COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BRISTOL, ss. **2021 SITTING**

SJC-13086

COMMONWEALTH

V.

ZAHKUAN BAILEY-SWEETING

ON APPEAL FROM A JUDGMENT OF THE
BRISTOL COUNTY SUPERIOR COURT

COMMONWEALTH'S BRIEF

Respectfully submitted,

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ISSUE PRESENTED

Where a passenger in a lawfully stopped car was not himself observed to engage in any suspicious conduct, could the police nonetheless order him out and frisk him for officer safety, where another passenger had gotten out of the car and angrily confronted the officers in a manner that they reasonably inferred was intended to direct their attention away from the car and its occupants, and where all three passengers had present gang affiliations and recent histories with firearms?

STATEMENT OF THE CASE

On March 15, 2018, the Bristol Grand Jury handed up Indictment No. 1873CR00090, charging the defendant, Zakhuan Bailey-Sweeting,[1] with: 1) unlicensed possession of a large-capacity firearm (G.L. c. 269, § 10(m)); 2) unlicensed possession of a large-capacity feeding device (G.L. c. 269, § 10(m)); 3) carrying a firearm without a license (G.L. c. 269, § 10(a)) when he "had been previously found delinquent in Juvenile Court of one or more violent crimes, as defined by

[1] Also referred to in the record as Zakhuan Sweeting-Bailey and Zahkuan Bailey.

G.L. Chap. 140, Sec. 121" (G.L. c. 269, § 10G)[2]; and 4) carrying a loaded firearm without a license (G.L. c. 269, § 10(n)) [R.3-5,9-17].[3] He was arraigned in the Superior Court on April 6, 2018, and held as a danger pursuant to G.L. c. 276, § 58A [R.5].

On June 12, 2018, the defendant filed a Motion to Suppress Evidence Seized Without A Warrant [R.5, CRA.3-7]. In his motion, he asserted that "said evidence was 1) not seized pursuant to a lawful arrest, 2) it was not in plain view, 3) there was no probable cause, 4) no warrant, 5) no exigent circumstances, 6) not pursuant to a lawful stop-and-frisk, 7) not consented to, 8) in violation of the Fourth and Fourteenth Amendments of the United States Constitution, Article 14 of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts and G.L. c.276" [R.18].

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[2] Specifically, the Grand Jury found that he, "[o]n or about February 22, 2016, was adjudicated delinquent in the New Bedford Juvenile Court of the crime: Of Assault and Battery by Means of a Dangerous Weapon, to wit: Firearm, said crime committed on or about September 30, 2015, a violent crime as defined by G.L. Chap. 140, Section 121" [R.15].

[3] Record references will be cited as follows: Defendant's Record Appendix, [R.#]; Commonwealth's Record Appendix, [CRA.#]; transcripts of the three-day evidentiary hearing on the Motion to Suppress, [T#:#]; Plea Transcript, [P.#].

An evidentiary hearing on the motion was held on June 20 and 22, 2018, before Yessayan, J. [R.5-6]. On June 29th, the defendant filed a supplemental memorandum of law arguing that *Commonwealth v. Elysee*, 77 Mass. App. Ct. 833 (2010), which the Commonwealth had cited at the hearing, was distinguishable from his case on its facts [R.6, CRA.8-10].[4]

At a hearing on July 20, 2018, Judge Yessayan denied the motion to suppress, reading his findings and rulings into the record [R.6,24-46].

On August 30, 2018, the defendant, again before Judge Yessayan, entered a conditional plea, preserving his right to appeal from the denial of his motion to suppress [R.7-8,21-23]. Judge Yessayan accepted the plea and agreed-upon sentence – two concurrent sentences of 2½-4 years in state prison - which he observed was an appropriate sentence for "a 19-year-old young man with his first adult offense" [P.34].

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[4] In its entirety, the defendant's argument asserted: "In this case – none of the preliminary facts are here. There are no observations of animosity, there are no furtive movements in the car, there are no tinted windows concealing any of activity [*sic*] within the car. We have a minor traffic violation and nothing more. But for the actions of the passenger – Paris – who was being uncooperative – but found not to be concealing anything, all three officers testified that the occupants of the vehicle would not have even been removed and searched" [CRA.10].

The defendant timely appealed [R.8]. On December 2, 2020, an expanded panel of the Appeals Court issued an opinion affirming the denial of the motion to suppress, with two justices dissenting. *Commonwealth v. Sweeting-Bailey*, 98 Mass. App. Ct. 862 (2020). The defendant sought further appellate review, which this Court granted on March 11, 2021.

STATEMENT OF FACTS[5]

At approximately 7:05 p.m. on February 26, 2018, a red Chevrolet traveling east on Kempton Street toward the intersection with County Street in the West End of New Bedford switched lanes in front of another car, causing that car to slam on its brakes to avoid a collision [T1.7-8,28, 2.5]. Behind both cars was an unmarked cruiser occupied by three detectives from the New Bedford Police Department Gang Unit, Kory Kubik, Gene Fortes, and Roberto DaCunha [T1.6-7, 3.6]. Kubik,

[5] The following account derives from the testimony of the three police witnesses, "all of whom were found by the judge to be 'credible in all relevant respects.'" *Sweeting-Bailey*, 98 Mass. App. Ct. at 863. Their testimony accords with the judge's own findings and rulings [R.28-45], but provides a greater level of detail. C.f. *Commonwealth v. Torres-Pagan*, 484 Mass. 34, 35 (2020), quoting *Commonwealth v. Jones-Pannell*, 472 Mass. 429, 431 (2015)("We present the facts as found by the motion judge, supplemented by uncontroverted facts from the record that have been 'explicitly or implicitly credited' by the motion judge[.]")

who was driving, pulled the cruiser into the right lane, behind the car the Chevy had cut off, and two cars behind the Chevy itself [T1.8, 3.6-7]. Within 60 feet of where the officers had seen the lane violation, the Chevy turned into the parking lot of a Kentucky Fried Chicken at the corner of Kempton and County Streets, and Kubik turned on the cruiser's blue lights (but not siren) to effect a traffic stop [T1.8, 29, 3.7]. At that time, Kubik could not see how many people were in the car, or recognize them [T1.9].

After Kubik turned on the blue lights, the Chevy "continued into the parking lot and parked in a parking space," facing the building's entrance [T1.9, 3.7]. The front passenger door opened, and Raekwan Paris stepped out [T1.9].

One of the jobs of a detective in the gang unit was "to be familiar with the various gangs and gang members of New Bedford," "[k]eeping tabs on local gangs: who they are, new members . . . , any potential issues or beefs with other gangs" [T1.7, 3.4]. The West End of New Bedford was particularly associated with the United Front gang, who were involved in "[c]rimes of violence; low-level drug dealing" [T3.4]. They were "[b]itter rivals" with the Monte's Park gang

in the South End of New Bedford; the type of interactions that had occurred between the two gangs included "[c]rimes of violence, from simple assaults up to and including homicides" [T1.11-12, 3.5].

Raekwan Paris was known to all three detectives as a member of the United Front gang, and the United Front area itself was "very close" to the KFC [T3.8].[6] Kubik and Dacunha had participated in an investigation in June 2016 where the police had received reports from a confidential informant that two males, one of whom was United Front gang member Shazan Gilmette, had gone down to the Monte's Park area in a particular car, "pointed a firearm at some parties in the south end of New Bedford," and then left [T1.10-12, 3.9-10]. Some of the officers went to the United Front in the hope of intercepting the car; when they arrived, it was parked, and Paris was walking away from its front door [T1.10, 3.10]. An officer stopped him and brought him back to the car, and police searched the car and found a firearm [T1.12-13, 3.10]. At booking, Paris said that "had he just parked around the corner with

[6] The judge refers to it as the United Front Housing Development [R.30]; it was previously known as United Front Homes, and in 2011 was renamed Temple Landing. https://www.poah.org/property/massachusetts/temple-landing.

the windows up, we would have never found [the firearm]" [T3.11].

Paris's interaction with Monte's Park gang that day in June 2016 was captured on surveillance video:

> The surveillance footage was on -- I believe it was city cameras pointing at the Central Kitchen. There was a video of him and Shazan getting out, and he -- I believe he asked for a fight or something along those lines with the Monte's Park gang members. There was just him and Shazan, and there was about six or seven Monte's Park. You could see that Paris didn't have a firearm at that time, but Shazan was holding his waistband the entire time of the video, and then they go back, get into a vehicle, the same vehicle that we locate in United Front that he's walking away from, and you can see Paris in the vehicle lean and point the firearm out across the passenger window. The video quality is not very good. You can see that it's a metallic object [T1.41-42].

At the time of the 2018 stop, Paris was out on bail on the 2016 firearm charge, and he was subsequently convicted of possessing that firearm [T1.13,42, 3.11].[7]

According to Kubik, Paris's demeanor when interacting with the police in June 2016 had been "[c]alm, not very talkative, but he was responding to anything we would ask him" [T1.12]. Dacunha, who

[7] In July 2020, the Appeals Court overturned Paris's conviction on the ground that the police had lacked reasonable suspicion for an investigatory stop at the time Paris was initially seized. *Commonwealth v. Paris*, 97 Mass. App. Ct. 785 (2020).

arrested him, recalled his demeanor as "cordial" [T.3.11,28-29].

Kubik had also interacted with Paris at two traffic stops, where his demeanor had been "[c]ooperative, calm" [T1.13].[8] Dacunha testified that "in the course of my duties as a -- as a Gang Unit detective, we've dealt with him numerous times on the streets" [T3.12]. He did not know "if I've ever stopped him in a car. I -- definitely on the street numerous times" [T3.12].[9] On those occasions, Paris's

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[8] The Appeals Court opinion, apparently drawing on Kubik's testimony, states that the February 2018 stop "was the fourth time that Paris had been involved in a police stop," and that "[o]n two of those occasions, Paris had been fully cooperative and no gun was recovered." 98 Mass. App. Ct. at 863. To the extent that this phrasing implies that firearms were sought unsuccessfully on other occasions when Paris was stopped, this is not supported by the record. Kubik and defense counsel had the following exchange:

> Q Okay. And in the other two occasions that you had to deal with Mr. Paris, did those also involve firearms, or did they not?
> A No.
> Q Just his involvement with gangs?
> A There was another incident other than that, yes, but -- it was two other traffic stops and a search warrant [T1.35].

[9] The record in this case is silent on what was involved in these stops: the purpose behind them, whether they were based on a proportionate level of suspicion, the degree of intrusion that resulted, and whether that intrusion was commensurate with the purpose of the stop.

behavior had been "[n]ormal -- cordial. Not -- never very engaging, but he would -- he would speak to us" [T3.12].

Fortes, meanwhile, had known Paris "since he was a young kid"; he had worked as a School Resource Officer, and when Paris "was in school, I would see him at school events" [T2.6]. "Through the years," they "had always had a good rapport" [T2.7]. Asked whether, as a detective in the Gang Unit, he had had prior encounters with Paris "as far as car stops or other interactions," he replied, "Yes, we have. We've had numerous encounters with him" [T2.7]. Asked about his demeanor towards Fortes and the other detectives on these occasions, Fortes replied, "It's always been pretty much the same. He's been respectful. We've always had like I said a good rapport, him and I" [T2.7].

But when Paris got out of the front passenger door of the Chevy on February 26, 2018, he was not calm or cordial. Dacunha testified:

> As soon as he came out of the car, he began arguing as he's taking steps away from the vehicle; something to the effect of "Why you guys stopping us? You're harassing us."
>
> I asked him to get back into the car. He continued to take an additional couple of steps.

> I asked him again; he wouldn't do it. He did not go back towards the car and kept on arguing, asking us why we stopped him; again, saying that we had – were harassing him [T3.12].

Paris's voice was "was louder than normal. I wouldn't say it was a shout, but it was definitely an authoritative type of voice" [T3.12-13]. In Fortes's description, he was "just like flaring his arms. He kept on going back and forth close in, away from the car, questioning the, you know, why, the reason for the stop" [T2.8]. Fortes described his behavior as "[v]ery uncharacteristic of him" [T2.9]. Kubik recalled, "One of the detectives informed him that it was a traffic stop[10] and to sit back in the vehicle. He didn't want to get back in" [T1.13-14].

Dacunha asked Paris twice to get back in the car, "neither of which time he complied," so Dacunha "thought better of it and I -- I walked towards him, I closed the gap, and I escorted him to rear of the car" [T3.13]. Kubik recalled him asking three times, and observed that as Dacunha kept asking, Paris "began

[10] The motion judge found: "the officers . . . were ordering him to get back into the vehicle, and they weren't trying to search him or anything of that nature. They were ordering him to get back into the vehicle as they were simply conducting a motor vehicle stop for a motor vehicle violation, and he refused to get back in the car" [R.32].

becoming more angry towards us" [T1.14]. Fortes, like Dacunha, had his whole attention on Paris: "his behavior was so agitated you could say and different that all my focus was -- was really on him" [T2.9].

At some point while Dacunha and Fortes were preoccupied with Paris at the back of the car, Kubik went to the driver's window to speak to the driver [T1.16,18-19]. He was prevented from doing so by the escalating situation with Paris, but did see who was inside the car: the female driver, whom he did not recognize, and two backseat passengers, whom he recognized as "Zahkuan Bailey and Carlos Cortes" [T1.16,18]. The defendant was in the rear driver's-side seat, and Cortes in the rear passenger's-side seat [T1.17]. The two of them were "just sitting there" [T1.19].

Kubik knew the defendant "[j]ust from being around"; the defendant was "[a]ssociated with some other parties that I've spoke with" [T1.17]. He knew him to be a member of the Bloods, who were associated with "[s]everal portions" of New Bedford [T1.17].

Paris was "dually validated[11] as a Blood gang member" in addition to his membership in the United Front gang [T1.38].

With regard to Cortes, the New Bedford Police gang unit had recently been "informed by Boston gang unit that he posted a video on some form of social media while in possession of a firearm. He made some kind of reference to 40 Block [*sic*] Gang, which is a gang based out of Fall River, in that video" [T1.18].[12]

Before he could speak to the driver, Kubik's attention was drawn to the back of the car, where the situation was "escalating" [T1.19]. Paris was "becoming more angry towards Detective Fortes, questioning the stop, accusing us of harassing him" [T1.19]. Kubik walked over to Paris and "decided to place him in handcuffs" for officer safety [T1.20]. He grabbed Paris by the wrist, informing him "that he wasn't arrested, that I was just placing him in handcuffs" [T1.20]. As he did so, he observed that Paris's fists were clenched [T1.20].

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[11] What it means to be a validated gang member in this context is discussed below at pp. 19-20; essentially, it is a police designation based on a points system.

[12] Kubik agreed with defense counsel that Cortes was "identified as someone . . . [f]rom a gang from Fall River" [T1.38].

In Fortes's recollection, Paris had initially "calmed down a little" after he was brought to the back of the car, "but he continued asking, you know, why we had stopped them and so on and so forth" [T2.10]. At some point, Paris "just appeared to be different" to Fortes: "And what I mean by that is he -- he took kind of like a bladed stance and it appeared like it -- it, you know, I wasn't -- I wasn't sure if he was -- he was getting ready to – to attack me or -- or not" [T2.10]. A "bladed stance," with one leg in front of the other, was one people in martial arts or boxing take because "it's a more comfortable stance to -- to make an assault" [T2.10]. Paris appeared to Fortes as if he was "kind of like sizing me up, you know. He looked me and down [*sic*], kind of sized me up. Like I said, very uncharacteristic of him because we've always had a good rapport" [T2.11]. This led Fortes to step closer to Paris, "close enough where if he threw a punch, he wasn't going to have any power on it" [T2.11]. In Fortes's recollection, what brought Kubik over at that point was that he "noticed something that I -- I didn't pick up. He stated to me later that -- that he had a closed, clenched fist. So

he came over and that's when we handcuffed" Paris [T2.11].

Paris's demeanor after being handcuffed was essentially the same: "he pretty much continued talking about, you know, the legalities of the stop and why we stopped him; that he mustn't did anything for a while" [T2.12]. Fortes thought that he "didn't look high or drunk" [T2.20]. Paris was pat-frisked at this time, and nothing was found on him [T2.14].

At this point, the officers were able to turn their attention to the occupants of the car for essentially the first time [T1.21, 2.12, 3.16].

Kubik "went to go speak with" the driver, and "while speaking with her, I asked her to step out of the vehicle" [T1.21]. He did this because "[d]ue to the uncharacteristic behavior of Raekwan Paris, I believed that he was trying to distract us from the vehicle; that there was some kind of illegal activity going on that he wanted to redirect us from" [T1.21]. He was concerned for his safety, "Based upon the fact that I have caught him with a firearm in the past, and his behavior was concerning me that there may be a

weapon in that vehicle" [T1.21].[13] Kubik escorted the driver to the back of the car and pat-frisked her: "I believe that was me that pat frisked her the initial time" [T1.22]. He did not recall if she was put in handcuffs [T1.22]. The officers did not find anything on her [T1.22].

At some point the defendant and Cortes were also asked to step out for reasons of officer safety [T1.22]. In Fortes's recollection, the reason for the exit order was "[o]nce we realized that Carlos Corte[s] was in the car, we had -- we had received information that from another Gang Unit that he had -- he had pictures of -- had posted pictures of a firearm on -- on social media" [T2.14]. Fortes had "heard about" Cortes, but had "never had a face to face with

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[13] At the motion hearing, defense counsel asked Kubik whether his "actions and the actions of the other detectives" from the point when Paris got out of the car on "were – it's fair to say were entirely based on a hunch?" [T1.32]. Kubik replied, "It was more of a fear, yes" [T1.33]. She asked, "A fear?" and he replied, "For officer safety" [T1.33].

A few transcript pages later, counsel asked Kubik, "Okay. And your whole suspicion about this vehicle, your whole fear about this vehicle was as a result of Mr. Paris?" [T1.36]. He replied, "Yes." [T1.36]. Counsel then asked, "And his getting out of that vehicle and wanting to know what was going on?" [T1.36]. He replied, "It led us to believe that he was using tactics to distract us, yes" [T1.36]. Counsel then asked, "Again, you had a hunch about him using tactics?" and Kubik replied, "Yes" [T1.36].

him. So I didn't really know him" [T2.13]. Meanwhile, Fortes had recognized the defendant immediately, because he had "had more encounters with him" [T2.13]. These encounters involved "[j]ust hanging around the north end area where I usually see him" [T2.13]. Fortes knew that the defendant "and his family have ties to the Blood Gang" [T2.13].

Dacunha knew Cortes, who was "a New Bedford resident who spends a lot of time in Fall River" [T3.16]. He recalled that the message from the Boston Police Youth Violence Strike Force, with a link to a YouTube music video in which Cortes had "was observed with what we suspect to be authentic firearms," had been within a month of the traffic stop [T3.16]. Based on that information and Paris's behavior, Dacunha was concerned that "either within that vehicle or Mr. Cortes could have a firearm" [T3.16-17].

Dacunha also knew the defendant, "[a]gain, from my prior dealings with him as a member of the Gang Unit," and knew he "was validated as a Blood gang member" [T3.17]. He also knew that "he was charged with a – I believe it was an armed robbery,[14] a

[14] An indictment in the present case specifies a prior charge of assault and battery with a dangerous weapon

firearms offense, in 2015," for which he had been committed to the Department of Youth Services [T3.18]. Seeing the defendant in the car gave Dacunha a concern "[t]hat either – again, within the vehicle or on his person, there may be a firearm" [T3.18].

Meanwhile, as Dacunha recalled, Paris "really didn't stop his -- his demeanor. He kept on being argumentative, stating that we had no reason to stop him; again, demanding to speak to his lawyer like he spoke with his -- his girlfriend, . . . the operator, a few times" [T3.18]. Dacunha was concerned: "It felt to me that he was trying to distract us for -- for something within that vehicle" [T3.18].

Dacunha asked Cortes to step out of the car; he was frisked and found to have a large sum of money,[15] but no weapons [T1.22-23]. Kubik then asked the defendant to step out of the car, and pat-frisked him [T1.23]. In the defendant's front waistband, Kubik felt "[t]he grip portion of a firearm" [T1.24]. He gained control of the defendant's hands, placed them

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[R.15]; at the plea colloquy, the judge described the underlying incident as, "But then you got involved in an incident as a juvenile where there was a gun and a robbery" [P.25]. The gun was never recovered [P.26-27].

[15] Fortes testified that this "wasn't suspicious" [T2.18].

behind his back, and told the other officers he had a firearm [T1.25].

The defendant was handcuffed and placed in the police cruiser [T1.25]. As Kubik was escorting him to the cruiser, he told the defendant, "good thing it was on him and not on the floor, because everyone would be getting arrested" [T1.25]. The defendant "stated, 'I'm not like that, and it was mine'" [T1.25-26]. As the defendant was being handcuffed, Cortes had asked him why he was getting arrested, and the defendant replied, "I had that blicky," a term Kubik knew to be "a term used for a firearm" [T1.26].

At the time Cortes and the defendant had been removed from the car, Kubik still had not had an opportunity to identify the driver or check her license [T3.20]. Dacunha attributed this to, "Just the ruckus that Mr. Paris was causing. There was four of them and only three of us, so best to have all hands on deck, given the behavior he was exhibiting and past dealings with both him and Mr. Bailey[-Sweeting]" [T3.20]. From the time Paris had gotten out of the car to the time the defendant was asked to get out of the car, a minute and a half had elapsed [T3.20].

Following the defendant's arrest, the driver was issued with a citation for the unsafe lane change, and the car and its remaining occupants – including Paris - were allowed to leave [T1.26-27, 3.21].

Without Paris's activity, Kubik would "[a]bsolutely not" have removed the others from the car [T1.39]. Fortes agreed that but for Paris's actions no one would have been taken out of the car, notwithstanding the defendant's and Cortes's being recognized as gang members [T2.16]. And Dacunha ultimately agreed with counsel that "but for Mr. Paris, none of them would have been taken out of that car" [T3.28].

Defense counsel cross-examined Dacunha about what it meant to be "validated" as a member of a particular gang [T3.21-26]. The New Bedford Police Gang Unit used the term to mean individuals who matched certain criteria on a checklist, with different numbers of points allotted for different factors; scoring more than ten points would indicate that a person was a validated gang member [T3.22]. At the time of the stop, factors relating to the defendant were: contact with known gang members (2 points); a "[g]roup-related photograph" (4 points); and "use and/or possession of

group paraphernalia or identifiers" (4 points) [T3.23].[16] With regard to the first factor, there were "documented reports" of the defendant in contact with Brent Lagoa, "another validated Blood gang member"; this documented contact included, "Pictures; we've seen them together outside of Tilia's, which is an establishment in the city" [T3.23-24]. The "[g]roup-related photograph" was a photograph of the defendant with several other Bloods members [T3.24]. With regard to the "use and/or possession of group paraphernalia or identifiers," the police had "several photos of Mr. Bailey[-Sweeting] with red bandannas either on his head or on his neck, and several photographs of Mr. Bailey throwing up well-known, documented Blood hand signs" [T3.25].

SUMMARY OF THE ARGUMENT

The United States Supreme Court recognized in *Terry v. Ohio*, *infra*, that a patfrisk for weapons during the course of an ongoing police encounter implicates two important and conflicting interests: a person searched in this manner is subjected to a severe intrusion upon cherished personal security,

[16] At booking, the defendant admitted to being a member of the Bloods, adding an additional eight points to his checklist score [T3.23,25].

while the officer has an interest in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. With regard to whether a patfrisk is justified, the standard set forth in *Terry*, and recently reemphasized by this Court in *Commonwealth v. Torres-Pagan*, *infra*, is that an officer must have a reasonable suspicion, based on specific articulable facts, that the person frisked is both dangerous and has a weapon. Whether such a suspicion exists is assessed from the perspective of a reasonable person in the officer's circumstances (pp.27-30).

An officer may take into account include his personal knowledge of the defendant, such as prior history of gun possession and gang affiliations. Gang membership alone does not provide reasonable suspicion that an individual is a threat to the safety of an officer or another, but is part of the totality of the circumstances the police confront and must assess (p.30-31).

Here, while the defendant had a three-year-old juvenile adjudication for armed robbery and was known to the officers as a member of the Bloods, in this

instance their concern that he might be armed and dangerous did not arise from anything that he was personally observed to do. The car he was in was stopped for unsafe driving by officers who did not know who was in it. All three officers agreed that what began as a traffic stop would have continued as a traffic stop, even once they became aware that all three of the car's passengers had gang affiliations and relatively recent histories with firearms, had it not been for Raekwan Paris's conduct.

Paris had had numerous encounters with all three officers, and had always behaved calmly and politely, even on an occasion in 2016 when he had just been to a rival gang's territory and pointed a gun at members of that gang, and where, when he encountered the police, he was walking away from the driver's side door of the car that had been used in that errand, which still contained the gun he had used. This time, in 2018, he got out of the front passenger seat of the car, began forcefully questioning the purpose of the stop and claiming harassment, and, despite being told that this was a traffic stop, progressed within the course of a minute to the point of appearing about to punch an officer. This uncharacteristic conduct appeared

calculated to draw – and succeeded in drawing - the attention of all three officers to him and away from the other occupants in the car. Until he was handcuffed, none of them was able to get more than a brief glimpse inside the car, or pursue the original purpose of the stop.

All three officers were concerned that Paris was seeking to distract them from something in the car. Two of the car's three occupants had firearms histories known to the officers, as well as gang associations, and the officers could not know what they had been doing during the time the officers had been unable to observe them. Two of the officers had been involved in Paris's 2016 arrest for possessing a gun in a car that he had just used for gang activity. And the officers were outnumbered four to three, and it had already taken the full attention of all three to deal with just one person. In the totality of the circumstances, the officers' evident conclusion that by that point anyone in the car might have a gun was based in specific reasonable inferences which they were entitled to draw from the facts in light of their experience (pp.31-34).

The fact that the defendant himself was not observed engaging in any suspicious behavior is certainly important, but cannot be dispositive. First, the officers were entitled to be concerned that Paris's apparent efforts to distract them from something inside the car were made in concert with one or more of the people in the car. This made what they knew about the people in the car relevant to assessing the scope of the concern. The gang affiliations and firearms histories of the passengers, *in that context*, made it reasonable for them to be concerned that what Paris was seeking to distract them from was a firearm (pp.34-35).

Second, while it will likely be rare that police develop a particularized suspicion that a person may be armed and dangerous without that person's being seen to do anything, the *Terry* standard is, by its nature, centered on the perspective of a reasonable person in the officer's circumstances. Given this, there is no way that any individual, particularly one traveling in a car full of other people, can wholly immunize himself from a *Terry* frisk simply by virtue of his own conduct at the time of the stop. If, for instance, one occupant of a car that has been stopped

for a traffic violation got out and began loudly informing the police – spuriously but convincingly – that a particular other passenger was armed and dangerous, the police might well arrive at a point where they were legally entitled to frisk that other passenger, through no fault of that person. There is simply no way to formulate a rule that completely insulates the actions of one passenger from those of the others, in this sort of analysis (pp.36-37).

And to the extent that Paris was seeking to distract the officers from something inside the car, he was more likely to be seeking to distract them from an action, such as movement to hide an object, than from an object that was already hidden. Thus, his conduct reasonably suggested that he was acting jointly with somebody inside the car (pp.37-38).

While Paris's dramatic demeanor was susceptible to multiple interpretations, it was reasonably concerning, even alarming, in the fast-moving context of the stop. As motion defense counsel noted, Paris did not fight with police on the occasion of the 2016 encounter because he was "not a dummy." Where the officers had known him to behave with what could be described as a savvy level of politeness in their past

interactions with him, they were entitled to be concerned that he was behaving strategically now as well, rather than simply feeling too upset to think strategically. And he was not simply expressing an opinion about policing: he was functionally derailing what he had been told was a traffic stop, by escalating within a period of a minute from complaining forcefully of harassment to appearing to be about to punch an officer (pp.38-40).

In assessing the significance of the defendant's three-year-old juvenile delinquency finding for armed robbery, the officers were entitled to consider it in combination with everything else they knew about the defendant – including his present gang affiliation, and the gang affiliations and firearms histories of the other people he was in the car with. And while the defendant's firearm history was the most distant in time of the three passengers', he was also the only one with an adjudication, and had committed the most serious offense. It was reasonable to take all of this into consideration in assessing the totality of the circumstances (pp.40-41).

While recent opinions of this Court have noted potential issues with the accuracy and evidentiary

value of gang databases, the overall validity and accuracy of the New Bedford Police Gang Unit validation system was not an issue in the case - possibly because the defendant, the only person for whom such validation information was elicited, confirmed on arrest that he was indeed a member of the Bloods. The judge properly treated the evidence of gang membership as part of the totality of the circumstances the police confront and must assess, rather than as an independent basis for concluding that there was a danger to the officers (pp.41-43).

Finally, while the motion judge noted that the stop occurred in a high-crime area – a fact that this Court has emphasized must be treated with caution - all of the testimony of crime in the area of the stop concerned the United Front gang in general and Paris's 2016 firearm arrest in particular. Every reference in the judge's findings to the stop's taking place in a high-crime area is accompanied by mention of Paris's nearby arrest. In this circumstance, it is unlikely that the fact that the stop occurred in a 'high-crime area' played a significant independent role in the judge's conclusions (pp.43-44).

ARGUMENT

THE JUDGE PROPERLY DENIED THE MOTION TO SUPPRESS.

In reviewing a ruling on a motion to suppress, this Court "accept[s] the judge's subsidiary findings of fact absent clear error but conduct[s] an independent review of his ultimate findings and conclusions of law." *Commonwealth v. Tremblay*, 480 Mass. 645, 652 (2018), quoting *Commonwealth v. Clarke*, 461 Mass. 336, 340 (2012). The 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." *Clarke*, 461 Mass. at 340, quoting *Commonwealth v. Bostock*, 450 Mass. 616, 619 (2008). "It is well established that in reviewing the denial of a motion to suppress, an appellate court may not consider evidence outside the factual record that was put before the motion judge." *Commonwealth v. Johnson*, 481 Mass. 710, 726 n.14 (2019).

As set out in the seminal case of *Terry v. Ohio*, 392 U.S. 1, 30 (1968), and emphasized by this Court in its recent opinion in *Commonwealth v. Torres-Pagan*, 484 Mass. 34 (2020), a patfrisk, "a 'carefully limited search of the outer clothing of a person to discover

weapons' for safety purposes," is "a 'serious intrusion on the sanctity of the person that is not to be undertaken lightly.'" *Torres-Pagan*, 484 Mass. at 36, quoting *Terry*, 392 U.S. at 30, and *Commonwealth v. Almeida*, 373 Mass. 266, 270-271, S.C., 381 Mass. 420 (1980) (some internal punctuation and formatting omitted). "A lawful patfrisk" requires that "police must have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous." *Id.* at 38-39. "The protection provided by the Massachusetts Declaration of Rights is coextensive with that of the United States Constitution in this regard." *Id.* at 36-37.

As the Supreme Court explained in *Terry*:

> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual . . . . The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable

> inferences which he is entitled to draw from the facts in light of his experience.[17]

Terry, 392 U.S. at 27 (internal citations omitted).

Officers are "entitled to consider their personal knowledge of the defendant," *Commonwealth v. Dasilva*, 66 Mass. App. Ct. 556, 561 (2006), and to consider a defendant's prior history of gun possession, with greater weight given to indictments and convictions over arrests. *Commonwealth v. Elysee*, 77 Mass. App. Ct. 833, 841-842 (2010).[18] Contrast *Commonwealth v. Hooker*, 52 Mass. App. Ct. 683, 687 (2001) (officer's knowledge of defendant's prior arrests, one for

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[17] Kubik agreed to a question including the word "hunch" on one of the occasions on cross-examination where defense counsel sought to get him to do so [T1.32-33,36]. Regardless of whether this can reasonably be said to constitute evidence that Kubik considered himself to be acting on a hunch, it cannot be taken as a concession that the information and inferences available to him did not rise to the level of reasonable suspicion. That is a question of law, and assessed under an objective standard.

[18] "While knowledge of an arrest and an indictment or conviction - something not shown on this record — would provide a stronger basis for a belief in prior possession of firearms, these arrests are one factor that may be considered by police in assessing the circumstances confronting them." *Elysee*, 77 Mass. App. Ct. at 841-842 (internal citation omitted). While Paris had, at the time of the February 2018 stop, not been convicted of gun possession in the June 2016 event and had only been complained of rather than indicted, the officers' belief in his possession of a firearm on the previous occasion was presumably rooted in Kubik and Dacunha's direct personal observations.

domestic violence, did not create reasonable apprehension of danger, where officer's experience with defendant never involved weapon). "While gang membership alone does not provide reasonable suspicion that an individual is a threat to the safety of an officer or another, the police are not required to blind themselves to the significance of either gang membership or the circumstances in which they encounter gang members, which are all part of the totality of the circumstances they confront and must assess." *Elysee*, 77 Mass. App. Ct. at 841.

Here, the officers had some degree of familiarity with everyone in the car except the driver, and two of them had been personally involved in Paris's 2016 arrest for possession of a firearm in a car. This time, in 2018, Paris behaved in a way that was fundamentally inconsistent with their prior experiences of him, and that appeared calculated to draw – and succeeded in drawing – the attention of all three officers to him and away from the other occupants in the car. Until he was handcuffed, none of them was able to get more than a brief glimpse inside the car, or pursue the original purpose of the stop.

Kubik testified that until he made his aborted attempt to speak to the driver, he had no idea who was in the car: "I just assumed there was someone driving, but I didn't see anyone in the vehicle" [T1.18]. It was not until Paris had been brought to the back of the car that Kubik went to the driver's window and observed the driver and passengers, and then the escalating situation with Paris and the other officers drew him away before he could speak with the driver [T1.19]. When he returned and spoke with her after he had handcuffed Paris, he asked her to step out of the car, because "[d]ue to the uncharacteristic behavior of Raekwan Paris, I believed that he was trying to distract us from the vehicle; that there was some kind of illegal activity going on that he wanted to redirect us from" [T1.21]. Kubik was specifically concerned "there may be a weapon in that vehicle" [T1.21].

Fortes testified that he had not been able to focus on anybody in the car until Paris was handcuffed [T2.11-12]. When defense counsel subsequently asked him, "So even though Mr. Paris was -- was agitated at that particular point in time, only one of the reasons could have been because that he was concealing

something or doing something that was suspicious?" he replied, "Or distracting us, yes" [T2.17].

Dacunha testified that when the Chevy parked at the KFC he could see three or four people inside, but not identify them [T3.8]. As he interacted with Paris and brought him to the back of the car, he "could see that there was definitely two people in the back of the car, but at this point all our attention was drawn to Mr. Paris" [T3.13-14]. He recalled that when he and Paris were at the back of the car, "[m]y focus was predominantly on him, while still trying to maintain eye contact with the people in the vehicle" [T3.14]. He still did not know who they were [T3.14]. Once Paris had been handcuffed, Dacunha went to the rear passenger-side window of the car, and recognized Cortes and the defendant [T3.16-17]. Paris continued to behave as he had been, and Dacunha testified, "It felt to me that he was trying to distract us for -- for something within that vehicle" [T3.18]. He subsequently agreed with defense counsel's suggestion, "And the majority of your attention was focusing on Mr. Paris. . . . You didn’t even look at who was in the car because of Mr. Paris' activities" [T3.31].

All three detectives were concerned that Paris was seeking to distract them from something in the car. Two of the car's three occupants had firearms histories known to the officers, as well as gang associations, and the officers could not know what they had been doing during the time when the officers had been unable to observe them. Two of the officers had been involved in a prior arrest of Paris, nearby, for possessing a gun in a car that he had just used for gang activity. And the officers were outnumbered four to three, and it had already taken the full attention of all three of them to deal with just one person. In the totality of the circumstances, the officers' evident conclusion that by that point anyone in the car might have a gun was based in "specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27.

The dissenting justices of the Appeals Court write:

> In the absence . . . of any evidence that the defendant engaged in suspicious behavior or activity, his past firearm involvement as a juvenile and gang association with Paris did not alone create a reasonable suspicion that the defendant was armed and dangerous. To hold otherwise would, in effect, exclude gang members

> with any prior firearm involvement from the reasonable suspicion requirement established by *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and its progeny.

Sweeting-Bailey, 98 Mass. App. Ct. at 870 (Maldonado, J., dissenting). While the fact that the defendant himself was not observed engaging in any suspicious behavior is certainly an important factor in this case, it cannot be dispositive.

First, while it is possible that Paris's behavior was outside of the defendant's expectation or control, the officers were entitled to be concerned that his apparent efforts to distract them from something inside the car were made in concert with one or more of the people in the car. To find reasonable suspicion for a patfrisk of the defendant in this case would not "exclude gang members with any prior firearm involvement from the reasonable suspicion requirement" because it is undisputed that, but for Paris's conduct, what was intended to be a routine traffic stop would have continued as a routine traffic stop, notwithstanding the known histories of three of the cars' occupants. *Sweeting-Bailey*, 98 Mass. App. Ct. at 870 n.2 (Maldonado, J., dissenting). The defendant's, and Cortes's, histories became relevant when the

officers, concerned that Paris was trying to distract them from something, sought to assess the scope of that concern. The gang affiliations and firearms histories of the passengers, *in that context*, made it reasonable for them to be concerned that what Paris was seeking to distract them from might well be a firearm.

Second, while it will likely be rare that police develop a particularized suspicion that a person may be armed and dangerous without that person's being observed to do anything, it is not possible to craft a bright-line rule, consistent with the objectives of *Terry*, that prohibits the frisking of a car's occupants for any reason other than their individual observed conduct. The *Terry* standard is, by its nature, centered on the perspective of a reasonable person in the officer's circumstances – whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief" that the action taken was appropriate[.]" *Terry*, 392 U.S. at 21-22. Given this, there is no way that any individual, particularly one traveling in a car full of other people, can wholly immunize himself from a *Terry* frisk simply by virtue

of his own conduct at the time of the stop. To point to an extreme example, if one occupant of a car that had been stopped for a traffic violation got out and began loudly informing the police – spuriously but convincingly - that a particular other passenger was armed and dangerous, the police might well arrive at a point where they were legally entitled to frisk that other passenger, through no fault of that person. There is simply no way to formulate a rule that completely insulates the actions of one passenger from those of the others, in this sort of analysis.

And again, a major reason Paris's conduct was concerning to the officers is that it seemed designed to distract them from something inside the car, and if those concerns were accurate, Paris was unlikely to be acting alone. If Paris had, for instance, a gun secreted in the car, unbeknownst to the driver or his fellow passengers, there was nothing to be accomplished, and much to be lost, by his actions towards the police at a routine traffic stop. The only way it would make sense for him to seek to distract the police in this fashion, is if he were buying time for someone inside the car to *do* something – such as to hide a gun, or to take possession of it so that it

would not be found on the floor and tied to everyone in the car, including the female driver (mentioned by one of the officers to be Paris's girlfriend).

Whatever Paris specifically had in mind, it was much more likely that he would be seeking to distract the police from an action, such as movement to hide an object, than from an object that was already hidden. In these circumstances, the police were not required to view the defendant as "mere[ly] presen[t] in the same car as Paris." *Sweeting-Bailey*, 98 Mass. App. Ct. at 868 (Maldonado, J., dissenting). While the defendant may not have "engage[d] in any verbal or nonverbal communication with Paris from which to infer that he jointly possessed a weapon with Paris," *id.* at 869, Paris's conduct suggested that *he* was acting jointly with somebody inside the car.

And while Paris's dramatic demeanor was susceptible to multiple interpretations, it was reasonably concerning, even alarming, in the fast-moving context of the stop. As motion counsel – who devoted as much space in her closing to suggesting that Paris might have been "under the influence of crack cocaine" as that he might simply have been

feeling harassed [T3.35][19] – elicited from Dacunha, on the prior occasion when Paris had ultimately been arrested for possessing a firearm, he had not fought with the police, because he knew it would be counterproductive:

> Q He -- he's not a dummy; he knows that that was a problem.
> A Correct.
> Q Would have been a problem and he would have been arrested?
> A Yes, ma'am [T3.28-29].

The officers, who had known Paris to behave calmly in the presence of police when he was engaged in criminal conduct, could not simply assume that, now that he was very much *not* calm, he must therefore *not* be engaged in criminal conduct.

And whatever was motivating Paris, he was not simply expressing an opinion about policing: he was functionally derailing what he had been told was a traffic stop, by escalating within a period of a minute from complaining forcefully of harassment to

[19] She also sought unsuccessfully to elicit evidence – consistent with the defendant's affidavit in support of the motion to suppress [R.19] – that Paris had in fact simply been trying to go into the restaurant for food: "And it's fair to say that Mr. Paris was saying, 'Hey, man. I just want to go in the restaurant. I just want to get some food.' Wasn't he trying to tell you that?" [T1.31]. Kubik replied, "He was just saying, 'Why do I have to get in the vehicle?' I don't recall him saying he had to go in the restaurant" [T1.31-32].

appearing to be about to punch an officer. Where the officers had known him to behave with what could be described as a savvy level of politeness in all their past interactions with him, they were entitled to be concerned that he was behaving strategically now as well, rather than simply feeling too upset, on this one occasion, to think strategically. "The standard of 'reasonable suspicion' does not require that an officer exclude all possible innocent explanations of the facts and circumstances." *Commonwealth v. Deramo*, 436 Mass. 40, 44 (2002).

Just as the officers were not required to assume that Paris was acting independently of the car's other occupants, they were not required to treat the defendant's "three year old juvenile delinquency finding on a firearm offense," *Sweeting-Bailey*, 98 Mass. App. Ct. at 868 (Maldonado, J., dissenting), independent of the other information available to them. Specifically, the delinquency adjudication was described at the hearing as pertaining to an armed robbery. Regardless of whether three years is viewed as a long time ago for this purpose in abstract terms, the officers were not confronting the information in an abstract context. This three-year-old juvenile

adjudication belonged to a "validated" current member of the Bloods (based on his known association with gang members, wearing bandanas in gang colors, and throwing gang signals), who was in a car with two other known gang members, both of whom *also* had firearms histories from the past several years. Paris was out on bail after having been arrested nearby for possessing a gun he had pointed at rival gang members, and in Cortes's case, the New Bedford Police Gang Unit had within the previous month received YouTube footage of him holding what appeared to be a real firearm [T3.16]. The evidence before the motion judge suggests that the officers prioritized their concerns by first removing and searching Cortes, whose apparent firearm involvement was the more recent, before removing and searching the defendant. But while the defendant's firearm history was the most distant in time, he was also the only one with an adjudication, and had committed the most serious offense. It was reasonable to take all of this into consideration in assessing the totality of the circumstances.

With regard to evidence of gang membership, the Chief Justice recently noted, in her concurrence in *Commonwealth v. Long*, the potential for gang database

information to contain "stark racial disparities and errors." *Long*, 485 Mass. 711, 751 (2020) (Budd, J., concurring). But here, though defense counsel questioned Dacunha in some detail regarding the process used to "validate" a person as a gang member, the overall validity and accuracy of this validation system was not an issue in the case. Quite possibly this was because the defendant, on being arrested, confirmed that he was a member of the Bloods: in his case, at least, the police assessment yielded an undisputedly accurate result. The question of how the police came to identify Paris and Cortes as gang members was largely unaddressed, though a basis for concluding that Paris was a member of the United Front gang was arguably obvious on the face of the record. There was no evidence elicited in this case that the New Bedford Police Gang Unit's identification of anyone as a gang member had been incorrect, and no attack on the underlying methodology. Contrast *Commonwealth v. Wardsworth*, 482 Mass. 454, 466-471 (2019) (gang expert lacked "basis in personal knowledge" for concluding defendant member of particular gang; expert relied in part on presence of defendant's name in "gang database" that did not

provide "underlying facts or data to which he could apply his own expertise"). And consistent with *Elysee*, the judge treated the evidence of gang membership as "part of the totality of the circumstances the[police] confront and must assess," rather than as an independent basis for concluding that there was a danger to the officers. *Elysee*, 77 Mass. App. Ct. at 841. Under all of these circumstances, and in light of the case law, it was reasonable for the judge to give the gang evidence the weight and credit that he did.

Finally, there was testimony, cited by the judge, that the stop occurred in a high-crime area. This is a factor that this Court has repeatedly indicated must be treated with caution: "[W]henever this factor is considered in the reasonable suspicion analysis, we have urged a cautious approach because 'many honest, law-abiding citizens live and work in high-crime areas. Those citizens are entitled to the protections of the Federal and State Constitutions, despite the character of the area.'" *Commonwealth v. Meneus*, 476 Mass. 231, 238 (2017), quoting *Commonwealth v. Gomes*, 453 Mass. 506, 512 (2009). But in this case, all of the testimony of crime in the area of the stop concerned the United Front gang in general and Paris's

2016 firearm arrest in particular. Every reference in the judge's findings to the stop's taking place in a high-crime area is accompanied by mention of Paris's nearby arrest [R.7,18,19]. In this circumstance, it is unlikely that the fact that the stop occurred in a 'high-crime area' played a significant independent role in the judge's conclusions. Compare *Commonwealth v. Evelyn*, 485 Mass. 691, 709 (2020) ("we consider this factor only if the 'high crime' nature of the area has a 'direct connection with the specific location and activity being investigated'").

* * *

At the heart of the *Terry* analysis is a recognition of the important and competing concerns implicated on both sides: on the one side, the Supreme Court recognized that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience," and on the other side is the "interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used

against him." *Terry*, 392 U.S. at 23-25. "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Id.* at 21, quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967). The resulting balancing test provides some amount of guidance to officers in the field, but can be fully applied only upon review after the fact, as no person can assess their own objective reasonableness in the moment:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Id. at 21-22.

Here the motion judge, having heard and credited the testimony of all three officers, properly concluded that in the particular circumstances of this case, the search of the defendant for weapons was reasonable. The officers stopped a car for unsafe driving without having any knowledge of who was in it,

and were prevented from ticketing the driver by Paris's spontaneous, uncharacteristic, and aggressive behavior. This behavior commanded the near-exclusive attention of all three officers, and led them to conclude that Paris was seeking to distract them from something in the car. In light of this concern, it was relevant that two of the car's three occupants had firearms histories known to the officers, as well as gang associations, and that the officers could not know what they had been doing during the time when the officers had been unable to observe them. Two of the officers had been involved in a prior arrest of Paris for possessing a gun in a car that he had just used for gang activity. And the officers were outnumbered four to three, and it had already taken the full attention of all three of them to deal with just one person. In the totality of the circumstances, the officers' evident conclusion that by that point anyone in the car might have a gun was based in "specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27.

CONCLUSION

For the aforementioned reasons, the Commonwealth asks that this Court affirm defendant's convictions.

Respectfully submitted
For the Commonwealth,

/s/ Shoshana Stern
Shoshana E. Stern
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April 20, 2021

COMMONWEALTH'S ADDENDUM

G.L. c. 140,

Section 121: Firearms sales; definitions; antique firearms; application of law; exceptions

Section 121. As used in sections 122 to 131Y, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:—

''Ammunition'', cartridges or cartridge cases, primers (igniter), bullets or propellant powder designed for use in any firearm, rifle or shotgun. The term ''ammunition'' shall also mean tear gas cartridges.

''Assault weapon'', shall have the same meaning as a semiautomatic assault weapon as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921(a)(30) as appearing in such section on September 13, 1994, and shall include, but not be limited to, any of the weapons, or copies or duplicates of the weapons, of any caliber, known as: (i) Avtomat Kalashnikov (AK) (all models); (ii) Action Arms Israeli Military Industries UZI and Galil; (iii) Beretta Ar70 (SC–70); (iv) Colt AR–15; (v) Fabrique National FN/FAL, FN/LAR and FNC; (vi) SWD M–10, M–11, M–11/9 and M–12; (vi) Steyr AUG; (vii) INTRATEC TEC–9, TEC–DC9 and TEC–22; and (viii) revolving cylinder shotguns, such as, or similar to, the Street Sweeper and Striker 12; provided, however, that the term assault weapon shall not include: (i) any of the weapons, or replicas or duplicates of such weapons, specified in appendix A to 18 U.S.C. section 922 as appearing in such appendix on September 13, 1994, as such weapons were manufactured on October 1, 1993; (ii) any weapon that is operated by manual bolt, pump, lever or slide action; (iii) any weapon that has been rendered permanently inoperable or otherwise rendered permanently unable to be designated a semiautomatic assault weapon; (iv) any weapon that was manufactured prior to the year 1899; (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable assault weapon; (vi) any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition; or (vii) any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine.

[Definition of ''Bump stock'' in first paragraph applicable as provided by 2017, 110, Sec. 53.]

''Bump stock'', any device for a weapon that increases the rate of fire achievable with such weapon by using energy from the recoil of the weapon to generate a reciprocating action that facilitates repeated activation of the trigger.

''Conviction'', a finding or verdict of guilt or a plea of guilty, whether or not final sentence is imposed.

''Court'', as used in sections 131R to 131Y, inclusive, the division of the district court department or the Boston municipal court department of the trial court having jurisdiction in the city or town in which the respondent resides.

''Deceptive weapon device'', any device that is intended to convey the presence of a rifle, shotgun or firearm that is used in the commission of a violent crime, as defined in this section, and which presents an objective threat of immediate death or serious bodily harm to a person of reasonable and average sensibility.

''Extreme risk protection order'', an order by the court ordering the immediate suspension and surrender of any license to carry firearms or firearm identification card which the respondent may hold and ordering the respondent to surrender all firearms, rifles, shotguns, machine guns, weapons or ammunition which the respondent then controls, owns or possesses; provided, however, that an extreme risk protection order shall be in effect for up to 1 year from the date of issuance and may be renewed upon petition.

''Family or household member'', a person who: (i) is or was married to the respondent; (ii) is or was residing with the respondent in the same household; (iii) is or was related by blood or marriage to the respondent; (iv) has or is having a child in common with the respondent, regardless of whether they have ever married or lived together; (v) is or has been in a substantive dating relationship with the respondent; or (vi) is or has been engaged to the respondent.

''Firearm'', a stun gun or a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun as originally manufactured; provided, however, that the term firearm shall not include any weapon that is: (i) constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to, covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette-packages; or (ii) not detectable as a weapon or potential weapon by x-ray machines commonly used at airports or walk- through metal detectors.

''Gunsmith'', any person who engages in the business of repairing, altering, cleaning, polishing, engraving, blueing or performing any mechanical operation on any firearm, rifle, shotgun or machine gun.

''Imitation firearm'', any weapon which is designed, manufactured or altered in such a way as to render it incapable of discharging a shot or bullet.

''Large capacity feeding device'', (i) a fixed or detachable magazine, box, drum, feed strip or similar device capable of accepting, or that can be readily converted to accept, more than ten rounds of ammunition or more than five shotgun shells; or (ii) a large capacity ammunition feeding device as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921(a)(31) as appearing in such section on September 13, 1994. The term ''large capacity feeding device'' shall not include an attached tubular device designed to accept, and capable of operating only with,.22 caliber ammunition.

''Large capacity weapon'', any firearm, rifle or shotgun: (i) that is semiautomatic with a fixed large capacity feeding device; (ii) that is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device; (iii) that employs a rotating cylinder capable of accepting more than ten rounds of ammunition in a rifle or firearm and more than five shotgun shells in the case of a shotgun or firearm; or (iv) that is an assault weapon. The term ''large capacity weapon'' shall be a secondary designation and shall apply to a weapon in addition to its primary designation as a firearm, rifle or shotgun and shall not include: (i) any weapon that was manufactured in or prior to the year 1899; (ii) any weapon that operates by manual bolt, pump, lever or slide action; (iii) any weapon that is a single-shot weapon; (iv) any weapon that has been modified so as to render it permanently inoperable or otherwise rendered permanently unable to be designated a large capacity weapon; or (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for

use as a functional weapon and cannot be readily modified through a combination of available parts into an operable large capacity weapon.

''Length of barrel'' or ''barrel length'', that portion of a firearm, rifle, shotgun or machine gun through which a shot or bullet is driven, guided or stabilized and shall include the chamber.

''Licensing authority'', the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them.

[Definition of ''Machine gun'' in first paragraph applicable as provided by 2017, 110, Sec. 53.]

''Machine gun'', a weapon of any description, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged by one continuous activation of the trigger, including a submachine gun; provided, however, that ''machine gun'' shall include bump stocks and trigger cranks.

''Petition'', a request filed with the court by a petitioner for the issuance or renewal of an extreme risk protection order.

''Petitioner'', the family or household member, or the licensing authority of the municipality where the respondent resides, filing a petition.

''Purchase'' and ''sale'' shall include exchange; the word ''purchaser'' shall include exchanger; and the verbs ''sell'' and ''purchase'', in their different forms and tenses, shall include the verb exchange in its appropriate form and tense.

''Respondent'', the person identified as the respondent in a petition against whom an extreme risk protection order is sought.

''Rifle'', a weapon having a rifled bore with a barrel length equal to or greater than 16 inches and capable of discharging a shot or bullet for each pull of the trigger.

''Sawed-off shotgun'', any weapon made from a shotgun, whether by alteration, modification or otherwise, if such weapon as modified has one or more barrels less than 18 inches in length or as modified has an overall length of less than 26 inches.

''Semiautomatic'', capable of utilizing a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and requiring a separate pull of the trigger to fire each cartridge.

''Shotgun'', a weapon having a smooth bore with a barrel length equal to or greater than 18 inches with an overall length equal to or greater than 26 inches, and capable of discharging a shot or bullet for each pull of the trigger.

''Stun gun'', a portable device or weapon, regardless of whether it passes an electrical shock by means of a dart or projectile via a wire lead, from which an electrical current, impulse, wave or beam that is designed to incapacitate temporarily, injure or kill may be directed.

''Substantive dating relationship'', a relationship as determined by the court after consideration of the following factors: (i) the length of time of the relationship; (ii) the type of relationship; (iii) the frequency of interaction between the parties; and (iv) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship.

[Definition of ''Trigger crank'' in first paragraph applicable as provided by 2017, 110, Sec. 53.]

''Trigger crank'', any device to be attached to a weapon that repeatedly activates the trigger of the weapon through the use of a lever or other part that is turned in a circular motion; provided, however, that ''trigger crank'' shall not include any weapon initially designed and manufactured to fire through the use of a crank or lever.

''Violent crime'', shall mean any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult, that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another.

''Weapon'', any rifle, shotgun or firearm.

Where the local licensing authority has the power to issue licenses or cards under this chapter, but no such licensing authority exists, any resident or applicant may apply for such license or firearm identification card directly to the colonel of state police and said colonel shall for this purpose be the licensing authority.

The provisions of sections 122 to 129D, inclusive, and sections 131, 131A, 131B and 131E shall not apply to:

(A) any firearm, rifle or shotgun manufactured in or prior to the year 1899;

(B) any replica of any firearm, rifle or shotgun described in clause (A) if such replica: (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition; or (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; and

(C) manufacturers or wholesalers of firearms, rifles, shotguns or machine guns.

G.L. c. 269,

Section 10: Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment

Section 10. (a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid Class A or Class B license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 21/2 years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

G.L. c. 269,

Section 10G: Violations of Sec. 10 by persons previously convicted of violent crimes or serious drug offenses; punishment

Section 10G. (a) Whoever, having been previously convicted of a violent crime or of a serious drug offense, both as defined herein, violates the provisions of paragraph (a), (c) or (h) of section 10 shall be punished by imprisonment in the state prison for not less than three years nor more than 15 years.

(b) Whoever, having been previously convicted of two violent crimes, or two serious drug offenses or one violent crime and one serious drug offense, arising from separate incidences, violates the provisions of said paragraph (a), (c) or (h) of said section 10 shall be punished by imprisonment in the state prison for not less than ten years nor more than 15 years.

(c) Whoever, having been previously convicted of three violent crimes or three serious drug offenses, or any combination thereof totaling three, arising from separate incidences, violates the provisions of said paragraph (a), (c) or (h) of said section 10 shall be punished by imprisonment in the state prison for not less than 15 years nor more than 20 years.

(d) The sentences imposed upon such persons shall not be reduced to less than the minimum, nor suspended, nor shall persons convicted under this section be eligible for probation, parole, furlough, work release or receive any deduction from such sentence for good conduct until such person shall have served the minimum number of years of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

(e) For the purposes of this section, ''violent crime'' shall have the meaning set forth in section 121 of chapter 140. For the purposes of this section, ''serious drug offense'' shall mean an offense under the federal Controlled Substances Act, 21 U.S.C. 801, et seq., the federal Controlled Substances Import and Export Act, 21 U.S.C. 951, et seq. or the federal Maritime Drug Law Enforcement Act, 46 U.S.C.

App. 1901, et seq. for which a maximum term of imprisonment for ten years or more is prescribed by law, or an offense under chapter 94C involving the manufacture, distribution or possession with intent to manufacture or distribute a controlled substance, as defined in section 1 of said chapter 94C, for which a maximum term of ten years or more is prescribed by law.

G.L. c. 276,

Section 58A: Conditions for release of persons accused of certain offenses involving physical force or abuse; hearing; order; review

Section 58A. (1) The commonwealth may move, based on dangerousness, for an order of pretrial detention or release on conditions for a felony offense that has as an element of the offense the use, attempted use or threatened use of physical force against the person of another or any other felony that, by its nature, involves a substantial risk that physical force against the person of another may result, including the crimes of burglary and arson whether or not a person has been placed at risk thereof, or a violation of an order pursuant to section 18, 34B or 34C of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209 A or section 15 or 20 of chapter 209C, or arrested and charged with a misdemeanor or felony involving abuse as defined in section 1 of said chapter 209A or while an order of protection issued under said chapter 209A was in effect against such person, an offense for which a mandatory minimum term of 3 years or more is prescribed in chapter 94C, arrested and charged with a violation of section 13B of chapter 268 or a charge of a third or subsequent violation of section 24 of chapter 90 within 10 years of the previous conviction for such violation, or convicted of a violent crime as defined in said section 121 of said chapter 140 for which a term of imprisonment was served and arrested and charged with a second or subsequent offense of felony possession of a weapon or machine gun as defined in section 121 of chapter 140, or arrested and charged with a violation of paragraph (a), (c) or (m) of section 10 of chapter 269, section 112 of chapter 266 or section 77 or 94 of chapter 272; provided, however, that the commonwealth may not move for an order of detention under this section based on possession of a large capacity feeding device without simultaneous possession of a large capacity weapon; or arrested and charged with a violation of section 10G of said chapter 269.

(2) Upon the appearance before a superior court or district court judge of an individual charged with an offense listed in subsection (1) and upon the motion of the commonwealth, the judicial officer shall hold a hearing pursuant to subsection (4) issue an order that, pending trial, the individual shall either be released on personal recognizance without surety; released on conditions of release as set forth herein; or detained under subsection (3).

If the judicial officer determines that personal recognizance will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

(A) subject to the condition that the person not commit a federal, state or local crime during the period of release; and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community that the person—

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode or travel;

(v) avoid all contact with an alleged victim of the crime and with any potential witness or witnesses who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial service agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial officer may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

The judicial officer may at any time amend the order to impose additional or different conditions of release.

Participation in a community corrections program pursuant to chapter 211F may be ordered by the court or as a condition of release; provided, however, that the defendant shall consent to such participation.

(3) If, after a hearing pursuant to the provisions of subsection (4), the district or superior court justice finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community, said justice shall order the detention of the person prior to trial. A person detained under this subsection shall be brought to a trial as soon as reasonably possible, but in absence of good cause, the person so held shall not be detained for a period exceeding 120 days by the district court or for a period exceeding 180 days by the superior court excluding any period of delay as defined in Massachusetts Rules of Criminal Procedure Rule 36(b)(2). A justice may not impose a financial condition under this section that results in the pretrial detention of the person. Nothing in this section shall be interpreted as limiting the imposition of a financial condition upon the person to reasonably assure his appearance before the courts.

(4) When a person is held under arrest for an offense listed in subsection (1) and upon a motion by the commonwealth, the judge shall hold a hearing to determine whether conditions of release will reasonably assure the safety of any other person or the community.

The hearing shall be held immediately upon the person's first appearance before the court unless that person, or the attorney for the commonwealth, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed seven days, and a continuance on motion of the attorney for the commonwealth may not exceed three business days. During a continuance, the individual shall be detained upon a showing that there existed probable cause to arrest the person. At the hearing, such person shall have the right to be represented by counsel, and, if financially unable to retain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information. Prior to the summons of an alleged victim, or a member of the alleged victim's family, to appear as a witness at the hearing, the person shall demonstrate to the court a good faith basis for the person's reasonable belief that the testimony from the witness will be material and relevant to support a conclusion that there are conditions of release that will reasonably assure the safety of any other person or the community. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing and the judge shall consider hearsay contained in a police report or the statement of an alleged victim or witness. The facts the judge uses to support findings pursuant to subsection (3), that no conditions will reasonably assure the safety of any other person or the community, shall be supported by clear and convincing evidence. In a detention order issued pursuant to the provisions of said subsection (3) the judge shall (a) include written findings of fact and a written statement of the reasons for the detention; (b) direct that the person be committed to custody or confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentence or being held in custody pending appeal; and (c) direct that the person be afforded reasonable opportunity for private consultation with his counsel. The person may be detained pending completion of the hearing. The hearing may be reopened by the judge, at any time before trial, or upon a motion of the commonwealth or the person detained if the judge finds that: (i) information exists that was not known at the time of the hearing or that there has been a change in circumstances and (ii) that such information or change in circumstances has a

material bearing on the issue of whether there are conditions of release that will reasonably assure the safety of any other person or the community.

(5) In his determination as to whether there are conditions of release that will reasonably assure the safety of any other individual or the community, said justice, shall, on the basis of any information which he can reasonably obtain, take into account the nature and seriousness of the danger posed to any person or the community that would result by the person's release, the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, his reputation, the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, his record of convictions, if any, any illegal drug distribution or present drug dependency, whether the person is on bail pending adjudication of a prior charge, whether the acts alleged involve abuse as defined in section one of chapter two hundred and nine A, or violation of a temporary or permanent order issued pursuant to section eighteen or thirty-four B of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, sections three, four or five of chapter two hundred and nine A, or sections fifteen or twenty of chapter two hundred and nine C, whether the person has any history of orders issued against him pursuant to the aforesaid sections, whether he is on probation, parole or other release pending completion of sentence for any conviction and whether he is on release pending sentence or appeal for any conviction; provided, however, that if the person who has attained the age of 18 years is held under arrest for a violation of an order issued pursuant to section 18 or 34B of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A or section 15 or 20 of chapter 209C or any act that would constitute abuse, as defined in section 1 of said chapter 209A, or a violation of sections 13M or 15D of chapter 265, said justice shall make a written determination as to the considerations required by this subsection which shall be filed in the domestic violence record keeping system.

(6) Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

(7) A person aggrieved by the denial of a district court justice to admit him to bail on his personal recognizance with or without surety may petition the superior court for a review of the order of the recognizance and the justice of the district court shall thereupon immediately notify such person of his right to file a petition for review in the superior court. When a petition for review is filed in the district court or with the detaining authority subsequent to petitioner's district court appearance, the clerk of the district court or the detaining authority, as the case may be, shall immediately notify by telephone, the clerk and probation officer of the district court, the district attorney for the district in which the district court is located, the prosecuting officer, the petitioner's counsel, if any, and the clerk of courts of the county to which the petition is to be transmitted. The clerk of the district court, upon the filing of a petition for review, either in the district court or with the detaining authority, shall forthwith transmit the petition for review, a copy of the complaint and the record of the court, including the appearance of the attorney, if any is entered, and a summary of the court's reasons for denying the release of the defendant on his personal recognizance with or without surety to the superior court for the county in which the district court is located, if a justice thereof is then sitting, or to the superior court of the nearest county in which a justice is then sitting; the probation officer of the district court shall transmit forthwith to the probation officer of the superior court, copies of all records of the probation office of said district court pertaining to the petitioner,

including the petitioner's record of prior convictions, if any, as currently verified by inquiry of the commissioner of probation. The district court or the detaining authority, as the case may be, shall cause any petitioner in its custody to be brought before the said superior court within two business days of the petition having been filed. The district court is authorized to order any officer authorized to execute criminal process to transfer the petitioner and any papers herein above described from the district court or the detaining authority to the superior court, and to coordinate the transfer of the petitioner and the papers by such officer. The petition for review shall constitute authority in the person or officer having custody of the petitioner to transport the petitioner to said superior court without the issuance of any writ or other legal process; provided, however, that any district or superior court is authorized to issue a writ of habeas corpus for the appearance forthwith of the petitioner before the superior court.

The superior court shall in accordance with the standards set forth in section fifty-eight A, hear the petition for review under section fifty-eight A as speedily as practicable and in any event within five business days of the filing of the petition. The justice of the superior court hearing the review may consider the record below which the commonwealth and the person may supplement. The justice of the superior court may, after a hearing on the petition for review, order that the petitioner be released on bail on his personal recognizance without surety, or, in his discretion, to reasonably assure the effective administration of justice, make any other order of bail or recognizance or remand the petitioner in accordance with the terms of the process by which he was ordered committed by the district court.

(8) If after a hearing under subsection (4) detention under subsection (3) is ordered or pretrial release subject to conditions under subsection (2) is ordered, then: (A) the clerk shall immediately notify the probation officer of the order; and (B) the order of detention under subsection (3) or order of pretrial release subject to conditions under subsection (2) shall be recorded in (i) the defendant's criminal record as compiled by the commissioner of probation under section 100 and (ii) the domestic violence record keeping system.

Constitution of United States of America

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis

of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation

incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Massachusetts Declaration of Rights

Article 14

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws. [See Amendments, Art. XLVIII, The Initiative, II, sec. 2].

CERTIFICATE OF SERVICE

I, Shoshana E. Stern, hereby certify that I have this date, April 20, 2021, served a copy of the Commonwealth's Brief RE: *Commonwealth v. Zahkuan Bailey-Sweeting,* Supreme Judicial Court No. SJC-13086, on counsel for the defendant by e-filing (or e-mailing) to the office of:

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Signed under the pains and penalties of perjury.

/s/ Shoshana E. Stern
Shoshana E. Stern
Assistant District Attorney
For the Bristol District
BBO # 667894

April 20, 2021

CERTIFICATION

Commonwealth v. Zahkuan Bailey-Sweeting
SJC-13086

As counsel for the Commonwealth, I certify that this brief complies with the rules of court that pertain to the filing of briefs. This brief is produced in monospaced font, Courier New 12, and contains no more than 50 pages from the statement of the issues through the conclusion. Mass. R. App. P. 16(a)(5).

/s/ Shoshana E. Stern
Shoshana E. Stern
Assistant District Attorney
For the Bristol District
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April 20, 2021