

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

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FAR-27605  
2018-P-1440

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COMMONWEALTH OF MASSACHUSETTS,  
Appellee

V.

JAMAL CHIN-CLARKE,  
Defendant-Appellant

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COMMONWEALTH'S APPLICATION FOR  
LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

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SUFFOLK COUNTY

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**REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW**

The Commonwealth respectfully requests leave from this Court to obtain further appellate review of the Appeals Court decision in *Commonwealth v. Chin-Clarke*, 97 Mass. App. Ct. 604 (2020). The Appeals Court reversed the lower court's denial of the defendant's motion to suppress evidence because they concluded that Officer McHugh did not have reasonable suspicion of criminal activity justifying the initial seizure of the defendant. *Chin-Clarke*, 97 Mass. App. Ct. at 611.

Further appellate review is appropriate because the Appeals Court majority (1) ignored a critical factual finding of the judge that gave context to Officer McHugh's observations, (2) improperly parsed the facts found by the motion judge rather than viewing them in totality and in light of the officer's experience, and (3) imposed a greater quantum for reasonable suspicion than required under both the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights.

**STATEMENT OF PRIOR PROCEEDINGS**

On May 2, 2017, the defendant, Jamal Chin-Clarke, was arraigned in Suffolk Superior Court, Indictment Number 1784CR0243, for the following charges: carrying a firearm without a license, in violation of G.L. c. 269, § 10(a); carrying a loaded firearm without a license, in violation of G.L. c. 269, § 10(n); posses-

sion with intent to distribute a class B substance, in violation of G.L. c. 94C, § 32A(b); possession with intent to distribute cocaine, in violation of G.L. c. 94C, § 32A(d); and possession of a firearm in commission of a felony, in violation of G.L. c. 265, § 18B. (C.A.4-5).<sup>1</sup>

On December 11, 2017, the defendant filed a motion to suppress evidence (C.A.8). The Commonwealth filed an opposition to that motion on June 7, 2018 (C.A.9). On June 7, 2018, the Honorable Diane Freniere held an evidentiary hearing and denied the defendant's motion to suppress on June 28, 2018 (C.A.9).

The defendant filed a notice of appeal on July 25, 2018, and an application for leave to appeal in the Supreme Judicial Court for Suffolk County on July 26, 2018 (C.A.10, 14). On August 3, 2018, the Single Justice, Lowy, J., allowed the defendant's application and ordered the case be transmitted to the Appeals Court (C.A.14). This case was entered in the Appeals Court on October 16, 2018 (C.A.15).

After briefing and oral argument, on June 9, 2020, the Appeals Court (Shin, Singh, JJ. with Meade, J. dissenting) reversed the denial of the motion to suppress. See *Chin-Clarke*, 97 Mass. App. Ct. at 611.

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<sup>1</sup> (C.A.[page]) herein refers to the record appendix attached to this application; and (Tr.[page]) refers to the transcript of the evidentiary hearing which is included at the end of the Commonwealth's appendix.

Neither party sought reconsideration or a rehearing in the Appeals Court.

**STATEMENT OF RELEVANT FACTS**

***A. Motion Judge's Findings of Fact.***

At the evidentiary hearing on the defendant's motion, the Commonwealth presented testimony from Officer Michael McHugh, whom the motion judge found credible (Tr.3-51; C.A.18). The defendant did not present any evidence. After the evidentiary hearing, the motion judge issued written findings of fact and rulings of law on June 28, 2018 (C.A.17-24). The judge made the following factual findings:<sup>2</sup>

I credit and accept the testimony of Officer McHugh regarding the events he observed and participated in the morning of January 27, 2017 (Tr.3-51). I find that Officer McHugh is an experienced member of the Boston Police Department, serving as an officer in varied capacities for 10 years (Tr.4-6). In addition to his academy training and yearly in-service training, Officer McHugh has participated in specialized training in surveillance tactics, active shooter training and trademarks and identification of armed subjects (Tr.5).

For the last four years, Officer McHugh has been assigned to a plain-clothes, walking beat in the downtown Boston area, covering in relevant part the portion of Boylston Street between Washington and Tremont Streets. (Tr.5-6). The area is dominated by commercial properties and has heavy pedestrian foot traffic (Tr.5-7). It is a high crime area with frequent arrests for buy-

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<sup>2</sup> The Commonwealth has included citations to the motion hearing transcript in parenthesis where there is support in the record for the judge's findings.



ing/selling narcotics, larceny, robbery, assault, trespassing and shoplifting (Tr.5-12). As for shoplifting, Officer McHugh has made numerous arrests for shoplifting and has made observations of individuals selling or trading stolen property on the street (Tr.5-12). Additionally, Officer McHugh has made numerous shoplifting arrests and has observed individuals selling and/or trading their stolen property outside on the street, often to feed drug addiction (Tr.5-12). Officer McHugh has made arrests for shoplifting crimes based on his observation of people engaged in commerce on the street with items with tags still on them and/or items in bags not consistent with the contained items (Tr.10).

Saint Frances House ("SFH"), a daytime homeless shelter located at 39 Boylston Street, is within Officer McHugh's walking beat and he spends much of his time patrolling in and around SFH (Tr.10-12). SFH provides daytime meals, social services and clothing to the homeless (Tr.10-12). SFH has security comprising a half-dozen blue-uniformed staff equipped with metal detectors to uncover weapons (Tr. 10-12). There are frequent altercations both inside and outside SFH and Officer McHugh has made hundreds of arrests near [SFH] for crimes ranging from drug dealing/possession, stabbings, warrant arrests, trespassing and malicious destruction of property (Tr.10-12).

On January 27, 2017 at approximately 9:20 A.M., Officer McHugh was in plain clothes working alone on Boylston Street in the vicinity of SFH (Tr.12-13). Officer McHugh carried an iPad tablet which he routinely used to access the Criminal Justice Information System ("CJIS"), including booking photos, license photos, warrants and BOP records (Tr.13). As he walked past the front door of SFH, Officer McHugh observed three males looking in a plastic shopping bag and talking to each other (Tr.14). Officer McHugh was alerted to the three males,

who he did not know, when he noticed that the bag contained clothing and some of the clothing was outside of the bag with tags still attached and visible (Tr.14-15). Based on this observation, his training and experience, Officer McHugh suspected that the men were involved in a street sale transaction of stolen clothing and he decided to conduct a threshold inquiry (Tr.14-15).

As Officer McHugh approached the males, he overheard one male ask "how much is this?" as another male held up some merchandise (Tr.15-16). Officer McHugh then engaged the trio directly asking "what's up guys? Is that stuff stolen?" (Tr.15-16). Startled, the male holding up the merchandise (later identified as Milton Noj) responded "Woah" (Tr.16). Officer McHugh identified himself as a Boston Police officer and asked the men for their identifications (Tr.16-17). As Officer McHugh spoke with Noj, Chin-Clarke had his hands in his front pockets and was looking up and down Boylston Street (Tr.20-21). For safety purposes, Officer McHugh asked the Chin-Clarke to stand next to the exterior of the SFH building while he spoke with Noj (Tr.34). Noj initially told Officer McHugh that he purchased the items in the plastic bag at the Natick Mall (Tr.17). When asked for receipts, Noj then told Officer McHugh that his mother gave the items to him and he did not have any receipts (Tr.17-18). This change in story further heightened Officer McHugh's belief that the items were stolen (Tr.18). Noj was nervous but provided his identifying information, to include his full name and date of birth, without hesitation (Tr.18). Officer McHugh accessed CJIS images on his iPad to confirm Noj's identity (Tr.19-20).

Officer McHugh's interaction with Noj to confirm his identity lasted 38 seconds (Exhibit 1). Officer McHugh then turned his attention to Chin-Clarke (Tr.21). While waiting, Chin-Clarke was fidgety, nervous and looking up and down Boylston Street,

again heightening Officer McHugh's suspicion that a crime was afoot (Tr.20-22). Chin-Clarke had his hands in his pockets and Officer McHugh instructed him to remove his hands from his pockets (Tr.21). Although he initially complied, within a minute or two Chin-Clarke put his hands back inside his clothing (Tr.21). Based on his observations of Chin-Clarke, Officer McHugh was concerned that he might be armed and dangerous (Tr.21-22). Officer McHugh asked the Chin-Clarke for his identifying information (Tr.22). In response, Chin-Clarke noticeably hesitated before replying "Dana Clarke," and hesitated again before giving a date of birth of April 10, 1982 (Tr.22). Using that information, Officer McHugh accessed the CJIS system and obtained a RMV license image for Dana Clarke (Tr.22-23). Although the image was similar to, it did not match, the individual standing before him (Tr.23). In an attempt to learn his true identify, Officer McHugh asked the Chin-Clarke for his social security number (Tr.23). Chin-Clarke could not remember either the last four or the first three digits of his social security number (Tr.23). Officer McHugh then called for backup (Tr.24). In order to compare the RMV image to Chin-Clarke, Officer McHugh asked Chin-Clarke to take off his glasses and he complied (Tr.40). Concerned about his own safety, Officer McHugh then asked Noj and the Chin-Clarke to take a seat on the ground as he awaited backup (Tr.35). One minute thirty seconds later, Officer Fabian Belgrave, also in plain clothes, arrived on scene to assist Officer McHugh (Exhibit 1). Officer Belgrave agreed that the Chin-Clarke did not match the RMV image for Dana Clarke (Tr.25). As Officer Belgrave searched other images on CJIS, he asked Chin-Clarke to stand to get a better look at his face and it became increasingly clear to both officers that the person in front of them was not Dana Clarke (Tr.25-26).

Chin-Clarke stood directly in front of the two officers, smoking a cigarette as they

compared the CJIS images to him.<sup>3</sup> Given the totality of the circumstances, including Officer McHugh's initial observations of the suspicious street commerce and Chin-Clarke's nervous behavior, providing a false identification and inability to answer basic questions, Officer McHugh decided to handcuff the Chin-Clarke (Tr.26-27). In total, six minutes had passed from the time Officer McHugh began speaking to Chin-Clarke and his decision to handcuff him (Exhibit 1). When Officer McHugh attempted to handcuff him, Chin-Clarke spun around striking Office Belgrave in the chest and the three men ended up wrestling to the ground as SFH security attempted to assist (Tr.26-27). Shortly, two other uniformed Boston Police Officers arrived on scene and placed Chin-Clarke into handcuffs (Tr.27). One of those officers, Officer Lopez, pat-frisked Chin-Clarke and located a firearm in a fanny pack in his front pant area, announcing "gun" to his fellow officers as he did so (Tr.27-28). Officers unzipped the fanny pack and recovered a loaded Beretta firearm, 9 bags of heroin and 23 bags of crack cocaine (Tr.28-29). Chin-Clarke was arrested and transported to District A-1 for booking (Tr.29). At booking, \$100 in currency and a cell phone were retrieved (Tr.29-30).

(C.A.18-21) (internal footnotes omitted).

## ***B. Motion Judge's Rulings of Law.***

### ***1. Reasonable suspicion of criminal activity.***

The motion judge reasoned that Officer McHugh's observations of what appeared to be the selling or trading of stolen goods in a high crime area particularly known for shoplifting and the selling or trading

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<sup>3</sup> This appears to be an erroneous finding in that there is no testimony that the defendant was smoking a cigarette, however, there is testimony to support that the defendant was standing directly in front of the two officers (Tr.23).

of stolen goods for drugs provided a reasonable suspicion that warranted further inquiry (C.A.23). The motion judge then reasoned that Officer McHugh was justified in making a threshold inquiry of Mr. Noj and the defendant because of the officer's observations and reasonable suspicion that the men were about to commit a crime, the sale of stolen property (C.A.24).

The judge also reasoned that asking Mr. Noj (the individual displaying the clothing) and the defendant for identifying information, in sequence, was a permissible and reasonable way to approach this field investigation and did not constitute a seizure of the defendant (C.A.23). She concluded that Officer McHugh's initial instruction to the defendant to stand by the wall was a safety-based police tactic to separate the two suspects, which was particularly appropriate because Officer McHugh was outnumbered (C.A.23).<sup>4</sup>

**2. Reasonable belief the defendant was armed and dangerous.**

While concluding that the defendant was not seized until Officer McHugh asked him to turn around

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<sup>4</sup> While the Commonwealth conceded in the Appeals Court, as it does here, that the defendant was seized when Officer McHugh asked the defendant to stand by the wall while he first questioned Mr. Noj, and the motion judge concluded that the seizure did not occur until later, when the defendant was handcuffed, the difference is immaterial as reasonable suspicion existed at both points.

so that he could handcuff him (C.A.23-24),<sup>5</sup> the motion judge also ruled that at that point, the officers not only had reasonable suspicion that the defendant was engaged in criminal activity, but also that he was armed and dangerous (C.A.23-24). The evasive and conflicting responses from Mr. Noj and the defendant's hesitation, evasiveness and inability to provide valid identifying information enhanced that suspicion, and the defendant's nervousness, and repeated insertion of his hands in his pockets gave rise to the reasonable belief that he was armed and dangerous (C.A.24). Accordingly, the judge denied the motion to suppress the evidence seized (C.A.24).

**C. Appeals Court Ruling.**

The Appeals Court majority concluded that Officer McHugh did not have reasonable suspicion of criminal activity to justify the stop and reversed the motion judge's ruling. The Court concluded that the defendant was seized no later than the point at which he was asked to stand against the wall. See *Chin-Clarke*, 97 Mass. App. Ct. at 608. The majority focused on the facts Officer McHugh knew when he was asked to stand by the wall: "(1) Mr. Noj had a bag of clothes with

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<sup>5</sup> As discussed *supra* n.4 the judge's determination that the seizure did not occur until this point is immaterial as the judge also ruled that the police had reasonable suspicion at the time Officer McHugh asked the defendant to stand against the wall.

tags on them; (2) the three men were looking in the bag; (3) one of the men said '[H]ow much is this?'; (4) Mr. Noj held up an item of merchandise; (5) Mr. Noj gave arguably conflicting answers about the origin of the clothes; and (6) the defendant appeared to be nervous, had his hands in his pockets (at times), and was looking up and down the street." *Chin-Clarke*, 97 Mass. App. Ct. at 608-609.

The majority reasoned that that these facts did not give rise to reasonable suspicion and that the Officer observed nothing specific to suggest the defendant received or was about to receive any of the items knowing them to be stolen. *See Chin-Clarke*, 97 Mass. App. Ct. at 609. Conspicuously absent from the majority's analysis is an important fact expressly found by the motion judge that provided critical context to Officer McHugh's observations: Officer McHugh made his observations in a specific locale -- a high crime area particularly known for shoplifting, where he had previously made numerous arrests for shoplifting and had observed individuals selling or trading stolen property on the street, often to feed drug addiction (Tr.5-12; C.A.18).

**POINTS ON WHICH FURTHER APPELLATE REVIEW IS SOUGHT**

The Commonwealth seeks further appellate review of the motion judge's determination that based upon all the facts found by the motion judge Officer McHugh

had a reasonable suspicion that the defendant was engaged in criminal activity so as to warrant a further inquiry to confirm or dispel that suspicion and to ask the defendant to stand against the wall while inquiry was made of Mr. Noj.<sup>6</sup>

**REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE**

- I. THE MAJORITY ERRED IN IGNORING A CRITICAL FACT FOUND BY THE MOTION JUDGE, IN PARSING THE FACTS FOUND RATHER THAN VIEWING THEM IN TOTALITY, AND BY REQUIRING MORE THAN THE REASONABLE SUSPICION STANDARD REQUIRES. BASED UPON THE FACTS FOUND BY THE MOTION JUDGE, OFFICER MCHUGH HAD A REASONABLE SUSPICION THAT THE DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY SUFFICIENT TO SUPPORT A THRESHOLD INQUIRY WHEN HE ASKED THE DEFENDANT TO STAND AGAINST THE WALL WHILE HE INQUIRED FIRST OF MR. NOJ.

A person is seized in the constitutional sense 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). It is the defendant's burden to show that an encounter with the police rises to the level of a seizure in the constitutional sense. See *Commonwealth v. Thinh Vao Cao*,

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<sup>6</sup> Between the time of briefing and oral argument, the Supreme Judicial Court released its opinion in *Commonwealth v. Matta*, 483 Mass. 357 (2019), clarifying when a defendant is seized in Massachusetts. As such, at oral argument the Commonwealth conceded, as it does here, the defendant was seized when Officer McHugh first asked the defendant to stand against the wall, for officer safety, while Officer McHugh spoke with Mr. Noj.



419 Mass. 383, 388 (1995). Here, the Commonwealth agrees that defendant was seized when Officer McHugh initially asked him to stand by the wall while Officer McHugh first inquired of Mr. Noj (Tr.35). See *Matta*, 483 Mass. at 362. (defendant seized because officer objectively communicated he would use power to coerce defendant to stay). As correctly found by the motion judge and overlooked by the Appeals Court majority, in the facts and circumstances known to Officer McHugh, he reasonably believed that the defendant and Mr. Noj were engaged in criminal behavior, the purchase and sale of stolen property when he asked the defendant to stand against the wall while he first questioned Mr. Noj. Officer McHugh's reasonable belief was grounded in specific and articulable facts observed in a particular context. He had worked in this part of downtown Boston for the last four years (Tr.5). In his experience, the locale was a high crime area where he had previously made numerous arrests for shoplifting and had observed individuals selling or trading stolen property on the street, often to feed drug addiction (Tr.5-12; C.A.18).

There, Officer McHugh observed the defendant, Mr. Noj, and another individual huddled in a doorway with Mr. Noj holding a plastic bag of clothing and the others looking at the clothing; the clothing had store tags attached to them; and one man asked "How much is

this?" when an item was held up from the bag on display Mr. Noj was startled when Officer McHugh engaged the trio directly asking "what's up guys? Is that stuff stolen?" (Tr.15-16). Mr. Noj replied "Woah." After immediately handing back the item of clothing to Mr. Noj, the defendant appeared to be nervous while constantly surveying Boylston Street and keeping his hands in his pockets (Tr.34).

"Under art. 14 of the Massachusetts Declaration of Rights, the touchstone of our analysis of police conduct that results in a search or seizure is whether that conduct was reasonable." *Commonwealth v. Watts*, 74 Mass. App. Ct. 514, 517 (2009). See *Commonwealth v. Anderson*, 406, Mass. 343, 346 (1989). See also *Terry v. Ohio*, 392 U.S. 1, 9 (1968) ("what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures" [citations omitted]). An investigatory stop, or "seizure" in the constitutional sense, is justified under art. 14 if the police have reasonable suspicion of criminal activity at the time of the stop. See *Commonwealth v. Pinto*, 476 Mass. 361, 363 (2017).<sup>7</sup> "Reasonable suspi-

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<sup>7</sup> Article 14 does not impose a higher standard than the Fourth Amendment to the United States Constitution. The Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U. S. 411, 417-418

cion exists when an officer, based on specific, articulable facts and reasonable inferences therefrom, in light of the officer's experience, has reasonable grounds to suspect a person is committing, has committed or is about to commit a crime" (quotation and citation omitted). *Commonwealth v. Pinto*, 476 Mass. 361, 363-364 (2017). See *Commonwealth v. Franklin*, 456 Mass. 818, 820 (2010). Importantly, "reasonable suspicion is a lower standard than probable cause," *Commonwealth v. Smigliano*, 427 Mass. 490, 492 (1998), and it is measured objectively. See *Commonwealth v. Meneus*, 476 Mass. 231, 235 (2017).

Here, the Appeals Court majority erred both in ignoring the motion judge's factual finding as to the context in which Officer McHugh made his observations (a high crime area where he had made numerous arrests for shoplifting and encountered the trading of shoplifted merchandise for drugs) and in applying the reasonable suspicion standard by requiring more than a reasonable suspicion. The facts that form the basis for reasonable suspicion must be viewed collectively, in context, and in light of a police officer's experience, not parsed individually. See *Commonwealth v. Edwards*, 476 Mass. 341, 346-347 (2017). A police officer may stop a person to conduct a threshold inquiry

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(1981); see also *Terry v. Ohio*, 392 U. S. 1, 21-22 (1968).

if the police have a reasonable, articulable suspicion that a person has committed, is committing, or is about to commit a crime. *Commonwealth v. Bostock*, 450 Mass. 616, 619 (2008); *Commonwealth v. Wilson*, 441 Mass. 390, 394 (2004); *Terry*, 392 U.S. at 21-22. "The standard is objective: 'would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?'" *Commonwealth v. Mercado*, 422 Mass. 367, 369 (1996), quoting *Terry*, 392 U.S. at 21-22. An officer's suspicions may be derived from the application of his experience to his detailed observations of the defendant. See *Commonwealth v. Silva*, 440 Mass. 772, 784 (2004). Seemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry." *Commonwealth v. Grandison*, 433 Mass. 135, 139 (2001). Analysis of the order in which events occur is critical in determining whether a threshold inquiry (or full-blown search and seizure) is proper. *Commonwealth v. Torres*, 424 Mass. 153, 163 n.8 (1997).

The Appeals Court majority improperly parsed the motion judge's factual findings regarding Officer McHugh's observations and divorced them from the context and experience in which McHugh made his observations thereby diminishing their collective import. Based on this parsing, and requiring demonstrably more

than what reasonable suspicion requires, the Appeals Court majority incorrectly ruled that reasonable suspicion was lacking. The Commonwealth seeks further appellate review to correct the majority's error in this case and to reinforce the well-established, but sometimes misapplied canon of reasonable suspicion. Under both the Fourth Amendment to the United States Constitution and art. 14 of Massachusetts Declaration of Rights:

[T]he level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than probable cause." . . . Because it is a "less demanding" standard, "reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause." . . . The standard "depends on the factual and practical considerations of everyday life on which *reasonable and prudent men*, not legal technicians, act.

*Kansas v. Glover*, 140 S.Ct. 1183, 1187-1188 (2020) (internal citations omitted). Here, Officer McHugh's observations, coupled with his significant experience in this particularized area of Boston, provided a lens through which his observations provided a reasonable suspicion that the defendant and Mr. Noj were engaged in criminal activity, specifically illegal street commerce. See *Mercado*, 422 Mass. at 369.

As noted in Justice Meade's dissent, this case is directly comparable to the seminal case, *Terry v.*

*Ohio*, 392 U.S. 1 (1968). Officer McHugh's actions were well within the guidelines set forth within the Fourth Amendment, and art. 14 does not require a higher standard than the Fourth Amendment. See *Cortez*, 449 U. S. at 417-418; *Pinto*, 476 Mass. at 363. Just as in *Terry*, Officer McHugh was familiar with this area of Downtown Boston because of his four years patrolling the area (Tr.6-11). With this experience in mind, Officer McHugh's observations of the defendant and Mr. Noj piqued his interest and he decided to approach the men (Tr.14-15). Upon approaching the men, Officer McHugh had noticed (1) the clothing pulled from the plastic bag with store tags still attached; (2) one man asking "How much is this?" when an item of clothing was being held outside of the bag; (3) Mr. Noj's startled demeanor when approached by Officer McHugh; (4) the defendant appearing nervous while continuously surveying Boylston street; and (5) the defendant's hands remaining inside his clothing (Tr.14-21). This furthered Officer McHugh's suspicion that criminal activity was afoot which was why he decided to speak with the men further (Tr.15-16). Based on these specific and articulable facts, in conjunction with Officer McHugh's significant experience, there was reasonable suspicion to believe the defendant was involved in criminal activity. See *Terry*, 392 U.S. at 5-7.

**CONCLUSION**

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court allow the application for further appellate review and, ultimately, affirm the denial of the defendant's motion to suppress.

Respectfully submitted  
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ADDENDUM**Fourth Amendment to the United States Constitution.**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Article 14 of the Massachusetts Declaration of Rights.**

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

**G.L. c. 265, § 18B. Use of firearms while committing a felony; second or subsequent offenses; punishment.**

Whoever, while in the commission of or the attempted commission of an offense which may be punished by imprisonment in the state prison, has in his possession or under his control a firearm, rifle or shotgun shall, in addition to the penalty for such offense, be punished by imprisonment in the state prison for not less than five years; provided, however, that if such firearm, rifle or shotgun is a large capacity weapon, as defined in section 121 of chapter 140, or if such person, while in the commission or attempted commission of such offense, has in his possession or under his control a machine gun, as defined in said section 121, such person shall be punished by imprisonment in the state prison for not less than ten years. Whoever has committed an offense which may be punished by imprisonment in the

state prison and had in his possession or under his control a firearm, rifle or shotgun including, but not limited to, a large capacity weapon or machine gun and who thereafter, while in the commission or the attempted commission of a second or subsequent offense which may be punished by imprisonment in the state prison, has in his possession or under his control a firearm, rifle or shotgun shall, in addition to the penalty for such offense, be punished by imprisonment in the state prison for not less than 20 years; provided, however, that if such firearm, rifle or shotgun is a large capacity semiautomatic weapon or if such person, while in the commission or attempted commission of such offense, has in his possession or under his control a machine gun, such person shall be punished by imprisonment in the state prison for not less than 25 years.

A sentence imposed under this section for a second or subsequent offense shall not be reduced nor suspended, nor shall any person convicted under this section be eligible for probation, parole, furlough or work release or receive any deduction from his sentence for good conduct until he shall have served the minimum term of such additional sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

**G.L. c. 94C, § 32A. Class B controlled substances; unlawful manufacture, distribution, dispensing or possession with intent to manufacture, etc.**

. . . .

(b) Any person convicted of violating this section after 1 or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute or dispense a controlled substance as defined by section 31 under this or any other prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not more than 10 years, by a term of imprisonment in the state prison for not more than 10 years and by a fine of not less than \$2,500 and not more than \$25,000, or by a fine of not more than \$25,000.

. . . .

(d) Any person convicted of violating the provisions of subsection (c) after 1 or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute, or dispense a controlled substance, as defined in section 31 or of any offense of any other jurisdiction, either federal, state or territorial, which is the same as or necessarily includes, the elements of said offense, shall be punished by a term of imprisonment in the state prison for not more than 15 years, a term of imprisonment in the state prison for not more than 15 years and a fine of not less than \$2,500 nor more than \$25,000 or a fine of not more than \$25,000.

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

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and

twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section

twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

. . . .

(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 21/2 years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

. . . . .

**CERTIFICATION**

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of petitions for further appellate review, including those rules specified in Mass. R. App. P. 27.1(b), 16(k) and 20(a). The brief is in 12-point Courier New with 10 CPI and has an argument length of 7 pages.

/s/Houston Armstrong

HOUSTON ARMSTRONG

Assistant District Attorney

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have today made service on counsel for the defendant by directing that a copy of the attached brief and motion be sent via the e-file and email to:

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Respectfully submitted  
FOR THE COMMONWEALTH,

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For the Suffolk District

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July 15, 2020



COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

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FAR-27605  
2018-P-1440

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COMMONWEALTH OF MASSACHUSETTS,  
Appellee

V.

JAMAL CHIN-CLARKE,  
Defendant-Appellant

---

COMMONWEALTH'S APPLICATION FOR  
LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

---

SUFFOLK COUNTY

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COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

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FAR-27605  
2018-P-1613

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COMMONWEALTH OF MASSACHUSETTS,  
Appellee  
V.

JAMAL CHIN-CLARKE,  
Defendant-Appellant

---

APPENDIX FOR THE COMMONWEALTH'S  
APPLICATION FOR LEAVE TO OBTAIN  
FURTHER APPELLATE REVIEW

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SUFFOLK COUNTY

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JULY 15, 2020

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[Skip to main content](#)**1784CR00243 Commonwealth vs. Chin-Clarke, Jamal D**

- Case Type
- Indictment
- Case Status
- Open
- File Date
- 04/12/2017
- DCM Track:
- B - Complex
- Initiating Action:
- FIREARM, CARRY WITHOUT LICENSE, 2ND OFF. c269 §10(a) & (d)
- Status Date:
- 05/02/2017
- Case Judge:
- 
- Next Event:
- 09/11/2020

[All Information](#) [Party](#) [Charge](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)**Party Information****Suffolk County District Attorney**  
- Prosecutor[Alias](#)**Party Attorney**

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- Cascione, Esq., Amanda Read
- Bar Code
- 685555
- Address
- District Attorney's Office Suffolk County
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- Dorchester, MA 02114
- Phone Number
- (617)396-5724

[More Party Information](#)**Chin-Clarke, Jamal D**  
- Defendant[Alias](#)**Party Attorney**

- Attorney
- CPCS Boston Office, .
- Bar Code
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- 44 Bromfield Street
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C.A. 4

[More Party Information](#)**Stanton ,Clerk, Joseph**

- Other interested party

**Alias****Party Attorney**[More Party Information](#)**Party Charge Information**• **Chin-Clarke, Jamal D**

• - Defendant

Charge # 1 :

**269/10/K-0 - Felony** FIREARM, CARRY WITHOUT LICENSE, 2ND OFF. c269 §10(a) & (d)

• Original Charge

• 269/10/K-0 FIREARM, CARRY WITHOUT LICENSE, 2ND OFF. c269 §10(a) &amp; (d) (Felony)

• Indicted Charge

•

• Amended Charge

•

• **Chin-Clarke, Jamal D**

• - Defendant

Charge # 2 :

**94C/32A/D-0 - Felony** COCAINE, POSSESS TO DISTRIBUTE, SUBSQ. c94C §32A(d)

• Original Charge

• 94C/32A/D-0 COCAINE, POSSESS TO DISTRIBUTE, SUBSQ. c94C §32A(d) (Felony)

• Indicted Charge

•

• Amended Charge

•

• **Chin-Clarke, Jamal D**

• - Defendant

Charge # 3 :

**94C/32A/H-0 - Felony** DRUG, POSSESS TO DISTRIB CLASS B, SUBSQ. c94C §32A(b)

• Original Charge

• 94C/32A/H-0 DRUG, POSSESS TO DISTRIB CLASS B, SUBSQ. c94C §32A(b) (Felony)

• Indicted Charge

•

• Amended Charge

•

• **Chin-Clarke, Jamal D**

• - Defendant

Charge # 4 :

**265/18B/A-3 - Felony** FIREARM IN FELONY, POSSESS c265 §18B

• Original Charge

• 265/18B/A-3 FIREARM IN FELONY, POSSESS c265 §18B (Felony)

• Indicted Charge

•

• Amended Charge

•

• **Chin-Clarke, Jamal D**

• - Defendant

Charge # 5 :

**269/10/EE-0 - Felony** FIREARM, CARRY WITHOUT LICENSE LOADED c269 s.10(n)

• Original Charge

• 269/10/EE-0 FIREARM, CARRY WITHOUT LICENSE LOADED c269 s.10(n) (Felony)

• Indicted Charge

•

• Amended Charge

•

• **Chin-Clarke, Jamal D**

• - Defendant

Charge # 6 :

**269/10/TT - Misdemeanor - more than 100 days incarceration** AMMUNITION WITHOUT FID CARD, POSSESS c269 §10(h)(1)

• Original Charge

• 269/10/TT AMMUNITION WITHOUT FID CARD, POSSESS c269 §10(h)(1) (Misdemeanor - more than 100 days incarceration)

- Indicted Charge
- Amended Charge

**Events**

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
05/02/2017 09:00 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Arraignment	Curley, Edward J	Held as Scheduled
06/08/2017 09:30 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Pre-Trial Conference	Curley, Edward J	Held as Scheduled
06/28/2017 09:30 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Pre-Trial Conference	Curley, Edward J	Held as Scheduled
07/26/2017 09:30 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Pre-Trial Conference	Medeiros, Lisa B	Held as Scheduled
08/31/2017 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Filing of Motions	Sullivan, Hon. William F	Held as Scheduled
10/31/2017 09:30 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Pre-Trial Hearing		Not Held
11/09/2017 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Motion Hearing		Held as Scheduled
12/11/2017 09:30 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Filing of Motions	Medeiros, Lisa B	Held as Scheduled
01/29/2018 09:30 AM	Criminal 9	BOS-7th FL, CR 713 (SC)	Evidentiary Hearing on Suppression	Donatelle, Hon. Sharon	Rescheduled
01/29/2018 02:00 PM	Criminal 2		Final Pre-Trial Conference		Rescheduled
02/06/2018 09:00 AM	Criminal 2		Jury Trial		Rescheduled
02/15/2018 02:00 PM	Criminal 1		Bail Review via Video Conference	Tochka, Hon. Robert N	Not Held
03/26/2018 09:30 AM	Criminal 9	BOS-7th FL, CR 713 (SC)	Evidentiary Hearing on Suppression	Donatelle, Hon. Sharon	Not Held
04/19/2018 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Hearing for Appearance / Appointment of Counsel	Cannone, Hon. Beverly J	Held as Scheduled
05/14/2018 02:00 PM	Criminal 2	BOS-8th FL, CR 806 (SC)	Final Pre-Trial Conference		Canceled
05/29/2018 09:00 AM	Criminal 2	BOS-8th FL, CR 806 (SC)	Jury Trial		Canceled
05/29/2018 09:30 AM	Criminal 9	BOS-7th FL, CR 713 (SC)	Evidentiary Hearing on Suppression	Freniere, Hon. Diane	Rescheduled
06/07/2018 09:00 AM	Criminal 9	BOS-7th FL, CR 713 (SC)	Evidentiary Hearing on Suppression	Freniere, Hon. Diane	Held as Scheduled
07/23/2018 02:00 PM	Criminal 5	BOS-8th FL, CR 817 (SC)	Final Pre-Trial Conference	Cannone, Hon. Beverly J	Not Held
07/30/2018 02:00 PM	Criminal 5	BOS-8th FL, CR 817 (SC)	Final Pre-Trial Conference		Rescheduled
08/06/2018 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial		Rescheduled
08/29/2018 02:00 PM	Criminal 5	BOS-8th FL, CR 817 (SC)	Conference to Review Status	Cannone, Hon. Beverly J	Held as Scheduled
09/10/2018 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial	Cannone, Hon. Beverly J	Rescheduled
09/10/2018 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Bail Hearing	Cannone, Hon. Beverly J	Not Held
10/15/2018 02:00 PM	Criminal 5	BOS-8th FL, CR 817 (SC)	Conference to Review Status		Held as Scheduled

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
01/09/2019 02:00 PM	Criminal 5		Conference to Review Status		Not Held
04/29/2019 02:00 PM	Criminal 5		Trial Assignment Conference		Held as Scheduled
08/14/2019 02:00 PM	Criminal 5		Conference to Review Status		Held as Scheduled
11/04/2019 02:00 PM	Criminal 5		Conference to Review Status		Not Held
02/05/2020 02:00 PM	Criminal 5		Conference to Review Status		Held as Scheduled
04/13/2020 02:00 PM	Criminal 5		Trial Assignment Conference		Canceled
06/11/2020 09:30 AM	Criminal 1		Hearing for Review of Other Detainee (COVID19)	Tochka, Hon. Robert N	Held via Video/Phone- Defendant Released (COVID19)
06/17/2020 10:45 AM	Criminal 5		Conference to Review Status	Ricciuti, Hon. Michael D	Held as Scheduled
09/11/2020 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Conference to Review Status		Canceled
09/11/2020 09:30 AM	Criminal 5		Conference to Review Status	Ames, Hon. Mary K	

**Ticklers**

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Pre-Trial Hearing	05/02/2017	09/14/2017	135	
Final Pre-Trial Conference	05/03/2017	01/12/2018	254	04/12/2018
Case Disposition	05/02/2017	01/26/2018	269	

**Docket Information**

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
04/12/2017	Indictment(s) returned	1
04/12/2017	Commonwealth 's Motion for an arrest warrant filed	2
04/12/2017	Endorsement on Motion for an arrest warrant , (#2.0): ALLOWED	
04/12/2017	Issued: Straight Warrant issued on 04/12/2017 for Chin-Clarke, Jamal D	
05/02/2017	Recalled: Straight Warrant cancelled on 05/02/2017 for Chin-Clarke, Jamal D	
05/02/2017	Bail set at \$1,000,000.00 Surety, \$100,000.00 Cash. GPS Prior to Release w/o/p BWR COB: Stay Away from Saint Francis House	
05/02/2017	Issued on this date:  Mittimus in Lieu of Bail Sent On: 05/02/2017 12:14:10	
05/02/2017	Defendant Brought Into Court The following event: Arraignment scheduled for 05/02/2017 09:00 AM has been resulted as follows: Result: Held as Scheduled Case Put on Track B PTC - 6/8/17 (MAG JAIL LIST) PTH - 10/31/17 (1st Session) FPTH- 1/29/18 2nd Session, 2PM JT - 2/6/18 2nd Session A.Kaczmarek, MAG - A.Cascione, ADA - Y.Luvish, Atty - FTR	

<u>Docket Date</u>	<u>Docket Text</u>	
05/02/2017	Defendant arraigned before Court.	
05/02/2017	Defendant waives reading of indictment	
05/02/2017	Plea of not guilty entered on all charges.	
05/02/2017	Bail warnings read	
05/02/2017	Court inquires of Commonwealth if abuse, as defined by G.L. c. 209A, § 1, is alleged to have occurred immediately prior to or in connection with the charged offense(s).	
05/02/2017	Court finds NO abuse is alleged in connection with the charged offense. G.L. c. 276, § 56A.	
05/02/2017	Defendant informed of right to request a drug exam. G.L. c. 111E, § 10	
05/02/2017	Attorney appearance On this date Yefim Luvish, Esq. added as Appointed - Indigent Defendant for Defendant Jamal D Chin-Clarke Appointment made for the purpose of Case in Chief by Judge Anne Kaczmarek.	
05/02/2017	Commonwealth files the statement of the case.	3
05/02/2017	Commonwealth 's Notice of Discovery (First) Filed	4
05/02/2017	Endorsement on Motion for the Defendants Out of State Records, (#5.0): ALLOWED See Endorsement	
05/03/2017	Case assigned to: DCM Track B - Complex was added on 05/03/2017	
05/03/2017	Defendant 's Motion for The Defendants Out of State Records Filed	5
06/08/2017	Event Result: Deft not in Court Continued to 6-28-17 for hearing Re: PTC in Rm 705 The following event: Pre-Trial Conference scheduled for 06/08/2017 09:30 AM has been resulted as follows: Result: Held as Scheduled Appeared: Attorney Luvish, Esq., Yefim Kacz, MAG - FTR	
06/08/2017	Defendant 's Motion for Criminal Records of witnesses filed and allowed  Applies To: Luvish, Esq., Yefim (Attorney) on behalf of Chin-Clarke, Jamal D (Defendant); Cascione, Esq., Amanda Read (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)	6
06/08/2017	Defendant 's Motion for funds for Investigator filed and allowed as endorsed  Applies To: Luvish, Esq., Yefim (Attorney) on behalf of Chin-Clarke, Jamal D (Defendant); Cascione, Esq., Amanda Read (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)	7
06/28/2017	Event Result: Deft brought into Court Continued to 7-26-17 for hearing Re: PTCi n Rm 705 The following event: Pre-Trial Conference scheduled for 06/28/2017 09:30 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Chin-Clarke, Jamal D Attorney Cascione, Esq., Amanda Read Medeiros, MAG - FTR	
07/26/2017	Event Result: Deft. brought into court. Case continued by agreement to 8/31/17 Hrg Re: Motions Filing (J. Session) JAIL LIST  E. Curley, MAG A. Cascione, ADA Y. Luvish, Atty FTR	
07/26/2017	Pre-trial conference report filed	8
07/26/2017	Commonwealth 's Notice of second discovery, filed.	9
08/31/2017	Deft Brought into Court Continued by agreement to 11/9/17 for Hearing re: Motion to Dismiss in 1st, JAIL LIST  Sullivan, J A Cascione, ADA Y Luvish, ATTY FTR	



<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>
08/31/2017	Defendant 's Motion to dismiss filed	10
08/31/2017	Commonwealth 's Notice of Discovery III filed	11
08/31/2017	Commonwealth 's Notice of Chemist as Expert Witness filed	12
08/31/2017	Commonwealth 's Notice of Intention to Call a Latent Print Examiner as an Expert Witness filed	13
08/31/2017	Commonwealth 's Notice of Intention to Call a Ballistician as an Expert Witness filed	14
08/31/2017	Commonwealth 's Notice of Expert Witness filed	15
10/31/2017	Event Result: Judge: Curley, Edward J The following event: Pre-Trial Hearing scheduled for 10/31/2017 09:30 AM has been resulted as follows: Result: Not Held Reason: Transferred to another session	
10/31/2017	Event Result: Judge: Miller, Hon. Rosalind H The following event: Motion Hearing scheduled for 11/09/2017 09:30 AM has been resulted as follows: Result: Not Held Reason: Joint request of parties	
11/09/2017	Event Result: Deft. brought into court -Hrg Re; Motion to dismiss (#10), after hearing, taken under advisement.  Case continued by agreement to 12/11/17 Hrg Re: Filing of motions to suppress and to schedule hearing thereon (CM Session) -Deft will not be brought in 12/11/17  Miller, J A. Cascione, ADA Y. Luvish, Atty FTR  Judge: Miller, Hon. Rosalind H	
11/09/2017	Opposition to paper #10.0 Opposition to motion to dismiss. filed by Suffolk County District Attorney  Judge: Miller, Hon. Rosalind H	16
12/04/2017	ORDER: Memorandum of decision and order on deft's motion to dismiss(P#10) P#10 denied ADA Cascione and Atty Luvish notified with copy  Judge: Miller, Hon. Rosalind H	17
12/11/2017	Event Result: Deft not in Court Continued to 1-29-18 for Motion to Suppress in RM 713 Judge: Medeiros, Lisa B The following event: Filing of Motions scheduled for 12/11/2017 09:30 AM has been resulted as follows: Result: Held as Scheduled Appeared: Attorney Luvish, Esq., Yefim Attorney Cascione, Esq., Amanda Read Medeiros, MAG - FTR  Judge: Medeiros, Lisa B	
12/11/2017	Defendant 's Motion to suppress Evidence and Affidavit filed  Judge: Medeiros, Lisa B Applies To: Luvish, Esq., Yefim (Attorney) on behalf of Chin-Clarke, Jamal D (Defendant); Cascione, Esq., Amanda Read (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)	18
01/29/2018	Event Result: Judge: Donatelle, Hon. Sharon The following event: Evidentiary Hearing on Suppression scheduled for 01/29/2018 09:30 AM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	
01/29/2018	Event Result: Judge: Donatelle, Hon. Sharon The following event: Final Pre-Trial Conference scheduled for 01/29/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>
01/29/2018	Deft not in court Continued at request of deft to 2-15-18 hearing re video bail(J).Jail list, 2pm Y Luvish, Atty. - FTR  Judge: Tochka, Hon. Robert N	
01/29/2018	Commonwealth 's Joint Motion to Continue filed & allowed	19
02/15/2018	Deft refused transportation to the jail for video bail Case off the list  Judge: Tochka, Hon. Robert N	
03/26/2018	Event Result: Judge: Donatelle, Hon. Sharon The following event: Evidentiary Hearing on Suppression scheduled for 03/26/2018 09:30 AM has been resulted as follows: Result: Not Held Reason: Court Order	
04/12/2018	Event Result: Judge: Donatelle, Hon. Sharon The following event: Jury Trial scheduled for 05/29/2018 09:00 AM has been resulted as follows: Result: Canceled Reason: Joint request of parties	
04/13/2018	Pro Se Defendant 's Motion to remove counsel and for appointment of new counsel with affidavit in support thereof. Filed (Copy of motion sent to Y. Luvish Atty, A. Cascione ADA)	20
04/19/2018	Deft brought into court Continued by agreement to 6-7-18 re motion to suppress(713, needs jail list), to 7-30-18 re FPTH(817) and to 8-6-18 re trial(817) A Cascione, ADA. - A Hackett, Atty. - FTR  Judge: Cannone, Hon. Beverly J	
04/19/2018	Endorsement on , (#20.0): ALLOWED Atty Luvish allowed to withdraw  Judge: Cannone, Hon. Beverly J	
04/19/2018	Attorney appearance On this date Yefim Luvish, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Jamal D Chin-Clarke	
04/19/2018	Attorney appearance On this date . CPCS Boston Office added as Appointed - Indigent Defendant for Defendant Jamal D Chin-Clarke	
04/19/2018	Attorney appearance On this date Alyssa Thrasher Hackett, Esq. added as Appointed - Indigent Defendant for Defendant Jamal D Chin-Clarke Appointment made for the purpose of Case in Chief by Judge Hon. Beverly J Cannone.	
05/03/2018	Alyssa Thrasher Hackett, Esq.'s Notice of Appearance for the Defendant	21
06/07/2018	Event Result:: Evidentiary Hearing on Suppression scheduled on: 06/07/2018 09:00 AM Has been: Held as Scheduled Hon Diane Freniere, Presiding Appeared: Staff: Rourke Donnelly, Assistant Clerk Magistrate	
06/07/2018	Commonwealth 's Memorandum in Opposition to Defendant's Motion to Suppress, filed	22
06/07/2018	Defendant 's Memorandum in Support of Defendant's Motion to Suppress, filed	22.1
06/28/2018	MEMORANDUM & ORDER:  ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE  DENIED  Judge: Freniere, Hon Diane	23
06/29/2018	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Alyssa Thrasher Hackett, Esq. Attorney: Amanda Read Cascione, Esq.	

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>
07/10/2018	Event Result:: Final Pre-Trial Conference scheduled on: 07/30/2018 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Beverly J Cannone, Presiding Appeared: Staff: Anne Kaczmarek, Assistant Clerk Magistrate	
07/23/2018	Defendant not present. Final PTH not held due to appeal on MTS. Cancel 8/6/18 JT. Case continued by agreement to 8/29/18 at 2pm for status re: appeal and FPTH and 9/10/18 for JT in 817. Jail list  ADA Caschione Atty Hackett FTR 817  Judge: Cannone, Hon. Beverly J	
07/24/2018	Event Result:: Jury Trial scheduled on: 08/06/2018 09:00 AM Has been: Rescheduled For the following reason: By Court prior to date Hon. Beverly J Cannone, Presiding Appeared: Staff: Anne Kaczmarek, Assistant Clerk Magistrate	
07/25/2018	Notice of appeal filed by defendant regarding the denial of the motion to suppress evidence in this case	24
08/06/2018	Notice to the Supreme Judicial Court of Interlocutory Appeal Order: Interlocutory appeal allowed; to appeals court. Lowy, J  Applies To: Chin-Clarke, Jamal D (Defendant)	25
08/13/2018	OTS is hereby notified to provide the JAVS transcript of the proceedings of 06/07/2018 09:00 AM Evidentiary Hearing on Suppression. (Per Atty A.Hackett)	
08/15/2018	Attorney appearance On this date David Rassoul Rangaviz, Esq. added as Appointed - Indigent Defendant for Defendant Jamal D Chin-Clarke Appointment made for the purpose of Appellate action by Judge Unassigned.	
08/15/2018	David Rassoul Rangaviz, Esq.'s Notice of appearance. Filed.	26
08/29/2018	defendant not present. Status conference held before Cannone, J. Case continued by agreement to 9/10/18 for bail hearing in 817- cancel 9/10/18 JT due to interlocutory appeal.  ADA Caschione Atty Hackett FTR 817  Judge: Cannone, Hon. Beverly J	
08/31/2018	Event Result:: Jury Trial scheduled on: 09/10/2018 09:00 AM Has been: Rescheduled For the following reason: By Court prior to date Hon. Beverly J Cannone, Presiding Appeared: Staff: Anne Kaczmarek, Assistant Clerk Magistrate	
09/10/2018	Defendant not present. Bail hearing not held at request of the defendant. Case continued by agreement to 10/15/18 at 2pm for status re: appeal in 817.  ADA Caschione Atty Hackett FTR 817  Judge: Cannone, Hon. Beverly J	
10/12/2018	Appeal: FTR DVD/CD Received from OTS; re: 6/7/18 (Copy e-mailed to Atty A.Hackett, Atty D.Rangaviz and ADA J.Zanini) (Filed in case)	

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>
10/15/2018	Defendant not present. Status re: appeal held before Ullmann, J. Case continued by agreement to 1/9/18 at 2pm in 817 for status re: appeal.  ADA Caschione Atty Hackett FTR 817  Judge: Ullmann, Hon. Robert L	
10/16/2018	Attorney appearance On this date John P Zanini, Esq. added as Attorney for the Commonwealth for Prosecutor Suffolk County District Attorney	
10/16/2018	Appeal: notice of assembly of record sent to Counsel Atty D.Rangaviz, ADA J.Zanini and Clerk J.Stanton	
10/16/2018	Appeal: Statement of the Case on Appeal (Cover Sheet).	27
10/22/2018	Notice of Entry of appeal received from the Appeals Court Case was entered in this court on October 16, 2018	28
01/09/2019	Event Result::  Defendant brought into Court, but not brought to the courtroom, presence waived in courtroom. Defense Counsel not present.  Continued to 4-29-19 for Status or trial assignment conference in Rm 817 at 2pm.  Conference to Review Status scheduled on:  01/09/2019 02:00 PM  Has been: Not Held For the following reason: Defense Attorney failed to appear Hon. Jeffrey A Locke, Presiding  Appeared: FTR  Prosecutor Amanda Read Cascione, Esq., Defendant Jamal D Chin-Clarke Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk	
04/29/2019	Defendant brought into Court. Presence in Courtroom waived by Court.  Continued by Agreement to 8/14/19 for Hearing Re: Status of Appeal at 2:00PM in Courtroom 817. - Jail List  Hon. Robert N Tochka, Presiding Appeared: K. McCarthy for A. Casione, ADA - J. Garland for A. Hackett, Atty. - FTR Staff: Rebeca Figueroa, Assistant Clerk Magistrate Michelle Pierce, Assistant Clerk	
08/14/2019	Defendant not in Court. Defendant is in custody.  Conference to Review Status Re: Appeal held before Campo, J.  Continued by Agreement to 11/4/19 for Conference to Review Status at 2:00PM in Courtroom 817. - Defendant's presence waived for next date.  Hon. Anthony M. Campo, Presiding Appeared: A. Cascione, ADA - A. Hackett, Atty. - FTR Staff: Rebeca Figueroa, Assistant Clerk Magistrate Carol Mullen-Maguire, Assistant Clerk Magistrate	

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>
11/04/2019	<p>Defendant not in Court. Defendant is in custody and his presence was previously waived. Defense Counsel unavailable for today's hearing due to ongoing trial in the Fourth Criminal Session, Courtroom 815.</p> <p>Continued by Agreement to 2/5/20 for Conference to Review Status of Appeal at 2:00PM in Courtroom 817.</p> <p>Hon. Helene Kazanjian, Presiding  Appeared: A. Boulanger, ADA for A. Cascione, ADA - XXX, Atty. - FTR (2:25PM)  Staff:  Rebeca Figueroa, Assistant Clerk Magistrate  David Sheehan, Assistant Clerk Magistrate</p>	
02/05/2020	<p>Defendant not in court. Defendant's presence was previously waived for today's hearing.</p> <p>Conference to Review Status of Commonwealth's Appeal held before Locke, J.</p> <p>Continued by Agreement to 4/13/2020 for Trial Assignment Conference at 2:00PM in Courtroom 817.  - Defendant's presence waived.</p> <p>Hon. Jeffrey A Locke, Presiding  Appeared: K. Tolbert, ADA - A. Hackett, Atty. - FTR (2:00PM)  Staff:  Rebeca Figueroa, Assistant Clerk Magistrate</p>	
05/04/2020	<p>Event Result:: Trial Assignment Conference scheduled on: 04/13/2020 02:00 PM  Has been: Canceled For the following reason: By Court due to Covid-19  Staff:  Rebeca Figueroa, Assistant Clerk Magistrate  Michelle Pierce, Assistant Clerk</p>	
06/03/2020	<p>Motion for Release without Rebuttable Presumption (COVID19)</p> <p>(Defendants Motion for release based on SJC 1926: Non-Presumptive release, filed)</p>	29
06/11/2020	<p>Defendant oral motion for reduction of bail is ALLOWED. All prior orders of bail are REVOKED.</p> <p>Judge: Tochka, Hon. Robert N</p>	
06/11/2020	Bail warnings read	
06/11/2020	<p>Released on Personal Recognizance  NO conditions.</p> <p>Judge: Tochka, Hon. Robert N</p>	
06/11/2020	<p>The following form was generated:</p> <p>Release from Custody Order  Sent On: 06/11/2020 10:55:45</p>	30
06/11/2020	<p>Defendant on video at Nashua St. Jail  Hearing for Review of Other Detainee (COVID19): Held via Zoom Call- Defendant Released (COVID19)  All prior orders of bail are REVOKED  Defendant released on personal recognizance with no conditions  Case continued by agreement to 9/11/2020 at 9:30am, re: Conference to Review Status, 1st Criminal Session, Courtroom 704 (non-custody)</p> <p>R. Tochka, Presiding  J. Pardi, ACM  A. Cascione, ADA  A. Hackett, Atty  FTR 10:26 AM</p>	
06/15/2020	<p>Attorney appearance  On this date John P Zanini, Esq. dismissed/withdrawn as Attorney for the Commonwealth for Prosecutor Suffolk County District Attorney</p>	

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>
06/17/2020	<p>Defendant is not in court. Defendant's presence is waived with no objection.</p> <p>Conference to Review Status held before Ricciuti, J.</p> <p>Continued by Agreement to September 11, 2020 for Conference to Review Status of Commonwealth's Appeal at 9:30AM in Courtroom 817.</p> <p>Hon. Michael D Ricciuti, Presiding            Appeared: A. Cascione, ADA (via Zoom) - A. Hackett, Atty. (via Zoom) - FTR (11:00AM)            Staff:            Rebeca Figueroa, Assistant Clerk Magistrate</p>	
06/17/2020	<p>Event Result:: Conference to Review Status scheduled on: 09/11/2020 09:30 AM</p> <p>Has been: Canceled For the following reason: Transferred to another session</p> <p>Hon. Michael D Ricciuti, Presiding            Staff:            Carol Mullen-Maguire, Assistant Clerk Magistrate            James Pardi, Assistant Clerk Magistrate</p>	
06/17/2020	ORDER: SCHEDULING ORDER	31

### Case Disposition

<a href="#">Disposition</a>	<a href="#">Date</a>	<a href="#">Case Judge</a>
Active	05/03/2017	

**SUPREME JUDICIAL COURT**  
for Suffolk County  
Case Docket

**COMMONWEALTH v. JAMAL CHIN-CLARKE**  
SJ-2018-0333

**CASE HEADER**

<b>Case Status</b>	Interlocutory appeal allowed	<b>Status Date</b>	08/03/2018
<b>Nature</b>	Lv for interloc appeal	<b>Entry Date</b>	07/26/2018
<b>Sub-Nature</b>	Mot to Suppress	<b>Single Justice</b>	Lowy, J.
<b>TC Ruling</b>	Motion denied	<b>TC Ruling Date</b>	06/28/2018
<b>SJ Ruling</b>		<b>TC Number</b>	
<b>Pet Role Below</b>	Defendant in lower court	<b>Full Ct Number</b>	
<b>Lower Court</b>	Suffolk Superior Court	<b>Lower Ct Judge</b>	Diane C. Freniere, J.

**INVOLVED PARTY**

**Jamal Chin-Clarke**  
Defendant/Petitioner

**Commonwealth**  
Plaintiff/Respondent

**ATTORNEY APPEARANCE**

[Alyssa Hackett, Esquire](#)

[Amanda Read Cascione, Assistant District Attorney](#)

**DOCKET ENTRIES**

<b>Entry Date</b>	<b>Paper</b>	<b>Entry Text</b>
07/26/2018		Case entered.
07/26/2018	#1	Defendant's Request To Waive Filing Fee with Affidavit filed by Atty. Alyssa Hackett.
07/26/2018	#2	Defendant's Application For Interlocutory Appeal with Certificate of Service filed by Atty. Alyssa Hackett.
07/26/2018	#3	Memorandum Of Law In Support Of The Defendant's Application For Interlocutory Appeal with attachments filed by Atty. Alyssa Hackett.
07/26/2018		Fee Waiver ALLOWED by Judge. (Lowy, J.)
07/31/2018	#4	Commonwealth's Opposition To The Defendant's Application For Leave To Take An Interlocutory Appeal with Certificate of Service filed by ADA Amanda Cascione.
08/02/2018		Under advisement. (Lowy, J.).
08/03/2018	#5	ORDER: Interlocutory appeal allowed; to Appeals Court. (Lowy, J.)
08/03/2018	#6	Notice to counsel/parties, regarding paper #5 filed.

As of 11/04/2019 8:00pm

**APPEALS COURT**  
**Full Court Panel Case**  
**Case Docket**

**COMMONWEALTH vs. JAMAL D. CHIN-CLARKE**  
**2018-P-1440**

**CASE HEADER**

<b>Case Status</b>	FAR pending	<b>Status Date</b>	06/29/2020
<b>Nature</b>	Crime: Possession of Gun	<b>Entry Date</b>	10/16/2018
<b>Sub-Nature</b>	Denial of the Motion to Suppress Evidence	<b>SJ Number</b>	
<b>Appellant</b>	Defendant	<b>Case Type</b>	Criminal
<b>Brief Status</b>		<b>Brief Due</b>	
<b>Panel</b>	Meade, Shin, Singh, JJ.	<b>Argued/Submitted</b>	12/12/2019
<b>Citation</b>	97 Mass. App. Ct. 604	<b>Decision Date</b>	06/09/2020
<b>Lower Court</b>	Suffolk Superior Court	<b>TC Number</b>	
<b>Lower Ct Judge</b>	Diane C. Freniere, J.	<b>TC Entry Date</b>	04/12/2017
<b>FAR Number</b>	<a href="#">FAR-27605</a>	<b>SJC Number</b>	

**INVOLVED PARTY**

**Commonwealth**  
Plaintiff/Appellee  
Red brief & appendix filed  
3 Enls, 112 Days

**Jamal D. Chin-Clarke**  
Defendant/Appellant  
Blue br, app & reply br filed  
2 Enls, 94 Days

**ATTORNEY APPEARANCE**

[John P. Zanini, A.D.A.](#) - Withdrawn  
[Amanda Read Cascione, A.D.A.](#)

[David Rassoul Rangaviz, Esquire](#)  
[Alyssa Hackett, Esquire](#)  
[Patrick Levin, Esquire](#)

**DOCUMENTS**

[Appellant Brief](#) 

[Appellee Brief](#) 

**ORAL ARGUMENTS**

**DOCKET ENTRIES**

Entry Date	Paper	Entry Text
10/18/2018		Transcript Volume: 06/07/2018 - Evidentiary hearing .
10/16/2018	#1	Lower Court Assembly of the Record Package
10/16/2018	#2	Notice of entry sent.
11/15/2018	#3	Motion of Appellant to extend date for filing brief and appendix filed for Jamal D. Chin-Clarke by Attorney Alyssa Hackett.
11/16/2018		RE#3: No action taken pending receipt of the docketing statement, now due on or before 11/23/2018. *Notice sent
11/16/2018	#4	Docketing Statement filed for Jamal D. Chin-Clarke by Attorney Alyssa Hackett.
11/16/2018		RE#3: Allowed to 02/12/2019. Notice sent.
11/30/2018	#5	Notice of appearance filed for Commonwealth by Attorney Amanda Read Cascione.



C.A. 16

02/06/2019	#6	Motion of Appellant to extend date for filing brief and appendix filed for Jamal D. Chin-Clarke by Attorney Alyssa Hackett.
02/07/2019		RE#6: Allowed to 02/28/2019. Notice sent.
02/25/2019	#7	Appellant brief filed for Jamal D. Chin-Clarke by Attorney Alyssa Hackett.
02/25/2019	#8	Appendix filed for Jamal D. Chin-Clarke by Attorney Alyssa Hackett.
02/25/2019	#9	Rule 18(e) notice of filing of reproduction of video exhibit by Jamal D. Chin-Clarke by Attorney Alyssa Hackett.
02/27/2019	#10	MOTION of Appellee to extend brief due date filed for Commonwealth by Attorney Amanda Read Cascione.
02/28/2019		RE#10: Allowed to 5/28/19. Parties to note that amendments to the Massachusetts Rules of Appellate Procedure that include revisions to the Rules' brief and appendix content, formatting, certification and filing requirements take effect 3/1/19 and govern appeals then pending. *Notice
03/01/2019	#11	Copy of Exhibit 1 (surveillance video) received from Alyssa Hackett, Esq..
05/21/2019	#12	Notice of appearance filed for Jamal D. Chin-Clarke by Attorney Patrick Levin.
05/21/2019	#13	MOTION of Appellee to extend brief due date filed for Commonwealth by Attorney Amanda Read Cascione.
05/21/2019		RE#13: Allowed to 06/25/2019. Notice sent.
06/18/2019	#14	MOTION of Appellee to extend brief due date filed for Commonwealth by Attorney Amanda Read Cascione.
06/19/2019		RE#14: Allowed to 07/17/2019. Notice sent.
07/17/2019	#15	Appellee brief filed for Commonwealth by Attorney Amanda Read Cascione.
07/17/2019	#16	Appendix filed for Commonwealth by Attorney Amanda Read Cascione.
10/09/2019		Notice sent seeking information on unavailability for oral argument in December 2019
10/21/2019		Response from Amanda Read Cascione, A.D.A. re: available all dates for oral argument..
10/30/2019	#17	Notice of 12/12/2019, 9:30 AM argument at John Adams Courthouse, Courtroom 4 (a4) sent.
10/31/2019		Response from Amanda Read Cascione, A.D.A. re: will appear and argue on 12/12/2019.
11/08/2019		Response from Alyssa Hackett, Esquire re: will appear and argue on 12/12/2019.
11/08/2019	#18	Motion of Appellant to extend date for filing Reply Brief filed for Jamal D. Chin-Clarke by Attorney Alyssa Hackett.
11/08/2019	#19	Reply brief filed for Jamal D. Chin-Clarke by Attorney Alyssa Hackett.
11/14/2019		RE#18: Allowed. (Meade, Shin, Singh, JJ.) *Notice.
12/12/2019		Oral argument held. (Meade, J., Shin, J., Singh, J.).
12/12/2019	#20	Letter under MRAP 22(c) filed for Jamal D. Chin-Clarke by Attorney Alyssa Hackett.
04/28/2020		ORDER: The one hundred and thirty day guideline for the above entitled case is waived by order of the Court. (Meade, Shin & Singh, JJ.) *Notice.
06/09/2020	#21	Decision: Full Opinion (Shin, J.). Order denying motion to suppress reversed. *Notice.
06/29/2020		FAR-27605 opened on MOTION to file FAR application late filed for Commonwealth by Attorney Houston Armstrong.

As of 07/08/2020 2:15pm

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CRIMINAL ACTION NO.: 2017-00243

COMMONWEALTH

vs.

JAMAL CHIN-CLARKE

**MEMORANDUM OF DECISION AND ORDER ON  
DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**

The defendant, Jamal Chin-Clarke ("Chin-Clarke"), is charged with various firearm offenses. Chin-Clarke now moves to suppress the firearm, ammunition, narcotics, cell phone and cash that police recovered from his body on January 27, 2017. As grounds for his motion, Chin-Clarke argues the Boston Police did not have reasonable suspicion to justify the investigatory stop and that he was improperly seized thereafter.

The Court conducted an evidentiary hearing on June 7, 2018 and received testimony from one witness, Boston Police Officer Michael McHugh ("Officer McHugh"). One exhibit was admitted as evidence, a DVD containing video surveillance clips taken from a camera in the area where the defendant was questioned, seized and arrested. On the basis of the evidence as determined to be credible by this Court, and the reasonable inferences drawn from that evidence, Chin-Clarke's motion to suppress is **DENIED**. I make the following findings of fact and rulings of law.

### **FINDINGS OF FACT**

I credit and accept the testimony of Officer McHugh regarding the events he observed and participated in the morning of January 27, 2017. I find that Officer McHugh is an experienced member of the Boston Police Department, serving as an officer in varied capacities for 10 years. In addition to his academy training and yearly in-service training, Officer McHugh has participated in specialized training in surveillance tactics, active shooter training, and trademarks and identification of armed subjects.

For the last four years, Officer McHugh has been assigned to a plain-clothes, walking beat in the downtown Boston area, covering in relevant part the portion of Boylston Street between Washington and Tremont Streets. The area is dominated by commercial properties and has heavy pedestrian foot traffic. It is a high crime area with frequent arrests for buying/selling narcotics, larceny, robbery, assault, trespassing and shoplifting. As for shoplifting, Officer McHugh has made numerous shoplifting arrests and has observed individuals selling and/or trading their stolen property outside on the street, often to feed a drug addiction. Officer McHugh has made arrests for shoplifting crimes based on his observation of people engaged in commerce on the street with items with tags still on them and/or items in bags not consistent with the contained items.

Saint Frances House ("SFH"), a daytime homeless shelter located at 39 Boylston Street, is within Officer McHugh's walking beat and he spends much of his time patrolling in and around SFH. SFH provides daytime meals, social services and clothing to the homeless. SFH has security comprising a half-dozen blue-uniformed staff equipped with metal detectors to uncover weapons. There are frequent altercations both inside and outside SFH and Officer

McHugh has made hundreds of arrests near SVH for crimes ranging from drug dealing/possession, stabbings, warrant arrests, trespassing and malicious destruction of property.

On January 27, 2017 at approximately 9:20 A.M., Officer McHugh was in plain clothes<sup>1</sup> working alone on Boylston Street in the vicinity of the SFH. Officer McHugh carried an iPad tablet which he routinely used to access the Criminal Justice Information System ("CJIS"), including booking photos, license photos, warrants and BOP records. As he walked past the front door of SFH, Officer McHugh observed three males looking in a plastic shopping bag and talking to each other. Officer McHugh was alerted to the three males, who he did not know, when he noticed a bag contained clothing and that some of the clothing was outside of the bag with tags still attached and visible. Based on this observation, his training and experience, Officer McHugh suspected that the men were involved in a street sale transaction of stolen clothing and he decided to conduct a threshold inquiry.

As Officer McHugh approached the three males, he overheard one male ask "how much is this?" as another male held up some merchandise. Officer McHugh then engaged the trio directly asking "what's up guys. Is that stuff stolen?" Startled, the male holding up the merchandise (later identified as Milton Noj) responded "Whoa." Officer McHugh identified himself as a Boston Police officer and asked the men for their identifications.<sup>2</sup> As Officer McHugh spoke with Noj, Chin-Clarke had his hands in his front pockets and was looking up and down Boylston Street. For officer safety purposes, Officer McHugh asked Chin-Clarke to stand next to the exterior of the SFH building while he spoke with Noj. Noj initially told Officer McHugh that he purchased the items in the plastic bag at the Natick Mall. When asked for receipts, Noj then told Officer McHugh that his mother gave the items to him and he did not

<sup>1</sup> Specifically, Officer McHugh was wearing a black puffy vest, green sweatshirt, camouflage cap and long pants.

<sup>2</sup> The third male, an onlooker who was present but does not appear to be an active participant in the sale, exited promptly.

have any receipts. This change in story further heightened Officer McHugh's belief that the items were stolen property. Noj was nervous but provided his identifying information, to include his full name and date of birth, without hesitation. Officer McHugh accessed CJIS images on his iPad to confirm Noj's identity.<sup>3</sup>

Officer McHugh's interaction with Noj to confirm his identity lasted 38 seconds. Officer McHugh then turned his attention to Chin-Clarke. While waiting, Chin-Clarke was fidgety, nervous and looking up and down Boylston Street, again heightening Officer McHugh's suspicion that a crime was afoot. Chin-Clarke had his hands in his pockets and Officer McHugh instructed him to remove his hands from his pockets. Although he initially complied, within a minute or two Chin-Clarke put his hands back inside his clothing. Based on his observations of Chin-Clarke, Officer McHugh was concerned that he might be armed and dangerous. Officer McHugh asked Chin-Clarke for his identifying information. In response, Chin-Clarke noticeably hesitated before replying "Dana Clarke," and hesitated again before giving a date of birth of April 10, 1982. Using that information, Officer McHugh accessed the CJIS system and obtained an RMV license image for Dana Clarke. Although the image was similar to, it did not match, the individual standing before him. In an attempt to learn his true identity, Officer McHugh asked Chin-Clarke for his social security number. Chin-Clarke could not remember either the last four or the first three digits of his social security number. Officer McHugh then called for backup. In order to compare the RMV image to Chin-Clarke, Officer McHugh asked Chin-Clarke to take off his glasses and he complied. Concerned about his own safety, Officer McHugh then asked Noj and Chin-Clarke to take a seat on the ground as he awaited backup. One minute thirty seconds later, Officer Fabian Belgrave, also in plain clothes, arrived on scene to assist Officer

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<sup>3</sup> Officer McHugh has made hundreds of arrest on outstanding warrants in this area. He regularly asks for identifying information to run through CJIS during threshold inquiries.

McHugh. Officer Belgrave agreed that Chin-Clarke did not match the RMV image for Dana Clarke. As Officer Belgrave searched other images on CJIS, he asked Chin-Clarke to stand to get a better look at his face and it became increasingly clear to both officers that the person in front of them was not Dana Clarke.<sup>4</sup>

Chin-Clarke stood directly in front of the two officers, smoking a cigarette as they compared the CJIS images to him. Given the totality of the circumstances, including Officer McHugh's initial observation of the suspicious street commerce and Chin-Clarke's nervous behavior, providing a false identification and inability to answer basic questions, Officer McHugh decided to handcuff Chin-Clarke. In total, six minutes had passed from the time Officer McHugh began speaking to Chin-Clarke and his decision to handcuff him. When Officer McHugh attempted to handcuff him, Chin-Clarke spun around striking Officer Belgrave in the chest and the three men ended up wrestling to the ground as SFH security attempted to assist.<sup>5</sup> Shortly, two other uniformed Boston Police officers arrived on scene and placed Chin-Clarke into handcuffs. One of those officers, Officer Lopez, pat-frisked Chin-Clarke and located a firearm in a fanny pack in his front pant area, announcing "gun" to his fellow officers as he did so. Officers unzipped the fanny pack and recovered a loaded Beretta firearm, 9 bags of heroin and 23 bags of crack cocaine. Chin-Clarke was arrested and transported to District A-1 for booking. At booking, \$100 in currency and a cell phone were retrieved.

### **RULINGS OF LAW**

"In the absence of seizure there is no need for the police to justify their conduct by showing a reasonable suspicion of criminal activity." *Commonwealth v. Nester*, 67 Mass. App. Ct. 225, 229, *rev. denied*, 447 Mass. 1112 (2006)(proper threshold inquiry). A person has been

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<sup>4</sup> Among the differences, one male had a facial scar and the other did not.

<sup>5</sup> While the officers struggle with Chin-Clarke, Noj leaves the scene.

seized by a police officer “if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Commonwealth v. Borges*, 395 Mass. 788, 791 (1985), quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870 (1980). “[N]ot every encounter between a law enforcement official and a member of the public constitutes an intrusion of constitutional dimensions requiring justification.” *Commonwealth v. Stoute*, 422 Mass. 782, 789 (1996). The police are free to approach individuals on the street and ask threshold questions, *Commonwealth v. Narcisse*, 73 Mass. App. Ct. 406, 408 (2008); see also *Commonwealth v. Narcisse*, 457 Mass. 1, 6-7 (2010); *Commonwealth v. Damelio*, 83 Mass. App. Ct. 32, 35-36 (2012); *Commonwealth v. Martin*, 73 Mass. App. Ct. 526, 530-32 (2009). “[T]he police do not effect a seizure merely by asking questions unless the circumstances of the encounter are sufficiently intimidating that a reasonable person would believe he was not free to turn his back on his interrogator and walk away.” *Commonwealth v. Fraser*, 410 Mass. 541 (1991). “Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” *Commonwealth v. Thinh Van Cao*, 419 Mass. 383, 388 n. 7, cert. denied, 515 U.S. 1146 (1995), quoting *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868 (1968).

The defendant argues that he was initially seized when Officer McHugh instructed him to stand by the wall. The defendant argues that the level of the seizure escalated when Officer McHugh instructed him to sit on the ground and, later, to stand up so the officers could get a better look at him. The defendant also notes, the officers’ request to remove Chin-Clarke’s hood and eyeglasses as further evidence of seizure. The court does not agree that these police actions constituted a seizure given the facts before it.

Here, Officer McHugh was justified in making a threshold inquiry of both Roj and Chin-Clarke given that he had reasonable suspicion to believe that the two men were about to commit a crime in the sale of stolen property. Chin-Clarke was approached on a public street by a single officer in plain clothes who identified himself as an officer seeking to investigate what he believed to be a street sale of stolen property. The video shows Officer McHugh working at pace to identify the two individuals involved in the suspected activity on his tablet. He is not hostile or aggressive with the defendant. Further, asking for each man's identifying information in sequence was a permissible and reasonable way to approach this field investigation and did not constitute a seizure of Chin-Clarke. Officer McHugh's initial instruction to Chin-Clarke to stand by the wall was a safety-based police tactic to separate the two suspects which was particularly appropriate given that he was outnumbered. According to the video footage, it took Officer McHugh only 38 seconds to verify Noj's identity.

Thereafter, once Officer McHugh determined that Chin-Clarke provided him with false identifying information (and he was still outnumbered), his request that the defendant sit down was justified. At that point, Officer McHugh knew that Chin-Clarke was concealing his true identity, warranting a brief further investigation. See *Commonwealth v. Torres*, 424 Mass. 153, 162 (1997). After Officer Belgrave arrived, his instruction that Chin-Clarke stand so that he could compare the CJIS images to the defendant's face was also appropriate. *Id.* Finally, the entire time from when Officer McHugh started talking to the defendant to the time he attempts to place him in handcuffs is a relatively short 6 minutes. *Commonwealth v. Barros*, 435 Mass. 171, 174 (2001).

The seizure here occurred when Officer McHugh asked Chin-Clarke to turn around so that he could handcuff him, a clear indication that he was then no longer free to leave. At that



point, however, Officers McHugh and Belgrave had reasonable suspicion that Chin-Clarke was about to commit a criminal offense and was armed and dangerous. *Narcisse*, 457 Mass. at 9. The observations made by Officer McHugh of the street sale, in a high crime area particularly known for shoplifting, and the defendant's hesitation and inability to provide valid identifying information along with his nervous behavior supported the requisite reasonable suspicion. Finally, based on the totality of the circumstances, including the defendant's (i) nervous, fidgety behavior, (ii) failure to comply with Officer McHugh's direction to keep his hands out of his pockets, and (iii) provision of a false identifying information, provided reasonable suspicion that Chin-Clarke was armed and dangerous.

Once officers attempted to restrain Chin-Clarke, the situation rapidly deteriorates with Chin-Clarke flailing and tumbling on the ground with the officers. It was not until the two uniformed Boston Police officers arrive on scene that the police were able to contain and handcuff the defendant. At that point, the pat-frisk of Chin-Clarke was proper, as was his arrest, and the evidence retrieved by the officers thereby, including the loaded firearm, narcotics, cell phone and money, will not be suppressed. See *Commonwealth v. Gomes*, 453 Mass. 506, 512 (2009)

### **ORDER**

For the foregoing reasons, Chin-Clarke's Motion to Suppress is **DENIED**.

Date: June 28, 2018

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Diane C. Freniere  
Justice of the Superior Court

Volume: I  
Pages: 1-71  
Exhibits: 1

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

\* \* \* \* \*

COMMONWEALTH OF MASSACHUSETTS

v.

DOCKET NO. 1784CR00243

JAMAL D. CHIN-CLARKE

\* \* \* \* \*

EVIDENTIARY HEARING ON SUPPRESSION  
BEFORE HER HONORABLE JUSTICE DIANE FRENIERE

APPEARANCES:

For the Commonwealth:

Suffolk County District Attorney's Office

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Boston, MA 02114

By: Amanda R. Cascione, Assistant District Attorney

For Defendant:

Committee for Public Counsel Services

1 Congress Street

Boston, MA 02114

By: Alyssa Hackett, Esquire

Courtroom 713  
Boston, Massachusetts  
June 7, 2018

Julianne Schultz  
Approved Transcriber

## I N D E X

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
MICHAEL MCHUGH				
(By Ms. Cascione)	4			
(By Ms. Hackett)		38		
EXHIBITS:			PAGE:	
1 CD			31	
WORD INDEX:			54	

1 (Court called to order.)

2 (Defendant present.)

3 (10:19 a.m.)

4 THE COURT OFFICER: Court, all rise. This Honorable  
5 Court's in session. Please be seated.

6 THE CLERK: Good morning, Your Honor. Before the Court  
7 is the matter of Commonwealth versus Jamal Chin-Clarke.  
8 Docket 2017-00243.

9 If parties could please identify themselves for the  
10 record and who they represent.

11 MS. CASCIONE: Good morning, Your Honor. Amanda  
12 Cascione for the Commonwealth.

13 THE COURT: Good morning.

14 MS. HACKETT: Good morning, Your Honor. Alyssa Hackett  
15 for Mr. Chin-Clarke.

16 THE COURT: Good morning, counsel.

17 Good morning, Mr. Chin-Clarke.

18 THE DEFENDANT: Good morning.

19 THE COURT: So we're on for Defense motion to suppress.  
20 I don't need opening arguments. You can call your first  
21 witness.

22 MS. CASCIONE: Sure. Commonwealth would call Officer  
23 McHugh, McHugh, please.

24 MS. HACKETT: Your Honor, I'm sorry to interrupt. Is it  
25 okay -- I have an intern present, Lindsay Kramer. Is it okay

1 if she sits with us and takes notes?

2 THE COURT: She may.

3 MS. HACKETT: Thanks.

4 MICHAEL MCHUGH, Sworn

5 THE WITNESS: I do.

6 THE CLERK: Officer, take a seat here, sir.

7 THE COURT: And counsel, just give me one second. I'm  
8 bringing my computer up. It's slow. A little slow.

9 THE CLERK: Please try to keep your voice up.

10 THE WITNESS: Sure.

11 THE COURT: Go right ahead.

12 MS. CASCIONE: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MS. CASCIONE:

15 Q Good morning, Officer. Could you please introduce  
16 yourself to the Court, stating your full name and spelling  
17 your full name for the record?

18 A Good morning. My name is Michael McHugh. My first name  
19 is spelled M-i-c-h-a-e-l. My last name is spelled  
20 M-c-H-u-g-h.

21 Q And you work for Boston Police Department?

22 A I do.

23 Q How long have you been with the department?

24 A 10 years.

25 Q When you first started with the department, did you

1 undergo the initial six month training or academy that the  
2 Boston Police Department provides?

3 A I did.

4 Q And what are some of the things, topics and things that  
5 you covered and learned while that, in that six month  
6 academy?

7 A Criminal law, constitutional law, tactics, operations,  
8 rules and regulations of the Boston Police Department, that  
9 nature.

10 Q Have you undergone any training subsequent to that  
11 initial six month training?

12 A I have.

13 Q And could you just briefly detail some of the trainings  
14 that you have gone through subsequent to that initial  
15 training?

16 A So I've undergone multiple what they call in-service  
17 trainings as wells as some out trainings that, active shooter  
18 training, trademarks and identification of armed subjects,  
19 surveillance, those kind of things.

20 Q And could you, what's your current assignment with the  
21 Boston Police Department?

22 A I'm a walking beat in the downtown area, specifically  
23 around Boylston Street.

24 Q And how long have you been working in that capacity?

25 A Almost four years now.

1 Q Prior to that, could you just describe for the Court the  
2 different areas or units that you were assigned to?

3 A So, for just under a year I was probationary officer in  
4 Brighton, District 14. After that, I went for two years to  
5 Roxbury, Area B-2. And for two years after that I was with  
6 the Boston Police Fugitive Unit. One year after that in  
7 Mattapan. And ever, for the last four now in this current  
8 assignment.

9 Q And when you, you indicated that you were, that you are  
10 working in, as a walking beat patrolman. Can you describe  
11 some of your duties and responsibilities working in that  
12 particular role?

13 A So it's a little bit unique. I work in plain clothes by  
14 myself mostly in that specific area, because it's sort of a  
15 high crime area. There's a daytime homeless shelter at 39  
16 Boylston Street, called the St. Francis House. And I spend a  
17 lot of my time in the street there and the alleys around that  
18 area.

19 Q And you indicated that you work in the Downtown area of  
20 Boston. When you're assigned in this walking beat capacity,  
21 where specifically are you assigned to?

22 A So the portion of Boylston Street between Washington  
23 Street and Tremont as well as some parts of Chinatown, to  
24 include Lagrange Street and some of the alleys along  
25 Washington Street, Marty's Way, Head Place, that kind of an

1 area.

2 Q And what shift do you typically work?

3 A The day tour, which goes from 7:30 in the morning until  
4 four o' clock in the afternoon.

5 Q You indicated that you work in a plain clothes capacity.  
6 What do you typically wear when you're working this shift?

7 A Usually I'm not dressed like this. I wear a t-shirt  
8 and, in the summertime, a t-shirt and shorts. In the  
9 wintertime, maybe a sweatshirt and pair of jeans. I wear my  
10 badge on my belt customarily, like that.

11 Q And you indicated moments ago that this area, you're  
12 assigned to this particular area because it's a high crime  
13 area because there's issues. Can you go into a little more  
14 detail in terms of what sort of crime you're dealing with in  
15 that walking beat in the first block of Boylston Street?

16 A So the area's frequented by a lot of people who sell and  
17 buy drugs, people who have drug problems, and that causes  
18 other problems. There's larcenies and robberies,  
19 shoplifting, assaults, public intoxication, trespassing,  
20 shoplifting, that kind of thing.

21 Q And have you made arrests for all of these different  
22 types of crimes in that specific area?

23 A Yes, I have.

24 Q Officer McHugh, that first block area of Boylston, I  
25 know you mentioned a residency that's there, the St. Francis



1 House, but what else is on that street?

2 A So currently there's a library on the corner and the  
3 Chinatown commercial building, I believe it's called.  
4 There's a convenience store at 40 Boylston Street. There's a  
5 nail parlor. There's the employee entrance to the Ritz  
6 Carlton Hotel on that side, and the Masons Lodge is there.

7 Q Is it fair to say that it's a relatively commercial area  
8 of the city?

9 A Absolutely.

10 Q And Officer McHugh, when you're typically working the  
11 day tour in that area, can you describe, in terms of walking  
12 traffic, how many people are usually out and about?

13 A Hundreds and hundreds of people walk through that area  
14 each day. It's the way people get from the Boylston subway  
15 station to the other side or from the Chinatown T Station to  
16 the other side as well as the people that are using the  
17 services of the St. Francis House, the daytime homeless  
18 shelter there.

19 Q And Officer McHugh, I know you mentioned a number of  
20 different crimes that you've seen occurring in that downtown  
21 area. Could you, focusing specifically on your experience  
22 with respect to shoplifting, receiving stolen property and  
23 crimes of that nature, can you explain, during your four  
24 years working in this specific area, through your training  
25 and experience, what you've learned with respect to those

1 crimes? And -- yeah.

2 A So it's not infrequent that we come across people that  
3 are in possession of stolen property. Often times, as I said  
4 before, the people are addicted to heroin, crack cocaine,  
5 fentanyl, that kind of thing. They don't have any money. So  
6 in order to acquire those drugs, what they'll do often times  
7 is shoplift and then sell or trade those items in the street.

8 Q And in your experience, is shoplifting an issue in the  
9 stores that are located in that particular area of Downtown  
10 Boston?

11 A It's a huge problem. Just previous to the incident that  
12 we're talking about today, we had stopped, the My Tan  
13 convenience shop -- I guess you want to call it -- it had  
14 hundreds and hundreds of thousands of dollars of shoplifted  
15 items that the people were pawning at that shop. And so I  
16 think just a month or two previous, we executed a search  
17 warrant on the place.

18 MS. HACKETT: Objection. I don't have any discovery  
19 about, I don't know what he's talking about. I wasn't  
20 provided with anything before today.

21 THE COURT: Well, I think it goes to the issues in that  
22 particular neighborhood. And for that, I'll consider it.

23 THE WITNESS: So that store is just located a block  
24 away.

25 BY MS. CASCIONE:

1 Q And have you personally been involved in making arrests  
2 with respect to shoplifting in the stores in that particular  
3 area?

4 A I have.

5 Q You also mentioned moments ago that there, that you had  
6 dealt with and made observations in terms of these crimes.  
7 What are some of the indicators or things that you look with,  
8 look for with respect to shoplifting, receiving stolen  
9 property, crimes of that nature?

10 A Well, you know, numerous kind of odd items in a bag.  
11 Somebody might be in possession with, often with the tags  
12 still on them and often with, in a bag that might not be  
13 associated with the store that things were purchased from.  
14 And then people stand on the street looking in a bag and, you  
15 know, looking at new articles of clothing or sunglasses or  
16 something of that nature. And you can tell it's, there's  
17 some commerce going on there.

18 Q And this is something that you had experience dealing  
19 with in this particular area?

20 A I have.

21 Q And have you made arrests as a result of observations  
22 and investigations with respect to that type of conduct?

23 A I have.

24 Q Just drawing your attention for a moment to the St.  
25 Francis House. Are you familiar with that particular

1 facility?

2 A Yes.

3 Q And where is that located specifically?

4 A 39 Boylston Street.

5 Q And just in general, what, what does that facility  
6 provide, if you know?

7 A So they provide a number of different services, help  
8 with drug addiction, social workers that are trying to find  
9 beds for people. They provide breakfast in the morning.  
10 They provide lunch in the afternoon. You can get clothing  
11 there on certain days. All kinds of help that homeless  
12 people need.

13 Q Does St. Francis, does that facility have staff that is  
14 employed for security purposes?

15 A They do.

16 Q And could you just describe briefly what you know in  
17 terms of that particular role for the individuals that work  
18 at St. Francis?

19 A So they usually have maybe half a dozen or more people  
20 dressed in blue that provide security. They, they have a  
21 metal detector as well as a wand to prevent people from  
22 coming in with weapons. It's not infrequent that there's  
23 altercations and fights inside the place, so they'll help  
24 stop those.

25 Q And have you been involved in making arrests both

1 outside of St. Francis Street and inside of St. Francis?

2 A Yes.

3 Q And just, if you could just describe some of the types  
4 of arrests that you've made outside of that particular  
5 building.

6 A I've made hundreds of arrests around that building for  
7 things ranging from stabbings to drug trafficking, drug  
8 dealing, drug possession, warrant arrests, mostly warrant  
9 arrests. There's, you know, dozens and dozens of warrant  
10 arrests there every year. Trespassing, malicious destruction  
11 of property, that kind of thing.

12 Q Officer, drawing your attention to Friday, January 27th  
13 of 2017. Do you recall if you were working on that  
14 particular day?

15 A I was.

16 Q And were you working in the capacity that you've  
17 described as a walking beat patrolman in the Downtown area of  
18 Boston?

19 A Yes.

20 Q Did you work the day tour on that day?

21 A I did.

22 Q And do you remember what you were wearing?

23 A I was wearing a black vest that I often wear. It's a,  
24 it's a warm kind of puffy winter vest. I think I had a green  
25 sweatshirt on, a camouflage cap that I often wear, I think

1 work pants.

2 Q And when you work in this walking beat capacity, are you  
3 working with anyone or are you working alone?

4 A Usually I work alone.

5 Q On this day, were you working alone?

6 A I was.

7 Q Aside from your typical Boston Police, or the items that  
8 you typically carry on your duty belt, is there anything else  
9 that you have issued through Boston Police that you use when  
10 you're working the walking beat?

11 A Yes.

12 Q And what's that?

13 A I carry a tablet with me. It's an iPad that I use to  
14 access a couple of different applications that are helpful,  
15 mostly the Criminal Justice Information System.

16 Q And when you access that Criminal Justice Information  
17 System, which is typically referred to as CJIS, what can you,  
18 what information can you obtain in that particular program?

19 A So we can access AFIS, which gives us old booking  
20 photos. We can access licenses. It would have a license  
21 photo. Board of probation records. We can tell if you have  
22 a warrant that's current or if you had one in the past. That  
23 kind of thing.

24 Q Drawing your attention to the morning, approximately  
25 9:20 on January 27th of 2017. Do you recall being in the

1 area of the St. Francis House?

2 A I do.

3 Q Can you describe what you recall happening in that  
4 vicinity on that morning?

5 A So I was walking outbound on the odd numbered side of  
6 the street, so that would be heading towards Washington  
7 Street with the St. Francis House on my left. I always have  
8 a heightened sense of awareness when I'm in the area, and I  
9 saw a couple of gentlemen as I walked past the door of the  
10 St. Francis House. I think three gentlemen looking in a  
11 plastic shopping bag and talking to each other.

12 Q And that plastic shopping bag that you made observations  
13 of, do you have a memory of what type of plastic bag it was,  
14 if it came from a store or if it had any sort of insignia of  
15 a store on the outside of it?

16 A I don't recall.

17 Q And what, what, if anything, sort of caught your  
18 attention in terms of the behaviors of these gentlemen at  
19 that moment?

20 A So any time I see some guys on the street, you know,  
21 looking down at their hands, you know, it catches my  
22 attention. So as I approached closer, I noticed that there  
23 was some clothing in the bag, and some of it was outside of  
24 the bag and it had the tags.

25 Q And is there any significance of the items that they

1 were showing each other having a visible tag on it, based on  
2 your training and experience?

3 A Yeah, it's often stolen property.

4 Q And why do you believe that based on your experience?

5 A Because that's what it's looked like in the past when  
6 we've come upon that kind of a thing. And then it's odd that  
7 it's not in, as I said, in a bag that, that would come from  
8 the store with and things of that nature just because that  
9 happens there all the time.

10 Q And when you first made these observations, you said  
11 there was three males?

12 A There was.

13 Q Did you know any of those three males?

14 A I did not.

15 Q And once you made those initial observations, is it fair  
16 to say that your awareness was heightened even more so at  
17 that point?

18 A It was.

19 Q What did you do?

20 A So I decided to conduct a threshold inquiry.

21 Q And did you approach those three gentlemen?

22 A I did.

23 Q And what, if anything, happened when you approached  
24 them?

25 A I believe I said hey, what's up guys. Is that stuff



1 stolen.

2 Q And before you made those statements, did you hear any  
3 of the gentlemen say anything when you got closer to them?

4 A Yes, somebody, and I don't recall who, said how much is  
5 this.

6 Q And again, based on your training and experience, that  
7 question, how much is this, in conjunction with holding items  
8 up that still have tags, what is that consistent with?

9 MS. HACKETT: Objection. Speculation.

10 THE COURT: I'll allow it.

11 THE WITNESS: Shoplifting and receiving stolen property.

12 BY MS. CASCIONE:

13 Q And have you seen that type of behavior before?

14 A I have.

15 Q And had that resulted in arrests before, in your  
16 experience in that area?

17 A Yes.

18 Q You indicated a moment ago that you decided at that  
19 point to conduct a threshold inquiry of these individuals.  
20 How did you do that?

21 A So I approached and I made that initial statement. The  
22 gentleman I identified, a Mr. Noj, later on. He was  
23 definitely startled, and he said something like whoa, and he  
24 backed up. So I immediately identified myself as a police  
25 officer because I am in plain clothes. I had my badge on my

1 belt, but sometimes it's out of, you know, kind of out of  
2 people's immediate vision. So I said I'm a Boston Police  
3 officer, and then I asked that they identify themselves.

4 Q And the individual you just indicated, Mr. Noj, did he,  
5 when you asked him, is the property stolen, did he give you  
6 any information about the items that he had in that bag?

7 A He did.

8 Q And what did he say?

9 A He indicated that he had purchased the items at the  
10 Natick Mall.

11 Q And once you learned that information, did you inquire  
12 further of Mr. Noj?

13 A I did.

14 Q And what did you ask him?

15 A I said do you have the receipts for these items.

16 Q Was Mr. Noj able to provide you receipts at that point?

17 A No, he said he did not, and then he indicated that his  
18 mother had actually purchased the items.

19 Q And again, based on all of your training and experience,  
20 anything about Mr. Noj changing his story with respect to  
21 those items that caught your attention?

22 MS. HACKETT: Objection.

23 THE COURT: Can I have the question back?

24 MS. CASCIONE: Sure.

25 BY MS. CASCIONE:

1 Q Based on your training and -- excuse me. Based on your  
2 training and experience, anything about Mr. Noj's responses  
3 with respect to the items in the bag that caught your  
4 attention?

5 THE COURT: Overruled.

6 You can answer the question.

7 THE WITNESS: Yes, him changing his story so quickly  
8 gave me a heightened sense of awareness that something indeed  
9 was wrong.

10 BY MS. CASCIONE:

11 Q And Officer McHugh, were you able to make observations  
12 of any receipts in the bag Mr. Noj had?

13 A I looked, and there were none.

14 Q You indicated that you asked for the gentlemen to  
15 provide you with their names at that point. Starting with  
16 the individual, Mr. Noj, did he provide you information?

17 A He did.

18 Q And can you describe his demeanor while this was  
19 happening?

20 A He was a bit nervous, but he complied quickly and gave  
21 me his information.

22 Q And fair to say he informed you that his name was Milton  
23 Noj, and Noj is spelled is N-o-j?

24 A That's correct.

25 Q Did you ask for a date of birth?

1 A I did.

2 Q And did he provide you with one?

3 A I did, he did, but I don't recall what he said.

4 Q Fair to say it was January 15th of 1973?

5 A That sounds right.

6 Q Did Mr. Noj hesitate at all when giving you his name and  
7 date of birth?

8 A He did not.

9 Q Did Mr. Noj, if you remember, provide you any other  
10 information at that point?

11 A No, I don't think so.

12 Q You indicated earlier that you carry a tablet. Were you  
13 able to utilize that tablet in confirming Mr. Noj's identity?

14 A I did.

15 Q And is that something that you typically do in these  
16 situations?

17 A Yes.

18 Q And why so?

19 A I do it as a rule down there. As I said, I've made  
20 hundreds of warrant arrests in that area, and sometimes  
21 they're really violent crimes. So I do that so I know who  
22 I'm dealing with.

23 Q Did you feel comfortable with the identity that Mr. Noj  
24 had provided you -- or let me rephrase that.

25 Did you believe that that was in fact Milton Noj?

1 A Yes, I was able to collect some images from CJIS, and it  
2 appeared to be that he was correct.

3 Q While you were speaking to Mr. Noj, did you make any  
4 observations of the other gentlemen that were present?

5 A I did.

6 Q One of the other gentlemen that was present, do you see  
7 that, one of the men that was there in court here today?

8 A I do.

9 Q And did you ultimately learn that gentleman's name?

10 A Yes.

11 Q Fair to say it's Jamal Chin-Clarke?

12 A That's correct.

13 Q And do you see that person here in court?

14 A I do.

15 Q Could you just identify something that he's wearing?

16 A He's wearing a blue shirt with a blue tie.

17 MS. CASCIONE: May the record reflect, Your Honor, that  
18 he's identified the Defendant?

19 THE COURT: The record will so reflect.

20 BY MS. CASCIONE:

21 Q When you were speaking with Mr. Noj, can you describe  
22 any observations you made of Mr. Chin-Clarke?

23 A So he appeared fidgety and he looked a little nervous,  
24 and he was looking up and down the street.

25 Q And did that, again, did that heighten your awareness

1 even more so at that point?

2 A It did.

3 Q Once you were done gaining information from Mr. Noj, did  
4 you then speak to Mr. Chin-Clarke?

5 A Yes.

6 Q Did you make any observations with respect to Mr. Chin-  
7 Clarke's hands?

8 A Yes.

9 Q Could you describe what you saw and what happened?

10 A So the sequence of events, you know, I may have done  
11 this before completely identifying Mr. Noj, but very quickly  
12 I noticed that Mr. Clarke's hands were in his pockets. And  
13 so I asked him to remove them.

14 Q Did he comply at that point?

15 A He did.

16 Q What happened after that with respect to Mr. Chin-  
17 Clarke's hands?

18 A So within a minute or two, he put his hands back inside  
19 of his, I think, his pants pockets, but I can't be sure. But  
20 they, he put them back inside of clothing.

21 Q And based on your training and experience and  
22 specifically your training with respect to armed subjects,  
23 did you have any concerns with those behaviors of Mr. Chin-  
24 Clarke?

25 A Yes.

1 Q And can you explain what those concerns were?

2 A Well, I would have some concern that somebody might be  
3 armed, and then armed themselves with something that was inside  
4 their clothing and harm me.

5 Q Did you have that concern at that time?

6 A I did.

7 Q Did you ask, did you ask Mr. Chin-Clarke for his name  
8 and identifying information?

9 A Yes.

10 Q What happened when you asked him for his name?

11 A He hesitated noticeable before he gave a reply.

12 Q And what name did he provide?

13 A I believe he, the name he replied was Dana Clarke.

14 Q And did you then ask Mr. Chin-Clarke for a date of  
15 birth?

16 A I did.

17 Q And how did he react when you asked that?

18 A I believe he hesitated again, but he provided a date of  
19 birth.

20 Q Fair to say that date of birth he provided was April  
21 10th of 1982?

22 A Yes.

23 Q What did you do at that point?

24 A So I accessed the CJIS again, and I entered the name  
25 that he gave me as well as the date of birth. And I was able

1 to get a license photograph for that person, Dana Clarke. It  
2 was indeed, it was somebody of that name in the system with a  
3 license and the date of birth that --

4 Q Did you make observations of that RMV image for a Dana  
5 Clarke?

6 A I did.

7 Q And did you compare those, that image to Mr. Jamal Chin-  
8 Clarke?

9 A Yes.

10 Q And what did you believe at that time?

11 A The two appeared similar, but I did not think that the  
12 person in the picture was the gentleman that was standing in  
13 front of me.

14 Q Did you ask any followup questions of Mr. Chin-Clarke at  
15 that point?

16 A I did.

17 Q And what did you ask him?

18 A So I often ask for a social security number to be  
19 provided to give me a little more to go on to prove that that  
20 is in fact you.

21 Q Did you ask Mr. Chin-Clarke for his social, social  
22 security number?

23 A I did.

24 Q And how did he respond?

25 A He said that he didn't know it.



1 Q And in your training and experience working for Boston  
2 Police Department, has that happened before where someone  
3 doesn't know their social security number?

4 A Yes.

5 Q What is that typically consistent with?

6 MS. HACKETT: Objection.

7 THE COURT: Sustained.

8 BY MS. CASCIONE:

9 Q Officer McHugh, once Mr. Chin-Clarke was unable to  
10 provide his social security number and you had made  
11 observations of the RMV photograph and his actual physical  
12 presence, what did you do at that point?

13 A So it gave me a heightened sense of concern that  
14 something might be wrong, so I called for some assistance on  
15 the radio on channel two.

16 Q Who responded to assist you?

17 A Fabian, Officer Fabian Belgrave came pretty quickly.

18 Q And once Officer Belgrave approached, what, if anything,  
19 did you do?

20 A So I asked Fabian if he thought that the person in the  
21 license photo was the same person that we were talking to.

22 Q And how did, did you show Officer Belgrave the  
23 photograph of Dana Clarke, the RMV image?

24 A Yes.

25 Q And fair to say Officer Belgrave was standing right next

1 to you, in front of Mr. Chin-Clarke?

2 A That's correct.

3 Q And what did Officer Belgrave believe at that point?

4 A He felt the same way, that it was similar, but he didn't  
5 think it was the same person.

6 Q What did you do at that point?

7 A So Officer Belgrave -- I hadn't thought of it, but he  
8 access AFIS, which is a information system that the jails and  
9 the prisons use, and they'll have photographs of subjects.  
10 And so he accessed some of those, and it became increasingly  
11 clear to us that Mr. Chin-Clarke was not who he said he was.

12 Q And just so we're clear. When you, when Officer  
13 Belgrave accessed AFIS, he was looking for photographs of a  
14 Dana Clarke?

15 A That's correct.

16 Q And what, what were some of the things that made it  
17 clear to both you and Officer Belgrave that Dana Clarke and  
18 the Defendant were not the same person?

19 A So I kind of remember, I think Dana Clarke may have had  
20 a scar here. One of the images, one of the persons did, had  
21 a scar, and the other did not. And while it wasn't  
22 immediately obvious in the first photographs that we looked  
23 it, it became obvious in the second. And I think there was  
24 also a freckle that was, was there on one of the images but  
25 not on Mr. Chin-Clarke, you know.

1 Q And with respect to Mr. Chin-Clarke's socials security  
2 number, did you ask him if he was able to give any of the  
3 numbers that were part of that social security number?

4 A I did.

5 Q And how did he respond?

6 A So I asked him if he knew the last four, and he  
7 indicated that he did not. I asked him if he knew any of the  
8 last four, and he stated that he did not. And I asked him if  
9 he just knew the first three, and he said that he did not.

10 Q And Officer McHugh, fair to say you ultimately made a  
11 determination that this individual was not Dana Clarke?

12 A Yes.

13 Q What did you do at that point?

14 A So Mr. Chin-Clarke was clearly very nervous, and that  
15 was making me nervous, and the fact that he was giving these  
16 sort of bizarre answers to our questions. I thought it would  
17 be prudent to put him in handcuffs until we could kind of  
18 sort out what was going on there.

19 Q And did you attempt to put Mr. Chin-Clarke in handcuffs?

20 A Yes, I did.

21 Q What happened at that point?

22 A So I believe I said turn around and give me your hands,  
23 and I reached to handcuff him. And he spun around, and he  
24 was trying to evade us. And I think in doing so, he punched  
25 Fabian sort of in the chest. And I think he spun to his

1 left, and so we all had to, we all ended up on the ground.

2 Q Fair to say a couple of other officers came to assist?

3 A Yeah, we were there for a while, trying to get handcuffs  
4 on Mr. Chin-Clarke, and then Eddie Lopez and Officer  
5 Caulfield showed up to help us out.

6 Q During that struggle, were you ultimately able to get  
7 handcuffs on Mr. Chin-Clarke?

8 A Yes.

9 Q At that point, are you aware of any of the officers  
10 present, including yourself, conducted a pat frisk of Mr.  
11 Chin-Clarke?

12 A Yes, Officer Lopez did. They had him, I was kind of  
13 collecting some of the items that we had dropped. So he was  
14 safely in handcuffs, and so Officer Lopez conducted a pat  
15 frisk.

16 Q And did, to your knowledge, did Officer Lopez locate  
17 anything as a result of that pat frisk?

18 MS. HACKETT: Objection.

19 THE COURT: Basis?

20 MS. HACKETT: No personal knowledge.

21 THE COURT: Overruled.

22 THE WITNESS: He did.

23 BY MS. CASCIONE:

24 Q And what did he locate?

25 A Well, he stated gun, which indicated that he had found

1 something that he believed to be a firearm on Mr. Chin-  
2 Clarke's person.

3 Q And did Officer Lopez actually recover a gun that you  
4 could see?

5 A Yes.

6 Q And did you ever see or hold that gun?

7 A I did. So what happened then was of course that  
8 immediately got my attention, so I went back to where they  
9 were going through Mr. Chin-Clarke's items. And he had a,  
10 like a fanny pack, I guess, that had been inside of his pants  
11 in the, in the front of his pants that I had never seen. And  
12 so Eddie had palpated this, and that's when he felt what he  
13 believed a trigger guard and I think, you know, the handle of  
14 the firearm. So I think Eddie unzipped it. There was a  
15 zipper on the top of it. And we all kind of looked in. And  
16 I saw the firearm there, and so I withdrew it.

17 Q And to your knowledge, was anything else recovered from  
18 inside of that fanny pack?

19 A Yes.

20 Q And do you recall specifically what was recovered?

21 A There was what I believed to be heroin as well as crack  
22 cocaine in multiple plastic baggies.

23 Q Fair to say there was about 23 bags of what you believed  
24 to be crack cocaine?

25 A Yes.

1 Q And approximately nine bags of what you believed at that  
2 time to be heroin?

3 A That's correct.

4 Q And fair to say that the gun that was recovered was  
5 determined to be a Beretta?

6 A That's correct.

7 Q And that gun was loaded with seven rounds of ammunition  
8 in the magazine and one in the chamber?

9 A That's my understanding.

10 Q Officer McHugh, fair to say that Mr. Chin-Clarke was  
11 arrested at that, at that time?

12 A He was.

13 Q And he was transported back to A1 and booked?

14 A Yes.

15 Q To your knowledge, were any items recovered or seized  
16 off of Mr. Chin-Clarke at booking?

17 A I don't recall.

18 Q Would it refresh your memory to look at the report  
19 generated?

20 A It would.

21 MS. CASCIONE: If I may, Your Honor?

22 THE COURT: You may.

23 BY MS. CASCIONE:

24 Q If you could just take a look at that paragraph right  
25 there, and just look up at me when you're done.

1 A Yes.

2 Q Thank you. And Officer McHugh, does that refresh your  
3 memory with respect to what was seized at booking?

4 A It does.

5 Q And what was that?

6 A It was \$100 in U.S. currency and a cellphone.

7 Q Fair to say, Officer McHugh, that there was video  
8 surveillance that was recovered from the St. Francis House?

9 A There was.

10 Q You've had an opportunity to view that video  
11 surveillance?

12 A I have.

13 MS. CASCIONE: I'd move to enter this, Your Honor, this  
14 CD as the next exhibit at this time.

15 MS. HACKETT: No objection.

16 THE COURT: It will be admitted as Exhibit 1.

17 MS. CASCIONE: And then with the Court's permission, I'd  
18 like to just publish a couple of portions of it unless Your  
19 Honor wants me to play the whole thing at this time.

20 THE COURT: How long is the video?

21 MS. CASCIONE: Do you know -- it's probably, in  
22 totality, maybe like 10 to 15 minutes. But there's  
23 definitely one part that's not relevant, so I can sort of  
24 skip that part if --

25 THE COURT: Okay.

1 MS. CASCIONE: -- Your Honor's inclined to --

2 THE COURT: Is that fine with the Defense?

3 MS. HACKETT: Yes, I had actually planned to play quite  
4 a bit of it for the officer, just to go over a couple of  
5 different points. So I don't know if it would be repetitive  
6 to play the whole thing, but I'm sure there's points that  
7 Commonwealth wants --

8 THE CLERK: Exhibit 1 so marked.

9 (Clerk marks CD as Exhibit Number 1.)

10 MS. CASCIONE: And just for the record, Your Honor,  
11 there are three files that are part of this. I'm going to  
12 play what's marked Chin-Clarke two at this point.

13 (Video played.)

14 BY MS. CASCIONE:

15 Q And Officer McHugh, fair to say that this video  
16 surveillance is from Boylston Street in Downtown Boston?

17 A That's correct.

18 Q If you're looking sort of to this building to the right  
19 here, what is that building?

20 A That's the building that houses the St. Francis House  
21 daytime shelter.

22 Q And fair to say that this video surveillance is date and  
23 time stamped?

24 A It is.

25 Q And there's a date stamp of January 27th, 2017?



1 A That's right.

2 Q And there's a timestamp of 8:54 a.m.?

3 A Correct.

4 MS. CASCIONE: If I may, I'll just skip a little bit to  
5 the relevant portion, Your Honor?

6 BY MS. CASCIONE:

7 Q Fair to say, Officer McHugh, this is fairly consistent  
8 with the traffic in this area on a typical morning?

9 A Yes.

10 Q That individual walking with the yellow bag, fair to say  
11 that was the individual identified as Mr. Noj?

12 A Yes.

13 Q And if I can, fair to say -- strike that.

14 If I could just pause this for one moment. Fair to say  
15 that this individual speaking to the man with the yellow bag  
16 was ultimately identified as Mr. Chin-Clarke?

17 A That's correct.

18 Q And Officer McHugh, I know it might be a little bit  
19 difficult to see, but do you know where you are at this  
20 point?

21 A So I think you can see three persons.

22 MS. CASCIONE: If, actually, if the officer may step  
23 down?

24 THE COURT: You may.

25 MS. CASCIONE: Thank you.

1 THE WITNESS: So about 15 feet away, there are, there  
2 would be four people here. And I'm further down the  
3 sidewalk, I think, another 50 feet maybe.

4 BY MS. CASCIONE:

5 Q And are you, can you see yourself in this image?

6 A That might be me. It looks like I have the iPad in my  
7 left hand.

8 Q I'm going to play it for a little bit for a moment.

9 A So that's, that's me approaching.

10 Q And if you could just point out to the Court.

11 A Approaching here.

12 Q You can have a seat. Thank you. This still image here,  
13 Officer McHugh, I know you testified moments ago to what you  
14 observed. But this, at this time frame right here when  
15 you're approaching, can you just let the Court know sort of  
16 what part of your testimony this is, is occurring here?

17 A So this is the portion when, this is what initially  
18 caught my attention with the people looking into the bag and  
19 the new items of clothing. It looked like some commerce was  
20 going on.

21 Q Fair to say that Mr. Noj is holding an article of  
22 clothing in his hand?

23 A That's correct.

24 Q And fair to say that Mr. Chin-Clarke also had a sort of  
25 nondescript bag in his hand as well?

1 A He did.

2 Q Did he take any items out of that bag?

3 A I can't recall.

4 Q And if I could stop for a moment. Fair to say, Officer,  
5 that you can see Mr. Chin-Clarke hand back an item to Mr. Noj  
6 at that point, is that accurate?

7 A That is accurate.

8 Q And you can also see Mr. Noj is about to hand over that  
9 blue article of clothing to Mr. Chin-Clarke, and when he  
10 walked up, he immediately gave it back, is that accurate?

11 A Yes.

12 Q And what is that consistent with in your experience?

13 MS. HACKETT: Objection.

14 THE COURT: Overruled.

15 THE WITNESS: Well, I think he didn't want any part of  
16 what was going on at that point.

17 BY MS. CASCIONE:

18 Q And I'm going to continue this for a moment. Just in  
19 general, what's happening at this point, Officer?

20 A So my, I kept my attention on these two because those,  
21 these two gentlemen, Mr. Noj and Mr. Chin-Clarke, were the  
22 ones that were engaged in that. The third guy is gone. I  
23 think I actually told him to leave because that's too many  
24 people to have with me. But I'm asking Mr. Noj for, you  
25 know, who he is, where did he get these items, those first

1 questions that we spoke about.

2 Q At this point, had you identified yourself as a police  
3 officer?

4 A Yes, I had.

5 Q Do you have a memory of what you said to Mr. Chin-Clarke  
6 at that point when he went against the wall?

7 A I had told him to take his hands out of his pockets, and  
8 I asked him to stand on the other side of me.

9 Q And why did you do that?

10 A I didn't want them to split me up, so that they could  
11 approach me from two sides.

12 Q Do you remember what you said to Mr. Noj at that point  
13 once you confirmed who he was?

14 A I asked him to stay standing like he was. It makes it  
15 safer for me.

16 Q Fair to say you're taking information from Mr. Chin-  
17 Clarke at this point?

18 A That's correct.

19 Q What's happening in that portion of the video?

20 A So I had looked at the image of Mr. Dana Clarke, and I  
21 was concerned that it wasn't matching the person that was in  
22 front of me. So I was a little more concerned about what was  
23 happening, and so I asked him to sit on the sidewalk for my  
24 safety.

25 Q Fair to say they both complied at that point?

1 A They did.

2 Q This individual here in the blue jacket, Officer McHugh,  
3 are you familiar with who that person is?

4 A I think that's, I believe his name is Beau. He's one of  
5 the security guards.

6 Q And --

7 A That's Officer Belgrave that just approached.

8 Q In the black sweatshirt, that's Officer Belgrave?

9 A That's correct.

10 Q And so to your knowledge, this individual works for the  
11 St. Francis House?

12 A Yes.

13 Q Fair to say Officer Belgrave's accessing AFIS at this  
14 point?

15 A That's correct.

16 Q And what are you doing right here, Officer McHugh?

17 A I wanted to get a better look at what was in there, the  
18 items, and make sure there's nothing else that might be  
19 dangerous. Neither one of these guys had been frisked.

20 Q Do you have a memory of whether the items in the bag  
21 appeared to come from the same store or not?

22 A I don't.

23 MS. CASCIONE: Just for the record, I'm now playing the  
24 portion entitled Chin-Clarke, which is part of Exhibit 1.

25 BY MS. CASCIONE:

1 Q What's happening at this point?

2 A Mr. Clarke is trying to get away from us.

3 Q Was that the moment when you went for his arm, that you  
4 were attempting to place handcuffs on Mr. Chin-Clarke?

5 A That's correct.

6 Q Did you say anything at that moment?

7 A I believe I said give me your hands.

8 Q There's a number of people, Officer, in blue jackets.  
9 To the best of your knowledge, did they all work for St.  
10 Francis as well?

11 A They did.

12 Q Is it fairly normal for them to assist in things that  
13 occur outside of St. Francis House?

14 A They will sometimes.

15 Q Those two officers that just approached, are those  
16 Officers Caulfield and Lopez?

17 A Yes.

18 Q Do you know what happened to Mr. Noj?

19 A He departed. That lady told him to move. I wanted him  
20 to be away from us as well. And I, I might've said, like,  
21 get away, move down there. I didn't think he was going to be  
22 a problem at the point.

23 Q And is that when the, the item, what's the item that's  
24 in your right hand?

25 A It's the firearm.

1 MS. CASCIONE: Can I just have one moment, Your Honor?

2 THE COURT: You may.

3 MS. CASCIONE: I don't have anything further.

4 THE COURT: Cross-exam.

5 CROSS-EXAMINATION

6 BY MS. HACKETT:

7 Q Good morning, Officer.

8 A Good morning.

9 Q When you first approached Mr. Noj and Mr. Chin-Clarke,  
10 did you say anything specifically to Mr. Chin-Clarke?

11 A I think I addressed both of them. I think I said is  
12 this stuff stolen. Something along those lines.

13 Q And what did you tell Mr. Chin-Clarke to do?

14 A I don't think I told him to do anything right then.

15 Q So you said is this stuff stolen, and Mr. Noj said whoa,  
16 right?

17 A That's correct.

18 Q And did Mr. Chin-Clarke say anything?

19 A I don't think so. I don't recall.

20 Q Did you tell him to stand in a particular area or do  
21 anything particular?

22 A Not immediately.

23 Q When did you first tell him to do something?

24 A After I had spoken to Mr. Noj.

25 Q And what did you say to him?

1 A I said stand over there.

2 Q And was that after you had ascertained Mr. Noj's  
3 identity?

4 A I'm not sure.

5 Q When you told him to stand over there, is that before or  
6 after you had a conversation with Mr. Noj about where the  
7 clothing came from?

8 A It was after. It was after the initial inquiry.

9 Q You just reviewed much of the video in this case, is  
10 that right?

11 A That's correct.

12 Q Yeah. And you saw that at one point you instructed or  
13 you did something to have Mr. Chin-Clarke stand against the  
14 wall, right?

15 A Yes.

16 Q And then you also had Mr. Noj stand with his face facing  
17 the wall?

18 A Yes.

19 Q And then he also, both people were told to sit on the  
20 ground, right?

21 A Yes.

22 Q On the sidewalk?

23 A That's correct.

24 Q And after they were sitting on the sidewalk for a period  
25 of time, they, Mr. Chin-Clarke was told to stand up, right?



1 A Yes.

2 Q And is that so you could get a better view of his face?

3 A That's correct.

4 Q And you touched the brim of his hat, is that right?

5 A I think so. I know I asked him to take his hood off at  
6 one point, and he complied. He may have put it back on.

7 Yeah, that, that could be accurate.

8 Q Okay. And then, but whatever is captured in the video  
9 is accurate, right?

10 A That's correct.

11 Q And you also had him take his glasses off?

12 A Again, I don't recall. Of course what's on the video,  
13 yes, that would've been at my behest.

14 Q Mr. Noj was never charged with receiving stolen  
15 property, right?

16 A No, he was not.

17 Q Prior to this interaction with Mr. Noj and Mr. Chin-  
18 Clarke, you hadn't had any specific calls for a report of  
19 shoplifting, right?

20 A No.

21 Q And when you looked at the clothes that were in the bag,  
22 you didn't see any security, like, ink security devices  
23 attached to them? You're familiar with an ink security --

24 A Yeah.

25 Q -- device, right?

1 A No, not that I recall.

2 Q And you know that an ink security device is something  
3 that would be taken out, taken off at the point of purchase,  
4 right?

5 A Yes.

6 Q Where were the, you said that there were tags on the  
7 clothes, right?

8 A Yes.

9 Q Where were the tags, what was the store that the tags  
10 came from?

11 A I don't recall.

12 Q And what was the brand labeled on the yellow plastic bag  
13 that Mr. Noj was holding?

14 A I don't recall.

15 Q And you didn't know any of these people before that day,  
16 right?

17 A That's correct.

18 Q You said you had a conversation with Mr. Noj about where  
19 the clothes came from, right?

20 A Yes.

21 Q And he said they came from the Natick Mall?

22 A He stated that he had bought them at the Natick Mall.

23 Q And then he also told you later that his mother actually  
24 purchased them?

25 A Yeah, he said his mother gave them to him. It was, so

1 he did not state my mother purchased them. He said my mother  
2 gave them to me. That's what he said.

3 Q And did you ask additional questions about where his  
4 mother got them?

5 A I don't recall.

6 Q And did you ask additional questions about whether he  
7 was with his mother when she purchased them?

8 A No.

9 Q You said that you're familiar with a lot of the stores  
10 in the Downtown Crossing area where the homeless shelter is,  
11 right?

12 A Yes.

13 Q And most of those stores in that area open around nine  
14 or ten o'clock in the morning, right?

15 A Yes.

16 Q And this incident occurred shortly after nine o'clock in  
17 the morning?

18 A Yes.

19 Q You said that you can get donated clothing or I think  
20 you said you can get clothing, as a homeless person, you can  
21 get it from St. Francis, right?

22 A That's correct.

23 Q And do you know where some of that clothing comes from?

24 A I do not.

25 Q And do you know whether or not some of that clothing is

1 donated?

2 A I believe it's all donated.

3 Q Do you know if some of it might have tags on it and some  
4 of it might not?

5 A I don't know.

6 MS. HACKETT: Just one moment if I may. Nothing  
7 further. Thank you.

8 THE COURT: Any redirect?

9 MS. CASCIONE: No, Your Honor.

10 THE COURT: The witness may step down.

11 THE WITNESS: Thank you, Your Honor.

12 (Witness excused.)

13 MS. CASCIONE: I'm just going to grab that exhibit so I  
14 don't forget it.

15 THE COURT: Does the Commonwealth have any other  
16 witnesses?

17 MS. CASCIONE: No, the Commonwealth would rest.

18 THE COURT: Does the Defense have any witnesses?

19 MS. HACKETT: Nothing from the Defense. Thank you.

20 THE COURT: Okay. I'll hear closing arguments.

21 MS. HACKETT: Defendant is asking that the evidence that  
22 was taken from Mr. Chin-Clarke's person at the time of arrest  
23 and also the items taken at booking be suppressed. And the  
24 basis of that is that essentially the stop of Mr. Chin-Clarke  
25 was a stop that did not have reasonable suspicion based on

1 specific articulable facts. That moment of the seizure is  
2 important in this case as the facts that you heard today and  
3 the video surveillance show sort of an escalating encounter  
4 with the police.

5 The first couple seconds or first few seconds of this  
6 encounter probably can be characterized as a casual encounter  
7 between a police officer and a citizen. They're allowed to  
8 have some conversation, ask certain questions, ask a person's  
9 identity. That is permissible and does not rise to the level  
10 of a constitutional seizure. However, at the point where, at  
11 the point where the officer starts telling the individuals  
12 what they're required to do, at that point a reasonable  
13 person in the Defendant's position would've believed that  
14 they were not free to leave.

15 At one point Mr. Chin-Clarke is told to stand over  
16 there. He's, and also the, and I think at the point of, that  
17 he's told to stand over there, that is a seizure in a  
18 constitutional sense because he is being instructed, he, they  
19 are using the police authority to, to limit his ability to  
20 move in a, in a constructive manner. The seizure increases,  
21 and the level of the seizure increases as the encounter goes  
22 on. The encounter lasts for several minutes. You'll see on  
23 the surveillance video that it lasts for somewhere around  
24 eight minutes, where he is not only told to stand over in a  
25 particular area. They call in for a second officer.

1           They are accusing of having the property be stolen. So  
2 the awareness of the Defendant in that situation would know  
3 that they're being accused of a crime. They would know that  
4 they were being told to do something. They were then told to  
5 sit on the ground. And so being told to sit on the ground on  
6 a public sidewalk is something that a person would do if they  
7 were under the authority of a police officer, and that they  
8 were, at that point certainly would've understood that they  
9 were not free to leave.

10           In addition to that, the level of the seizure goes on  
11 where Mr. Chin-Clarke is told to stand up. He's required to  
12 take off certain items of clothing. The police officer  
13 actually touches his clothing at a certain point and touches  
14 Mr. Chin-Clarke. Prior to, prior to their attempt to place  
15 him into handcuffs, there was no specific and articulable  
16 facts that Mr. Chin-Clarke was committing or receiving stolen  
17 property. What we have is items of clothing with tags on  
18 them. They really had no information that those items of  
19 clothing were stolen. Simply because they have tags on them  
20 doesn't mean that they were stolen. Any person can walk  
21 around with tags on clothes. It doesn't mean that those  
22 items are stolen.

23           And the fact that they're standing outside of a homeless  
24 shelter cannot be the fact that differentiates this case from  
25 all other cases where people have tags on clothing. The fact

1 that a person's homeless does not mean that they can't  
2 purchase clothing. It doesn't mean they can't be donated  
3 clothing from the St. Francis House that has tags on it. It  
4 doesn't mean that they can't receive clothing from their  
5 mother that has tags on it. A person who's homeless can have  
6 new items of clothing without having stolen them.

7 The cases that I put in the memo aren't exactly on point  
8 because I don't think there are cases directly on point about  
9 a person standing outside of a homeless shelter with tags on  
10 the clothing. However, the cases often have, as an aspect of  
11 them, a radio call for some kind of theft crime that happened  
12 relatively recently in the area. That is absent in this  
13 case. So without more factors to fill in the specific and  
14 articulable facts that we need for reasonable suspicion, the  
15 officer is not permitted to hold Mr. Chin-Clarke and keep him  
16 in the place that he kept him for the period of time that he  
17 kept him, and limit his freedom of movement in the way that  
18 he was permitted to do so.

19 Then he then, it's a full arrest. Our argument is that  
20 it's a full arrest when they attempt to place him in  
21 handcuffs. And at that point they really don't have  
22 significant additional information that would have increased  
23 the level of suspicion to the level of probable cause. It is  
24 not relevant that Mr. Chin-Clarke is under suspicion for  
25 providing a false name. There is no law requiring that a

1 person, a citizen standing on the street provide an accurate  
2 name to police officers until the moment they are arrested.

3 If Mr. Chin-Clarke had provided a false name after  
4 arrest, that would've been a crime that he could've been, you  
5 know, that he, there could be separate probable cause for.  
6 But during this period of time leading up to the point where  
7 they are attempting to place him under arrest, he wasn't  
8 under arrest at that point. And therefore there is no basis  
9 to arrest him based on suspicion that he's providing false  
10 information.

11 THE COURT: Thank you.

12 MS. CASCIONE: Thank you, Your Honor. I'd ask you to  
13 deny the motion to suppress. I'm just going to highlight a  
14 couple of things that my sister didn't argue that I don't  
15 think I touched upon in my memo. I didn't get my sister's  
16 memo until late yesterday. She is subsequent counsel, and  
17 the initial attorney didn't file a memorandum. So just a  
18 couple of things that I didn't touch upon in my memorandum.

19 Essentially, the Commonwealth's argument is that the  
20 moment of seizure is the moment that Officer McHugh grabs Mr.  
21 Chin-Clarke's arm and attempts to place him in handcuffs.  
22 And the Commonwealth would suggest that nothing prior to that  
23 was outside the realm of an appropriate and allowable  
24 threshold inquiry.

25 I think that I did say some of this in my memorandum.



1 But essentially, I think the case law is clear that officers  
2 are permitted to go up and inquire in a particular situation.  
3 I don't think that the individuals were detained for an  
4 overly long amount of time in order for the officers to  
5 confirm or dispel the suspicions that they had with respect  
6 to their observations. I think the *Barros* case, 425 Mass.  
7 572, I think, in that case, it was a 15 minute detention that  
8 was rule permissible. I think, in this case, frankly, having  
9 the video is great because it shows exactly how long this  
10 happened, and I think that it was not an unreasonable amount  
11 of time for the officers to investigate what they believed to  
12 be suspicious conduct.

13 Additionally, I don't think moving the individuals  
14 against the wall and/or asking them to sit down is outside of  
15 the realm of a threshold inquiry. *Commonwealth v. Ferrara*,  
16 376 Mass. 502, stands for the proposition that moving an  
17 individual during a stop is permissible. Most of the cases  
18 in that area focus on moving, removing people --

19 THE COURT: Car.

20 MS. CASCIONE: -- from cars. But I do think that the  
21 safety concern is present here when, as Officer McHugh  
22 testified, he didn't want to be split by these individuals.  
23 He's making observations of Mr. Chin-Clarke going in and out  
24 of his pockets along with nervousness and both individuals  
25 looking up and down the street, which I apologize and I

1 didn't pause on that. But there in the video, you can see  
2 Mr. Chin-Clarke scanning up and down the street, looking to  
3 his right.

4 And all that taken together, I think, more than  
5 justifies asking the individuals to be in a place that's more  
6 safe for the officer who is alone and outnumbered by these  
7 two gentlemen, and also on a street where there's tons of  
8 civilians around. So I don't think it's unreasonable to make  
9 that move and/or to ask them to sit down to protect the  
10 officers' safety. And frankly, they could've said no, I'm  
11 not going to sit down, and we may not be here today.

12 One thing I didn't touch upon in my motion. I would  
13 suggest that the officer had probable cause to arrest both of  
14 these individuals. This isn't a beyond, proof beyond a  
15 reasonable doubt standard in terms of probable cause for  
16 arrest. But I think that all of the actions of Mr. Noj and  
17 Mr. Chin-Clarke are consistent with receiving stolen property  
18 or attempt. I think that it's clear, at nine o'clock in the  
19 morning when these individuals have a bag of clothing with  
20 tags -- they didn't just purchase them. The stores are not  
21 open at that time. They aren't returning them because they  
22 don't have receipts.

23 And I think, if you look at the actual conduct, Mr. Noj  
24 is showing items, handing them to Mr. Chin-Clarke. He holds  
25 a black item. He's looking at it. And as Officer McHugh

1 approaches, he's almost holding that blue object, about to  
2 look at it, and then his action of giving it back  
3 immediately, of course, would raise the level of suspicion.  
4 And I would suggest that the officer indicated he made  
5 arrests for that. And just because he didn't arrest him at  
6 that time and made a choice to continue investigating, I  
7 don't think that that means there's not probable cause.

8 But even so, I think that there is more than enough to  
9 establish reasonable suspicion based on all of those  
10 observations, based on this particular area and the  
11 heightened issues in terms of shoplifting and drug use. And  
12 I don't think that the information about St. Francis House  
13 was provided to the Court to say that just because this  
14 happened outside of it, it should be treated differently.  
15 But I would ask the Court to take into consideration that  
16 there is a lot of crime that's occurring in this particular  
17 street to the point where an officer's assigned a walking  
18 beat. And whether that is a direct correlation with St.  
19 Francis House or not, that fact alone isn't something that's  
20 rising, raising the level of reasonable suspicion.

21 I think it's more so just the conduct that happens to be  
22 happening on that block and the arrests that are being made.  
23 I think the initial observations coupled with Mr. Chin-Clarke  
24 being evasive when asked questions, providing information  
25 that was believed to be incorrect by the officers -- and I

1 think you can see from the video, they take time. They don't  
2 just jump the gun and say this isn't him. They look at  
3 pictures in different databases.

4 And that taken in conjunction with not knowing any  
5 portion of his social security number, again, all goes into  
6 the reasonable suspicion calculus, putting his hands in and  
7 out of his waistband, consistent with potentially carrying a  
8 weapon, as Officer McHugh testified based on his training and  
9 experience, all that taken together would certainly rise to  
10 the level of reasonable suspicion that a crime is afoot. And  
11 so I think that my first argument would be that they had  
12 probable cause. My second argument would be that they had  
13 reasonable suspicion. And all this would be at the time of  
14 what I would suggest is the seizure when Officer McHugh puts  
15 his hand on Mr. Chin-Clarke's arm.

16 THE COURT: Okay. Thank you very much. I'm going to  
17 take it under advisement.

18 THE CLERK: This case has a July 30 final pretrial in  
19 courtroom 817 and a August 6th trial date.

20 THE COURT: 7/30, did you say?

21 THE CLERK: 7/30 is the next date, yes.

22 THE COURT: Thank you, counsel.

23 MS. HACKETT: Thank you, Your Honor.

24 Thank you, Mr. Clerk.

25 (Court adjourned at 11:25 a.m.)



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**COMMENTS**

C E R T I F I C A T I O N

I, Julianne Schultz, an approved court transcriber, do hereby certify that the foregoing is a true and accurate transcript from the audio recording provided to me regarding the Suffolk County Superior Court proceedings in the above entitled matter.

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I Julianne Schultz, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

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## Commonwealth v. Chin-Clarke

Appeals Court of Massachusetts

December 12, 2019, Argued; June 9, 2020, Decided

No. 18-P-1440.

### Reporter

97 Mass. App. Ct. 604 \*; 2020 Mass. App. LEXIS 69 \*\*

**COMMONWEALTH vs. JAMAL CHIN-CLARKE.**

**Prior History:** **[\*\*1]** Suffolk. INDICTMENTS found and returned in the Superior Court Department on April 12, 2017.

A pretrial motion to suppress evidence was heard by *Diane C. Freniere*, J.

An application for leave to prosecute an interlocutory appeal was allowed by *David A. Lowy*, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him to the Appeals Court.

### Core Terms

suspicion, bag, clothes, stolen, Street, seizure, pockets, shoplifting, tags, identification, seized, suppress, arrests, nervous, frisk, merchandise, handcuff, training, armed, articulable, minutes, walking, gun

### Case Summary

#### Overview

**HOLDINGS:** [1]-A stop was unlawful, and the evidence obtained during the subsequent patfrisk and at booking should have been suppressed as fruits of the poisonous tree because a police officer did not have reasonable suspicion of criminal activity to justify the stop; [2]-Defendant was seized when the officer directed him to stand by a wall and asked for identification because the officer was communicating what a reasonable person would understand as a command that would be

enforced by the police power; [3]-There were no facts giving rise to reasonable suspicion because the officer did not know defendant and was aware of no reports of shoplifting in the area that day. Defendant's nervous demeanor, and the officer's general sense of concern that something was wrong did not justify the stop.

### Outcome

Order denying motion to suppress reversed.

### LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Search & Seizure

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Stop & Frisk

#### HN1 **De Novo Review, Motions to Suppress**

Absent clear error, the appeals court accepts and adopts the findings of the motion judge, but it independently determines the correctness of the judge's application of constitutional principles to the facts as found. It is the Commonwealth's burden to show that the seizure and frisk of the defendant were within constitutional limits.

## Headnotes/Summary

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Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Seizure of Persons

### [HN2](#) **Search & Seizure, Scope of Protection**

A person is seized in the constitutional sense 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.

Criminal Law & Procedure > ... > Warrantless Searches > Stop & Frisk > Reasonable Suspicion

### [HN3](#) **Stop & Frisk, Reasonable Suspicion**

The question then is whether, at the time of the seizure, an officer had reasonable suspicion that the defendant was committing, had committed, or was about to commit a crime. Reasonable suspicion must be grounded in specific, articulable facts and reasonable inferences drawn therefrom. A hunch will not suffice.

Criminal Law & Procedure > ... > Stolen Property > Receiving Stolen Property > Elements

### [HN4](#) **Receiving Stolen Property, Elements**

The crime of receiving stolen property requires knowledge that property was stolen and knowing possession.

Criminal Law & Procedure > ... > Warrantless Searches > Stop & Frisk > Reasonable Suspicion

### [HN5](#) **Stop & Frisk, Reasonable Suspicion**

It is common, and not necessarily indicative of criminality, to appear nervous during even a mundane encounter with police.

## Headnotes

MASSACHUSETTS OFFICIAL REPORTS  
HEADNOTES

*Receiving Stolen Goods > Constitutional Law > Search and seizure > Reasonable suspicion > Investigatory stop > Search and Seizure > Reasonable suspicion > Threshold police inquiry > Threshold Police Inquiry > Practice, Criminal > Motion to suppress*

A Superior Court judge erred in denying the criminal defendant's pretrial motion to suppress evidence discovered after a police officer stopped and frisked the defendant, where, at the time that the defendant was seized by the officer, the officer's training and experience with identifying incidents of shoplifting combined with his observations — i.e., the defendant and two other men looking at a bag of new clothing and discussing the price of items, the man holding the bag giving conflicting explanations of the clothing's origins, and the defendant's nervous appearance — did not amount to reasonable suspicion that the defendant was committing, had committed, or was about to commit a crime. [607-611] MEADE, J., dissenting.

**Counsel:** *Alyssa Hackett*, Committee for Public Counsel Services (*Patrick Levin*, Committee for Public Counsel Services, also present) for the defendant.

*Amanda Cascione*, Assistant District Attorney, for the Commonwealth.

**Judges:** Present: MEADE, SHIN, & SINGH, JJ.

**Opinion by:** SHIN



## Opinion

**SHIN, J.** The defendant appeals from an order denying his motion to suppress evidence obtained following a stop and frisk of his person. The stop occurred after Boston Police Officer Michael McHugh observed the defendant on a city sidewalk with [\*605] a man holding a bag of what looked like new clothes, which McHugh suspected were stolen. Because we conclude that McHugh did not have reasonable suspicion of criminal activity to justify the stop, we reverse.

*Background* [\*\*2]. The motion judge's factual findings are unchallenged on appeal. We supplement those findings with facts drawn from McHugh's testimony, which the judge expressly credited, see [\*Commonwealth v. Jones-Pannell\*, 472 Mass. 429, 431, 35 N.E.3d 357 \(2015\)](#), and from our independent observations of the surveillance video entered as an exhibit at the hearing, see [\*Commonwealth v. Tremblay\*, 480 Mass. 645, 654-655, 107 N.E.3d 1121 \(2018\)](#).

On the morning of January 27, 2017, McHugh was on a "plain-clothes, walking beat" in the area of Boylston Street between Washington and Tremont Streets in downtown Boston. This area "is dominated by commercial properties and has heavy pedestrian foot traffic" and, by McHugh's description, is high in crime in that it is "frequented by a lot of people who sell and buy drugs, people who have drug problems, and that causes other problems. There's larcenies and robberies, shoplifting, assaults, public intoxication, trespassing ... that kind of thing." McHugh had previously seen people selling or trading stolen items on the street and had made several arrests in the area for shoplifting. "[T]hings that [he] ... look[s] for" as indicative of shoplifting are "numerous kind[s] of odd items in a bag," items "with the tags still on them," and "bag[s] that might not be associated with the store that things were [\*\*3] purchased from."

Around 9:20 A.M., McHugh was near St. Francis House, a daytime shelter that provides services to homeless people, including help with drug addiction, social services, meals, and clothing.<sup>1</sup> By the front door were

three men, not known to McHugh, "looking in a plastic shopping bag and talking to each other." As McHugh drew closer, he saw "that there was some clothing in the bag, and some of it was outside of the bag and it had the tags."

McHugh heard one of the men — he could not recall who — say, "[H]ow much is this?" He also saw one man, later identified as Milton Noj, hold up some merchandise, an item of clothing. McHugh saw no security devices attached to any of the items in the bag, and he could not recall what store name was on the tags or on the bag. He was also unaware of any reports of shoplifting [\*606] in the area that day.

Nonetheless, suspecting that "some commerce was going on," McHugh walked up to the men and asked, "[W]hat's up guys. Is that stuff stolen?" Noj appeared startled, said, "[W]hoa," and backed up. McHugh identified himself as a police officer and told the third man to leave.<sup>2</sup> Responding to McHugh, Noj initially stated that he had purchased the items in [\*\*4] the bag at the Natick Mall. When McHugh asked for receipts, Noj stated he did not have any and that his mother gave him the items.

While McHugh was talking to Noj, he noticed that the defendant had his hands in his pockets and was looking up and down the street. McHugh told the defendant to remove his hands from his pockets and to "stand over there" against the exterior wall of St. Francis House. The defendant complied. He also showed McHugh the inside of the bag he was carrying.

Turning his attention back to Noj, McHugh asked for his name and date of birth and entered the information into an "iPad" tablet computer that he carried while working to "access a couple of different applications that are helpful, mostly the Criminal Justice Information System." Upon verifying Noj's identity,<sup>3</sup> McHugh told him to stand facing the wall and "to stay standing like he was." Noj complied, standing a few feet away from the defendant with his face inches from the wall.

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[t]respassing, malicious destruction of property, that kind of thing."

<sup>2</sup> McHugh testified that he did so in part because "that's too many people to have with me."

<sup>3</sup> Although McHugh was unsure whether this occurred before or after he told the defendant to stand by the wall, the surveillance video shows that McHugh first had the defendant stand by the wall and then used the iPad to confirm Noj's identity.

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<sup>1</sup> McHugh had made "hundreds of arrests around [St. Francis House] for things ranging from stabbings to drug trafficking, drug dealing, drug possession, warrant arrests, ...

As this was occurring, the defendant “appeared fidgety,” “looked a little nervous,” and “was looking up and down the street.” After instructing Noj to stand facing the wall, McHugh asked the defendant for his identification.<sup>4</sup> The defendant [\*\*5] “hesitated noticeabl[y]” before giving the name “Dana Clarke” and a date of birth. McHugh entered that information into the iPad and was able to find a driver’s license photograph for a Dana Clarke, who looked “similar” to the defendant. McHugh was unsure, however, if the defendant was actually the person in the photograph. When McHugh asked the defendant for his Social Security number, the defendant said that he did not know it. Sometime during this conversation (it is unclear from the record precisely when), McHugh noticed that the defendant’s hands were in his pockets and asked him to remove them. Although the defendant complied, “within a minute or two, he put his hands back inside of his ... clothing.”


McHugh’s uncertainty about the defendant’s identity “gave [him] a heightened sense of concern that something might be wrong,” and so he had the defendant and Noj sit on the ground and called for back-up. Less than two minutes later, Officer Fabien Belgrave arrived at the scene and told the defendant to stand up so that he could get a better look at the defendant’s face. The officers also had the defendant remove his hood and eyeglasses. Based on other images Belgrave found [\*\*6] using the iPad, the officers ultimately determined that the defendant was not the Dana Clarke depicted in the driver’s license photograph.

At this point, given the defendant’s nervousness and his “sort of bizarre answers to [the officers’] questions,” McHugh “thought it would be prudent to put him in handcuffs until [they] could kind of sort out what was going on there.” As McHugh reached out to handcuff the defendant, the defendant spun around, striking Belgrave in the chest and causing all three men to fall to the ground.<sup>5</sup> Two other officers arrived, and together they were able to handcuff the defendant.<sup>6</sup> One officer then

pat frisked the defendant and found a loaded firearm, nine bags of heroin, and twenty-three bags of “crack cocaine” in “a fanny pack that ... had been inside of [the defendant’s] pants.” The defendant was arrested and transported to the police station where, at booking, one hundred dollars in cash and a cell phone were inventoried.

 [HN1](#) Discussion. “Absent clear error, we accept and adopt the findings of the motion judge, but we ‘independently determine the correctness of the judge’s application of constitutional principles to the facts as found.’” [Commonwealth v. Narcisse, 457 Mass. 1, 5, 927 N.E.2d 439 \(2010\)](#), quoting [Commonwealth v. DePeiza, 449 Mass. 367, 369, 868 N.E.2d 90 \(2007\)](#). It is the [\*\*7] Commonwealth’s burden to show that the seizure and frisk of the defendant were within constitutional limits. See [Narcisse, supra](#).

We begin with the question of when the defendant was seized. The Commonwealth argued at the motion hearing, and the judge [\*\*608] concluded, that the encounter did not escalate to an investigatory stop until McHugh tried to place the defendant in handcuffs. On appeal, however, the Commonwealth concedes that the defendant was seized when McHugh directed him to stand by the wall and asked for identification. We agree that the defendant was seized no later than this point.<sup>7</sup>

[HN2](#) A person is seized in the constitutional sense 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, 133 N.E.3d 258 \(2019\)](#). By directing the defendant to stand by the wall, McHugh “was communicating what a reasonable person would understand as a command that would be enforced by the police power.” [Commonwealth v. Barros, 435 Mass. 171, 176, 755 N.E.2d 740 \(2001\)](#). The language McHugh used, “stand over there,” would have indicated to a reasonable person that compliance would be compelled. By that point McHugh had already asserted his authority over the situation by telling the third man [\*\*8] to leave. He then further asserted his authority by conducting a records check on Noj and ordering him “to stay standing like he was” with his face inches from the wall. Certainly,

[\(1983\)](#).

<sup>7</sup> The defendant claims that he was seized at the very outset of the encounter because McHugh immediately accused the men of committing a crime and ordered the third man to leave. We do not decide this issue.

<sup>4</sup> As discussed *infra*, the Commonwealth concedes, and we agree, that the defendant was seized by this point.

<sup>5</sup> While the officers struggled with the defendant, Noj left the scene, apparently at the direction of a St. Francis House worker. He was never charged with receiving stolen property.

<sup>6</sup> The Commonwealth does not argue that the defendant’s struggle with the officers constituted an intervening act permitting the admission of evidence obtained thereafter. Cf. [Commonwealth v. King, 389 Mass. 233, 245, 449 N.E.2d 1217](#)

by the time McHugh asked the defendant for his identification, he had objectively communicated that he would use his police power to compel the defendant to stay. See [Matta, supra at 365](#) (defendant seized “once the officer ordered him to stop, and then chased him”); [Barros, supra](#) (similar); [Commonwealth v. Harris, 93 Mass. App. Ct. 56, 61, 96 N.E.3d 729 \(2018\)](#) (defendant seized when “officers secured identification from each of [his] companions and began calling in that information”).

**HN3** [↑] The question then is whether, at the time of the seizure, McHugh had reasonable suspicion that the defendant “was committing, had committed, or was about to commit a crime.” [Matta, 483 Mass. at 365](#), quoting [Commonwealth v. Martin, 467 Mass. 291, 303, 4 N.E.3d 1236 \(2014\)](#). Reasonable suspicion must be grounded in “specific, articulable facts and reasonable inferences drawn therefrom. A hunch will not suffice.” [Commonwealth v. Barreto, 483 Mass. 716, 720 \(2019\)](#), quoting [Commonwealth v. Wren, 391 Mass. 705, 707, 463 N.E.2d 344 \(1984\)](#).

When McHugh told the defendant to stand by the wall and asked for identification, he knew the following facts: (1) Noj had **[\*609]** a bag of clothes with tags on them; (2) the three men were looking in the bag; (3) one of the men said, “[H]ow much is this?”; (4) Noj held up an item of **[\*\*9]** merchandise; (5) Noj gave arguably conflicting answers about the origin of the clothes; and (6) the defendant appeared nervous, had his hands in his pockets (at times), and was looking up and down the street. These facts do not give rise to reasonable suspicion that the defendant committed or was about to commit a crime. As an initial matter, though the Commonwealth contends that McHugh could rely on his training and experience to infer that the clothes were stolen, McHugh saw none of the signs of shoplifting “that [he] ... look[s] for,” apart from the unremarkable fact that the clothes had tags. He could not recall any details about the items, what store brand was on the tags or on the bag, or whether there was a discrepancy between the brands. That the clothes appeared to be new could not alone give rise to reasonable suspicion that they were stolen, especially given that it was daytime and the area is one that is heavily commercial. Cf. [Barreto, 483 Mass. at 721](#) (movements consistent with drug transaction “were just as consistent with any number of innocent activities”).

Furthermore, even assuming, without deciding, that Noj’s explanation about where he got the clothes gave rise to reasonable suspicion **[\*\*10]** that Noj committed a

crime,<sup>8</sup> McHugh observed nothing to suggest that the *defendant* received or was about to receive any of the items knowing them to be stolen. The judge made no finding that McHugh saw the defendant accept any item or give Noj anything in exchange. To the contrary, the judge found only that the defendant was looking on as Noj held up some merchandise. Cf. [Barreto, 483 Mass. at 721](#) (no reasonable suspicion that defendant sold drugs to pedestrian where “officers did not observe an object change hands and did not observe anything in the pedestrian’s hands either before or after meeting the defendant”); [Commonwealth v. Smith, 55 Mass. App. Ct. 569, 573, 772 N.E.2d 1084 \(2002\)](#) (no reasonable suspicion where officer “did not observe any actual transaction or furtive activity on the part of the defendant”).

Nor did McHugh have any information that the defendant knew the clothes were stolen (assuming that they were). See [Commonwealth v. Namey, 67 Mass. App. Ct. 94, 97, 852 N.E.2d 116 \(2006\)](#) (**HN4** [↑] crime of receiving stolen property requires knowledge that property was stol- **[\*610]** en and knowing possession). There were no security devices on the clothes or any other signs of theft. McHugh asked the defendant not one question relating to the clothes — he did not ask, for instance, whether the defendant knew Noj or what the defendant was doing there.<sup>9</sup> See [Harris, 93 Mass. App. Ct. at 62](#) **[\*\*11]** (although officers were justified in approaching defendant to investigate possible bicycle theft, “importantly, over the next several minutes they learned nothing that could have added to their suspicions”). Cf. [Commonwealth v. Cordero, 477 Mass. 237, 242, 74 N.E.3d 1282 \(2017\)](#), quoting [Commonwealth v. Cruz, 459 Mass. 459, 465, 945 N.E.2d 899 \(2011\)](#) (traffic stop may not last “longer than reasonably necessary to effectuate the purpose of the stop”). The first question McHugh directed to the defendant was for his identification. As a result, while McHugh may have suspected that “some commerce was going on,” he had no specific and articulable facts indicating that it was *illegal* commerce. Cf. [Barros, 435 Mass. at 177](#) (because carrying gun is not illegal, “anonymous tip that someone is carrying a gun does

<sup>8</sup> McHugh did not ask Noj whether he was with his mother when she purchased the clothes.

<sup>9</sup> The surveillance video showed Noj and the third man standing together on the sidewalk when the defendant passed by. They appear to get the defendant’s attention. The three men were then together for approximately twenty seconds before McHugh walked up.

not, without more, constitute reasonable suspicion to conduct a stop and frisk”); [Commonwealth v. Clark, 65 Mass. App. Ct. 39, 44-45, 836 N.E.2d 512 \(2005\)](#) (observations of defendant handing item to another person and then appearing to count money did not support reasonable suspicion of drug activity).

There are no other facts giving rise to reasonable suspicion. McHugh did not know either the defendant or Noj. See [Barreto, 483 Mass. at 720](#) (no reasonable suspicion where, among other factors, “neither the defendant nor [the person with whom he engaged in suspected exchange] was known to the officers”); [Clark, 65 Mass. App. Ct. at 45](#) (similar); [Smith, 55 Mass. App. Ct. at 573](#) (similar). He was aware of no reports of shoplifting in the area that day that might have added to the reasonable suspicion calculus. See [Commonwealth v. Ellis, 12 Mass. App. Ct. 476, 477-478, 426 N.E.2d 172 \(1981\)](#) (no reasonable suspicion where officer had no “independent information, such as a tip, that a crime was being committed” and “[t]here had been no report of a recent crime”). That the area is high crime did not justify the stop. See [Narcisse, 457 Mass. at 13](#); [Clark, supra at 44](#); [Smith, supra at 572](#). [HN5](#)<sup>10</sup> The defendant’s nervous demeanor, and McHugh’s general “sense of concern that something might be wrong,” also did not justify the [\*611] stop. See [Cruz, 459 Mass. at 468](#) (“It [\*12] is common, and not necessarily indicative of criminality, to appear nervous during even a mundane encounter with police ...”); [Barros, 435 Mass. at 178](#) (“defendant’s suspicious activities, including his breaking eye contact with the officer and his refusing to answer the officer’s initial questions ...[,] cannot provide reasonable suspicion for justification of a detention or seizure”).

For these reasons we part ways with the dissent’s conclusion that the facts in this case are analogous to those in [Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 \(1968\)](#). There, the officer observed the petitioner himself, along with another man, “hover about a street corner for an extended period of time,” “pace alternately along an identical route, pausing to stare in the same store window roughly [twenty-four] times,” and confer on the corner after “each completion of this route.” [Id. at 23](#). In comparison here, McHugh observed the defendant, in a span of a few seconds, do nothing more than look on as Noj showed him what appeared to be new clothes. A reed as thin as this does not support reasonable suspicion of criminal activity.

We therefore conclude that the stop was unlawful and that the evidence obtained during the subsequent

patfrisk and at booking should have been suppressed [\*13] as fruits of the poisonous tree.<sup>10</sup> The order denying the motion to suppress is reversed.

So ordered.

**Dissent by: MEADE**

## Dissent

**MEADE, J.** (dissenting). The majority concludes that the seizure of the defendant occurred without sufficient antecedent reasonable suspicion, and as a result, his motion to suppress the firearm and narcotics found on his person should have been allowed. Because I believe the record evidence, the motion judge’s findings, and the controlling case law support a conclusion at odds with that determination, I respectfully dissent.

“Under [art. 14 of the Massachusetts Declaration of Rights](#), the touchstone of our analysis of police conduct that results in a search or seizure is whether that conduct was reasonable.” [Commonwealth v. Watts, 74 Mass. App. Ct. 514, 517, 908 N.E.2d 788 \(2009\)](#). See [Commonwealth v. Anderson, 406 Mass. 343, 346, 547 N.E.2d 1134 \(1989\)](#). See also [Terry v. Ohio, 392 U.S. 1, 9, 88 S. Ct. 1868, 20 L. Ed. 2d 889 \(1968\)](#) (“what the Constitution for- [\*612] bids is not all searches and seizures, but unreasonable searches and seizures” [citation omitted]). An investigatory stop, or “seizure” in the constitutional sense, is justified under [art. 14](#) if the police have reasonable suspicion at the time of the stop. See [Commonwealth v. Pinto, 476 Mass. 361, 363, 67 N.E.3d 713 \(2017\)](#). “Reasonable suspicion exists when an officer, based on specific, articulable facts and reasonable inferences therefrom, in light of the officer’s experience, has reasonable grounds to suspect a person is committing, has committed, [\*14] or is about to commit a crime” (quotation and citation omitted). [Id. at 363-364](#). See [Commonwealth v. Franklin, 456 Mass. 818, 820, 926 N.E.2d 199 \(2010\)](#). Importantly, “reasonable suspicion is a lower standard than probable

<sup>10</sup> Given our ruling, we do not address the defendant’s argument that the officers’ use of handcuffs was disproportionate to any threat he posed.



cause,” [\*Commonwealth v. Smigliano\*, 427 Mass. 490, 492, 694 N.E.2d 341 \(1998\)](#), and it is measured objectively. See [\*Commonwealth v. Meneus\*, 476 Mass. 231, 235, 66 N.E.3d 1019 \(2017\)](#).

Moreover, it had been long held that “[p]olice have seized a person in the constitutional sense ‘only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’” [\*Commonwealth v. Barros\*, 435 Mass. 171, 173-174, 755 N.E.2d 740 \(2001\)](#), quoting [\*United States v. Mendenhall\*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 \(1980\)](#) (opinion of Stewart, J.).<sup>1</sup> See [\*Florida v. Royer\*, 460 U.S. 491, 502, 103 S. Ct. 1319, 75 L. Ed. 2d 229 \(1983\)](#). However, more recently, the Supreme Judicial Court has charted a course away from the “legal fiction” of the *Mendenhall-Royer* standard, because “civilians rarely feel ‘free to leave’ a police encounter,” and a literal “application of the test would result in nearly every police inquiry being deemed a seizure in the constitutional sense.” [\*Commonwealth v. Matta\*, 483 Mass. 357, 360-361, 133 N.E.3d 258 & n.4 \(2019\)](#). Instead, after a review of the totality of the circumstances, “the more pertinent question is whether an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay.” *Id.* at 362. It is the defendant's burden to show that an encounter with the police rises to the level of a seizure in the constitutional sense. **[\*\*15]** See [\*Thinh Van Cao\*, 419 Mass. 383, 388, 644 N.E.2d 1294, cert. denied, 515 U.S. 1146, 115 S. Ct. 2588, 132 L. Ed. 2d 836 \(1995\)](#); J.A. Grasso, Jr., & C.M. McEvoy, *Suppression Matters Under Massachusetts Law* § 4-2[a] (2019).

1. *The initial seizure.* Here, the totality of the circumstances, as **[\*613]** found by the motion judge, are as follows: Michael McHugh,<sup>2</sup> a ten-year veteran of the Boston Police Department, was specially trained in surveillance tactics, active shooter training, trademarks and identification of armed subjects. For the last four years prior to the arrest at issue here, he had been working as a plainclothes officer walking a beat in the area of Boylston Street between Washington and Tremont Street, which is a “high crime” area. McHugh

had made numerous shoplifting arrests and had observed individuals selling and trading their stolen property outside on the street, often to feed drug addictions. McHugh had made arrests for shoplifting crimes based on his observation of people engaged in commerce on the street with items with tags still on them and items in bags not consistent with the items contained therein.

On the morning of January 27, 2017, McHugh was by himself, in plain clothes, patrolling Boylston Street in the area of St. Francis House, a daytime homeless shelter located at 39 Boylston **[\*\*16]** Street, which was an area where McHugh had made hundreds of arrests. In that area, he saw three men looking in a plastic shopping bag and talking to each other. McHugh's attention was drawn to the men, whom he did not know, when he noticed that the bag contained clothing, some of which was outside of the bag, with store tags still attached and visible. Based on what he saw, coupled with his training and experience, McHugh suspected that the men were buying or selling stolen clothing, and he decided to conduct a threshold inquiry.

As McHugh approached the three men, he overheard one male ask, “[H]ow much is this,” as another male held up some merchandise. McHugh asked the group, “[W]hat's up guys. Is that stuff stolen?” Milton Noj, the man holding up the merchandise, became startled and responded, “Whoa.”<sup>3</sup> McHugh identified himself as a Boston Police officer and asked the men for their **[\*614]** identifications.<sup>4</sup> As McHugh spoke with Noj, the defendant had his hands in his front pockets and was looking up and down Boylston Street. For safety purposes, McHugh asked the defendant to stand next to the exterior wall of St. Francis House while he spoke with Noj. Noj initially told McHugh that he purchased **[\*\*17]** the items in the plastic bag at the Natick Mall. When Noj could not produce receipts, he

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<sup>3</sup> The surveillance video recording (video) depicts the defendant holding the merchandise and only returning it to Noj when McHugh confronted the two. In other words, the clothing was handed back to Noj when they were caught. Also, the video belies the majority's assertion that the defendant did not give Noj anything in exchange for the item handed to him. While it is true that McHugh did not see the exchange, the video depicts the defendant putting something in Noj's hand when the defendant arrives, which occurred before Noj displayed the merchandise for the defendant.

<sup>4</sup> McHugh had sent the third man away for safety reasons because the third man was not engaged in the transaction with the defendant and Noj.

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<sup>1</sup> For more than fifty years, it has been recognized that “not every encounter between a law enforcement official and a member of the public constitutes [a seizure].” [\*Commonwealth v. Stoute\*, 422 Mass. 782, 789, 665 N.E.2d 93 \(1996\)](#).

<sup>2</sup> The motion judge expressly credited McHugh's testimony.

changed his story and told McHugh that his mother gave him the items. This change in story further heightened McHugh's belief that the items were stolen. Noj was nervous, but provided his identifying information, including his full name and date of birth, without hesitation. McHugh accessed the Criminal Justice Information System (CJIS) images on his "iPad" tablet computer and confirmed Noj's identity in thirty-eight seconds.

At the hearing on the motion to suppress, the defendant claimed that he was seized at the moment Officer McHugh told him to stand next to the wall of St. Francis House.<sup>5</sup> On appeal, the Commonwealth concedes that this is the point the seizure occurred. Assuming this to be true, i.e., that McHugh, through his words or conduct, objectively communicated that he would use his police power to coerce the defendant to stay, see [Matta, 483 Mass. at 360-361](#) & n.4, this initial seizure was justified and appropriate for a threshold inquiry and safety purposes.<sup>6</sup>

For four years, Officer McHugh had been working in this high crime area, where he had made hundreds of arrests for narcotics sales, stabbings, larceny, **[\*\*18]** robbery, assault, receiving stolen goods, trespassing, and shoplifting. See [Matta, 483 Mass. at 367](#) (reaffirming that incident occurring in high crime area "may be taken **[\*615]** into account as a factor in the reasonable suspicion analysis"). In particular, McHugh had made arrests for shoplifting based on his observation of people selling stolen items on the street

with store tags still attached to the items. With that experience, as well as his training and the fact that the location was a high crime area, McHugh saw Noj holding a bag of clothing, with the defendant looking on, and he heard one of the men ask, "[H]ow much is this," as the merchandise was held up. As the motion judge found, when McHugh approached the men, he was neither "hostile" nor "aggressive." McHugh inquired if the goods were indeed stolen, which startled Noj, and he exclaimed, "[W]hoa." As McHugh spoke to Noj, the defendant had his hands in his pockets and was surveilling Boylston Street. These specific, articulated facts, and the reasonable inferences drawn therefrom, when viewed in total and in light of Officer McHugh's experience, provided him reasonable grounds to suspect that Noj was attempting to sell or the defendant was attempting **[\*\*19]** to receive stolen goods. See [Pinto, 476 Mass. at 363-364](#). See also [Matta, supra at 366](#) (police may rely on their experience and training as basis for reasonable suspicion); [Commonwealth v. Silva, 440 Mass. 772, 784, 802 N.E.2d 535 \(2004\)](#) (same). Accordingly, McHugh was warranted in stopping these individuals and making a threshold inquiry to either confirm or dispel his suspicions based on their actions and his experience.<sup>7</sup>

The majority labors to isolate McHugh's articulated facts and to diminish their collective import, and instead emphasizes things McHugh did not know. The majority

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<sup>5</sup> The defendant also claims that he was seized when McHugh accused him of a crime. However, McHugh merely queried whether the items in the bag were stolen. It is well settled that "the police do not effectuate a seizure merely by asking questions unless the circumstances of the encounter are sufficiently intimidating that a reasonable person would believe that he was not free to turn his back on his interrogator and walk away" (citation omitted). [Commonwealth v. Depina, 456 Mass. 238, 242, 922 N.E.2d 778 \(2010\)](#). Here, Noj, although startled, claimed that the items were not stolen. In any event, as describe *infra*, McHugh had a reasonable and articulable suspicion that criminal activity was afoot even at the time he posed the question.

<sup>6</sup> The motion judge found that the seizure occurred later, when the defendant was handcuffed, but we can affirm her denial of the motion to suppress if the facts found by the motion judge support an alternative theory that justifies her ultimate order. See [Commonwealth v. Va Meng Joe, 425 Mass. 99, 102, 682 N.E.2d 586 \(1997\)](#).

<sup>7</sup> The defendant posits a variety of possible innocent explanations for the circumstances, including that Noj could have been selling the clothing his mother gave him. However, much like when proving guilt beyond a reasonable doubt or establishing probable cause, the government is not charged with excluding hypotheses of innocence, see [Commonwealth v. Merola, 405 Mass. 529, 533-534, 542 N.E.2d 249 \(1989\)](#); [Commonwealth v. Hason, 387 Mass. 169, 175, 439 N.E.2d 251 \(1982\)](#), the same is true — on a much greater scale — for reasonable suspicion. See [Commonwealth v. Isaiah I., 450 Mass. 818, 823, 882 N.E.2d 328 \(2008\)](#) (police do "not have to exclude all the possible innocent explanations for the facts in order to form a reasonable suspicion"); [Commonwealth v. Deramo, 436 Mass. 40, 44, 762 N.E.2d 815 \(2002\)](#) ("The standard of 'reasonable suspicion' does not require that an officer exclude all possible innocent explanations of the facts and circumstances"); [Commonwealth v. Watson, 430 Mass. 725, 729, 723 N.E.2d 501 \(2000\)](#) ("Seemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry"); [Commonwealth v. Cabrera, 76 Mass. App. Ct. 341, 346, 921 N.E.2d 1026 \(2010\)](#) ("Viewed through the eyes of experienced police officers and as a whole, even seemingly innocent activities may take on a sinister cast and give rise to reasonable suspicion").

correctly notes that the in- [\*616] cident occurred in the daytime in a heavy commercial area, and that McHugh did not know whether the clothing items were actually stolen or whether the items retained security tags on them. He was also unaware of any reports of shoplifting in the area that day, and he did not know whether there was a discrepancy between the tags on the items and the bag from which they were retrieved. The majority further notes that McHugh neither knew the defendant nor Noj, that McHugh failed to inquire whether they knew one another, and that McHugh did not know whether the items in the bag were stolen.<sup>8</sup>

An examination of the seminal case of [Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 \(1968\)](#), illustrates why the majority's focus is improper. [\*20] In *Terry*, at 2:30 P.M. on an October day, Martin McFadden, a plainclothes police officer, was patrolling downtown Cleveland, Ohio. [Id. at 5](#). He had been assigned to patrol this area for shoplifters and pickpockets for thirty years. *Id.* McFadden had developed "routine habits of observation over the years and that he would 'stand and watch people or walk and watch people.'" *Id.* While engaged in this routine, McFadden's attention was drawn to two men, Terry and Chilton. McFadden "was unable to say precisely what first drew his eye to them," but these men "didn't look right to [him]." *Id.* From his vantage point 300 to 400 feet away, McFadden watched the two men repeatedly walking past and peering into a storefront before returning to a corner to converse. [Id. at 5-6](#). At one point, a third man, Katz, approached the two and briefly engaged them in conversation, before the two men resumed their window peering exercise. [Id. at 6](#). After this had gone on for ten to twelve minutes, McFadden had "become thoroughly suspicious." He suspected the two men were "casing a job, a stick-up," and feared they may have been armed with a gun. *Id.* McFadden approached them, identified himself as a police officer,

and asked for their [\*21] names. [Id. at 6-7](#). When the men mumbled in response, McFadden grabbed Terry, "spun him around," [\*617] and pat frisked him. [Id. at 7](#). This frisk revealed a gun in Terry's left breast coat pocket. McFadden's patfrisk of Chilton similarly yielded a gun; Katz was not armed. *Id.*

Like McHugh in this case, McFadden did not know Terry or Chilton, and had never seen them before. "[H]e had received no information concerning them from any other source." [Terry, 392 U.S. at 7](#). McFadden was not patrolling with any specific knowledge of criminal activity in the area, but rather McFadden's "knowledge was confined to what he had observed." *Id.* He did not ask Terry and Chilton if they knew one another, but only requested their names. The Court concluded that Terry was seized when McFadden grabbed him. [Id. at 19](#). Despite the gaps in McFadden's knowledge, and that each of the acts McFadden observed could have themselves be innocent, [id. at 22-23](#), the Court nonetheless concluded that it was reasonable for McFadden — given his experience — to believe that Terry and Chilton were about to commit a crime, and that they were probably armed. [Id. at 23, 28, 30](#). With this comparison to the instant case, which the majority artificially truncates, I respectfully suggest the majority [\*22] has misapplied the reasonable suspicion standard.

2. *The continuing investigation.* After the initial seizure, McHugh's further investigation and action were similarly justified and proper in scope and proportionality. See [Commonwealth v. Williams, 422 Mass. 111, 116, 661 N.E.2d 617 \(1996\)](#); J.A. Grasso, Jr. & C.M. McEvoy, *Suppression Matters Under Massachusetts Law* § 4-4[b]. Given that he was outnumbered, and that the defendant had his hands in his pockets while he looked up and down Boylston Street, McHugh appropriately separated the defendant from Noj for safety purposes by having the defendant stand against the wall.

After separating the two, McHugh learned that Noj did not have receipts for the clothing items, and Noj gave McHugh conflicting explanations as to whether and where he purchased the items, before claiming they were a gift from his mother. As the motion judge found, this change in story further heightened McHugh's belief that the items were stolen. See [Commonwealth v. Feyenord, 445 Mass. 72, 78, 833 N.E.2d 590 \(2005\)](#), cert. denied, 546 U.S. 1187, 126 S. Ct. 1369, 164 L. Ed. 2d 77 (2006) (defendant's inconsistent explanations for his activity provided proper basis for reasonable suspicion). Also, as the motion judge found, as the

<sup>8</sup> Relying on [Commonwealth v. Namey, 67 Mass. App. Ct. 94, 97, 852 N.E.2d 116 \(2006\)](#), the majority correctly notes that receiving stolen property requires knowledge that the property is stolen. However, the issue in *Namey* was whether there was sufficient evidence to prove the defendant guilty of the crime beyond a reasonable doubt. [Id. at 99-100](#). Here, in contrast, the issue is merely reasonable suspicion, a standard even lower than probable cause. [Smigliano, 427 Mass. at 492](#). In other words, McHugh was only required, in light of his experience and the articulated facts, to have reasonable grounds to suspect the defendant was committing, had committed, or was about to commit a crime. See [Pinto, 476 Mass. at 363-364](#). This he had.

defendant stood against the wall, he “was fidgety, nervous and looking up and down Boylston Street, again heightening Officer McHugh’s **[\*\*23]** suspicion that a crime was afoot.” **[\*618]** See [\*Commonwealth v. DePeiza\*, 449 Mass. 367, 372, 868 N.E.2d 90 \(2007\)](#) (“Although nervous or furtive movements do not supply reasonable suspicion when considered in isolation, they are properly considered together with other details to find reasonable suspicion”). The defendant had his hands in his pockets, and McHugh instructed him to remove them from his pockets. Although the defendant initially complied, within a minute or two, he put his hands back inside his clothing. See [\*Commonwealth v. Johnson\*, 454 Mass. 159, 164, 908 N.E.2d 729 \(2009\)](#) (officers in high crime area “not required to accept the risk of ... ambiguity” posed by defendant who disregarded command to take his hands out of his pockets); [\*Commonwealth v. McKoy\*, 83 Mass. App. Ct. 309, 313, 983 N.E.2d 719 \(2013\)](#) (for reasonable suspicion of defendant being armed analysis, proper for officer to consider that defendant failed to remove hands from pockets after being requested to do so). Based on his observations of the defendant, McHugh was concerned that he might be armed and dangerous. When the defendant was asked for his identification, he lied,<sup>9</sup> and could not provide a single digit of his Social Security number. McHugh called for back-up, and for safety reasons, asked the defendant and Noj to sit on the ground. Given everything that had transpired, including the defendant providing a **[\*\*24]** false identification, McHugh decided to handcuff the defendant. During this attempt, the defendant spun around, striking another officer, and all three men ended up on the ground. Once subdued, a patfrisk revealed the defendant was in possession of a firearm, heroin, and “crack” cocaine.

In the end, where McHugh, in a high crime area, saw the defendant engage in conduct consistent with the attempted purchase or sale of stolen goods; where the defendant refused to keep his hands out of his pockets and looked up and down Boylston Street; where the defendant gave a false name and date of birth and could not provide his Social Security number; and where the defendant was nervous and fidgety, McHugh was

justified in placing the defendant in handcuffs and pat frisking him as a precautionary safety measure. See [\*Pinto\*, 476 Mass. at 363](#). In my view, McHugh acted reasonably under the circumstances, and the motion to suppress was properly denied.

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<sup>9</sup>The defendant claimed he was “Dana Clarke,” and “noticeably hesitated” before he provided a date of birth. McHugh’s CJIS search with that information produced a registry of motor vehicles photograph that was similar to the defendant’s appearance, but not a match. Another officer, who provided McHugh with back-up, agreed that the defendant did not appear to be Dana Clarke.



COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

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FAR-27605  
2018-P-1440

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COMMONWEALTH OF MASSACHUSETTS,  
Appellee

v.

JAMAL CHIN-CLARKE,  
Defendant-Appellant

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APPENDIX FOR THE COMMONWEALTH'S  
APPLICATION FOR LEAVE TO OBTAIN  
FURTHER APPELLATE REVIEW

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SUFFOLK COUNTY

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