COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

SUPREME JUDICIAL COURT
No.

MASSACHUSETTS APPEALS COURT
No. 2021-P-0093

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

NATHAN MIZRAHI,
Defendant-Appellant

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**APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW**

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February 16, 2022

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What happens when politics grow so seething that violence greets mere expression of a differing viewpoint? What happens when government indulges protestor violence, right down to policy refusing arrest? What happens when mob impunity so threatens public safety that police – given assailants shielded from arrest – instead quash targeted expression to appease persistent violence?

What happens when that state-imposed heckler's veto causes discovery of a licensed gun carried interstate, yet reviewing courts remove from suppression analysis credited police concession of grounds for seizure?

Years of ratcheting censorship and violence happen, subverted rule of law happens, life-changing injustice happens, and every threat to the public's interest in reasoned limits on state overreach happens.

Boston and the whole country have a grave problem with political violence. This case marks an instructive moment in social and legal regression. Nathan Mizrahi seeks further review of count one and two convictions on indictment 2017-00670 of Suffolk Superior Court. Mass. R. App. P. 27.1.

Respectfully submitted,

NATHAN MIZRAHI,

By his attorney,

/s/ Kathryn Karczewska Ohren

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**MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW**

**PAST PROCEEDINGS**

Nathan Mizrahi appeals convictions and denied retrial of charges for carrying into Massachusetts a gun that he was licensed to carry in New York.

On September 25, 2017, a Suffolk County grand jury returned a three-count indictment, alleging: (1) loaded firearm carriage without a license, G.L. c. 269, § 10(n); (2) unlicensed firearm carriage, G.L. c. 269, § 10(a); and (3) unlawful ammunition possession, G.L. c. 269, § 10(h)(indictment 2017-00670)(R. 5, 17).[1] Mizrahi pleaded not guilty (on October 27, 2017)(R. 6).

[1] This application designates the record appendix (R.__); the June 11, 2018, suppression hearing (S.H.__); the April 2-5, 2019, trial (Tr. 1-4:__); Mizrahi's brief (D.Br.__); and the Appeals Court's February 2, 2022, opinion (A.C.O.__).

On February 7, 2018, he moved to suppress evidence stemming from police seizure of a ballistics vest (R. 20). The court (Diane Freniere, J.) heard evidence on June 11, 2018 (S.H. 10–98), and denied suppression two months later (R. 63).[2] A single justice of this Court (Elspeth Cypher, J.) denied interlocutory appeal (on September 26, 2018)(R. 9).

Jury trial began on April 2, 2019 (Robert Tochka, J.)(Tr. 1:128), which produced conviction on all counts (Tr. 4:16–17).[3] The court ordered eighteen months in the house of correction for unlicensed firearm carriage, with two years' probation from and after on remaining ammunition counts (Tr. 4:20–21).[4] Mizrahi appealed (R. 72),[5] and the Appeals Court (docket 2020-P-0242) granted him leave to litigate a new trial motion. A substitute trial court judge (Jackie Cowin, J.)[6] denied that motion (on January 19, 2021)(R. 141), and Mizrahi

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[2] On August 14, 2018 (R. 63).

[3] On April 5, 2019 (Tr. 4:16–17).

[4] Probationary periods to run concurrently (Tr. 4:20–21).

[5] On April 8, 2019 (R. 72).

[6] Due to the trial judge's retirement, a substitute judge decided Mizrahi's motion.

appealed six days later (R. 146). The Appeals Court – on February 1, 2021 – consolidated appeals from convictions and denied retrial (docket 2021-P-0093).

Appeal caused[7] reversed conviction for illegal ammunition possession and order that judgment be entered for Mizrahi (A.C.O. 3, 17). The court affirmed, though, count one and two firearm convictions (A.C.O. 3, 17).

Serial error by commission and omission caused that wrongful result.

## FACTS

### I. Boston's Free Speech Rally Suffers Violent Protestor Attack

Free speech had its champions, who gathered from homes far and wide to rally on Boston Common (S.H. 12–17, 44, 54, 69–72, 85–89).[8]

A crowd of roughly 40,000, though, started arriving early to protest them (S.H. 14–17, 21–24, 36, 38–41, 44–45, 47, 58–60, 72, 77, 79, 85–89). Protestor ranks dwarfed the free speech ralliers, who came under protestor attack (S.H. 14–17, 21–24, 29–30, 36, 38–41, 44–45, 47, 58–60, 72, 77, 79, 85–89). Police saw it all for hours, and more protestors were arriving by the

[7] On February 2, 2022.

[8] On August 19, 2017 (S.H. 12–13, 53–54).

moment (S.H. 14–17, 21–24, 29–30, 36, 38–41, 44–45, 47, 58–60, 72, 77, 79, 85–89).

Policy that day was to avoid protestor arrest (S.H. 41).

Despite violence seen by police (S.H. 21–24, 29–30, 38–41, 44–45, 47, 58–60). Protestor projectiles threatened and struck police and ralliers, including liquid-filled bottles (S.H. 21–24, 29–30, 38–41, 44–45, 47, 58–60). On spotting an arriving rallier, screaming protestors converged (S.H. 21–24, 29–30, 38–41, 44–45, 47, 58–60). Protestors physically dogged spotted targets, shouting obscenities (S.H. 21–24, 29–30, 38–41, 44–45, 47, 58–60). They blocked ralliers trying to reach the event area (S.H. 21–24, 29–30, 38–41, 44–45, 47, 58–60). Physical and verbal abuse rejoined suspected political dissent (S.H. 21–24, 29–30, 38–41, 44–45, 47, 58–60).

Skirmishes erupted as protestors targeted and attacked rally attendees (S.H. 21–24, 29–30, 38–41, 44–45, 47, 58–60). Police worked to quell scattering violence, confiscating projectiles and "speaking to" assailants involved (S.H. 21–24, 29–30, 38–41, 44–45, 47, 58–60)(Tr.1:176).

Policy that day, though, was to avoid protestor arrest (S.H. 41). Protestors were unimpressed by police warnings (S.H. 21–24, 29–30, 29–30, 38–41, 44–45, 47).

## II. Nathan Mizrahi Accompanies A Rally Speaker From New York, Unleashing Protestor Fury

It was all foreseen: Media for weeks had stressed that tens of thousands were expected to protest that rally (S.H. 13–17, 21–22, 37, 54). One week before, violence had erupted in Charlottesville, Virginia (S.H. 14, 37). Boston police and officials anticipated huge, irate crowds (S.H. 13–17, 21–22, 37, 54).

Boston, indeed, had resisted issuing rally permits because of feared violence (S.H. 13–14, 37). Ralliers yet gathered from all over, including New York (S.H. 13–17, 21–22, 38, 69–72, 85–89). Tammy Lee was set to speak, who had brought New York companions, including Nathan Mizrahi (S.H. 69–72, 85–89).

Angry protestors raged as Mizrahi and his group neared the barricaded rally area (S.H. 23–24, 29–30, 38–41, 44–45, 47, 58–60). The protestors hurled projectiles, along with screaming epithets (S.H. 23–24, 29–30, 38–41, 44–45, 47, 58–60). They converged on Mizrahi and kept trying to grab him (S.H. 23–24, 29–30, 38–41, 44–45, 47, 58–60).

Threatening rage so intensified that alarmed witnesses sought police help (S.H. 23–24, 29–30, 38–41, 44–45, 47, 58–60). Violence against Mizrahi was imminent, and intervention needed to quash it (S.H. 23–24, 29–30, 38–41, 44–45, 47, 58–60). Police swiftly jumped in to block enraged protestors, forming an officer chain to force his assailants back (S.H. 23–24, 29–30, 38–41, 44–45, 47, 58–60).

Police had to get Mizrahi into the rally area double-barricaded against protestor violence: Once in, everyone's safety was assured (S.H. 23–24, 29–30, 38–41, 44–45, 47, 58–60). They yet refused him entry because of his attire (S.H. 23–30, 44–45, 82–83, 89–97).

### III. Police Seize Ballistics Vests From Mizrahi And A Companion Because They Project "Militaristic Imagery" That Further "Incites" Violent Protestors, Who Threaten Public Safety

Mizrahi and a companion wore military fatigues, "helmets," and ballistics vests (S.H. 23–30, 44–45, 82–83, 89–97). The vests were not soft body armor worn by most police (S.H. 23–30): They were steel-plated vests used by police tactical units and military (S.H. 23–30).

Rally police targeted the vests for seizure: They projected a "militaristic image" that a violent mob was

now "grabbing at" (S.H. 23–30, 38–45, 47, 49, 58–60, 89–97). Police had seen protestor violence for hours, and such dress "incited the crowd there even more" (S.H. 23, 25–27, 41, 44, 46, 49):

> I considered the bulletproof vest that the image that it projected to be a danger to the public safety. I felt that the dress that he was wearing, armed with that militaristic body armor, was incited the crowd there even more. So in the interest of public safety I seized it as contraband (S.H. 49).

The vest's contraband status was, further, plain because police and military alone "legitimately" wear body armor (S.H. 47); witnesses confirmed instant police upset over civilian use (S.H. 92, 95–96). Police, finally, told Mizrahi that rally screening search policy forced vest confiscation (S.H. 24–25, 28–29, 91–92, 95–97). Policy proscribed "shields" and any item usable as a weapon (S.H. 16, 49–52).

Mizrahi contested vest seizure, stressing his right to rally as dressed (S.H. 24–25, 28–29). When he demanded rally entry, police took the vest, then escorted him to the gate (S.H. 24–25, 28–29, 32–33, 42, 45–47, 78, 91–97).

The crowd cheered when police seized the targeted vest (Tr. 1:172).

Stationhouse inventory search of that vest found a small, loaded pistol pocketed behind a front steel plate carrier (S.H. 33–34, 64–67). When Mizrahi claimed his property postrally, he produced a New York license to carry that gun (S.H. 34–35, 68).

### IV. Counsel Moves To Suppress Fruits Of Vest Seizure, Urging Deficient Constructive Notice Of Screening Policy And Seizure Distanced From Rally Gates

Massachusetts indicted despite gun licensing, stressing no interstate reciprocity (S.H. 35). Mizrahi thus sought suppression of evidence born of unconstitutional vest seizure (S.H. 5, 98–103) (R. 20–22).

Counsel urged that constructive notice of screening policy had been constitutionally deficient: No evidence proved that Mizrahi (who lives in New York) had seen prerally Boston media advisories (S.H. 5, 98–103) (R. 20–22). Further constitutional offense stemmed from seizure though Mizrahi had not yet reached an entry gate (he had merely demanded entry, prompting police escort to the nearest gate)(S.H. 98–103)(R. 20–22).

Counsel did not contest vest seizure because it projected "militaristic imagery" or purportedly "incited" already violent protestors (S.H. 5, 98–103) (R. 20–22). Nor did he contest, as constitutionally

overbroad, screening policy targeting "shields" and any property repurposable as weaponry (S.H. 5, 16, 51–52, 98–103)(R. 20–22). This is true, though the court gave counsel two weeks following hearing testimony to file written response (S.H. 6–8, 113).

And it is true, though police conceded that seizure parameters hinged on individual discretion (S.H. 16, 51–52): Even pens, after all, can be used as weapons, again on police concession (S.H. 51–52).

The court stressed testimony that police had told Mizrahi about entry screening policy (R. 63–71); actual notice alerted him to it, making constructive notice claims irrelevant (R. 63–71). And though violent protestors had blocked Mizrahi from reaching a rally gate, entry demand justified screening policy enforcement (R. 63–71).

The court thus denied suppression (R. 63–71).

## V. Threefold Counsel Oversight Costs Mizrahi Suppression Defenses Sure To Quash Elemental Evidence

No strategy caused counsel failure to contest vest seizure because it projected "militaristic imagery" (R. 121–27). Or non-contest of claim that the vest had "incited" already violent protestors shielded by policy from arrest (R. 121–27). Or silence with respect to

screening parameters, which targeted not just weapons but any body "shield" and anything repurposable as weaponry (R. 121–27).

No order or information from Mizrahi caused counsel silence either (R. 121–23, 126–27). Mizrahi is no lawyer (R. 121–23, 126–27). Precisely because he lacks legal training and experience, he hired counsel armed with both (R. 121–23, 126–27). He relied on counsel to mount all defenses that he could not mount for himself, and left the nature and scope of suppression contest to counsel expertise that he knew he lacked (R. 121–23, 126–27).

Far from strategy or compliance with client order, counsel overlooked all contest to vest seizure, save for urged constructive notice deficiency and seizure distanced from rally gates (R. 121–27).

## VI. Mizrahi Seeks Retrial, Stressing Counsel's Failure To Contest Vest Seizure By Viewpoint Discrimination And Unconstitutionally Overbroad Screening Policy

Mizrahi sought retrial, stressing counsel's ineffective assistance in overlooking serial suppression defenses (R. 78–127). Mass. R. Crim. P. 30(b).[9]

[9] "The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b).

Police had conceded grounds for vest seizure, and the suppression judge had credited that testimony (R. 64):

> I considered the bulletproof vest that the image that it projected to be a danger to the public safety. I felt that the dress that he was wearing, armed with that militaristic body armor, was incited the crowd there even more. So in the interest of public safety I seized it as contraband (S.H. 49)(R. 78–127).

Supreme Court precedent, though, elementally disproved incitement (R. 78–127): The vest urged no illegality, much less with intent to cause imminent crime, much less with any chance at success (R. 78–127). *Hess v. Indiana*, 414 U.S. 105, 106–109 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

Which left, as seizure grounds, conceded viewpoint discrimination. Officers had been dealing all day with protestors violently quashing dissent, who had now targeted despised "militaristic imagery" (R. 78–127). Mizrahi's assailants, indeed, cheered when police forcibly confiscated the hated vest (Tr. 1:172): Law calls that a "heckler's veto," which state actors here unconstitutionally forced to placate mob violence (R. 78–127). *Brown v. Louisiana*, 383 U.S. 131, 133–34, 133 n.1 (1966); *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965); *Wright v. Georgia*, 373 U.S. 284, 293 (1963).

Administrative search policy, further – on two grounds – was unconstitutionally overbroad (R. 78–127). First, since justification for screening was to protect safety, law required minimizing intrusiveness to that end (R. 78–127). *Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979); *Commonwealth v. Carkhuff*, 441 Mass. 122, 125–30 (2004). Search policy here yet exceeded its own safety justification by targeting safety-enhancing "shield" garments (R. 78–127).

No valid administrative search, further, leaves targets and parameters to individual officer discretion (R. 78–127): Search must hew, rather, to written guidelines foreclosing variable judgment (R. 78–127). *Prouse*, 440 U.S. at 653-55; *Carkhuff*, 441 Mass. at 125–30. Screening here yet relegated to individual discretion what property – even, e.g., keys, pens, clothes, and bags – could be seized as potentially repurposable into weaponry (R. 78–127).

On such logic: (1) police could seize virtually anything at will; (2) seizure parameters hinged on subjective standards; and (3) search targets were subject to prohibited variable judgment (R. 78–127).

The Commonwealth, finally, fleetingly invoked inevitable discovery, but made no factual and logical

showing needed to make that claim (R. 78–127). *Commonwealth v. Balicki*, 436 Mass. 1, 16 (2002); *Commonwealth v. Barros*, 56 Mass. App. Ct. 675, 680–81 (2002). Discovery, first, was neither factually nor logically certain: The small gun was pocketed behind a steel plate (S.H. 64-67), which would have explained metal detector and wand alerts, then shielded the gun from tactile detection during hand frisk (R. 78–127).

And even assuming inevitable discovery, Article Fourteen requires suppression when grave constitutional offense compels redress to deter future overreach (R. 78–127). *Commonwealth v. Sbordone*, 424 Mass. 802, 809–11 (1997); *Commonwealth v. Gomes*, 408 Mass. 43, 46–47 (1990); *Commonwealth v. O'Connor*, 406 Mass. 112, 115–18 (1989); *Commonwealth v. Benoit*, 382 Mass. 210, 218–19 (1981).

A heckler's veto forced by police to appease mob violence mandated that remedy: Suppression alone cured this and future First and Fourth Amendment offenses fueling intensified aggression, censorship, and crime (R. 78–127). Mizrahi, on all scores, stressed police overreach and ineffective counsel assistance mandating reversal and judgment in his favor (R. 78–127).

**VII. A SUBSTITUTE JUDGE CLAIMS UNCONSTITUTIONAL OVERBREADTH CURED BY ADVANCE NOTICE, THEN CONTRADICTS CREDITED POLICE TESTIMONY TO APPROVE SEIZURE BY VIOLENT HECKLER'S VETO.**

Due to the trial judge's retirement, a substitute judge decided Mizrahi's motion (R. 148–52).

She rejected contest of search policy overbreadth because Mizrahi had received notice of that policy and could have left the rally, which satisfied reasonableness requirements (R. 151). Mizrahi's vest, further, could be confiscated as a shield and potential weapon since it could be removed, swung, and used to strike (R. 152). And vest seizure alone assured safety from "the already hostile crowd" (R. 152), despite credited concession that admitting Mizrahi to the barricaded rally area would have instantly assured that safety goal (S.H. 23–24, 29–30, 38–41, 44–47, 58–60).

The substitute judge removed from analysis: (1) *Brandenburg* standards and credited police concessions elementally foreclosing incitement; and (2) Article Fourteen precedent mandating suppression – even assuming inevitable discovery – when needed to check serious state overreach.

Even graver, she contradicted credited testimony that police had seized the vest because of its "militaristic imagery" (R. 151); she claimed, rather,

that police concession merely explained how Mizrahi had committed "incitement" (R. 151).

The substitute judge, on those grounds, denied postconviction relief (R. 148–52).

## VIII. Appeal Spotlights Factual And Legal Court Error Further Proving Need For Reversal.

Appeal stressed that reviewing courts were bound by the suppression judge's findings, including credibility determinations (D.Br. 48-49, 52-53). *Commonwealth v. Drayton*, 479 Mass. 479, 480 (2018); *Commonwealth v. McCowen*, 458 Mass. 461, 469 (2010). It further stressed de novo review of Mizrahi's new trial motion: Since the trial judge had retired, a substitute judge had decided that motion instead (D.Br. 46). *Commonwealth v. Watkins*, 486 Mass. 801, 804 (2021); *Commonwealth v. Mazza*, 484 Mass. 539, 547 (2020).

And the substitute judge had made serial factual and legal errors further proving unconstitutional vest seizure (D.Br. 25-26, 46-55).

### A. Appeal Stresses That No Constitutional Offense Is Cured Merely By Preannouncing It

The substitute judge, e.g., rebuffed showing of overbroad screening policy because Mizrahi had notice of its provisions and a chance to leave the rally, which

satisfied reasonableness requirements (R. 151) (D.Br. 47-48).

Advance notice of illegal overreach – especially when contested – neither logically nor legally cures illegal overreach (D.Br. 47-48). That is especially true in the administrative search context, where no facts reasonably implicate specific search targets in wrongdoing (D.Br. 47-48).

And it is especially true when overreach forces involuntary relinquishment of constitutional rights (D.Br. 47-48). *Carkhuff*, indeed, mandates: (1) narrow restriction of search intrusiveness to repelling prespecified danger; and (2) advance notice of search parameters rigorously narrowed to root out that prespecified danger (D.Br. 47-48). *Carkhuff*, 441 Mass. at 125–30. *See too Prouse*, 440 U.S. at 653-55; *Commonwealth v. Anderson*, 406 Mass. 343, 346–48 (1989); *Commonwealth v. Harris*, 383 Mass. 655, 656–57 (1981); *Commonwealth v. Garcia-German*, 90 Mass. App. Ct. 753, 757–58 (2016).

On the substitute judge's logic, the state could precure any overreach by announcing in advance will to overreach: That looses the state from all restraints on

its conduct, fueling open disregard for law by government charged with law's enforcement (D.Br. 47-48).

That is the antithesis of reasonableness on state and federal constitutional doctrine (D.Br. 47-48).

### B. Appeal Stresses Credited Police Testimony That They Had Seized The Vest Because It Projected A "Militaristic Image"

The substitute judge further wrongly claimed that the police did not seize the vest because it projected a "militaristic image" (R. 151)(D.Br. 31-34, 48-49). Police testimony stressed:

> I considered the bulletproof vest that the image that it projected to be a danger to the public safety. I felt that the dress that he was wearing, armed with that militaristic body armor, was incited the crowd there even more. So in the interest of public safety I seized it as contraband (S.H. 49).

The suppression judge had credited this testimony (R. 64)(D.Br. 31-34, 48-49). The substitute judge, who saw no case witnesses, was bound by the suppression judge's credibility findings (D.Br. 31-34, 48-49). *Drayton*, 479 Mass. at 480; *McCowen*, 458 Mass. at 469.

### C. Appeal Laments Removing From Seizure Analysis: (1) *Brandenburg* And Progeny Stressing Elementally-Foreclosed Incitement; And (2) Article Fourteen Exceptions To Inevitable Discovery Meant To Check Incentives For State Overreach

Appeal contested such fragmentary substitute judge analysis that – twice over – it omitted facts and law requiring suppression (D.Br. 31-34, 49-51).

The substitute judge first removed from analysis *Brandenburg* and progeny law: She neither addressed incitement's elements, nor acknowledged credited testimony elementally disproving incitement (D.Br. 31-34, 49-51). She instead declared: "the crowd was incited to violence by the body armor" (R. 151) (D.Br. 31-34, 49-51).

Though even she could not say: (1) what illegality it urged; (2) facts suggesting intent to cause imminent lawless action; or (3) circumstances showing likelihood that that intent would succeed (D.Br. 31-34, 49-51).

Nor could she. She was, again, bound by credited police testimony that: (1) violent protestors had been attacking ralliers all day well before Mizrahi had even arrived; (2) Mizrahi was always, already peaceful; (3) even during violent protestor attack; (4) during which projectiles had been used; and (5) police had offered forcible defense that Mizrahi had refused to assert (D.Br. 31-34, 49-51).

The substitute judge further removed from analysis Article Fourteen precedent mandating suppression even in cases of inevitable discovery (D.Br. 43-45, 50-51). That is true though Mizrahi had stressed this Court's caution that: (1) inevitable discovery logic thwarts

suppression's deterrent virtues; (2) illegality is faster and easier than principled constitutional process; (3) doctrine fueling such shortcuts is repugnant to logic and law; and (4) sole corrective incentive may lie in voiding illegality's fruit of trial value (R. 116-18)(D.Br. 43-45, 50-51). *Sbordone*, 424 Mass. at 809–11; *Gomes*, 408 Mass. at 46–47; *O'Connor*, 406 Mass. at 115–18; *Benoit*, 382 Mass. at 218–19.

Findings and rulings thus omitted: (1) Article Fourteen suppression mandated when grave constitutional offense compels redress to deter future overreach; and (2) response to analysis proving suppression needed to check future violent heckler's vetoes (D.Br. 43-45, 50-51).

Removing this Court's precedent from analysis confirmed error mandating reversal (D.Br. 43-45, 50-51).

### D. Appeal Stresses Credited Police Testimony That Public Safety Would Have Been Instantly Assured By Admitting Mizrahi To The Barricaded Rally Area

Appeal contested mistaken claim that given violent protestor attack, sole means to protect public safety was to seize Mizrahi's vest (R. 152)(D.Br. 16, 51-52).

The substitute judge, again, was bound by credited police concession that: (1) safety would have been instantly assured by letting Mizrahi into the barricaded

rally area; and (2) sole reason that did not happen was the "militaristic" vest (S.H. 23–24, 29–30, 38–41, 44–45, 47, 58–60)(D.Br. 16, 51-52). No overreach was needed to protect public safety, just admission to the secure rally area after constitutionally valid screening (D.Br. 16, 51-52).

### F. Claim That The Vest Was a Seizable Potential Weapon Hinges On Such Dubious Proposed Abuse That Nothing Resembling It Appears In State And Federal Law, Again Proving Overbroad Screening Policy Hinging On Variable Judgment

Appeal, finally, contested screening overbreadth proven by substitute judge claim that the vest was lawfully seized because – if removed and swung – it could be repurposed as a weapon (D.Br. 36-43, 53-55).

Strained logic needed to make such claim doubly confirmed overbreadth failing constitutional benchmarks: Purses, bags, and backpacks too could be swung, yet screening targeted none of them for seizure (though it is far more likely that such items – as opposed to a protective garment – would be swung to strike bystanders)(D.Br. 36-43, 53-55).

Further, only variable – indeed, idiosyncratic – judgment could deem proposed vest weaponization reasonable: Research finds no federal or state precedent involving swinging vests, thrown vests, and vests

flipped, slammed, or otherwise used to strike or bludgeon (D.Br. 36-43, 53-55). Weaponization proposed here stands factually, logically, and legally unprecedented (D.Br. 36-43, 53-55).

Such attenuated seizure justification brightly spotlights overbroad policy hinging on variable seizure standards (D.Br. 36-43, 53-55). It never occurred, indeed, even to police that the vest could be repurposed as weaponry and seized on those grounds: The prosecution, rather, advanced that logic ten months later at the suppression hearing (S.H. 5–6, 27, 51–52, 103–10)(D.Br. 36-43, 53-55).

Which proves: (1) such unreasonable inference of weaponry that it occurred to no officer responding to facts; and (2) such malleable discretion under that screening policy that it took ten months and bar-licensed counsel to theorize potential weaponization registering nowhere in American law (D.Br. 36-43, 53-55).

That is the opposite of hewing to rigorous written guidelines foreclosing variable judgment (D.Br. 36-43, 53-55). *Prouse*, 440 U.S. at 653-55; *Carkhuff*, 441 Mass. at 125–30. Appeal, on all scores, sought reversal and entry of judgment for Mizrahi.

**G. APPEALS COURT AFFIRMANCE ROOTS IN: (1) CLEAR ERRORS UNGROUNDED IN EVIDENCE; AND (2) REMOVAL FROM ANALYSIS OF *BRANDENBURG* AND ARTICLE FOURTEEN INEVITABLE DISCOVERY PRECEDENT.**

The Appeals Court affirmed convictions for unlicensed firearm carriage and carrying a loaded gun (A.C.O. 3, 17). It held that: (1) preannouncing the screening policy satisfied reasonableness standards, and Mizrahi could have chosen to leave; (2) the vest could be seized as a potential weapon; and (3) the gun would have been inevitably discovered (A.C.O. 9, 15-16).

It rejected contest of trial counsel's purported suppression "strategy," which was not unreasonable when devised (A.C.O. 3, 11-12). It found no ineffective assistance because trial counsel had timely contested: (1) seizure based on "incitement"; and (2) screening overreach thwarting safety goals and entrusting seizure parameters to variable discretion (A.C.O. 12, 14).

It stated that Mizrahi had contested no suppression findings and rulings (A.C.O. 3, 6-8, 13-14), including reasonableness rulings and findings that: (1) Mizrahi had consented to vest seizure (A.C.O. 7-8); and (2) the vest could be seized as a potential weapon because it could be swung (A.C.O. 6, 13). It stated that Mizrahi denies public safety threats prompting police

enforcement of a violent mob's heckler's veto (A.C.O. 10, 13).

The Appeals Court removed from analysis: (1) *Brandenburg* and credited police testimony elementally foreclosing "incitement" claimed as seizure grounds; and (2) Article Fourteen suppression mandates overriding inevitable discovery doctrine.

## ISSUES

**I.** May police enforce a political "heckler's veto" on behalf of an enraged mob if the hecklers: (1) commit violence to quash disfavored viewpoints; (2) persistently threaten public safety; and (3) are shielded by government policy from arrest for assault?

**II.** May courts justify property seizure under administrative screening search policy that: (1) exceeds its own safety rationale to target safety-enhancing items that pose no threat; and (2) hinges on unfettered individual discretion to determine parameters of property seizable as potentially repurposable into weaponry?

## WHY FURTHER REVIEW IS PROPER

Healthy societies ground in rule of law, which checks not just crime, but criminal capture of state actors to force victim acquiescence. Rule of law is especially crucial in times of political strife.

That time is now in Boston and other American cities. This case yet proves stark regression in response to political violence: No law enforcement actor – police, prosecutors, and now two courts of law – has: (1) objected to (or even acknowledged) seizure by conceded state-imposed heckler's veto; or (2) suggested that police should have arrested violent assailants, instead of allowing them to persist in criminally harming more victims.

Indeed, though review has been bound by credibility findings from the sole fact-finder to see suppression witnesses (S.H. 2), two courts have removed conceded seizure grounds from case rulings:

> I considered the bulletproof vest that the image that it projected to be a danger to the public safety. I felt that the dress that he was wearing, armed with that militaristic body armor, was incited the crowd there even more. So in the interest of public safety I seized it as contraband (S.H. 49).

This case's heart – on credited police concession – spotlights government force abused to quash expression

targeted by a violent mob: The crowd, indeed, literally cheered when police seized the hated vest (Tr. 1:172). The Supreme Court, for good reason, has outlawed heckler's vetoes as repugnant to constitutional enactment. *Brown*, 383 U.S. at 133–34, 133 n.1; *Cox*, 379 U.S. at 551–52; *Wright*, 373 U.S. at 293.

A legalized heckler's veto subverts rule of law every bit as much as claim that notice of unconstitutional overreach precures unconstitutional overreach (R. 151)(A.C.O. 9, 15): That just instructs state actors how to preemptively loose themselves from bounds on – and accountability for – their conduct.

And instruction has issued here as published law controlling future First and Fourth Amendment violations. That is particularly bitter fruit of a rally to honor the First Amendment.

Safety concerns justifying screening proscribed search overbreadth thwarting safety goals (including seizure of safety-enhancing garments, which should have been treated like any other clothing under screening guidelines). *Prouse*, 440 U.S. at 653-55; *Carkhuff*, 441 Mass. at 125–30. And disparate vest treatment on grounds it could be swung and potentially weaponized proved seizure by forbidden variable judgment: It took

ten months and a prosecutor charged with rationalizing police action to first hypothetize vest weaponry unprecedented in American law. *Prouse*, 440 U.S. at 653-55; *Carkhuff*, 441 Mass. at 125–30.

A perfect storm of error and abuse has razed constitutional bulwark six times over. The First Amendment (and Article Sixteen)[10] lie felled by state force quashing expression disfavored by violent assailants. So too the Fourth Amendment and Article Fourteen, since police: (1) stressed no suspected Mizrahi threat or misconduct; and (2) enjoyed unfettered discretion to seize property bearing no reasonable relation to safety threats.[11]

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[10] U.S. CONST. AMEND. I ("Congress shall make no law [...] abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble");

MASS. DECL. RIGHTS, ART. XVI ("The right of free speech shall not be abridged").

[11] U.S. CONST. AMEND. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated");

MASS. DECL. RIGHTS, ART. XIV ("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").

And so too the Sixth Amendment and Article Twelve, which ensured counsel help needed to redress fourfold constitutional offense.[12]

Two courts have now approved this result based on serial error, including removing from analysis seizure grounds credited by the sole judge to assess witnesses on the stand. The public's interests and those of justice plead for correction and sound development of common law. Mass. R. App. P. 27.1.

**I. REMOVING INCITEMENT AND INEVITABLE DISCOVERY LAW FROM ANALYSIS THWARTS APPELLATE REVIEW, WHICH ASSESSES COURT UNDERSTANDING AND APPLICATION OF PRECEDENT, AND CORRECTS LEGAL ERRORS CAUSING INJUSTICE.**

Due process assures: (1) a chance to be heard with respect to facts and law warranting relief; and (2) findings and rulings needed to support just case resolution and review for error. *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. Ct. 412, 416 (1980); *Commonwealth v. Grassie*, 476 Mass. 202, 214–15

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[12] U.S. CONST. AMEND. VI ("In all criminal prosecutions, the accused shall enjoy the right [...] to have the assistance of counsel for his defense");

MASS. DECL. RIGHTS, ART. XII ("And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election").

(2017). Both goals have been thwarted by courts' removing from analysis incitement law and Article Fourteen suppression mandates overriding inevitable discovery logic.

Fragmentary analysis – twice over – structurally forecloses appellate review, which: (1) identifies and corrects legal errors that threaten injustice, *Markell*, 9 Mass. App. Ct. at 416; and (2) requires enough accounting of grounds for state action that reviewing courts can perform error correction functions. *Grassie*, 476 Mass. at 214–15. Both duties are crucial to public confidence in reliable and just court results. *Grassie*, 476 Mass. at 214–15; *Markell*, 9 Mass. App. Ct. at 416.

The substitute judge and Appeals Court have yet offered this Court (and the public) no means to assess application of *Brandenburg* and progeny to "incitement" justifying vest seizure. Or means to satisfy even themselves that they have "fully and properly" addressed seizure grounds conceded by credited testimony. *Markell*, 9 Mass. App. Ct. at 416.

Same goes for Article Fourteen mandates suppressing even inevitably discovered evidence as needed to check grave overreach: If any offense warrants that remedy, it's police helping a violent mob quash hated viewpoints

instead of arresting criminals for threatening public safety.

Removing core law from analysis forecloses Court and public assurance that justice has been done: "There must be some mechanism by which an appellate court can meaningfully assess whether a judge acted appropriately." *Grassie*, 476 Mass. at 214–15; *Markell*, 9 Mass. App. Ct. at 416.

Here there is not. And no "gut feelings" ground reasoned review for court error. *Olmstead v. Murphy*, 21 Mass. App. Ct. 664, 667 (1986).

**II. Evidence Uniformly Forecloses Claims Of: (1) Counsel Strategy; And (2) Timely Suppression Contest Based On Purported Mizrahi "Incitement" And Overbroad Screening Policy Thwarting Its Own Public Safety Justification.**

The Appeals Court claims timely suppression contest of: (1) incitement claims; and (2) screening overreach thwarting safety goals and entrusting seizure parameters to variable discretion (A.C.O. 3, 11-14). It claims counsel "strategy" incorporating those defenses, which was not manifestly unreasonable (A.C.O. 3, 11-14). In support, it quotes suppression counsel's comment that: "police "went in" due to the defendant's "military gear" (A.C.O. 12).

No evidence, though, grounds claim of counsel strategy: Counsel, under oath, stressed that no strategy had underpinned suppression argument restricted to deficient notice and search too distanced from rally gates (R. 123). Counsel's sworn statement was sole evidence on point. Any claim of strategy is clear error unmoored from facts. *Commonwealth v. Dasilva*, 56 Mass. App. Ct. 220, 223 (2002).

Counsel's sworn statement – alongside transcribed suppression proceedings – equally disproves timely contest of incitement claims and search overbreadth: Both stressed twofold suppression contest and no strategy excluding other defenses (R. 121-27). Which is why the suppression court reached no issues beyond notice and distance arguments: Absent identification of specific grounds for relief – along with facts and authority proving overreach – counsel failed to alert the court to further issues needing resolution. *Commonwealth v. Bettencourt*, 447 Mass. 631, 634 (2006); *Commonwealth v. Mathis*, 76 Mass. App. Ct. 366, 374 (2010).

The Appeals Court yet urges that counsel preserved incitement and overbreadth defenses by saying: "Police "went in" due to the defendant's "military gear"

(A.C.O. 12). It does not explain how that relates to *Brandenburg* incitement standards, much less mounts defense under them. Nor does the court explain how that comment contests screening policy overbreadth hinging on variable discretion.

Clear error, again, grounds mistaken claim of counsel strategy and timely *Brandenburg* defense. *Dasilva*, 56 Mass. App. Ct. at 223.

### III. PREANNOUNCING CONSTITUTIONAL OFFENSE CANNOT CURE CONSTITUTIONAL OFFENSE, ESPECIALLY SINCE MIZRAHI CONTESTED CONDITIONING HIS CONSTITUTIONAL RIGHTS ON WAIVING HIS CONSTITUTIONAL RIGHTS.

The Appeals Court repeats substitute judge claim that since the screening policy was preannounced to Mizrahi, notice reduced search intrusiveness to make that policy legal (A.C.O. 9, 15-16). That, though – again – removes from analysis any limit on state overreach, which the court claims cured just by preannouncing overreach. Which, again, fuels disregard for law by government charged with law's enforcement.

And further leaves – as a matter now of controlling precedent – anyone subjected to preannounced overreach no cure for intentionally violated rights.

**IV. RECORD FACTS FORECLOSE CLAIM THAT MIZRAHI CONTESTED NO SUPPRESSION FINDINGS AND RULINGS THAT HAD SERIALLY GROUNDED NEW TRIAL LITIGATION.**

The record, finally, forecloses claim that Mizrahi contested no suppression findings and rulings (A.C.O. 3, 6-8, 13-14), including reasonableness rulings and findings that: (1) Mizrahi had consented to vest seizure by entering the rally area (A.C.O. 7-8); and (2) the vest could be seized as a potential weapon because it could be swung (A.C.O. 6, 13). The Appeals Court further wrongly claims that Mizrahi denies public safety threats prompting police enforcement of a violent mob's heckler's veto (A.C.O. 10, 13).

The record proves, on all scores, clear error unmoored from evidence. *Dasilva*, 56 Mass. App. Ct. at 223. The whole point of Rule 30 litigation was to contest counsel's failure to raise fact-relevant suppression defenses, which had denied the court a chance to make findings and rulings needed for just case disposition (R. 89-119)(D.Br. 18-46). The court could not rule on the reasonableness of incitement and screening overbreadth issues that counsel had neither raised nor contested.

That included ruling on seizure legality because:

> I considered the bulletproof vest that the image that it projected to be a danger to the public safety. I felt that the dress that he was wearing, armed with that militaristic body armor, was incited the crowd there even more. So in the interest of public safety I seized it as contraband (S.H. 49)(R. 78–127).

Justice and the public's interest still seek court ruling on seizure justified by such logic.

Mizrahi has, further, uniformly contested any claim that he consented to vest seizure. He did so at the suppression stage (S.H. 24–25, 28–29), during Rule 30(b) trial court litigation (R. 12), and on appeal (R. 17, 48). Consent claims find no support in evidence that serially contradicts them. *Dasilva*, 56 Mass. App. Ct. at 223.

Mizrahi has just as hotly contested vest seizure on grounds that it could be repurposed as a weapon. He pressed ineffective assistance claims for failing to raise that suppression defense (R. 1-4, 12-43), then appealed adverse rulings (D.Br. 18-46). Far from acquiescing to claim that the vest was a seizable repurposeable weapon, Mizrahi spotlighted how that very strained logic proved screening overbreadth hinging on forbidden variable discretion (R. 32-35)(D.Br. 40-43, 53-55).

As for claim, finally, that Mizrahi denies public safety threats prompting police enforcement of a violent mob's heckler's veto (A.C.O. 10, 13), postconviction litigation has stressed the exact opposite the whole time (R. 84-89, 93-103, 107-109)(D.Br. 13-18, 21-26, 31-36, 49-50).

It is, indeed, the very heart of injustice that brought Mizrahi back to trial court, then to the Appeals Court, and now before this Court: Few things threaten constitutional bedrock, social stability, and public safety more than a police-imposed heckler's veto forced to appease mob violence loosed by state policy from arrest.

## CONCLUSION

Case disposition here matters not just for Mizrahi, but for anyone offering a political viewpoint that finds disfavor with violent censors. This is especially true as political divisions deepen this election year. Justice and the public's interest lie in foreclosed replication of violent censorship now approved by binding precedent.

Mizrahi, on all scores, seeks further appellate review (or remand for Appeals Court correction).

Respectfully submitted,

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By his attorney,

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Dated: February 16, 2022

**CERTIFICATE OF SERVICE**

I, Kathryn Karczewska Ohren, certify that I served this Appellant's Application For Further Appellate Review through the Massachusetts Odyssey Electronic Filing Service on Assistant District Attorney Brooke Hartley.

/s/ Kathryn Karczewska Ohren

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Kathryn Karczewska Ohren

Dated: February 16, 2022

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2017-0670

COMMONWEALTH

vs.

NATHAN MIZRAHI

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTIONS TO SUPPRESS STATEMENTS

The defendant, Nathan Mizrahi ("Mizrahi") is charged with various firearm violations. Mizrahi now moves this court to suppress all of the evidence seized by the police seized from his person on August 19, 2017, including a firearm, body armor tactical vest, detachable magazine and ammunition. Mizrahi argues that this evidence was the product of an illegal warrantless search of his person, which he contends was improper as the search and seizure was not supported by reasonable suspicion of wrongdoing.

The court held an evidentiary hearing on June 11, 2018. At the hearing, the Commonwealth called three witnesses: Boston Police Captain John Danilecki ("Captain Danilecki"), Officer Kyle Gomes ("Officer Gomes") and Officer Vincent Schettino ("Officer Schettino"). The defendant called two witnesses: Philip Polizotto and Judith DeFrance. Three exhibits admitted into evidence: a BPD Community Advisory dated August 17, 2017, BPD Rules and Procedures, Rule 318 – Prisoners, and an audio/video CD taken on August 19, 2017.



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On the basis of the evidence determined to be credible by this Court and considering the motions and memoranda of counsel, Mizrahi'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 Captain Danilecki regarding the events he observed and participated in on and before August 19, 2017. Captain Danilecki is a 32 year veteran of the Boston Police Department, currently assigned as the night captain of the BFS command. Captain Danilecki has extensive law enforcement experience working his way up from patrolman. He serves as the commander of COBRA (Cops on Bikes Regional Assistance), a multi-agency bike unit which mobilizes for special events in Boston to provide additional police officers with high visibility and mobility. I also credit the testimony of Officer Vincent Schettino, an 8 year veteran of the Boston Police Department, regarding the events he observed and participated in on August 19, 2017 while working the front desk at the district A-1 station. Finally, I credit and accept the more limited testimony of Officer Gomes, a day patrolman with approximately two years' experience, whose principal role was in bringing the body armor vest from Captain Danilicki to a patrol car for transport to the A-1 station. Officer Gomes also made observations of the crowd while on the Boston Common on August 19, 2017. I do not credit much of the testimony of the two civilian witnesses, Philip Polizotto and Judith DeFrance, to the extent their testimony contradicts that of Captain Danilecki. Specifically, I do not credit Mr. Polizotto's or Ms. DeFrance's testimony that there were not many counter protesters in their vicinity immediately before the police approached Mizrahi and another man in their party. On the morning of August 19, 2017, Polizotto and DeFrance travelled with Mizrahi, and one of the "Free Speech" event speakers, as part of a six person group from New York to Massachusetts.

Mr. Polizotto testified that he did not see the police approach Mizrahi and Ms. DeFrance testified that she was live-feeding at the time police approached Mizrahi and then occupied as her own bag was searched.

I find that the credible evidence demonstrates the following events to have occurred:

On August 19, 2017, a permitted "Free Speech" rally[1] was scheduled to take place at the rotunda on the Boston Common. Law enforcement had considerable concern for the safety and security of those attending the rally, and those opposing the rally, particularly in light of violence that had taken place the prior week at a similar rally in Charlottesville, Virginia. In response, the Boston Police Department took steps to secure the safety of the public by setting up a buffer zone area which would separate the permitted group in the secured rally space near the rotunda from the opposing parties. The permitted group planned to march from Reggie Lewis Center in Roxbury to the Boston Common to the rally. Boston Police estimated that there would be a group of 40,000 counter protesters. In advance of the event, Boston Police made numerous public statements to the news media and on social media to alert the public of certain security protocols which would be in place to ensure a safe and peaceful demonstration day. As part of their media campaign, the Boston Police put out a community advisory on August 17, 2017, Exhibit 1, which alerted the public that there would be a large police presence (both uniformed and undercover officers), fixed video cameras, and mobile support video teams in place to assist in keeping the event safe for all those who attended. The advisory also alerted:

> Due to increased public safety concerns, those who plan on visiting the Boston Common on Saturday August 19, 2017, are strongly urged not to bring backpacks, large bags or strollers. For those who choose to bring these items, please be advised that they may be subject to search, and there will be no storage area designated to leave the belongings.
>
> In order to provide a safe and peaceful environment, the Boston Police Department has determined certain items be prohibited from the Boston Common. Please see the list of prohibited items below:

[1] The Free Speech supporters were known to the Boston Police to be a pro-Second Amendment group.

- Firearms, knives, weapons, sharp objects, shields or fireworks
- Pop up tents or canopies
- Cans, glass containers, pre-mixed beverages or alcoholic beverages
- Wagons or pull carts
- Coolers
- Drones
- Pets (excluding certified service animals)
- Grills, propane tanks or open flames
- Bicycles
- Flag poles, bats, clubs, sticks (including signs attached to sticks)
- Any athletic equipment or other item which could be used as a weapon

On the morning of August 19, 2017, Captain Danilecki split his 150 person squad into two, one squad was assigned to accompany the Free Speech marchers from Roxbury to the Boston Common and the second assigned to the Boston Common to establish a perimeter around the rotunda for the permitted rally. This second squad set up steel barricades on the Boston Common to separate the permitted, Free Speech event-goers from the counter protesters. Police presence on the Boston Common was obvious based on the number of officers, which included specialized units including the COBRA bike unit wearing highly visible, bright yellow jackets and shirts. To enter the permitted, secured rally space, event goers were required to submit to a search/screening of their bags and to walk through metal detectors and a handheld wand. Due to security concerns, there were two entrance points to the secured rally space, each with a large police presence (> 10 officers), designed to regulate the number of people that came into the area.

At approximately 9 AM on August 19, 2017, Captain Danilecki arrived on his bike at the buffer zone area on the Boston Common. The rally was expected to begin at noon. When he arrived, to his surprise, Captain Danilecki observed a large crowd of counter protesters (estimated at 10,000 – 15,000 people) already on the Boston Common. The counter protesters significantly outnumbered the permitted protesters then onsite. The counter protestors were taunting, shouting profanity, and throwing projectiles at the permitted protestors, all of which created much tension.

At that time, Captain Danilecki's attention was drawn to two men in the crowd who were moving toward him wearing military gear – specifically, U.S. Army fatigues, a steel-plated tactical vest/body armor and military helmet. As the two men attempted to get through the crowd, counter protestors tried to grab them and shouted "fuck Trump, fuck Trump." Captain Danilecki believed that the dress of the two men was inciting the counter protesters and that they were in danger.[2] As such, he intervened, with the assistance of fellow officers, to secure their safety. Specifically, six officers who were in close proximity on bicycles separated the opposing parties and surrounded the two men as the gathered counter protester crowd continued to taunt and throw projectiles. Officers pushed the crowd of counter protesters back to separate the parties.[3] Simultaneously, Captain Danilecki questioned the two men, one later identified as Mizrahi, asking if they intended to go into the permitted area. Mizrahi was calm and well-behaved. Mizrahi answered that he did intend to go into the permitted area. In response, Captain Danilecki told Mizrahi (and the second man also wearing military gear) that he could not go into the permitted area wearing the body armor and helmet. He explained that if Mizrahi wanted to go

[2] Mr. Polizotto testified that although he was waiting in the same general area as Mizrahi, he did not see the police approach Mizrahi or take off his vest. He also testified that there were few counter protestors in the area and that he did not fear for his safety. As stated above, to the extent that this testimony contradicts that of Captain Danilecki, I do not credit it. Polizotto used his phone to videotape the search of Mizrahi, Exhibit 3.

[3] Captain Danilecki testified that once the Boston Police surrounded Mizrahi and his companion, the crowd quickly dispersed. This testimony is consistent with the videotape, Exhibit 3, which the court carefully reviewed.

into the permitted area his body armor and helmet would be confiscated. Mizrahi did not want to take off the body armor, but Captain Danilecki reiterated that if he wished to go into the permitted area he would seize the body armor and search Mizrahi's backpack. Mizrahi then decided to enter the permitted area. It was clear, however, that Mizrahi did not want to give up his body armor and he asked for Captain Danilecki's name and to see his badge, which he provided. Captain Danilecki took Mizrahi's steel-plated vest and ballistic helmet off of him as he was unwilling to take it off. The vest was very heavy, weighing approximately 15-20 pounds, and had compartments which could be used to conceal items. Mizrahi asked for a receipt, which Captain Danilecki was unable to provide, but he informed Mizrahi that he could retrieve his vest at the A-1 station after the rally.[4] Further, after Mizrahi's backpack was searched, Captain Danilecki told him that he could proceed into the barricaded area and asked officers nearby to escort Mizrahi to one of the entrance points.[5] Later, Captain Danilecki observed Mizrahi inside the secured Free Speech rally area.

Captain Danilecki passed Mizrahi's vest to Officer Gomes who, in turn, brought the vest to a nearby cruiser for transport to the district A-1 station.[6] He further told Officer Gomes to write a report for seized property and that the unknown owner[7] would be by the district A-1 station to retrieve the items later in the day. The Boston Police Department has rules and procedures for the safeguarding of personal property; among them, Rule 318, § 4. Exhibit 2. Pursuant to that policy, after the vest was brought to the district A-1 station, Officer Schettino conducted an inventory search of Mizrahi's body armor/vest to safeguard the property and

[4] Mizrahi did not tell the Boston Police that there was a loaded firearm hidden inside the vest. Captain Danilecki and Officer Gomes testified that there are signs posted throughout the Boston Garden indicating that firearms are not permitted.
[5] The defendant's witnesses testified that they were not escorted by police to the security entrance point.
[6] Boston Police seized two military grade armored vests, from Mizrahi and the other male, and both were transported to district A-1.
[7] Mezrahi refused to provide Captain Danilecki with his name or an identification.

protect the police against any allegation of theft or abuse. Officer Schettino described the vest as a tactical, steel-plated body armor with a radio. At the time he conducted the inventory, he did not know who the vest belonged to. Officer Schettino found a loaded firearm in an inside front compartment of the vest under a velcro flap and immediately notified his supervisor who, in turn, informed Captain Danilecki.

After the rally, Mizrahi arrived at the district A-1 station to pick up his body armor/vest. Mizrahi provided identification and claimed the property as his. Officers then asked Mizrahi for a license to carry a firearm and Mizrahi provided a New York license. There is no reciprocity and it is not lawful to carry a firearm in Massachusetts with a New York license.

## RULINGS OF LAW

This case deals with the breath of an administrative search. Under the law, such a screening search requires two things: first, that the purpose of the search is something "other than the gathering of evidence for criminal prosecutions," *Commonwealth v. Harris*, 383 Mass. 655, 657 (1981), and second, that the search is "reasonable" in the sense that it "must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it." *United States v. Davis*, 482 F.2d 893, 910 (9th Cir. 1973). See *Commonwealth v. Carkhuff*, 441 Mass. 122, 126-28 (2004).

The police purpose of ensuring a safe and peaceful "Free Speech" protest on the Boston Common on August 19, 2017, satisfies the threshold requirement for a lawful administrative search. See, e.g., *Commonwealth v. Roland*, 448 Mass 278, 281 (2007)(area-entry inspections at courthouse entrances, for safety and security purposes, are permissible without a warrant or individualized suspicion of wrongdoing or danger). Next, in assessing the reasonableness prong, the question is whether the government could implement measures to reduce the

intrusiveness of the search without compromising the legitimate administrative goal. The question of reasonableness turns on whether the individual was given notice such that he or she could decline to be searched. Prior notice of the search minimizes intrusiveness by allowing the person to avoid the search entirely (by choosing not to enter the protected area) and by reducing the fright or alarm that might otherwise be experienced. *Carkhuff*, 441 Mass. at 127-28.

Here, the Boston Police engaged in a significant public advisory campaign in advance of the "Free Speech" rally event. The BPD publicity campaign, a part of which was its community advisory two days before the scheduled rally on the Boston Common, clearly noticed the public that if they attended the rally there would be a large police presence (both uniformed and undercover officers) and that they were strongly urged not to bring backpacks, large bags or strollers. For those who disregarded such warnings, the public was on notice that they might be searched and that there would be no storage area to leave any belongings. The BPD's advisory also provided a comprehensive list of prohibited items which included any items which could be used as a weapon, firearms and shields. Next, on the morning of the rally, there was an obvious and highly-visible police presence on the Boston Common and, in particular, at the two entry points to the secured rally space. Officers wore brightly colored uniforms, metal barricades were in place, and walk-through metal detectors and hand-wand screeners were visible on scene. These circumstances alone would have been sufficient to satisfy the reasonableness prong; that is, Mizrahi was given sufficient notice such that he could have declined to enter the secured area and thus declined to be searched.[3] However, in this case Mizrahi also was given actual and direct notice by Captain Danilecki that if he intended to enter the secured rally space he would need to give up his body armor to the police before entering. Mizrahi made the choice to enter

[3] Mizrahi's body armor vest, with its various compartments, was akin to any large multi-compartment item (e.g. a large bag or backpack) identified in the police advisory. In addition, the court agrees that Mizrahi's tactical body armor, as described, could easily be used as a weapon. More obviously, firearms were prohibited from the secured rally space.

the secured space with the full knowledge that a consequence of that decision was he would have to turn over his tactical vest and helmet to the police and that it would be taken to a police station for safeguarding. Thereby, he consented to the search of those items.

The defendant argues that because he was not yet in the entry line to one of the two entrance points that the administrative search analysis should not apply. The court does not agree. Although the defendant was not in line to enter the secured rally space, he was on the Boston Common in an area where protestors and counter protestors were gathering and in the close vicinity of the entrance. Mizrahi's choice of clothing -- full military camouflaged fatigues, military grade body armor vest and military helmet -- gained the attention of the large crowd of rowdy counter protesters, creating an unsafe situation for both Mizrahi and his companions and the Boston Police. It was necessary and appropriate for the police to take steps to determine his intentions and to secure his safe passage to the secured rally area once Mizrahi made his destination intentions known. Said another way, once Mizrahi made it clear to the police that he intended to go into the secured rally area, given that his dress had incited the counter protestors, for safety reasons, he moved to the head of the security checkpoint line.

**ORDER**

For these reasons, the defendant's Motion to Suppress Evidence is **DENIED**.

Dated: August 14, 2018

Diane C. Freniere
Justice of the Superior Court

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**Commonwealth v. Nathan Mizrahi**
**C.R. No. 1784-CR-00670**

**Memorandum and Order on Defendant's Motion for New Trial (P#55)**

Following his conviction by a jury on firearms charges, defendant Nathan Mizrahi ("Mizrahi") moved for a new trial, arguing that his trial counsel was ineffective due to failure to raise certain grounds for suppression of evidence used against him. His appeal of the verdict has been stayed pending disposition of the motion by this Court.

After review and consideration of the defendant's motion, the Commonwealth's opposition, and materials related to the suppression decision, the Motion for New Trial is DENIED, for the reasons set forth below.

**Facts**

The incident underlying this case occurred during the "Free Speech Rally" held on the Boston Common on August 19, 2017. The rally was held one week after the "Unite the Right" rally in Charlottesville, Virginia which resulted in the death of one person, and a few days after the Holocaust Memorial in Boston was vandalized for a second time. Large crowds consisting of both those joining the rally, and counter-protestors who opposed the rally, were expected to gather on the Common.

In the days leading up to the rally, the Boston Police Department ("BPD") advised the public through press releases, news conferences, and social media postings that there would be a large police presence at the rally, certain items would be banned from the Common,[1] attendees and items such as backpacks and large bags would be subject to search, and there would be no place to store personal belongings.

On the day of the rally, police set up a secured area on the Common surrounded by steel barricades, in which rally-goers were permitted to gather and rally, separate from counter-protestors. In order to enter the secured rally space, rally-goers were required to submit to a search and pass through metal detectors. There were only two entrance points to the secured rally space. Signs were posted throughout the Common warning that firearms were not permitted on the grounds.

Counter-protestors at the event vastly outnumbered those attending the rally – numbering 10 to 15,000 by 9 a.m., with the rally not expected to begin until noon. The counter-protestors were rowdy and hostile, taunting, shouting profanity, and throwing projectiles at the rally-goers.

On the morning of the rally, Mizrahi traveled along with five others from New York to Massachusetts to attend the rally. Mizrahi and one of the men with him were dressed in U.S.

[1] The list of prohibited items included firearms, knives, weapons, sharp objects, shields, fireworks, tents, canopies, cans, glass containers, pre-mixed and alcoholic beverages, wagons, pull carts, coolers, drones, pets, grills, propane tanks, bicycles, flag poles, bats, clubs, sticks, athletic equipment and any other item which could be used as a weapon.

Army fatigues, steel-plated tactical vests, and military helmets. As the two men attempted to make their way through the crowd on the Common, counter-protestors tried to grab them and shouted, "f**k Trump, f**k Trump."

Members of a police bicycle unit that was working the rally, led by Boston Police Captain John Danilecki ("Danilecki"), came to the assistance of Mizrahi and his companion. The officers, on bicycles, surrounded the two men in order to separate them from the gathering counter-protestors, who continued to taunt and throw projectiles at the two men. Officers pushed the counter-protestors back, and the crowd dispersed.

After the situation had been defused, Danilecki asked Mizrahi and his companion if they intended to go into the secured rally area, and Mizrahi told him they did. Danilecki told the men that they could not go into the area with the body armor and helmet, and that if they went into the secured area those items would be confiscated and Mizrahi's backpack would be searched.

Mizrahi decided to enter the permitted area, but would not give up his body armor, so Danilecki took the vest and helmet off of him, as well as his companion. The vests weighed 15 to 20 pounds each, were steel-plated, and had compartments in which items could be concealed. Danilecki searched Mizrahi's backpack and returned it, and told him he could retrieve his vest and helmet at the police station after the rally. Mizrahi then entered the rally area.

Danilecki had the defendant's vest and helmet brought to the district police station, where, pursuant to BPD policy, an inventory search was conducted which revealed a loaded firearm concealed inside a front compartment of the vest. When Mizrahi arrived at the station to pick up the vest after the rally, he provided a license to carry firearms issued by the State of New York. It is unlawful to carry firearms in Massachusetts under a New York license, and Mizrahi was duly charged.

Relevant to the instant motion, Danilecki testified at the suppression hearing that the vest and helmet worn by the defendant and his companion projected a "militaristic" image which "incited" the counter-protestors. Thus, he considered the items to endanger the public safety, and seized them in order to "de-escalate [the] situation." Hearing Transcript, at 25, 44, 49. He also stated his belief that it was "common sense" that only on-duty military and law enforcement personnel have legitimate reason to wear bullet-proof vests such as that worn by the defendant. Id., at 47.

## DISCUSSION

### 1. Standard of Review

Mizrahi seeks a new trial on grounds that he received ineffective assistance of counsel during the suppression hearing. "To prevail on a motion for a new trial claiming ineffective assistance of counsel, a defendant must show that there has been a 'serious incompetency, inefficiency, or inattention of counsel – behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer,' and that counsel's poor performance 'likely deprived the defendant of an otherwise available, substantial ground of

defence.'" Commonwealth v. Millien, 474 Mass. 417, 429-30 (2016) (quoting Commonwealth v. Sferian, 366 Mass. 89 (1974)). A defendant must show that better work might have accomplished something material for the defense. See Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006). In the context of a motion to suppress, a defendant must show that counsel failed "to litigate a *viable* claim of an illegal search and seizure." Commonwealth v. Comita, 441 Mass. 86, 90 (2004) (quoting Commonwealth v. Pena, 31 Mass.App.Ct. 201, 204 (1991)) (emphasis in original).

2. Analysis

While the defendant's trial counsel argued (unsuccessfully) that evidence of the firearm should be suppressed because seizure of the vest in which it was found was unlawful, the defendant argues that counsel was ineffective in failing to raise certain grounds for suppression.

Specifically, the defendant argues, first, that his prior counsel should have argued that the seizure was unlawful because it was done for the following reasons: (1) the vest projected "militaristic imagery;" (2) the vest incited violence; and (3) police deemed civilian use of such a vest to be "illegitimate." Second, the defendant argues that prior counsel should have argued that the administrative search policy under which the vest was seized was overly broad.

a. Hearing

A judge may rule on a motion for new trial without a hearing "if no substantial issue is raised by the motion or affidavits." Mass.R.Crim.Pro 30(c)(3). With respect to the arguments raised in the new trial motion, the affidavit of prior counsel states: "[t]here was no strategic reason for omitting additional arguments for suppression. Nor did Mr. Mizrahi order me to omit any arguments for suppression." For the reasons explained below, the additional arguments for suppression now raised by the defendant are not meritorious. Accordingly, neither the motion for new trial, nor the affidavit of prior counsel stating there was no strategic reason for not raising those additional arguments, raises a substantial issue requiring a hearing, and the Court has decided this motion on the papers.

b. Basis for the Search

As noted, the defendant argues that prior counsel should have argued that seizure of the vest was unlawful because it was based on police determinations that: (1) the vest projected "militaristic imagery;" (2) the vest incited violence; and (3) civilian use of the vest is "illegitimate."

The defendant's contention fails because the police did not proffer these determinations as bases for the seizure, nor can it reasonably be inferred that they were bases for the seizure. Rather, the Commonwealth argued, and the Motion Judge agreed, that the vest was seized as part of a lawful administrative search. For the reasons set forth below, the Motion Judge's finding does not merit revisiting, and therefore arguing that suppression was warranted on the grounds now raised would not have accomplished anything material for the defendant.

Specifically, while Danilecki testified that the vest projected a "militaristic" image, this was not an explanation of why the vest was seized, but of why it was inciting the crowd. Contrary to defendant's contention, the officers' belief that the crowd was incited to violence by the body armor was well-founded, as the credible evidence proffered at the hearing – including the officers' testimony and a videotape of the incident – established that counter-protestors gathered around the men as soon as they approached the rally area, shouted profanities, and threw projectiles at them until police physically forced them back. Danilecki explicitly testified that he removed the vests and helmets from the defendant and his companion in order to de-escalate the rising tensions and defuse the threat to public safety that these items were creating. As Danilecki seized the vest in order to maintain public safety, not as a means of gathering evidence for criminal prosecution, the threshold requirement for a lawful administrative search was satisfied. See Commonwealth v. Carkhuff, 441 Mass. 122, 126 (2004) (administrative search must be conducted as part of a scheme that has as its purpose something other than the gathering of evidence for criminal prosecutions).

Similarly, Danilecki's statement that "common sense" dictates that only military or law enforcement personnel have "legitimate" reason to wear a bullet-proof vest was not proffered as a basis for the seizure, nor can it reasonably be inferred that it was one, as the statement was in response to defense counsel's question as to how one would know not to wear such a vest to the rally. Hearing Transcript, at 47.

Accordingly, the defendant's contention that seizure of the vest was unlawful because it was based on "police hostility" toward the vest does not state a viable claim of an illegal search and seizure, and the decision not to raise this argument by defendant's prior counsel did not comprise ineffective assistance of counsel. See Comita, 441 Mass. at 90-91 ("it is not ineffective assistance of counsel when trial counsel declines to file a motion with a minimal chance of success").

c. Lawfulness of Policy

The defendant further argues that prior counsel should have argued that the administrative search policy under which the vest was seized was unconstitutionally vague and overbroad, because it subjected to confiscation anything that could be used as a "weapon" or a "shield," giving police too much discretion in determining what items could be seized.

Such an argument would have been futile, because the public had adequate notice that items such as the vest defendant wore would be subject to search and seizure.

Specifically, the BPD advised the public through press releases, media reports, and social media that any item "which could be used as a weapon," as well as "shields" were banned from the rally, and that there was nowhere on the Common where such items could be stored. Thus, Mizrahi had constructive notice that the vest would be subject to seizure. Mizrahi also had actual notice that his vest would be seized if he went into the secured rally area, as Danilecki explicitly advised him it would be following the confrontation with the counter-protestors.

The defendant's contention that the policy was too vague to give the defendant adequate notice that his vest qualified as something that "could be used as a weapon," or a "shield," is implausible. The vest weighed 15 to 20 pounds, was steel-plated, and had compartments which could conceal items. It does not require "ad hoc discretion," as defendant argues, to conclude that such an item could be used as a weapon or a shield, or to consider it comparable to a "large bag," which was subject to search under the explicit terms of the police advisory.

The notice that was provided to Mizrahi minimized the intrusiveness of the search policy, as it gave him the opportunity to avoid the seizure by not wearing the vest, or wearing the vest but staying out of the secured rally area. See Carkhuff, 441 Mass. at 128 ("[p]rior notice minimizes intrusiveness" of a search by allowing individuals to avoid the search entirely, and by reducing the fright or alarm that would otherwise be experienced). Moreover, removal of the vest and helmet, which were the source of increasing tension among the already hostile crowd, while allowing the defendant to enter the rally area otherwise unimpeded, was the only realistic way to defuse the threat and simultaneously protect the defendant's First Amendment rights. The seizure was therefore "reasonable," in that it was "as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it," and thus satisfied the second and final prong of a lawful administrative search. Id., 441 Mass. at 127.

Accordingly, challenging the administrative search policy would not have accomplished anything material for the defendant, and the decision not to do so by defendant's prior counsel did not comprise ineffective assistance of counsel.[2]

**ORDER**

Accordingly, the defendant's Motion for New Trial is DENIED.

Date: January 19, 2021

Jackie Cowin
Associate Justice, Superior Court

[2] The Commonwealth further correctly argues that there would have been inevitable discovery of the firearm even had the vest not been seized, as the firearm would have been detected by the metal detectors at the entrance to the rally. It strains credulity for the defendant to argue that his entrance to the secured rally area is a matter of speculation, since he traveled from New York for purposes of attending the rally, and was one of the scheduled speakers that day.

21-P-93 Appeals Court

COMMONWEALTH vs. NATHAN MIZRAHI.

No. 21-P-93.

Suffolk. December 1, 2021. – February 2, 2022.

Present: Milkey, Blake, & Grant, JJ.

Firearms. Practice, Criminal, Motion to suppress, New trial, Assistance of counsel, Duplicative convictions. Constitutional Law, Search and seizure, Assistance of counsel. Search and Seizure, Administrative inspection, Inevitable discovery.

Indictments found and returned in the Superior Court Department on September 25, 2017.

A pretrial motion to suppress evidence was heard by Diane C. Freniere, J.; the case was tried before Robert N. Tochka, J., and a motion for new trial was considered by Jackie A. Cowin, J.

Kathryn Karczewska Ohren for the defendant.
Brooke Hartley, Assistant District Attorney, for the Commonwealth.

BLAKE, J. Approximately one week after a violent protest in Charlottesville, Virginia, resulted in the murder of a counter protestor, and days after the New England Holocaust

Memorial in Boston was vandalized, a "free speech" rally was scheduled to take place at the rotunda on Boston Common.[1] The defendant, Nathan Mizrahi, traveled from New York to attend the rally. As the defendant approached the entrance to the rotunda, he was met by counter protestors who verbally attacked him and threw projectiles, including bottles full of liquid, at him. Before he could be admitted into the area set aside for rally attendees, Captain John Danilecki of the Boston Police Department (department) seized the tactical steel-plated body armor (vest) that the defendant wore. A loaded firearm was found in an inside front compartment of the vest. Because the defendant did not have a Massachusetts license to carry a firearm, he was arrested and charged with various firearm offenses.

The defendant's attorney (suppression counsel) filed a motion to suppress all evidence seized from the defendant. After an evidentiary hearing, a judge of the Superior Court (suppression judge) denied the motion. Following a jury trial before a different judge, the defendant was convicted of possession of a loaded firearm without a license, possession of a firearm without a license, and possession of ammunition without a firearm identification (FID) card. The defendant, now

[1] The rotunda is also known as the Parkman Bandstand.

represented by new counsel, filed a motion for a new trial that was assigned to a third judge (motion judge), the trial judge having retired. The motion was denied without a hearing.

In this consolidated appeal from his convictions and the order denying his motion for a new trial, the defendant claims that suppression counsel was constitutionally ineffective for not pursuing a different strategy in the motion to suppress. He also contends, and the Commonwealth agrees, that the conviction of unlawful possession of ammunition is duplicative of the conviction of unlawful possession of a loaded firearm. As that conviction relates only to the ammunition that was located inside the firearm, we agree and vacate that conviction. We affirm the remaining convictions.

Background. 1. The hearing on the defendant's motion to suppress. a. Findings of fact. We recite the facts as found by the suppression judge, none of which the defendant challenges on appeal. The city of Boston issued a permit for a free speech rally[2] to be held on August 19, 2017, at the rotunda on Boston Common. The department was concerned for the safety of the rally attendees and the anticipated 40,000 counter protestors, particularly in the wake of the violence at the Charlottesville

[2] The free speech rally attendees were known to the department to be a "pro-Second Amendment" group.

rally the week prior. In response, the department set up what they called a "buffer zone" area[3] (permitted area) to separate the rally attendees in a secure area near the rotunda. Also, in advance of the rally, the department made multiple public statements to the news media and on social media to alert the public of security protocols that would be in place to ensure a safe and peaceful rally. As part of the media campaign, the department issued a community advisory two days prior to the rally. Among other things, the advisory notified the public that there would be a large presence of police officers in uniform and in plainclothes, and fixed and mobile video cameras. The advisory also alerted attendees not to bring large bags or backpacks, that these items may be subject to search, and that there was no storage available for personal items. The department also released a list of prohibited items that, as relevant here, included firearms, knives, weapons, sharp objects, shields, and other items that could be used as weapons.

The rally was scheduled to begin at noon. To enter the permitted area, attendees were required to submit to a search and screening of their bags, to walk through metal detectors, and to be scanned with a handheld wand. There were two entrance

[3] This area included a "corral area" for the press. It also had a fifty-foot "buffer zone" with metal barriers to separate the rally attendees from the counter protesters.

points to the permitted area, each with a large police presence. Captain Danilecki arrived at Boston Common at 9 A.M. At that time, there were already approximately ten to fifteen thousand counter protesters, who significantly outnumbered the rally attendees. The counter protestors were taunting, shouting profanities, and throwing projectiles at the rally attendees.

Danilecki's attention was drawn to two men in the crowd, one of whom was later identified as the defendant. The men, who were moving toward him, wore United States Army fatigues, steel-plated tactical body armor, and military helmets. Counter protestors tried to grab the two men and shouted profanities at them.[4] Danilecki believed that the men's attire was inciting the counter protestors and that, as a result, the two men were in danger. To ensure their safety, six officers separated the opposing parties and surrounded the two men. Counter protestors continued to taunt and throw projectiles. Danilecki asked the men whether they intended to go in to the permitted area. The defendant, who was calm and well behaved, said that they did. Danilecki advised the men that they could not do so while

[4] The suppression judge credited the testimony of Danilecki. She did not credit "much of the testimony" of the two witnesses called by the defendant, who testified that "there were not many counter protesters in their vicinity immediately before the police approached" the defendant. She also viewed a video recording that she found to be consistent with Danilecki's testimony.

wearing the vests[5] and helmets. The defendant did not want to remove his vest. Danilecki told him that he would confiscate the vest if the defendant wanted to go in to the permitted area. Ultimately Danilecki removed the defendant's helmet and the vest. Danilecki said the vest was very heavy, weighing between fifteen and twenty pounds, and had compartments that could conceal items. The defendant asked for a receipt; Danilecki was unable to provide one, but he advised the defendant, who refused to identify himself, that he could retrieve the items at the area A-1 police station (police station) after the rally. After a search of the defendant's backpack (which revealed no prohibited items), the men were escorted into the permitted area.

At Danilecki's request, an officer transported the vest to the police station for safekeeping. Pursuant to the department's rules and procedures for the safeguarding of personal property, an inventory search of the vest was conducted. A loaded firearm was located in an inside front compartment of the vest under a Velcro strap. After the rally, the defendant arrived at the police station to pick up his

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[5] As described infra, the suppression judge found that the vest was "akin to any large multi-compartment item" identified in the police advisory, and that it "could easily be used as a weapon." The defendant does not challenge these findings on appeal.

belongings. He provided identification and confirmed that the vest belonged to him. When asked whether he had a license to carry firearms, the defendant produced one from New York. He was not licensed in Massachusetts.

b. Rulings of law. The suppression judge made the following rulings of law, none of which the defendant challenges on appeal. The police purpose of ensuring a safe and peaceful free speech rally on Boston Common satisfied the threshold requirement for a lawful administrative search. In analyzing the reasonableness of the search, the judge considered whether the department implemented measures to reduce the intrusiveness of the search without compromising the administrative goals of the search, and whether the defendant was given notice that he could decline to be searched. She found that the defendant had actual and constructive notice of the event's security requirements based on the significant public advisory campaign in advance of the rally; he made the choice to enter the permitted area with full knowledge that as a consequence of that decision he would have to turn over his tactical vest and helmet to the police; and he was aware the vest would be taken to a police station for safeguarding. She concluded that the defendant consented to the search. The defendant, through counsel, reaffirmed at oral argument before this court that he

was not challenging the suppression judge's findings of fact and rulings of law.

2. Motion for new trial. The defendant filed a motion for a new trial, contending that suppression counsel was ineffective where he did not argue that the seizure of the vest was unlawful because it was based on police determinations that the vest projected militaristic imagery and incited violence, and that its civilian use was illegitimate. In denying the motion without a hearing, the motion judge concluded that the vest was seized as part of a lawful administrative search. Citing Commonwealth v. Comita, 441 Mass. 86, 90-91 (2004), she concluded that the grounds raised by the defendant "would not have accomplished anything material for the defendant."

Discussion. 1. Administrative search. Here, the suppression judge and the motion judge concluded that the police lawfully seized the defendant's vest as part of an administrative search. Administrative searches must be conducted "as part of a scheme that has as its purpose something 'other than the gathering of evidence for criminal prosecutions.'" Commonwealth v. Carkhuff, 441 Mass. 122, 126 (2004), quoting Commonwealth v. Harris, 383 Mass. 655, 657 (1981). As the motion judge found, that purpose was to ensure a safe and peaceful free speech rally on Boston Common. See Commonwealth v. Roland R., 448 Mass. 278, 281 (2007) ("area-

entry inspections at court house entrances" permissible without warrant for safety and security purposes). Cf. Commonwealth v. Gray, 466 Mass. 1012, 1013 (2013) ("sobriety checkpoint must be conducted in strict compliance with the written guidelines applicable to that particular checkpoint").

"An administrative search must also be 'reasonable' in the sense that it 'must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it'" (citation omitted). Carkhuff, 441 Mass. at 127. In order to minimize the intrusiveness, there typically must be prior notice of the search. See id. at 127-128. Here, the police made multiple statements about the security protocols leading up to the rally, including on social media. There was signage at Boston Common, and Danilecki told the defendant that he could not enter the permitted area with the vest and helmet.[6] This satisfied the reasonableness requirement set out in Carkhuff.[7] It is against this backdrop that we consider the defendant's ineffective assistance of counsel claim.

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[6] Among other things, the signs posted throughout Boston Common stated that "firearms are not permitted."

[7] The defendant's reliance on Commonwealth v. Garcia-German, 90 Mass. App. Ct. 753 (2016), is misplaced. There, we recognized that a house of correction (HOC) has an interest in preventing contraband from being accessible to inmates, but we concluded that the search of a vehicle in the HOC parking lot was not a valid administrative search, as the HOC had no written

2. Ineffective assistance of counsel. The defendant claims that suppression counsel was ineffective because in arguing the motion to suppress, counsel should have raised issues about the police misconduct and alleged violations of the defendant's right to free speech under the First Amendment to the United States Constitution. He asserts that suppression counsel ignored the fact that Danilecki "conceded" that the seizure of the vest was the result of "viewpoint discrimination," and not public safety, and the department's security policies were "overbroad" and ripe for subjective abuse. He maintains that the real reason that Danilecki seized the vest was because counter protesters were "shrieking" at him to do so, and not because of the administrative search or public safety grounds to which Danilecki testified.

We review the denial of a motion for a new trial for a significant error of law or abuse of discretion. See Commonwealth v. Wilson, 486 Mass. 328, 334 (2020). To prevail on a claim of ineffective assistance of counsel, "the defendant must show that the behavior of counsel fell measurably below that of an ordinary, fallible lawyer and that such failing 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" Commonwealth v. Prado, 94

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policy that regulated the search, and the decision to search was discretionary. Id. at 758-760.

Mass. App. Ct. 253, 255 (2018), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

At the suppression hearing, the defendant attacked the sufficiency of the advisories issued prior to the rally. Suppression counsel argued that there was no specific evidence of which publication methods were used by the department, and that there was no evidence that any of the information actually reached the defendant, who had traveled from New York to attend the rally. Moreover, suppression counsel argued that the removal of the vest from the defendant was not justified as an administrative search, because the defendant was some distance from the entrance to the permitted area. This, suppression counsel claimed, proved that Danilecki made a unilateral decision to remove the vest before the defendant subjected himself to the rally's search requirements. To support this claim, suppression counsel called two witnesses who testified that there were not many counter protestors in the vicinity before the police approached the defendant. Suppression counsel also applied for interlocutory review of the order denying the motion to suppress.[8] Although suppression counsel's strategy in challenging the search was ultimately unsuccessful, it was reasonable when made. See Commonwealth v. Gomes, 478 Mass.

[8] The petition for interlocutory review was denied.

1025, 1026 (2018) (strategic choices reviewed with some deference to avoid characterization of defense as unreasonable when merely unsuccessful).[9]

The defendant's argument also fails under the second prong of the Saferian test. The motion judge found that the strategy the defendant contends should have been employed would not have accomplished something material for him. See Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006). We agree. At bottom, the defendant's claims on appeal are a repackaging of the arguments made by suppression counsel. More specifically, as to the defendant's claim of "viewpoint discrimination," suppression counsel argued that the police "went in" due to the defendant's "military gear," and that the defendant was not given a real choice whether to remove his vest and enter the permitted area or to refuse to do so. Suppression counsel argued that the police simply seized the vest, rendering the search unconstitutional. Further, contrary to the defendant's

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[9] The defendant contends that suppression counsel had no strategic reason for failing to take the approach that the defendant now claims would have been successful. He bases that contention on suppression counsel's affidavit filed in support of the defendant's motion for a new trial, in which suppression counsel stated, "As far as I can remember, there was no strategic reason for omitting additional arguments for suppression." In finding that suppression counsel met the standard of an ordinary, fallible lawyer, the motion judge was not bound by suppression counsel's affidavit disavowing that he had any such strategy. See Commonwealth v. Hudson, 446 Mass. 709, 714 (2006).

contention, and as the motion judge observed, Danilecki did not concede that his actions, and those of the department, were for a reason other than public safety. He testified that the department had serious public safety concerns well before the rally began, which included that a counter protestor at a similar rally was recently murdered in Charlottesville. He also explained that tens of thousands of counter protestors showed up three hours in advance of the rally, and that a group of these individuals singled out the defendant and his companion, who were wearing "militaristic" attire. Danilecki was concerned for the pair's safety, and in order to protect them, the defendant and his companion were escorted into the permitted area. It was at this point that the administrative search was conducted. In addition, suppression counsel also argued that the security policy -- by its own terms -- did not authorize the police to seize the vest. However, the suppression judge found that the vest was "akin to any large multi-compartment item" identified in the police advisory. Notably, she found that the vest "could easily be used as a weapon," a finding not challenged on appeal.[10]

[10] The suppression judge observed that a steel-plated vest weighing between fifteen to twenty pounds could be used as a weapon or as a shield. She also concluded that the vest could be considered comparable to a large bag that was subject to search under the explicit terms of the policy advisory.

A defendant alleging the ineffective assistance of counsel must establish that the Commonwealth would not have met its burden to prove that the warrantless search and seizure was constitutional. See Comita, 441 Mass. at 93-94. See also Commonwealth v. McWilliams, 473 Mass. 606, 615, 619 (2016) (motion to suppress statements and identification would not have succeeded). This the defendant failed to do.[11] Suppression counsel was not ineffective for failing to pursue a motion on what the defendant categorized as "correct grounds." Indeed the defendant's preferred arguments would not have been successful, as they are nothing more than a refinement of the arguments that he made in connection with the motion to suppress.[12] See Comita,

[11] The motion judge was not required to conduct an evidentiary hearing. This is particularly true where the defendant does not challenge the findings of the suppression judge, which support the conclusion that the motion for a new trial did not raise a substantial issue requiring a hearing.

[12] Questioned on cross-examination about whether he found any contraband on the defendant, Danilecki replied that he considered the vest contraband because it conveyed a "militaristic" image that was "inciting" the counter protestors. The defendant seizes on that comment and argues that counsel was ineffective for not having argued that this was an improper reason for Danilecki to seize the vest. Read in context, Danilecki's comment did not undermine his detailed testimony about the administrative search protocols, based on which the suppression judge found that seizure of the vest was justified. Indeed, Danilecki's concerns for public safety support the appropriateness of the administrative search protocols that the department established to allow for a safe and peaceful rally.

supra at 91 (counsel cannot be ineffective for not pursuing futile motion).

The defendant next claims that suppression counsel would have been successful had he argued that the search was excessive and subject to abuse, and therefore was unreasonable. We are not persuaded. The department provided ample constructive and actual notice to the defendant before he surrendered his vest to gain access to the permitted area. As the media advisories indicated, there was a large police presence at the rally, and conspicuous signs warned that attendees were subject to search if they wanted to enter the permitted area. Moreover, there were steel barricades, handheld wand scanners, and metal detectors at the only two entry points to the permitted area. As the motion judge found, the department policy that resulted in seizure of the vest was the most minimally intrusive way to ensure public safety while protecting the defendant's rights under the First Amendment to the United States Constitution. See Carkhuff, 441 Mass. at 127-128 (prior notice minimizes intrusiveness of search).

Indeed, the defendant had the option to avoid the search entirely by not entering the permitted area; he chose

otherwise.[13] Moreover, the metal detectors at the entrance to the rally would have detected the firearm. Therefore, it was inevitable that the firearm would have been discovered. See Commonwealth v. Campbell, 475 Mass. 611, 622 (2016) (suppression not required where Commonwealth can demonstrate that discovery of evidence by lawful means was certain and police did not act in bad faith to accelerate discovery). As was the case here, the inevitability of the discovery was "certain as a practical matter" (citation omitted), Commonwealth v. Hernandez, 473 Mass. 379, 387 (2015), that is, discovery of the firearm was "virtually certain." Commonwealth v. Perrot, 407 Mass. 539, 547 (1990). This doctrine serves as an independent ground for affirming the denial of the motion for a new trial and the firearm convictions. See Commonwealth v. Pridgett, 481 Mass. 437, 438 n.2 (2019) (appellate court is free to affirm so long as grounds for affirmance are supported by record and findings).

3. Possession of ammunition. The defendant argues -- and the Commonwealth concedes -- that the conviction of unlawful possession of ammunition is duplicative of the conviction of unlawful possession of a loaded firearm. This is the only claim that the defendant raises with respect to his direct appeal.

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[13] Danilecki told the defendant that he had two options. He could give up the vest and subject himself to search, or he could leave the rally without entering the permitted area.

Because the defendant was convicted of possessing only the ammunition that was located inside the firearm, we agree and that conviction must be vacated. See Commonwealth v. Johnson, 461 Mass. 44, 51-54 (2011).

Conclusion. On the indictment charging possession of ammunition without an FID card, the judgment is vacated, the verdict is set aside, and that indictment is to be dismissed. The remaining judgments are affirmed. The order denying the motion for a new trial is affirmed.

So ordered.