The Commonwealth of Massachusetts

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October 14, 2016

The Honorable Ralph D. Gants
Chief Justice of the Supreme Judicial Court
John Adams Courthouse, Suite 2500
One Pemberton Square
Boston, Massachusetts 02108

Re: *Commonwealth v. Jimmy Warren*
No. SJC-11956, 475 Mass. 530 (2016).

Dear Chief Justice Gants:

The Commonwealth respectfully petitions this Honorable Court pursuant to Mass. R. App. P. 27 for rehearing of this case. This Court's decision, rendered on further appellate review, cited and relied upon the opinion of a dissenting Appeals Court justice that improperly interjected, and accepted as fact, materials that were never offered in evidence by either party in the trial court, alluded to in the parties' briefs or arguments, or subjected to adversary scrutiny. In particular, these materials included (1) a press release by the Boston Police Department about a report on Field Interrogations Observations during the period 2007-2010, and (2) a summary of the report by the American Civil Liberties Union.

In reliance on these sources and the facts allegedly established therein, this Court declared:

> "Such an individual [a black male in the City of Boston], when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings [that the Court characterized as black men being disproportionately "targeted" by police for stops, frisks, observation, and interrogations] in weighing flight as a factor in the reasonable suspicion calculus.

Commonwealth v. Warren, 475 Mass. 530, 539-40 (2016).

Articulating a general rule about how Judges should apply article 14 from such improperly noticed sources is both improper and unwise. Moreover, doing so on the actual facts found in this case is particularly inappropriate. This defendant fled from two different police officers at two different times and places, each of whom merely asked to speak with the defendant without a show of authority. The defendant fled because he was armed with a firearm, of which the jury convicted him. There is no evidence to support the notion that the defendant fled because he had been the subject of any prior encounters with the police, or because his dignity was affronted.

At minimum, this Court should reconsider its opinion, strike its citation to and reliance on the Boston Police Department press release and summary of the report by the American Civil Liberties Union, and delete the special article 14 constitutional rule regarding the possible

causes of flight from police by black males in Boston as a factor in the reasonable suspicion calculus. See 475 Mass. at 539-540 & n. 13.

The court's decision has caused understandable concern and discord in the Commonwealth, as it discourages peaceful interactions between the police and citizens, impairs community policing in all neighborhoods, suggests acceptance by the court of racially biased policing, and creates disparate constitutional rules depending on a judge's after-the-fact determination of the race of the person with whom the police interacted, all based on a selective and biased interpretation of data.[1]

The Commonwealth respectfully requests a rehearing in the above-captioned case for these reasons, and for all of the following reasons set forth below.

First, the Boston Police and American Civil Liberties Union (ACLU) summaries cited by the Court were not offered

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[1] Indeed, the court's opinion fails to note that the Boston Police Department Press release observes: "The study showed that the amount of crime in a neighborhood is the most powerful predictor of the number of FIO's done in a neighborhood." See: https://perma.cc/H9RJ-RHNB. As well,"Gang Membership and prior arrest history are very strong predictors of repeated FIO's." See: https://perma.cc/H9RJ-RHNB.One of the criteria of gang identification in the FIO's is criminal conduct, and those who either had a prior history of crime or were identified as gang members accounted for 40% of the FIO's. In short, FIO's correlate to crime and criminality. In addition, a very significant number of FIO's were non-contact, that is they were just observational reports of data, with no contact between the police and the person observed.

in evidence at any time, indeed were likely not admissible evidence at all.[2] The Court's reliance on the report, the summaries, or the press releases, first interjected in the case in the dissenting opinion of an Appeals Court justice, is improper both as a matter of appellate procedure and the rules of evidence. "[I]n no event is it proper for an appellate court to engage in what amounts to independent fact finding in order to reach a conclusion of law that is contrary to that of a motion judge who has seen and heard the witnesses, and made determinations regarding the weight and credibility of their testimony." *Commonwealth v. Jones-Pannell,* 472 Mass. 429, 438 (2015).

Even if the report were admissible with one of the authors to lay a foundation, the interpretation of the data would be vastly different from the ACLU gloss relied on by the Court.[3] *See generally,* Mass. Guide to Evidence § 201

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[2] Compounding the error, the Court does not appear to have utilized the analysis in the actual report written by criminologists, but cites to summaries, written by the Boston Police and ACLU, released in 2014. The actual report was released in its entirety in 2015. Likewise, the report may not be admissible as evidence for reasons discussed herein, and due to lack of probative value.

[3] Based on discussions with an author, the Commonwealth expects that at an evidentiary hearing, some or all of the following would be testified to: The ACLU summary, cited by the Court, draws conclusions that are not appropriate given the data available in the FIO Study; the Court draws inappropriate conclusions that were not reached in the FIO Study; the FIO Study finds disparate minority contact but not racial profiling, and not enough data is available to accurately determine why this disparate contact occurs; the FIO Study does not draw the conclusions of the Court and ACLU that disparate contact is based on bias or prejudice;

(2016 edition). The report is not the type of evidence of which judicial notice may be taken, but even if it were, the parties are entitled to notice and the opportunity to be heard before any such evidence is taken. Mass. Guide to Evidence, § 201.[4] "A judge shall consider only the evidence presented and any adjudicative facts that may be properly judicially noticed, and shall not undertake any independent investigation of the facts in a matter." Supreme Judicial Court Rule 3:09; Rule 2.9 (C).[5] "A judge's reliance on

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the word prejudice does not appear in the body of the FIO study; while the Court notes that the Boston Police Summary of the FIO Study finds "a pattern of racial profiling of black males", the FIO Study does not reach this conclusion; the strongest predictors of being the subject of an FIO by the Boston Police are prior criminal history and gang affiliation (which requires criminality); the FIO Study shows clear evidence that FIOs are part of a crime control strategy employed by the Boston Police Department[Query—regardless of race]; the FIO Study controls for patterns of crime, but does not control for microcontext crime or immediate or short term responses to incidents; a significant number of FIO's were non-contact observations; and, an updated study of data through 2015 shows a large decline in the number of FIO's in recent years, such that the average number of FIO's during 2006-2010 was 49,457, while the average from 2013-2015 was 29,692, with only 21,243 FIO's in 2015.

[4] The report does not fall into any recognizable category of knowledge about which judicial notice would be proper. See *Commonwealth v. Green*, 408 Mass. 48, 50 n.2 (1990) (recognizing that judicial notice may be proper for matters of common knowledge or that are the "subject of generalized knowledge readily ascertainable from authoritative sources"). A Judge "could not act upon his private knowledge of particular facts which are not a matter of common knowledge or observation." *Ferriter v. Borthwick*, 346 Mass. 391, 393 (1963).

[5] Even should this Court choose to engage in fact-finding by taking judicial notice in this case, the Commonwealth is

information that is not part of the record implicates fundamental fairness concerns." Commonwealth v. O'Brien, 423 Mass. 841, 848 (1996). Ultimately, reliance on the ACLU's gloss on the report or on the report is inappropriate as a matter of evidentiary law, appellate process, and simple fairness.

Second, there is no factual basis in this case to adopt and apply a race-based constitutional rule that a Judge should consider whether the defendant fled to avoid the indignity of repeated police stops. *See Commonwealth v. Thomas*, 429 Mass. 403 (1999) (no seizure where officer asked questions during FIO); *Commonwealth v. Thinh Van Cao*, 419 Mass. 383, 387-388, cert. denied, 515 U.S. 1146 (1995) (no seizure by FIO where officer approached defendant in public, asked several questions, and did not indicate that defendant was not free to terminate encounter). There was no evidence that the defendant ever had been approached by the police previously, let alone that he was previously subject to any interview or conversation. Not only was there no evidence that the defendant had prior interactions

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still entitled to a hearing in order to challenge the propriety of taking notice, the nature of the facts of which notice will be taken, and to present countervailing evidence or interpretations of the data. The right to notice and an opportunity to be heard is a matter of simple fairness and due process; the government is entitled to a fair trial in this Commonwealth and a fair hearing in the Supreme Judicial Court. *Commonwealth v. Scesny*, 472 Mass. 185, 200-01 (2015); *Commonwealth v. Mutina*, 366 Mass. 810, 832 (1975); *Commonwealth v. Roy*, 349 Mass. 224, 227 (1965).

with police that would give cause to his want to "avoid the reoccurring indignity of being racially profiled", but also there was no evidence as to how long the defendant had been in the City of Boston, if he resided in Boston, or even in the Commonwealth of Massachusetts.

Third, this rule is ill-conceived as a judicial interpretation of human conduct. The rule is based on a misinterpretation of data from a short-duration study in Boston.[6] The summaries that the Court cites are from a report that only examines field interrogation or observation (FIO) reports from 2007 to 2010. Of more concern is that the Court ignores the significant training initiatives undertaken by the Department to address concerns raised by the data, including trainings on racial profiling and unconscious bias. See: https://perma.cc/H9RJ-RHNB. Accordingly, the limited data in the study should not be the basis for a constitutionally based rule. This Court relied on an unreliable interpretation of the data without any testimony from the authors of the study about the correct interpretation of the data. The authors note disparate minority contact, but do not speculate as to why it occurs. This court finds a "pattern of racial profiling," while the term "profiling" does not appear in the study itself. The report attempts to control for area-specific crime with the resulting

[6] See fn. 1 - 3, supra.

increases in FIO activity. The authors do this by accounting for major reported crime, known as index crime. This method does not account for increases in FIO activity due to a multitude of other legitimate reasons, including reports of shots fired, neighbors calling the police to report suspicious activity, or drug dealing or fights in connection with which no one is arrested. For example, if there are shots-fired incidents in a specific neighborhood and a corresponding increase in FIO activity, this is often at the request of the citizens who reside there, or police efforts to speak with gang-involved persons to de-escalate tensions and discourage retaliatory violence. None of these realities are controlled for under the study and may account for disparate contact. These factors, among others, as noted in footnotes 1-3, *supra*, are part of the reason why the authors of the study do not attempt to draw the conclusions that others inappropriately did, and should not be the basis of any rule from this Court.

Fifth, the Court should be wary of adopting an interpretive guideline for lower-court judges based on a few years of data, which does not take into account recent training by the Police Department or the significant decrease in FIO's, and which is contrary to reasonable inferences about human behavior, and consciousness of guilt. As this Court has previously recognized, history teaches that:

> Where the criminal betakes himself in flight, hurries with the utmost speed from the scene of the crime, that is accepted as evidence of consciousness of guilt, and it is imbred in the law, and it is expressed even in the Scriptures, where they say, 'The wicked flee when no man pursueth, and the innocent is as bold as a lion,' [Proverbs 28:1] or something to that effect.
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> *Commonwealth v. Derby*, 263 Mass. 39, 43 (1928).
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> 'The wicked flee, even when no man pursueth; but the righteous are bold as a lion.' [Proverbs 28:1] . . . It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, . . . and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.
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> *Commonwealth v. Haney*, 358 Mass. 304, 306 (1970).

Sixth, this new guidance is contrary to established jurisprudence that an innocent explanation does not dispel the inference of criminality when facts are viewed through the lens of the experienced police officer (who obviously has a different perspective from a Judge sitting on a bench in a courtroom after the fact). *See, e.g., Ornelas v. United States*, 517 U.S. 690, 700 (1996) ("a police officer may draw inferences based on his own experience in deciding whether probable cause exists. . . To a layman, the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to Officer Luedke, who had searched roughly 2,000 cars for

narcotics, it suggested that drugs may be secreted inside the panel.") Indeed, substituting a judge's Monday-morning quarterbacking for the officer's experience and judgment in the moment inappropriately grants precedence to the limited experiences and subjective biases of the particular judge.

Seventh, if this is a constitutionally based rule then it must apply throughout the Commonwealth, which it cannot, as it relies on dated data and its misinterpretation solely about police observations in Boston.

Eighth, the rule gives rise to the different application of constitutional rules based on the race of the person with whom police wish to speak. Indeed, it may well follow from the Court's decision that all of the various races, religions, ethnicities and cultural mores of an individual will need to be distinctly assessed in order to weigh and analyze whether flight or similar behavior evinces consciousness of guilt.[7] It is hard to imagine how a police officer will do this in a split-second when a

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[7] The United States Census Bureau, for instance, is considering changing the way it collects and reports data, as it notes: "We recognize that race and ethnicity are not quantifiable values. Rather, identity is a complex mix of one's family and social environment, historical or socio-political constructs, personal experience, context, and many other immeasurable factors." See: "2010 Census Race and Hispanic Origin Alternative Questionnaire Experiment," available at: https://www.census.gov/2010census/pdf/2010_Census_Race_HO_AQE.pdf.

decision is made. And if these considerations are in play in the courtroom after the fact, then the courts will need expert witnesses to put into context all of the various sociological permutations that may or may not be at play when a person runs away from a police officer who merely asks to speak with him or her.

The motion judge, who heard the witnesses and was actually in a position to judge their credibility, made lengthy factual findings that were supported by the evidence. This Court cannot interject new facts to overrule the lower court, and cannot substitute its view of the facts for that of the experienced police officer on the ground. *See Jones-Pannell,* 472 Mass. at 438. By parsing the facts, viewing them in the light most favorable to the defendant, and taking judicial notice of a study that was not entered in evidence, this Court erred.

Requiring victims of and witnesses to crimes to supply precise detail as to height, weight, or other observations of perpetrators interrupted in crimes, as this court did, transforms the reasonable suspicion standard into something akin to a preponderance of the evidence.[8] In this case,

[8] Even the probable cause standard does not "demand any showing that such a belief be correct or more likely true than false.'" *Commonwealth v. Skea*, 18 Mass. App. Ct. 685, 689 (1984) (quoting *Texas v. Brown*, 460 U.S. 730, 742

given the level of detail as to the description of the perpetrators of the home invasion provided by the victim, the police acted reasonably on facts that were specific and articulated. The defendant's flight on two separate occasions --at a mere request for a consensual encounter, and then at mere eye contact with police -- gave rise to a reasonable suspicion. Viewing the facts in the light most favorable to the Commonwealth and through the eyes of the experienced police officer, the motion judge did not err in concluding that reasonable suspicion existed under traditional art. 14 analysis.[9]

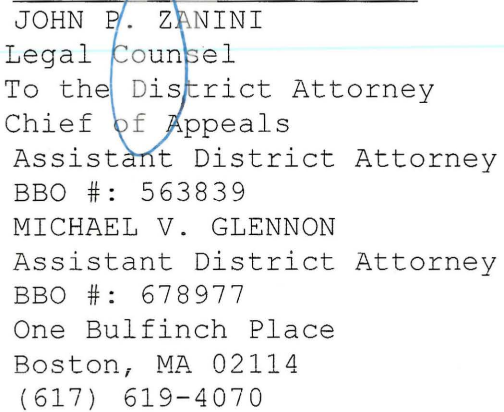
(1983) and *Sullivan v. District Court of Hampshire*, 384 Mass. 736, 743-744 (1981)).

[9] Even more fundamentally, by continuing to employ the unduly subjective "free to leave standard" to determine whether a stop has occurred for purposes of art. 14 jurisprudence(rather than the standard accepted by the United States Supreme Court for Fourth Amendment purposes of actual seizure or submission), this Court invites analyses that either are based on the subjective thought processes of each individual (i.e. is the person submissive or overly deferential to authority figures based on some social, cultural, ethnic, religious, or racial characteristic that renders his otherwise voluntary and consensual response to a question an involuntary and unconstitutional seizure?); or opens the Court's decisions to the criticism that the law is nothing more than the subjective judgment of the panel. Far from being based on whether a reasonable person would feel free to leave, the "free to leave standard" is really an after-the-fact determination whether the Court thinks the actions of the police are reasonable or unreasonable under the circumstances. There is no predictability and uniformity in the law to guide the conduct of police and the citizenry.

For all of these reasons, the Commonwealth respectfully petitions this Honorable Court to allow its petition for rehearing on this issue.

Respectfully submitted
FOR THE COMMONWEALTH,

DANIEL F. CONLEY
District Attorney
For The Suffolk District



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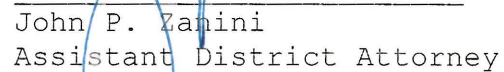
October 14, 2016

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have today made service on the defendants by directing that a copy of the attached petition for rehearing be sent by first-class mail, addressed as follows:

Nelson Loving
Ten Cedar Street, Suite 22
Woburn, MA 01801



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