COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-12808

COMMONWEALTH OF MASSACHUSETTS,
Appellee
V.

TYKORIE EVELYN,
Appellant

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

SUFFOLK COUNTY

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ISSUE PRESENTED

Whether the judge properly denied the defendant's motion to suppress where the judge weighed and credited officer testimony and conflicting expert testimony, found facts, and correctly concluded that the stop of the defendant was supported by reasonable suspicion.

STATEMENT OF THE CASE

On March 20, 2017, a Suffolk County grand jury returned indictments charging the defendant, Tykorie Evelyn, with murder, in violation of G.L. c. 265, § 1; carrying a firearm without a license, in violation of G.L. c. 269, § 10(a); and possessing ammunition without an FID card, in violation of G.L. c. 269, § 10(h) (CA.4).[1]

On June 5, 2018, the defendant filed a motion to suppress challenging the constitutionality of his stop and a motion for a *Daubert* hearing supported by an curriculum vitae from a proposed expert, Dr. Dawn Sweet (CA.30-39). On August 15, 2018, the Commonwealth

[1] "(CA._)" herein refers to the Commonwealth's Record Appendix; and "(Tr._:_)" refers to the motion transcript; and "(D.Br._)" refers to the defendant's brief.

filed a response to the defendant's request for a *Daubert* hearing (CA.68-71). On August 29, 2018, the Commonwealth filed an opposition to the defendant's motion to suppress (CA.59-67). On September 7 and 20, 2018, Judge Michael Riciutti held an evidentiary hearing on the defendant's motion (CA.11). On October 22, 2018, the judge denied the defendant's motion in a 36-page memorandum of decision and order (CA.11, 72-107).

On November 20, 2018, the defendant filed a notice of appeal (CA.12). The next day he filed an application for interlocutory review, which was allowed by the Single Justice (Lenk, J.), on January 14, 2019 (CA.108).

STATEMENT OF FACTS

The Judge's Factual Findings

The motion judge made detailed factual findings after an evidentiary hearing during which Boston Police officers Joseph Abasciano and Officer Brian Garney and defense expert Dawn Marie Sweet testified. The judge fully credited Officer Abasciano and found:

> Abasciano has been a Boston Police officer for 11 years, although that experience has been interrupted by deployments overseas as

an infantry Marine and by an injury which sidelined him from police work from late 2014 to December 2016. Abasciano has been trained and is fully familiar with firearms, including handguns, through his experience with the Boston Police and with the Marines, including a seven-month deployment for combat tours in Iraq. He has received training with the Boston Police and Marines regarding the identification of individuals carrying concealed firearms, and has dealt with people in illegal possession of firearms on many occasions prior to January, 2017, participating in more than 10 arrests of suspects in possession of guns and has assisted others in such arrests on further occasions.

In 2012, Abasciano was assigned to District B2, and has been assigned there ever since. He is familiar with the geography of that area and the gangs that exist within it. As of January, 2017, he was aware that there has been gang activity in the area of Melnea Cass Boulevard, Dearborn Avenue and Eustis Street, where the Orchard Park and VNF gangs were active. He is also familiar with the Ruggles Street gang. Disputes between gangs would occasionally come to Abasciano's attention, and he was aware of a rivalry between gangs based on Ruggles Street and in Orchard Park/VNF. Dudley Street separated the territory of these two gangs. Active feuds have broken out with these gangs while Abasciano has served as a police officer in the area. Those feuds involved firearm and other forms of violence. Abasciano also received intelligence from other officers, often via emai1, concerning ongoing gang activity in Boston.

On January 9, 2017, Abasciano was working the 4 PM to 11:45 PM shift in a Rapid Response patrol wagon with his partner, Officer Brian Garney. Abasciano was driving the wagon, and the officers were primarily

responding to priority one radio calls of crimes in progress. At approximately 7:27 PM, Abasciano and Garney received a ShotSpotter alert. ShotSpotter is a system which identifies firearm shots fired and directs the police to the general location of the sound of the shots. At the time, Abasciano and Garney were on Quincy Street approaching Colombia Road. The ShotSpotter notification, which Garney saw on the computer aided dispatch ("CAD") screen in use on the computer in the patrol wagon or on his cell phone, stated that the shots occurred at Dearborn Street in Roxbury. Abasciano knew that the Orchard Park/VNF and the Ruggles Street gangs were active in that area. He turned the wagon around and headed toward that area.

First responders converged at the location of the shots and were reporting their findings via radio. Those reports reflected that there was a person shot near the intersection of Dearborn and Eustis who was severely injured and that three people had run from area, but no descriptions of them were given. The officers drove up Harrison Avenue and looked down Eustis toward the intersection with Dearborn. Based on the number of units that were there and the radio reports, Abasciano concluded there were enough police at the scene and decided to look in the area of the reported flight of the assailants. Abasciano believed the radio report was that the men were running down Eustis away from Adams Street, which would put them heading in the direction of Harrison Avenue and beyond. Although Abasciano later learned that he misheard the radio call the radio call was that the assailants were reported to have fled toward Adams Street on Eustis, not away from Adams Street- in the chaos of the calls, Abasciano understood the opposite. As a result, he drove up Harrison Ave e and took a left onto

Melnea Cass Boulevard.[2] A map was introduced to illustrate the route that Abasciano and Gamey drove that night. The lights and siren of the patrol wagon, which had been on as Abasciano and Gamey began heading to the scene, were switched off.

The night was very cold, close to single digits. Abasciano was looking for vehicles quickly driving away from the scene, any victims or witnesses and anything else that stood out. He saw no pedestrians on Harrison Avenue. He took a left into Melnea Cass and drove toward the stop light at Melnea Cass and Shawmut. He saw no one on Melnea Cass until he got to that intersection, at which point Abasciano saw one person on the street, walking on Melnea Cass toward Dewitt Drive, a few yards from Shawmut Avenue. This was approximately a half mile from the shooting, and approximately 13 minutes after it was reported to police. The person, later identified as defendant Tykorie Evelyn, was walking in the opposite direction from the scene.

Abasciano took a left onto Shawmut and pulled up next to Evelyn. Photographs of Evelyn were introduced into evidence that showed at the time, Evelyn was wearing a dark overcoat, dark hooded sweatshirt, black pants, white sneakers and a white, orange and maroon knit hat with a pompom. Abasciano saw that Evelyn kept his hands in his pockets, and his right hand appeared to be clutching an object in his right jacket pocket, which Abasciano could not identify but which was generally consistent with the size of a firearm. Evelyn was on Abasciano's side of the car, separated from Abasciano's

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[2] The judge noted: “The defense suggested that officers took this route to approach the Madison Park housing project, which was in the direction of travel, and did so for racially discriminatory reasons. No facts support this claim” (CA.76, n.2).

car by a row of parked cars. Despite the fact that the patrol wagon pulled up next to him, Evelyn did not look over - in fact, it appeared to Abasciano that Evelyn was trying to ignore the officers. Evelyn was walking at a brisk pace. Abasciano continued to track and observe Evelyn, and did so for approximately 100 yards down Dewitt Drive. The street was fairy well-lit with street lights. Abasciano has responded to and made numerous firearms arrests in this area, and Abasciano was also aware there was active gangs in that area. During the 10 yards, Evelyn did not make eye contact or look over to the police at all, and kept his hands in his pockets. At one point, he began to blade[3] his body, moving the right side of his body, the side closest to Abasciano, away from the officers, turning his body to the left, which appeared unnatural to Abasciano. As they followed, Evelyn picked up this pace of walking and began looking in directions other than at the police.[4]

Abasciano, who had the "window down, called out something like "hey, man, can I holler at you?"[5] In substance, Evelyn responded

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3 The judge noted: "Abasciano is familiar with this term both has a police officer and Marine. It means to turn one's body so that one side, usually the side where contraband is kept, is further away from an authority figure" (CA.77, n.3).

4 The judge noted: "The defense asked Abasciano whether he had undergone training put on by the Boston Police Youth Violence Strike Force in identifying individuals who are carrying concealed weapons. Abasciano did not recall ever having done so. Evelyn's argument premised on his criticism of that training are thus inapplicable as to the observations made by Abasciano on the night in question" (CA.77, n.4).

5 The judge noted: "The defense suggested that Abasciano used this phraseology for racially

"for what?" Evelyn did not face the officers when he spoke and increased his pace of walking. Abasciano said that something had happened in the area and he wanted to know whether he had seen or heard anything. Evelyn mumbled something in response, but neither Abasciano nor Garney could understand it. Evelyn had still not made eye contact with the officers, and his eyes began darting directions other than the location of the police, which suggested to Abasciano that Evelyn might flee (Abasciano had seen this behavior in the past, after which a suspect had fled). Abasciano stopped the patrol wagon and suggested to Garney that Evelyn appeared ready to run and he should probably step out, since they were in a poor position sitting in the car to protect themselves in the event Evelyn had a firearm and sought to use it. Garney opened the passenger side door to exit. When he did so, Evelyn fled.[6] Garney pursued him.

Garney ran after Evelyn up Shawmut Avenue onto Ruggles Street, as Evelyn ran through backyards. Abasciano called out the foot chase and location, and followed in the patrol wagon. Evelyn ran into a courtyard area on Dewitt Way. Abasciano knew that area. He parked the patrol wagon and ran up Kerr Way to head Evelyn off. At no point did Abasciano command Evelyn to stop. For a brief period Evelyn disappeared on Kerr Way

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discriminatory reasons. No facts support this claim. Abasciano credibly testified at he used this expression frequently. Nothing suggests that this expression was used for, or resulted in, any form of racial discrimination" (CA.77, n.5).

6 The judge noted: "As discussed below, the officers' intention as to why Garney opened the wagon door is irrelevant to the Court's assessment of whether Evelyn was thereby seized, as that intent was not shared with Evelyn" (CA.78, n.6).

> but reappeared on Kerr Way, running awkwardly with his hands in pockets, with parked cars between Abasciano and Evelyn which obstructed Abasciano's view of him.
>
> Evelyn and Abasciano almost ran into each other. When they did, Evelyn tried to draw an item out of his right pocket while still running. Abasciano was concerned he was pulling a firearm, so he drew his firearm and commanded Evelyn to stop and show his hands. Evelyn ran a few more feet but eventually stopped near 17 Kerr Way, showed his hands, which held nothing, and laid flat on ground with his hands exposed. Garney then arrived and handcuffed Evelyn.
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> A pat frisk of Evelyn revealed that whatever Evelyn had in his right pocket was now gone. Shortly thereafter, Abasciano and other officers walked back over the route Evelyn had just taken and saw a firearm between two cars on the sidewalk, past which Evelyn had run and within throwing distance of where Evelyn was stopped. As noted below, a cellular phone was also found in Evelyn's possession

(CA.74-79).

The judge also fully credited the testimony of Officer Garney and found:

> Garney has been a Boston Police Officer for three years, and has served on patrol since 2016. As of January 2017, Garney had not made arrests himself but has assisted on a few. On the evening of January 9, 2017, Gamey was in the patrol wagon with Abasciano. It was a very cloudy, cold night, close to the single digits in temperature, and a little windy. Garney heard the shots fired alert, and, like Abasciano, erroneously thought the radio reports alerted officers that the suspects had fled

up Eustis away from Adams Street. They then bypassed the crime scene itself and drove to Melnea Cass and Shawmut Avenue. Garney did not believe they saw anyone during the drive until he and Abasciano saw Evelyn on Dewitt.

Evelyn was a tall (about 6 feet) black male wearing a red hat, black "hoodie," black jacket and black pants. Garney knew the area to be high-crime and that it was the site of ongoing gang-related violence. As they drove closer to him, Gamey noted that Evelyn kept eyes straight forward and did not look at the officers. The officers did not command him to look at them, but Garney described Evelyn's demeanor as refusing to look at the police. Evelyn also kept his hands tight to his body and in his pockets, did not swing his arms, and appeared to clutch something, but Garney could not see the outline of what it was.

After Abasciano called out to him, Evelyn kept looking forward, made no eye contact with the officers, and kept his hands in his pockets, tight to his body. Evelyn looked around but not at the police. The police were shadowing Evelyn, driving just behind him while trying to converse with him. After Abasciano asked if he could “holler” at Evelyn, Garney recalled Evelyn asking "for what?" Evelyn did not refuse to speak with the police. When Abasciano asked him whether he saw or heard anything, Evelyn said something Garney could not hear, and Garney was unsure whether Evelyn answered the question or not. He bladed his body away from the police as he continued walking, but did not ask the police to leave him alone. The police made no commands to Evelyn, did not tell him to stop, and did not activate the patrol wagon's sirens or lights.

Shortly after Evelyn mumbled his response to Abasciano, Garney started getting out of the

patrol wagon. Evelyn broke into a full sprint as soon as Garney tried to open the wagon door and get out of the vehicle. Garney followed, and noticed that Evelyn kept his hands his pockets, which struck Garney as unnatural Garney made no statements and issued no commands to Evelyn as he followed him. Evelyn veered off the roadway and ran across front lawns and down a small, unlit back alley on Ruggles Street, and then onto another dark alley. Garney paused there, as he was concerned that Evelyn was leading Gamey into an ambush and that Evelyn had a firearm, especially since, during his run, he kept his hands in his pockets, which was consistent with securing a weapon. Garney lost sight of Evelyn for a few seconds, but resumed the chase when he heard Abasciano call out to Evelyn to stop. Garney ran toward Abasciano's voice.

Photographs were introduced evidencing the route of Evelyn's run. Evelyn ended up in the vicinity of 17 Kerr Way, where he was arrested.

During his academy training, Garney was trained by officers of the Youth Violence Strike Force, otherwise known as the Gang Unit, on potential evidence that showed a person was possibly carrying a concealed firearm. These factors included the manner in which the person carried himself or herself, how he or she walked, and what he or she did with his or her hands, such as keeping his or her hands lose to the body. Gamey recalled a PowerPoint presented by the Gang Unit on this, a paper copy of which was introduced into evidence. It listed several factors as "Characteristic of Armed Gunman Overview" (hereinafter, "Gunman Characteristics"), including presence in a high crime area; prior criminal history; weighted pocket; bulge in pocket; hypervigilance; change in gait or direction;

running while clutching waist; bladed stance; nervous behavior; evasive or inconsistent answers; "security checks" (checking one' body to confirm e presence of a firearm); repeated noncompliance; breaking from a group of area; and bending, leaning or reaching during a car stop.

As applied to this case, some of the Gunman Characteristics pointed to Evelyn having a gun, while others did not. Those which suggested Evelyn held a gun included: high crime area (the encounter occurred in around Ruggles and Kerr, which Garney described as a high-crime area); weighted/bulge in pocket (Evelyn had something in his hands in his pockets, with his hands tight to his body); hypervigilance (Evelyn appeared very aware of his surroundings, constantly scanning)[7]; running while clutching waist (Garney said that Evelyn ran running while clutching something in his pocket in his abdomen area)[8]; bladed stance (Evelyn turned his body away to conceal a side of body); nervous behavior (Evelyn appeared nervous); evasive or inconsistent answers (Evelyn's mumbling in response to the Abasciano's question whether he saw anything was evasive); and breaking from group or area (Evelyn fled

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[7] The judge noted: "The police report did not state that Evelyn's eyes were 'darting' around, but it stated that Evelyn 'appeared to be looking for an avenue of escape' when he spoke with the officers, which describes the same observation" (CA.81, n.7).

[8] The judge noted: "The defense argued that this was not at the "waist," but the distinction does not appear to make a difference, as the factor is focused on efforts to control a firearm concealed on the persons' body and not secured in a holster" (CA.81, n.8).

> from the area).[9] Those Gunman Characteristics which did not suggest a gun included criminal history (neither Garney nor Abasciano knew whether Evelyn he had a prior criminal history or, for that matter, gang membership); change in direction (Evelyn did not change direction); security checks (Evelyn did not make security checks, although he clutched something in his pocket); repeated noncompliance (Evelyn did not fail to comply with any requests, as none were made); and bending, leaning or reaching during a car stop (there was no car stop).

(CA.79-82).

As to the defense expert, the judge found:

> The defense called Dawn Marie Sweet. Sweet is a professor of Communication Studies in the Department of Psychology at Iowa State University, and holds a Ph.D. in Communication from Rutgers University. Sweet is a researcher who focuses on deception, threat assessment and nonverbal communication, and studies detection of threats by examining non-verbal behavior - body movements, gazes, facial expressions, voice tone and tenor - which are associated with threatening acts, and the extent to which behavior leads to detection of concealment of object on a person. Sweet has studied and written in the field, including for scholarly, peer-reviewed journals, and

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[9] The judge noted: “ln addition, as noted above, Abasciano testified that Evelyn changed his gait while he was talking with the police. In his cross-examination, Gamey concerned the police report did not state this observation, but the Court credits it, as it is consistent with the report's statement that Evelyn was looking for an avenue of escape when he spoke with the officers and took off running when Garney tried to get out of the wagon” (CA.82, n.9).

contributed to research that was used by others in testimony before the House of Representatives on evaluating a Transportation Security Administration efforts to use body movements to detect deception or threat.[10] After the September 11th attacks, Sweet became interested in studying threat detection and methods to determine weapon concealment and identify threats. Sweet teaches nonverbal communication at Iowa State, and since 2011, has worked with the sworn officers of the Iowa State Police Department to use her research in detecting threats in crowds, like that which assemble for home Iowa State football games.

Sweet stated that prior studies had found that nonverbal cues often used to identify deception correlated not with deception but with anxiety, such as fidgeting, averting gaze, and flushing, and that studies that correlated these factors with deception were split in their results, but which suggested they may not be reliable diagnostic indicators of deception. Sweet recognized that there was little research into whether behavioral clues accurately detect whether an individual actually possessed weapon (a firearm or bomb), and she began examining that issue as a researcher. She won two grants to further that research, including an $11,000 grant from Motorola Solutions Foundation for a project entitled "Recognizing Hostile Intent Through Nonverbal Communication in Emotionally-Charged High-Risk/High-Consequence Situations." This grant funded Sweet's research, published in 2017 in the peer-reviewed journal, Law and Human Behavior, entitled "Assessing Law Enforcement

[10] The judge noted: “Sweet's role in this research was to review interviews of study participants and to assign a code to their gestures” (CA.82, n.10).

Performance in Behavior-Based Threat Detection Tasks Involving a Concealed Weapon or Device" (hereinafter, "Threat Study").[11] The Threat Study was introduced into evidence, as was a disc containing recordings used to derive its results. Sweet testified that she believed that the Threat Study was the only published research of its type to analyze whether police can effectively identify persons concealing weapons.

In relevant part, the Threat Study used eight videos which depicted one of two males who served as the targets, both of who had minimal experience holding or concealing a weapon. The targets walked approximately 100 yards in daytime along a public street toward a camera. The targets were not pursued, approached or questioned by anyone on the walk. The targets were dressed in street clothes, but wearing jeans, not sweatpants or athletic wear. In two trials each, the targets concealed a 9 mm Glock firearm in the small of their backs and in the waistband of their jeans. In the other two, the targets did not carry a gun at all. The targets were instructed to walk normally without raising suspicion and were told that sheriffs deputies were monitoring them as they entered the building to decide whether they were carrying a firearm. The targets were also told that they could earn up to total of $125 for bringing in a firearm undetected, but that they would be penalized if they were caught by losing rewards they had earned by previous successful non-detection.

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[11] “Sweet, et al., "Assessing Law Enforcement Performance in Behavior-Based Threat Detection Tasks Involving a Concealed Weapon or Device," 41 Law and Human Behavior411 (Oct. 2017)” (CA.83, n.11).

Police officers and student volunteers viewed the tapes and were asked which of the targets were carrying a weapon and the level of certainty. The participants in the Threat Study were 51 police officers and 56 students. The police officers were sheriff deputies, patrol officers and detectives with varying levels of law enforcement experience. They were not asked how many times they had stopped suspects and made gun arrests, and there was no data showing whether any had interacted with suspects who had allegedly just committed a homicide. The students were psychology and communications undergraduates who earned credit for participating. The students were not asked whether they were studying human behavior, which Sweet conceded would probably have an effect on the study's results. The students were also not asked whether they had interacted with people illegally possessing firearms or had a license to carry firearms. The participants viewed each video and then made a binary judgment whether the target was or was not concealing a firearm, to provide a confidence rating from 50 to 100 percent, and list behavioral indicators they perceived to be indicative of concealment or non-concealment. The participants did not view the targets live, only by video.

The Threat Study concluded that both officers and the student controls performed greater than chance in discriminating threat. While successful identification of the target when concealing was “quite poor,” the correct rejection of a non-concealing target was high (as high as 75%), which “suggest[ed] that [participants] were more likely to report non-concealment across trials.” There were no significant differences between officers and civilians on accuracy. Further, the Threat Study found no significant association between officer's experience and accuracy, but did find a

> negative correlation between officer's experience and response criterion, which "suggest[ed] that officers with greater experience were more likely to perceive 'concealment' on the part of the target . . . leading to more frequent perception of threat across trials."
>
> The Threat Study recognized that it was a "first step toward understanding officers' ability to detect a concealed weapon," and that further research was needed to determine which behaviors suggest weapon concealment, such as "deviations in gait patterns, arm movements, and gross movement patterns related to one's own bodily awareness of the concealed object." Moreover, the Threat Study recognized its results could not be directly applied to real-life incidents in high-crime, urban environments where the consequences of finding a weapon are high and where police are trained and experienced in detecting such threats"

(CA.82-85).

The judge then went on to quote the study, which said:

> "it is quite difficult for researchers to genuinely replicate the limbic responses that could affect nonverbal behavior in a high-risk, high-consequence situation [and]. . . that the impact of these consequences for being identified as concealing are unlikely to produce the same degree of physiological stress as is likely to be evidenced in real-world settings (e.g., loss of freedom ...) .... [T]here is good evidence to suggest that one's expressive nonverbal behavior is influenced during periods of increased emotional arousal and those underlying neurological processes

> influence movement ... We encourage researchers to further develop experimental paradigms that model a limbic system response induced by concealment of a weapon or threatening device, and to explore the limitation of movements related to the characteristics of a concealed object or device (e.g., weight, size, stability, etc. and the location of concealment on his or her person. Of course, real-world stimuli come with their own set of limitations that must be considered, including . . . consequences associated with detection ... Our initial studies also failed to consider several environmental, contextual, and personal factors that could influence judgments of concealment, such as the setting (e.g., an urban vs. rural environment), features of the target (e.g., gender, age, race, etc.), or characteristics of the object being concealed (e.g., weight, seize, stability, etc.). Future research should address the potentially significant impact that such factors may produce on biased responding and detection accuracy. It should also be noted that our samples were drawn from a region of the Midwest in which the population is primarily Caucasian (91.8% according to census data), [and] the crime rate is low ... Although the officers who participated in this study routinely receive tactical training, threat assessment training, and interview/deception detection training, they do not receive equivalent guidance in identification of concealment or threat behaviors. Future studies should consider assessing the performance of officers in areas where crime rates involving weapons are much higher and the threat of attack to people and infrastructure is heightened, as well as those who may receive more substantive training in behavioral detection of threat."

(CA.86).

The judge went on to find:

> In her testimony, Sweet conceded that the risk/reward system used in the Threat Study did not mimic the risk/rewards of an actual illegal gun possession case where the target faced prosecution if found to be in possession of a gun- especially if that gun linked the possessor to a murder. Sweet testified that she was not interested in a scenario in which the target just killed someone, or where the participants faced safety concerns themselves in confronting the target, which she conceded changed the dynamic. She noted that the research was flawed in that it could not replicate real world, high risk situations, and that the setting of the interaction, the gender and race of the target, and the characteristic of the object being concealed were all relevant variables. Sweet also noted that she did not consider the racial background of the participants because it was not relevant, as she was not interested in implicit bias that may have existed.[12] She rather simply wanted to test whether the presence of a gun could be reliably detected.
>
> Sweet also briefly reviewed the Gunman Characteristics and commented that some of the Characteristics, like a bladed stance, are not supported by research as being indicative of gun possession, and others, like hypervigilance, have no defined meaning in her field. Indeed, her testimony was that, aside from anecdotal evidence, there was no published, peer-reviewed research

[12] The judge noted: “Evelyn introduced a number of studies (Ex. 5) which he claimed Sweet had relied on concerning interracial interactions, but the Court finds them unhelpful. None were authored by Sweet, and in her testimony, Sweet disclaimed studying the impact of race in the Threat Study” (CA.87).

> other than the Threat Study which tested behaviors to determine whether they were reliable indicators of deception or weapon concealment. Accordingly, when Sweet was asked a hypothetical that summarized the facts of this case and the observations made by police as alleged by the government-which she testified was the first time she had heard the alleged facts of this case - Sweet testified that there was little research that supported the conclusion that Evelyn, a young African American male, was acting deceptively or possessing a weapon because his hands were pressed tightly to his body grasping an object, with his head down, looking around and making no eye contact with police, walking straight forwardly and fairly quickly, responding "for what?" to the request by a white police officer to "holler at you real quick," or that after the request, his eyes darted around, his demeanor changed, he "bladed" his body away from the police, or that he clutched an item in his pocket more intensely. Indeed, Sweet testified that there were no studies that showed that running from the police was indicative of deception or concealment, or even necessarily showed that the runner did not want contact with the police. However, Sweet conceded that anecdotal experience as to markers for weapon concealment could be tested and perhaps valid ted. Sweet did not testify that the Gunman Characteristics were not indicative of someone carrying a weapon, just that that there was no research supporting that conclusion.

(CA.86-88).

The Judge’s Rulings.

As to the moment of seizure, the judge ruled that the defendant “was not seized when the police officers

approached him. Evelyn was the only person the officer's saw anywhere near the scene of a violent murder. The officers' approaching him to ask whether he saw anything was lawful" (CA.92). The judge also explained that, "under these facts Evelyn was not seized when the officers in the patrol wagon shadowed him in their attempt to talk with him. The officers' questions to Evelyn did not suggest criminal activity by Evelyn, and neither officer ordered Evelyn to do anything, including answer their questions" (CA.92-93, internal citations omitted). The judge further ruled:

> Garney's attempt to exit the patrol wagon did not amount to a seizure, either. Nothing suggested that Garney intended to seize Evelyn by exiting the wagon. Evelyn had not refused to speak to the officers, and Garney's opening of the patrol wagon the door was unaccompanied by any command that Evelyn stop and speak to the officers. Nor did Garney's merely exiting the vehicle fairly suggest that he was going to pursue Evelyn on foot, as there was little cause to do so at that time. This was not a case, then, that opening the door would have communicated to a reasonable person that he was then compelled to submit to police authority. Further, Garney's opening of the door was appropriate from an officer safety perspective. Evelyn thus ran on his own, not occasioned by anything the police did. Garney's chase did not constitute a seizure because nothing he did- such as issue a command, block Evelyn's path or demonstrate authority- caused Evelyn's flight.

(CA.93-94, internal citations omitted).

The judge ruled that the moment was seized, "at the end of his run" and by that time, "the totality of the facts established reasonable suspicion" (CA.94). Indeed, as explained by the judge:

> In this case, the police had no description of the assailants in the murder, but the evidence showed that Evelyn was the only person on the street in a high-crime area walking away from the area of a murder on an extremely cold night and that the police initially queried Evelyn as a potential witness, not a suspect. Evelyn was a half-mile from the shooting some 13 or so minutes after it took place, a distance he could have traversed in his brisk walk. Evelyn refused make eye contact with the police and clutched something tightly in his hand. He searched for an avenue of escape when the police asked to speak with him and bladed his body away from the police.[13] He inexplicably took off in flight away from the police, through no actions of the police; and ran awkwardly while holding something more intensely close to his body. Under these facts, the police had a basis to pursue Evelyn, at least initially because he may have been a witness to a brutal crime. As the pursuit continued, however, its length and the fact that Evelyn ran

[13] The judge discounted the defendant's argument that Sweet's testimony supported that the officers observations were not indicative of guilt noting that "Sweet did no testing of these factors, but only summarized studies completed by others and which were not relied upon as references in the Threat Study. Further, the studies were duplicative of case law which already noted that avoidance of the police is not necessarily evidence of guilt" (CA.95).

> awkwardly as he held something close to his body established reasonable suspicion that Evelyn as engaged in some form of criminal activity, potentially the murder that caused he police to want to speak with Evelyn in the first place. Evelyn was properly seized. Lastly, shortly after Evelyn was stopped, the police retraced his steps and found a firearm. The police thus had probable cause to arrest Evelyn for unlawful possession of a firearm.

(CA.95-96, internal citations omitted).

The judge explained that it reached its conclusion, "despite Sweet's testimony" (CA.96). While finding Sweet's expert testimony admissible (CA.97), the judge explained he found it unhelpful for three reasons:

> First, based on the Threat Study, Evelyn essentially argues that the standard of proof that police must follow in determining whether there is reasonable suspicion must be based on observations that have been validated by social science principals. That is not the law. There is no requirement that conclusions drawn in the real world by police officers based on their training and experience satisfy a scientific standard of proof.
>
> Second, while validation of police observations by social science has potential value, that literature simply does not exist. Indeed, Sweet testified that there are no studies, beside hers, that test whether police can reliably identify gun carriers, and none that have tested observations like the Gunman Characteristics are reliable indicators of deception or

> weapons concealment. Sweet's testimony thus described weaknesses in her field in failing to measure the effectiveness of police success in weapon detection, and did not show that the officers' reliance on the Gunman Characteristics is in error. And in this case, the record shows that the observations of Evelyn made by Abasciano and Garney that suggested to them that Evelyn was concealing a weapon were, in fact, reliable.
>
> Third, the testing used in the Threat Study simply did not mimic the conditions that existed in this case such that its conclusions undermine the Court's conclusion that there was reasonable suspicion to stop Evelyn. Sweet admitted, and the Threat Study expressly recognized, that it was unable replicate real-world circumstances, particularly in a high-stakes/high-consequence situation in an urban environment involving officers trained and experienced in weapon detection. The targets in the Threat Study simply and calmly walked easily with a gun tucked in the small of their backs without fear of consequences if they were caught with the weapon. That test bore no relationship to this situation, where a person was walking briskly from the scene of a brutal murder, evidently with the murder weapon on him, and was approached by police under circumstances where the consequences of detection were extraordinarily high. Sweet's conclusions, then, do not undercut the finding that the observations made by the officers here objectively established reasonable suspicion.

(CA.98-100, internal citations omitted).

ARGUMENT

THE JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS WHERE HE PROPERLY WEIGHED THE VALUE OF THE EXPERT TESTIMONY; PROPERLY CONCLUDED THAT THE OFFICERS COULD TESTIFY AS TO THEIR OBSERVATIONS AND THE SIGNIFICANCE OF THOSE OBSERVATIONS; AND PROPERLY RULED THAT THE STOP OF THE DEFENDANT WAS SUPPORTED BY REASONABLE SUSPICION.

The defendant argues that the judge erred in denying his motion to suppress in myriad ways; specifically in how the judge weighed testimony from Dr. Sweet (D.Br.54), valued the officer's training and experience and how it impacted their observations (D.Br.50), and considered the totality of the circumstances to conclude that reasonable suspicion supported the stop of the defendant (D.Br.37). The defendant suggests that many of these valuations, including factual determinations, should be reviewed de novo (D.Br.41, 44, 50, 54). The law does not support this assertion.

"In reviewing a ruling on a motion to suppress, [the court] accept[s] the judge's findings of fact absent clear error but conducts an independent review of his ultimate findings and conclusions of law." *Commonwealth v. Montoya*, 464 Mass. 566, 576 (2013).

"Where the judge's finding 'is plausible in light of the record viewed in its entirety, the [appellate court] may not reverse it even though convinced that had it been sitting as the [finder] of fact, it would have weighed the evidence differently.'" *Commonwealth v. Gonzalez*, 93 Mass. App. Ct. 6, 11 (2018) (quoting *Edinburg v. Edinburg*, 22 Mass. App. Ct. 199, 203 (1986) (quoting from *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985))). Moreover, where, as here, a judge has made careful and explicit credibility determinations, this Court cannot cast them aside as the judge "saw and heard the witnesses." *Commonwealth v. Moon*, 380 Mass. 751, 756 (1980). Viewing the motion judge's findings of fact and legal conclusions through the appropriate standards of review, there was no error.

A. The Judge did Not Err in His Weighing of Testimony, including that of Dr. Sweet.

The defendant argues that the judge erred because he concluded that Dr. Sweet's testimony was unhelpful to the ultimate issue in the motion (D.Br.54). There was no error. The central complaint is that the judge did not weigh the evidence as the defendant wanted.

However, a judge is "not required to weigh the evidence to the satisfaction of a particular party," *Commonwealth v. O'Brien*, 432 Mass. 578, 587 (2000), even where evidence presented is from an expert, *see Commonwealth v. Goodreau*, 442 Mass. 341, 349 (2004).

Supporting the judge's conclusion that Dr. Sweet's opinion was unhelpful are the specific factual findings that the judge made with regards to Dr. Sweet's testimony, all of which are supported. Notably, the defendant suggests that Dr. Sweet's testimony was probative of implicit bias "and racially discriminatory policing, behaviors caused by stereotype threat, discriminatory use of fatal force, and inadequate police training," (D.Br.54). That argument, however, ignores that the only peer reviewed published study on threat detection of concealed weapons, as testified to by Dr. Sweet (Tr.1:39, 111),[14] was not concerned with implicit bias (Tr.1:102-103), and that the study itself expressly noted its own limitations, mainly that it studied police officers from the Midwest, who policed largely white low-crime

[14] Dr. Sweet testified that she was the only one publishing on this topic at all (Tr.1:111).

areas (CA.51, 86). The study itself explicitly stated that its results, "could not be directly applied to real-life incidents in high-crime, urban environments where the consequences of finding a weapon are high and where police are trained and experienced in detecting such threats" (CA. 51, 86). By its own terms the study was not applicable to the case at bar. More than that, Dr. Sweet admitted on cross-examination, that the police participants in the study were not asked whether they had participated in a gun arrest or ever interacted with someone who had just committed a murder (Tr.1:87). The judge did not err in finding the study itself and testimony about the threat study unhelpful.[15]

Nor did the judge err in concluding that Dr. Sweet's opinion about characteristics that someone displayed while concealing a weapon were not helpful to the ultimate issue in the motion. Dr. Sweet's

[15] Nor did the judge err in not considering the scholarly articles that the defendant submitted as Dr. Sweet did not author them and Dr. Sweet specifically testified she did not consider race in The Threat Study (Tr.1:102), and was merely summarizing what other people had written about their research concerning race and implicit bias (*see, e.g.*, Tr.1:64).

testimony was that there were no studies *at all* studying, through experimental design, characteristics that individual may display while armed (Tr.1:70-71). She did not testify that armed individuals do not display certain characteristics. Indeed, to the contrary, Dr. Sweet testified that there is a study from the Naval Research Lab which supported the opposite (Tr.1:68). Moreover, on cross-examination she admitted that certain characteristics could be indicative of someone carrying a firearm but that just had not been studied (Tr.1:112). Given this specific testimony, the judge did not err in finding Dr. Sweet's testimony unhelpful to this case.

B. The Judge Did Not Err in Rejecting the Notion that Observations Made by Police Officers are Insufficient to Establish Reasonable Suspicion that an Individual is Armed.

The defendant also complains that the judge erred in accepting what is already well established in law, that the officer's observations of the defendant could establish reasonable suspicion to stop him, arguing instead that reasonable suspicion can only be established via a method that social science has established as reliable under *Daubert/Lanigan*

(D.Br.50). This argument must fail for at least two reasons.

First, the defendant's argument is confused as to the purpose of *Daubert/Lanigan*. A *Daubert/Lanigan* hearing "focuses on whether 'the process or theory underlying a scientific expert's opinion lacks reliability' such that the opinion "should not reach the trier of fact" *at trial*. *Commonwealth v. Camblin*, 471 Mass. 639, 643 n.9 (2015). The officers here did not offer a scientific opinion and did not do so at trial. The cases the defendant cites are inapposite.

Second, an officer, and indeed any witness, may testify about the observations that he or she made. *See Commonwealth v. Cintron*, 435 Mass. 509, 521 (2001), overruled in part on other grounds, *Commonwealth v. Hart*, 455 Mass. 230, 239-242 (2009) ("The only foundation required for the testimony of lay witnesses is the ability to perceive, recall, and recount information within the witness's personal knowledge."). The case law also expressly recognizes that an officer may testify to the significance of those observations based on his or her training and experience at a motion to suppress. *See Commonwealth*

v. Resende, 474 Mass. 455, 461 (2016) (police may rely on training and experience when concluding someone in possession of a firearm); *Commonwealth v. DePeiza*, 449 Mass. 367, 373 (2007) (police may rely on their experience and training as a basis for reasonable suspicion of a crime); *Commonwealth v. Silva*, 440 Mass. 772, 784 (2004) (same); *Commonwealth v. Shane S.*, 92 Mass. App. Ct. 314, 324 (2017) (same). Accordingly, there was no error.

C. The Judge Correctly Determined the Moment the Defendant was Stopped in The Constitutional Sense and Concluded That it was Supported by Reasonable Suspicion.

Finally, the defendant argues that the motion judge erred in ruling that the stop of the defendant was supported by reasonable suspicion (D.Br.36-44). He first takes issue with the moment of seizure. The defendant mistakenly claims that the judge "located the seizure sometime while Garney's and Abasciano's pursuit of [the defendant] 'continued'" (D.Br.40). That argument is unsupported. The judge unequivocally ruled that the moment of seizure was "at the end of his run" (CA.94). That ruling was proper.

Determining the precise moment at which a seizure occurs is critical to resolving the issue of suppression." *Commonwealth v. Sykes*, 449 Mass. 308, 310 (2007); *accord Commonwealth v. Monteiro*, 71 Mass. App. Ct. 477, 483 (2008). "Not every encounter between a law enforcement official and a member of the public constitutes an intrusion of constitutional dimensions that requires justification." *Commonwealth v. Gomes*, 453 Mass. 506, 510 (2009). Instead, "police officers may approach individuals on the street to ask them about their business without implicating the balance between State power and individual freedom." *Commonwealth v. Narcisse*, 457 Mass. 1, 5 (2010). Here, the judge properly ruled that the defendant was not seized until the end of his run when Officer Abasciano demanded that the defendant "stop show me your hands!", and by that point the police had at the very least reasonable suspicion to believe that he illegally possessed a firearm.

To start, Officer Abasciano's initial attempt to speak with the defendant did not rise to the level of a constitutional stop. A person is not seized for the purposes of Article 14 until "'a reasonable person

would have believed that he was not free to leave.'" *Commonwealth v. Barros*, 435 Mass. 171, 175-76 (2001) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Mere questions posed by an officer to an individual do not constitute a seizure. *See Commonwealth v. Lopez*, 451 Mass. 608, 611 (2008); *Commonwealth v. Fraser*, 410 Mass. 541, 544 (1991). A command by an officer --that is, a statement that necessarily "demands obedience" -- however, will transform the encounter into a seizure. *Lopez*, 451 Mass. at 610; *see also Stoute*, 422 Mass. at 789 ("hold up a minute," said after officers in car followed two young men and pulled up beside them was not seizure); *Barros*, 435 Mass. at 174-176 ("Hey you. I wanna talk to you. Come here," constituted a seizure because the officer said it while walking towards and pointing at the defendant); *Fraser*, 410 Mass. at 544 (officer did not seize defendant when he asked him to take his hands out of his pockets).Here, there was nothing compulsory about Officer Abasciano's attempt to engage the defendant in conversation, and that attempt did not constitute a seizure.

The defendant also was not seized when Officer Garney exited the wagon. As ruled by the judge, opening the door to the vehicle, without more, was not a show of authority (CA.93). Moreover, the defendant broke into a full sprint before Officer Garney even opened the door (CA.80). That the defendant ran away from the officer is indicative of the fact that he felt free to leave. *See Commonwealth v. Martin*, 467 Mass. 291, 303 (2014) (that officer "called out to [the defendant] to hold up or stop or we want to speak with you" was not a stop in the constitutional sense as shown by the defendant's action of continuing to walk away from the police); *Sykes*, 449 Mass. at 313 ("plainly the defendant felt free to leave, because his response to the officers' inquiry was to pedal away quickly."). Thus, the defendant was not seized at that point.

Nor was the defendant seized in the constitutional sense when Officer Garney chased after him without words of command, a show of authority, or blocking or changing the defendant's path. "Whether a police 'pursuit' will be considered a seizure depends on the particular nature of the law enforcement

action." *Sykes*, 449 Mass. at 312; *accord Commonwealth v. Isaiah I.*, 450 Mass. 818, 822 (2008). While law enforcement officers must have justification for "pursuit," officers are in pursuit only when their actions would communicate to a reasonable person their attempt to capture or otherwise intrude on the person's freedom of movement. *See Commonwealth v. Watson*, 430 Mass. 725, 731 (2000); *Commonwealth v. Williams*, 422 Mass. 111, 116 (1988). Again, the defendant started to run before Officer Garney even exited the car (CA.80). Where no police action prompted the defendant's flight, running after the defendant does not constitute a seizure. *See Powell*, 459 Mass. 578 ("the defendant's flight was not prompted by anything the police did"); *Franklin*, 456 Mass. at 822-823 (same).

"[F]ollowing a person, presumably at a rate of speed sufficient to keep him in sight, does not amount to a seizure absent some additional assertion of authority, by direct verbal communication ("stop") or otherwise (blocking, use of flashers)." *Franklin*, 456 Mass. at 822. An officer's act of getting out of a vehicle and running after an already-running defendant

does not itself turn police surveillance into a constitutional stop. *See Commonwealth v. Battle*, 365 Mass. 472, 474-75 (1974) (police officers' immediately stopping their car, getting out, and pursuing defendants into outer hallway of building did not constitute seizure); *see also Commonwealth v. Rock*, 429 Mass. 609, 612 (1999) (no seizure where police followed defendant in unmarked cruiser, did not activate sirens or lights, stopped, left cruiser, and asked if they could speak with defendant briefly); *Commonwealth v. Perry*, 62 Mass. App. Ct. 500, 502 (2004) ("merely running after a running person, without more, does not effect a seizure in the constitutional sense."); *Commonwealth v. O'Laughlin*, 25 Mass. App. Ct. 998, 999 (1988) (officers, who had been following the defendant on foot, did not seize defendant by running after him when he began to run).

It is in this way this case can be distinguished from a case like *Commonwealth v. Meneus*, 476 Mass. 231 (2017), upon which the defendant relies in his argument (D.Br.39). In *Meneus*, the defendant was part of a group that initially was cooperative with police and responded to questions about a recent shooting;

however, once the police announced an intention to pat frisk everyone in the group, the defendant backed away, and an officer pursued him. 476 Mass. at 235. The court ruled that the officer pursuit of the defendant, after the defendant refused to submit to a request, added a "compulsory dimension" to the encounter, transforming it into a stop. *Id*. There was no such compulsion here. There was never a request from the officers that the defendant do anything (CA.77, 80). Indeed, they merely asked if he had witnessed anything from a nearby shooting while driving alongside him for 100 yards (CA.77). There was never a request that the defendant do anything followed by pursuit. The case at bar is simply factually different than *Meneus*.

Regardless, even if the Court were to conclude that the defendant was seized constitutionally when he began to run, the seizure was supported by reasonable suspicion. *Commonwealth v. Warren*, 475 Mass. 530, 534 (2016), upon which defendant relies (D.Br.41), does not prove otherwise. First, *Warren* can be distinguished on its facts. There, this Court "held that it was unreasonable to stop pedestrians twenty-

five minutes after, and one mile away from, a breaking and entering where they did not match the description provided to the police." *Commonwealth v. Mendez*, 476 Mass. 512, 518 n.6 (2017) (citing *Warren*, 475 Mass. at 535-536).

Here, in contrast, a murder had been committed, thirteen minutes before and half a mile away (CA.76). It was important that the police were investigating a murder and shooting, and while that factor does not negate the obligation of the Commonwealth to establish reasonable suspicion, the "gravity of the crime and the present danger of the circumstances" may be considered as a factor in the reasonable suspicion calculus. *Id*. at 239; *Depina*, 456 Mass. at 247.

The defendant was also half of mile from the scene of the murder thirteen minutes after the murder (CA.76). Geographic and temporal proximity is another factor adding to the reasonable suspicion calculus. *See Meneus*, 476 Mass. at 240. The defendant was nervous and evasive refusing to make eye contact or even look at the police (CA.76). *See Commonwealth v. Alvarado*, 420 Mass. 542, 551 (1995).

Most critically, the officer observed behavior that reasonably led them to believe that the defendant was carrying an unlicensed firearm. This case is like, if not stronger than, *DePezia*, a case in which the Supreme Judicial Court held that the police had reasonable suspicion to believe that the defendant was carrying an unlicensed firearm based on the way the defendant was walking with his right arm stiff appearing to hold something heavy, his nervousness while speaking with police, his keeping his right arm out of view from the police, and his actions of looking as if he were about to run. *Id*. The Court held that there was reasonable suspicion to frisk the defendant because of the firearm incidents in the area, the way in which the defendant's was walking, which the officer's knew from training indicated that the defendant was carrying a firearm, and the defendant's attempt to conceal whatever item was in his possession. *Id*. at 371-372.

Here, all the same (if not more) factors are present. The officers were a mile and a half away from a shooting that had taken place thirteen minutes before (CA.76). The defendant refused to speak with

the police and held his right hand tightly to his side as if clutching an object in his pocket (CA.76-77). The defendant bladed his body to the left side, which shielded his right side from the police (CA.77). At the same time, he appeared as if he was looking for a way to escape (CA.77). Even if this Court were to conclude, notwithstanding well- established case law suggesting otherwise, that the moment of seizure arose when the defendant began to run, the facts amply established reasonable suspicion to believe that the defendant unlawfully possessed a firearm at that point.

Finally, without any factual basis for asserting that race played a part in the case, the defendant argues that the Court must consider the "reality of being black in Boston," (D.Br.44), which, he contends, serves to negate a number of factors (D.Br.41-49), that support the judge's conclusion that reasonable suspicion existed. To that end, he posits a number of possible innocent explanations for the defendant's behavior. "That there may be an innocent explanation for the defendant's actions 'does not remove [those actions] from consideration in the reasonable

suspicion analysis.'" *Gomes*, 453 Mass. at 511 (citing *DePeiza*, 449 Mass. at 373). Moreover, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Gonzalez*, 93 Mass. App. Ct. at 11. Very simply, the defendant has not shown that the judge erred in his determination that reasonable suspicion supported the stop.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the order denying the defendant's motion to suppress.

Respectfully submitted
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ADDENDUM TABLE OF CONTENTS

G**.L. c. 265, § 1. Murder defined.**

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

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

(a). (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.

****

(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.

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k) and Mass. R. App. P. 20(a)(2)(F). The brief is in 12-point Court new with 10 CPI and has a length of 43 pages.

/s/ Cailin M. Campbell
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COMMONWEALTH'S CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service on the defendant by e-filing a copy of the brief and record appendix.

/s/ Cailin M. Campbell
CAILIN M. CAMPBELL
Assistant District Attorney

December 18, 2019