COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11956

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

v.

JIMMY WARREN,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
BOSTON MUNICIPAL COURT, CENTRAL DIVISION

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS IN SUPPORT OF APPELLANT'S OPPOSITION TO APPELLEE'S PETITION FOR REHEARING

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November 23, 2016

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The American Civil Liberties Union of Massachusetts ("ACLUM") respectfully submits this brief pursuant to its motion under Massachusetts Rule of Appellate Procedure 17 for leave to file a brief as amicus curiae, filed herewith. ACLUM's Statement of Interest is recited in its Rule 17 motion.

INTRODUCTION

On September 20, 2016, this Court unanimously held that it is not automatically suspicious for a Black man in Boston to flee a voluntary encounter with police officers, and it instructed that, in appropriate cases, courts should consider data about racially disparate policing when determining whether flight contributes meaningfully to the reasonable suspicion analysis. Commonwealth v. Warren, 475 Mass. 530 (2016). In support of that holding, the Court cited a police-commissioned study concluding that Black individuals and communities in Boston have been disparately policed (the "FIO Report");[1] a Boston Police Department ("BPD") statement on the study's preliminary findings (the "BPD Statement");[2] and an

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[1] Fagan, et al., Final Report: An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports (2015), available at raceandpolicing.issuelab.org/resources/25203/25203.pdf.

[2] Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results,

ACLUM summary of those findings (the "ACLUM Summary")[3] (collectively, the "FIO Materials").

The Commonwealth's rehearing petition ("Pet.") now asks the Court to excise these citations, and strike its analysis of the possibility that a Black person might flee from the police due to fears of mistreatment. The Commonwealth suggests that the Court would do better to follow the Biblical verse that "the wicked flee." Pet. 9. But ignoring the lived experiences of Bostonians in favor of proverbs would promote neither accuracy nor justice.

Nor has the Commonwealth identified any issue of law or fact that warrants rehearing. See Mass. R. App. P. 27. Consistent with its precedent, the Court assessed the probative value of flight in the circumstances of this case; consistent with its prior practice, the Court cited publicly available research about human behavior to inform its legal analysis; and, consistent with the data presented in the FIO Materials, the Court cautioned judges to take special care before ruling that flight from the police is automatically probative of reasonable suspicion.

Oct. 8, 2014, available at bpdnews.com/news/2014/10/8/ boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results.

[3] American Civil Liberties Union of Massachusetts, Stop and Frisk Report Summary (Oct. 2014), available at aclum.org/sites/all/files/images/education/stopand frisk/stop_and_frisk_summary.pdf.

Because it was well within this Court's authority to reference a publicly available study in elaborating its conclusion that someone might have "a reason for flight [from the police] totally unrelated to consciousness of guilt," Warren, 475 Mass. at 540, the petition should be denied.

ARGUMENT

I. THE COURT'S HOLDING FOLLOWS FROM ESTABLISHED DOCTRINE.

The Court held that Warren's flight from police did not establish a reasonable suspicion that he had been involved in a crime. This holding is correct, and the Commonwealth is wrong to accuse the Court of creating a new "race-based constitutional rule." Pet. 6. Faced with a study providing ample reason for concern that Black men might flee from police due to fears of disparate treatment, and no evidence that Black men flee only when guilty of crimes, the Court declined to deem flight automatically suspicious. Warren, 475 Mass. at 538, 540.

A. The Court correctly considered the circumstances of this case in determining that the police lacked reasonable suspicion.

In appropriate circumstances, flight can be relevant to reasonable suspicion, but its probative value depends on the context. See, e.g., Commonwealth v. Sykes, 449 Mass. 308, 314-315 (2007); Commonwealth v. Thibeau, 384 Mass. 762, 764-765 (1981). Warren is

consistent with this precedent. Considering Warren's flight together with the other asserted bases for reasonable suspicion -- including that Warren was a mile from the scene of a breaking and entering -- the Court concluded that the police lacked individualized suspicion that he had committed a crime. Warren, 475 Mass. at 535-540.

As part of its analysis, the Court cited the FIO Report, which concluded that Black men and Black communities had been disparately targeted by Boston police from 2007 to 2010. Warren, 475 Mass. at 539-540.[4] The Court held that the report's findings provided reason to treat evidence of flight with particular caution and to consider, "in appropriate cases," that individuals may flee for reasons other than a guilty conscience. Id. The Court's conclusion that the police lacked reasonable suspicion was appropriately bolstered by its recognition that Black men in Boston may have reasons to flee police that are unrelated to criminal activity. Id. at 540.

[4] The Commonwealth claims to have been surprised by the Court's reference to the FIO Materials. Pet. 5-6 & n.5. But the FIO Materials were cited by Justice Agnes in his Appeals Court dissent, Commonwealth v. Warren, 87 Mass. App. Ct. 476, 495 n.18 (2015) (Agnes, J., dissenting), and in the defendant's Petition for Further Appellate Review (at 13-14).

B. The Court properly cited data on racially disparate policing in analyzing the probative value of flight.

The Court's use of publicly available research was hardly unusual. This Court has often cited academic works about human behavior to inform its legal analysis. See, e.g., Commonwealth v. Collins, 470 Mass. 255, 262-263 (2014) (citing report bearing on eyewitness behavior); Commonwealth v. Gentile, 466 Mass. 817, 827 (2014) (citing academic articles bearing on police officers' evaluation of "their [own] ability to ascertain whether someone is lying").

The Commonwealth does not suggest otherwise. Instead, it asserts that this Court's references to the FIO Materials constituted improper appellate fact-finding about what happened in this specific case. Pet. 4. The Commonwealth misunderstands the Court's purpose for citing the FIO Materials.

The Court did not cite the FIO Materials as evidence that the police targeted Warren because of his race. If it had, the Court's thorough reasonable suspicion analysis might have been entirely unnecessary, as unlawful racial targeting could have supplied an independent ground to grant the motion to suppress. Commonwealth v. Lora, 451 Mass. 425, 440 (2008) (holding statistical evidence of disparate treatment can make out a prima facie case for excluding evidence on equal protection grounds). Nor

did the Court cite the FIO Materials as evidence that Warren had in fact fled due to fears about racial profiling. The Court relied only on the trial court's findings of fact to determine what had occurred in this case. Warren, 475 Mass. at 531. It cited the FIO Materials to aid its legal analysis of whether flight contributed meaningfully to reasonable suspicion. Id. at 539-540.

C. The Court accurately interpreted the FIO Materials.

The Court accurately interpreted the FIO Report, which was based on data concerning police-civilian encounters in Boston from 2007 to 2010 and revealed racial disparities that could not be explained by "non-race" factors like crime and gang membership. FIO Report at 3-4. The FIO Report found that most FIO subjects were male and that Blacks and Hispanics were subject to FIOs at rates disproportionate to their share of Boston's population. Id. at 5. Even after controlling for non-race factors, the FIO Report's analysis "revealed racially disparate treatment of minority persons." Id. at 20.

The FIO Report measured disparate treatment in three ways. First, Black and Hispanic people were more likely than otherwise identical white people to "experience repeated FIO encounters." Id. at 20. Second, Black and Hispanic people were more likely than otherwise identical white people to be frisked or

searched during an FIO. Id. at 13, 20. Third, Black and Hispanic neighborhoods could expect more FIOs than white neighborhoods with identical crime levels and gang activity. Id. at i, 8-10, 20. A census tract "with 85% Black residents," for example, "would experience approximately 53 additional FIO reports per month compared to an 'average' Boston neighborhood" with the same amount of crime. Id. at i, 9-10.

The FIO Report therefore supports this Court's conclusion that, in the years just prior to the events of this case, "black men in the city of Boston were more likely to be targeted" for police action. Warren, 475 Mass. at 539. Mirroring this Court's conclusion that such treatment could influence the actions of Black men in Boston, the FIO Report acknowledges "popular, legal, political and social science concerns about disparate treatment" and "wide divides in trust of the police between minority and white citizens." FIO Report 1.

II. THE COMMONWEALTH'S ATTACKS ON THE COURT'S OPINION ARE INACCURATE.

The Commonwealth's various arguments in support of rehearing ask the Court to ignore empirical research in favor of an unsupported assumption that people do not flee police to avoid racially disparate treatment. See, e.g., Pet. 2. These arguments are without merit. While people of color in Massachusetts and elsewhere are advocating for recognition that

their lives matter, the Commonwealth would have this Court blind itself to their experiences. It should not do so.

A. The Commonwealth cites no evidence that fear of racially-disparate policing is irrelevant.

In stark contrast to the Court's citation to empirical data, the Commonwealth offers no evidence to support its apparent view that Black men evade the police only when they are guilty of crimes. It cites no evidence, for example, that discriminatory policing never occurs, or that people never reasonably fear it. The Commonwealth relies instead on its own "inferences about human behavior," as well as an old line of cases citing the Bible's admonition that "[t]he wicked flee, even when no man pursueth." Pet. 8-9 (citing, e.g., Commonwealth v. Derby, 263 Mass. 39, 43 (1928)).

But the Court is not obliged to take on faith that all human behavior accords with this verse. Indeed, this Court has already rejected the view that people flee only when they are guilty, see Commonwealth v. Toney, 385 Mass. 575, 584-585 (1982), and has acknowledged that flight sometimes has minimal probative value, see Thibeau, 384 Mass. at 764. The Commonwealth fails to provide any reason to reconsider this precedent or the Court's cautionary instruction about the potential effect of racially disparate policing on police-civilian interactions.

B. The Commonwealth's accusation of judicial bias is unsupported.

The Commonwealth accuses the Court of "biased" interpretation of data -- a claim that is wholly unsupported. Pet. 3.

First, the Commonwealth argues that the Court has misinterpreted the data from the FIO study and has been led astray by an "ACLU gloss." Pet. 4-5, 7-8. For instance, the Commonwealth observes that the terms "prejudice" or "profiling," which appear in this Court's opinion, do not appear in the FIO Report. Pet. 4-5 n.3, 7. That is true. The FIO Report uses the terms "racially disparate treatment" and "racial discrimination." FIO Report ii, 20-21 (emphases added).[5] Moreover, as demonstrated above, all of the Court's statements are directly supported by the FIO Report.[6] See supra Part I.C. Indeed, it is the Commonwealth that fails to mention -- anywhere in its petition -- the FIO Report's actual findings on race.

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[5] This Court has used the term "profiling" to mean disparate treatment generally, as opposed to racial animus by individual officers. See Lora, 451 Mass. at 436; St. 2000, c. 228, § 1. It was appropriate for this Court to use the term "racial profiling" to refer to the racially disparate treatment found by the FIO Report. Compare Pet. 4-5 n.3, 7, with Warren, 475 Mass. at 539.

[6] The Commonwealth argues that the Court ignored the FIO Report in favor of the BPD statement and ACLUM's summary. This is plainly wrong, as the Court did cite the FIO Report. Warren, 475 Mass. at 539 n.15.

Second, the Commonwealth contends the Court ignored "training initiatives undertaken . . . to address concerns raised by the data." Pet. 7. These initiatives are an important acknowledgment that the FIO Report identified a critical need for change. But none of these measures preceded the December 2011 stop in this case. Nor have they been shown to reduce the disparate targeting of Black people in Boston.[7]

Third, the Commonwealth urges the Court to ignore the role of race in policing. But this Court's consideration of the lived experiences of people of color is a virtue, not a defect, of its reasoning. In the face of a national call for police reform, it is impossible to ignore that the behavior of many Americans might be impacted by a fear of racially discriminatory policing. This Court was right to take that reality into account and should not take up the Commonwealth's invitation to reconsider its position.

CONCLUSION

Because the Commonwealth's petition asks this Court to ignore the real life experiences of people encountered by the police, it should be denied.

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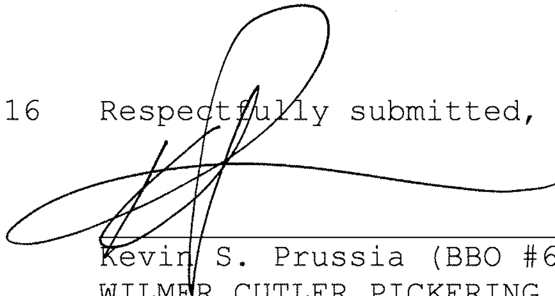
[7] See Marcelo, Boston Police Defend Steps on Stop and Frisk, NEW BOSTON POST (March 7, 2016), available at newbostonpost.com/2016/03/07/boston-police-defend-steps-on-stop-and-frisk/ ("[T]he rate at which blacks were subject of [FIOs] between 2011 and 2015 held fairly steady at nearly 60 percent annually").

November 23, 2016 Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kevin S. Prussia, hereby certify, under the penalties of perjury that on November 23, 2016, I caused true and accurate copies of the foregoing to be filed in the office of the clerk of the Supreme Judicial Court and served two copies upon the following counsel by electronic and overnight mail:

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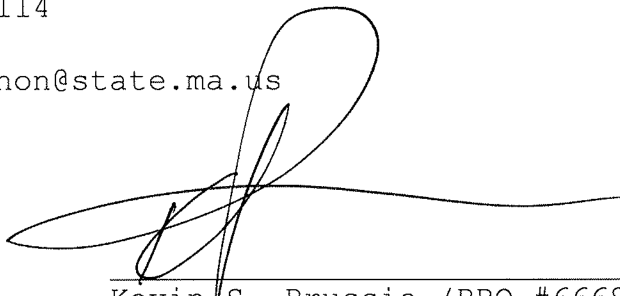

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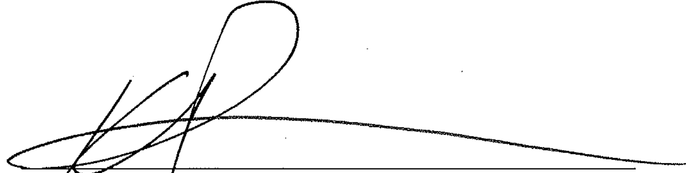
MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs.



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