COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. No. SJC-12808

COMMONWEALTH OF MASSACHUSETTS

v.

TYKORIE EVELYN

SUPPLEMENTAL BRIEF FOR THE DEFENDANT ON INTERLOCUTORY APPEAL FROM THE SUFFOLK SUPERIOR COURT

K. HAYNE BARNWELL
B.B.O. 667952
ATTORNEY AT LAW
401 ANDOVER STREET
SUITE 201-B
NORTH ANDOVER, MA 01845
TEL (978) 655-5011
FAX (978) 824-7553
attorney.barnwell@gmail.com

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ATTORNEY FOR DEFENDANT
TYKORIE EVELYN

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I. In Matta, this Court re-affirmed that when police escalate an encounter with a presumptively innocent person after that person has rebuffed interaction with the police, such action is a show of authority constituting seizure.

In Matta, this Court held that a police officer's single statement, "Hey, come here for a second", did not constitute a seizure. Commonwealth v. Matta, 483 Mass. 357, 359 (2019). Because of the limited nature of the officer's statement and without any other intimidating context, this Court considered this statement a "request" even though "few civilians feel as if they could discontinue an encounter with a law enforcement officer, let alone ignore an inquiry from one." Matta, 483 Mass. at 363. In doing so, this Court re-affirmed prior case law that any escalation of such a law enforcement "request" tends towards a finding of seizure. "In contrast, we have concluded that where a defendant chooses to ignore verbal attempts by police to speak with him, and officers persist by issuing a subsequent order, that subsequent order constitutes a seizure." Matta, supra at 364, citing Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015) and Commonwealth v. Barros, 435 Mass. 171, 172 (2001).

This Court mentioned neither the defendant's race nor his age when assessing the totality of the circumstances as applied to the moment of seizure in Matta. Nor did the Court discuss whether the Holyoke police have a history of racial profiling whereas here, the record establishes – even more so than in

Commonwealth v. Warren, 475 Mass. 530 (2016) - that Boston police disproportionally target African-American males for Field Interrogation Observations (FIO)s. An African-American boy, who has repeatedly rebuffed police questioning and attempted to avoid their surveillance, would not only feel his freedom curtailed by any further escalation by police in Roxbury, but would then reasonably believe that the police "would compel him [] to stay", see Matta, supra at 363, in accordance with the Boston Police Department's pattern of racial profiling.

II. The characteristics of an African-American boy are inextricably tied to what a police officer "objectively communicated" to him during the encounter. This Court should also clarify that Matta's definition of seizure did not elevate law enforcement expedience over an individual's right to be free of unreasonable searches and seizures.

In Matta, this Court broadly held that "rather than attempting to determine whether a reasonable person would believe he or she was free to leave, in our view, the more pertinent 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." Matta, supra at 362. This Court should further hold that, consistent with this newly formulated test, a person's race and age must be included within it because these factors impact both police officers in how they communicate their authority and individuals in how they reasonably perceive such communication during an encounter. Although race and age are static factors, they

create a power dynamic that escalates more quickly for African-American boys like Mr. Evelyn than for white men – especially in Boston. Otherwise, Matta cannot be reconciled with this very recognition in Warren and United States Supreme Court case law. See Warren, 475 Mass. at 549 (acknowledging "this reality for black males in the city of Boston" as part of the reasonable suspicion analysis); Kaupp v. Texas, 538 U.S. 626, 631 (2003) ("A 17-year-old boy was awakened in his bedroom at three in the morning by at least three police officers … [¶] … [A] group of police officers rousing an adolescent out of bed in the middle of the night with the words 'we need to go and talk' presents no option but 'to go.'"); and United States v. Mendenhall, 446 U.S. 544, 558 (1980) ("…[i]t is argued that the incident would reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant, …neither were they decisive" with respect to the seizure determination).

"[S]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011). Here, the police knew

that Mr. Evelyn was an African-American male who appeared so young that they did not bother asking him whether he had a license for the firearm. (RA II:57-67,106). See Commonwealth v. Powell, 459 Mass. 572, 581 (2011). Boston police officers know or should know that they have a continuing pattern of racially discriminatory stops particularly against young, African-American males. Police officers generally know that children will view certain police actions as coercive when adults would not. To the extent that the Commonwealth may respond by relying on Matta's apparent rejection of a subjective state of mind test, see Matta supra at 362, "the same can be said of every objective circumstance that the State agrees is relevant to the custody analysis: Each circumstance goes to how a reasonable person would 'internalize and perceive' every other…Indeed, this is the very reason that we ask whether the objective circumstances 'add up to custody,'…, instead of evaluating the circumstances one by one." J.D.B., 564 U.S. at 279 (citations omitted).

In sum, police officers know or should know that they will generally be communicating detention to an African-American boy at an earlier point in time than a white man. "Youth are not only socialized to comply with adult authority figures, such as parents, teachers, and police, but they also have less experience to draw upon than adults, especially in the legal arena." Henning, Kristin, An Honest Conversation on the Criminal Justice System in 2017: Lead Article: The

Reasonable Black Child: Race, Adolescence, and the Fourth Amendment, 67 Am. U.L. Rev. 1513, 1523 (June 2018). "The prevailing approach to policing youth, especially black, Latino, and immigrant youth, involves excessive displays of force, a liberal use of arrest power to control youth conduct, and militarism that underscores the power of the police over the child." Id. at 1543. These realities do not mean that factors like race and age will always prove dispositive as to whether a person is seized. See J.D.B., supra at 277. However, they are significant factors that can "add up to" seizure especially in a case where expert testimony and statistics demonstrate that Boston police officers are likely guided more by implicit and investigative bias than competent training and experience[1] when disproportionately stopping young African-American males. Factoring in race and age is not so much addressing Mr. Evelyn's "state of mind", see Matta supra at 362, as it is recognizing an objective "state of affairs" when it comes to an African-American boy naturally attempting to "avoid the recurring indignity of being

[1] "[O]rdinarily, when an officer relies on his or her training and experience to draw an inference or conclusion about an observation made, the officer must explain the specific training and experience that he or she relied on and how that correlates to the observations made." Matta, supra at 366 n.8. Here, the Commonwealth showed no such correlation between the officers' training and experience and their interpretations of otherwise innocent behaviors and assertions of rights like "blading" (or turning away from an officer), "refusing" eye contact and "refusing" to speak with police.

racially profiled," see Warren, 475 Mass. at 540, and that attempt being met with police pursuit.

This Court should also modify Matta's language that the "more pertinent question" involves the officer's words or conduct rather than a reasonable person's belief about his or her freedom of action. Matta, supra at 362. One question is not more pertinent than the other – they are instead intertwined. An officer will objectively communicate a detention earlier to a person confined to a wheelchair than to a person walking freely and the officer would (or should) adjust his or her communications accordingly. This Court recognizes this proposition when it states: "[T]he inquiry must be whether, in the circumstances, a reasonable person would believe that an officer would compel him or her to stay. Although this is a different question from what we heretofore have asked, the analysis takes the same circumstances into consideration." Matta, supra at 363. However, it later appears to backtrack that assessment: "The difference is one of emphasis — that is, even though most people would reasonably feel that they were not 'free to leave' in any police encounter, the coercion must be objectively communicated through the officer's words and actions for there to be a seizure." Id. at 363-364.

The danger of such backtracking is most acute when this Court declares: "Indeed, the police depend on a degree of civilian compliance to maintain public safety and carry out criminal investigations." Id. at 363. It is that very compelled

compliance from which citizens are protected by the Fourth Amendment and Article 14. Law enforcement expedience may not be elevated over a reasonable person's belief that he or she has been detained. A police officer's need to hasten an investigation through coercive means is antithetical to the Fourth Amendment's and Article 14's design, which is to guard an individual's right to be free of unreasonable searches and seizures. If any question should be "more pertinent", it is whether a "reasonable person would have believed that he was not feel free to leave" a police officer's encroachment. Mendenhall, 446 U.S. at 554. Intertwining both questions of an officer's objective communications and a reasonable person's belief of that officer's authority, here, once Officer Garney opened the cruiser door, any reasonable African-American boy, having tried to avoid police questioning and encroachment, would believe that he would be compelled to stay put and answer their questions.

CONCLUSION

For the above reasons and those presented in the defendant's briefs, this Court should reverse the Superior Court's order denying his motion to suppress and enter an order allowing it. Alternatively, it should remand the matter to the Superior Court for further findings and/or hearing.

Date: November 22, 2019

Respectfully Submitted,

TYKORIE EVELYN

By His Attorney:

/s/ K. Hayne Barnwell
K. Hayne Barnwell
BBO # 667952
401 Andover Street, Ste. 201-B
North Andover, MA 01845
TEL: 978-655-5011
FAX: 978-824-7553
attorney.barnwell@gmail.com

CERTIFICATE OF SERVICE

I, Kathryn Hayne Barnwell, certify that on November 22, 2019, I served by e-mail, one copy of the foregoing Supplemental Brief, to:

ADA Cailin Campbell
Suffolk District Attorney's Office
One Bulfinch Place
Boston, MA 02114

/s/ Kathryn Hayne Barnwell
Kathryn Hayne Barnwell

CERTIFICATE OF COMPLIANCE

I hereby certify that the brief in this matter comply with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs and word limitations in briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices and other papers). The Brief was produced, using Microsoft Word for Mac Version 16.16.8, in proportional font and the non-excluded sections consist of 1,707 words (or less than the maximum of 4,500 words for a Reply Brief).

/s/ Kathryn Hayne Barnwell
Kathryn Hayne Barnwell