COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

_____

NO. 13248

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COMMONWEALTH OF MASSACHUSETTS,
Appellee
V.

DAVID PRIVETTE,
Appellant

_____

COMMONWEALTH'S BRIEF
ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

_____

SUFFOLK COUNTY

_____

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AUGUST 2022

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ISSUE PRESENTED

Whether the motion judge correctly concluded Officer Doherty had reasonable suspicion to stop the defendant where, following radio broadcasts of an armed robbery and a description of the suspect, Officer Doherty observed the defendant, who matched the general description of the suspect, was the only individual at 3:43 a.m. on a rainy night, walking in a location temporally and geographically proximate to the crime, and in the direction consistent with the robber's reported flight path.

STATEMENT OF THE CASE

This case is before the Court on the interlocutory appeal of the defendant, David Privette, from the denial of his motion to suppress evidence.

On October 10, 2018, a Suffolk County Grand Jury returned indictments against the defendant for armed robbery, in violation of G.L. c. 265, § 17; possession of a firearm in the commission of a felony, in violation of G.L. c. 265, § 18B; possession of a firearm as an armed career criminal, in violation of G.L. c. 269, § 10(a), 10G (b); possession of ammunition without an FID card, in violation of G.L.

c. 269, § 10(h); and carrying a loaded firearm, in violation of G.L. c. 269, § 10(n) (CA. 4-5).[1]

On May 3, 2019, the defendant filed a motion to suppress the stop, the pat-frisk of his body and backpack, and the show-up identification of the defendant following the robbery (CA. 10). The Commonwealth filed its opposition on October 9, 2019 (CA. 12). The Honorable Elaine Buckley held a hearing on the motion on October 10, 2019 (CA. 12), and on October 15, 2019, she issued a written decision denying the motion in its entirety (CA. 12). The defendant timely filed a notice of appeal and an application for leave to pursue an interlocutory appeal on November 12, 2019 (CA. 13).

On September 14, 2021, the Appeals Court (Sacks, JJ.) issued an opinion affirming the denial of the motion to suppress. *Commonwealth v. Privette*, 100 Mass. App. Ct. 222 (2021). The defendant sought

[1] References to the defendant's brief will be cited by page number as (D.Br. _) and references to his appendix will be cited by page number as (DA. _). References to the motion transcript will be cited by page number as (Tr. _) and the motion exhibits as (Exh. _).

further appellate review, which this Court granted on February 11, 2022.

STATEMENT OF FACTS

The Commonwealth presented three witnesses at the motion to suppress hearing: Boston Police Department Officers Brian Doherty and Luis Lopez, and Boston Police Department Lieutenant Darryl Dwan (CA. 53). The motion judge explicitly credited the testimony of each witness (CA. 54).

The judge made written factual findings as follows:[2]

> I credit and accept the testimony of BPD Officers Brian Doherty and Luis Lopez as well as BPD Lt. Daryl [sic] Dwan regarding the events they observed and participated in during the early morning hours of August 12, 2019.[3] I find that all BPD members who

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[2] The Commonwealth has inserted citations to those portions of the suppression record that supplement the judge's findings of fact with the officer's uncontroverted testimony in order to provide a full narrative. *See Commonwealth v. Isaiah I.*, 448 Mass. 334, 337 (2007) (upon review, an appellate court may add facts if evidence was uncontroverted and undisputed and if motion judge explicitly or implicitly credited witnesses' testimony as long as the supplemented facts do not detract from the judge's ultimate finding). Any fact that Judge Buckley did not explicitly find is distinguished from her explicit findings by its presence in a footnote.

[3] The written findings list the date of the offense as August 12, 2019, on multiple occasions. This was in

testified had successfully completed the BPD training academy and that in the case of Lt. Dwan, he has had additional police training when he obtained the rank of Sergeant which he held for seven (7) years before obtaining his recent rank of L[ieutenan]t (Tr. 9, 41, 71). [Judge's footnote: At the time of the events at issue, Lt. Dwan held the rank of Sergeant.]

BPD Officer Doherty is a five (5) year veteran police officer who has been assigned to the C-11 Dorchester area for the last three (3) years (Tr. 9). He is extremely familiar with the specific area of Dorchester and knows is intimately, not just from his work experience as a police officer assigned in that district, but also as he grew up living [sic] blocks of[f] the area where the investigation occurred on the morning of August 12, 2019 (Tr. 12). Equally, Officer Lopez is sixteen (16) year veteran of the Boston Police Department who has had multiple assignments, but most recently has been assigned to the City Drug Control Unit (DCU) for the last three (3) years (Tr. 71). Over his career he has participated in many "show up identifications" (Tr. 74-75). [Judge's footnote: On the morning of the events at issue, Officer Lopez was working an overtime detail. He did not have on his person his "card" that had the specific cautions to be given to the victims when bringing them back for a show up identification. However the officer testified, and I credit, that from his past experience he was able to recall

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error, for all parties acknowledge the date of August 12, **2018**, as the date of the offense.

those cautions and provide them to the victim prior to the identification.][4]

On August 12, 2019, Officer Doherty was working the midnight shift in the C-11, Dorchester area of the city (Tr. 10). He was in plain clothes and driving an unmarked car (Tr. 10). At approximately 3:35 a.m. he received a radio transmission that there was an armed robbery of a Shell Gas Station on Morrissey Boulevard and that the suspect was a "black male, late 20's between 5'7 and 5'8 in height [Judge's footnote: Privette is 5'11 inches in height.] and wearing dark jeans and a blue hoodie" (Tr. 11, 16). [Judge's footnote: there was no mention in the original broadcast about facial hair or a red plaid backpack.][5] The suspect was thought to be fleeing toward the CVS on Morrissey Boulevard (Tr. 13). Upon hearing the call, Officer Doherty did not respond to the gas station as other police were en route, but rather surveilled the area for

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[4] The defendant is not appealing the portion of the judge's ruling that denies suppression of the identification procedure (D.Br. 12 n.12).

[5] At 3:35:59, police dispatch broadcast the address of the Shell Gas Station, within ninety seconds of the original broadcast, police dispatched further "armed robbery at gunpoint, I'll get you more." At 3:36:31, Boston Police dispatched a description of the armed robber: "So far, I've got a black male, late twenties, medium build, five foot seven, blue hoodie, blue jeans, on foot towards the CVS" (Ex. 5). At 3:38:04, Boston Police dispatch updated the description, broadcasting, "again we are looking for a black male, twenty-eight to twenty-nine, medium build, five foot seven, five foot eight, blue hoodie, blue jeans, with facial hair, should have a silver firearm" (Ex. 5). Dispatch again updated the description at 3:41:19, broadcasting "black male, twenty-eight to twenty-nine, medium build, five foot seven, five foot eight, blue hoodie, blue jeans, some facial hair" (Ex. 5).

the suspect (Tr. 11-16).[6] Intimately familiar with the locus, Officer Doherty headed towards the "Clam Point" area which is in proximity to the CVS and gas station (Tr. 14-16). From his personal experience, he was aware of a large gap in a fence that separated Morrissey Boulevard and Ashland Street close to the robbery at the Shell Gas Station (Tr. 12). He traveled the various streets within that area, including Everdeen Street, Banche Street, Greenhill Street for approximately 4-6 minutes (Tr. 12-16). [Judge's footnote: he canvassed an area of about nine streets.] During that time, he observed no individuals walking about on the streets (Tr. 15, 16).

As he turned onto Ashland Street,[7] Officer Doherty observed an individual, later identified as the Defendant Privette, walking in a normal pace in the direction of his un-marked car (Tr. 18, 19). It was raining at the time and the area was poorly lit (Tr. 16). [Judge's footnote: Officer Lopez credibly testified that when he returned to the area with the victim for the "show up" identification, that it was dark and that he turned on all of the lights of his cruiser which illuminated the area.] Officer Doherty observed that the person walking towards him was a black male, of the same approximate age as on the broadcast and that he had noticeable facial hair consisting of a large beard (Tr. 20).[8] He

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[6] Officer Doherty received the updated radio broadcasts as he drove around the area looking for a suspect (Tr. 11, 16, 18).

[7] Officer Doherty arrived at Ashland Street at 3:43 a.m., after receiving the initial radio broadcast at 3:36 and continued updates during the ensuing seven minutes (Tr. 17, 18, Ex. 2).

[8] At the motion hearing, Officer Doherty described the broadcasted description as "black male, with a beard, with a blue sweatshirt on, and blue jeans" (Tr. 20).

was wearing a green colored sweater and blue jeans (Tr. 20, 26, 27). [Judge's footnote: At hearing [sic] the defendant was attired in a green sweater of the same color as the defendant was wearing at the time he was stopped by Officer Doherty.]

Officer Doherty parked his car and approached the Defendant on foot (Tr. 18). As he neared the Defendant he immediately identified himself as Boston Police and commanded the Defendant to "show me your hands" (Tr. 19). Defendant complied; he did not attempt to run or evade Officer Doherty (Tr. 19). Officer Doherty, concerned that the alleged crime that had occurred within the hour and given the nature of the call (armed robbery) and the fact that the Defendant was the sole black male walking about the area of the flight path of the robber, properly determined that a pat-frisk of the Defendant was necessary (Tr. 19-21).[9] Officer Doherty felt the front pocket of the Defendant's jeans, and located a large wad which he instructed the Defendant to remove (Tr. 21). Once out of the pocket, it was realized that the wad represented cash and Officer Doherty instructed the Defendant to return the wad to his pocket (Tr.21, 35-36). The officer's pat-frisk of the Defendant did not recover any weapons upon his person (Tr. 21,22).

Contemporaneously, Lt. Dwan arrived at the scene from the opposite direction (Tr.

He described the individual on the street as "a black male, with a beard. He was the only person on the street, and he was wearing a dark sweater and blue jeans" (Tr. 20). To be clear, Officer Doherty did not mention the size of the individual's beard (Tr. 20).

9 The pat-frisk of the defendant and the defendant's backpack are not challenged in this appeal, other than as fruits of the unconstitutional stop (D.Br. 8).

> 21, 43).[10] [Judge's footnote: Lt. Dwan was working an overtime detail as part of the National Grid Strike detail on Victory Road, Dorchester. Victory Road is in close proximity to the locus where the robbery occurred and where Officer Doherty located the Defendant.][11] He alighted his vehicle and approached the Defendant from behind (Tr. 21, 46, 47). As he approached the Defendant, he observed that the Defendant was wearing a red plaid backpack upon [sic] (Tr. 47). Lt. Dwan assisted the Defendant in removing the pack (Tr. 47, 48). Thereafter, given the nature of the call which involved a gun and his concern that there could be a weapon, Lt. Dwan pat-frisked the backpack (Tr. 22, 48-50). He began the process by squeezing its contents from the bottom to the top (Tr. 49). He did not open the backpack during this process (Tr. 22, 49, 50). [Judge's footnote: This was corroborated by Officer Doherty who was standing in front of the Defendant, facing Lt. Dwan and who testified that he observed Lt. Dwan pat frisk the backpack.] While he was manipulating the closed backpack to get a feel of what was inside, Lt. Dwan felt a

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[10] Lt. Dwan saw the defendant and began to approach him from behind moments before Officer Doherty stopped him (Tr. 47).

[11] As the motion judge noted, Lt. Dwan had been stationed on Victory Road as part of his detail with for the National Grid strike (Tr. 20). Upon hearing the initial radio broadcast at 3:35 a.m., he traveled from Victory Road to Morrissey Boulevard, up Morrissey Boulevard, u-turned to the other side of Morrissey Boulevard, took a right onto Victory Road, a right onto Everdean Street, until reaching Ashland Street (Tr. 45-46, 56-60). As he drove, he heard an updated radio description, which included the detail that the suspect had facial hair (Tr. 46). Throughout the drive, Lt. Dwan did not see anybody on the roads (Tr. 46). He arrived at where Privette was stopped at 3:42 a.m. (Ex. 2).

> hard object near the top of the backpack which, in his experience and training, he recognized as potentially a weapon (Tr. 49, 50). [Judge's footnote: In his police career, he has recovered more than a dozen or more guns while performing a pat frisk and is well familiar with the feel of a weapon inside of a bag/backpack.] He then placed the backpack on the ground, opened it, and observed a silver gun that was towards the top of the backpack (Tr. 49, 50, 61). Various articles of clothing were also in the backpack (Tr. 49, 52).[12] Lt. Dwan did not remove any of the items; rather, he zipped up the backpack and gave it to another officer at the scene who brought it to the police station (Tr. 54). Lt. Dwan has had no further involvement with the backpack which was taken to the police station (Tr. 54).[13]

(DA. 42-44).

The judge denied the motion to suppress the stop and the pat-frisks, reasoning:

> The investigatory stop of the Defendant by BPD Officer Doherty was lawful based upon reasonable suspicion that the Defendant was the suspect they were searching for. "To justify a police investigatory stop under the Fourth Amendment or art. 14, police must have 'reasonable suspicion' that the person has committed, is committing, or is about to commit a crime." *Commonwealth v. Costa*, 448 Mass. 510, 514 (2007), quoting *Commonwealth v. Lyons*, 409 Mass. 16, 19 (1990). Whether

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[12] These items included a blue hooded sweatshirt (Tr. 25).

[13] The Commonwealth has removed findings of fact that relate to Officer Luis Lopez and the "bring back" identification procedure because those facts are not relevant to the challenge on appeal.

reasonable suspicion exists for the police to conduct an investigatory stop is determined by (1) whether the initiation of the investigation by the police is permissible under the circumstances and (2) whether the scope of the search was justified by the circumstances. *See*, *Commonwealth v. McKoy*, 83 Mass. App. Ct. 309, 313 (2013). It is well settled that reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" an intrusion. *Terry v. Ohio*, 392 U.S.1, 21-22 (1968); *See also*, *Commonwealth v. Gomes*, 452 Mass. 506, 511 (2009), quoting *Commonwealth v. Thibeau*, 384 Mass. 762, 764 (1981) (holding "we view the 'facts and inferences underlying the officer's suspicion. . .as a whole when assessing the reasonableness of his acts.'"). Whether the facts and circumstances known to the police constitute reasonable suspicion is measured by an objective standard. *Commonwealth v. Mercado*, 422 Mass. 367, 369 (1996). The evidence to establish a reasonable suspicion, while less than that necessary to show probable cause, requires information supporting the officer's suspicion have an indicia of reliability. *Commonwealth v. Pinto*, 476 Mass. 361, 364 (2017). Here, the investigatory stop of the Defendant on Ashland Street was permissible and justified in the circumstances then existing.

Specifically, the Defendant was located in the locus of the robbery and within minutes of its occurrence and fit the general description of the initial bulletin of the robbery. Given the early morning hour and the fact that the Defendant was the only person observed by any police surveillance in the area, the police had specific, articulable facts, which when viewed in their totality create a rational inference

that the Defendant was the suspect they were seeking. *See Commonwealth v. Johnson*, 88 Mass. App. Ct. 705, 712 (2015), quoting *Commonwealth v. Stoute*, 422 Mass. 782, 791 (1996). ("test for determining reasonable suspicion should include consideration of the possibility of the possession of a gun, and the government's need for prompt investigation.").

Assessing all of the circumstances known to the police at the time, I find and rule that there were specific and articulable facts from which, objectively considered, a reasonable suspicion existed that Privette was involved in the robbery and illegally in possession of a firearm. Thus, Officer Doherty's stop of Privette was entirely proper and constitutionally as he had suspicion that Privette had committed a crime. *See*, *Commonwealth v. Narcisse*, 457 Mass. 1, 9 (2010).

Equally, the seizure of the Defendant on Ashland Street, within minutes of the robbery was lawful. I find that the Defendant was seized on Ashland Street by Officer Doherty when he was commanded by the officer to "show his hands". At that time, a reasonable person would have believed that he was not free to leave. *Id*. This contact "had a compulsory dimension to it" and no reasonable person would have felt that he was free to leave. *See Commonwealth v. Barros*, 435 Mass 171, 173-174 (2001) (ruling that police have seized a person in the constitutional sense, 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'"). At the time he was seized, Officer Doherty had reasonable suspicion to

believe that Privette was the suspect in the recent robbery.[14]

(DA. 45-47).

ARGUMENT

THE MOTION JUDGE CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS WHERE HE WAS THE ONLY PERSON WALKING IN THE RAIN AT 3:43 A.M., IN THE DIRECTION OF AN ARMED ROBBER'S REPORTED FLIGHT PATH MINUTES AFTER THE CRIME AND WHERE HE MATCHED, IN ALL MATERIAL RESPECTS, THE DESCRIPTION OF THE ARMED ROBBER, THEREBY GIVING RISE TO REASONABLE SUSPICION TO JUSTIFY THE STOP OF THE DEFENDANT.

The defendant claims that the motion judge erred in denying his motion to suppress because Officer Doherty lacked reasonable suspicion to stop him, and that, as a result, the firearm and other incriminating evidence found on him ought to be suppressed as the fruits of an illegal stop (D.Br. 19-20). The defendant's claim has no merit as the motion judge properly concluded the police had reasonable suspicion to stop and pat frisk the defendant.

In reviewing a motion to suppress, this Court will accept the motion judge's findings of fact unless

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[14] The Commonwealth has removed findings of law that relate to the pat frisk of the Defendant's backpack and the "bring back" identification procedure because those issues are not relevant to the challenge of this appeal.

there is clear error. *Commonwealth v. Welch*, 420 Mass. 646, 651 (1995); *Commonwealth v. Yesilciman*, 406 Mass. 736, 743 (1990).[15] The Court will, however, "independently determine the correctness of the judge's application of constitutional principles to the facts found." *Commonwealth v. DePeiza*, 449 Mass. 367, 369 (2007) (quoting *Commonwealth v. Catanzaro*, 441 Mass. 46, 50 (2004)).

"To justify a police investigatory stop under the Fourth Amendment [to the United States Constitution] or art. 14 [of the Massachusetts Declaration of Rights], the police must have 'reasonable suspicion' that the person has committed, is committing, or is about to commit a crime." *Commonwealth v. Costa*, 448 Mass. 510, 514 (2007).[16] Here, as the parties agree and the motion judge found (D.Br. 21; DA. 47), the stop occurred when Officer Brian Doherty stepped out of his motor vehicle and ordered the defendant to show his hands. *See Commonwealth v. Mock*, 54 Mass. App. Ct.

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[15] The Commonwealth does not challenge any of the motion judge's findings of facts.

[16] The defendant does not challenge the subsequent patfrisk. *See Commonwealth v. Ng*, 420 Mass. 236, 241 (1995) (reasonable suspicion defendant participated in armed home invasion justified pat frisk).

276, 278 (2002) (officer exiting cruiser and telling suspect to stop constituted a seizure). The question, therefore, is whether, at that moment, Officer Doherty had reasonable suspicion that the defendant had committed the armed robbery.

Reasonable suspicion "must be based on specific and articulable facts, and reasonable inferences therefrom, in light of the officer's experience." *Commonwealth v. Wilson*, 441 Mass. 390, 394 (2004). "The standard is an objective one: would the facts available to the officer at the moment of the seizure or search "warrant a [person] of reasonable caution in the belief" that the action taken was appropriate?" *Commonwealth v. Mercado*, 422 Mass. 367, 369 (1996) (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)). As the Appeals Court below aptly explained:

> Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020) (quoting *Prado Navarette v. California*, 572 U.S. 393, 397 (2014)). In determining whether an officer has reasonable suspicion justifying a stop, a court does "not examine each fact known to [the officer] at the time of the stop in isolation; instead [a court]

> view[s] the 'facts and inferences underlying the officer's suspicion. . .as a whole when assessing the reasonableness of his acts.'" *Isaiah I.*, 450 Mass. at 823 (quoting *Commonwealth v. Thibeau*, 384 Mass. 762, 764 (1981)). Further, "[a]n officer does not have to exclude all the possible innocent explanations for the facts in order to form a reasonable suspicion." *Isaiah I.*, *supra*, *citing Commonwealth v. Deramo*, 436 Mass. 40, 44 (2002)

Privette, 100 Mass. App. Ct. at 228.

Here, as the motion judge correctly found, the police had "specific, articulable facts, which when viewed in their totality create[d] a rational and reasonable inference that the Defendant was the suspect they were seeking" (DA. 46). In so doing, the motion judge properly considered the temporal and physical proximity of the defendant to the reported armed robbery, description of the suspect, the defendant's physical characteristics, and the full context of the stop (DA. 45-48). The Commonwealth will address each factor in turn.

I. The defendant's temporal and geographic proximity to the crime strongly supported reasonable suspicion to stop him because of his sole, conspicuous presence in the area near the crime and soon after the crime at 3:43 a.m. in the rain.

As the motion judge found, the defendant's temporal and geographic proximity to the reported armed robbery - and the singularity of his temporal and geographic proximity - amply supported the reasonable suspicion to stop him. Indeed, between 3:36 a.m. and 3:38 a.m., police were notified that a man who had robbed the Shell Gas Station at 655 Morrissey Boulevard at gunpoint had fled on foot in the direction of the CVS (Exh. 5). The defendant was stopped seven minutes after the first dispatch, on a street that was accessible either by a shortcut, a hole in a fence between Morrissey Boulevard and Ashland Street, or by traveling on roads (Tr. 12-13; 16, 20, 30, 33; Exhs. 1, 4). He was the only person present on both main arteries and residential side streets at 3:43 a.m. in the rain (Tr. 15, 16, 20, 30, 45).

Physical and temporal proximity to crime, temporal setting of stop, and reasonableness of flight

distance are all significant analytical factors when assessing reasonable suspicion. *See Commonwealth v. Doocey*, 56 Mass. App. Ct. 550, 554-555 (2002). For instance, in *Commonwealth v. McKoy*, 83 Mass. App. Ct 309 (2013), officers saw two men walking during a slushy, cold, windy night at 9:20 p.m. *Id.* at 310. Moments after passing the men, officers received a dispatch about a shooting about 100 yards away, but the dispatch did not include a physical description of any suspect or suspects. The officers immediately stopped the two men. *Id.* The Appeals Court ruled that "because of the nature of the crime, the time of day, the weather conditions, and the proximity to the crime scene, the police officers had reasonable suspicion" to question the men. *Id.* at 313. Those same factors are present in this case, in addition to a physical description of the robber that matched the defendant, see *infra*, § II, giving rise to reasonable suspicion justifying the stop of the defendant. *See Commonwealth v. Evelyn*, 485 Mass. 691, 704 (2020) (noting that Court has "consistently . . . held that geographic and temporal proximity to a recent crime weigh toward reasonable suspicion in the over-all analysis.");

Commonwealth v. Riggins, 366 Mass. 81, 87 (1974) (reasonable suspicion where the time and location of encounter "was consistent with the time necessary to travel there from the scene of the robbery"). *Contrast Commonwealth v. Warren*, 475 Mass. 530, 536 (2016) (no reasonable suspicion where officers were acting on a hunch and stopped suspects one mile away from crime scene over 25 minutes later).

To this, the defendant suggests that, given the seven minutes that passed between the initial dispatch and the stop, the defendant's relative nearness to the crime (700 feet as the crow flies) detracts from the reasonable suspicion calculus (D.Br. 21), and furthermore, that officers did not thoroughly search the surrounding area during those seven minutes (D.Br. 21-22). Though Officer Doherty knew that the hole in the fence on Morrissey Boulevard gave a direct route to Ashland Street, there was no evidence presented at the motion hearing that the defendant in fact used the hole in the fence (Exhs. 1, 4). An equally plausible inference is that he traveled on foot on several streets – for example, from Morrissey Boulevard to Victory Road to Mill Street - thereby covering as much

as 2100-2200 feet (or about four-tenths of a mile) in the course of seven minutes.[17] Officer Doherty, Officer Lopez, and Lieutenant Dwan concentrated their searches for the robbery suspect in the reported direction of flight: south down Morrissey Boulevard towards the CVS (Exh. 1; Tr. 13, 44-45, 73). This was an eminently reasonable use of their seven minutes spent searching before the defendant was stopped and does not detract from reasonable suspicion.[18]

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[17] This approximation is based off the scale on Exh. 4; the defendant advocates for the Court's adoption of this scale and the Commonwealth agrees (D.Br. 14-15 n. 7).

[18] The defendant challenges Judge Buckley's finding that Officer Doherty canvassed "an area of about nine streets" as clearly erroneous (D.Br. 14 n.6; DA. 43 n.5). A factual finding is only clearly erroneous where upon a review of the entire record, the court is left with a definite and firm conviction that an error was made. *Anderson v. Bessmer*, 470 U.S. 564, 573 (1985); *Commonwealth v. Tremblay*, 480 Mass. 645, 655 n.7 (2018); *Commonwealth v. Castillo*, 89 Mass. App. Ct. 779, 781 (2016). No such error was made here because Officer Doherty testified that he drove on nine streets in sequence before seeing and stopping the defendant. He was in the parking lot of the police station on Gibson Street (street 1) when he received the call for the armed robbery (Tr. 11, 31). He then drove down Neponset Avenue (street 2) to Victory Road (street 3) (Tr. 14, 31). Officer Doherty next turned left onto Everdeen (street 4), right onto Blanche Street (street 5), then circled back to Victory Road (street 6) (Tr. 31-32, Exh. 4). He drove onto Green Hill Street (street 7), then back onto Mill Street (street 8), and finally Ashland Street (street 9)

In addition to the proximity to the crime, the temporal setting of the stop, and the reasonable distance of flight, the nature of the reported crime – an armed robbery at gunpoint – likewise plays into the reasonable suspicion calculus in this case. Indeed, when the crime under investigation involves a firearm and a legitimate concern for the safety of the community, the courts have factored the nature of the weapon into the totality of the circumstances when determining reasonable suspicion. *Commonwealth v. Depina*, 456 Mass. 238, 247 (2010) ("The gravity of the crime and the present danger of the circumstance may be considered in the reasonable suspicion calculus"); *see Commonwealth v. Lopes*, 455 Mass. 147, 157-159 (2009) (report that van had been involved in homicide may be considered in evaluating whether police had reasonable suspicion to stop van meeting dispatcher's description); *Commonwealth v. Stoute*, 422 Mass. 782 (1996) (bystander tip that one of two companions had a gun may be used in evaluating whether police had

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where he saw and stopped the defendant (Tr. 16, 31-32).

reasonable suspicion to stop both men). Such is the case here.

In the end, the motion judge specifically found that the stop of the defendant was "permissible and justified" because of the defendant's presence "in the locus of the robbery and within minutes of its occurrence" and his correspondence to the general description of the suspect (DA. 46). The judge found that the early hour, combined with the fact that "the Defendant was the only person observed by any police surveillance in the area" created the rational inference that he was the person sought for the robbery (DA. 46). The defendant asks this Court to reach a contrary conclusion based on inferences that were rejected by the motion judge in her ruling and not incontrovertibly supported by the record. This Court should decline to do so, and instead, based on the evidence at the hearing, affirm the motion judge's finding of reasonable suspicion and her denial of the motion to suppress.

II. In addition to being the only person in the vicinity of the crime and in the direction of the robber's flight moments after the crime occurred, the defendant also substantially matched the immutable physical features of the armed robber.

Furthermore, the defendant substantially matched the immutable physical features of the armed robber, namely his height, age, build, and race. True, there were minor differences between the description broadcast to the officers and the defendant's appearance, but such differences are insignificant in comparison to the clear similarities between the suspected robber and the defendant.

In particular, the first dispatch broadcast on police radio described the suspect as roughly five feet, seven inches to five feet, eight inches tall (Tr. 20; Ex. 5); the defendant is listed on his booking form as five feet, eleven inches tall (Tr. 27). Though not an exact match, these heights are near matches and both within a nondescript range - not noticeably short and not noticeably tall. Similarly, the dispatches described the robber's age as "late twenties," but the defendant was thirty-two years old when he was stopped (Tr. 27, 29, 46; Exhs. 2, 5). Not

only are these ages a near match, but the motion judge had the ability to observe the defendant's appearance before endorsing Officer Doherty's reasonable belief that the defendant was the same "approximate age" as the suspect (DA. 43). The same is true for the build of the robber – "medium" – which the defendant concedes matches his build at the time of the stop (D.Br. 28; Tr. 30; Exhs. 2, 5). The defendant's race – "black" – is also not in dispute (D.Br. 28-29, 53; Tr. 20-21, 29; Exhs. 2, 5).

As the Appeals Court correctly reasoned, "a complete match to a description is not required to establish reasonable suspicion," *Privette*, 100 Mass. App. Ct. at 230, and here, any minor differences do not detract from the reasonable suspicion calculus. There is "'no hard or fast rule governing the required level of particularity [of a description]; [the Court's] constitutional analysis ultimately is practical, balancing the risk that an innocent person . . . will be needlessly stopped with the risk that a guilty person will be allowed to escape.'" *Commonwealth v. Meneus*, 476 Mass. 231, 236-237 (2017) (quoting *Lopes*, 455 Mass. at 158). A description of a

perpetrator sought by police "need not be so particularized as to fit only a single person, but it cannot be so general that it would include a large number of people in the area where the stop occurs." *Depina*, 456 Mass. at 245-246. On the other hand, "the value of [even] a vague or general description in the reasonable suspicion analysis may be enhanced if other factors known to the police make it reasonable to surmise that the suspect was involved in the crime under investigation." *Meneus*, 476 Mass. at 237.

III. Reasonable suspicion to stop the defendant existed whether or not Officer Doherty knew from the updated police radio broadcasts that the suspect had facial hair, but the record supports a finding that Officer Doherty did know about the beard even before stopping the defendant. Although unnecessary to the reasonable suspicion calculus, knowledge of the suspect's beard can also be imputed to Officer Doherty by application of the collective knowledge doctrine.

"The principal components of a determination of reasonable suspicion [or probable cause] will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion [or to probable cause]." *Ornelas v. United*

States, 517 U.S. 690, 696 (1996). *See Commonwealth v. Alvarado*, 423 Mass. 266, 269 (1996) ("We decide this case under art. 14. As would a Federal appellate court, we review the historical facts to determine on our own whether an objectively reasonable police officer would have been warranted in having a reasonable suspicion of criminal activity"). Here, it is reasonable for this Court to infer from Officer Doherty's testimony, the police radio broadcasts, and CAD sheet that Officer Doherty heard the updated broadcasts and was therefore aware that the suspect had facial hair as he searched the streets for the robber. In any event, while the broadcast regarding the suspect's facial hair was a factor that added to reasonable suspicion for the defendant's stop, it was not essential to it given the totality of other factors. Even without considering the facial hair descriptor, the defendant's other immutable features matched those of the suspect. Those immutable features, when considered in conjunction with his temporal and physical proximity to the crime and his singular presence on the street, provided Officer Doherty ample reasonable suspicion to believe that the

defendant was involved in the robbery and illegally in possession of a firearm, thereby justifying the stop of the defendant. Indeed, given the circumstances, Officer Doherty would have been derelict had he not stopped the defendant, and nothing in art. 14 principles suggests otherwise.

In addition to being of a similar height, age, build, and race, the defendant - like the robber - had a beard. Though the first dispatched description (at 3:36:34 a.m.) did not mention any facial hair, two subsequent descriptions sent over the radio (at 3:38:04 and 3:41:19 a.m.) - and broadcast *before* Officer Doherty first saw the defendant - described the robber as having facial hair (Tr. 20, Exh. 5).[19] The first updated broadcast to include "facial hair" was transmitted on channel 6 – the channel for district C-11 officers - only 90 seconds after the initially broadcast description (Tr. 29, 66; Exhs. 2, 5). Officer Doherty testified that he was listening to

[19] Notably, the first dispatch did not explicitly indicate the assailant lacked facial hair and also primed the listeners to await more details, by saying "*So far*, I've got a black male, late 20s, medium build, 5'7", blue hoodie and blue jeans on foot toward CVS" (Exh. 5).

channel 6 while searching for the suspect. In fact, his participation on that channel is noted on the CAD sheet and explained in his testimony and his testimony on direct examination made clear that he was aware that the suspect had facial hair (Tr. 11-12, 16-17, 29; Exh. 2). Though the motion judge did not make any factual findings about when or how Officer Doherty learned of this updated description, the motion exhibits (i.e., turret recording and CAD sheet) are uncontested and incontrovertible and can therefore be used to supplement the motion judge's findings of facts in affirming her ultimate finding. *See Commonwealth v. Jones-Pannell*, 472 Mass. 429, 431 (2015) ("[a]lthough an appellate court may supplement a motion judge's subsidiary findings with evidence from the record that is uncontroverted and undisputed and where the judge explicitly or implicitly credited the witness's testimony, . . . it may do so only so long as the supplemented facts do not detract from the judge's ultimate findings") (quotations and citations omitted).[20]

[20] In concluding that the stop was supported by reasonable suspicion, the motion judge either

In its ruling below, the Appeals Court found that Officer Doherty "gave internally contradictory testimony regarding whether, when he stopped the defendant, he was aware that the suspect had been described as having facial hair. . ." *Privette*, 100 Mass. App. Ct. at 226. This interpretation, however, is at odds with a holistic reading of the transcript of Doherty's testimony (*see* D.Br. 25). First, on direct examination, Officer Doherty testified to the ways in which the defendant matched the description of the armed robber:

> Officer Doherty: There was only one individual in the street, and the call was for a black male, with a beard, with a blue sweatshirt on, and blue jeans. And, this was a black male, with a beard. He was the only person on the street, and he was wearing a dark sweater and blue jeans.
>
> Commonwealth: Was there any other physical description of the person?

---

implicitly found – based on an objectively reasonable assessment of the evidence at the hearing – that Officer Doherty had heard the updated description, or that, even if he was not so aware, such unawareness did not detract from the lawful basis for the stop. And even if the motion judge did not consider the facial hair description at all, doing so based on the testimony and motion exhibits "would not "detract from [her] ultimate findings." *Jones-Pannell*, 472 Mass. at 431.

> Officer Doherty: Twenty-eight to 29 years old.
>
> Commonwealth: And, did that person that you saw on Ashland Street, roughly meet that criteria?
>
> Officer Doherty: It did

(Tr. 20). Then, on cross-examination he affirmed that he heard the full description of the suspect as he drove, including that the suspect had facial hair (Tr. 30).

True, on cross-examination Officer Doherty answered a leading question in the affirmative that the *first dispatch* was "all of the information [he] had about the person he was looking for before [he] stopped Mr. Privette" (Tr. 38-39), but that one adoption belies his prior testimony on cross-examination that the description he heard on channel 6 - prior to the stop - included "facial hair" (Tr. 29-30), and his assertion on direct examination that he was looking for a suspect with facial hair (Tr. 20). The Appeals Court's characterization of Officer Doherty's testimony oversimplifies the differing lines of questioning on cross-examination that conflated the

initial radio dispatch of the crime and the initial description of the suspect:

> Q: Okay. And so, I want you to listen to it, and tell me if this is *the dispatch of the description* that you heard?
>
> A: Okay.
>
> Q: (Audio being played at 11:34:19 to 11:34:29). So, that's *the first thing you heard*, which just -- was the address of the location of the gas station --
>
> A: Correct.
>
> Q: -- with no description?
>
> A: Yes.
>
> Q: And then, you started driving?
>
> A: Yes.
>
> Q: (Audio being played at 11:34:40 to 11:35:10). So, that's *the description you heard*?
>
> A: That is the description, correct.
>
> Q: And, that's all of the information you had about the person you were looking for, before you stopped Mr. Privette?
>
> A: Yes.
>
> Q: And, just for the record, that is a dispatch on channel 6, at roughly, 3:36 in the morning, and 30 seconds
>
> (Tr. 38-39). Taken in its full context, characterization of Officer Doherty's testimony as "internally inconsistent" based on his answer to one question on cross-examination, where that answer contradicts other testimony on both direct examination and cross-examination, is an overstatement.

In affirming the denial of the defendant's motion to suppress, the Appeals Court imputed knowledge of the suspect's facial hair to Officer Doherty by invoking the collective knowledge doctrine. *Privette*, 100 Mass. App. Ct. at 227-228. At the motion hearing, Lieutenant Dwan testified that while driving down Morrisey Boulevard looking for the suspect, well before entering Clam Point and observing the defendant, he heard the updated radio description that included the detail that the suspect had facial hair (Tr. 46). Noting its ability to supplement a motion judge's subsidiary findings with uncontroverted and undisputed evidence from the record, the Appeals Court invoked the collective knowledge doctrine to impute Lieutenant Dwan's knowledge that the suspect had facial hair to Officer Doherty. *Privette*, 100 Mass. App. Ct. at 227-228.

As already noted, the Appeals Court did not need to invoke the collective knowledge doctrine in order to affirm the motion judge's ruling. In fact, the Court recognized as much when it stated, "If Dwan's knowledge may be imputed to Doherty under the collective knowledge doctrine . . . then Doherty would

have an *additional* basis for reasonable suspicion that the defendant was the robber." *Id.* at 226 (emphasis added). This circumspect consideration of the facial hair description aligns with how the motion judge considered the issue. Judge Buckley twice stated in her ruling that Officer Doherty had reasonable suspicion to stop the defendant based on his matching the description of the robber and being the sole person on the street in the area close in time to the robbery (DA. 46-47). She came to this conclusion without explicitly determining whether Doherty heard the additional broadcast regarding facial hair before stopping the defendant and without addressing whether Lieutenant's Dwan's knowledge of the facial hair description could be imputed to Officer Doherty under the collective knowledge doctrine. True, including the knowledge imputed from Lieutenant Dwan to Officer Doherty in the reasonable suspicion calculus further would bolster the number of factors giving rise to reasonable suspicion, but where reasonable suspicion exists, as it did here, such bolstering is immaterial for art. 14 purposes.

Though the Commonwealth maintains that the Appeals Court's application of the collective knowledge doctrine is superfluous to the legal propriety of the stop, should this Court conclude that Officer Doherty was not aware of the beard descriptor prior to stopping the defendant, and further conclude that the beard descriptor was necessary to reasonable suspicion, the Commonwealth agrees that the collective knowledge doctrine could be applied to the facts of this case.

First, it is clear from the record and the motion judge's findings that she considered Officer Doherty and Lieutenant Dwan to be involved in a cooperative effort: the testimony is clear that both officers were investigating the same crime based on the same dispatches, and the judge's ruling that the patfrisk of the defendant and his bag was permissible was based on the two officers sharing the same sources of information and working simultaneously on the same investigation (DA. 47). *See Commonwealth v. Quinn*, 68 Mass. App. Ct. 476, 480-481 (2007) (officers working independently but collaboratively on the same crime were in a "cooperative effort"). *See also Privette*,

100 Mass. App. Ct. at 228 n.11 (application of collective knowledge doctrine does not require an explicit finding by judge of cooperative effort). "In determining whether police officers have reasonable suspicion for making a stop, 'the knowledge of each officer is treated as the common knowledge of all officers' and must be examined to determine whether reasonable suspicion exists." *Commonwealth v. Roland R.*, 448 Mass. 278, 285 (2007) (quoting *Richardson v. Boston*, 53 Mass. App. Ct. 201, 206 (2001)); *Commonwealth v. McDermott*, 347 Mass. 246, 249 (1964) ("The knowledge of one [officer] was the knowledge of all").

To the extent that Lieutenant Dwan knew that the robbery suspect had facial hair, it is because he was listening to channel 6 radio, just like Officer Doherty, *see supra*, § III (Tr. 44, 46, 66; Exhs. 2, 5).[21] *Privette*, 100 Mass. App. Ct. at 227. Logically,

[21] The defendant argues that the Appeals Court improperly supplemented the judge's findings of facts by attributing knowledge of the beard to Lieutenant Dwan, but because his knowledge is indisputable based on his testimony and the judge credited his testimony in full, such a supplement would not be erroneous (DA. 42; D.Br. 31-32; Tr. 46; Exhs. 2, 5). *Commonwealth v. Garner*, 490 Mass. 90, 94 (2022).

then, it is reasonable to impart the same knowledge to Lieutenant Dwan and Officer Doherty. Put another way, since they were each listening to the same radio channel, the fact that the suspect had facial hair was available equally to both Lieutenant Dwan and Officer Doherty (Tr. 20, 29-30, 44, 46). *See Roland R.*, 448 Mass. at 280, 285 (information known to officer who initiated pursuit, but not to detaining officer, imputed to detaining officer through collective knowledge doctrine); *Quinn*, 68 Mass. App. Ct. at 476 (information broadcast by radio, but not heard by detaining officer, imputed to detaining officer through collective knowledge doctrine).

Also, the reliability of the radio broadcast from which Lieutenant Dwan learned of the beard was proven by the Commonwealth through the 911 recording, in which the caller identified himself with a full name and phone number. When a police officer initiates a stop on the basis of radio dispatch information, "the Commonwealth must present evidence at the hearing on the motion to suppress on the factual basis for the police radio call in order to establish its indicia of reliability." *Commonwealth v. Cheek*, 413 Mass. 492, 494-495 (1992). A 911 call based on a caller's personal observations satisfies the knowledge prong, *Commonwealth v. Depina*, 456 Mass. 238, 243 (2010), and a 911 caller's self-identification satisfies the veracity prong, *Commnowealth v. Costa*, 448 Mass. 510, 515-517 (2007).

The defendant characterizes the Appeals Court's application of the collective knowledge doctrine as a "horizontal application."[22] Should this Court reach the collective knowledge doctrine issue, and further wish to categorize the Appeals Court's use of the doctrine on an axis, the Commonwealth submits the application here would be "vertical." Any officer's knowledge of the facial hair description stemmed from the 911 call and its subsequent radio broadcast (Tr. 20, 29, 44, 46; Exhs. 2, 5). This description was communicated to all officers simultaneously from one source that had reliable hearsay knowledge on which to base that fact. This distribution of knowledge is akin to "vertical" directives, which the defendant concedes comports with art. 14 (D.Br. 46-47).

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[22] "Horizontal" collective knowledge describes a situation in which officers working together on an investigation are presumed to communally share all knowledge, whether or not it is communicated (D.Br. 37-40). "Vertical" collective knowledge describes a situation in which "a communication through official channels" directs an arrest or search and then officers who act in reliance on that communication are imbued with the knowledge of the original source (D. Br. 35-36, citations omitted). The Commonwealth does not agree with the defendant's classifications of the doctrine or characterization of its practice in the Commonwealth, but summarizes the distinctions for the sake of clarity in its response to the claims.

At bottom, the defendant's appeal asks this Court to needlessly opine on the collective knowledge doctrine. The Court should decline to do so because affirming the judge's ruling that there was reasonable suspicion to stop the defendant does not require imputing any knowledge to Officer Doherty in the first place; and, in any event, the facts of this case present neither a need nor a basis on which to bifurcate the collective knowledge doctrine and limit its already rare use in the Commonwealth.

IV. Discrepancies in the clothing and accessories between the robber and the defendant are inconsequential to a finding of reasonable suspicion and in no way detract from the lawfulness of the stop.

Finally, any discrepancies between the description of the robber and the defendant's appearance do not detract from the reasonable suspicion calculus. The first dispatch described the suspect's clothing as blue jeans and a blue hoodie (Tr. 20; Ex. 5). When stopped, however, in the rain and in the dark, the defendant was wearing dark jeans, seemingly black, and a green long-sleeve sweater (Tr. 27). But as the Appeals Court appropriately

recognized, "there are various shades of blue and black," *Privette*, 100 Mass. App. Ct. at 230, n.14, and moreover, "[u]pper-body garments may quickly be removed and either discarded or stowed in a container; alternatively, additional garments may be removed from a container and donned in order to conceal what a suspect wore at the time of the crime." *Id.* at 231. Not only that, but the motion judge found that at the motion hearing the defendant was wearing the green sweater he wore when he was stopped (DA. 43, n.8).[23] Accordingly, the motion judge had the opportunity to view its color and did not err in concluding any discrepancy insignificant to her ultimate conclusion that the defendant fit the "general description" of the robber (RA. 46).

While the broadcast description of the robber did not include a backpack and the defendant was carrying a backpack when stopped a short time later, that discrepancy did not overwhelm the other factors that gave rise to reasonable suspicion. A backpack is

[23] To be clear, no evidence of this was presented at the hearing by the defense, but Officer Doherty testified that the sweater the defendant was wearing at the hearing was "similar" to the one he was wearing when stopped (Tr. 26)

not an immutable characteristic but an easily removed, stowed, and retrieved accessory, similar to the defendant's outer layer of clothing. *See Commonwealth v. Staley*, 98 Mass. App. Ct. 189, 192 (2020) ("Such items [hat and sunglasses] are easily worn, taken off, and discarded, and they have no bearing on the defendant's age, height, weight, skin tone, or facial hair"). Its presence, therefore, did not detract from the officer's objectively reasonable basis, given the totality of the circumstances, to stop the defendant. *Compare Commonwealth v. Dedomenicis*, 42 Mass. App. Ct. 76, 77 (1997) (reasonable suspicion to stop unmasked man who was alone on path of flight after masked robbery by three perpetrators) *and Commonwealth v. Carrington*, 20 Mass. App. Ct. 525, 528 (1985) (reasonable suspicion to stop man who matched race, age, hairline, and facial hair, but did not match clothing description) *with Commonwealth v. Martinez*, 74 Mass. App. Ct. 240, 246 (2009) (no reasonable suspicion to stop defendant wearing an arm cast; robber described as wearing t-shirt, no description of arm cast). .

Moreover, "it would be 'inappropriate to assume [that reasonable suspicion] cannot exist absent a full match-up of all parts of the description.'" *Commonwealth v. Emuakpor*, 57 Mass. App. Ct. 192, 198 (2003) (citation omitted) (reasonable suspicion to stop car that matched color, temporal proximity, and physical proximity, but did not match door number or occupant number). *See Commonwealth v. Ancrum*, 65 Mass. App. Ct. 647, 653-654 (2006) (reasonable suspicion to stop car that matched make, partial color, temporal proximity, and path of flight, but did not match age, taillights, or occupant number; occupants' race and head coverings matched suspects').

There is no merit to the defendant's contention that the stop was merely premised on the defendant's race, gender, and medium build (D. Br. 28), and thus was weaker than that in *Commonwealth v. Cheek*, 413 Mass. 492 (1992). In *Cheek*, though, the only description of the suspect was a black male wearing a three-quarter-length goose jacket on a cool fall night. *Id.* at 496. Indeed, as this Court reasoned, "[t]he officers possessed no additional physical description of the suspect that would have

distinguished the defendant from any other black male in the area, *such as the suspect's height and weight, whether he had facial hair*, unique markings on his face or clothes, or other identifying characteristics." *Id.* (emphasis added). Because such a limited physical description could apply to many individuals, the Court concluded that there was insufficient particularity to justify the stop. *Id.*; *see Meneus*, 476 Mass. at 236 ("Other than the race and age of the group [. . .], the police had none of the usual descriptive information such as distinctive clothing, facial features, hairstyles, skin tone, height, weight, or other physical characteristics that would have permitted them to reasonably and rationally narrow the universe of possible suspects); *Warren*, 475 Mass. at 535 (description of suspects as "two black males" wearing "dark clothing" and "one black male" wearing a "red hoodie," without any information as to other physical characteristics, lacked sufficient detail to constitute particularized reasonable suspicion); *Commonwealth v. Jones*, 95 Mass. App. Ct. 641, 646 (2019) ("The description here [black man wearing white t-shirt and khaki pants] did not

meaningfully narrow the range of possible suspects;" distinctiveness of defendant's clothing offset fit to overly general description).

Here, in contrast, Officer Doherty was provided with far greater detail than just a black male in the area wearing a generic coat; he knew – based on the three broadcast descriptions - an approximate height, build, age, skin tone, clothing, facial hair, and potential flight pattern (Tr. 16-20), and the defendant was both the singular individual on the street at that hour and the singular individual matching those descriptors. The motion judge correctly considered these detailed descriptors when ruling that Officer Doherty had reasonable suspicion, based on specific, articulable facts, to believe that the defendant was the armed robber, thereby providing a lawful justification for the stop.

In sum, the defendant matched the physical description of the robber in meaningful dimensions, even if not in exactitudes. His inalterable features - height, age, build, race, and facial hair - substantially matched in all material respects. His alterable features - his outer garments and his

backpack – may not have been exact matches, but, contrary to the defendant's position (D.Br. 25), any such discrepancies do not negate Officer Doherty's objectively reasonable suspicion that the defendant was the robber for whom police were searching on that rainy early morning, seven minutes after the crime occurred, and only 700 feet away from its scene.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the denial of the defendant's motion to suppress.

Respectfully submitted
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August 4, 2022

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ADDENDUM

G.L. c. 265 § 17: Armed robbery; punishment.

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Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished by imprisonment in the state prison for life or for any term of years; provided, however, that any person who commits any offence described herein while masked or disguised or while having his features artificially distorted shall, for the first offence be sentenced to imprisonment for not less than five years and for any subsequent offence for not less than ten years. Whoever commits any offense described herein while armed with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than five years. Any person who commits a subsequent offense while armed with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than 15 years.

G.L. c. 265 § 18B: Use of firearms while committing a felony; second or subsequent offenses; punishment.

****

Whoever, while in the commission of or the attempted commission of an offense which may be punished by imprisonment in the state prison, has in his possession or under his control a firearm, rifle or shotgun shall, in addition to the penalty for such offense, be punished by imprisonment in the state prison for not less than five years; provided, however, that if such firearm, rifle or shotgun is a large capacity weapon, as defined in section 121 of chapter 140, or if such person, while in the commission or attempted commission of such offense, has in his possession or under his control a machine gun, as defined in said section 121, such person shall be punished by imprisonment in the state prison for not less than ten years. Whoever has committed an offense which may be punished by imprisonment in the state prison and had in his possession or under his control a firearm, rifle or shotgun including, but not

limited to, a large capacity weapon or machine gun and who thereafter, while in the commission or the attempted commission of a second or subsequent offense which may be punished by imprisonment in the state prison, has in his possession or under his control a firearm, rifle or shotgun shall, in addition to the penalty for such offense, be punished by imprisonment in the state prison for not less than 20 years; provided, however, that if such firearm, rifle or shotgun is a large capacity semiautomatic weapon or if such person, while in the commission or attempted commission of such offense, has in his possession or under his control a machine gun, such person shall be punished by imprisonment in the state prison for not less than 25 years.

A sentence imposed under this section for a second or subsequent offense shall not be reduced nor suspended, nor shall any person convicted under this section be eligible for probation, parole, furlough or work release or receive any deduction from his sentence for good conduct until he shall have served the minimum term of such additional 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.

G.L. c. 269 § 10: Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment.

****

(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.

****

(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

(2) Any person who leaves a firearm, rifle, shotgun or ammunition unattended with the intent to transfer possession of such firearm, rifle, shotgun or ammunition to any person not licensed under section 129C of chapter 140 or section 131 of chapter 140 for the purpose of committing a crime or concealing a crime shall be punished by imprisonment in a house of correction for not more than 21/2 years or in state prison for not more than 5 years.

****

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

****

(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.

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k) and Mass. R. App. P. 20(a)(2)(F). The brief is in 12-point Courier New with 10 CPI and has a length of 44 pages.

/s/ Kathryn Sherman
KATHRYN SHERMAN
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COMMONWEALTH'S CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service on the defendant by e-filing a copy of the brief and record appendix and emailing it to:

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August 4, 2022