samuolis*, 344 Conn. 200, 217-218, 278 A.3d 1027 (2022), and cases cited therein; *State v. Abu Youm*, 988 N.W.2d 713, 720 (Iowa 2023).

**HN7** [↑] Unlike the community caretaking exception, the emergency aid exception applies only when there are exigent circumstances or **[\*628]** an emergency. Because the purpose of police entry is not to investigate criminal activity, a showing of probable cause is not necessary to invoke the exception. See *Commonwealth v. Duncan*, 467 Mass. 746, 750, 7 N.E.3d 469, cert. denied, 574 U.S. 891, 135 S. Ct. 224, 190 L. Ed. 2d 170 (2014); *Commonwealth v. Raspberry*, 93 Mass. App. Ct. 633, 637-638, 107 N.E.3d 1195 & n.8 (2018). Instead, the warrantless entry must satisfy “two strict requirements.” *Id.* at 638, quoting *Duncan, supra*. “First, there must be objectively reasonable grounds to believe that an emergency exists. ... Second, the conduct of the police following the entry must be reasonable under the circumstances” **[\*\*\*9]** (citation omitted). *Duncan, supra*. Under the first requirement, “[r]easonableness must be ‘evaluated in relation to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis.’” *Townsend*, 453 Mass. at 425-426, quoting *Commonwealth*

*v. Young*, 382 Mass. 448, 456, 416 N.E.2d 944 (1981). For there to be reasonable grounds to believe that an emergency exists, “[t]he injury sought to be avoided must be immediate and serious, and the mere existence of a potentially harmful circumstance is not sufficient.” *Commonwealth v. Kirschner*, 67 Mass. App. Ct. 836, 841-842, 859 N.E.2d 433 (2006). On the other hand, officers do not need “ironclad proof of ‘a likely serious, life-threatening’ injury” to invoke the exception. *Commonwealth v. Entwistle*, 463 Mass. 205, 214, 973 N.E.2d 115 (2012), cert. denied, 568 U.S. 1129, 133 S. Ct. 945, 184 L. Ed. 2d 736 (2013), quoting *Michigan v. Fisher*, 558 U.S. 45, 49, 130 S. Ct. 546, 175 L. Ed. 2d 410 (2009).

**HN8** [↑] Even though performing wellness checks on vulnerable members of the community is among police officers' most important duties, the mere fact that a concerned friend, family member, or neighbor has requested a wellness check does not automatically justify warrantless entry into a home.<sup>3</sup> Instead, the facts known by the police at the time must establish an objectively reasonable basis to believe that entering a home is warranted to address an emergency. Here, the facts established an objectively reasonable basis for the officers to believe **[\*\*\*10]** that the victim was in his house and in need of emergency assistance. His failure to show up at work or answer his cell phone was so unusual that the police received two separate requests to conduct a wellness check at his **[\*629]** house.<sup>4</sup> The police were

<sup>2</sup> See *Caniglia*, 593 U.S. at 200 (Roberts, C.J., concurring) (“A warrant to enter a home is not required, we explained, when there is a ‘need to assist persons who are seriously injured or threatened with such injury.’ ... Nothing in today’s opinion is to the contrary, and I join it on that basis” [citations omitted]); *id.* at 204 (Kavanaugh, J., concurring) (“[T]he Court’s decision does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of aid”).

<sup>3</sup> **HN9** [↑] In particular, as this court discussed in *Gallagher*, 101

*Mass. App. Ct.* at 818-822, State law and regulations establish detailed “procedures for addressing emergency care for an elder at risk of abuse or neglect, with substantial due process protections and protection from unwarranted entry and treatment without consent.”

<sup>4</sup> Although the police were initially made aware of the victim’s absence two days before they entered the house, that delay does not indicate a lack of emergency where additional facts emerged that changed their analysis. *Townsend*, 453 Mass. at 427 (“The fact that the officers let some time pass ... does not



informed that **[\*\*639]** the victim was sixty-six years old and had certain, unspecified medical issues. As officers conducted their second wellness check outside the house, they were approached by the victim's brother, who urged the officers to enter the house, as well as by two of the victim's neighbors, who reported that they had not seen the victim or any indication of his normal activity at the house for days. The officers knocked and rang the doorbell and received no answer. Mail had accumulated inside the victim's door, and his car had not been moved for two nights. Considering these facts in their totality, we conclude that it was objectively reasonable for officers to believe that the victim was in his home and faced an immediate and serious risk to his health and safety. See, e.g., *Entwistle*, 463 Mass. at 216 ("although it could not reasonably be foreseen precisely what had happened to the missing family, there was a reasonable basis to believe that something unfortunate **[\*\*\*11]** might have happened that rendered the defendant's wife unable to communicate with her mother and friends"); *Townsend*, 453 Mass. at 426 (victim's failure to attend visit with her children, "which previously had never occurred," and other factors established reasonable basis to believe she needed aid).

As for the second requirement, there is no dispute that the police acted reasonably under the circumstances following their entry into the house. After officers asked the defendant to dress and transported him away, they "froze" or secured the house so that no one could enter while they sought a search warrant, and they reentered the house only after a warrant was issued.

Because the officers' entry into the victim's

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automatically negate application of the emergency exception"). Rather, the facts show that the police acted reasonably by taking appropriate steps based on information they gathered over time.

<sup>5</sup> Because we conclude that the entry was constitutionally

house satisfied the requirements for application of the emergency aid doctrine, we affirm the judge's decision denying the motion to suppress.<sup>5</sup>

**[↑]** **[\*630]** 2. *Fingerprint expert testimony*. At trial, the police criminologist testified that he recovered three latent fingerprints on the Charter Arms .38 caliber revolver that officers found hidden in the attic, and he opined that two of those fingerprints matched the defendant's thumb and index finger. He further testified that "[f]ingerprints are unique and persistent, **[\*\*\*12]** meaning they are unique that no two individuals have ever been found to have the same fingerprints," and after the prosecutor asked whether he had "ever made an erroneous identification," he responded "[t]o my knowledge, no." The defendant argues that these latter statements were improper because they suggested that fingerprint identification evidence is infallible. Because the defendant did not object to either statement, our review is limited to determining whether there was error and, if so, whether the error created a substantial risk of a miscarriage of justice. See *Commonwealth v. Acevedo*, 446 Mass. 435, 450, 845 N.E.2d 274 (2006).

**HN10****[↑]** "Testimony to the effect that a latent print matches, or is 'individualized' to, a known print, if it is to be offered, should be presented as an opinion, not a fact, and opinions expressing absolute certainty **[\*\*640]** about, or the infallibility of, an 'individualization' of a print should be avoided." *Commonwealth v. Gambora*, 457 Mass. 715, 729 n.22, 933 N.E.2d 50 (2010). Fingerprint expert witnesses "must clearly frame their findings in the form of an opinion to avoid improper testimony."

authorized, we need not address the defendant's argument that all "fruits" of the entry and subsequent search of the victim's house (including after the warrant was issued) should have been excluded at trial. See *Wong Sun v. United States*, 371 U.S. 471, 487-488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).



Commonwealth v. Fulgiam, 477 Mass. 20, 44, 73 N.E.3d 798, cert. denied, 583 U.S. 923 (2017).<sup>6</sup> Here, the trial judge intervened to ensure that the Commonwealth's witness adhered to these requirements. At one point, the judge asked the witness to confirm that he formed an "opinion" [\*\*\*13] on identification, and then directed the prosecutor to avoid testimony about the verification step of the latent print analysis because it was "a backdoor way of bootstrapping opinions." See Commonwealth v. Honsch, 493 Mass. 436, 451, 226 N.E.3d 287 (2024), quoting Fulgiam, *supra* at [\*631] 46 (urging judges to "use caution in allowing testimony regarding the verification step" in fingerprint analysis).

Notwithstanding the judge's careful supervision, we acknowledge that, considered in isolation, the unobjected-to statements by the witness might be interpreted as overstating the accuracy of forensic fingerprint science. See Commonwealth v. Wadlington, 467 Mass. 192, 205, 4 N.E.3d 296 (2014) (error for prosecutor to elicit testimony that latent print analysis is error-free when conducted properly); Commonwealth v. Joyner, 467 Mass. 176, 184 n.11, 4 N.E.3d 282 (2014) ("the primary question about the accuracy and reliability of fingerprint identification involves not the uniqueness of different fingerprints but an

examiner's ability reliably to discern such differences"). Nevertheless, in the context of the witness's over-all testimony, the statements did not give rise to a substantial risk of a miscarriage of justice. See Commonwealth v. Armstrong, 492 Mass. 341, 353-358, 211 N.E.3d 622 (2023); Commonwealth v. Bonnett, 472 Mass. 827, 831 n.5 (2015), S.C., 482 Mass. 838 (2019). The witness did not describe his methodology as infallible, and (with the judge's guidance) he properly framed his findings as an opinion, which reduced the risk that either [\*\*\*14] statement misled the jury. The judge also instructed the jury that they should evaluate the testimony of expert witnesses like any other witness and were not bound to accept any expert's testimony or opinions. Particularly when we consider the strength of the Commonwealth's evidence linking the defendant to the crime, separate from the fingerprint expert's testimony, we are not left with any "uncertainty that the defendant's guilt has been fairly adjudicated" (citation omitted). Commonwealth v. Azar, 435 Mass. 675, 687 (2002), S.C., 444 Mass. 72 (2005).<sup>7</sup>

[↑] [\*\*641] 3. *Convictions of unlawful possession of a firearm and ammunition.* Lastly, the defendant argues that his convictions of unlawful possession of a firearm and ammunition must be reversed [\*632] due to

<sup>6</sup> After this case was tried, the Supreme Judicial Court clarified the mechanics of fingerprint testimony. HN11[↑] "[A]n expert testifying to a fingerprint match must state expressly that the match constitutes the expert's opinion based on the expert's education, training, and experience." Commonwealth v. Robertson, 489 Mass. 226, 238, 181 N.E.3d 1065, cert. denied, 143 S. Ct. 498, 214 L. Ed. 2d 284 (2022). If the expert does not so testify, "the prosecutor must elicit this clarification even if the defendant does not object" by, for instance, clarifying that "a subjective opinion is being sought" and then asking "whether the witness has an opinion 'to a reasonable degree of fingerprint analysis certainty.'" *Id.* at 238-239, citing Commonwealth v. Pytou Heang, 458 Mass. 827, 848, 942 N.E.2d 927 (2011). See Mass. G. Evid. § 702, Note (Illustrations, Fingerprints) (2023).

<sup>7</sup> The defendant's argument fares no better when reframed as a

challenge to his trial counsel's failure to object to the fingerprint expert's statements at trial. HN12[↑] "To prevail on a claim of ineffective assistance of counsel, ... a defendant also must show that counsel's deficiency resulted in prejudice, which, in the circumstances of counsel's failure to object to an error at trial, is essentially the same as the substantial risk standard we apply to unpreserved errors" (citation omitted). Commonwealth v. LaChance, 469 Mass. 854, 858, 17 N.E.3d 1101 (2014), cert. denied, 577 U.S. 922, 136 S. Ct. 317, 193 L. Ed. 2d 227 (2015), citing Azar, 435 Mass. at 686-687. Because no substantial risk of a miscarriage of justice resulted from the expert's testimony, there is no basis for an ineffective assistance claim based on counsel's failure to object to that testimony. See Commonwealth v. Curtis, 417 Mass. 619, 624 n.4, 632 N.E.2d 821 (1994); Commonwealth v. Farnsworth, 76 Mass. App. Ct. 87, 100, 920 N.E.2d 45 (2010).

the Supreme Judicial Court's decisions in *Guardado I* and *Guardado II*. We agree.

**HN13** [↑] Following the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), the Supreme Judicial Court ruled in *Guardado I*, 491 Mass. at 690-693, that the Commonwealth bears the burden of proving that a defendant lacks a license for firearms and ammunition, and that a judge must instruct jurors as to this burden. In *Guardado II*, 493 Mass. at 6-9, the court clarified that the appropriate remedy for failing to properly instruct the jury on this issue is a new trial, as opposed to a judgment of acquittal. These decisions [\*\*\*15] apply to this case because the defendant's appeal was pending when they were published. *Guardado I, supra at 694*.

The Commonwealth concedes that it did not present evidence at trial that the defendant lacked a license for the firearm or the ammunition. Additionally, the judge, lacking the benefit of *Bruen*, *Guardado I*, or *Guardado II*, did not instruct the jury that nonlicensure is an essential element of the charges. We therefore vacate the defendant's convictions of unlawful possession of a firearm and ammunition and set aside those verdicts. The Commonwealth may retry the defendant on the firearm and ammunition charges if it so chooses. We affirm the defendant's conviction of murder in the second degree.

*So ordered.*