COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. **SJC-13329**

COMMONWEALTH OF MASSACHUSETTS
APPELLEE

V.

MICHAEL VAN RADER, JR.
APPELLANT

ON APPEAL FROM SUFFOLK SUPERIOR COURT

BRIEF OF THE APPELLANT

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ISSUES

1. Whether the seizure of two Black teenagers, neither of whom had a bicycle, on a well-traveled path in the Southwest Corridor Park on a Spring evening, was justified based on a "generic" initial description that two males on bicycles wearing hoodies were seen fleeing in a shots-fired incident nearly one mile away.

2. Whether the pedestrian stop of Mr. Van Rader violated his equal protection rights where he demonstrated, through an expert statistician, that Black individuals were over five times more likely to be stopped by the officers who stopped him, a statistical showing that the Commonwealth failed to rebut.

STATEMENT OF THE CASE

On September 14, 2018, Michael Van Rader, Jr., was arraigned in Suffolk Superior Court on charges of carrying a firearm, G.L. c. 269, § 10(a); carrying a loaded firearm, G.L. c. 269, § 10(n); unlawful possession of ammunition, G.L. c. 269, § 10(h); and discharging a firearm within 500 feet of a building, G.L. c. 269, § 12E. (R.7,10).[1]

A motion to suppress was filed on March 11, 2020. (R.42-46). The suppression hearing was held (Krupp, J.), over three dates: January 27, March 10, and May 18, 2021. (R.17-19).[2] On June 24, 2021, the motion judge denied the motion and issued written findings and order. (R.530-540)

On July 23, 2021, Mr. Van Rader's application for leave to pursue interlocutory appeal was docketed with the Single Justice of the Supreme Judicial Court (SJC). See SJ-2021-0276. The Single Justice (Georges, J.) denied the application. (R.542).

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[1] The Record Appendix is referred to as (R.*page*). The suppression hearing transcripts are referred to as (T*volume*/*page*). The Addendum is referred to as (Add.*page*).

[2] The following transcript volumes correspond to the following suppression hearing dates: TII (1/27/2021); TIII (3/10/2021); TIV (5/18/21).

On September 13, 2021, in Suffolk Superior Court, (Ames, J.), Mr. Van Rader tendered a conditional guilty plea, pursuant to Mass. R. Crim. P. 12(b)(6) and *Commonwealth* v. *Gomez*, 480 Mass. 240 (2018), wherein Mr. Van Rader reserved his right to appeal from the denial of his motion to suppress. (R.543-546). The conditional nature of the plea, which was adopted by the Court, was proposed jointly by Mr. Van Rader and the Commonwealth. (R.545). He conditionally pleaded guilty to carrying a firearm, unlawful possession of ammunition, and discharging a firearm within 500 feet of a building. (R.20-21). The carrying a loaded firearm charge was dismissed at the request of the Commonwealth. (R.20-21). On the carrying a firearm and unlawful possession of ammunition charges, he was sentenced to 18 months house of correction. (R.546). He was sentenced to three months house of correction for discharging a firearm within 500 feet of a building. (R.546). All three charges were ordered to be served concurrently. (R.546)

His rights having been reserved, Mr. Van Rader appeals from the denial of the motion to suppress.

STATEMENT OF FACTS

Three Boston Police officers testified for the Commonwealth at the motion to suppress, Officers James O'Loughlin, Jr., Gregory Eunis, and Reivilo Degrave. (R.530;Add.71). Mr. Van Rader called one witness, Mary S. Fowler, Ph.D., a statistics expert. (R530;Add.71).

A. The stop of two teenagers, Mr. Van Rader and J.H., a juvenile, on a path in the Southwest Corridor Park.

On April 23, 2018, at approximately 7:29 p.m., Officers Eunis, Degrave, and Korey Franklin were in an unmarked Ford Explorer in Dorchester when a radio broadcast reported shots fired in the area behind Boston Police headquarters. (TII/42-44;R.530,532;Add.71,73). The officers drove in the direction of Boston Police headquarters, which was about two to three miles away. (TII/44,58). There was no report, at any time, that anyone had been struck or injured by the gunshots. (TII/58).

Within about a minute of the shots fired report, the police received two 911 calls about the incident. (R.531;Add.72). The first caller, "Manny," reported hearing about eight shots, but reported no information about a

shooter. (R.270,531;Add.72). The second caller, "Marie," reported from the corner of Prentiss and Tremont Streets that she heard about six gunshots, and then "the guys went off on their bikes." (R.271-272,531;Add.72). Specifically, she said she saw two Black males in black hoodies on bicycles leave the area on Prentiss Street and turn right onto Tremont Street. (R.272,531;Add.72). She did not state that "the guys" were the shooters or that she saw anyone with a gun. (R.271-272).

A police dispatcher broadcasted over the radio that, "two males that were seen on bikes [took] off on Tremont from Prentiss," adding that they were wearing "black hoodies." (R.247,531;Add.72). Another radio report indicated that, according to multiple witnesses, two guys on bikes were the shooters. (R.248,531;Add.72). None of these purported witnesses were identified at the suppression hearing. The motion judge incorrectly found that the dispatcher radioed that the males "[took] a right" on Tremont Street (R.531;Add.72); in fact, this statement is not contained in the recorded radio transmissions.[3] (See R.245-267).

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[3] A Boston Police Incident History document ("CAD sheet"), introduced at the hearing, noted, "**took right on Tremont off Prentiss" (R.224); it was not made clear that the officers were

As the motion judge correctly found, the dispatcher did not broadcast the reported race of the two males over the police radio. (R.531;Add.72). Nor did dispatch provide information over the radio regarding the age, height, weight, hair style, or facial features of the males. (R.245-267,533;Add.74). Aside from the reported black hoodies, there was no other clothing description provided.

More than a half-mile away from the intersection of Prentiss and Tremont Streets, Officer O'Loughlin was working a paid detail on New Heath Street between Parker and Terrace Streets. (TII/6;R.531;Add.72). New Heath Street runs perpendicular to Columbus Avenue, but comes to a dead end before fencing, a retaining wall, and railroad tracks. (TII/34-35;R.531-532;Add.72-73). On the other side of the railroad tracks from New Heath Street is the Southwest Corridor Park and then Columbus Avenue. (TII/34-35;R.532;Add.73). A path runs through the Southwest Corridor Park. (TII/34-35;R.532;Add.73).

On his police radio, Officer O'Loughlin heard the report of shots fired in the area behind Boston Police headquarters.

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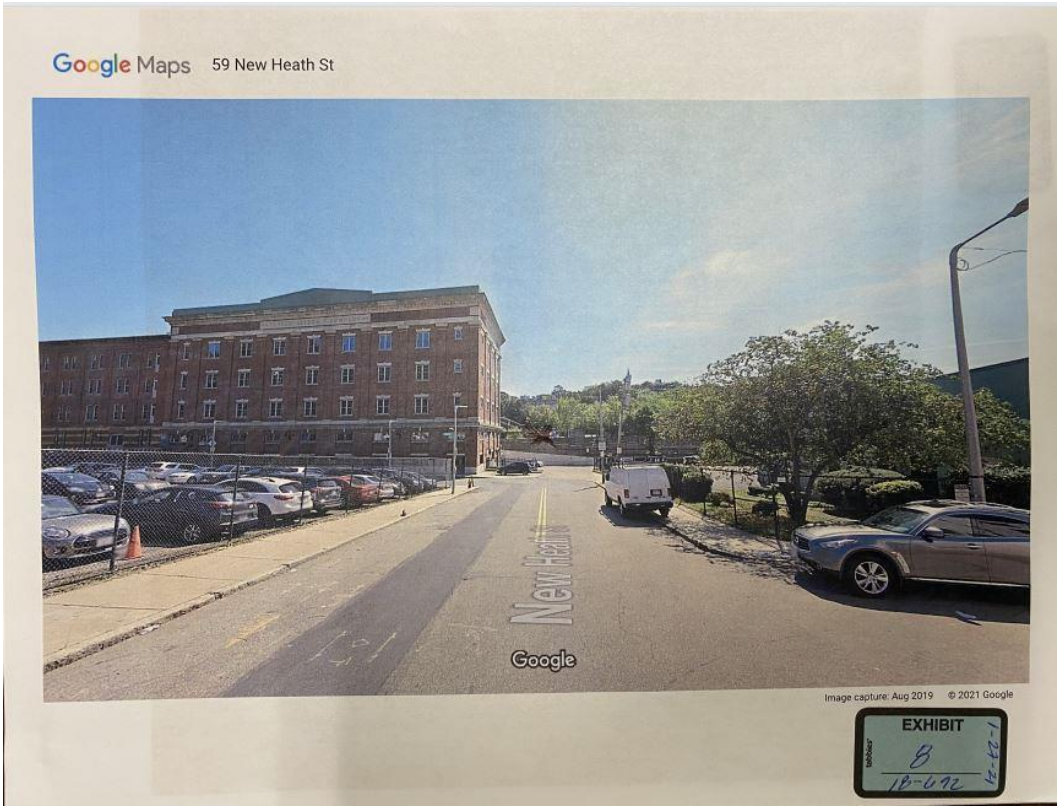
aware of this notation prior to seizing Mr. Van Rader and J.H.

(TII/8;R.532;Add.73). Officer O'Loughlin's testimony that the description over the radio was two males wearing "black shirts or sweatshirts" (TII/8), is belied by the recorded police radio transmissions which establish that the only clothing description provided by dispatch was "black hoodies." (R.248).

From where Officer O'Loughlin was standing, the path running through the Southwest Corridor Park was about 300 feet away, and elevated. (TII/35-36;R.532;Add.73). From his "obstructed, distant view" he observed two Black males on bicycles on the path heading southwest towards Heath Street. (TII/15,35-36;R.532;Add.73). Officer O'Loughlin testified that the photograph reproduced below, introduced as Exhibit 8, was a "great representation" of his vantage point and drew an "X" at the location where he saw the males on bicycles. (TII/36).



The motion judge credited Officer O'Loughlin's testimony that he observed the males on bikes to be wearing black "shirts or sweatshirts." (TII/14-15;R.532;Add.73). However, the recorded radio transmissions reveal that Officer O'Loughlin told dispatch that the males he saw on bicycles were wearing a "black vest" and a "black jacket." (TII/29-31;R.283;Add.73). The two males appeared to Officer O'Loughlin to be pedaling slowly, as if they were tired. (TII/9,37;R.532;Add.73).

Meanwhile, Officers Franklin, Eunis, and Degrave, driving from Dorchester, traveled to New Heath Street and

spoke to Officer O'Loughlin. (TII/45-47;R.532;Add.73). Officer O'Loughlin told them that he saw two Black males on bicycles heading towards Heath Street. (TII/45-47;R.532-533;Add.74). Officer O'Loughlin testified that he told the officers that the males he saw were wearing hooded sweatshirts. (TII/14;R.533;Add.74).

After speaking with Officer O'Loughlin, Officer Franklin drove the unmarked Ford Explorer towards Heath Street and took a left onto Columbus Avenue. (TII/47-48;R.533;Add.74). Officer Eunis was in the front passenger seat; Officer Degrave was seated behind him, in the rear. (TII/58;R.532;Add.73). All three officers, who were members of the "Youth Violence Strike Force," also known as the "gang unit," were in plain clothes but were wearing tactical vests emblazoned with "Boston Police" on the front and back. (TII/77;TIII/46;R.532;Add.73).

As the officers traveled north on Columbus Avenue, they observed two teenagers near the intersection of Heath Street and Columbus Avenue. (TII/48-49;R.533;Add.74). The teenagers were walking south on the path in the Southwest Corridor Park, a skinny strip of green in a busy, densely populated section of Boston. (TII/48-49;TIII/31-32;R.532-

533;Add.74). The path is "very commonly-traveled" and there are train stations and a community college in the area. (TIII/21,30-32). Officer Degrave testified that on a given Spring evening, one would see numerous people walking, running, and biking on the path. (TIII/30-31).

The motion judge's finding that "[t]here were not a lot of people out" on the evening of the stop, (R.533;Add.74), was erroneous. Officer Degrave testified that there were "a lot of people" in the area:

> "[s]ome people were on foot. A lot of people were just walking around, you know. Like I said, there's a train station in the area. So there was a lot of people in the area."

(TIII/20-21). Officer Eunis initially testified that there "[w]asn't a lot of people out that night" (TII/67), but his testimony made clear that he simply did not "remember" seeing other people:

> Q: Do you recall if there were any other pedestrians in the area during this stop?
>
> A: I didn't see any that stood out to me. I don't remember any that stood out to me.
>
> . . . .
>
> Q: Now, on this particular day Mr. Robinson-Van Rader and [J.H.] were not the only two people on

> the bike path, correct?
>
> A: I don't remember seeing other individuals.
>
> Q Fair to say it's possible there -- there were, at this stage you don't remember?
>
> A: Like I said -- like I stated earlier, I don't remember seeing other individuals. I remember seeing the two individuals that I -- that we stopped and spoke to.

(TII/57,67-68).

When the officers observed them on the path, the teenagers were near the intersection of Heath Street and Columbus Avenue, almost a mile away from Boston Police headquarters.[4] (TIII/40-41;R.533;Add.74). The teenagers were not riding bicycles and did not have bicycles with them. (TII/68,TIII/34;R.533,538-539;Add.79-80). They were wearing black hoodies, with the hoods down. (TIII/23;R.533;Add.74). The officers could tell that the teenagers were Black. (TII/65;TIII/34). The officers observed the teenagers repeatedly look over their respective shoulders,

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[4] The intersection of Heath Street and Columbus Avenue is 0.8 miles away from Boston Police headquarters, as shown by the Google map introduced as an exhibit at the hearing. (TIII/40-41;R.307). See *Commonwealth* v. *Augustine*, 472 Mass. 448, 457 n.14 (2015).

in the general direction of Boston Police headquarters, which was nearly a mile away. (TIII/35,40-41;R.307,533;Add.74). The officers did not know what the teenagers were looking at but did not see anyone following the teenagers. (TII/86;TIII/22,35;R.533;Add.74).

The teenagers were later identified as Mr. Van Rader and J.H. (TII/25-26;R.533;Add.74). When the officers spotted them on the path, however, the officers did not know who the teenagers were. (TII/71-72;TIII/35-36;R.533;Add.74). The two teenagers were not running or jogging and were not walking at an unusually fast or slow pace. (TII/68). They were just walking. (TII/68).

The officers could tell that the two teenagers were young. Officer Degrave referred to them as "kids" (TIII/22), and Officer Eunis agreed that they appeared to be teenagers and looked very young, (TII/74). Mr. Van Rader had long dreadlocks and was short—about five foot four, or five foot five. (TII/73;TIII/38-40;R.308).

Officer Franklin turned his vehicle around at Cedar Street and headed south on Columbus Avenue, trailing the teenagers from behind. (TII/69-70;R.533;Add.74). Officer Franklin approached the teenagers at about two miles per

hour—"very, very, very slow"—pulled up to the curb, about ten feet away from the teenagers, and stopped. (TIII/41-42). Officers Eunis and Degrave got out of the Ford Explorer to confront the teenagers. (TIII/42;R.533;Add.74).

Officers Eunis and Degrave had participated in a training on the "characteristics of an armed gunman." (TII/87;TIII/3,36-37). They were trained regarding indicators that someone is in possession of a firearm, including observations of a weighted pocket, a bulge in a pocket, a change in gait or direction, running while clutching one's waist, a security check, and breaking off from a group. (TIII/36-37). Officer Degrave testified that at no point did he observe either of the teenagers to be exhibiting any of those indicators. (TIII/36-37).

Officer Degrave went up to J.H., while Officer Eunis focused on Mr. Van Rader. (TII/78;R.533;Add.74). As the motion judge found, the officers had no information about the age, height, weight, build, hair style, or facial features of any suspects involved in the shots fired report. (TII/59-60;R.533;Add.74). Nor did the officers have any description of the model, color, or type of bicycles the suspects were riding. (TII/60;R.533;Add.74).

The motion judge found that Officer Degrave told the two teenagers to "hold up a second." (TII/76;R.533;Add.74). The two teenagers, who were within a couple of feet from each other, immediately stopped walking. (TII/76;R.533;Add.74). The teenagers did not run or turn away from the officers. (TII/76;TIII/45-46.).

Officer Degrave got closer to J.H. and asked, "do you have anything on you," referring to weapons. (TII/78;TIII/44-45;R.533;Add.74). The motion judge found that J.H. then, "turned sideways, blading his stance, as if to conceal something at his side." (TII/78-79;TIII/45-46;R.533-534;Add.75). The officers did not see a weapon or a bulge on either Mr. Van Rader or J.H. (TIII/36-37;R.533-534;Add.74-75). When asked whether "blading" is "really just turning your body," Officer Eunis responded, "[p]retty much." (TII/78-79). The officers were not wearing body worn cameras. (TII/77;TIII/45-46).

Although the officers, and the motion judge, characterized it as a "patfrisk" (TII/53;TIII/28-29;R.534;Add.75), the testimony from both officers made clear that Officer Degrave went up to J.H., lifted up his hoodie, pulled up his shirt, and observed the handle of a handgun,

which he seized. (TII/80-81;TIII/52). Approximately five minutes elapsed between the initial shots-fired report and the seizure of the gun from J.H.[5] (R.504-506)

Mr. Van Rader never reached or grabbed for anything. (TII/80). He had his hands in his hoodie pocket, but there was no observable bulge in his pockets and his pockets were not weighted down. (TII/80). He was sweating (TII/52;R.534;Add.75); however, Officer Degrave did not recall the temperature that day, (TIII/30). Mr. Van Rader never turned his body away from the officers or made any sudden movements. (TII/80;R.534;Add.75).

Officer Eunis immediately grabbed Mr. Van Rader, "[b]ecause we were trained that, if there's one firearm, there could be another." (TII/54,81). Officer Eunis physically brought him to the ground by pulling one of Mr. Van Rader's arms. (TII/81-82;R.534;Add.75). While Mr. Van Rader was on the ground, Officer Eunis handcuffed him, patfrisked his back, and then rolled him onto his side. (TII/82-83). Officer

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[5] The recorded police radio transmissions, introduced as Exhibit 3, reveal that the initial report of shots-fired came in at 7:29:23 pm, and that at 7:34:30 pm one of the officers reported, "[w]e got a gun here," inferentially the gun seized from J.H. (TIII/28;R.504-506).

Eunis found a handgun in Mr. Van Rader's pants pocket. (TII/84;R.534;Add.75).

Officer Degrave testified that he stops more than fifty vehicles and about five to ten pedestrians per month. (TIII/47-48). He has been an officer for twelve years and has personally seized about twelve firearms. (TIII/51-52). Based on statistician Dr. Fowler's review of eighteen months of Field Interrogation and Observations (FIOs) reported by Officers Eunis and Degrave, 45% of their 149 discretionary stops involved a patfrisk or search, but only 4% resulted in the seizure of a gun. (R.367).

B. Evidence of racially disproportionate stops conducted by Officers Eunis and Degrave.

In support of the claim that the stop of Mr. Van Rader violated his equal protection rights, he introduced evidence that Officers Eunis and Degrave had a history of racially disproportionate stops. See *Commonwealth* v. *Long*, 485 Mass. 711 (2020). He presented this evidence through a report prepared by statistics expert Mary S. Fowler, Ph.D.[6]

[6] Dr. Fowler, a mathematics professor at Worcester State University, holds an M.S. and a Ph.D. in Statistics from Carnegie Mellon University.

(R.325-425), and her testimony at the suppression hearing.

Dr. Fowler, who was also the expert statistician in *Long*,[7] applied the same benchmarking methodology approved by the *Long* Court. See *Long*, *supra*, at 715. In her analysis of FIO reports involving discretionary stops[8] conducted by Officers Eunis and Degrave, she determined that a Black individual was over *five times more likely* to be targeted for an FIO than someone who is not Black. (TIV/39;R.334). The motion judge found that Mr. Van Rader had presented "considerable statistical evidence that [the officers] have historically conducted discretionary investigative stops in a way that disproportionately impacted people of color more than white people." (R.534;Add.75).

Dr. Fowler began her analysis by charting the racial distribution in the dataset of FIOs reported by Officers Eunis and Degrave from January 5, 2017, to August 31, 2018. (R.335-336). She determined that of the 276 people involved in discretionary stops by the officers, 90% were Black, and just

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[7] See filings in *Commonwealth* v. *Edward Long*, Suffolk Superior Court, docket # 1884CR00084.

[8] The process for weeding out non-discretionary stops is detailed in an affidavit of counsel, admitted as an exhibit at the hearing. (R.458-459).

2% were white non-Hispanic. (R.336).

Table 3: Racial Distribution of Individuals Recorded in Discretionary FIOs

Race	Greg Eunis 91889	Reivilo Degrave 106678	Total
Black	116 (91%)	132 (89%)	**248 (90%)**
White non-Hispanic	5 (4%)	0 (0%)	**5 (2%)**
White Hispanic and Other	6 (5%)	3 (2%)	**9 (3%)**
Unknown	0 (0%)	14 (9%)	**14 (5%)**
Total	**127 (100%)**	**149 (100%)**	**276 (100%)**

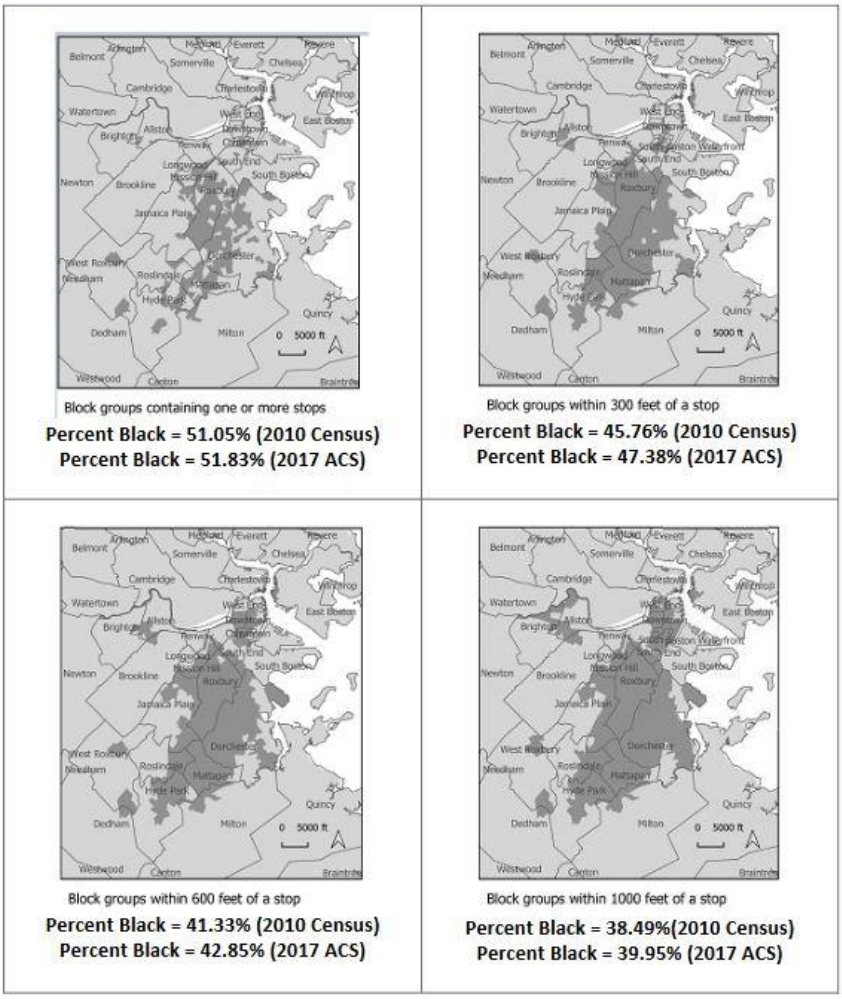
(R.336).

For comparison purposes, Dr. Fowler sought to estimate the racial distribution of the individuals whom Officers Eunis and Degrave would have encountered while on patrol, by plotting the location of all FIOs reported by the officers. (R.339-342). She used United States Census data to determine the racial distribution of the residents living in the officers' patrol area, relying on "census block groups" which are geographical regions that contain between 600 to 3,000 people. (R.341-342). Dr. Fowler explained that this process, benchmarking, "gives us a point of comparison. It's what we would expect in the absence of racial profiling." (TIV/15).

Dr. Fowler determined that the officers' patrol area was

51% Black. (TIV/18;R.341-342). Dr. Fowler then considered the residential populations beyond the patrol area. (TIV/18-21;R.341-342). The data revealed that as one moved further outside of the patrol area, the population had progressively fewer Black residents: 45% Black at 300 feet; 41% Black at 600 feet; 38% Black at 1,000 feet. (TIV/18-21;R.341-342).

Figure 1: Census Block Group with an FIO or Within 300 Ft, 600 ft, or 1000 ft of an FIO



(R.341). Dr. Fowler then determined the racial composition of every municipality within 35 miles of the patrol area, none

of which had a population that was more than 51% Black; in fact, the vast majority of municipalities were not remotely close. (TIV/21-23;R.347-409-416).

Given the racial distribution of the surrounding area, Dr. Fowler adopted the 51% Black estimation—likely, an overestimate—as a starting point for her benchmarking analysis. (R.347). Dr. Fowler explained:

> "as we moved further and further away from the patrol area, the percent [B]lack decreases. It is likely that if individuals came in from adjacent areas, that they would actually decrease the percent black in the patrol area."

(TIV/21).

To account for the likelihood that the officers spent more time in some areas than others, Dr. Fowler conducted a weighted average analysis, wherein areas with more FIOs were given greater representation in the racial distribution calculation. (R.343). Using the weighted average, and accounting for two additional variables—the time-of-day at which FIOs were recorded and racial distributions across ages and gender—Dr. Fowler determined that utilizing a 60% Black benchmark was appropriate, as a conservative estimation of the percentage of Black individuals that the

officers encountered on patrol. (TIV/26;R.343-345,351).

Using that benchmark, Dr. Fowler first conducted a probability ratio procedure. (R.348-359). With respect to discretionary stops made by the officers over the 18-month period, Dr. Fowler determined that Black individuals were *over five times more likely* to be stopped than non-Black individuals. (R.355,357.). Second, Dr. Fowler conducted an equality of proportions test, wherein she concluded that, assuming no racial profiling, the frequency with which one would observe data this extreme is *less than 1 in 100,000*. (R.360-367). Dr. Fowler concluded that the data revealed a situation "consistent with racial profiling." (R.334).

SUMMARY OF ARGUMENT

The denial of Mr. Van Rader's motion to suppress should be reversed because he was unconstitutionally seized. (pp.30-45). The seizure occurred when Mr. Van Rader and J.H., two Black teenagers, stopped walking in response to Officer Degrave and another gang unit officer, both armed and wearing tactical vests, alighting from an unmarked cruiser, confronting the teenagers, and telling them to "hold up a second." (pp.33-38). The seizure lacked individualized suspicion; it was based merely on a "generic" initial description of two males on bicycles wearing hoodies. (pp.33-44). Moreover, when Mr. Van Rader and J.H. were seized, they did *not* have bicycles. (pp.44-45). Although the seizure took place within several minutes of the report of shots fired, the teenagers were stopped nearly a mile away (pp.45-48), on a well-traveled path early on a Spring evening in a busy area of Boston. (pp.48-50). Further, the officers had only limited information regarding the suspects' direction of travel. (pp.50-52). Although the officers observed the teenagers look over their shoulders, they observed none of the characteristics of an armed gunman they were trained to detect. (pp.52-56).

The motion to suppress also should have been allowed because the stop violated the equal protection rights of Mr. Van Rader, who is Black. (pp.56-69). Mr. Van Rader was a pedestrian, but the framework set forth in *Long*, in the traffic stop context, applies here. (pp.58-61). Mr. Van Rader's statistical showing that the officers have a history of disproportionately stopping Black individuals established a reasonable inference that the stop here was based, at least in part, on race. (pp.61-64). Although the motion judge appropriately found that the statistical evidence was "considerable," he erroneously determined that the Commonwealth had, in any event, rebutted it by establishing that there was an art. 14 justification (namely, reasonable suspicion) for the stop. (pp.63-64). But an art. 14 justification does not suffice to rebut an equal protection claim. (pp.64-66). Under *Long*, the Commonwealth was required to prove that the stop was not even "in part" motivated by race by grappling with *all* of the evidence and inferences raised by Mr. Van Rader, including his statistical showing. (pp.65-66). The Commonwealth failed to do that and, accordingly, the motion to suppress should have been allowed on equal protection grounds. (pp.67-69).

ARGUMENT

I. Because Mr. Van Rader was unconstitutionally seized, absent reasonable suspicion, the motion to suppress should have been allowed.

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (citation omitted). This sacred right is secured by the Fourth Amendment and art. 14, which prohibit police interference from an individual's autonomy absent "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion." *Id.*, at 21. The Commonwealth bears the burden of proving that such an intrusion met these constitutional standards. See *Commonwealth* v. *Antobenedetto*, 366 Mass. 51, 56-57 (1974). Because the Commonwealth failed to establish that officers had reasonable suspicion when they seized Mr. Van Rader and J.H., nearly one mile away from the location of a shots-fired report, the motion judge erred in denying the motion to suppress.

A. Mr. Van Rader and J.H., two Black teenagers, were seized when they stopped walking after gang unit officers wearing "Boston Police" vests alighted from an unmarked SUV, approached them, and told them to "hold up a second."

A stop constitutes a seizure 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). The operative question is whether, based on the totality of the circumstances, "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 includes the defendant's age; "[p]retending otherwise would diminish a juvenile's right to be free from unwanted police interactions." *Commonwealth* v. *Evelyn*, 485 Mass. 691, 699 (2020).

Although the motion judge declined to decide when the interaction between the gang unit officers and the teenagers became a seizure, for purposes of the reasonable suspicion

analysis he focused on the moment when Officer Degrave told the teenagers to "hold up a second." (R.536;Add.77). The motion judge's inclination to view this as the seizure point was appropriate: when Officer Degrave ordered them to "hold up a second," and the teenagers stopped, the officers had "objectively communicated that [they would use their] police power to coerce that person to stay." *Matta*, 483 Mass. at 362.

In *Commonwealth* v. *Depina*, 456 Mass. 238 (2010), the SJC determined that the defendant was seized "when, after three officers converged on him on Emerson Street, Trooper Watson asked the defendant to 'come over here.'" *Id*. at 242. "When three armed officers wearing 'Gang Unit' shirts emerged from a single vehicle and pursued the defendant, continuing to close in on him even after he reversed direction to avoid them, a reasonable person would have believed he was not free to ignore Trooper Watson's request that he 'come over here' to answer their questions." *Id*.

The instant case mirrors *Depina*. Here, three gang unit officers in an unmarked Ford Explorer pulled up "very, very, very slow," to two teenagers walking along on a path, stopping ten feet from, and "slightly ahead of" them. (TII/69-70;TIII/41-42). Officers Eunis and Degrave, who were armed

and wearing tactical vests emblazoned with "Boston Police," got out of the vehicle and confronted the teenagers. (TIII/42;R.532;Add.73). When Officer Degrave told them to "hold up a second," the two teenagers obeyed his command. (TII/76;R.533;Add.74). Thus, as in *Depina*, this case involves the emergence of multiple armed gang unit officers from a single police vehicle, closing in on their target, and telling them to stop. *Depina*, 456 Mass. at 241-242.

Indeed, the instant case presents a stronger case for seizure that *Depina* because here, following Officer Degrave's command, the teenagers *actually stopped*. "Evidence that the defendant did in fact stop suggests that he believed, as would any reasonable person, that he was not free to leave." *Commonwealth* v. *Barros*, 435 Mass. 171, 176 (2001) citing *State* v. *Quezada*, 141 N.H. 258, 260 (1996) (submission after officer's statement to defendant, "[h]ey you, stop," indicated that compliance was not optional and was seizure).

In *Barros*, the SJC concluded that the officer's initial request to the defendant, "[h]ey you . . . I want to speak with you," was not a seizure because the officer "remained in his cruiser" and "did not impede or restrict the defendant's freedom of movement." *Barros*, 435 Mass. at 172-174. See

Commonwealth v. *Stoute*, 422 Mass. 782, 789 (1996) (no seizure when officer, while seated in police vehicle, asked defendant to "hold up a minute"). However, when the officer got out of his cruiser, walked up to the defendant, and said "[h]ey you. I wanna talk to you. Come here," a seizure had occurred. *Id*. at 172-175.

Depina, *Barros*, and *Stoute* suggest a distinction between an officer's request made from the inside of a police vehicle and a request made after the officer has opened the door to confront the target. See also *Evelyn*, 485 Mass. at 694-695, 703-704 (after defendant rebuffed officer, who said, "[h]ey, man, can I holler at you?" and trailed defendant for 100 yards, officer's mere opening of cruiser door was a seizure). The instant case, in this regard, aligns with *Depina*, *Evelyn*, and the second request in *Barros*, all of which involved stops determined to be seizures by the SJC.

Moreover, the apparent age of Mr. Van Rader and J.H. further solidifies the moment when they stopped, following Officer Degrave's command, as a seizure. In *Evelyn*, the SJC held that a child's age is relevant to the question of seizure under art. 14. *Evelyn*, *supra*, at 699. "The question will be whether the officer objectively communicated to a person of

the juvenile's apparent age that the officer would use his or her police power to coerce the juvenile to stay." *Id.* The officers could tell that the teenagers were young; Officer Degrave explained the moment he first saw them, "[a]nd then we noticed the two individuals, *kids* . . ." (TII/74;TIII/22). Individuals the apparent age of Mr. Van Rader and J.H.—i.e., "kids"—would have understood, by the officers' words and actions, that they would be made to stay. See *Evelyn*, *supra*, at 699 ("[t]he "naiveté, immaturity, and vulnerability of a child will imbue the objective communications of a police officer with greater coercive power").

Finally, this Court should also consider race as a factor in whether a seizure had occurred, a question explicitly left open by the SJC in *Evelyn*. *Id.* at 703. "African-Americans, particularly males," such as Mr. Van Rader and J.H., "may believe that they have been seized in situations where other members of society would not." *Id.* (citations omitted). Dr. Fowler's statistical analysis in this case constitutes yet another example of why "the troubling past and present of policing and race are likely to inform how African-Americans and members of other racial minorities interpret police encounters." *Id.* at 701 (citations omitted).

For these reasons, a seizure occurred when the teenagers, having been told to "hold up a second," did just that. But even assuming *arguendo* that a seizure did not occur at that moment, a seizure took place, at the very latest, when Officer Degrave asked J.H. if he "had anything on him." Officer Degrave's question injected another layer of coercion into the interaction. A reasonable person, particularly two Black teenagers, having just been confronted by two gang unit officers in tactical vests, certainly would have understood, when Officer Degrave effectively asked whether they were possessing contraband, that the officers would use their police power to make them stop. See *Matta*, 483 Mass. at 363.

Because Mr. Van Rader was seized when he followed the gang unit officers' command and stopped—or, at the latest, when Officer Degrave asked J.H. if he had "anything" on him—the question becomes whether officers had reasonable suspicion of criminal activity at that point.

B. Mr. Van Rader was seized absent reasonable suspicion that he was committing, had committed or was about to commit a crime.

For a seizure to be permissible, it must be "based on an officer's reasonable suspicion that the person was committing,

had committed, or was about to commit a crime." *Commonwealth* v. *Warren*, 475 Mass. 530, 534 (2016). That suspicion must be grounded in "specific, articulable facts and reasonable inferences draw therefrom"; a hunch will not suffice. *Warren*, 475 Mass. at 534 (cleaned up). The "essence" of the reasonable suspicion inquiry is whether police have an "individualized" suspicion that the person seized is the perpetrator. *Id.*, citing *Depina*, 456 Mass. at 238. Here, the officers lacked such a reasonable suspicion when, after receiving only a "generic" description from dispatch that did not mention race, they observed and seized two Black teenagers on the path in the Southwest Corridor Park.

1. The dispatcher's vague description—two guys on bikes wearing black hoodies—was, as the motion judge characterized it, "generic."

When police are looking for suspects based on information from police dispatch, the description "need not be so particularized as to fit only a single person, but it cannot be so generalized that it would include a large number of people in the area where the stop occurs." *Depina*, 456 Mass. at 245-246.

The officers here were provided with only a bare-bones,

"generic" (R.538;Add.79), description of the suspects from dispatch: *two guys on bikes wearing black hoodies*. Missing was any information regarding the suspects' race, age, height, weight, build, hair style, facial features, or any distinctive clothing they were wearing. (R.533;Add.74). There was *no* suggestion that the shooters were teenagers, that they were short, or that one of them had long dreadlocks, as Mr. Van Rader did that April evening. See, e.g., *Commonwealth* v. *Meneus*, 476 Mass. 231, 237 (2017) (notable lack of description of defendant's distinctive clothing).

Warren involved a similarly vague description. There, at 9:20 pm, breaking and entering suspects were described as three Black males, two wearing "dark clothing" and a third wearing a "red hoodie." *Warren*, 475 Mass. at 531-535. For about 15 minutes, on a cold night, Officer Anjos drove a four-to-five block radius and came across no pedestrians, until he observed two Black males, including the defendant, dressed in dark clothing about a mile away from the break-in. *Id*. at 532, 534-535. After Officer Anjos asked them to "wait a minute," the two men fled, and were eventually seized by another officer. *Id*. at 532-533.

The *Warren* Court determined that police lacked

reasonable suspicion for the seizure. The officers had no information "about facial features, hairstyles, skin tone, height, weight, or other physical characteristics." *Id.* Based on the "very general" description, "the police did not know whom they were looking for that evening." *Id.* It was, accordingly, "simply not possible for the police reasonably and rationally to target the defendant or any other black male wearing dark clothing as a suspect in the crime." *Id.* at 535-536.

Similarly, in *Commonwealth* v. *Cheek*, 413 Mass. 492 (1992), at 11:20 pm in the Grove Hall area of Roxbury, officers received a radio call that a victim was stabbed in the back by a "black male with a black 3/4 length goose known as Angelo of the Humboldt group." *Cheek*, 413 Mass. at 493. The officers searched the Grove Hall area and observed the defendant, a Black male, walking on a street about one-half mile from location of the stabbing. *Id.* The defendant was wearing "a dark-colored three-quarter length goose-down jacket." *Id.* When officers approached, the defendant, whose hands were in his coat pocket, told police his name was "Zan" or "Ann." *Id.* Officers frisked him and retrieved a handgun from his front pocket. *Id.*

The *Cheek* Court concluded that the seizure of the defendant was unlawful, reversing the denial of the suppression motion. *Id*. at 497. The description of a "black male with a black 3/4 length goose," "could have fit a large number of men who reside in the Grove Hall section of Roxbury, a predominantly black neighborhood of the city." *Id*. at 496. Although the defendant was wearing a "3/4 length goose," "[t]hat the jacket matched was not enough to single him out." *Id*. Additional physical descriptions, such as height, weight, facial hair, or unique markings on his face or clothes, were required to distinguish the suspect "from any other black male in the city." *Id*.

Finally, in *Commonwealth* v. *D.M.*, 100 Mass. App. Ct. 211, 216 (2021), the description of a "young Black man in a black hooded sweatshirt and blue jeans" was "bare-bones," and left the officers unable to "distinguish the suspect from any other younger-looking Black males wearing that type of clothing in the area." The Appeals Court determined that the juvenile, a Black male who was wearing a black sweatshirt and blue jeans, was "entitled to proceed uninhibited" and should not have been seized. *Id*. at 218.

The description of the suspects here, two guys on bikes

wearing black hoodies, was even less particularized than in *Warren* (three Black men, two wearing dark clothing and a third wearing a red hoodie), *Cheek* (Black male with a black 3/4 length goose) and *D.M.* (young Black man in a black hooded sweatshirt and blue jeans). Indeed, Officer Degrave testified that it would not be unusual to see young people in Boston, or any other city or town, wearing hoodies. (TII/34-35).

Moreover, in contrast to *Warren*, *Cheek*, and *D.M.*, cases in which police were looking for Black individuals, here, as the motion judge found, the dispatcher did not broadcast the reported race of the two males over the police radio. (R.531;Add.72). "Unparticularized racial descriptions, devoid of distinctive or individualized physical details . . . cannot by themselves provide police with adequate justification for stopping an individual member of the identified race who happens to be in the general area." *Commonwealth* v. *Grinkley*, 44 Mass. App. Ct. 62, 67 (1997). But here, police did not even have *that*. Here, the description provided by dispatch, "contributed nothing to the officers' ability to distinguish [Mr. Van Rader and J.H.] from any other male wearing a 'hoodie' in Roxbury." *Warren*, 475 Mass. at 535-536

(cleaned up).

2. Mr. Van Rader and J.H. had no bikes and did not even match Officer O'Loughlin's radioed description.

Mr. Van Rader and J.H. did not even match the "generic" description broadcasted over the radio by dispatch, because, when they were seized by the officers, neither teenager was riding, or had with them, a bicycle. See *Warren*, 475 Mass. at 535-536 (lack of corroborating details of victim's description where defendant was one of two men (not three), was not wearing "red hoodie" and was not carrying a backpack). As the motion judge noted, it is of course possible that two fleeing suspects could abandon their bicycles (R.538-539;Add.80), but the officers here had no reason to believe that they did. Given the already "generic" description, the absence of bicycles, a potentially corroborating detail, further diminishes the suggestion that the stop was supported by *individualized* reasonable suspicion.

Moreover, Officer O'Loughlin's reported observations added little, if anything, to the reasonable suspicion calculus. First, the initial description provided by dispatch—which lacked even rudimentary, descriptive information—was

simply too generalized for anyone to deduce that the two males he saw, from an obstructed view 300 feet away (R.532;Add.73), were the same two males involved in the shooting. Second, the clothing description of the males on bikes provided by Officer O'Loughlin over the radio ("black vest" and "black jacket") in fact did *not* match the initial description provided by dispatch ("black hoodies"). (TII/29-31;R.247,283,531;Add.72). Finally, Mr. Van Rader and J.H. did not match *Officer O'Loughlin's* descriptions: they were *not* riding bicycles, and they were both wearing hoodies, *not* a "black vest" and "black jacket." (TII/29-31,R.247,283). Put another way, there was insufficient information that Mr. Van Rader and J.H. were the males observed by Officer O'Loughlin, let alone the males involved in the shooting. Thus, there was no "link" between the teenagers and any bicycles, as the motion judge suggested (R.539;Add.80); Mr. Van Rader and J.H. did not match Officer O'Loughlin's description, which did not match the dispatcher's description.

3. <u>The stop, based on a "general description," occurred within several minutes of, but nearly one mile away from, the reported location of shots fired</u>.

The proximity of the stop to the time and location of the

crime is a relevant factor in the reasonable suspicion analysis. *Warren*, 475 Mass. at 536. Here, although Mr. Van Rader and J.H. were stopped several minutes after the shots fired report, they were stopped nearly one mile away from the location of that report. See *Warren*, 475 Mass. at 534-535; (no reasonable suspicion for stop one mile away from incident); *Cheek*, 413 Mass. at 493 (no reasonable suspicion; one-half mile). Contrast *Barros*, 425 Mass. 582-583.

In *Meneus*, 476 Mass. at 232, at 10:50 pm, a witness, Ms. Santos, reported that a bullet struck her vehicle, and that a group of young Black males had immediately run into the courtyard of a nearby housing complex. While speaking to Ms. Santos, officers observed a group of young Black males, including the defendant, standing on a sidewalk near the housing complex. *Id*. at 233. One of the males "stuck his head outside of the courtyard and stuck his head back inside." *Id*., (cleaned up). The officers approached the men and requested permission to patfrisk them. *Id*. The defendant became argumentative, "moving backwards" away from the group, and when the officers pursued him, he ran away. *Id*. Although the group was located in the courtyard, "literally around the corner" from, and "only minutes" after, the

shooting, the *Meneus* Court determined that officers lacked reasonable suspicion. The seizure, which occurred when "officers advanced toward the defendant as he turned to leave the area" was unconstitutional. *Id*. at 234-235, 241. *Meneus* illustrates that, as here, where officers have only a vague description of the suspects, the import of temporal and special proximity is limited.

The motion judge analogized the instant case to *Barros* (R.537-538;Add.78-79), but that case did *not* involve a vague or "generic" description of the suspects. There, the defendants were found walking away rapidly from the scene of a crime, just one-and-a-half blocks away, glancing over their shoulders. *Barros*, 435 Mass. at 582-583. However, the initial description included information that one of the suspects was wearing a distinctive black jacket with an "X" on the back, which matched, perfectly, the jacket being worn by one of the seized defendants. *Id*. at 583. Unlike the instant case—and *Warren*, *Meneus* and *Cheek*—*Barros* did not involve a generic description; the officers *did* know who they were looking for. Contrast *Warren*, 475 Mass. at 532-533.

Lastly, the motion judge's conclusion that, here, the location of the seizure was "consistent" with the expected

location of the suspects (R.538;Add.79), only holds true if one assumes that they covered that distance on bicycles and the suspects rode in the direction the police assumed; indeed, it would have been impossible for the suspects to travel nearly one mile, within several minutes, by walking. But that assumption, as applied to Mr. Van Rader and J.H., is tenuous, because the officers saw neither teenager with a bicycle prior to the seizure, and had little information about the suspects' path of flight from the scene.

4. The context of the stop—an early Spring evening in a busy area—made it less reasonable to believe that Mr. Van Rader and J.H. were the suspects.

The context of the seizure further diminishes the probative value of the timing and location of the stop. Mr. Van Rader and J.H. were not seized late at night, or in frigid temperatures, or in a desolate area. Rather, the stop occurred at around 7:30 pm on a Spring evening, while the two teenagers were walking on a path in a busy, densely populated section of Boston, amidst train stations and a college.[9] Officer Degrave testified that there were "[a] lot of

[9] Although the motion judge noted that Mr. Van Rader and J.H. were "the only people the police observed matching the descriptions in the area," (R.538;Add.79), the officers had not

people . . . just walking around" in the area that night, which was consistent with a typical Spring evening around the Southwest Corridor Park. (TIII/20-21). Considering Officer Degrave's clear testimony on this point, and Officer Eunis's vague testimony that he simply did not "remember" seeing other pedestrians (TII/57,67-68), and in light of the typical busyness of this area, the judge's finding that "[t]here were not a lot of people out" (R.533;Add.74), was error.

Thus, the instant case, just like *D.M.*, did not present a "situation where, given the time of day, it was unlikely that there would be others around who might match the description." *D.M.*, 100 Mass. at 216 (police looking for suspect at 5:00 pm on a Monday in September in a busy area). By contrast, the seizures in *Cheek*, *Meneus*, and *Warren*, all took place later at night. See *Cheek*, 413 Mass. at 493 (defendant stopped walking on a street, by himself, at 11:20 pm); *Meneus*, 476 Mass. at 232-233 (officers approached group of males in housing complex courtyard after 10:50 pm); and

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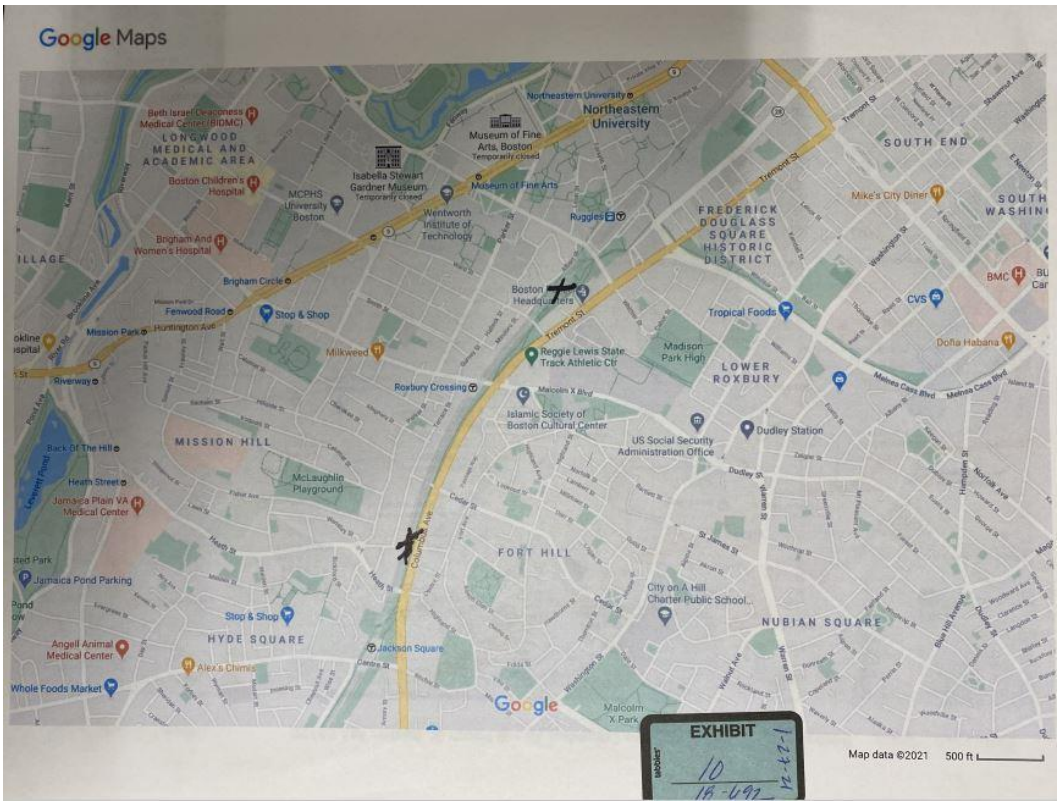
conducted an extensive search of the areas surrounding the location of the shots-fired report. To the contrary, they had just arrived at the Columbus Avenue area from Dorchester, two to three miles away. (TII/44,58).

Warren, 475 Mass. at 532 (9:40 pm). Moreover, in *Evelyn*, 485 Mass. at 694 and *Warren*, 475 Mass. at 532, the time of night and cold temperature resulted in an absence of other pedestrians in the area, in contrast to the instant case.

5. In several minutes, on bicycles, the suspects could have been in any number of different Boston neighborhoods.

The officers had only limited information regarding the direction of the suspects' travel, and thus, where they could be found. Specifically, the dispatcher radioed only that the males "[took] off on Tremont from Prentiss." (R.247,531;Add.72). As revealed in the map submitted as Exhibit 10, from the intersection of Tremont and Prentiss Streets, the officers could only guess where the suspects went: they could have continued on Tremont Street towards Brigham Circle and Brookline; headed right on Malcolm X Boulevard towards Dudley Square and Dorchester; or, turned onto Cedar Street, either right heading into Jamaica Plain or left to Fort Hill.



(R.306). On bicycles, within minutes, the suspects could have been in any number of neighborhoods in the dense city of Boston.

In *Warren*, the directional description of the suspects was similar, if not more detailed: the victim reported that the perpetrators fled toward Howard Street and dispatch suggested that they "could have fled toward Seaver Steet or Walnut Avenue." *Warren*, 475 Mass. at 537. The SJC concluded, based on this information that, "[d]epending on the direction taken, these paths of flight would lead to different Boston neighborhoods, Dorchester or Jamaica Plain, in

different areas of the city." *Id.* See also *Meneus*, 476 Mass. at 233-234 (no reasonable suspicion despite report that group of young men ran into housing complex courtyard).

6. Mr. Van Rader and J.H. were looking over their shoulders, but Officers Degrave and Eunis observed none of the characteristics of an armed individual that they were trained to detect.

There was nothing about Mr. Van Rader and J.H. that reasonably signaled to the officers that they were suspicious or armed with a gun. The two teenagers were not running or jogging; they were just walking through a park on a Spring evening. The officers did not know either of the teenagers. Contrast e.g., *Commonwealth* v. *Sweeting-Bailey*, 488 Mass. 741, 751-753 (2021). And when the unmarked police SUV passed them on Columbus Avenue, turned around, and then trailed them from behind, they did not flee or attempt to flee. Contrast *Depina*, 456 Mass. at 247 (defendant made "obvious effort to avoid encountering the police").

Officers Degrave and Eunis, who were searching for suspects in a shooting incident, had been trained regarding characteristics of individuals who are in possession of a firearm. (T2/86;T3/14,36-37). Yet the officers did not observe Mr. Van Rader or J.H. exhibit any of those indicators of an

"armed gunman"—weighted pocket, bulge in pocket, change in gait or direction, hands or arm held against the body, running while clutching waist, security checks, breaking off from group—prior to the seizure. (TIII/36-37). The dearth of any such evidence is particularly significant because the officers observed the teenagers from multiple angles—from the front, from behind, and, upon approach, from the side—prior to seizing them. The teenagers' behavior here suggested that they were *not* armed.

In *Evelyn*, 485 Mass. at 709-710, officers made "several observations" that indicated that the defendant, who was walking on a sidewalk "might have been carrying a firearm." *Id*. at 705. The defendant "kept his hands pressed against his body" and "proceeded to turn his body away from the officers in a manner that blocked them from seeing an object." *Id*. at 708. Most significantly, the officers, "observed that the defendant was holding in his pocket an object that was consistent with the size of a firearm." *Id*. There were no such observations here. Moreover, *Evelyn*, which the SJC determined was a "close question," involved a stop of the only pedestrian in the area on a cold night, on suspicion in an shooting that left a victim in critical condition. *Id*. at 694-710.

That Mr. Van Rader and J.H. were looking over their shoulders added little, if anything, to the suspicion equation. The officers could only speculate that the teenagers' head movements were related to the shots-fired incident, which took place nearly one mile away. Even assuming *arguendo*, that they were related, the teenagers' behavior did not indicate that they were the perpetrators of the shooting, as opposed to mere passersby, witnesses, or victims. Thus, even if their behavior did "imply nervousness," as the motion judge suggested (R.538;Add.79), it did not necessarily imply *suspiciousness*. See also *Evelyn*, 485 Mass. at 711 (discounting weight of the Black male's nervous and evasive behavior where it may be attributable to avoiding police interaction). In sum, there are simply too many innocent, or unrelated, explanations to infer anything nefarious from the teenagers' head turns.[10]

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[10] Because the seizure occurred when the teenagers stopped, after Officer Degrave told them to "hold up a second," or at the very latest, when Officer Degrave asked J.H. if he had "anything" on him, the officers' subsequent observations, including the claim that J.H., "bladed" (TII/78-79;TIII/45-46;R.533-534;Add.74-75), does not factor into the reasonable suspicion calculus. Should this Court disagree, however, and conclude that the seizure did not occur until J.H. was

It is easy to overvalue police observations—like teenagers looking over their shoulders—in the context of a suppression hearing, where contraband was ultimately found. See *Commonwealth* v. *Karen K.*, 99 Mass. App. Ct. 216, 234 (2021) (Milkey, J., dissenting) (discussing phenomenon of conflating probabilities known as "prosecutor's fallacy"). The reality is that Officers Degrave and Eunis usually guess wrong. Although recovering illegally carried guns is a top

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"patfrisked," it should afford little weight to the claim that J.H. "bladed." Although "blading" sounds intimidating, aggressive, and dangerous, Officer Eunis agreed that blading was "really just turning your body." (TII/78-79). There are myriad reasons why a teenager would turn his body when quickly confronted by two gang unit officers, including to "avoid police contact." See *Warren*, 475 Mass. at 539-540. If nervousness and flight are to be discounted in circumstances such as these, see *Id.*, and *Evelyn*, 485 Mass. at 708-709, conduct that is "really just turning your body," should hold even less weight. Moreover, nothing in J.H.'s appearance prior to the search under his clothing suggested that he was armed. The fact that the officer had to lift up his shirt and his sweatshirt to find a gun indicated that there was no need to "blade" to prevent the officer from seeing anything. Lastly, although characterized as a "patfrisk," Officer Degrave's actions—lifting up J.H.'s hoodie, then his shirt (TII/80-81;TIII/52)—are more aptly characterized as a "search," requiring probable cause. See *Commonwealth* v. *Flemming*, 76 Mass. App. Ct. 632, 637 (2010) (exterior pat-down ordinarily required, as less intrusive alternative, before further investigation of concealed areas is permitted).

priority, and Officer Degrave testified that he conducts about 50 car stops, and five to ten pedestrian stops, per month, he has personally seized just one gun per year. (TIII/56-62). Thus, by his own rough accounting, Officer Degrave recovers a gun in one out of every 660 stops. Dr. Fowler's review of the officers' FIOs revealed a similarly high strikeout rate: only 4% of discretionary stops resulted in the seizure of a gun. (R.367). The observations allegedly made by the officers in this case should be viewed in this context, not through the distorting impact of hindsight.

There is often no viable remedy for the countless stops that violate search and seizure guarantees; rather, the boundaries are shaped in cases, like this one, where contraband was unjustifiably seized. See *United States* v. *Calandra*, 414 U.S. 338, 347 (1974) (exclusionary rule is "calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it"). The evidence here, obtained after a seizure that lacked reasonable suspicion, must be suppressed.

II. **The motion to suppress should have also been allowed on equal protection grounds where Mr. Van Rader's "considerable" statistical showing established an unrebutted inference that the stop here was motivated "at least in part" by race.**

"The equal protection principles of the Fourteenth Amendment and arts. 1 and 10 prohibit discriminatory application of impartial laws." *Commonwealth* v. *Franklin Fruit Co.*, 388 Mass. 228, 229-230 (1983) (cleaned up). See *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886). "[C]entral to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations." *Goodridge* v. *Dep't. of Public Health*, 440 Mass. 309, 329 (2003).

Based on these constitutional guarantees, the SJC, in the motor vehicle context, set forth a revised framework to combat racially motived stops. See *Commonwealth* v. *Long*, 485 Mass. 711 (2020). In addition to allowing for a totality of the circumstances analysis and emphasizing that a "reasonable inference" is not a heavy burden, *Long* relaxed the requirements to prove a "broader class" of persons violated the law and that the failure to stop was consistent or deliberate. *Id*. at 722-726.

As discussed below, the motion judge correctly assumed that *Long*'s burden shifting framework applies to an equal protection challenge in a pedestrian stop case. (R.535;Add.76). The motion judge also appropriately evaluated the strength of the evidence in Mr. Van Rader's statistical case, which he determined was "considerable." (R.534;Add.75). However, the motion judge concluded that because the officers had an art. 14 justification for the stop, the Commonwealth successfully rebutted the equal protection claim. (See R.534;Add.75). This was error—not only because the stop in fact lacked reasonable suspicion, but also because, as the *Long* Court held, a selective enforcement claim may succeed even where the initial stop was authorized under art. 14.

A. The racially motivated stop of a pedestrian offends the constitutional right to equal protection and should be guided by the *Long* framework.

The motion judge, citing *Long*, "assume[d] 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." (R.535;Add.76). There can be no doubt—

and the Commonwealth below did not dispute (TIV/97-98)—that the motion judge's assumption is correct. Police action improperly motivated, even "in part," by race—whether a traffic stop, a license plate query, or, as here, a pedestrian stop—violates equal protection principles, warranting the suppression of evidence derived from those actions. See, e.g., *Long*, *supra*, at 758 (Cypher, J., concurring) ("[m]uch like a decision to selectively perform a traffic stop based on race, the querying of [a vehicle's license] plates based on race is a potential violation of the principles of equal protection" and the remedy "remains suppression of evidence").

Moreover, as the motion judge also, at least implicitly, assumed, the framework laid out by the SJC in *Long* should apply in the pedestrian stop context. (See R.535;Add.76). Although no appellate court in Massachusetts has squarely addressed this issue, there is no good reason that the *Long* framework would be inapplicable to a racially motivated stop of a defendant located outside of a vehicle. Nothing in *Long* expressly limited its application to traffic stops; expectedly, the *Long* Court addressed traffic stops as that was the issue before it. Indeed, *Long* situated the framework under familiar equal protection principles, declining to create a new search

and seizure art. 14 doctrine specifically linked to traffic stops. *Long*, *supra*, at 726-730.

Traffic and pedestrian stops share relevant similarities. Much like traffic stops, street stops have also, historically, disparately targeted Black (and Hispanic) people, see e.g., *Floyd* v. *City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), as the SJC has repeatedly acknowledged, see e.g., *Evelyn*, 485 Mass. at 708 ("this pattern of racial profiling has been confirmed by more recent FIO reports."); *Warren*, 475 Mass. at 539–40 ("[B]lack men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations" and repeated encounters); *Commonwealth* v. *Phillips*, 413 Mass. 50, 53 (1992) (describing informal Boston Police "search on sight" policy which enacted "martial law" for young Black people in Roxbury). Like traffic stops, which can be "humiliating and painful," see *Long*, *supra*, at 717, so too can discriminatory pedestrian stops, which are often effectuated in full view of the public. Finally, a pedestrian stop, like a traffic stop, often constitutes the only interaction between an officer and the target, and therefore "generally provides a minimal amount of direct evidence of the officer's motivations

for the particular stop." *Id*. at 718. This makes *Long*-type statistical evidence, in both stop contexts, compelling.

As the judge assumed, as in the traffic stop context, a defendant who establishes a reasonable inference that a pedestrian stop was racially motivated—either through statistics, a totality of the circumstances, or a combination of both—which the Commonwealth fails to rebut, is entitled to suppression of evidence flowing from that stop.

B. Mr. Van Rader's statistical showing sufficed to establish a reasonable inference that the stop was based, at least in part, on race.

The defendant's burden in the equal protection framework set forth in *Long* is not "heavy" and "conclusive evidence is not needed" to shift the burden to the Commonwealth. *Long*, *supra*, at 723-724. Rather, a defendant must "simply produce evidence upon which a reasonable person could rely to infer that the officer discriminated on the basis of the defendant's race." *Id*.

In her analysis of over eighteen months of FIO reports involving discretionary stops conducted by Officers Eunis and Degrave, Dr. Fowler determined that a Black individual was *over five times more likely* to be targeted for an FIO than

someone who is not Black. (TIV/39;R.334). As in *Long*, Dr. Fowler took a conservative approach in her analysis here, including the use of a benchmark that was almost certainly an overestimate of the actual percentage of Black individuals the officers encountered. See *Long*, *supra*, at 715 (analysis "more than adequate," even under more stringent *Lora* framework).

Buttressing Mr. Van Rader's statistical case were the circumstances of the stop itself. See *Long*, *supra*, at 724-725 (defendant may point to "totality of the circumstances" of a stop). Equipped only with a "generic" description of two suspects by dispatch that did *not* include race, the officers traveled up Columbus Avenue on a Spring evening when there were "a lot of people" in the area, looking for "anyone" or "anything out of the ordinary." (TIII/20-22). Although no other pedestrians "stood out" (TII/57), it was these Black teenagers—wearing hoodies and looking over their shoulders, but not riding bikes or exhibiting characteristics of an armed gunman—who grabbed the officers' attention.

Mr. Van Rader need not have established that Officer Eunis and Degrave were *explicitly* motivated by race; evidence of an *implicit* race-based motivation suffices. *Long*,

supra, at 724, 734 (implicit bias may lead officer to make race-based stop "without conscious awareness of having done so"). This concept is illustrated by a study, introduced as Exhibit 19 at the hearing (R.460-482), in which 105 racially diverse police officers were asked to read a police report relating to an alleged suspect whose race and ethnicity were unidentified. Sandra Graham, et. al., *Priming Unconscious Racial Stereotypes About Adolescent Offenders, Law and Human Behavior*, Vol. 28, No. 5 (October 2004). Before reading the report, the officers were subliminally exposed to words "related to the category *Black* or to words neutral with respect to race." (R.461). The officers in the racial prime condition—exposed to words "related to the category *Black*"—reported more negative trait ratings, greater culpability, and expected recidivism, and endorsed harsher punishment than officers in the neutral conditions. (R.461,466-469). The effect of the racial primes were not moderated by consciously held attitudes about African-Americans, suggesting the biases were unconscious, implicit. (R.461,471-472).

Based on the "considerable statistical evidence that [the officers] had a history of disproportionately stopping people of color" (R.534;Add.75), Mr. Van Rader met his initial burden

under the *Long* framework. He established a reasonable inference that the stop was motivated, "at least in part," by race, thus shifting the burden to the Commonwealth to rebut it.

C. The motion judge erroneously ruled that Mr. Van Rader's equal protection claim failed because there was an art. 14 justification for the stop.

Despite the motion judge's assessment of the statistical case presented in support of Mr. Van Rader's equal protection claim, the motion judge determined that he "need not dwell on this aspect of the case." (R.534;Add.75). Rather, the judge seemingly concluded that because, in his view, the stop was justifiable under art. 14, it was unnecessary to conduct a separate equal protection analysis. ("I need not address the question of a threshold showing [under *Long*] because the officers had a race-neutral motivation for stopping the defendant," R535;Add.76).

However, as was made clear in *Long*, the art. 14 and equal protection inquiries are separate assessments. *Long*, *supra*, at 726-30 (declining to "move" the evaluation of a potentially race-based stop to an art. 14 analysis, in part because an art. 14 analysis could mask racial profiling). In

the traffic stop context, the Commonwealth cannot rebut a claim that a stop was racially motivated simply by pointing to an art. 14 justification. *Id.* at 726 (Commonwealth must "do more than merely point to the validity of the traffic violation that was the asserted reason for the stop"). The same is true in the context of selective prosecution: that the Commonwealth has probable cause, or more, to pursue *criminal charges*, does not shield it from an equal protection challenge. See, e.g., *Commonwealth* v. *Bernardo B.*, 453 Mass. 158 (2009); *Commonwealth* v. *Franklin*, 376 Mass. 885, 894-897 (1978). Similarly, here, the equal protection question was not answered by the motion judge's art. 14 determination that the officers had reasonable suspicion to conduct the stop—that analysis is simply inapposite to rebutting the defendant's prima facie statistical case, apples and oranges.

The motion judge's reasoning is also at odds with *Long*'s holding that a stop need not *solely* have been motivated by race to violate equal protection principles. *Long*, *supra*, at 726 (stop violates equal protection principles even where motivated only "in part" by race). Thus, a stop that is justifiable under art. 14 based on reasonable suspicion but is nevertheless motivated "in part" by race, cannot withstand

equal protection scrutiny.

In its rebuttal case, the Commonwealth must "prove that the stop was not racially motivated" by "grappl[ing] with *all* of the reasonable inferences and *all* of the evidence that a defendant presented." *Id.*, (emphasis added). *Long*'s plain language dictates that the Commonwealth cannot ignore or sidestep a defendant's statistical case.[11] By accepting an art. 14 justification to resolve Mr. Van Rader's equal protection challenge, the motion judge erroneously absolved the Commonwealth of its equal protection rebuttal burden.

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[11] Even prior to *Long*, *Lora*'s framework required the Commonwealth to demonstrate a "race neutral explanation for the statistical disparities or explain a compelling government interest in treating members of one race differently from another." *Commonwealth* v. *Lora*, 451 Mass. 425, 432 (2008) (cleaned up). See also *Franklin*, 376 Mass. at 907 ("[w]hen and if the judge hears credible evidence which raises a reasonable inference of impermissible discrimination, he must require the Commonwealth to come forward with evidence to rebut that inference or suffer dismissal of the underlying indictments.").

D. The Commonwealth failed to adequately rebut the inferences and evidence raised by Mr. Van Rader.

The Commonwealth failed to adequately explain Mr. Van Rader's statistical case, or disprove the inferences that flowed from it. See *Id.* It did no such "grappling."

As in *Long*, the Commonwealth "did not call an expert or present any statistical evidence." *Id.* at 734. It did not argue that Dr. Fowler was unqualified, that her data was insufficient, or that her analysis was flawed. The Commonwealth did not introduce its own statistics to cast doubt on Dr. Fowler's conclusions. Nor did it assert a compelling government interest that would survive strict scrutiny for the uncontradicted racial disparities resulting from the officers' policing decisions. In short, the Commonwealth raised no meaningful challenge to the data or Dr. Fowler's analysis. See *Id.* (Commonwealth's claim that defendant's statistical analysis was unreliable and that "Black drivers were overrepresented in the statistical data because Black individuals commit more crimes," was "clearly" an insufficient rebuttal).

If anything, the officers' testimony here underscored the discretionary nature of their stop decisions, and therefore, the opportunity for implicit bias to take hold. Officer Degrave explained that FIOs may involve subjective determinations regarding whether an individual is "of unlawful design" and that whether someone had "been in certain areas for certain things," may lead him to write an FIO. (TIII/14-15;50-51). See (R.483-497), Katherine B. Spencer, et. al., *Implicit Bias and Policing*, *Soc. & Personality Psych. Compass*, Vol. 10, Issue 1, 50-63 (Jan. 2016) at 59 ("ambiguity leads to an increased reliance on cognitive heuristics like stereotypes to fill in missing information," cleaned up).

The Commonwealth's burden on rebuttal as described in *Long* is not merely a burden of production, it is a burden of *proof*. "If the Commonwealth does not rebut the reasonable inference that the stop was motivated *at least in part by race*, the defendant would have established that the stop violated the equal protection principles of arts. 1 and 10, and therefore was illegal, and any evidence derived from the stop would have to be suppressed." *Long*, *supra*, at 726 (emphasis added). It is unquestionably inconvenient for the Commonwealth to be tasked with the rebuttal burden

imposed by *Long*, but "the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Williams* v. *Illinois*, 39 U.S. 235, 245 (1970), quoted in *Long*, supra, at 716.

CONCLUSION

This Court should reverse the denial of Mr. Van Rader's motion to suppress because he was seized without reasonable suspicion and the stop violated his equal protection rights.

Respectfully submitted,

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
Criminal No. 18-692

COMMONWEALTH

vs.

MICHAEL ROBINSON-VAN RADER

FINDINGS AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

Defendant Michael Robinson-Van Rader is charged with unlawful possession of a firearm and discharging a firearm within 500 feet of a building. The charges arise out of an incident at a basketball court near Annunciation Road in Boston, a short distance behind Boston Police Headquarters on Tremont Street. Within minutes of the report of shots fired, defendant and a juvenile were stopped while walking a little more than a half mile away. Defendant moves to suppress the fruits of the stop. After an evidentiary hearing over three days,[1] and based on the following findings, the motion is denied.

FINDINGS OF FACT

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 report of shots fired at a basketball court near Annunciation Road in Boston in the area behind Boston Police Headquarters. The Boston Police ShotSpotter system also detected the gunshots. The police response was swift and coordinated.

[1] At the hearing, the Commonwealth called Boston Police Officers James O'Loughlin, Jr., Gregory Eunis, and Reivilo Degrave. Defendant called a statistic expert, Mary S. Fowler, PhD.

Within a minute or so of the report of shots fired, the police received two 911 calls about the incident. 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." 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).[2] 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.

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

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. New Heath Street runs perpendicular to Columbus Avenue, but comes to a dead end before the

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[2] About a block south of Prentiss Street, Tremont Street veers to the right and Columbus Avenue continues straight ahead. The testimony fairly described Tremont Street as turning into Columbus Avenue.

fences, retaining wall, and railroad tracks, which define and run through the Southwest Corridor, which also runs perpendicular to New Heath Street. On the other side of the Southwest Corridor from New Heath Street, is the Southwest Corridor Park,[3] and then Columbus Avenue.

Off. O'Loughlin was monitoring his police radio and heard the report of shots fired in the area behind Boston Police Headquarters. He heard a description over the radio of two males on bicycles wearing black shirts or sweatshirts. 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. His view of the bike path was partially obstructed by trees, fencing and signage. 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. They appeared to Off. O'Loughlin to be pedaling slowly, as if they were tired. Off. O'Loughlin told the dispatcher about his observations.

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 1½ to 2 miles away from Off. O'Loughlin. Off. Franklin was driving an unmarked Ford Explorer in the vicinity of Blue Hill Avenue and Columbia Road. Off. Eunis was in the front passenger seat. Off. Degrave was in the rear on the passenger side. All three officers were in plain clothes, but were wearing tactical vests emblazoned with "Boston Police" on the front and back.

Off. Franklin immediately drove quickly in the direction of the shooting and the officers he was with spoke to Off. O'Loughlin. Off. O'Loughlin described to them that he had seen two

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[3] 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.

Black males on bikes in black hooded sweatshirts heading south toward Heath Street. After hearing Off. O'Loughlin's description, Off. Franklin drove north along Columbus Avenue from Heath Street in the direction of the shooting.[4] Off. Eunis and the other officers observed two Black males in black hoodies walking south. The officers saw the two men repeatedly look back "over their shoulders" toward Boston Police Headquarters, although no one was following them. There were not a lot of people out that evening. The two men were the only two people with hoodies that the police observed in the area. The two men did not have bikes with them.[5]

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 corner of Columbus Avenue and Heath Street. Off. Eunis and Off. Degrave exited their vehicle and approached the two males, who turned out to be a juvenile, J.H., and defendant. The police officers did not recognize either of the two males, but noticed that they appeared to be teenagers. The two males did not change their gait as the officers approached. Off. Degrave asked the two men to "hold up a second" and the two men stopped walking. The officers did not see any weighted pockets in, or any suspicious bulges or protrusions from, either man's clothing.

Off. Degrave engaged J.H., while Off. Eunis approached defendant. When Off. Degrave asked J.H. if he had anything on him, J.H. turned sideways, blading his stance, as if to conceal

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[4] 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.

[5] 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.

something at his side. Off. Degrave then did a pat frisk of J.H. and located a firearm. As Off. Degrave was talking to J.H., Off. Eunis engaged defendant. Off. Eunis observed defendant to be sweating and still looking over his shoulder toward Boston Police Headquarters. Defendant kept his right hand in his hoodie pocket. Defendant did not make any sudden movements or blade his body. 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. Off. Eunis then conducted a pat frisk of defendant and located a firearm in his pants pocket. 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.

DISCUSSION

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[6] 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. 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.

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[6] 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.

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.[7] 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

[7] 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.

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 "naiveté, 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 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. 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. The dispatcher also reported that the two men were traveling south on Tremont Street toward Columbus Avenue and Heath Street. Soon after, Off. O'Loughlin observed two Black males in black hoodies traveling south on bicycles on Columbus Avenue toward Health Street. 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. 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. 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. 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. See Barros, 425 Mass. at 584. They

did not have bikes with them at the time, 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. 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. This movement was consistent with an effort to conceal a weapon. 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.

ORDER

Defendant's Motion to Suppress Evidence (Docket #22), as supplemented, is **DENIED**.

Dated: June 24, 2021

Peter B. Krupp
Justice of the Superior Court

UNITED STATES CONSTITUTION

FOURTH AMENDMENT

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

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS DECLARATION OF RIGHTS

ARTICLE 1

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

ARTICLE 10

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the

people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

ARTICLE 14

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

Part IV CRIMES, PUNISHMENTS AND PROCEEDINGSIN CRIMINAL CASES

Title I CRIMES AND PUNISHMENTS

Chapter 269 CRIMES AGAINST PUBLIC PEACE

Section 10 CARRYING DANGEROUS WEAPONS; POSSESSION OF MACHINE GUN OR SAWED-OFF SHOTGUNS; POSSESSION OF LARGE CAPACITY WEAPON OR LARGE CAPACITY FEEDING DEVICE; PUNISHMENT

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

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

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

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

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

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or

shotgun, loaded or unloaded, without either:

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

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

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

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

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

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

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

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

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

(b) Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, any stiletto, dagger or a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism, dirk knife, any knife having a double-edged blade, or a switch knife, or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches, or a slung shot, blowgun, blackjack, metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles, nunchaku, zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather, a shuriken or any similar pointed starlike object intended to injure a person when thrown, or any armband, made with leather

which has metallic spikes, points or studs or any similar device made from any other substance or a cestus or similar material weighted with metal or other substance and worn on the hand, or a manrikigusari or similar length of chain having weighted ends; or whoever, when arrested upon a warrant for an alleged crime, or when arrested while committing a breach or disturbance of the public peace, is armed with or has on his person, or has on his person or under his control in a vehicle, a billy or other dangerous weapon other than those herein mentioned and those mentioned in paragraph (a), shall be punished by imprisonment for not less than two and one-half years nor more than five years in the state prison, or for not less than six months nor more than two and one-half years in a jail or house of correction, except that, if the court finds that the defendant has not been previously convicted of a felony, he may be punished by a fine of not more than fifty dollars or by imprisonment for not more than two and one-half years in a jail or house of correction.

(c) Whoever, except as provided by law, possesses a machine gun, as defined in section one hundred and twenty-one of chapter one hundred and forty, without permission under section one hundred and thirty-one of said chapter one hundred and forty; or whoever owns, possesses or carries on his person, or carries on his person or under his control in a vehicle, a sawed-off shotgun, as defined in said section one hundred and twenty-one of said chapter one hundred and forty, shall be punished by imprisonment in the state prison for life, or for any term of years provided that any sentence imposed under the provisions of this paragraph shall be subject to the minimum requirements of paragraph (a).

(d) Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b) or (c) commits a like offense or any other of the said offenses, shall be punished by imprisonment in the state prison for not less than five years nor more than seven years; for a third such offense, by

imprisonment in the state prison for not less than seven years nor more than ten years; and for a fourth such offense, by imprisonment in the state prison for not less than ten years nor more than fifteen years. The sentence imposed upon a person, who after a conviction of an offense under paragraph (a), (b) or (c) commits the same or a like offense, shall not be suspended, nor shall any person so sentenced be eligible for probation or receive any deduction from his sentence for good conduct.

(e) Upon conviction of a violation of this section, the firearm or other article shall, unless otherwise ordered by the court, be confiscated by the commonwealth. The firearm or article so confiscated shall, by the authority of the written order of the court be forwarded by common carrier to the colonel of the state police, who, upon receipt of the same, shall notify said court or justice thereof. Said colonel may sell or destroy the same, except that any firearm which may not be lawfully sold in the commonwealth shall be destroyed, and in the case of a sale, after paying the cost of forwarding the article, shall pay over the net proceeds to the commonwealth.

(f) The court shall, if the firearm or other article was lost by or stolen from the person lawfully in possession of it, order its return to such person.

(g) Whoever, within this commonwealth, produces for sale, delivers or causes to be delivered, orders for delivery, sells or offers for sale, or fails to keep records regarding, any rifle or shotgun without complying with the requirement of a serial number, as provided in section one hundred and twenty-nine B of chapter one hundred and forty, shall for the first offense be punished by confinement in a jail or house of correction for not more than two and one-half years, or by a fine of not more than five hundred dollars.

(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.

(i) Whoever knowingly fails to deliver or surrender a revoked or suspended license to carry or possess firearms or machine guns issued under the provisions of section one hundred and thirty-one or one hundred and thirty-one F of chapter one hundred and forty, or firearm identification card, or receipt for the fee for such card, or a firearm, rifle, shotgun or machine gun, as provided in section one hundred and twenty-nine D of chapter one hundred and forty, unless an appeal is pending, shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars.

(j) For the purposes of this paragraph, "firearm" shall mean any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged.

Whoever, not being a law enforcement officer and notwithstanding any license obtained by the person pursuant to chapter 140, carries on the person a firearm, loaded or unloaded, or other dangerous weapon in any building or

on the grounds of any elementary or secondary school, college or university without the written authorization of the board or officer in charge of the elementary or secondary school, college or university shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 2 years or both. A law enforcement officer may arrest without a warrant and detain a person found carrying a firearm in violation of this paragraph.

Any officer in charge of an elementary or secondary school, college or university or any faculty member or administrative officer of an elementary or secondary school, college or university that fails to report a violation of this paragraph shall be guilty of a misdemeanor and punished by a fine of not more than $500.

[There is no paragraph (k).]

(l) The provisions of this section shall be fully applicable to any person proceeded against under section seventy-five of chapter one hundred and nineteen and convicted under section eighty-three of chapter one hundred and nineteen, provided, however, that nothing contained in this section shall impair, impede, or affect the power granted any court by chapter one hundred and nineteen to adjudicate a person a delinquent child, including the power so granted under section eighty-three of said chapter one hundred and nineteen.

[First paragraph of paragraph (m) effective until January 1, 2021. For text effective January 1, 2021, see below.]

(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid Class A or Class B license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and

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

[First paragraph of paragraph (m) as amended by 2014, 284, Sec. 91 effective January 1, 2021. See 2014, 284, Sec. 112. For text effective until January 1, 2021, see above.]

(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or

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

The provisions of this paragraph shall not apply to the possession of a large capacity weapon or large capacity feeding device by (i) any officer, agent or employee of the commonwealth or any other state or the United States, including any federal, state or local law enforcement personnel; (ii) any member of the military or other service of any state or the United States; (iii) any duly authorized law enforcement officer, agent or employee of any

municipality of the commonwealth; (iv) any federal, state or local historical society, museum or institutional collection open to the public; provided, however, that any such person described in clauses (i) to (iii), inclusive, is authorized by a competent authority to acquire, possess or carry a large capacity semiautomatic weapon and is acting within the scope of his duties; or (v) any gunsmith duly licensed under the applicable federal law.

(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).

(o) For purposes of this section, "loaded" shall mean that ammunition is contained in the weapon or within a feeding device attached thereto.

For purposes of this section, "ammunition" shall mean cartridges or cartridge cases, primers (igniter), bullets or propellant powder designed for use in any firearm, rifle or shotgun.

Part IV CRIMES, PUNISHMENTS AND PROCEEDINGSIN CRIMINAL CASES

Title I CRIMES AND PUNISHMENTS

Chapter 269 CRIMES AGAINST PUBLIC PEACE

Section 12E DISCHARGE OF A FIREARM WITHIN 500 FEET OF A DWELLING OR OTHER BUILDING IN USE; EXCEPTIONS

Section 12E. 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.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(13); Mass. R. A. P. 16(e); Mass. R. A. P. 18; Mass. R. A. P. 20; and Mass. R. A. P. 21, and does not exceed 11,000 words. The brief is printed in Century Schoolbook font consisting of 10,944 non-excluded words as tallied by the word count function of Microsoft Word.

April 19, 2022
Date

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CERTIFICATE OF SERVICE

I, John P. Warren, do certify that I served the enclosed Brief of the Appellant electronically upon the Commonwealth through the efiling system, to:

Cailin Campbell
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on this 19th day of April 2022.

/s/ John P. Warren
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