SJC-13103

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

COMMONWEALTH

v.

EARL GARNER

BRIEF AMICI CURIAE FOR THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE NEW ENGLAND INNOCENCE PROJECT IN SUPPORT OF THE DEFENDANT & AFFIRMANCE OF THE SUPPRESSION ORDER

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PREPARATION OF AMICUS BRIEF

Pursuant to Appellate Rule 17(c)(5), amici and their counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;

(b) no party or party's counsel contributed money to fund preparing or submitting the brief;

(c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and

(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

STATEMENTS OF INTEREST OF AMICI

The **Charles Hamilton Houston Institute for Race and Justice** ("CHHIRJ") at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the work of Charles Hamilton Houston, who engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. To further that goal and to advance racial justice, CHHIRJ seeks to eliminate practices or policies which compound the excessive policing and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most harmed.

The **Committee for Public Counsel Services** ("CPCS") is a statutorily created statewide agency established by G.L. c. 211D, §§ 1 et seq., whose responsibility is "to plan, oversee, and coordinate the delivery" of legal services to certain indigent litigants, including defendants in criminal cases and juveniles in delinquency and youthful offender proceedings. G.L. c. 211D, §§ 1, 2, 4. This brief

addresses issues related to police practices, including stops and patfrisks, that perpetuate racial injustice. Many CPCS clients—both juvenile and adult—are people of color who are disproportionately subjected to police intrusion because of these practices. As a result, this Court's decision in this case will affect the interests of CPCS's present and future clients. 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.").

The **Massachusetts Association of Criminal Defense Lawyers** ("MACDL") is an incorporated association of more than 1,000 experienced lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL seeks to improve the criminal legal system by supporting policies to ensure fairness in criminal matters and devotes much of its energy to attempting to correct problems in the criminal legal system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

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 judicial and policy reforms that will reduce the risk of wrongful convictions. This includes ensuring

that the presumption of innocence applies robustly and equally to all people and at all stages of the criminal legal system, from the moment of their encounter with the police through trial. It also includes ensuring that all evidence, regardless of its source or pedigree, is subjected to appropriately rigorous scrutiny and bears sufficient indicia of reliability before it is used against criminal defendants. Finally, in recognition of the grossly disproportionate number of members of communities of color who have been wrongfully convicted, NEIP's mission includes ensuring that explicit or implicit racial bias does not operate in ways that serve to undermine the presumption of innocence.

INTRODUCTION

This case concerns a routine traffic stop, routine police testimony, and the routinely degrading experiences of Black motorists police deem "dangerous" based on racialized assumptions, subjective conclusions, and inferential leaps veiled under police *training* and *experience*. This Court must interrupt this routine.

State police gang unit trooper Paul Dunderdale has repeatedly stopped Earl Garner for traffic violations, beginning with a 2011 stop that resulted in Mr. Garner's arrest for firearm offenses. Tr.19-20.[1] Trooper Dunderdale stopped him three additional times before the fifth stop in May 2017 at issue here, starting the week after he left prison in 2014. Tr.21-24. Only the first of those three additional

[1] The transcript of the September 21, 2017 suppression hearing is cited "Tr.__."

stops resulted in a criminal charge—driving on a suspended license. Trooper Dunderdale testified that he arrested Mr. Garner at that first 2014 post-release stop because "the stop escalated with him being so mad and angered that I stopped him that I ended up arresting him for operating after suspension." Tr.22:21-23.

This case involves another routine traffic stop, for darkened window tints and an abrupt turn. Three armed state troopers surrounded Mr. Garner's car. Mr. Garner immediately recognized Trooper Dunderdale and greeted him by name. Trooper Dunderdale told Mr. Garner why he stopped him and asked about his license, and Mr. Garner assured him it was "good." Trooper Dunderdale asked what he was doing in Taunton, and Mr. Garner explained he was there to buy marijuana from a friend. Trooper Dunderdale then pivoted and asked if he still "mess[ed] with firearms." Tr.25-27. Thus, the trooper catapulted the encounter from a traffic stop to a criminal investigation for weapons. As Chief Justice Budd has explained, this is a unique feature of traffic stops: "the moment a driver commits (or the police discover) a motor vehicle violation, the occupants of a vehicle are exposed to the very same investigatory stops we rightly prohibit when they are on foot -- stops based on unsupported hunches, discrimination, harassment, or any other purpose lacking reasonable articulable suspicion of criminal activity." *Commonwealth v. Long*, 485 Mass. 711, 743 (2020) (Budd, J., concurring).

Mr. Garner, a Black man alone and surrounded by three armed troopers, seemed nervous as he spoke with an officer who had twice taken his liberty. He volunteered to let police search the car and was not issued an exit order for officer safety but rather "exited the vehicle on his own without hesitation" at officer request. Tr.28:13-15. Despite his volunteered consent to search and perfectly compliant conduct, as Mr. Garner backed away to allow the officers to search the car, Tr.28-29, the officers said he looked around "in like a panicked manner." Tr.29:11. Trooper Dunderdale testified, "In my experience, we call that flight or fight mode. A suspect when he's in that type of mode . . . usually flees." Tr.29:19-21; accord Tr.53, 60-61 (Trooper Ledin's testimony). Concluding that Mr. Garner *might flee* as he backed away and called for his friend to come outside, the officers chose to subject him to a patfrisk: "Trooper Ledin was behind him as he was still backing across the street. We thought he was gonna flee, and Trooper Ledin advised him to come to the rear of the car . . . and pat frisked him." Tr.30:6-10. And thus unfurled the escalation of a pretextual stop into the invasion of bodily autonomy to which police routinely subject Black men: "' . . . feel[ing] with sensitive fingers every portion of the [] body. . . . arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.'" *Terry v. Ohio*, 392 U.S. 1, 17 n.13 (1968).

STATEMENT OF THE ISSUE

Earl Garner, a Black man, was stopped by three gang unit state troopers in an unmarked car for civil motor vehicle infractions. One of the troopers had arrested him for gun possession six years earlier, but repeated recent stops had yielded no contraband. Mr. Garner seemed nervous but answered questions, complied with instructions, volunteered consent to search the car, exited upon request, stepped back from the car, and called out for a friend. Did police have reasonable suspicion that he was both dangerous and armed?

SUMMARY OF ARGUMENT

This Court recently reconsidered the reasonableness of pretextual vehicle stops—traffic stops premised on civil infractions but motivated by a police purpose of criminal investigation, and often tied to racial profiling. See, e.g., *Long,* 485 Mass. at 726; *Commonwealth v. Buckley*, 478 Mass. 861, 879-880 (2018); *Commonwealth v. Cordero*, 477 Mass. 237, 246 (2017). This case does not squarely present the question of whether pretextual stops are constitutionally unreasonable, and this Court need not decide that they are in order to conclude the search here was illegal. But ignoring this stop's clear pretextual nature would be myopic: this illegal search happened because police have been empowered to use minor traffic violations to pursue suspicion-less criminal investigations, and similar illegal searches will proliferate as long as our jurisprudence endorses

police authority to make pretextual stops. *Infra* at 17-22. The case also invites this Court to reaffirm that officers cannot justify their suspicions that someone is dangerous and has a weapon based on improper propensity judgments—whether stale firearm convictions indicating a criminal character, *infra* at 28-29, or unexpected behavior being "out of character" with a purported prior "good rapport" with an officer, *infra* at 35-39.

The motion judge properly determined that the police did not have reasonable suspicion to believe Mr. Garner was armed and dangerous based on seeming nervous, stepping back from his car as the officers searched it *with his consent*, calling out the name of a friend, and turning his back to an officer while a second officer stood to his side and a third stood behind him. Mr. Garner's nerves and volunteered consent are far more suggestive of an attempt to "avoid the recurring indignity of being racially profiled," *Commonwealth v. Warren*, 475 Mass. 530, 540 (2016)—and the potential escalation of violence that too often follows traffic stops of Black people[2]—than probative of the claim that Mr. Garner was both *dangerous* and *had a weapon*. *Infra* at 22-28.

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[2] Carbado, *From Stopping Black People to Killing Black People*: *The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 150 (2017) (arguing that Fourth Amendment doctrine makes ordinary traffic stops of Black people a "gateway to extraordinary police violence").

The motion judge also properly discounted police testimony speculating about Mr. Garner's thoughts and the troopers' training and experience. *Infra* at 32-35. Neither trooper offered factual underpinnings for their asserted specialized knowledge, nor did they explain how *the possibility that Mr. Garner might flee* indicated he was armed and dangerous; thus the judge properly gave no weight to their "training" and "experience" about "fight or flight mode." The motion judge shut off the spigot, finding it improper to cascade from a routine stop to a routinely invasive patfrisk. Still, this Court must do more to curb common police claims of specialized knowledge based on nothing more than averred training and experience. When police officers offer opinion testimony, they must be qualified as expert witnesses. *Infra* at 29-32.

The Commonwealth implores this Court to reverse legitimate credibility judgments reserved to the motion judge, exaggerate the record, credit specialized knowledge from training and experience without any proper foundation, endorse illogical leaps *not* credited by the motion judge, equate potential future flight with dangerousness, and find a Black man's nervousness in a routine traffic stop suspicious because it was "out of character" with prior good rapport claimed by a trooper who had stopped him four times in three years. *Infra* at 39-41. The motion judge determined there was no reasonable suspicion based on specific, articulable

facts that Mr. Garner was dangerous and had a weapon after being stopped for window tints and an abrupt turn. This Court should affirm that decision.

ARGUMENT

I. The traffic stop of Mr. Garner was a prototypical pretextual stop—the exact context in which this Court has found racial profiling to be widespread and "particularly toxic."

Traffic stops premised on minor motor vehicle violations have long been a subterfuge for police to indulge unsupported, and often racialized, hunches of criminal activity. Citing statistical evidence of the pervasiveness of the problem of police disproportionately targeting drivers of color for stops and searches, "[t]his court has identified the discriminatory enforcement of traffic laws as particularly toxic." *Long*, 485 Mass. at 717. This Court recently reaffirmed that "police may not target drivers for traffic stops, citations, and further investigation because of their race," and reduced the burden on defendants to establish racial profiling, but "difficulties in identifying racially motivated traffic stops [remain] profound." *Id.* at 718. "[T]he root of the problem is pretextual stops, which allow police to utilize traffic stops as a means to act on hunches that are unsupported by reasonable suspicion and often based on the race of the driver." *Id.* at 737 (Budd, J., concurring).

The constitutional reasonableness of this police practice—"stops ostensibly made on the basis of a motor vehicle violation, but actually made for the purpose

of investigating suspicions of unrelated criminal activity," *id.* at 738—is not directly challenged here.[3] But that this patfrisk occurred during a traffic stop bears significantly on the reasonableness of Mr. Garner's conduct during the stop as well as the reasonableness of asserted police suspicions to justify a patfrisk.

Earl Garner was driving to his friend's house when he was stopped by three gang unit state troopers in an unmarked car. Tr.7, 9. He was pulled over for tinted windows and an abrupt turn. Tr.13. The stop marked the fifth time he had been stopped by Trooper Dunderdale for a traffic violation, including four stops in less than three years beginning the week he left prison from a 2011 firearm arrest made by Trooper Dunderdale at a traffic stop. Tr.19, 21-22. As both Trooper Dunderdale and Mr. Garner's fiancée testified during the motion hearing, he felt that Trooper Dunderdale was "out to get him." Tr.22:18; accord *id.* 87:13-15. ("[H]e would tell me like, 'Oh, that's the cop that kind of harasses me.'").

Traffic stops are an "investigative tool" used by the gang unit. Tr.40:21-42:7. Trooper Dunderdale testified that "[a] big part of our unit is just street level patrolling, going out there during the days or at nights in unmarked vehicles and

[3] Mr. Garner challenged the stop as pretextual, and discussed the then-pending appeal in *Buckley* regarding the constitutionality of pretextual stops, during the motion hearing. Tr.90-93. Mr. Garner asks this Court to affirm the motion judge on other grounds on appeal.

making traffic stops." Tr.7:8-10. In other words, *pretext stops* are a big part of gang unit "patrolling"—"investigative" stops premised on traffic violations.

As this Court has recognized, people of color have legitimate reasons to fear being repeatedly stopped by police for civil motor vehicle violations. *Long*, 485 Mass. at 718, quoting *Buckley*, 478 Mass. at 877 (Budd, J., concurring) ("African-Americans have been killed during routine traffic stops"). In some of the most high-profile cases of people killed by police officers at traffic stops, including Philando Castile in Minnesota, the victims were also repeatedly stopped by police for civil traffic infractions before being killed.[4] Further, research shows that "judicial doctrines permitting police officers to engage in pretextual traffic stops contribute to a statistically significant increase in racial profiling of minority drivers." Rushin & Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637, 643 (2021).

Trooper Dunderdale confirmed that police quickly escalated from routine traffic enforcement to criminal investigation; after recognizing Mr. Garner, telling him why he was stopped, and asking briefly about his license, Trooper Dunderdale swiftly pivoted to ask him why he was in Taunton and if he still

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[4] LaFraniere & Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. Times (July 16, 2016), https://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html.

"mess[ed] with firearms." Tr.25-27. He also noted that Mr. Garner was "a two time convicted firearm person,"[5] "[h]is right hand was on his leg shaking . . . and he was continuously trying to call somebody during our brief conversation." Tr.25:14-22.

Racialized experiences of policing are inextricably bound up with stops like this. People of color feel they have to perform in certain ways to maintain their physical safety during traffic stops,[6]—but also that no matter how they behave, they may be subject to police suspicion, mistreatment, and violence due to well-documented unconscious biases.[7] Researchers have documented that "racial anxieties can cause officers and people of color to view each other with suspicion. During an interaction, these anxieties can cause each to interpret the other's ambiguous behaviors through a biased lens. Furthermore, their mutual anxieties may influence their behaviors in a manner that fulfills their negative

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[5] Mr. Garner had one earlier firearm conviction prior to 2011. Tr.20, 86-87, 97.

[6] See, e.g., Karimi, *What Black drivers are doing to protect themselves during traffic stops*, CNN (Apr. 14, 2021), https://www.cnn.com/2021/04/14/us/driving-while-black-precautions-trnd/index.html; *Model Legislation: Instructing African American Drivers on How to Survive Police Traffic Stops*, Nat'l Black Caucus of State Legislators, https://nbcsl.org/public-policy/model-legislation/item/2081-instructing-african-american-drivers-on-how-to-survive-police-traffic-stops.html (last visited Aug. 17, 2021).

[7] See, e.g., Spencer et al., *Implicit Bias and Policing*, 10 Soc. & Personality Psychol. Compass 50, 55 (2016); Brunson & Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 Urb. Aff. Rev. 858 (2009); Johnson, *"A Menace to Society:" The Use of Criminal Profiles and Its Effects on Black Males*, 38 Howard L. J. 629, 663 (1995); Alpert et al., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 Criminology 407, 417-419 (2005).

expectations." Godsil & Richardson, *Racial Anxiety*, 102 Iowa L. Rev. 2235, 2253 (2017); *id.* at 2248-2253 (collecting research on racial anxiety in police encounters). This is closely related to "stereotype threat" in social science literature—"racial differences in anticipated anxiety, self-regulatory efforts, and suspicious behavior" make Black men "significantly more likely than White men to think they would feel anxious, anticipate they would monitor the situation and their behavior for risk of being stereotyped, and, ironically, behave in ways that police have been shown to perceive as deceptive or suspicious . . . ." Najdowski et al., *Stereotype threat and racial differences in citizens' experiences of police encounters*, 39 L. & Hum. Behavior 463, 471-472 (2015).

The fact that this patfrisk transpired during a civil traffic stop, which officers quickly transformed into a criminal investigation, bears significantly on how this Court interprets the reasonableness of both Mr. Garner's actions and the officers' suspicions. Officers may draw especially unreasonable inferences during pretextual stops because they are engaging in motivated reasoning: looking for criminal activity when, at the outset of the stop, there is no basis to suspect it. This Court will continue to see cases involving pretextual stops that escalate into unlawful patfrisks, and people of color doing anything and nothing in trying not to arouse suspicion, until it holds that making investigative stops premised on civil vehicle violations exceeds the boundaries of *reasonableness* in art. 14. "[T]he

phenomenon of racial profiling is . . . a systemic problem that has flourished under the rules that this court has set. . . . [A]s long as we continue to allow pretextual stops, the search and seizure protections of art. 14 will continue to ring hollow." *Long*, 485 Mass. at 756 (Budd, J., concurring).

II. The Commonwealth vastly overstates the value of nervous or evasive behavior in a traffic stop of a Black man by three armed troopers and the significance of remote convictions.

"[N]ervous or anxious behavior in combination with factors that add nothing to the equation will not support a reasonable suspicion that an officer's safety may be compromised." *Commonwealth v. Brown*, 75 Mass. App. Ct. 528, 534 (2009). This general prescription was enhanced in recent cases exploring how racialized experiences of policing affect behavior in response to police contact. See *Warren*, 475 Mass. at 539-540; *Commonwealth v. Evelyn*, 485 Mass. 691, 708-709 (2020). In *Warren*, this Court held that "flight to avoid [police] contact should be given little, if any, weight," toward reasonable suspicion because, based on well-documented racial profiling in street stops, a Black man running from police "is not necessarily probative of . . . consciousness of guilt," *Warren*, 475 Mass. at 539-540. In *Evelyn,* this Court expanded "the reasoning of *Warren* . . . to other types of nervous or evasive behavior in addition to flight." 485 Mass. at 708-709. "[T]he fear of [a police] encounter might lead an African-American male to be nervous or evasive in his dealings with police officers." *Id.* Accordingly, in assessing whether

the police had reasonable suspicion to make a stop, "the weight of the defendant's nervous and evasive behavior" should be "significantly discount[ed]." *Id.*

Based on the troopers' testimony, the motion judge found that Mr. Garner was "possibly" nervous, R.A. 54, 58, but that any nervousness did not add to or establish reasonable suspicion that he was armed and dangerous. Indeed, the troopers testified that people are commonly nervous when stopped by police, Tr.44, 68; see also *Commonwealth v. Cruz*, 459 Mass. 459, 468 (2011) (cited by motion judge), and the motion judge emphasized that Mr. Garner was "alone, surrounded by three, armed State troopers." R.A. 53. Further, the motion judge found that when Mr. Garner exited the car after volunteering to allow the search, "At first, the defendant had his back toward Trooper Dunderdale but he then took a few steps backward, away from the Trooper, so that he must have been facing the Trooper." *Id.*

By contrast, the Appeals Court panel vastly overstated the value of nervous or evasive behavior in the reasonable suspicion calculus—without citing *Warren* or *Evelyn*, which discounted this factor in police stops of Black men. The Commonwealth also revives these factors: Mr. Garner's nervousness (fidgeting with his cellphone, shaking his leg, backing away from the car to allow the search); "blading" as he walked away, which the panel said "evinc[ed] an attempt to shield the firearm in his waistband from the troopers' view," *Commonwealth v. Garner*, 99

Mass. App. Ct. 1104, No. 19-P-1069, Slip Op. at 5, 5 n.6 (Dec. 28, 2020) (hereinafter "Slip Op."), citing *Commonwealth v. Resende*, 474 Mass. 455, 459 n.8 (2016); and two firearm convictions from at least six years earlier. Comm. Br. at 24-26, 29.

a. Mr. Garner's nervousness should be entirely discounted.

The troopers repeatedly emphasized Mr. Garner's nervousness—they described him as "excessively nervous," his right hand "on his leg shaking," not "giving attention," Tr.25, and looking around "in like a panicked manner," Tr.29. But nervousness may signal *fear* as a Black man surrounded by three armed troopers.

Trooper Dunderdale testified that he believed it was unusual for Mr. Garner to repeat his name over and over again as he approached the car during the traffic stop. Tr.26-27. The Commonwealth seizes on this purportedly "out of character" behavior to distinguish Mr. Garner's nervousness from Mr. Warren's. Comm. Br. at 26. But the appearance of an officer who had repeatedly stopped him *and* twice previously arrested him was more likely to make him uneasy than to be "reassuring," as the Commonwealth absurdly argues, *id.* at 27. Mr. Garner's repetition of Trooper Dunderdale's name suggests frustration and resignation at being the repeated target of police scrutiny, by the same officer, for driving violations of the kind this Court recognizes that all drivers make, and yet for stops that drivers of color are more often subjected to. Far from being distinguishable,

his alleged nervousness falls precisely within *Evelyn*'s nuanced understanding of how racialized experiences of policing factor into whether behavior can be characterized as suspicious—a personal example of a broader pattern.

Evelyn and *Warren* clarified how nervousness affects reasonable suspicion for a seizure. But the reasonable suspicion calculus for a patfrisk demands an even higher burden. "[P]olice must have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous." *Commonwealth v. Torres-Pagan*, 484 Mass. 34, 38-39 (2020). "The only legitimate reason" for a patfrisk "is to determine whether [someone] has concealed weapons on his or her person." *Id.* at 39. Nothing in the officers' testimony about Mr. Garner's nervousness or body language established reasonable suspicion that Mr. Garner was a *threat*; it indicated, at most, that officers thought he *might* flee. Tr.29-30, 60-61, 68, 70. See Comm. Br. at 7 (his behavior "strongly implied to the troopers that he was about to flee"); *id.* at 22 ("he intended to flee"); *id.* at 27 (citing "the troopers' assessment that the defendant was going to flee"). The panel's assertion that officer suspicion that a person stopped for a motor vehicle infraction might run away allows a patfrisk flatly contradicts this Court's precedent. If a Black man's *actual flight* in *Warren* was insufficient for reasonable suspicion to even conduct a stop, *potential future flight* is certainly insufficient for reasonable suspicion to conduct a patfrisk

of Mr. Garner's body, a substantially more severe intrusion requiring a more particularized suspicion that Mr. Garner was both *dangerous* and *had a weapon*.

b. *The Appeals Court panel erred by relying on the offhand reference to Mr. Garner "kind of blading away" as he exited the car after he volunteered his consent to search it.*

Trooper Dunderdale used the term "blading" only once and described conduct inconsistent with the definition in this Court's precedent. In *Resende*, cited favorably by the Appeals Court panel, "'blading away' refers to the action of creating a thin profile of oneself with respect to another viewpoint, effectively hiding one side of the body from the other person's view." 474 Mass. at 459 n.8. But here, Mr. Garner stepped out of the car with his back to Trooper Dunderdale and then backed away to allow Trooper Dunderdale to search the car. Tr.at 28:19-25 ("He exits the vehicle as I'm standing at the door. And as he exits, his back and buttocks is like facing me. So he's kind of blading away from me, and he starts walking backwards across the street. . . . Trooper Ledin was behind him."). This is the opposite of what "blading" meant in *Resende*. Instead of "creating a thin profile," Mr. Garner stood at his widest view—with his back to the officer. No matter how someone is standing relative to an officer, part of their body will *always* be out of view. Yet increasingly, reasonable suspicion cases in our courts mention the police jargon "blading," which sounds intimidating, aggressive, dangerous, and evasive. See *Commonwealth v. Karen K.*, 99 Mass. App. Ct. 216, 228

n.19 (2021) (Milkey, J., dissenting) ("The justice system would be better served if motion judges, attorneys, and witnesses avoided loaded terms such as 'blading' and just addressed what happened. When such jargon is used, it should be defined . . . ."). The term "blading" is simultaneously loaded and meaningless. Describing Mr. Garner as "blading"—when the factual description of his body positioning was the exact opposite of "blading" as previously understood—suggests a reflexive police practice of employing this jargon because of its equally reflexive acceptance by the judiciary to justify intrusive stops and frisks.

The motion judge properly discounted any special significance of Mr. Garner's exit from the vehicle—which he did "on his own without hesitation" after being asked to "hop out." Tr.28. Unlike cases in which someone pivoted their hip or turned their body, the motion judge found: "At first, the defendant had his back toward Trooper Dunderdale but he then took a few steps backward, away from the Trooper, so that he must have been facing the Trooper." R.A. 54. Further, the officers did not see a waistband adjustment, a bulge suggesting an object, a straight-arm gait or his hands pressed against his body—none of the indicia that, when accompanying a body turn, have supported reasonable suspicion that someone might be armed. Cf. *Evelyn*, 485 Mass. at 708; *Resende*, 474 Mass. at 461; *Commonwealth v. DePeiza*, 449 Mass. 367, 371 (2007). As the motion judge emphasized, "He made no furtive gestures. He was not confrontational or

belligerent. He made no threats. He was alone and surrounded by three armed State troopers." R.A. 54.

c. Remote prior convictions should not indefinitely diminish a person's rights under article 14 and the Fourth Amendment.

The motion judge properly limited the weight of Mr. Garner's at least six-year-old firearm convictions, Tr.20, writing, "The defendant's convictions for possession of firearms . . . did not indicate that the troopers were in danger. A past conviction, even for possession of a firearm, does not by itself indicate the defendant poses a present threat to police . . . ." R.A. 54. Even the most recent conviction, in 2011, does not suggest that Mr. Garner was armed and dangerous in 2017—and Trooper Dunderdale calling Mr. Garner a "two time convicted firearm person," using prior convictions as evidence of his *character* for dangerousness by tying his criminal record to his personhood, cannot change the state of the law. See *Cordero*, 477 Mass. at 246; *Commonwealth v. Allen*, 406 Mass. 575, 579 (1990) (four-year-old conviction insufficient). Beyond the individual unfairness here, relying on such remote convictions raises concerns about racially disparate protection from unreasonable searches and seizures, given stark racial disparities in the prosecution of gun crimes in the Commonwealth. See Report by the Criminal Justice Policy Program, Harvard Law School, Racial Disparities in the Massachusetts Criminal System (Sept. 2020), at 58 (vast majority charged with unlicensed firearm possession are people of color).

III. Conclusory police judgments do not merit special deference and must be carefully scrutinized for a valid factual foundation, which is not satisfied by a general incantation of training or experience.

When police officers invoke their training or experience in testimony, they endeavor to buoy the authority of their observations through the lens of professional judgment.[8] This Court has held that when police rely on "training to draw an inference or conclusion about an observation," they "must explain the specific training and experience that [they] relied on and how that correlates to the observations made." *Commonwealth v. Matta*, 483 Mass. 357, 366 (2019). This minimal requirement creates a glaring asymmetry and offers insufficient protection to the targets of police suspicion; it presumes a proper foundation without requiring officers to (1) ground their incriminating inferences in reliable empirical evidence or (2) justify why their training and experience give the facts observed special significance.

Police officers must either be treated as lay witnesses, testifying from personal knowledge with strict limits on opinion testimony, see *Commonwealth v.*

[8] See Lvovsky, *The Judicial Presumption of Police Expertise*, 130 Harv. L. Rev. 1995, 2031 (2017) ("Transplanted from the merits trial into the suppression stage, the policeman as 'expert witness' no longer envisioned the officer's expertise as a body of fact submitted to the court for its analysis, but rather as a demand for deference, displacing the court's discretion in favor of his superior judgment."). *Id.* at 2064 ("[T]he selection bias of the suppression hearing does not just benefit officers in each particular case. It also underwrites a cumulative impression of police expertise, based on the courts' aggregate exposure to the police's professional insights.").

Nelson, 91 Mass. App. Ct. 645, 649 (2017) (Kafker, C.J.), or as experts, in which case their opinion testimony must be subjected to *Daubert/Lanigan* scrutiny, cf. *United States v. Drakeford*, 992 F.3d 255, 267 (4th Cir. 2021) (Wynn, J., concurring) ("affording strong deference to 'training and experience' has costs," including police leaning on "their 'impressions' instead of doing the hard work of building a case," racial profiling rooted in implicit biases, and arbitrary judicial decision-making). When police officers invoke training or experience to claim that their opinions derive from specialized knowledge, they are operating like experts and should be *validated* as experts before a court may credit any derivative opinion. See *Commonwealth v. Canty*, 466 Mass. 535, 542 n.5 (2013) ("[A] prosecutor who elicits from a police officer his or her special training or expertise in ascertaining [a conclusion] risks transforming the police officer from a lay witness to an expert witness on this issue, and the admissibility of any opinion proffered on this issue may then be subject to the different standard applied to expert witnesses.").

Trial judges are required to act as gatekeepers to ensure the reliability of expert opinion testimony before admitting it. They must at least ensure that the witness's opinion is supported by adequate training or experience. See, e.g., *Commonwealth v. Frangipane*, 433 Mass. 527, 536 (2001) (witness not qualified to discuss medical and scientific underpinnings of dissociative memory loss where only training was attendance at various seminars and studies with noted

researchers); *Peterson v. Foley*, 77 Mass. App. Ct. 348, 351-352 (2010) (officer not qualified as accident reconstruction expert absent any training with respect to accident reconstruction and determining speed); *Commonwealth v. Guinan*, 86 Mass. App. Ct. 445, 450-451 (2014) (witness not qualified to discuss integrity of car's onboard computer where he lacked any training or experience in electronic power steering). Cf. Lvovsky, *supra*, at 2021 (noting objections to drug user profiling testimony including that it "exceeded the police's professional knowledge, encroached on ultimate issues, or was either too commonsensical or speculative to qualify as 'expertise'").

This admonition is particularly salient in the context of reasonable suspicion, where researchers have shown that police create "narratives of suspicion" that, when empirically tested, have limited accuracy and high error rates. See Fagan & Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. Chi. L. Rev. 51, 62, 86-87 (2015); see also Rudovsky & Harris, Terry *Stops and Frisks: The Troubling Use of Common Sense in A World of Empirical Data*, 79 Ohio St. L.J. 501 (2018). Police judgments may be marred by "excess suspicion, overzealousness in the pursuit of crime, and pervasive racial prejudice leading to disproportionate enforcement against minorities." Lvovsky, *supra*, at 2069, 2069 nn.496-501 (collecting studies); see also Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L. J. 659 (1994).

Where courts abandon this vital gatekeeper function, and allow incantation of the magic words "training and experience" without probing to determine whether the asserted specialized knowledge is based on reliable principles and methods, they risk allowing the asserted fact of training or experience to mask unscientific principles or pernicious stereotypes. *Terry*, 392 U.S. at 21 ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge . . . .").

a. The motion judge properly declined to credit the troopers' testimony about their "training" and "experience" in perceiving a suspect's "fight or flight" response.

The motion judge found that the troopers' testimony that they were trained to recognize when a suspect is in "fight or flight mode" and that they concluded that Mr. Garner was thinking of fleeing "adds nothing to the analysis since: (1) they thought the defendant might take 'flight,' not 'fight;' and (2) they did not testify to any factual basis for that conclusion other than what has been described above." R.A. 54. Even though this finding may be considered a credibility judgment, the Commonwealth urges this Court to reverse it, against precedent, and embrace blind deference to police opinions without proven expertise. Such expansive judicial deference to the police "remov[es] democratic accountability from our

most common point of interaction with the state" because it "allow[s] policemen to define the legal limits of a search." Lvovsky, *supra*, at 2069.

The training briefly described in this case suggests that Trooper Ledin learned to recognize when suspects are in "fight or flight" mode based on watching videos in which people who were later determined to have contraband engaged in "behaviors" and "mannerisms" "consistent" with people "about to run." Tr.69-70. But Trooper Ledin did not describe the videos as having shown people who *were not* suspects or later found *not* to have contraband. This suggests a selection bias fallacy: relying on a limited pool of people known to have carried contraband to prove that the behavior is indicative of someone carrying contraband. This is not a reliable methodology—it ignores the possibility that people who did not flee may exhibit similar behavior. *Karen K.*, 99 Mass. App. Ct. at 234 (Milkey, J., dissenting) ("Conflating such probabilities is an error known by many names, including -- as particularly apt here – 'the prosecutor's fallacy.'").

Trooper Ledin's testimony also reflects another general problem—officers asserting a conclusion as a stand-in for articulating their factual observations. Invoking training supplants testimony about what was observed, replacing a description with a tautological explanation:

> Q Prior to that, just describe your observations of Mr. Garner, please.
> A His mannerisms, the way he was looking around, he was extremely nervous, almost like he had that look of

> him and his body movement, his body expressions
> were showing me that he was either getting ready to
> fight or flight. He was gonna run.
> Q And is that something you're trained on?
> A Yes.
> Q Is that something that you'd experienced prior to
> May of 2017?
> A Yes. Numerous times.

Tr.60-61. Trooper Ledin did not actually describe what parts of Mr. Garner's body were allegedly moving, his "body expressions," his mannerisms, or *how* he was looking around—descriptions that would fit the bill for "articulable facts." He just asserted they were happening *and* they demonstrated "fight or flight" mode, a conclusion reached through inarticulable circular reasoning. Such "fight or flight" speculation, which the Commonwealth now seeks to revive, Comm. Br. at 27-31, was discounted by the motion judge precisely because it lacked a "factual basis." R.A. 54. An "officer's conclusory testimony" that "fail[s] to articulate specific facts on which his impression could be evaluated" is insufficient for reasonable suspicion. *Commonwealth v. Teixeira-Furtado*, 474 Mass. 1009, 1011 (2016); see also *Commonwealth v. Franceschi*, 94 Mass. App. Ct. 602, 607-610 (2018) (excluding proffered expert opinion testimony from police officer about source of mark on road because "[w]hile training and experience, to which [the officer] referred, might have taught him a methodology, it is not itself a methodology. . . . In the absence of any explanation of how he identifies the mark as a shoe scuff, [the officer's] circular statement that he has seen such marks before at accident

scenes, with its implication that this one looked like the others, is not an explanation of methodology"). Here, the motion judge properly determined the troopers' testimony was not helpful, but the panel erroneously reversed on this basis, twice noting the value of the officers' training and experience.

Even if this Court credits the troopers' "fight or flight" opinion testimony, by the troopers' own admission, their opinion was that Mr. Garner was about to flee, not that he was armed and dangerous. Much like the incantation of the term "blading," see *supra*, the troopers repeatedly and misleadingly added the word "fight"—using rhetoric to suggest dangerousness even though their testimony supported only the inference that "he was gonna run," not that he threatened violence. The officers did not believe that Mr. Garner intended to "fight" them or posed a threat to their safety; neither the panel's analysis nor the Commonwealth's argument explains how suspicion that Mr. Garner might run would compromise officer safety, let alone suggest more particularly that he was *dangerous* and *had a weapon*.

b. *Officers' subjective judgments about their rapport with people subject to their authority are not properly considered articulable facts for reasonable suspicion.*

Trooper Dunderdale repeatedly asserted that prior to this stop he and Mr. Garner shared a "good rapport." This is a subjective, one-sided judgment, not an objective, factual assessment of their relationship; it fails to consider Mr. Garner's

experience of the interactions. Asserted “good rapport” is not an “articulable fact,” and is thus an inappropriate factor for reasonable suspicion as a baseline against which to assess Mr. Garner’s conduct during this stop.

Trooper Dunderdale offered a conclusory opinion in order to frame Mr. Garner as acting differently on this occasion. Yet Trooper Dunderdale testified *both* that there were times in which they’d had a good rapport, Tr.23:10-11, 24:5-8, 24:16-19, 25:17-18, and also in which Mr. Garner “immediately became angered and infuriated that I stopped him, and he thought I was -- I think he said out to get him.” Tr.22:16-18. Mr. Garner’s fiancée’s confirmed Trooper Dunderdale’s testimony that Mr. Garner felt harassed. Tr.87:13-15.

The motion judge did not rely on the improper subjective notion that Mr. Garner was acting “out of character” on this occasion, while the panel did. *Garner*, Slip Op. at 5. This was error. To know that something is “out of character” someone first must know one’s “character,” which police could not know from a handful of interactions. People react in all manner of ways when stopped by the police, and those reactions in high-stress situations do not reflect “character.” People may act differently on different occasions because of mood, circumstance, feeling targeted, frustration that grows over time, or trying a different approach to “avoid the recurring indignity of being racially profiled,” *Warren*, 475 Mass. at 540. Further, police *perception* of behavior may be different on different occasions.

The Appeals Court panel's statement was also inaccurate. Against the findings of the motion judge, the panel described Mr. Garner's *voluntary consent* to a search of his vehicle as "completely out of character" with his "cooperative" behavior in "all the previous encounters." Slip Op. at 5. First, Trooper Dunderdale did not testify that Mr. Garner was cooperative in all previous encounters—he also testified that he was "angered and infuriated" in at least one previous stop. Second, the motion judge found Mr. Garner "did everything the police asked" on *this* occasion as well. R.A. 54. Third, offering unprompted consent to a car search is hardly *un*cooperative and *suspicious*. Yet in the panel's view, this was an elaborate ruse: "[t]his is evidence of the defendant's effort to redirect the trooper's attention to the car and away from him, as the defendant had a loaded firearm in his waistband." Slip Op. at 5. This conclusion merely reflects the benefit of hindsight—Mr. Garner was found to have a gun on this occasion—and officer speculation about what the defendant was thinking, see, e.g., Tr.28:9-10 ("Almost as if he's saying it, but doesn't really want me to take a look."),[9] which the motion judge explicitly *did not credit*. R.A. 54 n.1; *id.* at 58; Slip Op. at 2, 4 n.4 ("[T]he judge credited the testimony of the troopers, 'except where they speculate[d] about the

[9] Although Trooper Dunderdale testified that he believed Mr. Garner didn't "really want me to take a look," shortly thereafter he testified that Mr. Garner "exited the vehicle on his own without hesitation." Tr.28:9-15.

defendant's thoughts.'"). In error, the panel nevertheless validated the officers' speculation.

This enormous inferential leap—from consensual vehicle search to sleight-of-hand deception—once again directly contravenes this Court's precedent, this time *Torres-Pagan*. Even if this Court were to find that consent to a car search was "completely out of character" from prior "cooperative" behavior, "surprise in response to unexpected behavior is not the same as suspicion that the person is armed and dangerous." *Torres-Pagan*, 484 Mass. at 40; cf. *Commonwealth v. Stampley*, 437 Mass. 323, 326 (2002) (defendant's initial behavior during routine traffic stop, although "peculiar" and "unusual," was not threatening). Indeed, comparison to the facts in *Torres-Pagan* is instructive. There, this Court found that "[t]he fact that the defendant turned to look into the front seat of his vehicle more than once after he got out adds little if anything to the analysis. At most, such action would suggest that the defendant had something of interest in his vehicle, not that he had a weapon on his person." *Torres-Pagan*, 484 Mass. at 40-41. As in *Torres-Pagan*, Mr. Garner's invitation for the trooper to search his vehicle suggests that he was trying to expedite the end of the police encounter, "not that he had a weapon on his person." *Id.*

Allowing officers to testify that changed rapport indicates suspicion that the defendant has a weapon also incentivizes officers to make more stops in order to

build up more data points for comparison. Only certain people, like Mr. Garner, have repeated interactions with the police. See *Warren*, 475 Mass. at 539-540 ("Black men were also disproportionally targeted for repeat police encounters."); *id.* at 540 n.16 ("[F]ive per cent of the individuals repeatedly stopped or observed accounted for more than forty per cent of the total interrogations and observations conducted by the police department."). If officers can establish suspicion based on asserted changed behavior, it will largely affect people for whom police create a profile—disparately poor men of color who are repeatedly criminalized based on who they are, who they know, and where they go.

IV. The Commonwealth urges this Court to embellish the record, make independent findings of fact, and credit escalating inferential leaps rejected by the motion judge which defy common sense.

As in *Commonwealth v. Jones-Pannell*, "[t]he Commonwealth essentially asks [this Court] to do what our case law proscribes: . . . make additional findings, and reach a different result, based on [its] own view of the evidence. . . . This [it] cannot do." 472 Mass. 429, 432 (2015). Beyond asking this Court to make factual findings not credited by the motion judge, both the Appeals Court panel and the Commonwealth have embellished the record, transforming the innocuous into the nefarious, like a game of telephone. For example, the Commonwealth describes Mr. Garner as agitated five times in its brief, a characterization that appears nowhere in the record. Comm. Br. at 7 ("the defendant was

unaccountably agitated"); *id.* ("the defendant, still **visibly agitated**"); *id.* at 22 ("**highly agitated defendant**"); *id.* at 23 ("**the defendant's agitated and anomalous behavior**"); *id.* at 26 ("**the defendant's evident agitation**"). Agitation is not a benign synonym for nervousness—it means "troubled in mind: disturbed and upset."[10] It is tinged with anger and frenzy. If it were reasonable to suspect that Mr. Garner was armed and dangerous, there would be no need to ratchet up the language for underlying facts to be untethered from the testimony.

Further, the Commonwealth invents facts not supported by the record in order to justify its argument, not raised at the motion hearing, that the troopers had authority to detain Mr. Garner until the end of the encounter and this automatically conferred the right to patfrisk him. Comm. Br. at 27-29. The Commonwealth conjectures, "they had reason to be concerned that in his panicked state he would chose [sic] to fight." *Id.* at 29. There is no factual support in the record for this argument. The troopers *never* testified and the motion judge *never* found that the troopers thought the defendant intended to fight them. Their conclusion was that he "was gonna run." Tr.61:1-2. Moreover, this argument is waived. See *Commonwealth v. Bettencourt*, 447 Mass. 631, 633 (2006) ("[W]e need not

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[10] *Agitated*, Merriam Webster, https://www.merriam-webster.com/dictionary/agitated.

consider an argument that urges reversal of a trial court's ruling when that argument is raised for the first time on appeal."),

Similarly, the final factor on which the panel relied was that "the defendant called out to an unknown person in an area in which he said he was trying to buy marijuana," implying "the possibility of others in the area who could be helpful to the defendant or who might pose a threat to the troopers." Slip Op. at 5. This statement also reflects a series of escalating inferential leaps unsupported by the record. Mr. Garner calling out one person's name after having told the officers he was there to meet a friend became in the panel's retelling the potential presence of "others," plural. Further, the panel then speculated that these invented *others*—who never appeared—might pose a diffuse "threat" to the troopers, presuming those "others" dangerous and failing to indicate how the potentiality of a threat from "others" established that *Mr. Garner was armed and dangerous*.

CONCLUSION

This case offers the Court an opportunity to clarify the difference between an inference drawn from specific, articulable facts and an improbable surmise cloaked in the authority of police training and experience. "From the 1960s to today, suppression hearings have been a core breeding ground for deference to police judgment. For the purposes of the Fourth Amendment itself, those proceedings have shepherded courts toward ever-greater reliance on police

testimony, in cases featuring increasingly weak evidence and thinly qualified witnesses." Lvovsky, *supra*, at 2063. Especially in the context of vehicle stops, which this Court has already found are a breeding ground for racial profiling, the Court must set guardrails to assure that police methods and suspicions are objective, factual, and not born of unconscious bias. This Court should affirm the suppression order.

Respectfully submitted,

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<u>Mass R. App. P. 16(K) Certification</u>

I hereby certify that this brief complies with the rules of the Court that pertain to the filing of briefs, including Mass. R. App. P. 16, 17, and 20. It is typewritten in 14-point, Athelas font, and complies with the length limit of 20(a)(2)(c) because it was produced with a proportionally spaced font and does not contain more than 7,500 non-excluded words. This document contains 7,495 non-excluded words as counted by the word-processing system used to prepare it.

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<u>Certificate of Service</u>

On August 24, 2021, I served a copy of this brief on all parties by e-mail.

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