COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. 13329

COMMONWEALTH OF MASSACHUSETTS,
Appellee
V.

MICHAEL VAN RADER, JR.,
Appellant

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

SUFFOLK COUNTY

KEVIN R. HAYDEN
District Attorney
For the Suffolk District

KATHRYN SHERMAN
Assistant District Attorney
For the Suffolk District
BBO# 691445
One Bulfinch Place
Boston, MA 02114
(617) 619-4174
kathryn.sherman@mass.gov

OCTOBER 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUES PRESENTED

I. Whether the officers had reasonable suspicion to stop the defendant when he and his companion were the only people matching the clothing description of two suspects who had fled a shooting five minutes prior, less than a mile away, and in the same path of flight.

II. Whether the judge correctly ruled that because the stop was justified by reasonable suspicion, the defendant's equal protection claim under *Commonwealth v. Long*, 485 Mass. 711 (2020), must be denied.

STATEMENT OF THE CASE

This case is before the Court on the juvenile's direct appeal after a conditional guilty plea.

On September 14, 2018, the defendant, Michael Van Rader, Jr., was arraigned in Suffolk Superior Court on charges of carrying a firearm without a license, in violation of G. L. c. 269, § 10(a); carrying a loaded firearm, in violation of G. L. c. 269, 10(n); unlawful possession of ammunition, in violation of G. L. c. 269, § 10(h); and discharging a firearm within 500

feet of a building, in violation of G. L. c. 269, § 12E (DA. 7, 10).[1]

On March 11, 2020, the defendant filed a motion to suppress the stop of his person and evidence recovered as fruits from the stop, arguing lack of reasonable suspicion to stop the defendant and a violation of his equal protection rights (DA. 15, 42-31). Testimony for the motion was taken on three days before the Honorable Judge Peter Krupp: January 27, March 10, and May 18, 2021 (DA. 17-19). Judge Krupp took the matter under advisement, allowed the parties to file additional memoranda, and issued a written decision on June 24, 2021, denying the motion (DA. 19, DAdd. 71-81). The defendant applied for interlocutory review of Judge Krupp's decision, which the Single Justice (Georges, Jr., J.) denied on August 11, 2021 (DA. 20).

The defendant pleaded guilty on September 13, 2021, conditioned on his right to appeal the denial of

[1] References to the defendant's record appendix will be cited as (DA. __), and references to the defendant's addendum will be cited as (DAdd. _). References to the transcripts of the motion to suppress hearing will be cited as (Tr. vol:page) and to the motion exhibits as (Exh _).

his motion to suppress (DA. 21). The judge adopted a joint sentencing recommendation from the parties, sentencing the defendant to eighteen months in the House of Correction on carrying a firearm without a license and discharging a firearm within 500 feet of a building and three months in the House of Correction on possession of ammunition, all to be served concurrently (DA. 20-21). The carrying a loaded firearm charge was dismissed at the request of the Commonwealth (DA. 20-21).

STATEMENT OF FACTS

The Commonwealth called three witnesses at the motion to suppress hearing: Boston Police Officers James O'Loughlin, Gregory Eunis, and Reivilo Degrave. The judge made written factual findings as follows:[2]

> Based on the preponderance of the credible evidence, I find the following facts:
>
> On April 23, 2018, at approximately 7:29 p.m., the Boston police received a

[2] The Commonwealth has inserted citations to those portions of the suppression record that support the motion judge's findings of fact. In addition, by way of footnote, the Commonwealth has supplemented the motion judge's findings of fact with the officer's undisputed testimony, which the motion judge credited, in order to provide a full narrative. *See Commonwealth v. Jones-Pannell*, 472 Mass. 429, 431 (2015).

report of shots fired at a basketball court near Annunciation Road in Boston in the area behind Boston Police Headquarters (Tr. 1: 7, 44; 2: 16-17). The Boston Police ShotSpotter system also detected the gunshots (Exh. 3, 4). The police response was swift and coordinated.

Within a minute or so of the report of shots fired, the police received two 911 calls about the incident.[3] The first caller, Manny, reported hearing about eight shots, but reported no information about the shooter(s). The second caller, Marie, provided a more detailed description. She reported from the corner of Prentiss and Tremont Streets. She said she heard about six gunshots, and then "the guys went off on their bikes" (Exhs. 3, 5). Specifically, Marie said she saw two Black males in black hoodies on bicycles leave the area on Prentiss Street and turn right (i.e. heading south) onto Tremont Street (i.e. toward Heath Street) (Exhs. 2, 3, 5, 10). [Judge's footnote: About a block south of Prentiss Street, Tremont Street veers to the right and Columbus Avenue continues straight ahead (Exh. 2, 10). The testimony fairly described Tremont Street as turning into Columbus Avenue (Tr. 1: 11; 2: 17).] Within 15 seconds of Marie telling the dispatcher that she could still see the two males on bicycles at the corner of Prentiss and Tremont Streets, she told the 911 operator she could see the police responding to the area and police sirens can be heard in the background of her 911 call (Exhs. 3, 5).

After Marie's 911 call, a responding officer informed the police dispatcher that multiple witnesses reported that the two

[3] Both civilian callers' telephone numbers were captured and recorded on the Boston Police CAD sheet (DA. 221, 224).

guys on bikes were the shooters. The dispatcher broadcast over the police radio that a caller had witnessed two males in black hoodies on bikes taking a right on Tremont Street from Prentiss Street (i.e. heading south on Tremont Street) and that the two guys on bikes were reported to be the shooters. When the dispatcher called out this description, she had information from the 911 caller describing the race of the two males on bicycles as Black, but the dispatcher did not broadcast the reported race of the two males over the police radio (Exhs. 3, 4, 5).

When the dispatcher broadcast information about the report of shots fired, Officer James O'Loughlin, Jr. was working a paid detail on New Heath Street between Parker and Terrace Streets, a little more than a half mile south of the intersection of Prentiss and Tremont Streets (Tr. 1: 6-8; Exhs. 1, 7, 11). New Heath Street runs perpendicular to Columbus Avenue, but comes to a dead end before the fences, retaining wall, and railroad tracks, which define and run through the Southwest Corridor, which also runs perpendicular to New Heath Street (Exhs. 2, 8, 10). On the other side of the Southwest Corridor from New Heath Street, is the Southwest Corridor Park and then Columbus Avenue (Exhs. 2, 8, 10). [Judge's footnote: Southwest Corridor Park is a skinny strip of green, with a bike trail running its length. It runs from the basketball courts and playground behind Boston Police Headquarters, south along Tremont Street and then along Columbus Avenue, and continues south of Heath Street (Tr. 1: 9-11; Exh. 2, 10.)]

Off. O'Loughlin was monitoring his police radio and heard the report of shots fired in the area behind Boston Police Headquarters (Tr. 1: 7, 23). He heard a

description over the radio of two males on bicycles wearing black shirts or sweatshirts (Tr. 1: 8-9, 24; Exh. 1, 3, 4). From where Off. O'Loughlin was standing, he had an obstructed, distant view of the bike path, which is elevated from where Off. O'Loughlin was standing and which runs perpendicular to his line of sight (Tr. 1: 35, 39; Exh. 8). His view of the bike path was partially obstructed by trees, fencing and signage (Tr. 35; Exh. 8). From his position, which was about 300 feet away from the bike path, Off. O'Loughlin observed two Black males on bicycles, wearing black shirts or sweatshirts, heading southward toward Heath Street (Tr. 1: 9, 35, 37). They appeared to Off. O'Loughlin to be pedaling slowly, as if they were tired (Tr. 1: 9). Off. O'Loughlin told the dispatcher about his observations (Tr. 1: 14, 25, 29; Exhs. 3, 4).

Meanwhile, when the police dispatcher first broadcast information about the incident over the police radio, Boston Police Officers Gregory Eunis, Korey Franklin and Reivilo Degrave were about 1 ½ to 2 miles away from Off. O'Loughlin (Tr. 1: 13, 44-45, 58; Tr. 2: 18). Off. Franklin was driving an unmarked Ford Explorer in the vicinity of Blue Hill Avenue and Columbia Road (Tr. 1: 43-44, 58; 2: 16-17). Off. Eunis was in the front passenger seat. Off. Degrave was in the rear on the passenger side (Tr. 1: 58). All three officers were in plain clothes, but were wearing tactical vests emblazoned with "Boston Police" on the front and back (Tr. 1: 77; 2: 25, 42).

Off. Franklin immediately drove quickly in the direction of the shooting and the officers he was with spoke to Off. O'Loughlin (Tr. 1: 44-47; 2: 16-17, 22). Off. O'Loughlin described to them that he had seen two Black males on bikes in black hooded sweatshirts heading south toward

Heath Street (Tr. 1: 14-15, 47; 2: 19-20). After hearing Off. O'Loughlin's description, Off. Franklin drove north along Columbus Avenue from Heath Street in the direction of the shooting (Tr. 1: 47-48; 2: 22). [Judge's footnote: At the time, the officers had no information about the suspects' age, height, weight, build, race, hair style, or facial features. They had no description of the model, color, or type of bicycles the suspects were riding (Tr. 1: 31-32, 58-60] Off. Eunis and the other officers observed two Black males in black hoodies walking south (Tr. 1: 48-50, 65; 2: 22). The officers saw the two men repeatedly look back "over their shoulders" toward Boston Police Headquarters, although no one was following them (Tr. 1: 48, 50, 52, 69, 70, 86; 2: 22, 35). There were not a lot of people out that evening (Tr. 1: 37-39, 50, 57, 67-68). The two men were the only two people with hoodies that the police observed in the area (Tr. 1: 50; 2: 24). The two men did not have bikes with them (Tr. 1: 48, 65; 2: 22, 24, 34). [Judge's footnote: The turret tape recording, which was admitted as part of Exhibit 3 and is transcribed in Exhibit 4, indicates that after defendant was stopped, searched and arrested, two bicycles were located against a fence further north from Heath Street. See, e.g., Exhibit 4 at 7. This information was not known to the officers who stopped defendant. It is not relevant to my analysis of the lawfulness of the stop.]

After seeing the two men in hoodies turning to look back toward Boston Police Headquarters, Off. Franklin turned his vehicle around at Cedar Street and headed south on Columbus Avenue, pulling up adjacent to the two men near the comer of Columbus Avenue and Heath Street (Tr. 1: 47-48, 50, 61; 2: 22; Exh. 10). Off. Eunis and Off. Degrave exited their vehicle and

approached the two males, who turned out to be a juvenile, J.H., and defendant (Tr. 1: 50-51, 74-76; Tr. 2: 22-24, 41). The police officers did not recognize either of the two males, but noticed that they appeared to be teenagers (Tr. 1: 72; 2: 33. 35). The two males did not change their gait as the officers approached (Tr. 1: 72; 2: 37). Off. Degrave asked the two men to "hold up a second" and the two men stopped walking (Tr. 1: 76; 2: 43).[4] The officers did not see any weighted pockets in, or any suspicious bulges or protrusions from, either man's clothing (Tr. 1: 72, 80; 2: 37).

Off. Degrave engaged J.H., while Off. Eunis approached defendant (Tr. 1: 51; 2: 26). When Off. Degrave asked J.H. if he had anything on him, J.H. turned sideways, blading his stance, as if to conceal something at his side (Tr. 1: 53, 79, 87; 2: 26-27, 45). Off. Degrave then did a pat frisk of J.H. and located a firearm (Tr. 2: 28, 52. As Off. Degrave was talking to J.H., Off. Eunis engaged defendant (Tr. 1:51; 2: 26). Off. Eunis observed defendant to be sweating and still looking over his shoulder toward Boston Police Headquarters (Tr. 1: 52). Defendant kept his right hand in his hoodie pocket (Tr. 1:53). Defendant did not make any sudden movements or blade his body (Tr. 1: 80). After Off. Degrave located a firearm in his frisk of J.H., Off. Eunis grabbed defendant, pulled him to the ground, secured his arms, and put him in handcuffs (Tr. 1: 54, 81, 84). Off. Eunis then conducted a pat frisk of defendant and

[4] Officer Degrave testified that he said, "Hey, what's up?" and did not say "Hold up," but the exact phraseology is irrelevant to this appeal as all parties agree that this moment, Officer Degrave calling out to the defendant and J.H., is the moment that they were stopped in the constitutional sense (Tr. 2: 43).

> located a firearm in his pants pocket (Tr. 1: 54-55; 2:29; Exh. 9). J.H and defendant were taken into custody between 7:35 and 7:36 p.m., approximately seven minutes after the report of shots fired (Exh. 1; DA. 235)

(DAdd. 71-75).

The motion judge made the following rulings of law:

> Defendant argues that he and his compatriot were stopped by the police in part based on their race, and that at the time of the stop the police lacked reasonable suspicion to believe that they had committed the crime. I find that, although the police who made the stop had a history of disproportionately stopping people of color and that they observed that defendant and J.H. were Black, the Commonwealth has demonstrated that the decision by the police to stop defendant and J.H. was not made because of any improper considerations of their race. [Judge's footnote: Defendant introduced a report by Dr. Fowler and considerable statistical evidence that Officers Franklin, Eunis and Degrave have historically conducted discretionary investigative stops in a way that disproportionately impacted people of color more than white people. I need not dwell on this aspect of the case, or make detailed findings in this regard, in light of my other findings and rulings in the case.] The police had sufficient information to support a reasonable suspicion that defendant and J.H. had just been involved in the incident during which shots were fired.
>
> The fruits of a motor vehicle stop - a so-called Terry stop - that is conducted, even in part, because of explicit or implicit racial discrimination will be

suppressed. *Commonwealth v. Long*, 485 Mass. 711, 724 (2020) ("a traffic stop motivated by race is unconstitutional, even if the officer also was motivated by the legitimate purpose of enforcing the traffic laws"); *Commonwealth v. Lora*, 451 Mass. 425, 440 (2008) ("if a defendant can establish that a traffic stop is the product of selective enforcement predicated on race, evidence seized in the course of the stop should be suppressed"). Defendant argues that the police decision to stop J.H. and defendant was racially motivated and that the analysis under *Lora* and *Long* applies in this instance.

I assume, without deciding, that, just as a racially motivated motor vehicle stop would be constitutionally problematic, a racially motivated stop of a pedestrian would also offend the constitutional right to equal protection. *Long*, 485 Mass. at 717. In the context of a motor vehicle stop, a defendant may base a "reasonable inference of impermissible discrimination" on "statistical evidence demonstrating disparate treatment of persons based on their race," *Lora*, 451 Mass. at 426, 437, or on "specific facts from the totality of the circumstances." *Long*, 485 Mass. at 713. Once a defendant raises a reasonable inference that a stop was racially motivated, the burden shifts to the Commonwealth "to provide a race-neutral explanation for such a stop." *Lora*, 451 Mass. at 426.

Here, I need not address the question of a threshold showing because the officers had a race-neutral motivation for stopping the defendant. [Judge's footnote: Race neutrality does not mean that race is always irrelevant. When race is part of the description of a perpetrator, for example, an officer seeking to locate the perpetrator may certainly take race into consideration,

among other factors, in deciding whether a suspect matches the perpetrator's description.] I begin my analysis with the basis for the stop.

A stop constitutes a "seizure" under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Commonwealth v. Martin*, 467 Mass. 291, 302 (2014), quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In determining whether a reasonable person would believe he was free to leave, a court must consider the totality of the circumstances. The operative question is "whether an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay." *Commonwealth v. Matta*, 483 Mass. 357, 362 (2019). Among the relevant circumstances is the defendant's apparent age, because the "naivete, immaturity, and vulnerability of a child will imbue the objective communications of a police officer with greater coercive power" and "[p]retending otherwise would diminish a juvenile's right to be free from unwanted police interactions." *Commonwealth v. Evelyn*, 485 Mass. 691, 699 (2020).

The defendant and J.H. were stopped when an unmarked SUV pulled up alongside them and two police officers wearing "Boston Police" vests approached them and told them to "hold up a second." The two men appeared to the officers to be (sic) juveniles. While, in *Commonwealth v. Stoute*, the request to "hold up a minute" was not considered a seizure, 422 Mass. 782, 785-89 (1996), the defendants' apparent age here imbues the directive by the police with

greater authoritative force. See *Evelyn*, 485 at 699. I need not ultimately decide whether "hold up a second" constituted a seizure here, because, if it were a seizure, there was reasonable basis to justify it.

A seizure is constitutional if it is "based on an officer's reasonable suspicion that the person was committing, had committed, or was about to commit a crime." *Martin*, 467 Mass, at 303, citing *Commonwealth v. Wilson*, 441 Mass. 390, 394 (2004). Reasonable suspicion "must be grounded in 'specific, articulable facts and reasonable inferences [drawn] therefrom' rather than on a 'hunch.'" *Commonwealth v. Warren*, 475 Mass. 530, 534 (2016), quoting *Commonwealth v. DePeiza*, 449 Mass. 367, 371 (2007). "The essence of the reasonable suspicion inquiry is whether the police have an individualized suspicion that the person seized is the perpetrator of the suspected crime." *Warren*, 475 Mass, at 534, citing *Commonwealth v. Depina*, 456 Mass. 238, 243 (2010). "[A] combination of factors that are each innocent of themselves may, when taken together, amount to the requisite reasonable belief." *Commonwealth v. Fraser*, 410 Mass. 541, 545 (1991).

If the police are looking for suspects based on information from a police dispatch, the description of the perpetrator "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." *Commonwealth v. Depina*. 456 Mass. 238, 245-246 (2010). See also, e.g., *Commonwealth v. Warren*, 475 Mass. 530, 535 (2016) (description of suspects wearing "the ubiquitous and nondescriptive 'dark clothing,' and one black male wearing a 'red hoodie'" added nothing to the police's ability to distinguish the suspect from

anyone else). A generic physical description is not fatal to the reasonable suspicion analysis, however. Other relevant factors include "[p]hysical proximity, closeness in time, the defendant's obvious effort to avoid encountering the police, and the danger to public safety," as well as the existence of continuing danger based on the gravity of the crime. *Depina*, 456 Mass, at 247.

A defendant's nervousness is also relevant to the reasonable suspicion analysis. For instance, in *Commonwealth v. Barros*, 425 Mass. 572 (1997), the court found reasonable suspicion for a stop where the defendants were found walking rapidly away from the scene of a crime, three blocks away, glancing over their shoulders. 425 Mass, at 584. There is reasonable suspicion to stop an individual who is found, travelling away from the crime, at the time the perpetrator would be expected to be at that location. In *Commonwealth v. Evelyn*, for instance, the officers found the defendant 13 minutes after the shooting, a half-mile from the location, walking away from the shooting location. 485 Mass. at 704-705. Likewise, in *Depina*, the defendant was found ten minutes after the shooting, three blocks away, walking away from the shooting location. 456 Mass. at 247.

In this case, the dispatcher reported two men on bicycles in black shirts or sweatshirts (Tr. 1: 8, 58-59; 2: 17; Exhs. 1, 3). The dispatcher had information that the two were Black males, but did not include the description about race in the dispatcher's broadcast about the incident before defendant was stopped (Exhs. 1, 3, 5, 6; DA. 247, 272). The dispatcher also reported that the two men were traveling south on Tremont Street toward Columbus Avenue and Heath Street (Exh. 1, 3; DA.

247). Soon after, Off. O'Loughlin observed two Black males in black hoodies traveling south on bicycles on Columbus Avenue toward Health Street (Tr. 1: 8-9, 13; Exh. 6). Off. O'Loughlin's observation was consistent in time and direction with two individuals fleeing from a shooting on bicycles. The officers who stopped defendant had heard the dispatcher's description and received a report from Off. O'Loughlin of his observations (Tr. 1: 14-15, 47; 2: 19-20). While these descriptions alone were generic, there were not many people in the area at that time, and defendant and J.H. were the only people the police observed matching the descriptions in the area (Tr. 1: 37-39, 50, 57, 67-68; 2:24). Defendant and J.H. were moving in the direction of flight from the scene where shots were fired and were observed there only a few minutes after the shots were reported (Tr. 1: 48-50, 65; 2:22). As in *Evelyn* and *Depina*, defendant's location and direction of travel were consistent with the expected location and direction of travel of the suspects at that time.

Moreover, defendant and J.H. were looking over their shoulders toward Boston Police Headquarters, and the area where the shooting had taken place, implying nervousness, even before they were aware of Off. Franklin's unmarked vehicle (Tr. 1: 48, 50, 52, 69, 70, 86; 2: 22, 35). See *Barros*, 425 Mass, at 584. They did not have bikes with them at the time (Tr. 1: 48, 65; 2: 22, 24, 34), but it is not unreasonable to expect that the shooters might drop their bikes while fleeing the scene, cf. *Commonwealth v. Crowley*, 29 Mass- App. Ct. 1, 3-4 (1990) (stop justified where police saw a lone man running away from the scene of the crime, when two men reported to have robbed the bank), and Off. O'Loughlin's description linked them to bicycles (Tr. 1:

9, 35, 37; Exh. 6). Finally, the officers were looking for suspects in a shooting that had occurred nearby, a very short time before. The gravity of this crime and the fact that the shooters were at large further supports the officers' stop. See *Depina*, 456 Mass, at 247. Here, the officers had a race-neutral motivation for stopping defendant and had reasonable suspicion to do so.

Following the lawful stop, the patfrisks were also constitutional. A patfrisk "is permissible where an officer has reasonable suspicion that the suspect is armed and dangerous." *Commonwealth v. Torres-Pagan*, 484 Mass. 34, 36 (2020), citing *Arizona v. Johnson*. 555 U.S. 323, 326-327 (2009). It must be "confined to what is minimally necessary to learn whether the suspect is armed and to disarm him should weapons be discovered." *Wilson*, 441 Mass, at 396, citing *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968). A suspect "blading," or "hiding one side of the body from the other person's view," *Commonwealth v. Resende*, 474 Mass. 455, 459 n.8 (2016), is consistent with the suspect trying to conceal a weapon and has been found to be a factor supporting reasonable suspicion. See *Evelyn*. 485 Mass, at 708; *DePeiza*, 449 Mass, at 371.

Off. Degrave saw J.H. "blade" his body away from Off. Degrave when Off. Degrave asked him if he had anything on him (Tr. 1: 53, 79, 87; 2: 26-27, 45). This movement was consistent with an effort to conceal a weapon (Tr. 2: 26-27). This action, together with the information tending to show that J.H. and the defendant were likely suspects in firing shots minutes earlier, gave Off. Degrave a reasonable basis to suspect J.H. was armed and dangerous. Off. Degrave had a reasonable basis to conduct the patfrisk of J.H.

> After Off. Degrave discovered a weapon on J.H., Off. Eunis' patfrisk of defendant was justified. The information that there was more than one shooter, that two men fled together from the scene of the shooting on bicycles, that two men on bicycles were seen by Off. O'Loughlin in the direction of flight, and that J.H. and defendant were found in the vicinity - all within minutes - and matched the description given by the dispatcher and Off. O'Loughlin, gave Off. Eunis reason to suspect that defendant was also armed, dangerous, and posed a risk to officer safety.
>
> Defendant's Motion to Suppress Evidence, as supplemented, is DENIED (DAdd. 75-81).

ARGUMENT

I. THE MOTION JUDGE CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS WHERE HE AND HIS CO-DEFENDANT WERE THE ONLY TWO MALES RIDING BICYLES AND WEARING THE CLOTHING DESCRIBED AS BEING WORN BY THE SHOOTERS, WERE OBSERVED ON THE REPORTED FLIGHT PATH FROM THE SHOOTING ONLY MINUTES AFTER THE SHOOTING, AND THE DEFENDANT WAS OBSERVED NERVOUSLY LOOKING OVER HIS SHOULDER TO THE AREA OF THE SHOOTING, THEREBY GIVING THE OFFICERS REASONABLE SUSPICION TO JUSTIFY THE STOP. THESE SAME FACTS, ENHANCED BY THE RECOVERY OF A FIREARM ON HIS CO-DEFENDANT, SUPPORTED THE FRISK OF THE DEFENDANT.

The defendant claims that the motion judge erred in denying his motion to suppress because officers lacked reasonable suspicion to stop him, and that, as a result, the firearm found on him ought to be suppressed as the fruit of an illegal stop (D.Br. 32,

39). The defendant's claim has no merit as the motion judge properly concluded the police had reasonable suspicion to stop and pat-frisk him.

In reviewing a motion to suppress, this Court will accept the motion judge's findings of fact unless there is clear error. *Commonwealth v. Welch*, 420 Mass. 646, 651 (1995); *Commonwealth v. Yesilciman*, 406 Mass. 736, 743 (1990). 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). Here, as the parties agree and the motion judge found (D.Br. 21; DA. 47), the stop occurred when Officer Revilio Degrave exited the unmarked police car, walked toward the defendant and

J.H., and told them to "hold up a second" (D.Br. 34; Tr. 1: 76; 2: 43; DA. 533). *See Commonwealth v. Mock*, 54 Mass. App. Ct. 276, 278 (2002) (officer exiting cruiser and telling suspect to stop constituted a seizure). The question, therefore, is whether, at that moment, Officer Degrave had reasonable suspicion that the defendant committed the shooting near Annunciation Road minutes earlier.[5]

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 explains:

---

[5] The defendant does not challenge the subsequent patfrisk, and thus the Commonwealth's brief will focus on the reasonable suspicion calculus for the stop. *See Commonwealth v. Ng*, 420 Mass. 236, 241 (1995) (reasonable suspicion defendant participated in armed home invasion justified pat frisk).

> 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. [818,] 823 [2008] (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)

Commonwealth v. Privette, 100 Mass. App. Ct. 222, 228 (2021).

Here, as the motion judge correctly found, the police had "sufficient information to support a reasonable suspicion that [the] defendant and J.H. had just been involved in the incident in which shots were fired" (DA. 534). In so doing, the motion judge properly considered the temporal and physical proximity of the defendant and J.H. to the reported shooting, the description of the suspects, and the

full context of the stop (DA. 534-540). The Commonwealth will address each factor in turn.

A. The defendant's and J.H.'s temporal and geographic proximity to the crime supported reasonable suspicion to stop them.

As the motion judge found, the defendant's temporal and geographic proximity to the shooting amply supported the reasonable suspicion to stop him (DA. 537-538). Physical and temporal proximity to a crime and reasonableness of flight distance are significant analytical factors when assessing reasonable suspicion. *See Commonwealth v. Doocey*, 56 Mass. App. Ct. 550, 554-555 (2002). Indeed, two minutes after the shooting was called into 911 dispatch (nearly simultaneously by a police officer and a civilian), police were notified that there were two shooters, wearing black hoodies, who fled on bikes on Tremont Street in the direction of Heath Street (Exh. 1, 3; DA. 221, 224).[6] Within one minute of that

[6] Although not challenged on appeal by the defendant, the reliability of this broadcast was proven by the Commonwealth through the 911 recordings and CAD sheets, in which callers identified themselves, or were identifiable, by names, addresses, and/or phone numbers (Exhs. 1, 3, 5). At least two of the witnesses were also present near the shooting location when they called 911 and would have been available to the police

description's broadcast, Officer O'Loughlin saw two men in dark hoodies, riding bikes slowly in that direction as if tired from exertion; about one minute later, Officer Degrave and Officer Eunis saw two individuals in dark hoodies (defendant and J.H.) walking together in the same direction, constantly looking over their shoulders at the scene of the shooting; and shortly thereafter, they were stopped (Exh. 3; Tr. 1: 8-13, 48-50; 2: 22; DA. 235). When Officer Degrave stopped the defendant 0.8 miles away from the shooting, it was less than five minutes after the shooting (Tr. 51; DA. 235). *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.").

---

responding to the scene (Exh. 3). 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, *Commonwealth v. Costa*, 448 Mass. 510, 515-517 (2007).

"Proximity is accorded greater probative value in the reasonable suspicion calculus when the distance is short and the timing is close." *Commonwealth v. Warren*, 475 Mass. 530, 536 (2016). Here, not only was the distance short and the timing close, but the shooters fled the scene in the direction of a distinct and contained corridor on which the defendant was found (Exhs. 2, 8). The defendant was stopped 0.8 miles away from the shooting – a distance plausible and likely for someone traveling on a straight pedestrian path by bike for at least three minutes and on foot for a minute or two more (Tr. 1: 9, 13, 65; Exhs. 10, 11). Adding to the reasonableness of that distance is the evidence that the defendant and J.H. exerted themselves when initially fleeing from the shooting. Indeed, Officer O'Loughlin observed their labored breathing as they pedaled their bicycles on the Southwest Corridor near New Heath Street (Tr. 1:9, 11). *See 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"). Not only was the defendant geographically

and temporally proximate to the crime, he and J.H. were also following the same reported flight path as the shooters, and the observed exertion of the fleeing riders provided further plausibility to the likelihood they may have abandoned the bicycles and begun walking. (Tr. 2: 17; Exh. 3). *Contrast Warren*, 475 at 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 and path of flight was "mere conjecture").

B. The defendant and J.H. matched the descriptors associated with the two shooters.

The description of the two shooters broadcast by the dispatcher to all officers was basic: two men wearing black hoodies on bikes (Exh. 3). Brief though the description of the shooters was, the defendant and J.H. matched those descriptors as Officer O'Loughlin observed them riding in labored fashion on the reported path of flight about three minutes after the shooting (Tr. Tr. 1: 8, 9, 13; Exh. 3). They were on that same path of flight and continued to be the only people seen matching the clothing description of the

shooters before being stopped by Officer Degrave and Officer Eunis (Tr. 1: 37-39, 57, 67-68).

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. Importantly, no other people wearing black hoodies were seen, nor in a pair together, in this area before the defendant and J.H. were stopped, and the judge

found that there were "not a lot of people out that evening" (DA. 533).[7] Here, the description of the shooters may have been limited, but it fit only two men in the area less than five minutes after the crime; under such circumstances, officers acted reasonably in making an investigatory stop of the defendant and J.H., and nothing in article 14 suggests otherwise. "[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth

[7] The defendant challenges Judge Krupp's finding that "there were not a lot of people out that evening" as clearly erroneous (D.Br. 18; DA. 533). 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. Officer O'Loughlin testified that there were no other bicyclists and no other pedestrians in the area when he saw the defendant (Tr. 1: 37-39) and Officer Eunis testified that he "didn't see any [other pedestrians] that stood out to him," that not many people were on the pathway that night, and that there "wasn't a lot of people out that night," and that the defendant and J.H. "were the only two people I seen [sic] walking in that area" (Tr. 1:57, 67-68). The judge appears to have credited this testimony, rather than Officer Degrave's testimony to the contrary (Tr. 2: 21, 32). "'Where a judge has seen and heard a witness, the judge determines credibility.'" *Commonwealth v. Rodriguez*, 63 Mass. App. Ct. 660, 673 (2005) (quoting *Commonwealth v. Rock*, 429 Mass. 609, 617 (1999)). The Commonwealth does not challenge any of the judge's factual findings.

Amendment. . ." *Hill v. California*, 401 U.S. 797, 804 (1971). *See Commonwealth v. Foster*, 48 Mass. App. Ct. 671, 672-673, 676 (2000) (reasonable suspicion where police stopped men who matched physical description and matched path of travel as men who were reported to be carrying guns).

Further contributing to the officers' reasonable suspicion was the behavior of the defendant and J.H.: pedaling their bicycles away from the shooting at a speed indicating they were tired, then walking in the same direction and constantly looking back over their shoulders towards the site of the shooting (Tr. 1: 9, 48, 50, 52, 69, 70, 86; 2: 22, 35). The defendant's actions, if taken in isolation, may have appeared innocent, but when viewed in the context of the recent shooting and his and J.H.'s presence on the shooters' path of flight away from the scene, they combine to support the reasonableness of the suspicion that supported the stop and subsequent frisk (Add. 47). *See Commonwealth v. Sweeting-Bailey*, 488 Mass. 741, 744 (2021) ("An innocent explanation for an individual's actions 'does not remove [those actions] from consideration in the reasonable suspicion analysis'")

(quoting *Commonwealth v. DePeiza*, 449 Mass. 367, 373 (2007)).

C. The on-going safety concerns related to the shooting further justified reasonable suspicion to stop the defendant and J.H.

In addition, the nature of the reported crime – a shooting at 7:30 p.m. at a public basketball court – likewise factors into the reasonable suspicion calculus. 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 crime and danger to the community into the totality of the circumstances when determining reasonable suspicion. *Depina*, 456 Mass. at 247 ("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 reasonable suspicion to stop both men). Such is the case here.

In sum, the motion judge correctly found that the stop of the defendant was based on "sufficient information to support a reasonable suspicion that the defendant and J.H. had just been involved in the incident during which shots were fired" (DA. 534). The judge found that the defendant and J.H.'s presence on the Southwest Corridor was "consistent in time and direction with two individuals fleeing from [the] shooting on bicycles;" that the two men matched the "generic" description of the shooters; and that they were "the only people the police observed matching the descriptions" in an area where "there were not many people" at that time (DA. 538). Further, he found that the defendant was "moving in the direction of flight from the scene where shots were fired and [was] observed there only a few minutes after the shots were reported" (DA. 538). These facts, combined with the defendant and J.H. looking over their shoulders towards the location of the shooting, "implying nervousness," all created the rational inference that the defendant and J.H. were the two shooters sought by

the police (DA. 538). The defendant asks this Court to reach a contrary conclusion based on inferences that were properly rejected by the motion judge in his ruling. This Court should decline to do so. Based on the credible evidence presented at the hearing and the motion judge's clear and correct factual findings, this Court should affirm the judge's ruling that reasonable suspicion supported the stop and his order denying the motion to suppress.

II. THE MOTION JUDGE CORRECTLY RULED THAT BECAUSE THE STOP HERE WAS JUSTIFIED BY REASONABLE SUSPICION, THE DEFENDANT'S EQUAL PROTECTION CLAIM MUST BE DENIED.

In response to the defendant's claim that his equal protection rights were violated as a result of the stop, the motion judge concluded that "the Commonwealth has demonstrated that the decision by the police to stop defendant and J.H. was not made because of any improper considerations of their race" (DA 534). Instead, the motion judge reasoned, "[t]he police had sufficient information to support a reasonable suspicion that defendant and J.H. had just been involved in the incident during which shots were fired" (DA. 534). Nonetheless, the defendant argues

that article 14 and equal protection analyses are mutually exclusive and the judge's finding of reasonable suspicion to justify the stop does not end the equal protection analysis (D.Br. 64-65). The defendant is incorrect: in finding that the stop of the defendant and J.H. was based on reasonable suspicion to believe that they were involved in criminal activity – "a race-neutral motivation for stopping the defendant" (DA. 535) - the judge properly found the equal protection framework inapplicable to this case.

In his motion to suppress, filed in March 2020, the defendant moved under *Commonwealth v. Lora*, 451 Mass. 425 (2008), to suppress his stop and the fruits of his stop as violations of his equal protection rights (DA. 68-70). *Commonwealth v. Long*, 485 Mass. 711 (2020), was decided in September 2020, and the defendant filed a supplemental memorandum in support of his motion to suppress on the first day of testimony on the motion, January 27, 2021, incorporating *Long*'s equal protection framework in support of his claim (DA. 316-319). He addressed

Long's application to this case in a second supplemental memorandum on May 17, 2021 (DA. 513-529).

On appeal, the defendant limits his claim to selective prosecution analysis under *Long* (D.Br. 57-66). *Long*, however, is patently inapplicable to this case. *Long*'s revised – and relaxed – method by which a defendant can meet his initial burden of establishing a reasonable inference of discriminatory enforcement of laws only applies to motor vehicle stops.[8] *Long*, 485 Mass. at 721, 723 ("In the context of racially biased *motor vehicle stops*, purportedly to enforce traffic laws, however, these first two requirements [showing a broader class of people violated the law than against whom it was enforced and that the failure to enforce was consistent or deliberate] are unnecessary;" "[O]ur past interpretations of a reasonable inference do not

[8] That is not to say that a pedestrian stop could never warrant suppression of evidence based on equal protection grounds, but such a claim would be properly brought and evaluated under *Commonwealth v. Betances*, 451 Mass. 457 (2008), and *Commonwealth v. Lora*. The defendant, however, did not meet the evidentiary burden required under those cases to show a reasonable inference of discrimination and the judge ruled accordingly, finding that he "need not address the question of a threshold showing because the officers had a race-neutral reason for stopping the defendant" (DA. 535). *See infra*.

control *in the context of traffic stops*") (emphasis added).

More specifically, the Court in *Long* reduced the evidentiary burden previously required of defendants under *Lora* and *Betances*. In those cases, a defendant was required to establish a reasonable inference of discrimination by showing: 1) that a broader class of people than those prosecuted violated the law, 2) that the failure to prosecute was consistent or deliberate, and 3) that the failure to prosecute was based on an impermissible classification, such as race. *Lora*, 451 at 437. As *Long* explicitly states, however, this evidentiary burden is reduced in the context of motor vehicle stops because "it virtually always will be the case 'that a broader class of persons' violated the law than those against whom the law was enforced." *Long*, 485 Mass. at 722, citing *Commonwealth v. Bernardo B.*, 452 Mass. 158, 168 (2009). "[I]t is clear that the root of the problem is pretextual stops, which allow police to utilize traffic stops as a means to act on hunches *that are unsupported by reasonable suspicion* and often based on the race of the driver." Long, 485 Mass. at 737 (emphasis added).

Regardless, whether defendant's claim is viewed as a one under *Long* or *Lora*, the fatal flaw in the defendant's equal protection claim is simple: this is not a case in which a law was selectively enforced based on race. See *Long*, 485 Mass at 722; *Lora*, 451 Mass. at 437. True, the judge found that "the police who made the stop had a history of disproportionately stopping people of color" (DA. 535), but that is of no legal consequence given the reason the police stopped defendant here. The defendant here was stopped based on reasonable suspicion that he had just fired a gun on a public basketball court, an unlawful activity that is far from ubiquitous and far from selectively enforced. *Long*, 485 Mass. at 722. *See also Long*, 485 Mass. at 741, 473 (Budd, J., concurring) ("If the officer has reasonable suspicion of the suspected criminal activity, he or she may conduct an investigatory stop;" "[U]nder the authorization test, the moment a driver commits (or the police discover) a motor vehicle violation, the occupants of a vehicle are exposed to the very same investigatory stops we rightly prohibit when they are on foot — stops based on unsupported hunches, discrimination, harassment, or

any other purpose *lacking reasonable articulable suspicion of criminal activity*") (citations omitted) (emphasis added). Accordingly, as the judge correctly reasoned, he "need not address the question of a threshold showing [of a reasonable inference that a stop was racially motivated] because the officers had a race-neutral motivation for stopping the defendant" (DA. 535). The Commonwealth, therefore, never needed to rebut this inference, contrary to the defendant's claim on appeal (D.Br. 67-69). The very facts that supported the stop rebutted any such inference.

This stop, as the judge correctly found, was based on reasonable suspicion that the defendant had committed a crime, so the defendant failed to establish a reasonable inference of discrimination (DA. 534-535). Simply put, "the reasonable suspicion requirement is the linchpin of a valid investigatory stop under art. 14," *Long*, 485 Mass. at 744 (Budd, concurring), and this valid investigatory stop was not influenced, implicitly or explicitly, by the defendant's race.

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
FOR THE COMMONWEALTH,

KEVIN R. HAYDEN
District Attorney
For the Suffolk District

/s/ Kathryn Sherman
KATHRYN SHERMAN
Assistant District Attorney
BBO# 691445
One Bulfinch Place
Boston, MA 02114
(617) 619-4174
kathryn.sherman@mass.gov

September 15, 2022

ADDENDUM TABLE OF CONTENTS

ADDENDUM

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

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.

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

(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.

G.L. c. 269, § 12E: Discharge of a firearm within 500 feet of a dwelling or other building in use; exceptions

Whoever discharges a firearm as defined in section one hundred and twenty-one of chapter one hundred and forty, a rifle or shotgun within five hundred feet of a dwelling or other building in use, except with the consent of the owner or legal occupant thereof, shall be punished by a fine of not less than fifty nor more than one hundred dollars or by imprisonment in a jail or house of correction for not more than three months, or both. The provisions of this section shall not apply to (a) the lawful defense of life and property; (b) any law enforcement officer acting in the discharge of his duties; (c) persons using underground or indoor target or test ranges with the consent of the owner or legal occupant thereof; (d) persons using outdoor skeet, trap, target or test ranges with the consent of the owner or legal occupant of the land on which the range is established; (e) persons using shooting galleries, licensed and defined under the provisions of section fifty-six A of chapter one hundred and forty; and (f) the discharge of blank cartridges for theatrical, athletic, ceremonial, firing squad, or other purposes in accordance with section thirty-nine of chapter one hundred and forty-eight.

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

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).

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 35 pages.

/s/ Kathryn Sherman
KATHRYN SHERMAN
Assistant District Attorney

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 sending it to:

John Warren
john@johnpwarrenlaw.com

Respectfully submitted
For the Commonwealth,
KEVIN R. HAYDEN
District Attorney
For the Suffolk District

KATHRYN SHERMAN
Assistant District Attorney
BBO# 691445
One Bulfinch Place
Boston, Massachusetts 02114

October 4, 2022

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

_____

NO. 13329

_____

COMMONWEALTH OF MASSACHUSETTS,
Appellee
V.

MICHAEL VAN RADER, JR.,
Appellant

_____

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

_____

SUFFOLK COUNTY

_____