COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-12808

COMMONWEALTH OF MASSACHUSETTS
APPELLEE

v.

TYKORIE EVELYN,
DEFENDANT-APPELLANT

BRIEF OF AMICI CURIAE THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, THE NEW ENGLAND INNOCENCE PROJECT, and THE PUBLIC DEFENDER AND PRIVATE COUNSEL DIVISIONS OF THE COMMITTEE FOR PUBLIC COUNSEL SERVICES IN SUPPORT OF THE DEFENDANT-APPELLANT

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STATEMENT OF INTEREST

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files *amicus curiae* briefs in cases raising questions of importance to the administration of justice.

The American Civil Liberties Union of Massachusetts, Inc. (ACLUM), an affiliate of the national ACLU, is a statewide nonprofit membership organization dedicated to the principle of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. ACLUM has a longstanding interest in addressing persistent racial inequalities in the Commonwealth's justice

system. *See, e.g.*, *Commonwealth v. Warren*, 475 Mass. 530 (2016); *Commonwealth v. Laltaprasad*, 475 Mass. 692 (2016).

The New England Innocence Project (NEIP) is a nonprofit organization dedicated to correcting and preventing wrongful convictions in the six New England states. In addition to providing pro bono legal representation to individuals with claims of innocence, NEIP advocates for legal and policy reforms that will reduce the risk of wrongful convictions. This includes advocating for the increased use of reliable scientific evidence and the exclusion of "common sense" misconceptions and assumptions to guide judicial decision-making. NEIP is committed to raising public awareness of the prevalence, causes, and costs of wrongful convictions, including bringing to light the racial disparities that exist within the criminal legal system and that have led to a disproportionate number of people of color who have been wrongfully convicted.

The Committee for Public Counsel Services (CPCS) was created by the Legislature in 1983 "to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services" to indigent parties in the Commonwealth. St. 1983, c. 673, codified in G. L. c. 211D, § 1. Together, the Public Defender Division (PDD) and the Private Counsel

Division (PCD) of CPCS are responsible for the representation of indigent adult criminal defendants, at both the trial and appellate levels. The issues addressed in this brief will affect many of the thousands of defendants that CPCS public defenders and appointed counsel represent every year. See *Patton v. United States*, 281 U.S. 276, 304 (1930) ("Whatever rule is adopted affects not only the defendant, but all others similarly situated") (citation, quotation marks omitted).

STATEMENT OF ISSUES

The Court has solicited amicus briefs on three issues, of which Amici's brief addresses the following two:

2. Whether the defendant's behavior gave rise to reasonable suspicion that he was engaged in any crime when he was seized, where he was in the vicinity of a reported shooting and assumed a "bladed" stance (i.e., turned his body so as to keep one side further away from the police), and where the defendant's expert witness testified that to date, there was no research showing that a "bladed" stance is a reliable indicator that a person is concealing a weapon.

3. Whether the motion judge properly rejected expert testimony concerning "stereotype threat," i.e., a person exhibiting certain behaviors or discomfort due to fear of being stereotyped in a negative way rather than due to consciousness of guilt.

Amici submit that the answer to both is, "No." The Defendant's behavior did not give rise to reasonable suspicion, and the motion judge improperly rejected expert testimony regarding stereotype threat.

STATEMENT OF THE FACTS

I. Policing by the Numbers.

Between 2007 and 2010, 63 percent of all police-initiated civilian encounters in Boston involved a black target.[1] This means that more

[1] Jeffrey Fagan et al., "Stops and Stares: Street Stops, Surveillance, and Race in the New Policing," 43 Fordham Urb. L. J. 539, 568 (2016), *available at* https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2658&conte

than three out of five Boston police stop-and-frisks during this period involved a black civilian despite the fact that black people represent just 25 percent of Boston's population.[2] Crime rates do not explain the disparity. Even controlling for crime, Boston police officers were statistically more likely to initiate encounters in black neighborhoods and with black people, particularly young black men.[3]

Amici include these numbers here because they are facts. The case before the Court cannot be divorced from these statistics and the documented reality of racially disparate policing in Boston. Amici accordingly ask that the Court keep these statistics in mind while considering this case.

II. The Night of January 9, 2017.

On January 9, 2017, at around 7:27 pm, Boston police officers responded to the area of 2 Dearborn Street in Roxbury for a call of shots

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xt=ulj. In this report, "police-initiated civilian encounters" do not include traffic stops.

[2] See United States Census Bureau, QuickFacts: Boston city, Massachusetts, www.census.gov/quickfacts/boston citymassachusetts (estimating Boston's black population at 25.3% as of July 1, 2018).

[3] *See* Fagan et al., at 552.

fired. Reports indicated that three people ran from the scene, but there were no physical descriptions of those people.[4]

Officers Joseph Abasciano and Brian Garney, both white, were on patrol that night in a patrol wagon.[5] Upon hearing the radio call, they drove in the opposite direction of the suspects' flight path and into Lower Roxbury.[6] The officers would later claim that they chose to canvas this area——a densely-populated black residential neighborhood——because it was, according to them, "high crime."[7]

At around 7:50 pm, the officers spotted Tykorie Evelyn, a black seventeen-year-old,[8] walking by himself on Dewitt Drive toward Melnea Cass Boulevard, with his hands in his pockets.[9] According to the officers, he appeared to be holding onto something in his right

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[4] Tr. II/69 (Abasciano testifying that radio call provided no physical description).

[5] Appx. Vol. I, 26; Tr. II/15-16.

[6] Tr. II/21-22.

[7] Tr. II/171.

[8] The officers were aware of Tykorie's youth. Their incident report states that they did not bother asking him for a firearm license because it was obvious from his appearance that he was underage. Appx. Vol. II, 106.

[9] Tr. II/24-25.

pocket.[10] At the time, Abasciano and Garney did not have any information about the shooting besides the initial radio call, which reported only that several people had fled the area.[11] Nevertheless, they claim to have found Tykorie "out of the ordinary."[12] They began to tail Tykorie, slowing the cruiser to drive directly beside him for close to 100 yards.[13] Tykorie turned away from them, did not make eye contact, and kept walking.[14]

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[10] Tr.II/114.

[11] Tr. II/74-75.

[12] *See* Tr. II/156:

Q: So, the fact that somebody was on the street at 7:30 at night in a residential area was out of the ordinary to you?

A: To me [yes], due to the fact of the temperature being as cold as it was, I wouldn't be outside personally.

Q: Well, would you be outside if you were walking home?

A: I drive home, ma'am.

[13] Tr. II/25-26.

[14] Appx. II, 114. The officers described Tykorie's turning away as taking a "bladed stance." See, e.g., Tr. II/144. The motion judge accepted Officer Abasciano's testimony that blading "means to turn one's body so that one side, usually the side where contraband is kept, is further away from an authority figure." Appx. II, 114. But as Officer Garney acknowledged, people also turn away when they want to *walk* away. *Id*.

At an intersection, Abasciano finally spoke, calling out the window to Tykorie, "Hey man, can I holler at you?"[15] Tykorie said, "For what?" and continued walking, not looking at the officers.[16] Abasciano replied, "I just want to know if you saw anything or heard anything."[17] Tykorie answered again, but the officers did not hear his response.

At this point, after driving alongside Tykorie for approximately the length of a football field and exchanging a few dozen words, the officers concluded that Tykorie might be carrying an illegal weapon.[18] They based their conclusion on the fact that Tykorie's hands were in his pockets, he did not want to speak to them, and he was turning his body away.[19] Garney opened the passengers' side door of his cruiser, and Tykorie ran.[20]

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[15] Tr. II/28.

[16] Tr. II/28-29.

[17] Tr. II/29.

[18] Tr. II/116.

[19] Appx. Vol. II, 114-115; Tr. II/116.

[20] Tr. II/116.

SUMMARY OF ARGUMENT

Courts assessing the constitutionality of a search or seizure must resolve two basic questions in every case. First, how likely is it that a crime is being committed? And second, is that likelihood strong enough to justify a search or a seizure? That likelihood, or "reasonable suspicion," must be grounded on two things: specific articulable facts, and the reasonable inferences drawn from these facts.

It is incumbent upon the courts to rigorously test the reasonableness of both facts and inferences. However, despite the purported rigor of search and seizure analysis, courts too often allow police officers to infer suspicion from innocent or ambiguous conduct, and then justify the reasonableness of those inferences using three magic words: "training and experience." This unquestioned deference to police officer inferences erodes the reasonable suspicion standard so that almost any set of facts——the suspect walked too fast or too slow, made too much eye contact or too little, drove a vehicle that was too dirty or too clean, was too nervous or too calm——can support an inference of criminality. "Training and experience" cannot be used to paper over a baseless search.

Here, the Court has asked whether Tykorie's behavior——being within a half-mile radius of a reported shooting and/or in a supposedly "high crime" area; having his hands in his pockets and not making eye contact; and turning his body away from the officers——gave rise to the reasonable suspicion that he was engaged in a crime. Amici submit that the answer must be no.

First, in order for an inference of criminality drawn from an individual's behavior to be reasonable, it must be grounded in context. Here, that context is a black teenager being tailed by a cruiser driven by two armed white police officers on an empty Boston street. Given this backdrop, the fact that Tykorie did not make eye contact, turned his body away, and kept walking may indicate nothing more than a desire to avoid engaging with the police, and the fact that he ran when the police encounter escalated may indicate nothing more than fear for his safety.

Race affects both participants in a police-civilian encounter. It affects how someone responds to police presence, *and* how the police interpret that person's behavior. On the police side, there is ample empirical evidence that implicit racial bias causes police officers to view black people, particularly black men, as more suspicious even as

they engage in ordinary behavior, such as walking home in their neighborhood with their hands in their pockets on a cold night. On the civilian side, there is empirical evidence that stereotype threat causes black people to adjust their behavior and exhibit signs of nervousness during situations involving perceived biases against them, including police encounters. The law of search and seizure should reflect this reality.

Second, the data behind police-citizen interactions increasingly shows that police officers are no better at deducing criminality from body language than the average person. Given this, it is inappropriate for courts to rely on a police officer's opinion about indicators of criminality, like Tykorie's "bladed" stance, merely by reference to the officer's "training and experience." This Court must look behind that label to ensure that the officer's inference has some basis in empirical reality. Unsubstantiated deference to officers' asserted "training and experience" will result in arbitrary stops, and invite implicit biases into the calculus.

Third, courts must be careful of which specific, articulable facts they credit as a basis for suspicion. Certain facts, like the target of a stop being in a supposedly "high crime" area, are not facts at all, but

conclusions. Too often, "high crime" simply means a low-income neighborhood where people of color live. To support a finding of reasonable suspicion, courts should not only probe the underlying basis for these conclusions, but also require officers to justify why that designation is relevant to the particular stop at issue. Here, the fact that Tykorie was walking in a neighborhood branded "high crime" by the police did not give rise to a reasonable inference of criminality; indeed, he was no more likely (and probably less) to be one of the shooters for whom Abasciano and Garney were searching than someone who simply lived in the neighborhood.

Because the Commonwealth has failed to meet its burden to establish that the officers had a reasonable suspicion of criminal conduct based on specific articulable facts, this Court should reverse the motion judge's decision denying the motion to suppress. Alternatively, amici urge this Court to remand this case back to the trial court with clear guidance that: (1) a blanket assertion of an officer's "training and experience" is insufficient for a judicial finding that a person's behavior indicates criminality justifying a seizure; (2) reasonable inferences drawn from a person's behavior are ones that take into account relevant societal factors, including stereotype threat,

biases, and historical and current events, and (3) the use of "high crime" to characterize a neighborhood, without data and a nexus to the person being seized, cannot be used to support a finding of "reasonable" suspicion.

ARGUMENT

I. Motion Judges Must Apply Rigor to the Reasonable Suspicion Analysis.

Under Article 14, "[i]f a seizure occurs, 'we ask whether the stop was based on an officer's reasonable suspicion that the person was committing, had committed, or was about to commit a crime.'" *Commonwealth v. Warren*, 475 Mass. 530, 534 (2016) (*quoting Commonwealth v. Martin*, 467 Mass. 291, 303 (2014)). "That suspicion must be grounded in 'specific, articulable facts and reasonable inferences [drawn] therefrom' rather than on a hunch." *Id*. (*quoting Commonwealth v. DePeiza*, 449 Mass. 367, 371 (2007)).

This Court has held that the articulable facts relied upon by the police must be specific enough to the defendant to distinguish him from an anonymous bystander. *See Warren*, 475 Mass. at 535-538 (finding that the description of the suspects, proximity to the crime, lack of other pedestrians, and defendant's flight did not distinguish defendant from any other black men in the area at the time); *see also Commonwealth v.*

Meneus, 476 Mass. 231 (2017) (description of suspect, presence in a high crime area, proximity to crime, and defendant's flight not sufficiently specific to defendant).[21]

Here, the motion judge found that the following facts were sufficient to support Officers Abasciano and Garney's inference that Tykorie was engaged in or had committed a crime:[22] (1) his hands were in his pockets and he appeared to be holding something in one of them; (2) he did not make eye contact with the officers and "searched for an escape;" (3) he spoke quietly when answering the officers; (4) he turned his body away, which the officers dubbed a "bladed" stance, (4) he was

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[21] The specificity requirement prevents police from sweeping an area around a crime and stopping and searching people at random. *See Commonwealth v. Cheek*, 413 Mass. 492, 496 (1992) (description of suspect as "black male with a black 3/4 length goose" coat insufficient for individualized suspicion, as it could have fit large number of men); *Commonwealth v. Lyons*, 409 Mass. 16, 20 (1990) (anonymous tip could not form basis for reasonable suspicion because it failed to specifically connect defendants to crime reported).

[22] Officers Abasciano and Garney testified and wrote in their police report that they stopped Tykorie because of their belief that he was carrying an unlicensed firearm. Tr. II/101; Appx. Vol. II, 114-115. However, the motion judge's decision went further, finding that the officers had reasonable suspicion that Tykorie "was engaged in some form of criminal activity, potentially murder." Appx. Vol. II, 133.

half-a-mile away from the shooting in a supposedly "high crime" area, and (5) he ran.[23]

Despite the fact that the defense introduced evidence that these facts are unreliable indicators of criminality and/or susceptible to implicit racial bias, and that the Commonwealth itself introduced no evidence at all to support the officers' inferences, the judge denied Tykorie's motion to suppress. In doing so, the judge stated that "[t]here 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."[24]

But Amici are not asking the Court to apply a scientific standard of proof. Officer inferences must be reliable; to be reliable, they must be accurate. Amici are asking the Court to apply the required standard under Massachusetts law, which is one of *reasonableness* and *specificity*. Police officer inferences, even those asserted to be based on training and experience, must be reliable, sufficiently explained and reasonably linked to the suspected crime. A blanket assertion of a

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[23] Appx. Vol. II, at 117-18, 132.

[24] Appx. Vol. II, 135.

police officer's "training and experience" cannot make up for a lack of evidence.

A. Police officers must be required to justify their incriminating inferences beyond a bare reference to "training and experience."

When a police officer "relies on his or her training to draw an inference or conclusion about an observation," this Court has held that the officer "must explain the specific training and experience that he or she relied on and how that correlates to the observations made." *Commonwealth v. Matta*, 483 Mass. 357, 366 (2019); *see also United States v. Johnson*, 171 F.3d 601, 604 (8th Cir. 1999) (although officers are permitted to draw "inferences and deductions that might well elude an untrained person … those inferences and deductions must be *explained*") (emphasis in original). The Fourth Amendment requires officers to justify why their knowledge of particular criminal practices "gives special significance to the apparently innocent facts observed." *Johnson*, 171 F.3d at 604.

This Court has also cautioned that the Commonwealth can "transform[] a police officer into an expert witness by relying on his "special training or expertise." *Commonwealth v. Canty*, 466 Mass.

535, 541 n.5 (2013). Here, both the Commonwealth[25] and the motion judge[26] relied extensively on Officers Abasciano and Garney's training and experience to justify their inferences about Tykorie's behavior. Despite this, the motion judge held that Officers Abasciano and Garney testified only as fact witnesses.[27] The Commonwealth makes the same argument in its brief, arguing that officers who testify based upon their "training and experience" are not offering expert testimony because they are not "offer[ing] a *scientific* opinion."[28]

This is unavailing. Expert testimony can be "based on scientific, technical, *or other specialized knowledge*." *Palandjian v. Foster*, 446 Mass. 100, 107 (2006); *see also Canavan's Case*, 432 Mass. 304, 313 (2000) ("Observation informed by experience is but one scientific technique that is no less susceptible to *Lanigan* analysis than other types of scientific methodology"). Here, Officers Abasciano and Garney offered testimony based on their specialized knowledge as police

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[25] Tr. II/5, 8, 20, 29, 106.

[26] Appx. Vol. II, 111, 118, 135.

[27] Appx. Vol. II, 110 n.1.

[28] Commonwealth Br. at 34 (emphasis added).

officers, in particular their training and experience related to concealed firearms and gangs. Allowing them to give conclusory testimony on these subjects in the face of empirical evidence questioning the reliability of their methods, and with no evidence to support their inferences, was improper.

No other expert witness would be allowed to testify by citing "training and experience" that has no reliable basis in fact or empirical reality. *See Commonwealth v. Nelson*, 91 Mass. App. Ct. 645, 649 (2017) (reiterating that officer testimony gets no greater credence than testimony from anyone else). Just as the defense expert's testimony regarding body language was subject to *Daubert*/*Lanigan* scrutiny, so too should Officers Abasciano and Garney's testimony. To do otherwise would subject only the defense's expert to rigorous analysis, while the Commonwealth's expert is presumed to have the necessary foundation.

To avoid this glaring asymmetry, the Court should hold that police officers must at *least* justify why their training and experience gives special significance to the facts observed, and ground their incriminating inferences in reliable empirical evidence. *Johnson*, 171 F.3d at 604; s*ee also Commonwealth v. Santos*, 2006 Mass. Super.

LEXIS 300, *8 (June 19, 2006) (Agnes, J.)("an officer's training and experience must be applied to specific and articulable facts in such a way that the average reasonably prudent person understands why the facts are indicative of criminal activity. Otherwise, this factor becomes a talisman that would effectively transform the police officer into a judge, and the court into a rubber stamp.).[29]

B. Subjecting police officer inferences to greater scrutiny produces more reliable results.

Research shows that relying on empirically proven grounds for suspicion to justify a search or seizure both (1) increases the effectiveness and fruitfulness of searches, and (2) reduces their racially disparate impact.[30] The inverse is also true. Too much deference to police intuition can lead to reduced accuracy, over-policing, wasted resources, and disparate treatment of communities of color.

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[29] Requiring empirical evidence to support a search is hardly a foreign concept in Fourth Amendment doctrine. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 454-455 (1990) (emphasizing the importance of using "empirical data[,] … [s]tated as a percentage" to demonstrate the "effectiveness" of a particular search); *Berger v. United States*, 388 U.S. 41, 60 (1967) (finding no "empirical statistics" to prove that search procedure served the government's asserted interests).

[30] *See* Sharad Goel et al., *Combatting Police Discrimination in the Age of Big Data*, 20 New Crim. L. Rev. 181, 181 (2017).

For instance, for decades federal narcotics agents have stopped individuals in airports based on an ambiguous "drug courier profile" that stems from their "training and experience". Deference to these agents and their training has produced inconsistent results that are apparent throughout the narcotics case law. *Compare United States v. Millan*, 912 F.2d 1014, 1015 (8th Cir. 1990) (defendant one of first to deplane) *with United States v. Sterling*, 909 F.2d 1078, 1079 (7th Cir. 1990) (defendant one of last to deplane) *and United States v. Buenaventura-Ariza*, 615 F.2d 29, 31 (2d Cir. 1980) (defendant deplaned in the middle); *compare United States v. Sullivan*, 625 F.2d 9, 12 (4th Cir. 1980) (defendant used one-way ticket) *with United States v. Craemer*, 555 F.2d 594, 595 (6th Cir. 1977) (defendant used round-trip ticket).

When both a fact and its opposite are a basis for suspicion, officers have complete discretion in deciding whom to stop and search. Too much deference to the police risks allowing implicit bias to creep into these decisions, driving the racial disparities that currently exist. *See Warren*, 475 Mass. At 539 ("[B]lack men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations."). As explained

below, implicit bias pervades every aspect of an encounter between a police officer and a black civilian, particularly when that civilian is a young black man. If courts refuse to properly scrutinize an officer's inference of criminality, instead allowing the officer to invoke his "training and experience" without evidence to support it, they may be allowing that officer's unconscious bias against black men to influence the suspicion analysis.

Finally, too much deference to police inferences can allow for "drag-netting" or volume-based policing, a practice where police officers simply stop everyone in a certain area. Research shows that this kind of over-policing produces incredibly poor results.[31]

II. The Motion Judge Did Not Subject Officers Abasciano and Garney's Testimony to Appropriate Scrutiny.

Rather than probe the reasonableness of Officers Abasciano and Garney's inferences, or subject them to the same kind of scrutiny he

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[31] *See* ACLUM, Stop and Frisk Report Summary (2014) (finding that, in Boston, out of over 200,000 police-civilian encounters from 2007 to 2010, only 2.5% of these encounters led to a seizure of contraband); Andrew E. Taslitz, Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right, 8 Ohio St. J. Crim. L. 7 (2010) [hereinafter "Police are People Too"] (finding that the New York Police Department made over 500,000 stops in 2006, and only 10% of those stops resulted in an arrest or summonses).

gave to the defense's expert, Dr. Sweet, the motion judge allowed the officers to fall back on a blanket assertion of their "training and experience." This is deeply problematic. As explained below, there is clear evidence that many of the facts the officers relied on here——Tykorie's behavior and mumbling, Tykorie's so-called "bladed" stance, Dewitt Drive being "high crime"——are either unreliable indicators of criminality, unsupported or even contradicted by empirical evidence, susceptible to racial bias, or all three.

A. Nervousness or lack of engagement by a black teenager during a police encounter is not indicative of criminality.

The motion judge found the fact that Tykorie "refused to make eye contact with the police" and the inference that he "searched for an avenue of escape when the police asked to speak to him" suspicious.[32] While the judge noted *Warren*'s holding that avoidance of the police is not necessarily evidence of guilt in a footnote, he failed to follow *Warren's* teaching or even acknowledge that young black men have plenty of non-criminal reasons to avoid engagement with police officers.

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[32] Appx. Vol. II, 132.

In order for an inference of criminality drawn from an individual's behavior to be reasonable, that inference must take into account the context of a police-citizen interaction. Here, that context is a black teenager being followed down an empty Boston street by two armed white police officers in a police cruiser, which drove beside him for the length of a football field. Viewed through this lens, the fact that Tykorie did not make eye contact, slightly turned his body away, and kept walking indicates fear rather than criminality.

This Court has already recognized that "the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department [] report documenting a pattern of racial profiling of black males in the city of Boston." *Warren*, 475 Mass. at 539. Just as actual flight from the police can "easily be motivated by the desire to avoid the recurring indignity of being racially profiled," *id*., so too can mere nervousness and a desire to avoid a police encounter.[33]

[33] It is also noteworthy that throughout this extensive period where the police cruiser was following Tykorie, approximately 100 yards, he did not flee.

There is ample evidence that implicit bias causes police officers to view black men as more suspicious even as they engage in ordinary behavior, due in large part to the stereotype of black men "as violent, hostile, aggressive, and dangerous."[34] Researchers consistently find that young black men attract more scrutiny and capture a viewer's attention faster than young white men.[35] This is true even as they engage in perfectly innocent behavior, such as walking home in their neighborhood with their hands in their pockets on a cold night.

Professor L. Song Richardson conducted a comprehensive review of psychological research and its effect on policing in 2012. She

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[34] *See* L. Song Richardson, "Arrest Efficiency and the Fourth Amendment," 95 Minn. L. Rev. 2035, 2039, 2044-2052 (2011) (examining hit-rate statistics from seven states and major cities and drawing from over a dozen psychological studies to analyze implicit bias in police-citizen encounters) [hereinafter "Arrest Efficiency"]; *see also Pippen v. State*, 854 N.W.2d 1, 33 (Iowa 2014) (J. Waterman, concurring specially)(citing Arrest Efficiency in discussion of implicit bias)

[35] *See* Arrest Efficiency at 2044 (citing Jennifer L. Eberhardt et al., "Seeing Black: Race, Crime, and Visual Processing," 87 J. Personality & Soc. Psychol. 876, 881, 883, 885-87 (2004) (finding that research subjects, primed with crime-related words or photographs below the level of conscious awareness, were drawn to black faces earlier and for longer time periods than to white faces)).

reviewed arrest statistics from seven cities and states, and described what was revealed there as follows:

> [P]olice attention may be drawn to … young men who look stereotypically black in particular, regardless of whether these individuals are engaged in suspicious behavior. Once their attention is captured, automatic stereotype activation can cause officers to interpret behavior as aggressive, violent, or suspicious even if identical behavior performed by a white individual would not be so interpreted. When officers approach the individual to confirm or dispel their suspicions, implicit biases can cause officers to behave aggressively without realizing it. The confronted individual may respond in kind, fulfilling officers' beliefs that the individual is suspicious and aggressive. This entire series of events, triggered not by conscious racial animus but by implicit racial biases, will likely result in officers conducting a frisk. All the while, officers will be unaware that the behavioral effects of their implicit bias triggered the entire chain of events. In the end, officers may stop and frisk black individuals, whom they would not have deemed suspicious if they had been white, not because of bigotry or conscious considerations of race, but because of implicit cognitions.[36]

Black men are well aware of these stereotypes and how they affect policing.

Given this context, the defense's expert testimony about stereotype threat was essential evidence that should have been considered in the motion judge's analysis of whether the officers'

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[36] Arrest Efficiency at 2053.

opinion on suspiciousness was reasonable. The motion judge stated in a footnote that the studies defense cited on stereotype threat and tension during cross-racial interactions were "unhelpful" because the defense's expert did not author them. Appx. Vol. II, 124 n.12. See also Appx. Vol. I, 3 (identifying the studies at issue). This is a plainly incorrect standard. There is no *Daubert/Lanigan* requirement that an expert personally author every study on which she testifies.

As the defense's expert testified, stereotype threat is a well-established phenomenon that refers to an individual's fear of confirming negative stereotypes about their racial, ethnic, gender, or cultural group.[37] The term was coined decades ago by the researchers Claude Steele and Joshua Aronson, who performed experiments that showed that black college students performed worse on standardized tests than their white peers when they were told, before taking the tests, that the test was designed to assess intelligence and aptitude.[38] When assessing intelligence was not emphasized as the goal of the test,

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[37] Tr. II, at 42-42.

[38] *See* Claude Steele and Joshua Aronson, "Stereotype threat and the intellectual test performance of African Americans," 69 J. of Personality and Social Psychology 797, 797 (1995).

however, black students performed better and equivalently with white students.[39] The results showed that an individual's performance can be harmed by the awareness that his or her behavior might be viewed through the lens of racial stereotypes——in that case, the stereotype that black students are not as smart as white students.

Stereotype threat can be triggered whenever an individual believes that a situation presents the possibility to confirm a negative stereotype of a group of which he is a member. The threat of possibly confirming the stereotype can interfere with the subject's performance in a variety of tasks, often inadvertently increasing their likelihood of conforming to the stereotype.[40] Increasingly and unsurprisingly, research shows that police targeting of young black men may cause these young men to experience stereotype threat during interactions with police officers, where the stereotype at play is criminality.[41]

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[40] Phillip Atiba Goff, "Stereotype Threat and Racial Differences in Citizen's Experience of Police Encounters," 39 L. and Human Behavior 463, 465 (2015).

[41] *Id*.

For example, the defense cited a study conducted by Bette Bottoms, Cynthia Najdowski, and Phillip Goff, which found that 27 percent of black college students reported that even during a low-stakes interaction with a police officer, they expected the officer to suspect them of being a criminal.[42] By contrast, only 3 percent of white college students had similar fears.[43] The scenario that Bottoms, Najdowski, and Goff asked participants, all college-age males, to visualize was this:

> It's about l0:00 pm and you're on your way home for the night. You just got off the bus and you're walking down the street carrying a backpack filled with various things you needed throughout the day. Only two more blocks and you'll be home. Before you cross the street to get to your building, a police officer walks out of the corner convenience store, a little ways in front of you. When he sees you, he stops and stands there. The officer is obviously watching you as you approach.[44]

Despite the theoretically low stakes of the encounter——the participant is innocent of any wrongdoing and the officer has not said or done anything to engage them——a significantly larger portion of black participants reported that they fully expected the officer to conclude

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[42] *Id.*

[43] *Id.*

[44] *Id.* at 467.

they were criminals. For instance, black participants responded that "I would feel like he suspects me of doing something because I'm black;" "I would think that the officer is racially profiling me and is probably thinking that I stole one of the items in my bookbag;" and "Not surprised, because being black people notice me at night, as if I'm a criminal."[45]

Importantly, the study found that the more black participants reported being concerned about being stereotyped, the more likely they were to monitor their behavior——to be self-conscious about how they were acting or wonder what the police officer thought of them. This translated into black participants anticipating that they would freeze up, look nervous, try to avoid looking nervous, or avoid making eye contact during the encounter.[46] As the defense's expert explained:

> [W]hen the Caucasian officer interacts with an African-American male, that African-American male, irrespective of whether he's the criminal or not, is going to experience discomfort because of the stress involved in these interracial interactions.
>
> And so, part of stereotype threat, it's that diminished cognitive capacity. It doesn't mean someone is unintelligent. What it means is in this moment I'm

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[45] *Id.*

[46] *Id.* at 470.

> experiencing high levels of physiological stress arousal. So, I'm not able [] to collect my thoughts. I might have speech disruptions, speech hesitations. Perhaps I'm not articulating myself loudly or clearly enough. I could feel anxious. And so, if I'm anxious, I might fidget. I might avert my gaze. I might rock back and forth like I was explaining earlier.
>
> And then there's also physiological things happening. So, for example, elevated heart rate, increased respiration, perspiration. And incidentally, these are behaviors that many law enforcement officers think are associated with deception. When in reality, [] it's a stress response. It's [] anxiety kicking in.[47]

Now take Tykorie. His encounter with Officers Abasciano and Garney was much higher stakes than the one described in the study: not one police officer alone on foot, but two in a cruiser; not passive surveillance from afar but two officers actively tailing him, driving directly beside him in their cruiser for a significant distance; not a commercial city street with open store fronts and witnesses, but a residential Boston neighborhood with no one around. Given the circumstances, and the specific context of the relationship between Boston police and black Boston residents, stereotype threat was a factor the judge should have considered in assessing Tykorie's reactions.

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[47] Tr. I, 45-46.

B. The motion judge improperly credited officer Abasciano's testimony about Tykorie's so-called "bladed stance" as reasonable without a reliable basis.

Abasciano testified that Tykorie adopted a "bladed stance" while talking to the officers. Although the behavior Abasciano described was simply Tykorie turning his body away from the officers, both Abasciano and the motion judge consistently used the word "bladed." The motion judge defined it as "to turn one's body so that one side, usually the side where contraband is kept, is further away from an authority figure"[48] and to turn "[one's] body away to conceal a side of [the] body."[49]

Under this definition, "bladed stance" is not an articulable fact, but a conclusion. It assigns a suspicious purpose to an innocent gesture, conveying not only that Tykorie turned his body away, but that he did so for reasons indicative of criminality.[50] The articulable fact is Tykorie's actual behavior, turning his body; "blading" is an inference.

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[48] Appx. Vol. II, at 114.

[49] Appx. Vol. II, at 118.

[50] Even the term itself——"bladed" or "blading"——is sinister and evocative of weapons.

In order for Abasciano's testimony about blading to be reasonable, there must be some link between the articulable fact (turning one's body away) and the conclusion (hiding a weapon or contraband). But as the defense pointed out, the "blading" conclusion has no reliable empirical basis. There is no research to support the idea that turning one's body away is indicative of gun possession, a fact the motion judge acknowledged in his ruling.[51] The Commonwealth acknowledged the lack of research in its brief, stating "there [are] no studies *at all* studying, through experimental design, characteristics that individual[s] may display while armed."[52] While the Commonwealth seems to believe this point somehow supports its argument, the Commonwealth is the party with the burden of production here, both to support the proffered testimony and the warrantless search it seeks to justify. It must have *some* obligation to show that the officer's training is grounded in empirical reality sufficient to support accurate conclusions. The officer's observations must have a reliable basis for suspicion. Instead, the motion judge fully credited Abasciano's

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[51] Appx. Vol. II, at 125 (emphasis in original).

[52] CW's Br. at 33.

testimony, pointing only to his training and experience as a police officer and marine.

That cannot be enough. The limited empirical research on concealed carrying is clear about one thing: police officers are no better than the average person at detecting when a suspect is carrying a weapon.[53] In fact, the research found a *negative* correlation between officer experience and accuracy, suggesting that police training and experience actually interferes with one's ability to detect a concealed weapon.[54]

Permitting police officers to testify using quasi-terms of art like "blading" without requiring that testimony to be grounded in fact is pernicious in multiple ways. First, it insulates their incriminating inferences from judicial review. Second, it creates precedential entrenchment that enables police to continue to pursue investigatory strategies without any reliable empirical basis, reducing the effectiveness of searches. Third and most importantly, given the reality

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[53] Appx. Vol. II, at 122 ("There were no significant differences between officers and civilians on accuracy.")

[54] *Id.*

of policing, poverty, and race in Boston, overreliance on police intuition will have a disparate impact on people of color.

C. The Motion Judge Improperly Credited Both Officers' Testimony That Lower Roxbury Was "High Crime" Despite A Lack of Specific, Articulable Facts.

Officer Garney testified that he considered the area where Tykorie was stopped in lower Roxbury——on Dewitt Drive, a tree-lined residential street——to be a "high crime area."[55] In concluding that police had probable cause, the motion judge observed both that Tykorie was in a "high-crime area" and that he was "a half-mile from the shooting."[56]

The judge cannot have it both ways. Either Tykorie was stopped because the officers suspected he was the shooter, in which case the "high crime" designation has no bearing on the analysis and contributed nothing to the officers' ability to distinguish Tykorie from any other black teenager in Roxbury, or Tykorie was stopped because he was suspected of carrying an unlicensed firearm, and not because he was a suspect in the shooting, in which case his proximity to it was irrelevant.

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[55] Tr. II/171.

[56] Appx. Vol. II, 132.

This Court has explicitly acknowledged that "[w]here there is a report of a crime in a neighborhood which police consider to be a 'high crime area,' law enforcement officials may not conduct a broad sweep of that neighborhood stopping individuals who happen to live in the area and be about, hoping to apprehend a suspect." *Cheek*, 413 Mass. at 496.

Like "blading," the term "high crime area" is not a fact in and of itself, but a conclusory label about a particular neighborhood. This Court had held that "[t]he term 'high crime area' is itself a general and conclusory term that should not be used to justify a stop or a frisk, or both, without requiring the articulation of specific facts demonstrating the reasonableness of the intrusion." *Commonwealth v. Johnson*, 454 Mass. 159, 163 (2009).

Despite this, many lower courts are remarkably lax in scrutinizing police officers' claims about high crime areas. The most common approach is deference to the officer's expertise and adopt his bald testimony that an area is "high crime" without any additional proof or relevant connection to the individual case. Given the empirical evidence that police officers are susceptible to implicit racial bias, as well as the unquestionable fact that most so-called high crime areas are

home to communities of color,[57] such unsubstantiated conclusions should not be considered without an underlying factual basis to support them.

If a defendant's presence in a so-called "high crime" area is going to continue to be part of the reasonable suspicion calculus, Amici urge the Court to require that it be supported by specific and articulable facts. At the very least, the officer should be required to establish the geographic scope of the area,[58] the basis of their assessment that the

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[57] Ben Grunwald & Jeffrey Fagan, The End of Intuition-Based High-Crime Areas, 107 Cal. L. Rev. 345, 388–89 (2019) ("[M]oving from a block group without any Black residents to a block group with 100 percent Black residents is associated with an 8 to 9 percent increase in the probability that an officer will call the area high crime."); *see also* Fagan et al., at 592–93 ("The pattern of race effects suggests evidence of disparate treatment in FIO activity based on neighborhood racial composition. After controlling for local crime rates, we observe higher rates of FIO activity for census tracts based on their Black or Hispanic racial composition, whether in residents, arrestees, or the race of known crime suspects.*")*.

[58] Other courts have demanded that the "high crime" designation encompass only narrow geographic areas, such as a block or a street. For example, in *United States v. Montero-Camargo*, the Ninth Circuit cautioned lower courts to "be particularly careful to ensure that a 'high crime' area factor is not used with respect to entire neighborhoods ... but is limited to specific, circumscribed locations." 208 F.3d 1122, 1138–39 (9th Cir. 2000) (en banc).

area is high crime, and how the high crime designation makes it more likely that *this* particular suspect is engaged in *this* particular crime.[59]

Here, it does not appear that the motion judge imposed any such limitations on the police designation of the area where Tykorie was stopped as high crime. The judge noted only that "Garney knew the area [undefined] to be high-crime and that it was the site of ongoing gang-related violence"[60] and "the encounter occurred in and around Ruggles and Kerr, which Garney described as a high crime area."[61]

This bare conclusory statement is simply insufficient. At the time of the encounter, the officers had no information about the shooting save that there were multiple individuals involved. They had no description of the suspects, and no information that the shooting was linked to gang activity. Without any empirical evidence that characterization of the area had predictive power over whether or not Tykorie was carrying a firearm, the "high crime" designation is as useless as it is unsupported. *See, e.g., Commonwealth v. Cheek*, 413

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[59] Ben Grunwald and Jeffrey Fagan, "The End of Intuition-Based High-Crime Areas," 107 Cal. L. Rev. 345 (2019).

[60] Appx. Vol. II, at 115.

[61] Appx. Vol. II, at 118.

Mass. 492, 496 (1992) (mere fact that defendant was in the vicinity of the crime, matched non-specific suspect description, and was in supposed high crime area was insufficient to justify a stop, as these facts "could have fit a large number of men who reside in the Grove Hall section of Roxbury.")

CONCLUSION

Because the Commonwealth has failed to meet its burden to establish that the officers had a reasonable suspicion of criminal conduct based on specific articulable facts, this Court should reverse the motion judge's decision denying the motion to suppress. Alternatively, amici urge this Court to remand this case back to the trial court with clear guidance that: (1) a blanket assertion of an officer's "training and experience" is insufficient for a judicial finding that a person's behavior indicates criminality justifying a seizure; (2) reasonable inferences drawn from a person's behavior are ones that take into account relevant societal factors, including stereotype threat, biases, and historical and current events, and (3) the use of "high crime" to characterize a neighborhood, without data and a nexus to the person being seized, cannot be used to support a finding of "reasonable" suspicion.

Respectfully submitted,

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 17(C)(9)

I, Ned Melanson, certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Rules 17 and 20. This brief contains 6,317 non-excluded words, which I ascertained using Microsoft Word 2016's word count function. The brief uses Times New Roman 14-point font and was composed in Microsoft Word 2016.

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CERTIFICATE OF SERVICE PURSUANT TO MASS. R. APP. P. 13(e)

I, Ned Melanson, certify that on December 20, 2019, on behalf of amici the Massachusetts Association of Criminal Defense Lawyers, the American Civil Liberties Union of Massachusetts, the New England Innocence Project, and the Public Defender and Private Counsel Divisions of the Committee for Public Counsel Services, I electronically filed the foregoing *Brief Amicus Curiae in Support of Defendant-Appellant* in Commonwealth v. Tykorie Evelyn, SJC-12808, via e-fileMA, with which counsel for Defendant-Appellant (K. Hayne Barnwell), and counsel for Appellee (Cailin Campbell) are registered and will receive automatic service. To the best of my knowledge, the contact information of the aforementioned counsel is:

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