COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
No. SJC-11475

COMMONWEALTH

v.

PAUL STEWART

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# BRIEF AND RECORD APPENDIX FOR THE DEFENDANT ON APPEAL FROM THE SUFFOLK SUPERIOR COURT

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## STATEMENT OF THE CASE

On July 23, 2008, a Suffolk County grand jury returned two indictments against the Defendant. *R. 6, 15-19.*[1] The indictments charged that on May 22, 2008, the Defendant (1) possessed with intent to distribute a Class B substance, in violation of G.L. c. 94C, § 32A(c); and (2), possessed with intent to distribute a Class B substance in a school zone, in violation of G.L. c. 94C, § 32J. *A. 5, 7.* The grand jury also charged, under the first indictment, that the Defendant was a second or subsequent violator of G.L.

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[1] The Record Appendix will be cited as "*R. (page).*" The Addendum will be cited as "*A. (page).*" The transcript of the hearing on the Motion to Suppress will be cited as "*S.H. (page).*" The trial transcript will be cited as "*Tr. (volume/page).*"

c. 94C, § 32A(c) (per G.L. c. 94C, § 32A(d)), and a habitual criminal (per G.L. c. 279, § 25). *R. 16-18; A. 5-6, 9.*

On November 20 and 21, 2008, the Defendant filed a Motion to Suppress Evidence and an affidavit in support thereof. *R. 7, 14, 20-22.*[2] The Defendant alleged that the evidence against him had been obtained through an unreasonable seizure and search. The Defendant later filed a supporting Memorandum of Law. *R. 26-36.* On January 27, 2009, a hearing on the Motion to Suppress Evidence was held before the Honorable Frank M. Gaziano. *R. 8.* On February 3, 2009, Judge Gaziano denied the motion. *R. 8, 37-46.*[3]

On February 25, 2009, the Defendant filed a Motion to Dismiss, arguing that he could not legally be sentenced as both a habitual criminal and a second or subsequent offender – and that thus, one of the two

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[2] The motion was filed with an unsigned affidavit on November 20, 2008. *R. 8.* There was initially no record in the trial court that the Defendant thereafter filed a signed affidavit. The record has since been corrected (on 8/8/11) to reflect that the Defendant filed his signed affidavit, appended here at *R. 22,* on November 21, 2008. *R. 14.* The Defendant's allowed Motion to Correct the Record is at *R. 23-25.*

[3] The judge delivered his findings orally. The transcript of his findings is at *R. 37-46.*

charges had to be dropped. *R. 8, 47-49*. The motion was not granted.[4]

The Defendant's bifurcated jury trial in Suffolk Superior Court occurred between March 8 and March 11, 2010, with the Honorable Judith Fabricant presiding. On March 11, 2010, the jury found the Defendant guilty of possession with intent to distribute a Class B substance, and not guilty of the same in a school zone. *R. 12, Tr. IV/8-9*.

Also on March 11, 2010, after the second part of the bifurcated trial, the jury found that the Defendant was both a habitual criminal and a second or subsequent violator of the drug statute. *R. 12, Tr. IV/61*. Judge Fabricant then sentenced the Defendant to 15 years in prison, believing that this sentence was made mandatory by the combination of the sentencing enhancement statutes. *R. 12, Tr. IV/64*.

On March 16, 2010, the Defendant filed a Motion to Vacate Sentence and Re-Sentence the Defendant, arguing that the application of both sentence enhancements was illegal. *R. 12, 52*. On March 22, 2010, Judge Fabricant denied the motion. *R. 12, 52*.

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[4] The docket does not show whether this Motion to Dismiss was ever formally denied.

On March 25, 2010, the Defendant filed a timely Notice of Appeal. *R. 12, 53.* On May 2, 2011, the Defendant's appeal was entered on the docket of this Court.

## STATEMENT OF FACTS[5]

### *Suppression Hearing*[6]

On May 22, 2008, at 5:40 p.m., four Boston police officers drove together in an unmarked SUV down Washington Street in the Theater District of Boston. *S.H. 7-9, 54-55, 65-66.* Detective William Dwan was driving. *S.H. 10.* The passengers were Officers Peter Chu, John Ryle, and Brian Linehan. *S.H. 8-9.* The officers were looking out for drug activity. *S.H.* 7. Dwan characterized the Theater District as a high-crime area known for drug activity. *S.H. 8.*

As he drove, Dwan saw the Defendant, who was walking on Washington Street toward its intersection with Hayward Place. *S.H. 9-10.* Dwan recognized the

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[5] Because no differences between the evidence at trial and the evidence at the suppression hearing are relevant to the arguments in this brief, only the facts from the suppression hearing are presented.

[6] These facts are derived from the motion judge's warranted findings, supplemented by uncontested testimony of the Commonwealth's witnesses. The judge's unwarranted findings will be noted in this section, and discussed in the argument section of the brief.

Defendant, whom he had arrested for distributing crack cocaine in the same general area in 2005. *S.H. 9-10.*

Two men and a woman were walking behind the Defendant. *S.H. 10.* To Dwan, it appeared that "[the Defendant] was leading this - these other three people so he was looking back towards the group." *S.H. 52.*[7] According to Dwan and Chu, as the woman walked, she was counting money in her hands. *S.H. 10, 66-67.*[8]

As Dwan continued down Washington Street toward Downtown Crossing,[9] he saw the Defendant and the three other individuals turn right off of Washington Street onto Hayward Place. *S.H. 11, 66.*[10] According to Dwan's testimony, Hayward Place is a "narrow, one-way street" where "[t]here's really not much vehicular nor pedestrian traffic…." *S.H. 12.*[11]

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[7] As will be discussed, Dwan's conclusion that the Defendant was leading the others was not supported by evidence.

[8] As will be discussed, the officers' conclusion that the woman was counting the money was not supported by evidence.

[9] A map of the area was an exhibit at trial, and is appended at *R. 50.*

[10] The judge found that the Defendant and others "ducked into" Hayward Place. *R. 42.* As will be discussed, this finding was unwarranted.

[11] The judge characterized Hayward Place as an "isolated" street. *R. 42.* As will be discussed, this finding was unwarranted.

At the time of the suppression hearing, Dwan had frequently encountered drug abusers on Hayward Place. *S.H. 12.* Several doorways on Hayward Place are slightly recessed into buildings. *S.H. 12.* At the time of the suppression hearing, Dwan had made arrests of people using drugs in those doorways. *S.H. 12.*[12]

Having driven past Hayward Place, Dwan drove around the block. He pulled up and parked on Harrison Avenue Extension, just short of its intersection with Hayward Place. *S.H. 13.* This was at the opposite end of Hayward Place from Washington Street. *R. 50.*

Having parked, Dwan and the other officers sat in the SUV and watched. *S.H. 13.* Dwan saw the Defendant and the three other individuals stop in a doorway halfway down Hayward Place. *S.H. 13.* Dwan watched as, according to his grand jury testimony,[13] the "parties … appear[ed] to make an exchange."[14] *S.H. 16.*

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[12] As will be discussed, Dwan did not say what experience he had had on Hayward Place, if any, at the time of the Defendant's arrest.

[13] The prosecutor had Dwan read his grand jury testimony after Dwan testified that he had not seen any exchange at all. *S.H. 14-16.*

[14] The judge found that "Dwan observed the group … exchange something," *R. 39,* and that "Dwan observed an exchange of an unknown object." *R. 43.* As will be discussed, these findings were unwarranted.

The individuals then separated. *S.H. 16-17.* The Defendant and one man walked to Harrison Avenue Extension, turned right, and proceeded toward Essex Street. At Essex Street, the other man turned left. *S.H. 43.* The Defendant walked through Essex Street and onto Harrison Avenue. *S.H. 17.*

Dwan followed the Defendant in the SUV. He stopped at a red light at the intersection of Harrison Avenue Extension and Essex Street. *S.H. 38.* Officers Ryle and Chu exited the vehicle. *S.H. 38, 59.* They quickly approached the Defendant, who was now on Harrison Avenue. *S.H. 58-59.* Ryle, with his badge in his hand, told the Defendant to stop. *S.H. 58-59.* The Defendant stopped. *S.H. 58.*

Ryle asked for the Defendant's name. The Defendant told Ryle his name, and produced his identification card. *S.H. 60, 71.* Ryle asked the Defendant what he was doing in the area. *S.H. 60.* The Defendant said that he was on his way home from work. *S.H. 60.* Dwan, who had parked the SUV, then arrived. *S.H. 17.* The officers continued to ask the Defendant what he had been doing. *S.H. 17.* The Defendant answered that he had not been on Hayward Place, and

had not been with anyone since he arrived downtown. *S.H. 17-18, 70.*

The Defendant was wearing a nylon backpack. The backpack appeared to have a heavy object inside. *S.H. 18.* Dwan asked what was in the backpack. The Defendant replied that a cell phone charger was inside. *S.H. 18.* Dwan felt the backpack. *S.H. 18.* He felt an item that seemed heavier than a cell phone charger. *S.H. 18.* Dwan again asked what the object was. The Defendant repeated that it was a cell phone charger. *S.H. 18.*

Dwan asked if he could search the backpack. *S.H. 18.* The Defendant handed Dwan his backpack. *S.H. 19.* Dwan pulled out a box that looked like a pack of cigarettes, but was heavier. The Defendant then told Dwan that he could search no further. *S.H. 19, 63-64.*

Dwan searched further. *S.H. 19, 63-64.* He opened the box and found that it was not a pack of cigarettes, but a digital scale. *S.H. 19-20.* There was a white residue on the scale. *S.H. 20.* The Defendant was placed under arrest for possession of cocaine. In a subsequent search, Ryle found $468 in the Defendant's pocket. *S.H. 20.* Chu found a plastic bag protruding from the Defendant's zipper, which

contained 12 smaller bags containing what appeared to be crack cocaine. *S.H. 20.*

## SUMMARY OF ARGUMENT

The Defendant's Motion to Suppress Evidence should have been granted because the Defendant was stopped without reasonable suspicion. The "silent movie" in this case, once reduced to its constitutionally cognizable parts – that is, once the officers' conclusory testimony, and the judge's erroneous findings, are put aside – was decidedly uneventful. Especially uneventful was the supposedly climactic event of the criminal sequence hypothesized by the officers - that was, the gathering in the doorway on Hayward Place. A comparison with a recent case shows that the facts here did not give rise to reasonable suspicion, never mind probable cause. (pages 11 to 31)

The Defendant's Motion to Suppress Evidence should have been granted because, even if the stop was reasonable, the subsequent frisk and search of the Defendant were not. The Defendant did not elevate reasonable suspicion to probable cause after he was stopped. Accordingly, he was not searchable incident to arrest. The Defendant was not friskable because the

officers did not reasonably suspect him to be armed and dangerous; in any case, a right to frisk would not have entailed a right to search the box inside the Defendant's backpack. The Defendant's consent to a search that stemmed from the illegal frisk was invalid; in any case, the Defendant did not consent to a search of the box inside his backpack. (pages 31 to 40)

The Defendant was deprived of a fair trial by the prosecutor's and officers' numerous and obvious allusions to his criminal past. To no permissible end, the officers testified repeatedly that they had known the Defendant prior to his arrest. The prosecutor took pains to highlight this fact for the jury, both by drawing out the testimony, and then by repeating it in her closing argument. When combined with other innuendo to the same effect, the message, that the Defendant had previously been involved in crime, was unmistakable. (pages 40 to 45)

The Defendant's sentence is illegal. The habitual criminal statute mandates the maximum sentence for a defendant's felony. The Defendant's felony was possession with intent to distribute a Class B substance. The appropriate sentence under the habitual

criminal statute would thus be 10 instead of 15 years. In any event, that statute should not be applied; on remand, the Defendant should be sentenced according to the second or subsequent drug offender statute, because that statute is specifically designed to apply to his case. (pages 45 to 50)

## ARGUMENT

### I. THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SHOULD HAVE BEEN GRANTED BECAUSE THE DEFENDANT WAS STOPPED WITHOUT REASONABLE SUSPICION.

The judge on the suppression motion held that the police had cause to arrest the Defendant when they stopped him on Harrison Avenue. *R. 42-43*. If this had been the case, the eventual search of the Defendant would have been justified as a search incident to arrest. This was not the case. When they stopped the Defendant, the police lacked even reasonable suspicion of his involvement in criminal activity.

#### A. The Officers Seized The Defendant When Officer Ryle Displayed His Badge And Told The Defendant To Stop.

A person encountered by the police is seized, under the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights, when a reasonable person in his shoes would not feel free to leave the encounter.

United States v. Mendenhall, 446 U.S. 544, 554 (1980); Commonwealth v. Borges, 395 Mass. 788, 791 (1985).

When Officer Ryle displayed his badge and ordered the Defendant to stop, the Defendant was seized. See Commonwealth v. Smith, 55 Mass. App. Ct. 569, 572 (2002) (defendant seized when told to stop); Commonwealth v. Barros, 435 Mass. 171, 174-176 (2001) (defendant seized when ordered to "come here").

**B. The Officers Lacked Reasonable Suspicion At The Time Of The Stop.**

For their seizure of the Defendant to be reasonable, under the Fourth Amendment and Article 14, the officers needed reasonable suspicion that the Defendant had committed, was committing, or was about to commit a crime. Commonwealth v. Silva, 366 Mass. 402, 405 (1974). This suspicion had to be based on "specific and articulable facts and reasonable inferences therefrom, in light of the officer[s]' experience." Commonwealth v. Gomes, 453 Mass. 506, 511 (2009) (citation to source omitted). See also Terry v. Ohio, 392 U.S. 1, 21 & n.18 (1968) ("[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence.").

The Commonwealth's case for stopping the Defendant was not sufficiently grounded in specific, articulable facts. Below, this point is made in four sections. First, the factually deficient nature of the Commonwealth's evidence is established. Second, the facts here are compared to the facts in a recent reasonable suspicion case. Third, the facts are compared to the facts in two commonly cited probable cause cases. In a fourth section, to emphasize the weakness of the Commonwealth's case, the logical and constitutional flaws of one of its probable points of focus, the "high crime area" factor, are shown.

**1. The Commonwealth's case for stopping the Defendant was largely devoid of specific, articulable facts.**

***a. There was no specific evidence of an exchange.***

The Commonwealth's case for stopping the Defendant revolved around a factual void. The main event of the officers' narrative was the gathering in the doorway on Hayward Place. As to what happened at that gathering, there was nothing in evidence but Dwan's vague conclusion, imported from his prior grand jury testimony, that the "parties … appear[ed] to make an exchange." *S.H. 16.* Dwan articulated no facts from which he drew this conclusion. He mentioned no

movements that suggested an exchange. He mentioned no object that was exchanged.[15] He did not even say which of the four parties made the supposed exchange. Lacking any such specifics, in the constitutional analysis, Dwan's inference that an exchange took place does not count. See Terry, at 21 ("inarticulate hunch[es]" do not count). Cf. Commonwealth v. Kennedy, 426 Mass. 703, 704, 707 (1998) (where drug distributor reached into car, and driver/defendant reached toward distributor, officer's inference of exchange was creditable).

Although the reason for Dwan's unsubstantiated conclusion is not important, it should be recognized

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[15] The judge found that "Dwan observed the group … exchange something," *R. 39*, and that "Dwan observed an exchange of an unknown object." *R. 43*. In fact, there was no admitted evidence that Dwan saw an object. After Dwan read his grand jury testimony about the appearance of an exchange, which included a denial that he had seen what was exchanged, the prosecutor asked him, "So, in fact, you did see something get exchanged; you just didn't see what?" Dwan answered, "Correct." *S.H. 16*. The judge, however, sustained counsel's objection to this question and answer – probably, because the question was leading; perhaps, because the question was compound. For the latter reason, it is not even clear what Dwan meant to affirm by "Correct." In any event, the objection was sustained. Thus, the judge's finding that an object was seen lacks an evidentiary basis, and is clearly erroneous.

that this was quite apparently not a case of testimonial neglect. Dwan, it seems, said nothing in particular because he saw nothing in particular:

Prosecutor: Did you see any exchange at all?

Dwan: No, I didn't.

*S.H. 14-15.*

It was at this point, in an effort to circumvent her witness, that the prosecutor tapped Dwan's prior grand jury testimony. That testimony, however — again, that the "parties … appear[ed] to make an exchange" — is not inconsistent with Dwan's admission that he saw no exchange at all. An appearance of an exchange is not an exchange. Indeed, the presumable function of "appear," as used in Dwan's grand jury testimony, was to establish that he had not, as a matter of fact, seen an exchange.

Besides not conflicting with Dwan's admission that he saw no exchange at all, the grand jury testimony underscored it. There is no conceivable reason why Dwan would fail to identify which of the four parties appeared to make an exchange, as he did, if he actually saw any exchange-like movements. Certainly, to see any such movements would have been to see the particular parties making them; and in a

case alleging intent to distribute, the particular parties involved in an apparent act of distribution is not information that a police officer would withhold.

In any event, what Dwan actually saw of an exchange is academic. What matters is the content of his testimony — and that, instead of specific, articulable facts, was an obscure conclusion. The centerpiece of the Commonwealth's case for seizure — the "parties … appear[ed] to make an exchange" — was, for constitutional purposes, a nullity.

***b. The judge's findings distort the scene on Washington Street.***

The judge's characterization of the initial events on Washington Street was largely unfounded. The judge found that the Defendant *led* the other individuals, the woman *counted* money, and the group *ducked into* an *isolated* one-way street. *R. 41*. These findings stem in part from unsubstantiated conclusions of the officers, and in part from the judge's exaggeration of the officers' testimony.

Dwan testified that he believed, "from his observations," that the Defendant was leading the group. *S.H. 52*. The only observations that he testified to, however, were that the Defendant walked

ahead of the others, and looked back toward them. *S.H. 52*. These observations were not a reasonable basis on which to infer that the Defendant was leading the others. The Defendant might simply have drifted ahead. He might have looked back to see if the others had stopped, as persons who drift ahead of companions tend to do. Absent some objective indication that the Defendant was guiding the others — for example, beckoning the group forward — the inference that he was leading the group was unreasonable, and therefore constitutionally untenable. See Terry, at 21 (to carry constitutional weight, inferences from facts must be rational).

Dwan and Chu both testified that the woman on Washington Street was *counting* the money in her hands. *S.H. 10, 66*. Neither officer testified, however, to any specific fact underlying this conclusion. It may be that the woman was flipping through a number of bills. It may be that she was mouthing words as she did so. If they saw such things, it was up to the officers to articulate them. They did not; accordingly, the inference that she was counting the money in her hands is not constitutionally tenable.

The judge's portentous description of the group's turn from Washington Street onto Hayward Place - they "*ducked into* an *isolated* one-way street" – is a distortion of the evidence. Ducking into a street, whatever that entails, does indeed sound suspicious; according to Dwan and Chu, however, the group simply "turned" onto Hayward Place. *S.H. 11, 66.* As for Hayward Place being "isolated," this is not entirely baseless – Dwan testified that the street is "off the beaten path" and without "much vehicular [or] pedestrian traffic," *S.H. 12* – but, to the degree that "isolated" suggests seclusion or remoteness, the characterization is clearly erroneous. Hayward Place is not a dead-end; moreover, it is exposed to the city – it has no buildings – on one side.[16] Cf. Commonwealth v. Cabrera, 76 Mass. App. Ct. 341, 346 (2010) (dead-end alley is suspicious); Commonwealth v. Egan, 12 Mass. App. Ct. 658, 660-661 (1981) (dead-end street in heavily wooded area was "relatively isolated," and thus suspicious).

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[16] When it is considered that Dwan was able to maintain surveillance of Hayward Place as he drove around the entire block, *S.H. 11-12*, "isolated" seems especially inapt.

Minus the judge's unwarranted findings, the scene on Washington Street boils down to this: the Defendant, walking in front of three others, and looking back toward them; one of the others, having money in her hands; the group, turning off onto a relatively quiet street. It is not nearly the ominous sequence that the judge portrayed it to be.

**2. Commonwealth v. Gomes shows that the police did not have reason to stop the Defendant.**

The judge concluded that, at the time that they stopped the Defendant, the officers had cause to arrest him. *R. 42-43*. The case of Commonwealth v. Gomes, 453 Mass. 506 (2009), shows that the officers lacked even reasonable suspicion.

The factual backdrop in Gomes was similar to that in the Defendant's case. In the Theater District of Boston, an experienced narcotics officer saw the defendant and another man in the doorway of a building. The officer knew that the defendant had previously been arrested for possession with intent to distribute drugs. Id. at 508 & n.3.

At the doorway in the Defendant's case, as explained above, the "silent movie" effectively ended, a casualty of Dwan's conclusory testimony. In Gomes,

the movie had just begun. The officer in Gomes testified to two specific acts of the defendant, each far more telling than any background circumstance attending the event: (1), the defendant was standing with his hand opened flat as if to show the other man something; and (2), upon the officer's approach, the defendant put his hand up to his mouth and appeared to swallow something. Id. at 508. Having observed these two actions, upon reaching the defendant, the officer immediately frisked him. This was the point of seizure. Id. at 510. The court decided that reasonable suspicion justified the seizure. Id. at 512.[17]

These two facts at the heart of Gomes highlight the shallowness of the Commonwealth's showing in the Defendant's case, where there was nothing nearly as suspicious as either fact. It is true, in the Defendant's case, unlike in Gomes, there was an opening scene prior to the doorway conference. But the scene on Washington Street, even in the judge's skewed

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[17] The court went on to suppress the evidence because the subsequent frisk was unsupported by a reasonable apprehension of danger, id. at 512-514, thus confirming that there was only reasonable suspicion, and not probable cause to arrest, prior to the stop. Had there been probable cause, the defendant would have been searchable incident to arrest, and there would have been no need to justify the frisk.

telling, was at most a faint hint of a coming transaction; it pales in comparison to the defendant Gomes, actually showcasing his wares, and then confirming their illicit nature by swallowing them upon the officer's approach.

The surrounding circumstances in Gomes were also more suspicious than in the Defendant's case. First, in Gomes, it was 4:00 a.m., a fact that the court considered important. Id. at 511. In the Defendant's case, it was 5:40 p.m..

Second, in Gomes, the officer had made hundreds of drug-related arrests in the area (the vicinity of Tremont and Stuart Streets). Id. at 508. In the Defendant's case, Dwan could only say, "[Hayward Place] is an area where I've cau - frequently encountered drug abusers. … I've made arrests in those doorways of people using drugs." *S.H. 12.* The most that might be taken from this testimony is that Dwan had made more than one arrest on Hayward Place – and even that inference would be charitable to the Commonwealth. Dwan did not testify that, *at the time of the Defendant's arrest*, he had made any arrests on Hayward Place. There is no indication in his testimony that he had made such an arrest before May 22, 2008;

on the contrary, the one arrest that he referred to in his testimony occurred the week before the hearing, on January 23, 2009, eight months after the Defendant's arrest. *S.H. 12*. That January 23rd arrest is neither logically nor legally relevant to the suspiciousness of an event that preceded it. See Terry, at 21-22 (relevant facts are those "available to the officer at the moment of the seizure").

In sum, the facts in the Defendant's case were far less suspicious than those in Gomes. The comparison with Gomes shows that, far from probable cause, the police did not have reasonable suspicion when they stopped the Defendant.

**3. The cases cited by the judge to support his conclusion that probable cause existed at the time of the stop are easily distinguished.**

The older cases cited by the judge to support his conclusion of probable cause are easily distinguished. The more prominent of these cases are Commonwealth v. Santaliz, 413 Mass. 238, 239-242 (1992), and Commonwealth v. Kennedy, 426 Mass. 703 (1998).[18]

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[18] The judge also cited Commonwealth v. McCoy, 59 Mass. App. Ct. 284 (2003), and Commonwealth v. Gant, 51 Mass. App. Ct. 314 (2001). An analysis of Santaliz and Kennedy should suffice to distinguish these cases as well. Neither resembles the Defendant's case. In

In Santaliz, an experienced officer watched as the defendant and a woman sat on the porch of a building known for drug activity. The officer had made some fifty drug-related arrests in the vicinity. A cab pulled up to the building. The woman on the porch removed something from her waistband and handed it to the defendant. The defendant walked to the cab. A woman exited the cab. Without conversing, the defendant gave the woman the object, and received money in return. The woman got back in the cab and left. The officer concluded that a drug transaction had occurred. The court held that there was probable cause to arrest the defendant at this point.

As the judge in the Defendant's case noted, the court in Santaliz identified four circumstances that, taken together, furnished probable cause: (1), the unusual nature of the activity (the cab's passenger alighting, exchanging money for an object, and promptly leaving); (2), the furtive actions of the participants (the object being kept in the woman's

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each, an actual exchange was observed – in McCoy, of money, id. at 286; in Gant, of a folded piece of paper, id. at 315. Moreover, in Gant, prior to the seizure, the piece of paper was dropped, and found to contain white powder. Id. at 316.

waistband; the silence of the exchange); (3), the high incidence of drug traffic in the area; and (4), the experienced officer's belief that he had just witnessed a drug transaction (hereinafter, the "experienced officer" factor). Id. at 242.

The judge in the Defendant's case did not explain how the Defendant's case resembles Santaliz, nor could he have. On the first two factors – presumably, the more important ones, inasmuch as they pertain to what actually happened – the Commonwealth presented nothing. There was nothing unusual or furtive about the observed behavior in the Defendant's case.[19] If the judge believed that there was, that may have had to do

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[19] For a case besides Santaliz with elements of both unusualness and furtiveness, see Commonwealth v. Hernandez, 448 Mass. 711, 712, 714 (2007), where an officer observed the defendant pacing back and forth on a street before meeting up with a man to whom he gave an item that he pulled out of his shoe. Notably, this behavior, combined with a high crime area setting, was still not enough for probable cause; probable cause arose only when the defendant fled upon seeing the officer. Id. at 714-715. Another example of unusual behavior, by way of contrast with the Defendant's case, is seen in Commonwealth v. Levy, 459 Mass. 1010, 1011 (2011), where a man pulled his car up to a payphone often used for drug deals, made a brief call, made a short drive to a residential area, alighted once again, paced back and forth, entered another car that pulled up, and traveled 200 yards in the second car before being disgorged. Notably, as in Hernandez, this unusual behavior gave rise only to reasonable suspicion. Id. at 1012.

with his exaggeration of the officers' testimony – particularly, that the group "ducked into an isolated one-way street."

The only arguable resemblances between the Defendant's case and Santaliz are in the high crime area and "experienced officer" factors. Even here, however, the Defendant's case does not measure up.

As for the high crime area factor, in Santaliz, as the court noted, *at the time of the incident*, the officer had been involved in some fifty drug-related arrests in the vicinity. Id. at 239. In the Defendant's case, as noted above, Dwan testified to having made arrests on Hayward Place (he gave no number), but he did not say that he had made any such arrest at the time of the Defendant's arrest. *S.H. 12.*

As for the "experienced officer" factor, it is not clear that the Commonwealth in the Defendant's case should receive credit. Dwan was experienced, and believed that a drug transaction had occurred, but because he described nothing in particular about an exchange in his testimony, and identified no particular parties involved in an exchange, there is no basis for saying that he "considered the event as revealing a drug sale accomplished by the defendant."

Santaliz, at 241. The meeting on Hayward Place did not, on the evidence, reveal anything to Dwan; rather, the events surrounding the meeting led Dwan to surmise that a sale had been accomplished by the Defendant.

In short, the Defendant's case bears little resemblance to Santaliz. The factors set forth as significant in that case serve only to underscore what Gomes, recently, has confirmed: probable cause in the Defendant's case is out of the question.

Commonwealth v. Kennedy, 426 Mass. 703 (1998), also goes to show the dearth of suspiciousness in the Defendant's case. In Kennedy, in a high crime area at a particular intersection where numerous neighbors had complained of drug-dealing, officers saw a car pull up to a curb. Id. at 704. One Morales approached the car's passenger window. Morales had been specifically complained of by the neighbors, and was known by the officers to have been arrested for drug-dealing. Morales leaned into the car, exchanged words with the driver, ran away, returned a minute later, and reached through the window toward the driver. The driver reached back. Morales walked away, and the driver drove off. The court held that there was cause to arrest the driver at this point. Id. at 711.

Four facts sharply distinguish Kennedy from the Defendant's case. First, the parties to the apparent exchange were identified. Second, the parties' reaching out toward each other gave factual support to an inference that an exchange had been made. Third, the sequence – a person on the street, approached by another; a brief conversation; the approached person hurriedly leaving, and quickly returning; a quick apparent exchange and an immediate parting of ways – fit the pattern of a "classic street level drug transaction." Id. at 705 & n.2. Fourth, in Kennedy, the observed events were corroborative: neighbors had been complaining specifically of Morales, and had been complaining of drug-dealing at precisely the location of the event. Id. at 704.

In sum, the cases cited by the judge do not support, but counter, his conclusion that probable cause existed when the Defendant was stopped.

**4. The "high crime area" factor allows an area to be found high in crime without a rational basis in fact.**

The high crime area factor, as currently conceived, is unconstitutional. Ultimately, it is for the SJC, and the Supreme Court, to correct its constitutional defects. Still, the argument below is

relevant to this Court, because the factor's unconstitutionality is a function of its imprecision, and its imprecision bears on the relative weight that it warrants in this Court's analysis, even if its constitutionality is assumed.

As the SJC has recognized, "'high crime area' is … a general and conclusory term…." Commonwealth v. Johnson, 454 Mass. 159, 163 (2009). Accordingly, to factor into the 4th Amendment or Article 14 analysis, it must be supported by specific facts. See Commonwealth v. Eddington, 459 Mass. 102, 106 & n.10 (2011) (disregarding assertion that area was high in crime absent factual support). As for the types of facts necessary to support the conclusion, the SJC has been content with, *inter alia*, an officer's claim to having made hundreds of arrests in an area. Gomes, at 507.

The Gomes example shows that the SJC has not fully grasped the conclusory nature of the high crime area label. For several reasons, an officer's number of arrests cannot support an inference that an area is high in crime.

First, something can be "high" only relative to other things. Hundreds of arrests indicate high

incidence of crime only if hundreds of arrests are unusual. Thus, a comparison of crime data among areas is necessary to justify the high crime area label.

Second, more comprehensive data are necessary. Unless he is the only officer making arrests in an area, one officer's arrest count is not a reliable measure of an area's incidence of crime.

Third, before any comparison among areas can be made, the size of the unit of comparison must be established — and it must be limited, both in space and in time. The larger the unit, and the longer the unit's duration, the less likely it is that its crime data are reflective of the criminal climate at a particular place or moment. In an area so large as the Theater District, for example, that climate may be markedly different from one place to another; and in any area, for any number of reasons — increased police presence and urban redevelopment among them — incidence of crime may change over time.[20]

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[20] The court in Gomes actually did recognize the importance of time-specific data at one point in its opinion. In holding unreasonable the frisk that followed the stop, the court noted that, while the officer testified to numerous shootings in the area, he did not say when those shootings had occurred. Id.

In sum, the fact of a "high crime area" is more complicated than the Massachusetts cases have recognized.[21] The label cannot logically be substantiated by data concerning one area, and in any event, for the data to present a reliable picture of an area's tendency toward crime, the spatial and temporal scope of the measured unit must be limited.[22]

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at 513. It is unclear why the court was less exacting in its appraisal of the officer's hundreds of arrests.

[21] The points made here have received some recognition in the federal courts. See United States v. Wright, 485 F.3d 45, 53-54 (1st Cir. 2007) (recognizing the importance of a narrow physical and temporal scope in gauging a location's criminal climate); United States v. Montero-Camargo, 208 F.3d 1122, 1140-1144 (9th Cir. 2000) (Kozinski, J., concurring) (disparaging reliance on a "cop's repertoire of war stories," id. at 1143; unwilling to "give police the power to turn any area into a high crime area based on their unadorned personal experiences." Id.). For a critique of the high crime area factor, and a proposal for its improvement along the lines suggested here, see Andrew Guthrie Ferguson, The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis, 57 Am. U. L. Rev. 1587 (2008).

[22] Although it should not matter if it is difficult for the Commonwealth to substantiate its conclusions — the Fourth Amendment and Article 14 do make exceptions for baseless suspicion, where a basis is burdensome to show — it would not be difficult for the Commonwealth to make the suggested showing. The Boston police do keep time-specific data as to the location of crimes, for the very purpose of detecting crime "hot spots." See Wright, 485 F.3d at 49-50. On the widespread availability and use of crime-mapping technology among urban police departments, see Andrew

* * *

In summary of Part I, the Defendant's Motion to Suppress Evidence should have been granted because he was stopped without reasonable suspicion.

## II. THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SHOULD HAVE BEEN GRANTED BECAUSE HE WAS UNREASONABLY FRISKED.

If there was reasonable suspicion to justify the stop of the Defendant, the next question is whether the frisk of his bag was reasonable. There are two ways in which the frisk could have been justified: (A) if, between the time of the stop and the frisk, the officers' reasonable suspicion was elevated to probable cause, thus making the Defendant searchable incident to arrest; or (B), if the officers reasonably suspected that the Defendant was armed and dangerous.

### A. A Marginal Case Of Reasonable Suspicion Is Not Elevated To Probable Cause On The Basis Of A Completely Cooperative Person's Implausible Answer To Police Questions.

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Guthrie Ferguson, Crime Mapping and the Fourth Amendment: Redrawing "High Crime Areas," 63 Hastings L.J. -- (to be published in November 2011). Professor Ferguson here expands on his 2008 article, cited *supra* at n.21, arguing that, because crime patterns can now be identified with such ease and precision, there is no reason to settle for officers' subjective impressions of whether an area is high in crime.

The one suspicious fact that occurred between the stop and the frisk was the Defendant's response to the officers' question of what he had been doing before they stopped him. The Defendant told the officers that he had not been on Hayward Place, and had not been with anyone since arriving downtown. *S.H. 17-18.*

It is true that once a Terry stop is made, implausible answers to police questions can, either by themselves or in combination with other facts, elevate reasonable suspicion to probable cause. Where the pre-stop circumstances are highly suspicious to begin with, implausible answers alone can make the difference. See Commonwealth v. Watson, 430 Mass. 725, 726-734 (2000) (suspects met with man in hotel whose behavior closely matched profile of drug courier; suspects left meeting with large suitcases; suspects drove away erratically, in telltale fashion of drug couriers looking to see if they are being followed – *held*, when suspects were stopped and gave conflicting accounts of suitcases' ownership, probable cause obtained); Commonwealth v. Modica, 24 Mass. App. Ct. 334, 335-340 (1987) (house was under surveillance after being identified as location of stolen computers; police had evidence that person involved in

one theft had been injured falling from window; police had evidence of the type of car involved in same theft; officer watched one evening as three men, one on crutches, emerged from house under surveillance; two men carried large box and looked around furtively while loading box onto car of type involved in prior theft; *held*, when suspects were stopped and each denied ownership of box, with defendant denying any knowledge about box, probable cause obtained).

On the other hand are cases where there is less clearance of the reasonable suspicion bar before the stop. In these cases, an implausible answer has combined with other post-stop circumstances to give rise to probable cause. See Commonwealth v. Riggins, 366 Mass. 81, 86-88 (1974) (reasonable suspicion became probable cause where robbery suspects, stopped on highway, besides giving implausible accounts of where they had been — one suspect claimed not to know where he had been — could produce no identification, and were very nervous); Commonwealth v. Alvarado, 420 Mass. 542, 547-551 (1995) (reasonable suspicion became probable cause where drug possession suspect, besides falsely denying that he had stuffed something into his pants, admitted to hailing from Medellin, Colombia,

and acted nervous; meanwhile, his companion, the driver of the car in which he was stopped, gave the officer an obviously false social security number).

The Defendant's case does not fall into either category. As shown in Part I, the Commonwealth did not come close to probable cause prior to the stop, as it did in Watson and Modica; and unlike in Riggins and Alvarado, there were no suspicious facts to supplement the Defendant's implausible answers after the stop. The Defendant freely gave his name. *S.H. 60.* He readily provided his identification card. *S.H. 71.* He did not behave nervously at all.

Cases akin to the Defendant's are Commonwealth v. Lehan, 347 Mass. 197, 199-205 (1964), and Commonwealth v. Dellinger, 383 Mass. 780 (1981). In Lehan, officers saw the defendant walking rapidly down a street with a bulge in his coat. The defendant, whom one officer knew as a suspect in earlier burglaries, carried two large boxes. The officers pulled up and asked what the defendant was carrying, and where to. The defendant replied that he was carrying his wife's possessions — among them, a hair dryer — to his new residence, having just fallen out with his wife. The court held that there was reason to stop the defendant, but that

his incredible claim to possessing his estranged wife's feminine apparatus did not elevate reasonable suspicion to probable cause. Id. at 204-206.

In Dellinger, 383 Mass. at 781-783, three men in a car followed a delivery van laden with a large amount of silver. The van driver called the police; an officer watched as the car's obvious tracking of the van continued. The officer pulled the car over. The officer asked for identifications, and received them. The officer asked what the occupants had been doing in the area, and was told that they had been in "Portsmouth or Portland, Maine," looking at boats. Id. at 782. This was ridiculous — Portsmouth is in New Hampshire; Maine boat-shoppers from Rhode Island were not likely to be found outside loading docks of industrial plants in Newburyport, MA, during severe snowstorms — but it was not enough, even when combined with the officer's discovery that the men had extensive criminal records, to elevate reasonable suspicion to probable cause. Id. at 783.

The Defendant's case is only roughly analogous to those above. If anything, the Defendant's overall circumstances were less suspicious — in Dellinger, for example, there was no conceivably innocent explanation

for following the delivery van; in the Defendant's case, there were any number of innocent explanations for the activity prior to the stop. In any event, Dellinger and Lehan show that implausible answers to police questions do not, by themselves, count significantly toward suspicion.

In short, the Defendant's false answers were at most a marginal supplement to a meager sum of suspicion. That sum did not, before the stop, amount to reasonable suspicion; but if it did, it did so barely, and the cases give no indication that implausible answers to police questions can alone elevate borderline reasonable suspicion to probable cause.

**B. The Frisk Of The Defendant Was Not Supported By A Reasonable Apprehension of Danger.**

Because the officers did not have probable cause to arrest the Defendant, and thus could not search him incident to arrest, the only way to justify the frisk of his bag was if the officers reasonably suspected him to be armed and dangerous. Terry, 392 U.S. at 27.

After the officers asked the Defendant what he had been doing, Dwan frisked the Defendant's backpack because "[i]t appeared to be weighted down." *S.H. 18.*

Dwan added, "it appeared to be a heavy object in the bag. I didn't want him to take the bag and - he could've used the bag as a weapon, swinging it and striking anybody there …." *S.H. 18-19.*

This frisk was unreasonable because Dwan did not reasonably suspect that the Defendant was "both armed *and* dangerous." Commonwealth v. Knowles, 451 Mass. 91, 99 (2008) (emphasis in original). Even if one accepts Dwan's far-fetched claim that the backpack suggested a potential weapon, there was no indication that the Defendant might be inclined to use it as such. The Defendant "did nothing to suggest that he might be attempting to secure or draw a weapon." Id. He did nothing evasive or furtive. Cf., e.g., Commonwealth v. Fisher, 54 Mass. App. Ct. 41, 44-46 (2002) (defendant did U-turn and made quick movement toward waist area upon seeing police); Commonwealth v. Isaiah I., 450 Mass. 818, 820, 824 (2008) (at officers' approach, defendant walked away quickly and appeared to place object in his sock). The Defendant's suspected crime was not violent. See Commonwealth v. Narcisse, 457 Mass. 1, 9-10 & n.7 (2010). There was no evidence that the Defendant was known ever to have been involved in weapons-related crime. See Gomes, at 512-513. There

was no evidence that the area of the stop was high in weapons-related crime. Cf. Fisher, 54 Mass. App. Ct. at 45. The Defendant was outnumbered by the officers. See Gomes, at 513. It was broad daylight. See Knowles, 451 Mass. at 99.

In sum, there was no suggestion that the Defendant was dangerous. Neither the Defendant's behavior nor the surrounding circumstances gave the officers cause to fear for their safety. Accordingly, as in Gomes, at 512-514, the frisk was unreasonable.[23] See also Commonwealth v. Greenwood, 78 Mass. App. Ct. 611, 616-617 (2011) (no reason to frisk where defendant acted in cooperative manner).

**C. The Defendant's Consent To The Search Of His Backpack Was Invalid Because It Stemmed From The Illegal Frisk.**

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[23] Even if the frisk of the bag had been justified, this would not have justified Dwan's later search of the box inside the bag. When the Defendant handed Dwan the bag, he removed any reason for Dwan to be concerned about its contents. See Commonwealth v. Pagan, 440 Mass. 62, 66-67 (2003) (suggesting that, once officers securely possess bag of friskable person, there is no right to search the bag for weapons). In any event, it was not reasonably conceivable that a weapon was contained within the cigarette-pack-sized box. See Commonwealth v. Cruz-Rivera, 76 Mass. App. Ct. 14, 18-20 (2009) (pill bottle not reasonably suspected to contain weapon).

When Dwan frisked the Defendant's bag, he felt an object that did not feel like a cell phone charger, which the Defendant had told him was inside. *S.H. 18.* His curiosity thus piqued, Dwan asked whether he could search the bag. *S.H. 18.* Dwan testified that the Defendant consented at first, but then withdrew his consent once Dwan pulled out what appeared to be a pack of cigarettes (but was much heavier). *S.H. 19.*

Because Dwan's request to search the bag stemmed directly from his illegal frisk of the bag – that is, the request was prompted by what Dwan felt inside – any consent given by the Defendant was invalid. See Commonwealth v. Midi, 46 Mass. App. Ct. 591, 594-596 (1999) ("When consent to search is obtained through exploitation of a prior illegality, particularly very close in time following the prior illegality, the consent has not been regarded as freely given." Id. at 595). Cf. Commonwealth v. Nickerson, 79 Mass. App. Ct. 642, 646-648 (2011) (consent valid because it did not result proximately from frisk).[24]

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[24] Even if the consent had been valid, it did not extend to the box. The Defendant was entitled to draw boundaries to his consent, which he unambiguously did. See Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("A suspect may of course delimit as he chooses the scope

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In summary of Part II, the Defendant's Motion to Suppress should have been granted because, even if the Defendant was legally stopped, there was no justification for the ensuing frisk and search.

## III. THE PROSECUTOR'S AND OFFICERS' REPEATED ALLUSIONS TO THE DEFENDANT'S PRIOR CRIMINAL CONDUCT DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

Under Article 12 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution, the Defendant was entitled to a fair trial. The prosecutor and police violated the Defendant's right to a fair trial by repeatedly alluding to his prior criminal conduct.

From the very start of the trial, the prosecutor tried to convey to the jury that the Defendant's criminality went beyond the facts of the case:

> Welcome to Suffolk Superior Court, my name is Melissa Brooks. As I've said, I'm an Assistant District Attorney, in the Major Felony Bureau of Suffolk County and I have the privilege of representing the Commonwealth of Massachusetts in this case.
>
> During this trial, I will prove to you, beyond a reasonable doubt, that the Defendant,

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of the search to which he consents."); Commonwealth v. Cantalupo, 380 Mass. 173, 178 (1980) ("[A] search with consent is reasonable and legal only to the extent that the individual has consented.").

> Paul Stewart, is a drug dealer in the city of Boston ….

*Tr. I/179.*

It was, as this Court has remarked of a similar opening statement, "not a good start." Commonwealth v. Griffith, 45 Mass. App. Ct. 784, 784 (1998). In Griffith, the prosecutor began her opening by calling the Defendant a drug dealer. "That," the court observed, "was rather much to say about a defendant charged with a single count of distributing marijuana, as compared with trafficking in marijuana." Id. To the court, the prosecutor's implication was clear: "that the defendant Griffith was a career criminal, i.e., that he committed prior bad acts and must be guilty of the crime now charged." Id.

In the Defendant's case, the innuendo was worse. Not only was the Defendant a "drug dealer," but the prosecutor worked for the "major felony bureau." The prosecutor evidently considered this an important credential to establish, given that she introduced herself before jury selection in the same way. *Tr. I/36.* The Defendant, then, was not just any felon; he was a major felon. It was rather much to imply, of a person who stood charged with possessing and intending

to distribute twelve rocks of crack cocaine on the street. The implication, as with the "drug dealer" characterization, was clear: the Defendant was a bigger criminal than his case would suggest.

If any juror missed this message, he could not have missed what followed. Three separate times, officers testified to having been familiar with Defendant before the time of his offense. First, Dwan testified on direct that, as he drove down Washington Street, he "observed the person that [he] was familiar with walking on the street …." *Tr. I/198*. Later, after Dwan testified that he was familiar with one party to the supposed exchange on Hayward Place, the prosecutor asked him to clarify whether he was referring to the Defendant. Dwan confirmed that he was. *Tr. I/207*.[25] In

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[25] Dwan's repeated references to his prior familiarity with the Defendant, and the prosecutor's amplification thereof, are especially remarkable in light of a colloquy that took place before trial. During the colloquy, the prosecutor assured the judge that she would not, at least on direct examination, refer to the officers' prior arrest of the Defendant — and that she would instruct her witnesses to likewise refrain. *Tr. I/13-14*. It is not clear how the prosecutor's promise can be reconciled with Dwan's (and her own) conduct at trial. Obviously, saying that Dwan was familiar with the Defendant was equivalent to saying that Dwan was familiar with the Defendant's previous involvement in crime. Certainly, Dwan could have been familiar with the Defendant from some other

her redirect examination of Officer Chu, the prosecutor dwelled at length, over objection,[26] on Chu's prior familiarity the Defendant. *Tr. II/65.*

Similar intimations of defendants' prior bad acts have been addressed in Commonwealth v. Gonzalez, 47 Mass. App. Ct. 255, 259 (1999), and Commonwealth v. McCollum, 79 Mass. App. Ct. 239, 258-259 (2011). In Gonzalez, an officer's claim to familiarity with the Defendant did not warrant reversal because the

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context – but in that case, there would have been no point in mentioning Dwan's familiarity with the Defendant at all.

[26] It is not clear why the judge overruled the Defendant's objection. After defense counsel had cross-examined Dwan, the prosecutor requested leave to ask Dwan about his prior arrest of the Defendant (although, in fact, she and Dwan had already amply covered this ground – see n.25, *supra*). Her theory was that the Defendant had opened the door to this subject by questioning Dwan as to why he made no effort to stop the other three persons involved in the supposed exchange. Perhaps because the prosecutor's theory did not make sense – the reason for targeting the Defendant was irrelevant to whether, as the Defendant proposed, the officers were investigatorily remiss in failing to stop the other parties – the judge denied the prosecutor's request. *Tr. I/240-241.*

It seems that the only way to explain the judge's subsequent approval of the prosecutor's inquiry into Chu's familiarity with the Defendant is that the judge, like the prosecutor, drew a distinction between questions about a prior arrest and questions about prior familiarity. It is, see *supra* n.25, a distinction that makes no difference. A jury will presumably understand that when a prosecutor fixates on a police officer's familiarity with a defendant, she is not alluding to a friendly association.

officer's remark "was isolated and not adverted to in closing arguments." 47 Mass. App. Ct. at 259. Likewise, in McCollum, reversal was unwarranted where an officer's past contact with the defendant was "never referred to again during the remainder of the trial or in closing argument…." 79 Mass. App. Ct. at 259 & n.23.

In the Defendant's case, by contrast, the officers' familiarity with the Defendant was a recurrent theme. Again, and again, and again, the theme was struck - three times during evidence, as detailed above, and then once more during the prosecutor's closing argument, where the prosecutor reminded the jury that on Washington Street, "(Dwan) saw the defendant, whom he recognized from the area …." *Tr. III/28*.

Add to this innuendo the prosecutor's "drug dealer" and "major felon" stratagems, the former of which she deployed again in her closing - "Now, let's call him what he is, ladies and gentlemen. He's a drug dealer in the city of Boston." *Tr. III/26* – and the jury might well have wondered whether the second part of the trial, the subsequent offender part, was redundant.

In sum, the Defendant's criminal history was a central theme of the Commonwealth's case. "This was not a momentary misstep but a persistent course of conduct designed to prejudice the [D]efendant." Commonwealth v. DeMars, 42 Mass. App. Ct. 788, 795 (1997) (Brown, J., concurring). As in Griffith, *supra*, "the consistent and, on the evidence, unwarranted characterization of the defendant as a career drug dealer, from the beginning of the case to the end of the case achieved a saturation level that deprived [him] of a fair trial." 45 Mass. App. Ct. at 789.[27]

## IV. THE DEFENDANT WAS ILLEGALLY SENTENCED AS BOTH A REPEAT DRUG OFFENDER AND A HABITUAL CRIMINAL.

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[27] In DeMars and Griffith, as in the Defendant's case, the defendant did not object to all of the prosecutor's misconduct. In each case, the court thus reviewed all of the misconduct together under a substantial risk of miscarriage of justice standard. In Griffith, the court noted that it could also have reviewed the objected-to misconduct separately, under a harmless error standard. Id. at 785 n.2. In the Defendant's case, it should not matter which standard of review is applied, nor which errors are reviewed under it, given that the jury was at first deadlocked, and had to be coaxed toward a verdict by the judge. *R. 51; Tr. III/73-74.* Apparently, at least one juror harbored considerable doubt about the Defendant's guilt. In such an evidently close case, one cannot conclude with any degree of assurance that any error was immaterial to the verdict (under a substantial risk of miscarriage of justice standard), never mind conclude that an error had no or negligible effect on the jury (under a harmless error standard).

After the Defendant was convicted of possessing with intent to distribute a Class B substance, the jury found that he was both a second or subsequent offender, under G.L. c. 94C, § 32A(d), and a habitual criminal, under G.L. c. 279, § 25. *A. 5-6, 9.* The predicate offense under c. 94C, § 32A(d), as proved by the Commonwealth, was a 2006 conviction for distribution of a Class B substance.[28] *Tr. IV/7, 49-50.* The two predicate offenses under c. 279, § 25, as proved by the Commonwealth, were the same 2006 conviction, and a 1994 conviction for assault and battery with a dangerous weapon. *Tr. IV/7, 49-50.*

G.L. c. 94C, § 32A(d), provides for a prison sentence of between 5 and 15 years for second or subsequent violators of c. 94C, § 32A(c). *A. 5-6.* G.L. c. 279, § 25, mandates the maximum penalty for the felony of which a habitual criminal is convicted. *A. 9.* By applying both statutes to the Defendant, the judge derived a mandatory sentence of 15 years.[29]

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[28] The indictment against the Defendant also named a 1989 conviction for possession of a Class B substance with intent to distribute. *R. 18; Tr. IV/19-20.* The prosecutor presented no evidence concerning this conviction at trial.

[29] The judge made clear that she sentenced the Defendant to fifteen years because she believed that

The Defendant's sentence is illegal. As noted above, the habitual criminal statute mandates imposition of the maximum penalty for the felony of which a person is convicted. The Defendant's felony was not, as assumed by the judge, a second or subsequent offense of distributing (or possessing with intent to distribute) a drug. As the SJC has made clear, there is no such felony:

> Section 32A(d) does not identify a crime that has a freestanding life of its own. It concerns solely the sentence of a person convicted of a violation of § 32A(c) who has previously been convicted of at least one similar drug offense. The prior offense is not an element of the crime for which a defendant is charged but concerns the punishment to be imposed if he is convicted of § 32A(c) and the prior offense is proved.

Bynum v. Commonwealth, 429 Mass. 705, 708-709 (1999).

The Defendant's crime, then, was simply possession with intent to distribute a Class B drug, under c. 94C, § 32A(c). The maximum penalty for that offense is 10 years in prison. *A. 5.* Accordingly, the application of the habitual criminal statute would result in a mandatory sentence of 10 years, not 15.

Even were a case like Bynum not to exist – that is, even were it ambiguous what a second or subsequent

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she was required to do so – not, that is, out of her own discretion. *Tr. IV/64; R. 52.*

drug distributor's "felony" is – the rule of lenity would require that the ambiguity be resolved in favor of the Defendant. Under the rule of lenity, where a criminal statute is ambiguous, "the defendant is entitled to the benefit of any rational doubt." Commonwealth v. Constantino, 443 Mass. 521, 524 (2005). It must thus be presumed that the Legislature does not intend the harsher of two possible meanings of "felony"; and more generally, it must be presumed that the Legislature does not mean to provide for the application of two enhancement statutes to a defendant's sentence.[30]

In short, the Defendant's sentence is invalid, and his case must be remanded for resentencing. The remaining question is which of the two enhancement

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[30] A presumption against such "double enhancement" exists in many jurisdictions. See, e.g., People v. Fetterley, 229 Mich. App. 511, 540-541 (1998); State v. Anaya, 123 N.M. 14, 22-25 (1996); Lawson v. State, 295 Ark. 37, 38-42 (1988); State v. Chapman, 205 Neb. 368, 370-372 (1980). In some jurisdictions, double enhancement is permitted, but only where the predicate offenses for the enhancements are different – unlike, that is, in the Defendant's case. See, e.g., Commonwealth v. Grimes, 698 S.W.2d 836, 836-837 (Ky. 1985); State v. Maxey, 264 Wis.2d 878, 886-890 (2003); State v. Baker, 935 So.2d 366, 367-369 (La. App. 2nd Cir. 2006). In what appears to be a small minority of jurisdictions, double enhancement is permitted notwithstanding an overlap among predicate offenses. See State v. Hayes, 330 S.W.3d 828 (Mo. App. 2011).

statutes must be used. If c. 94C, §32A(d), applies, the judge will have discretion over the length of the Defendant's sentence (between 5 and 15 years). If c. 279, § 25, applies, the Defendant's sentence will be a mandatory 10 years.

Because c. 94C, §32A(d), is specifically designed for drug cases such as the Defendant's – and moreover, because it was enacted more recently than c. 279, § 25[31] – it must take precedence. See Doe v. Attorney General, 425 Mass. 210, 215 (1997) ("[W]hen two statutes (or provisions within those statutes) conflict … the more specific provision, particularly where it has been enacted subsequent to a more general rule, applies over the general rule.").[32]

In sum, the Defendant's doubly enhanced sentence must be vacated. On remand, the Defendant must be sentenced solely according to G.L. c. 94C, §32A(d),

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[31] The original habitual criminal statute was enacted at St. 1887, c. 435, § 1. The original second or subsequent drug offender statute was enacted at St. 1971, c. 1071, § 32.

[32] In most jurisdictions, the more specific enhancement statute controls. See, e.g., People v. Edmonds, 93 Mich. App. 129, 135 (1979); Lloyd v. State, 139 Ga. App. 625, 627-628 (1976); Faubion v. State, 569 P.2d 1022, 1024-25 (Ok. Cr. 1977); Ex parte Chambers, 522 So.2d 313, 315-316 (Ala. 1987).

under which the judge will have discretion to impose a sentence of between 5 and 15 years.

## CONCLUSION

For the reasons stated in Parts I and II, the Defendant's Motion to Suppress Evidence was erroneously denied. Accordingly, his conviction must be reversed, and judgment entered for the Defendant. For the reasons stated in Part III, the Defendant's conviction must be reversed. For the reasons stated in Part IV, if the Defendant's conviction is upheld, his case must be remanded for resentencing.

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## CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure that this brief complies with the applicable rules pertaining to the filing of briefs.

James P. Vander Salm, Esq.

Dated: August 30, 2011

# ADDENDUM

## *Table of Contents*

**Fourth Amendment**
**United States Constitution**

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

**Fourteenth Amendment**
**United States Constitution**

**Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

C

Massachusetts General Laws Annotated Currentness
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts
→ Art. XII. Regulation of prosecutions; right of trial by jury in criminal cases

ART. XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. 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 defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Current through amendments approved August 1, 2011



END OF DOCUMENT

C

Massachusetts General Laws Annotated Currentness
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts
→ Art. XIV. Freedom from unreasonable searches and seizures; warrants

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

Current through amendments approved August 1, 2011



END OF DOCUMENT

**Effective: November 4, 2010**

Massachusetts General Laws Annotated Currentness
Part I. Administration of the Government (Ch. 1-182)
Title XV. Regulation of Trade (Ch. 93-110H)
Chapter 94C. Controlled Substances Act (Refs & Annos)
**§ 32A. Class B controlled substances; unlawful manufacture, distribution, dispensing or possession with intent to manufacture, etc.; eligibility for parole**

(a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class B of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years, or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than one thousand nor more than ten thousand dollars, or both such fine and imprisonment.

(b) Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute or dispense a controlled substance as defined by section thirty-one of this chapter under this or any other prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state, or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than three nor more than ten years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of three years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(c) Any person who knowingly or intentionally manufactures, distributes, dispenses or possesses with intent to manufacture, distribute or dispense phencyclidine or a controlled substance defined in clause (4) of paragraph (a) or in clause (2) of paragraph (c) of class B of section thirty-one shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than ten years or by imprisonment in a jail or house of correction for not less than one nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of one year and a fine of not less than one thousand nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum one year term of imprisonment, as established herein.

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

less than two thousand five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(e) Any person serving a mandatory minimum sentence for violating this section shall be eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to the house of correction, provided that said person shall not be eligible for parole upon a finding of any one of the following aggravating circumstances:

(i) the defendant used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so, during the commission of the offense;

(ii) the defendant engaged in a course of conduct whereby he directed the activities of another who committed any felony in violation of chapter 94C; or

(iii) the offense was committed during the commission or attempted commission of a violation of section 32F or section 32K of chapter 94C.

A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.

CREDIT(S)

Added by St.1980, c. 436, § 4. Amended by St.1981, c. 522; St.1982, c. 650, § 7; St.1983, c. 571, § 2; St.1988, c. 125, §§ 1, 2; St.1991, c. 391; St.2010, c. 256, § 68, eff. Nov. 4, 2010.

Current through Chapter 67 of the 2011 1st Annual Session



END OF DOCUMENT

**Effective: November 4, 2010**

Massachusetts General Laws Annotated Currentness
Part I. Administration of the Government (Ch. 1-182)
Title XV. Regulation of Trade (Ch. 93-110H)
Chapter 94C. Controlled Substances Act (Refs & Annos)
**§ 32J. Controlled substances violations in, on, or near school property; eligibility for parole**

Any person who violates the provisions of section thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F or thirty-two *J* while in or on, or within one thousand feet of the real property comprising a public or private accredited preschool, accredited headstart facility, elementary, vocational, or secondary school whether or not in session, or within one hundred feet of a public park or playground shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than fifteen years or by imprisonment in a jail or house of correction for not less than two nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of two years. A fine of not less than one thousand nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum two year term of imprisonment as established herein. In accordance with the provisions of section eight A of chapter two hundred and seventy-nine such sentence shall begin from and after the expiration of the sentence for violation of section thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F or thirty-two *J*.

Lack of knowledge of school boundaries shall not be a defense to any person who violates the provisions of this section.

Any person serving a mandatory minimum sentence for violating this section shall be eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to a house of correction, except that such person shall not be eligible for parole upon a finding of any 1 of the following aggravating circumstances:

(i) the defendant used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so, during the commission of the offense;

(ii) the defendant engaged in a course of conduct whereby he directed the activities of another who committed any felony in violation of chapter 94C.

(iii) the offense was committed during the commission or attempted commission of the a violation of section 32F or section 32K of chapter 94C.

A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.

CREDIT(S)

Added by St.1989, c. 227, § 2. Amended by St.1993, c. 335; St.1998, c. 194, § 146; St.2010, c. 256, § 72, eff. Nov. 4, 2010.

Current through Chapter 67 of the 2011 1st Annual Session



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**Effective:[See Text Amendments]**

Massachusetts General Laws Annotated Currentness
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title II. Proceedings in Criminal Cases (Ch. 275-280)
Chapter 279. Judgment and Execution (Refs & Annos)
**§ 25. Punishment of habitual criminals**

**Whoever has been twice convicted of crime and sentenced and committed to prison in this or another state, or once in this and once or more in another state, for terms of not less than three years each, and does not show that he has been pardoned for either crime on the ground that he was innocent, shall, upon conviction of a felony, be considered an habitual criminal and be punished by imprisonment in the state prison for the maximum term provided by law as a penalty for the felony for which he is then to be sentenced.**

Current through Chapter 67 of the 2011 1st Annual Session



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