COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BRISTOL, ss.

SUPREME JUDICIAL COURT
DOCKET NO.

APPEALS COURT DOCKET
NO. 2019-P-0992

COMMONWEALTH
OF MASSACHUSETTS,
Appellee

vs.

ZAHKUAN J. BAILEY-
SWEETING,
Appellant

APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

Elaine Fronhofer
BBO # 636135
Suite 206, PMB 234
6 University Drive
Amherst, MA 01002
(413) 253-8955
elaine@fronhoferlaw.com

Pursuant to Mass. R. App. P. 27.1, Mr. Bailey-Sweeting, the Appellant, applies for further appellate review of the Appeals Court's December 2, 2020 published decision (decided by a three-to-two split) because, if left to stand, it will sharply curtail the right of citizens, and especially Black citizens, to be free from a warrantless searches (patfrisks). The Appeals Court's decision dramatically lowers the bar for when police can patfrisk a citizen *if* the police claim the target is a member of a gang. The available data clearly shows police categorize Blacks as being members of a gang at a rate exponentially greater than Whites. That reality means that the Appeals Court's decision is not only inconsistent with settled precedent it will also greatly exacerbate the existing systemic racism in law enforcement and in our criminal justice system.

STATEMENT OF PRIOR PROCEEDINGS

On March 15, 2018, Mr. Bailey-Sweeting was indicted for possession of a loaded large capacity firearm, in a vehicle, without a license, in violation of Mass. General Laws chapter 269, sections 10(a),(m), and (n).

On June 12, 2018, he filed a motion to suppress evidence seized without a warrant. An evidentiary hearing on that motion was held on June 20th and 22nd, 2018 (Yessayan, R., J., presiding). On July 20, 2018, the lower court denied the motion making findings on the record.

On August 30, 2018, at a plea hearing (Yessayan, R., J., presiding), a nolle prosequi was entered on the charges of carrying a loaded large capacity weapon without a license, and, contingent upon the results of an appeal of the denial of the motion to suppress, Mr. Bailey-Sweeting pleaded guilty to one count each of possession of a large capacity firearm and carrying without a license. He was sentenced to state prison for not less than 2 years, 6 months and not more than 4 years on the possession charge with a concurrent sentence of the same length on the license charge. He received credit for 185 days of pre-trial incarceration.

At the suppression hearing and plea hearing, Mr. Bailey-Sweeting was represented by Michelle Rioux, the government by ADA Matthew Sylvia. His present counsel, Elaine Fronhofer, was appointed to represent him for post-conviction matters.

On July 2, 2019, Mr. Bailey-Sweeting's appeal of his convictions was entered in the Appeals Court. Oral argument was held March 13,

2020 before a panel of three judges. The underlying decision (submitted herewith) shows that while two of the judges on that panel ruled in favor of Mr. Bailey-Sweeting, the panel was later expanded to include two additional judges, which resulted in a three-two decision in favor of the Commonwealth.

FACTS RELEVANT TO THE APPLICATION

Set forth below are relevant facts not included in the Appeals Court's decision.

The police testified the driver had already made the decision to pull into the Kentucky Fried Chicken parking lot before the police, in an unmarked car, alerted the driver she was being stopped. Tr1/6,28,29.[1]

The officer who undertook the search of Mr. Bailey-Sweeting acknowledged that his speculation that Mr. Paris could be trying to divert the police attention was a "hunch." Tr1/35.

The officer who patfrisked Mr. Bailey-Sweeting said Mr. Paris's behavior was different than as he behaved in the two prior traffic stops he personally had made with Mr. Paris in the car, and said he may

[1] References to the suppression hearing transcripts are by Tr1[or Tr2, or Tr3]/[page number] (there are separate transcripts for the AM and PM hearing held June 22nd, referenced as Tr2 and Tr3). Reference to the dissenting justice's separately paginated portion of the attached Appeals Court decision will be by "Dissent/[page number]."

have even stopped him a third time before the underlying traffic stop but he could not be sure. Tr1/12,31. The other two officers who were involved in the underlying traffic stop likewise testified to having stopped Mr. Paris for in-the-street inquiries; *both* of those officers described having subjected Mr. Paris to these encounters on "numerous" occasions. Tr2/7; Tr3/12.

POINT WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

I. The exit order and patfrisk of Mr. Bailey-Sweeting that was conducted based upon the officer's supposition that another passenger's uncharacteristic behavior was an attempt to distract the police from possible illegal behavior and because some of the car's occupants were gang members violated Bailey-Sweeting's right to be free from unlawful search and seizure under the Fourth Amendment of the United States Constitution and art. 14 of the Massachusetts Declaration of Rights.

WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

Zahkuan Bailey-Sweeting was a backseat passenger sitting quietly in a car pulled over for a traffic infraction. There was no evidence the officers had any forehand knowledge or concern that the car or anyone in it was engaged in or about to engage in criminal activity. No officer claimed to see anyone in the car engage in any furtive movements

suggesting an attempt to conceal contraband. No officer claimed anyone in the car even appeared nervous about the arrival of police.

The court below relied upon the officer's supposition that the front seat passenger's (Raekwan Paris's) uncharacteristically belligerent behavior was an attempt to divert the police from possible illegal behavior. (Notably, the officer who undertook the search of Mr. Bailey-Sweeting acknowledged that that assumption was a "hunch." Tr1/35.)

It is well-settled that searches based on a hunch are "essentially random and arbitrary" and "inconsistent, under constitutional norms (art. 14 of the Declaration of Rights of the Massachusetts Constitution and the Fourth Amendment to the Constitution of the United States), with a free and ordered society." *Commonwealth* v. *Torres*, 424 Mass. 153, 161 (1997). Even if the officer had not himself characterized his supposition as to Mr. Paris's motives as being a "hunch", the evidence the government presented established that that is exactly what it was. This is especially clear because the conduct by Paris that led the officer to speculate that he was trying to divert police attention had a much more plausible explanation.

The police testified that Paris's behavior, vociferously complaining about being harassed by the police, was uncharacteristic as he had been compliant when police interacted with him on prior occasions – only one of which involved an incident that actually led to

an arrest (a firearm was found in a car he had been in). But the officers who effected the stop testified to stopping Paris multiple other times for traffic stops as well in the street to make inquiries (indeed, two of the officers testified they had subjected Paris to the latter type of stops "numerous times"). As such, the fact that Paris angrily complained of being harassed was not just a reasonable reaction, it was an almost predictable one. This is especially so in the circumstance of this traffic stop, where Paris would likely not have known why the car had been pulled over and understandably assumed it was because the police were, once again, harassing him.

Given this reality, the officer's speculation that Mr. Paris was not *actually* fed up with being constantly stopped by the police but rather that he might be attempting to divert police attention from possible illegal conduct was not even a particularly compelling hunch. Moreover, as this Court held in *Commonwealth* v. *Torres-Pagan*, 484 Mass. 34, 40 (2020) -- where the police were surprised by the defendant's behavior when he exited the car without being asked to do so -- "surprise in response to unexpected behavior is not the same as suspicion that the person is armed and dangerous." *Id.* at 40; see *Commonwealth* v. *Torres*, 424 Mass. at 159 (it "is not unnatural for a … passenger … to get out of the car to meet an officer who has signaled

for the vehicle to pull over"). And it certainly is not the same as a reasonable suspicion that *another* passenger who is just sitting quietly in the backseat is armed and dangerous. See Dissent/2-3 (acknowledging Paris's behavior but stating "…defendant's mere presence in the same car as Paris, however, was insufficient to justify a patfrisk of him [the defendant]), citing *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979) ("person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person"); *United States* v. *Di Re*, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled").

Also problematic is the majority's reliance on gang membership and Mr. Bailey-Sweeting's past firearms offense to justify his patfrisk.

As this Court recently reiterated, to establish the constitutionality of a patfrisk ("a 'severe ... intrusion upon cherished personal security [that] must surely be an annoying, frightening, and perhaps humiliating experience'"), the government must prove the police had a reasonable suspicion, based on specific articulable facts, that the suspect is both dangerous and has a weapon on them.

Commonwealth v. *Torres-Pagan*, 484 Mass. at 39, quoting *Terry* v. *Ohio*, 392 U.S. 1, 24-25 (1968).

That justification was not established here.

To justify the patfrisk of Mr. Bailey-Sweeting, the majority below reasoned as follows. Mr. Paris's hostile behavior *could* be a ploy to divert police attention from something in the car. The something in the car *could* be a gun. Because Bailey-Sweeting was allegedly a member of one of the two gangs that Paris was alleged to be a member of, Paris *could* know that Bailey-Sweeting had a gun on him and thus his actions *could* be an attempt to shield a fellow gang member. The dissent was correct to describe the speculation about Paris possibly knowing that another passenger had a gun as "too great an inferential leap, [which] is neither supported by the testimony or the judge's findings, nor argued by the Commonwealth." Dissent/6.

As the dissent also correctly noted, "…that the defendant was a known gang member in the company of another gang member, and was adjudicated delinquent as a juvenile on a firearm offense several years earlier, were also insufficient to justify his patfrisk." Dissent/3, citing *Commonwealth* v. *Pierre P.*, 53 Mass. App. Ct. 215, 216, 217(2001) (high crime area and fact that some individuals were gang affiliated

did not justify patfrisk) and *Commonwealth* v. *Cordero*, 477 Mass. 237, 246 (2017) ("the defendant's prior convictions, without further specific and articulable facts indicating that criminal activity was afoot, could not create reasonable suspicion").

Further, the fact that the case the majority cites to support its conclusion that the passengers' gang membership justified the search is *Commonwealth* v. *Elysee*, 77 Mass.App.Ct. 833 (2010) only further highlights the court's error. While in *Elysee* the vehicle's occupants did have gang affiliations and at least one had a pending gun charge (factors the court noted in deciding to uphold the constitutionality of the exit order at issue in that case), the factors that actually justified the exit order in *Elysee* were dramatically different and more compelling. What that court held were the key factors that justified the police ordering the backseat passenger out of the car were:

- The stop and police encounter occurred within *minutes* of an apparently unresolved and potentially violent gang dispute involving the occupants of the vehicle. Indeed, the police were tracking the vehicle because of that very real concern. *Id.* 841.
- When the police stopped the vehicle, they observed a rocking of the *rear* of the vehicle *where the passenger who was ordered out of the car was located*, consistent with something being concealed. *Id.* at

842. (The court referred to this as the most important factor.)

- The rear passenger's "failure when asked to identify himself, to look at [the officer], or to answer, and his lying when asked if he had identification…." *Id.* Behavior, the Court explained, that "could appropriately have served to bolster the officers' suspicion that indeed some contraband, most likely a weapon, was somewhere in the vehicle." *Id.*

Here, in contrast, "[n]othing the defendant said or did supports [the] conclusion" he was armed and dangerous, nor "did [he] engage in any verbal or nonverbal communication with Paris from which to infer that he jointly possessed a weapon with Paris." Dissent/4-5.

The Appeals Court's decision significantly lowers the protections afforded by the Fourth Amendment and art. 14 where the police conduct is directed against a gang member. According to the underlying decision, Mr. Bailey-Sweeting's right to be free from being forced out of a vehicle and patfrisked by police depended upon whether or not another passenger (Paris) expressed his anger at the police for harassing him, even in a situation where police should have known Paris's response was understandable. This case sets a precedent that even the most minimally suggestive conduct by a citizen justifies the patfrisk of any persons in their company who are gang members

with any prior firearm involvement. The dissent was correct when it warned that the decision "in effect, exclude[s] gang members with any prior firearm involvement from the reasonable suspicion requirement established by *Terry* v. *Ohio*, …, and its progeny." Dissent/6.

Further appellate review is necessary given the impact of the lower court's published decision on citizens who are simply going about their day. See *Commonwealth* v. *Loughlin*, 385 Mass. 60, 64 (1982) (Hennessey, J., concurring opinion). But it is especially important for another reason: the decision, as it stands, will actually exacerbate the existing racism in our criminal justice system.

In a 2016 address, the late Chief Justice Gants cited data showing "'great disparity in the rates of imprisonment among Whites, African-Americans, and Hispanics in this Commonwealth,'" noted "the need to take 'a hard look at how we can better fulfill our promise to provide equal justice,'" and announced a collaborative study with Harvard "'to examine racial and ethnic disparities in the Massachusetts criminal system.'"[2] This September, a culmination of

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[2] *Racial Disparities in the Massachusetts Criminal System*, Criminal Justice Policy Program Harvard Law School, Bishop E., et. al. (Sept. 2020) (https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf), page 3 (internal footnotes and citations omitted).

that research was published.[3] Despite being done at the direction of the Chief Justice, researchers were unable to obtain usable data from the police.[4] Nonetheless, given its relevance to the problem Justice Gants sought to address, the report summarizes what other researchers had found:

> … police officers stop, search, and arrest more Black and Brown people than White people. … In Massachusetts, a report on the Boston Police Department's civilian encounters between 2007 and 2010 showed that despite making up only 24% of Boston's population, Black people were subject to 63% of reported encounters where Boston police officers interrogated, stopped, frisked, or searched a civilian. … Another study of the Boston Police Department's traffic stops found that Black and Hispanic drivers were more than twice as likely as White drivers to have their car searched as part of a traffic stop. The study's modeling suggested that the disparity in searches was more consistent with racial bias than with differences in criminal conduct.[5]

In addition, in 2019, after fighting and losing a lawsuit filed to obtain data from the Boston police department about their gang membership database, it was revealed that the Boston police listed Blacks as accounting for an astounding 76.1 percent of all its listed gang members

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[3] *Id.* at 1-103.

[4] *Id.* at 3.

[5] *Id.* at 18 (internal footnotes and citations omitted).

(9.7 percent Black-Hispanic and 66.4 percent Black non-Hispanic); White non-Hispanics were only 2.3 percent.[6] The report on the data also highlights the highly subjective criteria police use to categorize citizens as gang members.[7]

The overall data is clear: the lower court's unconstitutional lowering of the standards by which police can undertake patfrisks will harm one sector of our society in particular -- the very group that is *already* disproportionately targeted and subjected to intrusive police encounters.

Finally, by a two to one margin, the majority of the Appeals Court justices assigned to this appeal and who participated in oral argument held the patfrisk was unconstitutional. Further appellate review is particularly appropriate because it was only when the lower court expanded the panel to include two additional justices who had not participated in oral argument that the court flipped to a three-two decision in favor of the government.

CONCLUSION

Further appellate review is requested because the decision below is unconstitutional and irreconcilable with the decisions of this Court and

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[6] https://www.wbur.org/news/2019/07/26/boston-police-gang-database-immigration.

[7] *Id.*

the United States Supreme Court; because the decision below will exacerbate the existing systemic racism in our criminal justice system; and because the decision below was not unanimous, with two of the three judges who signed onto the majority's opinion not having participated in oral argument.

December 23, 2020

ZAHKUAN BAILEY-SWEETING
By his attorney,

__/s/Elaine Fronhofer____
Elaine Fronhofer
BBO # 636135
6 University Drive, Suite 206, PMB 234
Amherst, MA 01002
(413) 253-8955
elaine@fronhoferlaw.com

CERTIFICATE OF COMPLIANCE WITH
MASS. R. APP. P 16(k) and 27.1(b)

I, Elaine Fronhofer, do hereby certify that the above Application for further appellate review conforms to the requirements of Mass. R. App. P. 16(k) and 27.1(b) by using proportional spaced 14 point font and that the section setting forth why appellate review is appropriate is no greater than 2,000 words.

Dated: December 23, 2020

__/s/ Elaine Fronhofer____

Elaine Fronhofer
BBO # 636135
6 University Drive, Suite 206, PMB 234
Amherst, MA 01002
(413) 253-8955
elaine@fronhoferlaw.com

19-P-992 Appeals Court

COMMONWEALTH vs. ZAHKUAN SWEETING-BAILEY.[1]

No. 19-P-992.

Bristol. March 13, 2020. - December 2, 2020.

Present: Green, C.J., Vuono, Rubin, Maldonado, & Shin, JJ.[2]

Firearms. Search and Seizure, Motor vehicle, Protective frisk, Reasonable suspicion, Threshold police inquiry. Constitutional Law, Reasonable suspicion, Stop and frisk. Practice, Criminal, Motion to suppress.

Indictments found and returned in the Superior Court Department on March 15, 2018.

A pretrial motion to suppress evidence was heard by Raffi N. Yessayan, J., and a conditional plea was accepted by him.

Elaine Fronhofer for the defendant.

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[1] In conformity with our custom, we spell the defendant's name as it appears in the indictments.

[2] This case was initially heard by a panel comprised of Justices Rubin, Maldonado, and Shin. After circulation of a majority and a dissenting opinion to the other justices of the Appeals Court, the panel was expanded to include Chief Justice Green and Justice Vuono. See Sciaba Constr. Corp. v. Boston, 35 Mass. App. Ct. 181, 181 n.2 (1993).

Daniel J. Walsh, Assistant District Attorney, for the Commonwealth.

RUBIN, J. The defendant, Zahkuan Sweeting-Bailey, entered a guilty plea (conditioned on his right to pursue an appeal from the order denying his motion to suppress) to one count of unlawful possession of a large capacity firearm, in violation of G. L. c. 269, § 10 (m), and one count of carrying a firearm without a license, in violation of G. L. c. 269, 10 (a).[3] Prior to the plea, the defendant had filed and litigated a motion to suppress the firearm, alleging that both an exit order from a vehicle and a subsequent patfrisk were invalid. The motion was denied after hearing, and this appeal timely followed. We affirm.

Factual background. The following facts were found by the judge, who issued findings from the bench, supplemented where noted by facts testified to by police witnesses, all of whom were found by the judge to be "credible in all relevant respects."

The defendant was a back seat passenger in a vehicle that police validly stopped for a traffic violation. The vehicle,

[3] In addition, nolle prosequis were entered on charges of unlawful possession of a large capacity firearm, see G. L. c. 269, § 10 (m), and carrying a loaded firearm without a license, see G. L. c. 269, § 10 (n).

containing a driver, the defendant, and two other passengers, came to a stop without incident in a parking lot. Once the vehicle stopped, the front seat passenger, Raekwan Paris, known to the police to be a member of the United Front Gang in New Bedford and of the Bloods, and to have previously been arrested for having a gun in a motor vehicle, exited the car.

This was the fourth time that Paris had been involved in a police stop. On two of those occasions, Paris had been fully cooperative and no gun was recovered. On another occasion, while still being cooperative, Paris was stopped while walking away from the vehicle. A firearm (which resulted in Paris's firearm conviction) was recovered from the vehicle from which he was observed walking away.

Having exited the car, Paris immediately became "combative" with the police, questioning the reason for the stop and complaining of harassment. Paris refused several commands to return to the vehicle and at one point took a fighting stance, as if ready to punch the officers. Meanwhile, the three remaining vehicle occupants -- the driver, the defendant, and one other passenger -- remained seated. The officers made no observations of any movements, gestures, or nervousness. They pat frisked and handcuffed Paris, and ordered the other occupants to exit the vehicle. They complied without incident.

The two back seat passengers (the defendant and one other) were both known to the police. They knew the defendant also was a member of the Bloods and that he had been found delinquent as a juvenile for a firearm offense. The other back seat passenger was known by police to be a member of a gang in a neighboring city and to have been seen on a video posted to the video sharing Web site YouTube in possession of what appeared to be a genuine firearm. The officers pat frisked each of the other three car occupants, and recovered the subject firearm from the defendant's person.

Discussion. "When reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of his ultimate findings and conclusions of law" (quotation and citation omitted). Commonwealth v. Almonor, 482 Mass. 35, 40 (2019).

1. Exit order. We turn first to the exit order. The standard for an exit order in Massachusetts is well settled. See Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020); Commonwealth v. Barreto, 483 Mass. 716, 722 (2019). The Supreme Judicial Court has made it clear that reasonable suspicion that an occupant or occupants of a vehicle are armed is not a necessary predicate for a valid exit order. Torres-Pagan, supra at 38-39. Rather, an exit order is valid when, among other

reasons, "police are warranted in the belief that the safety of the officers or others is threatened." Id. at 38. When reviewing an exit order, "we ask 'whether a reasonably prudent [person] in the [officer's] position would be warranted in the belief that the safety of the police or that of other persons was in danger.'" Commonwealth v. Santana, 420 Mass. 205, 212-213 (1995), quoting Commonwealth v. Almeida, 373 Mass. 266, 271 (1977). "[I]t does not take much for a police officer to establish a reasonable basis to justify an exit order . . . based on safety concerns, and, if the basis is there, a court will uphold the order." Commonwealth v. Gonsalves, 429 Mass. 658, 664 (1999).

Here, we have little doubt that Paris's combative behavior and threatening stance with the police raised such safety concerns. Paris directly confronted the officers and assumed a fighting stance with clenched fists -- which reasonably suggested that Paris was going to "throw a punch." The officers were also slightly outnumbered. See, e.g., Commonwealth v. Feyenord, 445 Mass. 72, 76 (2005) (exit order justified partly because occupants outnumbered officer). There were three police officers and, including Paris, four vehicle occupants -- one of whom still possessed control over the vehicle's movement. See Torres-Pagan, 484 at 37 n.4 (reasonable fear that vehicle could be used as weapon will justify exit order). "[P]olice officers

conducting a threshold inquiry may take reasonable precautions . . . when the circumstances give rise to legitimate safety concerns." Commonwealth v. Haskell, 438 Mass. 790, 794 (2003). "The [United States] Constitution does not require officers 'to gamble with their personal safety'" (citation omitted). Id. Accordingly, on all the facts and circumstances, we conclude the exit order was appropriate.

2. Patfrisk. To justify a patfrisk, "an officer needs more than safety concerns." Torres-Pagan, 484 Mass. at 37. The standard is more stringent. See id. at 39 ("Having different standards for exit orders and patfrisks makes logical sense. . . . [A]n exit order is considerably less intrusive than a patfrisk"). It is not enough for police to have a generalized safety concern. See id. at 38 ("A lawful patfrisk, however, requires more"). Rather, to justify a patfrisk, police must have a "reasonable suspicion" based on articulable facts, "that the suspect is dangerous and has a weapon." Id. at 39.[4]

[4] The dissent states that the judge conflated the test for an exit order and the test for a patfrisk. Post at . Although, because our application of the law to the facts is de novo, this is ultimately irrelevant, the judge's conclusions of law, issued from the bench, are not clear on the point. The judge found that there was reasonable suspicion that there was a firearm in the car and, before finding the patfrisk justified, he repeatedly referred to the firearm history of both the defendant and the other back seat passenger. Torres-Pagan, released after the within motion was decided, did not announce anything new; that a patfrisk is justified only where there is reasonable suspicion that an individual is armed and dangerous

We think the patfrisk was justified under this standard. In all the previous police encounters with Paris, he had been cooperative. Indeed, in a previous motor vehicle stop that had led to Paris's arrest for possession of a firearm found in the vehicle, Paris had gotten out of the car and started to walk away, but was cooperative when ordered back to the car. On this day, though, Paris got out of the vehicle, was combative, would not obey orders to return to the vehicle, behaved in a frenetic manner, and would not calm down.

As the judge found, particularly after the police pat frisked Paris and found nothing, it was reasonable for the officers to believe -- though not by any means with certainty -- that Paris was trying to distract the officers from the vehicle because it contained contraband, specifically, given the history of all the passengers, a firearm. In particular, the facts and circumstances supported reasonable suspicion that a firearm would be found in the car, either loose, or on the person of Paris's fellow Bloods member, the defendant, a passenger

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was a central holding in Terry v. Ohio, 392 U.S. 1, 30 (1968), and has been repeated often by our appellate courts throughout the years since then. See, e.g., Commonwealth v. Narcisse, 457 Mass. 1, 7 (2010). In the fifty-two years since Terry, a mere fear for officer safety, see post at , has never been enough to support a patfrisk of an individual's person. Torres-Pagan merely made clear that some loose language on the matter in prior opinions had not altered that.

previously adjudicated delinquent for an offense involving use of a firearm. (Given the posture of the case, whether there was a basis for a reasonable belief a firearm might have been found on the person of the other back seat passenger or the driver is not before us.) "While gang membership alone does not provide reasonable suspicion that an individual is a threat to the safety of an officer or another, the police are not required to blind themselves to the significance of either gang membership or the circumstances in which they encounter gang members, which are all part of the totality of the circumstances they confront and must assess." Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 841 (2010). It is reasonable to think that a gang member might act to protect a fellow gang member from arrest and thus, given the circumstances known to the police, it was reasonable to suspect that the item from which Paris was trying to distract the police could be found not only in the car, but on the defendant's person.

Although our dissenting colleagues state that "we cannot view the defendant's actions in isolation from Paris's behavior," their analysis essentially ignores that behavior. The dissent asserts that the defendant's "mere presence in the same car as Paris, however, was insufficient to justify a patfrisk of him," and that "the defendant did exactly what is

asked of those stopped by police[, sitting] calmly and compl[ying] with police instructions." Post at .

Those statements are true, but they do not address all the circumstances here. The question is whether there was reasonable suspicion based on articulable facts that the defendant, sitting in the car, was in possession of a firearm. Given the defendant's membership in the same gang as Paris, and the defendant's own history of crime involving a firearm, in light of Paris's conduct and history, there was. And, because our determination necessarily rests on Paris's unusual and combative behavior, his history, and his relationship with the defendant, our decision does not, as the dissent suggests, "exclude gang members with any prior firearm involvement from the reasonable suspicion requirement established by Terry v. Ohio, 392 U.S. 1, 30 (1968), and its progeny." Post at .

Because, taken together, all the facts and circumstances here supported a reasonable belief based on articulable facts that the defendant was armed and dangerous, the motion to suppress was properly denied.

Order denying motion to suppress affirmed.

MALDONADO, J. (dissenting, with whom Shin, J., joins). I respectfully dissent because I do not believe that we can impute, from a gang member's uncharacteristic behavior during a motor vehicle stop, reasonable suspicion to believe that a fellow gang member, who did nothing more than sit calmly and quietly and cooperate with police, was armed and dangerous.

In Commonwealth v. Torres-Pagan, 484 Mass. 34, 39 (2020), the Supreme Judicial Court made clear that, while concern for officer safety is sufficient to justify an exit order, "[a] lawful pat frisk . . . requires more." Id. at 38. The court reasoned that, "[h]aving different standards for exit orders and patfrisks makes logical sense" because "an exit order is considerably less intrusive than a patfrisk" (quotation omitted). Id. at 39. Thus, to justify a patfrisk, police must have a "reasonable suspicion that the suspect is dangerous and has a weapon." Id.

Without the benefit of Torres-Pagan, the judge concluded that both the exit order to, and the patfrisk of, the defendant were lawful because Paris's conduct raised legitimate safety concerns. The judge based his determination on the officers' belief that Paris's behavior gave rise to an inference that he was distracting police from discovering a weapon in the car. While I believe that inference is attenuated, I do not dispute that Paris's combative behavior, in the circumstances,

sufficiently justified an exit order. But I do not agree that such uncharacteristic behavior gave rise to a reasonable suspicion of there being a gun in the car or on the person of the defendant, and the judge did not so find.[1]

The majority, pointing to nothing the defendant said or did in the course of the motor vehicle stop that evening, but based on his association with Paris as a member of the Bloods, a three year old juvenile delinquency finding on a firearm offense, and Paris's combative behavior, concludes that the patfrisk of the defendant was justified. Although we cannot view the defendant's actions in isolation from Paris's behavior, the defendant's mere presence in the same car as Paris, however, was insufficient to justify a patfrisk of him (the defendant). Cf. Ybarra v. Illinois, 444 U.S. 85, 91 (1979) ("person's mere

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[1] It is clear from the judge's decision that the only conclusion he drew from Paris's actions was that they created sufficient officer safety concerns to justify the minimal intrusion of an exit order. Then, without the benefit of Torres-Pagan, the judge assumed that the same concerns validated the patfrisk. The judge did not conclude that Paris's actions gave rise to a reasonable suspicion to search the vehicle for weapons, and the Commonwealth does not so argue on appeal. Nor would such an argument be tenable. See Torres-Pagan, 484 Mass. at 40 ("surprise in response to unexpected behavior is not the same as suspicion"). In any event, any reasonable suspicion to search the car would not have automatically extended to the defendant's person. "A person is not a container" for purposes of an automobile search. Commonwealth v. Griffin, 79 Mass. App. Ct. 124, 128 (2011), citing Wyoming v. Houghton, 526 U.S. 295, 308 (1999) (Breyer, J., concurring).

propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person"); United States v. Di Re, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled"). Likewise, that the defendant was a known gang member in the company of another gang member, and was adjudicated delinquent as a juvenile on a firearm offense several years earlier, were also insufficient to justify his patfrisk. See Commonwealth v. Pierre P., 53 Mass. App. Ct. 215, 216, 217 (2001) (high crime area and fact that some individuals were gang affiliated did not justify patfrisk). Cf. Commonwealth v. Cordero, 477 Mass. 237, 246 (2017) ("the defendant's prior convictions, without further specific and articulable facts indicating that criminal activity was afoot, could not create reasonable suspicion").

Concluding otherwise, the majority relies, as did the judge, on Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 841 (2010), for the proposition that gang membership can be considered as part of the totality of the circumstances in a reasonable suspicion inquiry. I do not quarrel with that general proposition; however, Elysee concerned the validity of an exit order, and the judge here relied on it for that precise purpose. With jurisprudential guidance, the judge

understandably equated the justification necessary for the exit order with the justification required for the patfrisk. See Torres-Pagan, 484 Mass. at 38 ("we mistakenly have described a patfrisk as being constitutionally justified when an officer reasonably fears for his own safety" [quotation and citation omitted]).

We now know, however, that a reasonable fear of officer safety is not enough to justify the greater personal intrusion of a patfrisk. See Torres-Pagan, 484 Mass. at 39 ("a patfrisk . . . is a severe . . . intrusion upon cherished personal security" [quotation and citation omitted]). With this distinction clarified, therefore, the inquiry before us is whether the patfrisk was independently supported by a reasonable suspicion to believe the defendant was armed and dangerous. Id. Nothing the defendant said or did supports such a conclusion, and any reliance on Elysee in support of a contrary view is misplaced.

Putting aside that Elysee did not involve the validity of a patfrisk, it is also factually distinguishable because there, police had observed the occupants engage in movements consistent with the concealment of a weapon. See Elysee, 77 Mass. App. Ct. at 842. Conversely, no such similar observations were made of the driver or the back seat passengers here. Rather, in this case, the defendant exhibited no suspicious behavior in the

course of the stop. He did not make any furtive gestures from which to infer that he concealed a weapon. See Commonwealth v. Villagran, 477 Mass. 711, 718 (2017) (no "reasonable belief that the defendant was armed and dangerous where the defendant was compliant and did not make any furtive gestures or reach into his pockets in a manner that would suggest that he was carrying a weapon"). He did not bend down or make any movements from which to infer that he was attempting to reach for a weapon. See Torres-Pagan, 484 Mass. at 40 (patfrisk not justified where defendant made no movements suggesting he was armed and dangerous). He did not display any signs of nervousness. Cf. Commonwealth v. Brown, 75 Mass. App. Ct. 528, 533 (2009) ("Suppression is appropriately denied where, in addition to the defendant's nervous appearance, other factors exist, including in particular police observation of a furtive gesture"). And the defendant did not engage in any verbal or nonverbal communication with Paris from which to infer that he jointly possessed a weapon with Paris.

In short, the defendant did exactly what is asked of those stopped by police. He sat calmly and complied with police instructions. While acknowledging these facts, the majority surmises that a gang member might act to protect a fellow gang member and so it is reasonable to suspect that Paris's behavior and complaints of harassment were designed to distract the

police from a firearm that was on the person of the defendant, specifically. This is too great an inferential leap, and it is neither supported by the testimony or the judge's findings, nor argued by the Commonwealth. Indeed, the officers also pat frisked the female driver, who had no known gang affiliation or prior weapons involvement.

In the absence, therefore, of any evidence that the defendant engaged in suspicious behavior or activity, his past firearm involvement as a juvenile and gang association with Paris did not alone create a reasonable suspicion that the defendant was armed and dangerous.[2] To hold otherwise would, in effect, exclude gang members with any prior firearm involvement from the reasonable suspicion requirement established by Terry v. Ohio, 392 Mass. 1, 30 (1968), and its progeny.

[2] We recognize that "[t]he subjective intentions of police are irrelevant so long as their actions were objectively reasonable." Commonwealth v. Cruz, 459 Mass. 459, 462 n.7 (2011). Nevertheless, it is worth noting that all three officers indicated that, but for Paris's actions, they would not have even removed the defendant from the vehicle. Thus, based on the defendant's actions alone, even multiple police officers did not suspect that he was armed and dangerous.

CERTIFICATE OF SERVICE

The undersigned certifies that on the date set forth below, I served a copy of the accompanying Application for Further Appellate Review in this matter by filing same in the e-file system and, through that system, serving a copy upon opposing counsel, A.D.A. David B. Mark of the Bristol County District Attorney, at: Davidvid.B.Mark@state.ma.us.

Dated: December 23, 2020

/s/ Elaine Fronhofer
Elaine Fronhofer
Suite 206, PMB 234
6 University Drive
Amherst, MA 01002
(413) 253-8955
BBO # 636135
elaine@fronhoferlaw.com