COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY SJC NO----------
APPEALS COURT NO. 24-P-365

COMMONWEALTH

Appellee

v.

BYRON PALMER

Appellant

APPLICATION OF THE DEFENDANT-APPELLANT FOR FURTHER APPELLATE REVIEW OF A DECISION OF THE APPEALS COURT

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APPLICATION FOR FURTHER APPELLATE REVIEW

The defendant-appellant, Byron Palmer, pursuant to Mass. R. A.P. 27.1 and in the interest of justice, hereby applies for further appellate review of the Appeals Court's decision, issued September 19, 2025, affirming his conviction for possession of narcotics.

STATEMENT OF PRIOR PROCEEDINGS

On January 14, 2021, Byron Palmer was arrested by the Boston Police Department and charged with a robbery and shooting that occurred 12 days earlier, as well as narcotics offenses on the day of his arrest. After indictment, a motion to suppress evidence was denied by the Superior Court on November 10, 2022. On March 31, 2023, a jury acquitted Mr. Palmer of all robbery and shooting offenses, and convicted him only on the narcotics charges stemming from his seizure by the Boston Police. On September 19, 2025, a deeply divided Appeals Court affirmed his conviction in a case that was considered by the full Appeals Court. 18 Justices of the Appeals Court agreed with the defendant that he was seized, at the latest, when the police began running after him, while six Justices disagreed. On the ultimate question of reasonable suspicion, 13 Justices of the Appeals Court sided with the Commonwealth, while 11 Justices sided with the defendant. Justices

Massing and Shin wrote separate dissenting opinions in which each was joined by 10 other Justices of the Appeals Court. No petition for rehearing has been filed.

POINTS FOR WHICH FURTHER APPELLATE REVIEW IS SOUGHT

The published and binding decision of the Appeals Court must be reversed, as it upheld reasonable suspicion for a police stop based on a scant description of skin color, hairstyle, and a hat that could have matched any number of men in the area where the stop occurred. In so holding, the Appeals Court majority relied on an extravagant interpretation of the "fellow officer" rule that is directly at odds with Massachusetts caselaw and binding United States Supreme Court precedent. Finally, the Appeals Court decision ignored overwhelming evidence that the defendant was seized when three detectives approached him from one direction, four uniformed officers approached from another, a police wagon was visibly parked nearby, and a detective called out to him.

SHORT STATEMENT OF FACTS

The dissenting opinions of Justices Massing and Shin accurately state the facts of the case, so only a short summary is needed here. On January 2, 2021 a man reported to a Boston Police officer that he had been robbed and shot at in a housing development in Boston. The only description the victim gave was of "a man, 6'1 tall, wearing black clothing, a camouflage mask and who spoke with a southern

accent." (The southern accent was never a factor at the motion to suppress, as the police seized the defendant before ever hearing whether or not he spoke with an accent). A police officer named O'Donnell viewed video which she thought showed the person responsible for the crime, but this was never confirmed by the victim, who was unable to make any identification and who did not testify at either the suppression hearing or the trial. In the video Officer O'Donnell viewed, she observed clothing details that the victim had never mentioned. Most importantly, in the video Officer O'Donnell viewed on January 2, the person's face was not visible, as he was wearing a mask.

On January 3, Officer O'Donnell viewed another video of a person at the same housing development, without a mask, and concluded that this person was the same person in the January 3 video. Judge Massing, in a dissent joined by 10 other Justices, noted that "Indeed, I question whether the suspect seen on January 2 is the same person seen on January 3—there is little resemblance, other than the jacket and sneakers, and the fact that both men are Black." Commonwealth v. Byron Palmer, (Massing, J. dissenting, slip op. at 6, n. 2). Judge Massing further observed that "the suspect appears to be a dark-skinned Black man in some images, and he appears to be a medium- or light-skinned Black man in others." Id.

On January 14, 2025 Officer O'Donnell viewed another video in real time and texted the lead detective on this case, Detective Eng, "your guy is back." Detective

Eng traveled to the housing development with two other detectives. Four uniformed officers approached from a different direction, and a police wagon was visibly parked nearby in the parking lot where the detectives were walking. Detective Eng observed the defendant, Byron Palmer. She did not make a visual identification of Mr. Palmer's face as the person Officer O'Donnell had shown her in the January 2 or January 3 videos and photos. Commonwealth v. Byron Palmer, (Massing, J. dissenting, Slip op. at 4). Instead, she formed a belief that he was the suspect based on meager details about his skin color, hairstyle, and a hat that were provided to her by Officer O'Donnell. Based on this belief Detective Eng approached Mr. Palmer while a fellow detective called out to him. Mr. Palmer, and other people nearby, fled, while three detectives ran after Mr. Palmer from one direction and four uniformed officers ran after him from another direction, with a police wagon parked nearby. Officer O'Donnell never testified at the motion to suppress hearing.

GROUNDS FOR GRANTING APPELLATE REVIEW

A. IN A CLOSELY DIVIDED RULING, THE APPEALS COURT IMPROPERLY UPHELD REASONABLE SUSPICION TO STOP BASED ON A SCANT DESCRIPTION OF SKIN COLOR, HAIRSTYLE, AND A HAT THAT WOULD MATCH ANY NUMBER OF MEN IN THE AREA WHERE THE STOP OCCURRED

"When a defendant files a motion to suppress alleging that the police unconstitutionally exercised their coercive powers to detain him for the purposes of investigating a crime, it is critical not only for the public's confidence in the legitimacy of law enforcement, but also for the integrity of our criminal justice system, that prosecutors and the police come to court prepared to supply evidence of the specific, articulable facts that the police possessed and relied on to justify the seizure." (Commonwealth v. Byron Palmer, Massing, J., with 10 other justices, dissenting, Slip Opinion at 1). "The evidence adduced at the suppression hearing showed that the police stopped the defendant based on nothing more than his skin color, hairstyle, and hat -- descriptive features that could fit any number of young men in the area where the stop occurred and did not rise to the level of reasonable suspicion that the defendant was the same man seen on video surveillance footage almost two weeks before." (Slip Op at 1, Massing, with 10 other justices, dissenting).

The alleged victim in this case did not make any identification of the man, or men, in the video or photos. Suppression Hearing Tr. I-64, hereafter "Tr." The alleged victim did not testify at either the suppression hearing or the trial. Tr. I-64.

The only description the alleged victim gave was of "a man, 6'1 tall, wearing black clothing, a camouflage mask and who spoke with a southern accent." This description could fit any number of people in the area where the stop

took place and throughout the entire City of Boston. The Southern accent mentioned in the description was never a factor at the suppression hearing. This reduces the description to that of "a man, 6'1 tall, wearing black clothing {and} a camouflage mask.".

Officer O'Donnell viewed a video on January 2. The person she viewed in this video, whoever he was, wore a mask and his face could not be seen. Tr. II-18. This masked person in the video possessed characteristics, such as a common hairstyle and possession of a hat, which were never mentioned in the victim's description. Tr. I-12. These new details were apparently added to the police narrative of the facts of this case. These new details, never mentioned by the victim, have now been used by the Commonwealth and the Appeals Court to justify a detention in which the facts giving rise to the detention were never adequately proven at the suppression hearing.

Officer O'Donnell viewed additional videos and photos on January 3 and January 14 and concluded that the same person was in each video or photo, even though there were dramatic differences in the clothing worn and the person's appearance each time. (Commonwealth v. Byron Palmer, Massing, J. dissenting, Slip op. at). At the very least the Commonwealth was obligated to call Officer O'Donnell as a witness and present evidence as to why she reached these conclusions. Hearsay is admissible at suppression hearings, and the fellow officer

rule exists, but that does not mean that the Commonwealth's entire justification for, and articulation of, reasonable suspicion for a detention can be based so entirely on hearsay and the fellow officer rule as is being done in the Appeals Court's decision

It is undisputed that Detective Eng, the lead detective at the scene of the arrest, did not make a visual identification of Byron Palmer as the man she saw on video provided by Officer O'Donnell. Tr. I-45, 52. Instead she merely noted similarities in the skin color, hairstyle, and hat in videos provided by Officer O'Donnell, and pursued and seized Byron Palmer on this basis. If she had made an actual visual identification she would have placed Mr. Palmer under arrest, rather than purportedly attempting to talk to him. As Justice Massing put it "Eng did not testify, and the judge did not find, that she recognized the defendant based on the suspect's facial features that she had observed while studying the January 2 footage (in which, of course, the suspect was masked) or from viewing the January 3 footage." Commonwealth v. Byron Palmer, (Massing, J. dissenting, slip op. at 4.).

Except for skin color, none of the vague details that Detective Eng relied on were even mentioned by the victim. Tr. I-12. And court review of the videos provided by Officer O'Donnell makes no difference. As Judge Massing rightly pointed out, the clothing and physical appearance of the person, and even the skin color are different in each photo and video, in one photo the hairstyle is not visible at all, and when Byron Palmer was arrested on January 14 he was not wearing many items of

clothing similar to those described by the victim on January 2 or purportedly observed in videos on January 2 and 3. Even his hairstyle was not visible to the police before the stop. Commonwealth v. Byron Palmer. (Massing J., dissenting, Slip op. at 6-7 &note 3 and note 4). Without testimony from Officer O'Donnell, the Commonwealth's justification for reasonable suspicion falls like a house of cards.

As Judge Massing rightly pointed out in his dissent, the "collective knowledge" or "fellow officer" rule does not relieve the Commonwealth of its burden to establish, at a suppression hearing, the specific and articulable facts that it believes existed to create reasonable suspicion to stop the defendant. United States v. Hensley, 469 U.S. 221, 232-235 (1985); United States v. Alvarez, 40 F. 4th 339, 352 (5th Cir. 2022); Commonwealth v. Cheek, 413 Mass. 492, 494-495 (1992) ("Where the police rely on a police radio call to conduct an investigatory stop, under both Federal and State law, the Commonwealth must present evidence at the hearing on the motion to suppress on the factual basis for the police radio call in order to establish its indicia of reliability.") The Commonwealth bears the burden of proving why those facts should be credited by the judge deciding the motion. Here Officer Eng lacked reasonable suspicion herself and was relying solely on Officer's O'Donnell's text saying "your guy is back."

As Judge Shin pointed out in her separate dissent, if Officer O"Donnell had made the stop herself, the Commonwealth would have been required to present evidence as to why she did so. Merely calling her as a witness and eliciting a conclusory statement that the defendant was the same man she saw in the video would not have been even remotely sufficient. See Milline v. United States, 856 A. 2d 816, 819 (D.C. 2004).

The Appeals Court decision is at odds with Commonwealth v. Warren, 475 Mass, 530, 539 (2016), and, if allowed to stand, the Appeals Court decision would undermine that precedent. Warren flatly held that flight was to be given "little, if any, weight" in the reasonable suspicion calculus in circumstances where the person was "under no obligation to respond to a police officer's inquiry." Id. The Appeals Court decision allowed a Black man to be seized by Boston Police based on a vague description from 12 days earlier, a description that is not even verified by any testimony from the officer who added details to the victim's description based on a video she observed. This creates a cloud of confusion over the essential holding of Warren.

Likewise, the Appeals Court's expansive interpretation of the "fellow officer" rule would reduce Commonwealth v. Privette, 491 Mass. 501, 513-517 (2023), to a dead letter. As the dissents of Justices Massing and Shin noted, the Commonwealth has obligations as to the evidence it must present at suppression

hearings. The Appeals Court decision would largely relieve the Commonwealth of many of those obligations. If the decision is allowed to stand, suppression hearings in our Commonwealth could become exercises in the fellow officer rule, in which even the vaguest descriptions, from days or even weeks earlier, are proffered as justification without any testimony as to how the match was made between the defendant and the person in the description. See United States v. Alvarez, 40 F. 4th 359, 352 (5th. Cir. 2022).

B. BOTH THE MAJORITY AND CONCURRING APPEALS COURT OPINIONS MISINTERPRETED THE TIME OF SEIZURE

While 18 Justices of the Appeals Court agreed with the defendant that he was seized by the police at the very latest when they began to pursue him, it is important to note that nearly half of the Justices in the Appeals Court majority wrote a concurrence which is simply at odds with Massachusetts caselaw on the issue of when a stop begins. The concurrence cites to cases where the police said the words "stop" and asserts that fact distinguishes Palmer's case from prior holdings. (Commonwealth v. Byron Palmer, Ditkoff, J. concurring, joined by five other Justices, Slip Op at 8). No precedent requires specific words by the police before a finding that a reasonable person would believe that he was not free to leave. See Commonwealth v. Borges, 395 Mass. 788 (1985); Commonwealth v. Evelyn, 485 Mass. 691 (2020). In this case, the facts leading a reasonable person to believe he was not free to leave were: three detectives approached the defendant

in the parking lot, four uniformed officers approached from another direction, a police wagon was nearby, and one of the detectives called out to the defendant to get his attention. (Massing dissent, Slip op at 7 &n. 5). With this show of force by the approaching police, the word "stop" was not necessary to communicate the show of force.

This is a case in which 18 Judges of the full Appeals Court agreed with the Defendant's contention that he was seized at least at the time the police started running after him. Some of the Judges (the exact number is unspecified) agreed with Judge Massing's contention that the seizure occurred even earlier, when "three plainclothes detectives, recognizable as such" and four uniformed officers approached the Defendant from two different directions, while a police wagon was "visibly parked in the middle of the parking lot." On the final issue of reasonable suspicion to stop the Defendant, the numerical division of the Appeals Court was 13 judges in favor of the Commonwealth, 11 in favor of the defense. This case cries out for further appellate review, both in the interest of justice and to promote confidence in our judicial system. Rule 27.1, Massachusetts Rules of Appellate Procedure. The Defendant respectfully asks that the Court grant the Petition for Further Appellate Review in this case.

CONCLUSION

For the reasons stated above, the Appeals Court's binding decision on the law is incorrect, and this Court should grant further appellate review to correct that law as a matter of important public policy.

Respectfully submitted,

/S/ **Craig E. Collins**

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OCTOBER 2025

Certificate of Service

I hereby certify that I have this day served the Petition for Further Appellate Review, with Addendum, by electronic mail, through the eFile system, to ADA Ian MacLean and ADA David McGowan.

/S/ **Craig E. Collins**
Craig E. Collins

OCTOBER , 2025

CERTIFICATE OF COMPLIANCE

I hereby state that I have filed this Petition for Further Appellate Review in compliance with the Rules of Appellate Procedure, including, but not limited to Rule 16(a)(13) (addendum); Rule 16(e)(references to the record), Rule 18 (appendix); Rule 20 (form and length of briefs, appendices and other documents); Rule 21 (redaction; and Rule 27.1 (petition for further appellate review). I have used Times New Roman 14, a proportionally based font. The argument section of the petition, which begins on page 5 and ends on page 12, is under the 2,000 word limit set by Rule 20(a)(4)(B). The total word count for the entire document, before addendum, is less than 3,000 words.

/S/ **Craig E. Collins**
Craig E. Collins

ADDENDUM

COMMONWEALTH vs. BYRON PALMER.

No. 24-P-365.

Suffolk. February 3, 2025. – September 19, 2025.

Present: All the Justices.[1]

Robbery. Controlled Substances. Practice, Criminal, Motion to suppress. Constitutional Law, Search and seizure. Search and Seizure, Pursuit, Reasonable suspicion.

Indictments found and returned in the Superior Court Department on November 23, 2021.

A pretrial motion to suppress evidence was heard by Michael P. Doolin, J., a motion for reconsideration was considered by him, and the cases were tried before James F. Lang, J.

Craig E. Collins for the defendant.
Henry Drembus (Ian MacLean, Assistant District Attorney, also present) for the Commonwealth.

[1] This case initially was heard by a panel comprised of Justices Massing, Hershfang, and Tan. After circulation of a majority and dissenting opinion to the other justices of the Appeals Court, the justices decided to all participate in deciding the case after reviewing the briefs and record and listening to the recording of the oral argument. See G. L. c. 211A, § 11. Justice Allen did not participate in the deliberation on this case.

HERSHFANG, J. The defendant, Byron Palmer, was arrested outside an apartment complex in the Jamaica Plain section of Boston after fleeing from approaching police officers who sought to question him about an earlier robbery and shooting in the same location. A judge of the Superior Court denied a motion to suppress in which the defendant maintained that the officers lacked reasonable suspicion to question him. After a jury trial, the defendant was convicted of possession of cocaine with the intent to distribute, G. L. c. 94C, § 32A (c). On appeal, the defendant challenges only the denial of the motion to suppress.

Resolving this appeal requires that we determine first the moment of seizure and then whether the police had reasonable suspicion to seize the defendant at that moment. See Commonwealth v. Barros, 435 Mass. 171, 173, 176 (2001). As reflected in this opinion and the concurring and dissenting opinions that follow, eighteen Justices[2] are of the view that, at the latest, the defendant was seized the moment he turned to flee and was pursued by the police -- before he began to empty his pockets. These eighteen Justices join part 1 of the discussion, which is therefore a majority opinion of the court.

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[2] Chief Justice Blake and Justices Vuono, Rubin, Massing, Henry, Desmond, Sacks, Shin, Hand, Grant, Walsh, Hershfang, Brennan, D'Angelo, Smyth, Toone, Tan, and Wood.

Six Justices[3] are of the view that the defendant was not seized until the police either physically detained him or blocked his path and would affirm the motion judge's view that the cocaine and other items were discarded before this happened.

On the question of reasonable suspicion, thirteen Justices[4] are of the view that, assuming that the seizure occurred no later than when the police began to pursue the defendant, there was reasonable suspicion to believe that he had committed a crime and, therefore, to seize him. Twelve of these Justices[5] join part 2 of the discussion, which is therefore a plurality opinion. Eleven Justices[6] are of the view that the police did not have reasonable suspicion to seize the defendant at the time of the seizure. Accordingly, a majority of the court is of the view that the motion to suppress was properly denied, and the judgment of conviction should be affirmed.

Background. We recite the facts found by the motion judge after an evidentiary hearing on the defendant's motion to

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[3] Justices Meade, Neyman, Ditkoff, Singh, Englander, and Hodgens.

[4] Chief Justice Blake and Justices Vuono, Meade, Neyman, Ditkoff, Singh, Englander, Hand, Grant, Walsh, Hershfang, Brennan, and Hodgens.

[5] All except for Justice Ditkoff.

[6] Justices Rubin, Massing, Henry, Desmond, Sacks, Shin, D'Angelo, Smyth, Toone, Tan, and Wood.

suppress, supplemented with "uncontroverted and undisputed facts from the record that have been credited by the motion judge." Commonwealth v. Privette, 491 Mass. 501, 504 (2023).

On January 2, 2021, a cell phone salesperson went to meet a female customer at an apartment complex in the Jamaica Plain section of Boston. The salesperson was robbed of two cell phones and, when he went outside the building to attempt to get his stolen phones back, the robber fired a gun at him. The victim enlisted the help of a nearby police officer. The victim described the robber as a man, six feet, one inch tall, wearing black clothing and a camouflage mask. He further described the robber as speaking with a southern accent. The victim led the officer (who testified at the hearing, and whose testimony the judge credited) to the area behind the building where he said the shooting had occurred. The officer found a single shell casing and called the detective unit of the Boston police department.

Detective Allison Eng was assigned to the case. (At the time of her testimony, Eng was a sergeant, but we refer to her by the role she had at the relevant time.) Eng also testified and was credited by the motion judge. Eng reached out to Boston Housing Authority Police Sergeant Shannon O'Donnell for help in getting interior and exterior video recordings from the time of the robbery (January 2 videos). O'Donnell was "a police officer

inside the [apartment complex]" who was "responsible for taking care of and monitoring the cameras throughout the [complex]."

O'Donnell provided the January 2 videos, which Eng watched "multiple times." From the time stamps on the videos and by identifying the victim and the customer he was meeting in the exterior videos, Eng identified the suspected robber on both interior and exterior videos. Eng described the suspect as "fitting the description . . . [d]ark clothing, hood up," seen entering the building "directly before" he was seen on the interior videos. After some minutes passed, the victim and the customer entered the building. The customer was carrying a large, brown, "Louis Vuitton"-type shoulder bag. Approximately three minutes later, the suspect ran from the building, "carrying what look[ed] to be the large purse that the woman with the victim . . . was originally carrying." The customer followed within a second, without her purse.

From watching the suspect on the interior videos, Eng derived a "[p]retty good clothing description, and a general subject description. He was wearing a face mask at the time, but he had some pretty distinct features in addition to the clothing." He wore a "pretty distinct coat," a "heavy black jacket on the bottom, kind of two-toned gray on the top"; the suspect's shoes were "distinct sneakers" with "a metallic kind of reflective . . . kind of tape going around them." Eng

described the suspect as having a "long dreadlock" hairstyle and being "dark skin complected." The suspect's hat "was a black and white checker hat with a large round logo on the front and a metallic tag, I guess on the brim of the hat that comes when you purchase the hat." O'Donnell told Eng that she "ha[d] a pretty good knowledge of the residents" and "was surprised that she . . . didn't recognize the suspect."

On January 6, four days after the robbery, O'Donnell reached out to another detective because she had reviewed video footage from the day after the robbery (January 3 video) and seen someone who "fit the description of the suspect from the incident." That detective forwarded a still image from the video to Detective Eng with the notation, "this is guy who did robbery has jacket and sneakers on next day," adding, "[S]hannon [O'Donnell] says [this] is the guy. I don't know what her basis is." In addition to viewing this still image, Eng watched the January 3 video, which showed "a person fitting the same description of the suspect in the . . . same hallway" without a face mask. From viewing the still image, Eng believed it was the same person because the person in the hallway on January 3 was wearing the same jacket and sneakers that the suspected robber had worn on January 2 and had "the same hairstyle, same complexion" and "fit the genera[l] size" of the suspect.

On the morning of January 14, twelve days after the robbery, O'Donnell placed a telephone call to another detective to say she was "watching the videos in real time" and saw "this suspect who we believed to be the person responsible for the robbery" at the apartment complex.[7] O'Donnell also sent a "still shot" from that video footage depicting the suspect, noting, "Your guy is back." The motion judge found that O'Donnell "observed the same suspect in the parking lot."

Eng spoke to O'Donnell by telephone. O'Donnell "was watching the cameras and observed the suspect to be out in the parking lot." O'Donnell identified the person on the live video feed as "the person who was involved in the robbery." "Based on the conversation [she] had with [Sergeant] O'Donnell" and because, in the still image from the video footage Eng could "clearly see . . . the hat and the hairstyle of the suspect," Eng believed that she had "[r]easonable suspicion to respond and attempt to identify that individual." She and two other plainclothes detectives went to the apartment complex. Because the robbery had involved a firearm, Eng also "had an additional unit respond," consisting of four armed, uniformed officers. Those officers, including Officer Alex Rosa, arrived in a police

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[7] O'Donnell "believed that he was involved in drug transactions"; for reasons discussed below, this suspicion plays no role in our analysis.

wagon, which they parked in the parking lot. The detectives explained that they wanted to question the suspect and asked the uniformed officers to stand by "just in case if he tried to flee."

Eng and the two other detectives approached the defendant in the parking lot. The four uniformed officers approached from another direction, "not directly with" the detectives, but within the detectives' view. When Eng saw the defendant in the parking lot, she "believed [him] to be the person responsible for the robbery." One of the detectives called out to the defendant to get his attention. Eng testified that the detectives were "just trying to make casual conversation" and "just trying to get his name and information based on . . . him possibly being a suspect from the robbery."

The defendant immediately started to run away across the parking lot. Rosa and the other uniformed officers immediately ran after him. As Rosa gave chase, the defendant "tossed items out of his pocket." Rosa saw "individual monetary bills that were swirling in the air." Eng saw the defendant discarding plastic bags of what she believed to be drugs. The defendant stopped running after a few seconds, put his hands up, and was quickly arrested. The police recovered money and drugs from the ground where the defendant had been running.

The motion judge denied the defendant's motion to suppress. Prior to trial, the Commonwealth nol prossed an indictment for armed robbery. The defendant was tried before a different judge and jury in the Superior Court on charges of attempted assault and battery by means of a firearm, carrying a loaded firearm, unlawful possession of a firearm and ammunition, and possession of cocaine with the intent to distribute. The jury acquitted the defendant of all charges except the drug charge.

Discussion. The defendant maintains that his motion to suppress should have been allowed because he was seized the moment the officers approached him and, at that point in time, the officers lacked reasonable suspicion to justify an investigative stop. The Commonwealth maintains that no stop occurred until the police apprehended the defendant, after the pursuit. The motion judge agreed with the Commonwealth and opined that the defendant's flight, coupled with "the combination of all the other evidence . . . identifying the defendant with distinctive details and demonstrating his criminality was sufficient to establish reasonable suspicion." Ultimately, however, the judge's determination of reasonable suspicion was irrelevant because he concluded that the money and drugs discarded by the defendant "were abandoned and therefore their subsequent recovery by the police did not constitute a search."

"When reviewing the disposition of a motion to suppress, we accept the motion judge's subsidiary findings absent clear error, and 'make an independent determination whether the judge properly applied constitutional principles to the facts as found.'" Commonwealth v. Robinson-Van Rader, 492 Mass. 1, 9 (2023), quoting Commonwealth v. Lyles, 453 Mass. 811, 814 (2009).

Article 14 of the Massachusetts Declaration of Rights provides that "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." An investigatory stop or "seizure" by police is justified under art. 14 if the police have reasonable suspicion to believe at the time of the stop "that the person has committed, is committing, or is about to commit a crime." Robinson-Van Rader, 492 Mass. at 8, quoting Commonwealth v. Costa, 448 Mass. 510, 514 (2007). Thus, we must determine when the stop occurred before determining whether the police had reasonable suspicion for the stop. See Barros, 435 Mass. at 173 (determining precise moment of seizure "critical" to resolving motion to suppress). The timing of the stop is critical here because if the defendant dropped the drugs on the ground after an unjustified stop, the drugs would be the fruit of an unconstitutional seizure under art. 14. See Commonwealth v. Rodriguez, 456 Mass. 578, 587 (2010), and cases cited

therein. But "[i]f he dropped the drugs before he was stopped, then the drugs could not be the fruit of the seizure." Id.

1. When did the stop occur? "[N]ot every encounter between a law enforcement official and a member of the public constitutes [a seizure]." Commonwealth v. Franklin, 456 Mass. 818, 820 (2010), quoting Commonwealth v. Lopez, 451 Mass. 608, 611 (2008). To decide whether a person has been "seized" in the constitutional sense, "we look at the totality of the circumstances to determine whether a member of law enforcement has 'engaged in some show of authority' that a reasonable person would consider coercive; that is, behavior 'which could be expected to command compliance, beyond simply identifying [himself or herself] as police.'" Commonwealth v. Matta, 483 Mass. 357, 362 (2019), quoting Commonwealth v. Sanchez, 403 Mass. 640, 644 (1988). "[T]he inquiry must be whether, in the circumstances, a reasonable person would believe that an officer would compel him or her to stay." Matta, supra at 363.

In the absence of intimidating circumstances, when a police officer approaches someone and attempts to get the person's attention, asks to speak with the person, or engages in casual conversation, the interaction is not a seizure in the constitutional sense. See Lopez, 451 Mass. at 610-614 (collecting cases in which circumstances of police officers approaching suspects and asking questions held not to be

sufficiently intimidating that reasonable person in suspect's position would have felt compelled to stop and speak with officers). However, the "threatening presence of several officers" may amount to a show of authority inconsistent with casual conversation. United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). See Commonwealth v. Pimentel, 27 Mass. App. Ct. 557, 560 (1989). For example, in Commonwealth v. Grinkley, 44 Mass. App. Ct. 62, 74 (1997), we held that "several police officers' show of authority in advancing on [a group of youths], shouting and waving at them to stop" effected a seizure. In Pimentel, supra at 561, we observed that "the number of officers involved in an encounter could be great enough that their mere presence might reasonably be viewed as threatening," but we did not think that the presence of three officers in that case was "impressive or overwhelming." By contrast, in Commonwealth v. Depina, 456 Mass. 238, 242 (2010), three armed officers wearing "Gang Unit" shirts converging on the defendant and saying "come over here" was held to constitute a seizure.

Because the defendant did not discard the drugs until after he began to run and was immediately pursued, we need not decide whether the circumstances before that moment -- the approach of three plainclothes officers wearing visible badges and asking to speak to the defendant, while four armed, uniformed police

officers approached from another direction, with a police wagon parked nearby -- could reasonably be viewed as a sufficiently intimidating show of authority that a reasonable person in the defendant's position would have believed that the officers intended to use their police power to compel him to stay and answer their questions. It became apparent the moment the defendant turned to flee and several officers immediately chased after him that he would be compelled to stay. "Pursuit that appears designed to effect a stop is no less intrusive than a stop itself. . . . [A] stop starts when pursuit begins." Barros, 435 Mass. at 175, quoting Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981). See Commonwealth v. Stoute, 422 Mass. 782, 789 (1996) (holding that under art. 14 "a pursuit, which, objectively considered, indicates to a person that he would not be free to leave the area . . . without first responding to a police officer's inquiry, is the functional equivalent of a seizure").

This is not a case in which the police merely followed the defendant to maintain visual surveillance. See Franklin, 456 Mass. at 822-823, and cases cited therein. The officers were already approaching the defendant on foot, and their immediate pursuit of the defendant after he started to flee -- which he was free to do if their approach was truly an overture for a consensual encounter, see Commonwealth v. Warren, 475 Mass. 530,

538-539 (2016) -- would have made it clear to the defendant, if it was not already, that the officers intended to prevent him from leaving the parking lot. Contrast Franklin, supra at 823 (no seizure where defendant began running before officers got out of their vehicle and ran after him, with no evidence that they "exercised any show of authority" or "block[ed] or impede[d] his path"). The fact that he immediately surrendered himself seconds later, after his ineffectual attempt to distance himself from evidence of drug dealing, further demonstrates that he felt compelled to stay and answer questions. See Grinkley, 44 Mass. App. Ct. at 74 (youths' submission to officers' show of authority supported conclusion that no reasonable person would have felt free to leave). Thus, at the latest, the defendant was seized the moment he turned to flee and was pursued -- before he began to empty his pockets.

2. Did the police have reasonable suspicion to believe that the defendant committed the robbery? We next ask whether, at the time of the seizure, the officers "had reasonable suspicion to believe that the defendant was committing, had committed, or was about to commit a crime" (quotation omitted). Matta, 483 Mass. at 365, quoting Commonwealth v. Martin, 467 Mass. 291, 303 (2014). "Reasonable suspicion must be based on specific and articulable facts and reasonable inferences therefrom, in light of the officer's experience" (quotation and

citation omitted). Robinson-Van Rader, 492 Mass. at 8. "The facts and inferences underlying the officer's suspicion must be viewed as a whole when assessing the reasonableness of his [or her] acts." Matta, supra, quoting Commonwealth v. Sykes, 449 Mass. 308, 314 (2007). "Reasonable suspicion requires less than probable cause to arrest but must be based on more than just a hunch." Commonwealth v. Henley, 488 Mass. 95, 102 (2021).

In making this assessment, we trace the line from the robbery to the moment of the defendant's seizure, asking "whether, when viewed objectively, there were specific articulable facts and inferences that linked the defendant back to the point of origin of the commission of the crime[]" twelve days earlier. Commonwealth v. Doocey, 56 Mass. App. Ct. 550, 554 (2002).[8]

The victim described the robbery suspect by his height, dark clothing, face mask, and southern accent. Based on this initial description, combined with the time stamps on the

[8] The Commonwealth wisely did not argue that O'Donnell's observations of the defendant's purported involvement in drug transactions, standing alone, provided reasonable suspicion to stop the defendant. "It is not necessary in cases such as this that the police officer observe an exchange of items or actually see drugs or cash, but it is necessary that the observations by the police occur in a factual context that points to criminal activity." Commonwealth v. Kearse, 97 Mass. App. Ct. 297, 302 (2020). The Commonwealth's presentation at the suppression hearing was inadequate to provide specific, articulable facts to justify stopping the defendant for buying or selling drugs. See Commonwealth v. Lyons, 409 Mass. 16, 19 (1990).

January 2 videos and the people and interactions depicted in them, including the flight of the robbery suspect with what appeared to be the customer's brown bag, the officers identified the masked robbery suspect in those videos. That is, from this point on, they knew the person they were looking for was the man in the January 2 videos, although they did not know his name. From the videos the officers observed additional details about the suspect's appearance -- dark skin, dreadlocks, a black and white checkered hat with a logo on the front, and distinctive jacket and shoes. Thus, after O'Donnell and Eng reviewed the January 2 videos, they had identified the robbery suspect, as the motion judge correctly concluded.

The January 3 video from the apartment complex showed "the same suspect," as the motion judge found, including the man's bare face. O'Donnell reviewed the January 3 video and recognized the suspect, seen in a hall with other young adults as the "guy who did [the] robbery," noting in a message to Eng that the suspect was wearing the same distinctive jacket and sneakers as during the robbery. While the January 3 video was not admitted at the suppression hearing, Eng watched it. Also, from the still image sent by O'Donnell, Eng recognized the robbery suspect seen in the prior day's videos, noting that he was wearing the same jacket and sneakers on January 3 that he had worn on January 2 and had the same hairstyle, complexion,

and general size. While the timing is not "close" as in Warren or Robinson-Van Rader, the robbery suspect's appearance in the same location, one day after the robbery, adds to the reasonable suspicion calculus. See Robinson-Van Rader, 492 Mass. at 13; Warren, 475 Mass. at 536. Equally -- or perhaps more -- importantly, the January 3 video afforded O'Donnell and Eng another opportunity to observe the suspect, this time with a bare face, adding to their knowledge of what he looked like. See Commonwealth v. Odware, 429 Mass. 231, 236 (1999) (identification more reliable where witness "saw the defendant multiple times").

This brings us to the day of the arrest, January 14. By the day of the arrest, Eng and O'Donnell had seen multiple images, both still and video, of the suspect. They were not attempting to identify someone from a description alone. See Commonwealth v. Charley, 91 Mass. App. Ct. 223, 227 (2017) (reasonable suspicion calculus included officer's observation of suspect in person and on surveillance video footage). Cf. Depina, 456 Mass. at 243 ("When police officers on the street stop a defendant in reliance on a police dispatch alone . . ." [emphasis added]). They were looking for a person whom they had observed and studied at length on video recordings. O'Donnell was monitoring a live video feed and again saw the robbery suspect. When she saw him, she called the Boston police

detectives and sent a text message saying, "Your guy is back," to which she attached an image of the suspect. The image, combined with O'Donnell's identification, was "particular enough to support . . . reasonable suspicion that the defendant had committed a crime." Henley, 488 Mass. at 103. Eng went to the apartment complex "[b]ased on the conversation [she] had with Officer O'Donnell and you can clearly see in that still photo the hat and the hairstyle of the suspect. And . . . it was the same location . . . ." This evidence supported the motion judge's findings that on the day of the arrest O'Donnell "observed the [robbery] suspect in the parking lot," and the defendant "had the same hat, complexion and hair style" as the suspect.

"'In reviewing a ruling on a motion to suppress evidence, we accept the judge's subsidiary findings of fact absent clear error,' and we defer to the judge's determination of the weight and credibility to be given to oral testimony presented at a motion hearing." Commonwealth v. Hoose, 467 Mass. 395, 399 (2014), quoting Commonwealth v. Contos, 435 Mass. 19, 32 (2001). Given the motion judge's finding that O'Donnell observed the same suspect on the day of the arrest whom she had seen on two earlier occasions while investigating the robbery, O'Donnell had reasonable suspicion to approach and stop the defendant.

Therefore, the Boston police officers working with her were permitted to do the same. See Privette, 491 Mass. at 514-516.

We would reach the same conclusion if we considered what O'Donnell said to Eng using the framework applied to tips. We would consider whether "the information on which the dispatch was based had sufficient indicia of reliability," and whether "the description of the suspect conveyed by the dispatch had sufficient particularity that it was reasonable for the police to suspect a person matching that description." Depina, 456 Mass. at 243. "Where, as here, the required standard is reasonable suspicion rather than probable cause 'a less rigorous showing in each of these areas is permissible.'" Commonwealth v. Westgate, 101 Mass. App. Ct. 548, 551 (2022), quoting Commonwealth v. Lopes, 455 Mass. 147, 156 (2009).

"Particularity" is addressed above. Evaluating indicia of reliability involves considering "the basis of knowledge of the source of the information" and "the underlying circumstances demonstrating that the source of the information was credible or the information reliable" (citation omitted). Westgate, 101 Mass. App. Ct. at 551. "Information related by a reliable person can be sufficient to establish a reasonable suspicion." Commonwealth v. Wren, 391 Mass. 705, 707 (1984).

The basis of O'Donnell's knowledge was her prior review of the video footage and prior identifications of the defendant.

She knew who she was looking for. As a fellow law enforcement officer working in conjunction with Eng, her veracity was not in question.[9] Eng knew that O'Donnell's "knowledge was based on personal observation, and [she] had reason to trust [her] veracity." Wren, 391 Mass. at 707. And, importantly, when Eng saw the defendant in the parking lot, she identified him as the robbery suspect.

To the extent Eng also believed the defendant was the robbery suspect because the description (the defendant's size, hat, complexion, and hairstyle) matched the suspect she had observed in the video footage and still photographs, that corroborated the identification. This evidence amply supported the motion judge's findings that on the day of the arrest O'Donnell "observed the [robbery] suspect in the parking lot," and the defendant "had the same hat, complexion and hair style" as the suspect.

Finally, the fact that the defendant took off running when approached by detectives adds to the reasonable suspicion calculus. See, e.g., Stoute, 422 Mass. at 791; Commonwealth v.

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[9] O'Donnell also sent a text message to Eng on January 14 stating, "Your guy is back" and attached a "still shot" of the suspect. Although the still photograph did not show the person's face, there was no dispute that the man depicted in that still photograph and on the video feed from January 14 was the same person police approached and ultimately arrested -- that is, the defendant.

Mercado, 422 Mass. 367, 368, 371 (1996). While there are many legitimate reasons a person may choose not to engage with police, we need not completely ignore the defendant's sudden flight in the face of police inquiry. See Wren, 391 Mass. at 708 n.2. Because it "would have been poor police work indeed" for the officers not to investigate further after O'Donnell reported that the robbery suspect was "back," Terry v. Ohio, 392 U.S. 1, 23 (1968), and because there was reasonable suspicion to believe the defendant was the robbery suspect, we affirm.

Judgment affirmed.

DITKOFF, J. (concurring, with whom Meade, Neyman, Singh, Englander, and Hodgens, JJ., join). I concur because it is settled law that police officers do not seize a running defendant merely by running after that defendant.[1] One does not need police authority to follow someone, even someone who is running. Instead, a seizure occurs when pursuit is accompanied by a command to stop or by other actions communicating the use of police authority to require the defendant to stop.

Under art. 14 of the Massachusetts Declaration of Rights,[2] a seizure occurs when "an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay." Commonwealth v. Matta, 483 Mass. 357, 362 (2019). Usually this is accomplished through the classic, "Stop, police" in conjunction with a chase. See id. at 365 ("The defendant was seized . . . once the officer ordered him to stop, and then chased him"); Commonwealth v. Jones-Pannell, 472 Mass. 429, 433 (2015) (seizure at "loud

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[1] Furthermore, I concur because I agree with the majority that, even if the seizure occurred at the moment that the police officers began running after the defendant, the police had reasonable suspicion to stop the defendant at that point.

[2] Under the Fourth Amendment to the United States Constitution, a seizure does not occur until a person acquiesces to a show of authority or is physically seized. California v. Hodari D., 499 U.S. 621, 624-626 (1991). As the United States Supreme Court explained, "[s]treet pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged." Id. at 627.

command to '[w]ait,'" followed by pursuit); Commonwealth v. Quezada, 67 Mass. App. Ct. 693, 696 (2006), S.C., 450 Mass. 1030 (2008) ("a seizure occurred when [the officer] chased the defendant and yelled 'stop'"); Commonwealth v. Dasilva, 66 Mass. App. Ct. 556, 558 n.4 (2006) ("the defendant was seized when [the officer] first began pursuing him and ordered him to stop").

Both we and the Supreme Judicial Court have rejected the notion that pursuit without a command to stop constitutes a seizure. In Commonwealth v. Franklin, 456 Mass. 818, 819 (2010), the defendant ran when he saw the police vehicle approaching. As soon as the defendant started running, "three of the officers got out of the car, with two of them running after the defendant." Id. In the absence of a command to stop, running after the defendant was not a seizure. See id. at 823 ("the [motion] judge's conclusion that the defendant was seized when the police left their vehicle and began to run after him was incorrect"). Rather, the moment of seizure was when "the police grabbed the defendant as he was climbing the fence." Id.

Similarly, in Commonwealth v. Powell, 459 Mass. 572, 575 (2011), cert. denied, 565 U.S. 1262 (2012), the defendant began running after the officers drove "very slowly" down the street with the windows down. The defendant ran, and an officer alighted from his vehicle and followed the running defendant.

Id. at 575-576. The Supreme Judicial Court held that this was not a seizure. See id. at 578. As the court explained, "[w]hen [the officer] began following the defendant on foot, he had not exercised any show of authority or commanded the defendant to stop; and the officers had not blocked or impeded the defendant's path." Id. Rather, the moment of seizure occurred when the officer drew his weapon and instructed the defendant to drop his weapon. Id. Accord Commonwealth v. Isaiah I., 450 Mass. 818, 820, 822 (2008) (no seizure where juvenile "'quickly' walked into the store" and officer "'quickly' followed the juvenile down an aisle").

Our case law is in accord.[3] As we have stated, "merely running after a running person, without more, does not effect a seizure in the constitutional sense." Commonwealth v. Shane S., 92 Mass. App. Ct. 314, 321 (2017), quoting Commonwealth v. Perry, 62 Mass. App. Ct. 500, 502 (2004). In Shane S., supra at 316, an officer said to the juvenile and his companion, "Hey, guys, can I talk to you for a sec?" When the officer asked the companion his name and began to take out his cell phone, the juvenile ran, and the officer ran after him. Id. We held that

[3] I acknowledge that there are cases, issued before Matta and Franklin clarified the law, that state that mere pursuit constitutes a seizure. See, e.g., Commonwealth v. Sykes, 449 Mass. 308, 314 (2007); Commonwealth v. Webster, 75 Mass. App. Ct. 247, 253 (2009).

the officer did not seize the juvenile as "[t]here is no evidence in the record that [the officer] called out to the juvenile to stop" or that "the juvenile looked back at [the officer]." Id. at 318, 319.

In Perry, 62 Mass. App. Ct. at 501, the defendant ran away after seeing the officer, and the officer "broadcast the defendant's description and ran after the defendant." We rejected the motion judge's conclusion that this constituted a seizure. Id. at 503. As we explained, the officer "made no show of authority, or attempt to stop or restrain the defendant's movement, when he ran after him." Id. at 502. Accordingly, "[w]e conclude[d] that the police did not seize the defendant until [the officer] directed the defendant to stop." Id. at 503.

Here, there was no evidence that any officer told the defendant to stop. To the contrary, Detective Allison Eng testified, "We did not demand he stop" and that no officer at any point told him to stop. "The motion judge made no finding that the defendant was even aware that [the officer] was running behind him, and there is no evidence in the record to indicate such an awareness." Perry, 62 Mass. App. Ct. at 502. In short, nothing justifies the conclusion that the officers seized the defendant merely by running after him.

To be sure, a seizure occurred at some point. The officers eventually physically detained the defendant, and the body camera footage reveals that the uniformed officers at some point blocked the defendant's path. Compare Commonwealth v. Edwards, 476 Mass. 341, 345 (2017) (seizure occurs when police vehicle blocks defendant's vehicle's egress), with Commonwealth v. Karen K., 491 Mass. 165, 174 n.5 (2023) (not deciding whether seizure occurred when officer on foot blocked juvenile's path).

The motion judge appeared to find that the defendant discarded the drugs and money before he was seized, and the testimony of the officers supported such a finding. Detective Eng testified that "[i]mmediately upon fleeing on foot he began discarding drugs from his pockets," and one of the uniformed officers testified that "[w]hat caught my eye was like individual monetary bills that were swirling in the air." Although one could view the body camera footage as suggesting that the defendant discarded the money after the uniformed officers moved to block his path, that footage is inconclusive and is not enough to establish clear error in the motion judge's findings. See Karen K., 491 Mass. at 170, quoting Commonwealth v. Carr, 458 Mass. 295, 303 (2010) ("Where there are two permissible views of the evidence, [however,] the factfinder's choice between them cannot be clearly erroneous").

Because the defendant discarded the drugs before being seized, there is no basis for suppressing the drugs. See Commonwealth v. Lopez, 451 Mass. 608, 614 (2008). Moreover, once the defendant discarded drugs in plain view of the police officers, they unquestionably had reasonable suspicion to seize him. See Commonwealth v. Evans, 87 Mass. App. Ct. 687, 689 (2015). Accord Franklin, 456 Mass. at 823; Perry, 62 Mass. App. Ct. at 503-504. Accordingly, the motion judge properly denied the motion to suppress.

I respectfully concur in affirming the judgment.

MASSING, J. (dissenting in part, with whom Rubin, Henry, Desmond, Sacks, Shin, D'Angelo, Smyth, Toone, Tan, and Wood, JJ., join). When a defendant files a motion to suppress alleging that the police unconstitutionally exercised their coercive powers to detain him for the purposes of investigating a crime, it is critical not only for the public's confidence in the legitimacy of law enforcement, but also for the integrity of our criminal justice system, that prosecutors and the police come to court prepared to supply evidence of the specific, articulable facts that the police possessed and relied on to justify the seizure. "We do not blindly accept officers' reliance on information obtained through police channels; the government must substantiate the basis of the information." United States v. Alvarez, 40 F.4th 339, 352 (5th Cir. 2022). The evidence adduced at the suppression hearing showed that the police stopped the defendant based on nothing more than his skin color, hairstyle, and hat -- descriptive features that could fit any number of young men in the area where the stop occurred and did not rise to the level of reasonable suspicion that the defendant was the same man seen on video surveillance footage almost two weeks before. Because the Commonwealth failed to produce evidence demonstrating that the officers' decision was based on anything more, and because in my view the majority draws unwarranted inferences to compensate for this absence of

proof, I respectfully dissent from part 2 of the plurality's opinion.

As we must accept the motion judge's subsidiary findings of fact, unless clearly erroneous, and then "make an independent determination whether the judge properly applied constitutional principles to the facts as found," Commonwealth v. Robinson-Van Rader, 492 Mass. 1, 9 (2023), quoting Commonwealth v. Lyles, 453 Mass. 811, 814 (2009), I begin with the motion judge's brief written findings.

On January 2, 2021, after the victim "described his assailant as a man, 6'1" tall, wearing black clothing, a camouflage mask and who spoke with a southern accent," Boston Police Detective Allison Eng and Boston Housing Authority Police Sergeant Shannon O'Donnell reviewed surveillance footage from the Mildred C. Hailey Apartment complex[1] and determined "that the suspect was a dark-skinned male with dreadlocks, a coat, sneakers, and a hat with a logo on the front." On surveillance footage from the next day, January 3, "the same suspect was seen without a mask and was wearing a distinctive chain around his neck." On January 14, O'Donnell "observed the same suspect in

[1] The officers referred to the apartment complex as the "Bromley Heath Projects" at the suppression hearing, but it has been renamed for longtime tenant organization executive director and civil rights activist Mildred C. Hailey. See Commonwealth v. Karen K., 99 Mass. App. Ct. 216, 217 n.2 (2021), S.C., 491 Mass. 165 (2023).

the parking lot" while monitoring the live feed from the apartment complex's surveillance cameras. When Eng arrived on the scene, she saw the defendant. "Eng believed that this individual was the suspect from the robbery and surveillance footage." He "had the same hat, complexion and hairstyle as the suspect observed earlier."

Because O'Donnell did not testify at the hearing on the motion to suppress, the finding that O'Donnell "observed the same suspect in the parking lot" was based on Eng's testimony and one exhibit -- a text message that O'Donnell sent to Eng stating, "Your guy is back," along with a still image from the surveillance cameras. Eng testified that she decided to return to the apartment complex to investigate "[b]ased on the conversation [she] had with Officer O'Donnell and you can clearly see in that still photo the hat and the hairstyle of the suspect." Nowhere in her testimony did Eng describe O'Donnell's basis for her belief that the defendant in the parking lot was the suspect from the January 2 and 3 video footage. Nor did the motion judge make any findings concerning the basis of O'Donnell's belief -- he merely repeated Eng's testimony that O'Donnell told Eng that she "observed the same suspect." And the judge made no finding that the defendant's hat and hairstyle were "clearly visible," or visible at all, in the still image from the video footage. Such a finding would have been clearly

erroneous. See Commonwealth v. Yusuf, 488 Mass. 379, 385 (2021) (appellate court in same position as motion judge to review documentary evidence such as video recording).

According to the motion judge's findings, Eng decided to stop and question the defendant based on his "hat, complexion and hairstyle" -- and O'Donnell's word. The defendant was not wearing the same coat or sneakers that the suspect had been wearing on January 2 and 3. The officers did not see the distinctive chain from January 3, nor did they hear a southern accent. Eng did not testify, and the judge did not find, that she recognized the defendant based on the suspect's facial features that she had observed while studying the January 2 video footage (in which, of course, the suspect was masked) or from viewing the January 3 footage. Although Eng made a brief, vague reference to the defendant's "size" during her testimony, she did not state, nor did the judge find, that the defendant's height, weight, or build were similar to that of the suspect. The judge concluded that reasonable suspicion was established based on the defendant's flight in combination with "all the other evidence set forth above identifying the defendant with distinctive details," but it is our duty to make an independent determination whether these details were sufficiently distinctive to satisfy the constitutional standard.

The constitutional issues here are "whether, when viewed objectively, there were specific articulable facts and inferences that linked the defendant back to the point of origin of the commission of the crimes" twelve days earlier, Commonwealth v. Doocey, 56 Mass. App. Ct. 550, 554 (2002), and whether the description of the suspect "had sufficient particularity that it was reasonable for the police to suspect a person matching that description," Commonwealth v. Depina, 456 Mass. 238, 243 (2010). "To make an investigatory stop based solely on a physical description, the description need not be so particularized as to fit only a single person, but it cannot be so general that it would include a large number of people in the area where the stop occurs." Id. at 245-246. See Commonwealth v. Privette, 491 Mass. 501, 519 (2023) ("We have cautioned that a match between a defendant's appearance and a general description alone does not amount to reasonable suspicion, particularly if that general description could fit a large number of people in the area where the stop occurred"). A description of a Black male wearing dark clothing and a red "hoodie" (hooded sweatshirt) in the Roxbury neighborhood of Boston is not sufficient. See Commonwealth v. Warren, 475 Mass. 530, 535-536 (2016). Nor is a description of "a young Black man in a black hooded sweatshirt and blue jeans." Commonwealth v. D.M., 100 Mass. App. Ct. 211, 216 (2021). Likewise, "the

description of the suspect as a 'black male with a black 3/4 length goose[-down jacket]'" was insufficient to provide reasonable suspicion because it "could have fit a large number of men who reside in the Grove Hall section of Roxbury, a predominantly black neighborhood of the city." Commonwealth v. Cheek, 413 Mass. 492, 496 (1992).

The description of the suspect in this case as "a dark-skinned male" did not distinguish him from many Black men, or dark-skinned Latino men for that matter, who might be found in the neighborhood of the Hailey apartment complex in the Jamaica Plain section of Boston.[2] The suspect's hairstyle, which Eng described as "long dreadlock" based on the January 2 surveillance footage, likewise was not a distinguishing characteristic. See Commonwealth v. Davis, 487 Mass. 448, 469 (2021), S.C., 491 Mass. 1011 (2023) ("All one can see is that the shooter is a Black man with long hair in braids or

[2] I have reviewed the surveillance video footage and photographs in evidence. The suspect appears to be a dark-skinned Black man in some images, and he appears to be a medium- or light-skinned Black man in others. Indeed, I question whether the suspect seen on January 2 is the same person seen on January 3 -- there is little resemblance, other than the jacket and sneakers, and the fact that both men are Black. The suspect was wearing a different hat on January 3, as Eng acknowledged in her testimony. I concede, however, that the motion judge's finding that the suspect in the video footage on January 2 was "the same suspect" as the man in the video footage on January 3 is not clearly erroneous.

dreadlocks that extend down to his midback. As amici point out, braided hairstyles are not uncommon among Black people" [footnote omitted]).[3] And while a suspect's hat might be helpful to identify him in a showup identification procedure conducted promptly after a crime, see Commonwealth v. Meas, 467 Mass. 434, 443, cert. denied, 574 U.S. 858 (2014), the police could not reasonably identify the generally described robbery suspect, twelve days later, by his black and white checkered baseball hat with an unidentified logo and metallic tag.[4] Hats "are easily worn, taken off, changed, or discarded." Privette, 491 Mass. at 520. Indeed, the suspect as seen on the surveillance footage on January 2 was wearing a different hat from the suspect as seen on the January 3 footage.

As to the fact that the defendant fled immediately after seven police officers converged on him,[5] it was not a reasonable

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[3] Moreover, based on the evidence in the record, it is a mystery how Eng could discern the defendant's hairstyle on January 14. In the screenshot that O'Donnell sent Eng that day, and in the body camera footage of the pursuit and arrest, the defendant's hair is hidden by his hat and the raised hood of his jacket.

[4] Eng testified that "it's common for people to keep [the metallic tag] on the hat even after they purchase it and wear it with the reflective logo on the brim of the hat." Only after the defendant was arrested did the officers learn that the hat had the logo of the Brooklyn Nets basketball team.

[5] I join in part 1 of the majority's opinion. Speaking for myself and some, but not all, of the Justices joining in this dissent, I would go further and hold that the approach from one

inference that he fled because he thought the officers suspected him of the robbery and shooting incident twelve days earlier. In other words, his flight did not demonstrate consciousness of guilt related to the suspected crime and, therefore, did not contribute to the officers' reasonable suspicion that the defendant had committed that crime. "[E]vasive conduct in the absence of any other information tending toward an individualized suspicion that the defendant was involved in the crime is insufficient to support reasonable suspicion." Warren, 475 Mass. at 538. See id. at 539-540 (given documented pattern that Black men in Boston are disproportionately subjects of police-civilian encounters, evidence of flight carries diminished probative value).

As discussed above, Eng's testimony did not suggest that she recognized the defendant in the parking lot based on features of the suspect she had observed in the surveillance video footage, other than the hat, hairstyle, and skin color. Which brings us to Eng's reliance on O'Donnell's belief that the defendant, observed by O'Donnell while watching live

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direction of three plainclothes detectives, recognizable as such, with four uniformed officers approaching from the other direction, and with a police wagon visibly parked in the middle of the parking lot, was a sufficient show of force to amount to a stop. Considering the approach of the seven officers to be the seizure, the defendant's flight should not be considered at all. In any event, his flight adds nothing significant to the reasonable suspicion calculus.

surveillance feed, was the same person as the suspect. Because O'Donnell did not testify, and Eng's testimony relayed only O'Donnell's belief, but not the basis for that belief, the record is devoid of evidence supporting O'Donnell's representation to Eng that she observed "the same suspect" in the parking lot. Although the collective knowledge doctrine was not raised at the suppression hearing or in the parties' briefs on appeal, I do not doubt that Eng and O'Donnell's working relationship was sufficient to establish "horizontal collective knowledge," such that O'Donnell's knowledge can be aggregated with Eng's for the purpose of determining reasonable suspicion. See Privette, 491 Mass. at 513-514. The collective knowledge doctrine, however, does not relieve the Commonwealth of its burden to produce evidence of the specific, articulable facts known to O'Donnell that could be added to Eng's knowledge. For example, in Privette, the court concluded that the knowledge of one officer involved in an armed robbery investigation could be imputed to the arresting officer, but in defending the motion to suppress, both officers testified. See id. at 504, 518-519. Likewise, an officer from one police department may stop a named suspect based on a bulletin issued by another department, but to defend the stop in a suppression hearing, the government must present evidence of the specific and articulable facts underlying the bulletin that provided reasonable suspicion to

stop the suspect. See United States v. Hensley, 469 U.S. 221, 232-235 (1985). See also Cheek, 413 Mass. at 494-495 ("Where the police rely on a police radio call to conduct an investigatory stop, under both Federal and State law, the Commonwealth must present evidence at the hearing on the motion to suppress on the factual basis for the police radio call in order to establish its indicia of reliability").

It was the Commonwealth's responsibility to substantiate the basis for stopping the defendant; it is not the responsibility of an appellate court to compensate the deficiencies in the Commonwealth's proof. In my view, the plurality errs by accepting Eng's reliance on O'Donnell's conclusion that the defendant was the same person as the suspect she viewed on the video footage, without any evidence of the specific, articulable factors that led O'Donnell to that conclusion. "A court may not simply rely on a police officer's conclusory assertions in deciding whether a search or seizure was justified under the Fourth Amendment, but rather must evaluate the facts underlying those assertions" (citation omitted). Milline v. United States, 856 A.2d 616, 619 (D.C. 2004). "[T]o do so the [court] must be 'apprised of sufficient facts to enable [it] to evaluate the nature and reliability of that information.'" Id., quoting In re T.L.L., 729 A.2d 334, 341 (D.C. 1999). While it may have been "poor police work

indeed" for Eng not to follow up on O'Donnell's lead, see ante at , without evidence of the facts underlying that lead, we are left with a seizure based only on skin color, a common hairstyle, and a hat.

For the sake of completeness, other factors that sometimes figure into the reasonable suspicion calculus, such as "temporal and physical proximity," Privette, 491 Mass. at 519, can be ruled out. "Proximity is accorded greater probative value in the reasonable suspicion calculus when the distance is short and the timing is close." Warren, 475 Mass. at 536. Thus, where a defendant was found in the reported path of flight from the robbery scene seven minutes after the robbery was reported, "the timing and the location of the stop in relation to the armed robbery . . . weigh[ed] in favor of a finding of reasonable suspicion." Privette, supra at 520. Accord Doocey, 56 Mass. App. Ct. at 558 (general description enhanced by defendant's close physical proximity to crime scene, within moments of shots having been fired, where "defendant was the only person present in the very narrow zone where the suspect was seen headed and would probably be found"). Here, although the defendant was present near the crime scene, his presence did not contribute to reasonable suspicion that he had committed a crime twelve days earlier.

Finally, as to "[t]he gravity of the crime and the present danger of the circumstances," Depina, 456 Mass. at 247, although the police were investigating a robbery and the discharge of a gun, nothing in the circumstances of the gathering in the parking lot twelve days later suggested that a potentially violent crime was in progress, that the defendant was armed, or that any other threat of danger to the community was afoot. Compare Doocey, 56 Mass. App. Ct. at 557 (where possession of gun "presents an imminent threat because of shots just fired, or likely to be fired . . . there is an edge added to the [reasonable suspicion] calculus"), with D.M., 100 Mass. App. Ct. at 218-219 (reasonable suspicion not enhanced where defendant's conduct did not suggest he was concealing gun).

Because the Commonwealth failed to demonstrate that the police had reasonable suspicion to stop the defendant, the defendant's motion to suppress should have been allowed, and his judgment of conviction should be vacated.

SHIN, J. (dissenting in part, with whom Rubin, Massing, Henry, Desmond, Sacks, D'Angelo, Smyth, Toone, Tan, and Wood, JJ., join). I join Justice Massing's dissenting opinion in full. I write separately to underscore that the problem here lies not with the officers who made the stop but with the prosecution's failure, in response to the defendant's motion to suppress, to substantiate the basis of Sergeant Shannon O'Donnell's information that the defendant was the suspected robber, which was the underpinning of the stop. Thus, the notion that it would have been "poor police work" for the officers not to investigate the defendant based on O'Donnell's report only serves to obscure the real issue in the case.

It is settled law that officers may conduct a stop based on information possessed by another officer so long as their reliance on that information is objectively reasonable. See United States v. Hensley, 469 U.S. 221, 232-233 (1985); Commonwealth v. Privette, 491 Mass. 501, 508-509 (2023). "Variously called the 'collective knowledge' or 'fellow officer' rule, this doctrine recognizes the practical reality that 'effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another.'" United States v. Lyons, 687 F.3d 754, 766 (6th Cir. 2012), quoting Hensley, supra at 231. In this case I accept that it was objectively reasonable for Detective

Allison Eng and the other seizing officers to credit the information provided by O'Donnell that the defendant was the robbery suspect. I therefore further accept that the seizing officers were entitled to rely on that information in making the stop.

It is equally settled law, however, that once a defendant is then charged and moves to suppress evidence obtained from the stop, the government must prove not just objectively reasonable reliance by the seizing officers, but also that the information underlying the stop was based on reasonable suspicion that the defendant committed a crime. See Hensley, 469 U.S. at 232; Commonwealth v. Cheek, 413 Mass. 492, 494-495 (1992). See also Lyons, 687 F.3d at 766 (principles governing collective knowledge apply "[w]hether [information is] conveyed by police bulletin or dispatch, direct communication or indirect communication"). This rule does not hinder the officers' ability to make the stop but, once the matter is in court, puts the burden on the prosecution to "substantiate the basis of the [underlying] information" when faced with a motion to suppress. United States v. Alvarez, 40 F.4th 339, 352 (5th Cir. 2022). Were the rule otherwise, it "could enable an officer to 'bring about a lawful stop by the simple expedient of passing [information] on to another officer.'" Jenkins v. United States, 152 A.3d 585, 590 (D.C. 2017), quoting 4 W.R. LeFave,

Search and Seizure § 9.5(j) (5th ed. 2012). To illustrate, had O'Donnell made the stop herself, the Commonwealth would of course need to prove she had reasonable suspicion that the defendant was the suspect she saw in the video footage from eleven and twelve days earlier and could not rely merely on her say-so that the "guy" came "back." That O'Donnell instead communicated her suspicion to another officer does not lower the Commonwealth's burden. See Commonwealth v. Keene, 89 Mass. App. Ct. 902, 903-904 (2016) (although Boston police stopped defendant in reasonable reliance on radio report from Stoughton police describing car occupied by armed and dangerous suspects, stop violated Fourth Amendment because Stoughton police lacked reasonable suspicion that defendant or other occupant committed shooting).

At the suppression hearing, the Commonwealth offered three pieces of evidence relevant to O'Donnell's suspicion that the defendant was the robber: (1) the January 2 video footage, which showed the suspect wearing a mask, a coat and shoes with distinct markings, and a black and white checkered hat; (2) a screenshot from the January 3 video footage (but not the video itself), which showed an unmasked man wearing a similar coat and shoes but a different hat; and (3) a screenshot from the January 14 video footage (but not the video itself), which showed the defendant in profile -- his facial features and shoes

not visible -- wearing a similar hat to the one in the January 2 video footage, but a different coat. None of this evidence adds to the information already known to Eng, as she had watched the January 2 video footage and seen the screenshots from January 3 and 14 before making the stop. Consequently, there is no basis in the record to conclude that O'Donnell had any additional knowledge supporting reasonable suspicion that could be imputed to Eng or, alternatively, that could be pooled with Eng's existing knowledge to meet the reasonable suspicion threshold. See Privette, 491 Mass. at 514-515. And indeed, the Commonwealth never even raised such a claim, either to the judge or on appeal.

Thus, in the end, this case comes down to the question whether Eng herself had reasonable suspicion that the defendant was the robber. See Lyons, 687 F.3d at 766 ("if an investigating officer lacked sufficient information to satisfy the reasonable suspicion requirement, and the [responding officer's] subsequent observations did not produce reasonable suspicion, then the stop violates the Fourth Amendment" [quotation and citation omitted]). That question in turn comes down to whether the Commonwealth proved that the defendant's hairstyle and the hat he was wearing were distinctive enough to distinguish him from other dark-skinned men in the neighborhood given the twelve-day lapse in time between the reported robbery

and the stop. For the reasons well stated by Justice Massing, the Commonwealth did not meet that burden, and so the motion to suppress should have been allowed.