SJC-13086

COMMONWEALTH vs. ZAHKUAN SWEETING-BAILEY.[1]

Bristol. May 3, 2021. - December 22, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Firearms. Motor Vehicle, Firearms. Constitutional Law, Search and seizure, Reasonable suspicion, Investigatory stop, Stop and frisk. Search and Seizure, Threshold police inquiry, Reasonable suspicion, Protective frisk. Threshold Police Inquiry. Practice, Criminal, Motion to suppress, Plea.

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.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Elaine Fronhofer for the defendant.

Shoshana E. Stern, Assistant District Attorney, for the Commonwealth.

David Rassoul Rangaviz, Committee for Public Counsel Services, Radha Natarajan, Katharine Naples-Mitchell, Oren N. Nimni, Chauncey B. Wood, Erin Fowler, & Leon Smith, for

[1] As is our custom, we recite the defendant's name as it appears in the indictments.

Committee for Public Counsel Services & others, amici curiae, submitted a brief.

CYPHER, J. Following a routine traffic stop for an improper lane change, the defendant, Zahkuan Sweeting-Bailey, who had been a rear seat passenger in the vehicle, was ordered out of the vehicle and was pat frisked. Although the stop began as routine, when officers approached the vehicle, the front seat passenger immediately got out of the car, engaged in an argument with the officers, and took a threatening fighting stance. The officers, who were familiar with that passenger from prior encounters, found his angry outburst highly suspicious and believed he was trying to distract them from the vehicle because there was a firearm inside. The three male passengers in the car, including the defendant, were known to the officers as gang members with prior involvement with firearms. During the patfrisk of the defendant, an officer found a firearm tucked into the waist of his pants, and he was arrested.

The defendant was indicted on a number of firearm offenses.[2] After a judge in the Superior Court denied the defendant's

[2] The charges included (1) unlicensed possession of a large capacity firearm, G. L. c. 269, § 10 (m); (2) unlicensed possession of a large capacity feeding device, G. L. c. 269, § 10 (m); (3) carrying a firearm without a license, in violation of G. L. c. 269, § 10 (a), when he "had been previously found delinquent in Juvenile Court of one or more violent crimes," G. L. c. 269, § 10G; and (4) carrying a loaded firearm without a license, G. L. c. 269, § 10 (n).

motion to suppress, he entered a conditional guilty plea to the charges of possession of a firearm without a license and possession of a large capacity feeding device, and the other charges were dismissed. The defendant appealed from his convictions, and the Appeals Court affirmed. We granted the defendant's application for further appellate review. After considering the facts and inferences as a whole, we conclude that the officers had reasonable suspicion, based on specific, articulable facts, that the defendant might have been armed and dangerous. Commonwealth v. Gomes, 453 Mass. 506, 511 (2009). Accordingly, we affirm the order denying the defendant's motion to suppress.[3]

Background. At approximately 7 P.M. on a February evening, three detectives from the New Bedford police department's gang unit, Kory Kubik, Gene Fortes, and Roberto DaCunha, observed a red sedan change lanes abruptly, causing another vehicle to slam on its brakes in order to avoid a collision. The officers followed the sedan as it turned into the parking lot of a fast food restaurant, activated their lights, and initiated a traffic

[3] We acknowledge the amicus brief submitted by the Committee for Public Counsel Services; the Charles Hamilton Houston Institute for Race & Justice; the New England Innocence Project; American Civil Liberties Union of Massachusetts, Inc.; Lawyers for Civil Rights; Citizens for Juvenile Justice; Rights Behind Bars; and the Massachusetts Association of Criminal Defense Lawyers on behalf of the defendant.

stop. At that point, the officers did not know who was in the red sedan.

The vehicle was parked facing toward the restaurant, and the entrance to the restaurant was on the driver's side. Once the vehicle stopped, but before the officers approached, one of the passengers, Raekwan Paris, got out of the vehicle and began pacing between the officers and the vehicle on the passenger side, walking away from the entrance to the restaurant. Paris was angrily confronting them regarding the reason for the stop.

The officers were familiar with Paris from previous encounters, including field interrogations and arrests for firearm offenses. In the past, they had observed that he was cooperative and polite. At the time of this stop, Paris had been released on bail for a 2016 firearm charge.[4] Both Kubik and DaCunha had been involved in the 2016 arrest and recalled that Paris's demeanor had been calm and cordial during that encounter. Kubik also had interacted with Paris during two different traffic stops and had found his demeanor to be similarly cooperative and calm. Fortes, previously a school resource officer, had known Paris "since he was a young kid." Fortes had seen Paris at school events over the years and

[4] Raekwan Paris subsequently was convicted of this charge, but the Appeals Court overturned the conviction, concluding that police lacked reasonable suspicion for an investigatory stop. See Commonwealth v. Paris, 97 Mass. App. Ct. 785, 790 (2020).

recalled that he had "always had a good rapport" with Paris. Additionally, Fortes had had interactions with Paris during car stops and field interrogations. Fortes described Paris as "respectful" during all encounters.

During this encounter, however, DaCunha instructed Paris three times to reenter the car, but he refused. While two of the officers were occupied with Paris, the third attempted to approach the driver's window to speak with the female driver, but became concerned by the "escalating" situation between Paris and the other officers. The officers were unable to address the reason for the stop because of Paris's behavior. They observed that he was "becoming more angry." Fortes testified that, at this time, they were entirely focused on Paris: "his behavior was so agitated . . . and different that all my focus was -- was really on him." Fortes also testified that Paris took "a bladed stance" and that he was unsure if Paris was "getting ready . . . to attack" him. Fortes observed that Paris was "sizing [him] up" and found this behavior to be "very uncharacteristic of him." The officers also observed that Paris had "a closed, clenched fist" before he was handcuffed and that Paris did not appear to be intoxicated.

Paris was brought to the rear of the red sedan, handcuffed, and pat frisked. Only then were the officers able to turn their attention to the occupants of the car. The officers issued an

exit order and conducted a patfrisk of the driver and the two remaining passengers.[5] Although Fortes testified that Paris "calmed down a little" after he was brought to the back of the car, it is important to note that from the time Paris had gotten out of the car to the time the defendant was asked to get out of the car, only ninety seconds had elapsed.

The three male occupants of the vehicle were familiar to the officers at the time of the stop. Two of the officers had been involved in an incident about eighteen months earlier in which Paris had been arrested on two firearms-related charges. Officers had information that the back seat passenger, Carlos Cortes, had posted pictures of a firearm on social media within the previous month and were aware that the defendant had a three year old juvenile adjudication for an offense involving a firearm. Additionally, the officers were aware that Paris was a member of two gangs, the United Front and Bloods. The officers also were aware that the defendant was a member of the Bloods gang and that Cortes was a member of a gang in Fall River.

Discussion. A patfrisk is permissible only where an officer has reasonable suspicion that the stopped individual may be armed and dangerous. See Commonwealth v. Torres-Pagan, 484 Mass. 34, 36–37 (2020). In assessing whether an officer has

[5] The defendant does not challenge the stop or the exit order.

reasonable suspicion to justify a patfrisk, "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. Torres, 433 Mass. 669, 675-676 (2001), quoting Commonwealth v. Vazquez, 426 Mass. 99, 103 (1997). See Commonwealth v. Gonsalves, 429 Mass. 658, 666 (1999). An innocent explanation for an individual's actions "does not remove [those actions] from consideration in the reasonable suspicion analysis." Commonwealth v. DePeiza, 449 Mass. 367, 373 (2007).

In Torres-Pagan, 484 Mass. at 36 n.3, we clarified that "reasonable suspicion" that an individual is armed and dangerous, not "reasonable belief," "is the preferred patfrisk standard" (citations omitted). See Commonwealth v. Narcisse, 457 Mass. 1, 9 (2010). We acknowledged, however, that "the two standards are interrelated and perhaps even interchangeable." Torres-Pagan, supra. "The purpose behind the protective measures allowed by Terry [v. Ohio, 392 U.S. 1 (1968),] is to enable an officer to confirm or dispel reasonable suspicions" that the stopped individual may be armed and dangerous. Commonwealth v. Pagan, 440 Mass. 62, 68 (2003).

In 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 [the judge's] ultimate findings

and conclusion of law." Commonwealth v. Tremblay, 480 Mass. 645, 652 (2018), quoting Commonwealth v. Clarke, 461 Mass. 336, 340 (2012). "The determination of the weight and credibility of the testimony is the function and responsibility of the judge who saw and heard the witnesses, and not of this court." Commonwealth v. Neves, 474 Mass. 355, 360 (2016), quoting Commonwealth v. Moon, 380 Mass. 751, 756 (1980). "[F]indings drawn partly or wholly from testimonial evidence are accorded deference and are not set aside unless clearly erroneous." Tremblay, supra at 655. Here, the motion judge found the officers' testimony "credible in all relevant respects." The motion judge also concluded that the officers' inference that Paris was attempting to distract them from the vehicle was reasonable. We accept the motion judge's finding that the officers believed Paris was attempting to create a diversion; however, we review de novo the motion judge's conclusion that the officers' inference was objectively reasonable. See Commonwealth v. Mercado, 422 Mass. 367, 369 (1996) (we "make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found").

Factors that the motion judge considered included Paris's "uncharacteristic" behavior during the traffic stop, which officers interpreted as an effort to draw their attention away

from the vehicle and its contents, the prior involvement with firearms of the three male passengers in the car, their known gang affiliations, and the high crime area in which the traffic stop occurred. Although each of these factors standing alone would be insufficient to justify the patfrisk of the defendant, the totality of these factors justified not only the exit order, but also the patfrisk.

We address in turn each of the factors that the motion judge considered, keeping in mind that "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [his or her] safety or that of others was in danger." Terry, 392 U.S. at 27. First, we consider what the motion judge found to be the most critical factor in the analysis: Paris's behavior during the stop. We defer to the finding of the motion judge, who heard and saw the testimony, that the officers' suspicion was based on a reasonable inference, in light of their training and experience, as well as their familiarity with Paris, that Paris was trying to distract them from the stopped vehicle. We further conclude that the officers' inference was objectively reasonable given these facts. See id. at 30 ("where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that

the persons with whom he is dealing may be armed and presently dangerous . . . , he is entitled for the protection of himself and others in the area to conduct a carefully limited search . . . in an attempt to discover weapons").

"[An officer's] suspicion must be based on specific, articulable facts and reasonable inferences drawn therefrom." Commonwealth v. Moses, 408 Mass. 136, 140 (1990). In other words, reasonable suspicion that a defendant may be armed and dangerous derives not only from specific facts, but also from an officer's reasonable inferences drawn from those facts. See Sibron v. New York, 392 U.S. 40, 64 (1968) ("In the case of the self-protective search for weapons, [an officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous"); Commonwealth v. Silva, 366 Mass. 402, 406 (1974) ("we have required that the police officer's action be based on specific and articulable facts and the specific reasonable inferences which follow from such facts in light of the officer's experience"). See also Illinois v. Wardlow, 528 U.S. 119, 124-125 (2000) ("In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on

commonsense judgments and inferences about human behavior"). Police also may rely on their training and experience as a basis for reasonable suspicion. See DePeiza, 449 Mass. at 373. See also United States v. Arvizu, 534 U.S. 266, 273 (2002) (officers should "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person" [quotation and citation omitted]); United States v. Zambrana, 428 F.3d 670, 677 (7th Cir. 2005) ("in assessing the evidence presented by law enforcement officers, a district court should be mindful of the officers' experience, their training and the pressure-filled circumstances under which they fulfill their duties").

The motion judge credited the testimony of the three police witnesses entirely, including their testimony that they believed Paris's erratic behavior was intended to divert their attention from the car. See Neves, 474 Mass. at 360, citing Moon, 380 Mass. at 756. Specifically, the motion judge found that "[t]he officers had a legitimate concern at that point that there may be a weapon in the car because of the past dealing with [Paris] and his behavior on this date."[6] See Commonwealth v. Kennedy,

[6] In his dissent, Justice Gaziano faults the court for, as he puts it, "conclud[ing] that Paris's motive in undertaking his actions . . . could be imputed to the defendant, thereby providing reasonable suspicion that the defendant was armed and

426 Mass. 703, 708 (1998) (deference to motion judge's assessment of credibility of testimonial evidence extends to inferences "derived reasonably from the testimony").

The defendant argues that the officers' conclusion that Paris's erratic behavior was an effort to draw their attention away from the vehicle and its contents was a "mere hunch," rather than a reasonable inference. Silva, 366 Mass. at 406.[7] A "hunch" is a subjective opinion that has no basis in fact. See Commonwealth v. Villagran, 477 Mass. 711, 715-716, 718 (2017). Although the officers may have had the subjective opinion that Paris was attempting to create a diversion, we consider whether the officers' actions were objectively reasonable. "The subjective intentions of police are irrelevant so long as their actions were objectively reasonable." Commonwealth v. Cruz, 459

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dangerous, and that Paris was attempting to distract police from becoming aware of this fact." Post at . The court makes no such mental leap. We conclude only, as the judge did, that Paris's conduct gave rise to a reasonable inference that Paris was attempting to distract the officers' attention from the car because there was a firearm somewhere inside the car.

[7] The defendant in his brief and Justice Gaziano in his dissent make much of the fact that the officers testified that their actions were based on a hunch. See post at . This is a misrepresentation of the testimony. Defense counsel asked one officer: "[I]t's fair to say [your actions and the actions of the other detectives] were entirely based on a hunch?" The officer responded: "It was more of a fear, yes." The officer further stated that his actions were based on a fear for "officer safety." In any event, how the officer described his perceptions is not legally meaningful, as we are not bound to accept his characterization of his suspicion.

Mass. 459, 462 n.7 (2011). See Commonwealth v. Kearse, 97 Mass. App. Ct. 297, 300 (2020), quoting Commonwealth v. Bacon, 381 Mass. 642, 643 (1980) ("The test is not whether the officer is acting in good faith. Rather, '[t]he test is an objective one'" [citation omitted]).

In Villagran, 477 Mass. at 716, 718, we concluded that a vice-principal's opinion that an individual on school property "[had] something on him" and that "[s]omething[was] not right" with no explanation for the basis of this claim was a mere "hunch" that did not justify a patfrisk. There, at the time of the frisk, there was no conduct of which the officer was aware that would give rise to a specific and articulable reasonable suspicion that the defendant may be armed and dangerous. Id. at 718. Similarly, in Gomes, 453 Mass. at 513, we concluded that officers' vague reference to shootings in the area in which the defendant had no apparent involvement was insufficient to give police reasonable suspicion to conduct a patfrisk.

Here, the officers' inference that Paris was attempting to distract them from criminal activity in the vehicle was based in fact. Immediately after the officers initiated the stop, Paris got out of the vehicle and began pacing between the officers and the vehicle. He appeared to be angry and was uncooperative. The officers informed Paris that it was a traffic stop, but Paris refused to get in the vehicle when the officers instructed

him to do so multiple times. One officer testified that he was unable to approach the driver's window because of his concern for the "escalating" situation between Paris and the other two officers. Paris appeared to become angrier in time, and as a result, the officers were focused entirely on him, unable to attend to the vehicle or the other occupants in the vehicle. As Paris became more agitated, officers noticed that he took "a bladed stance," and appeared to be preparing "to attack [Fortes]," whom he had known for years and with whom he had had a good rapport. Officers also observed that Paris had "a closed, clenched fist."

As a result of the quickly escalating situation and their concern for their safety, the officers handcuffed and pat frisked Paris. Only then were they able to turn their attention to the other occupants of the car. Although Paris appeared to "calm[] down a little" after he was brought to the rear of the vehicle, only one and one-half minutes had elapsed since Paris initially got out of the vehicle. See Commonwealth v. Stampley, 437 Mass. 323, 326 (2002), quoting Gonsalves, 429 Mass. at 671 (Fried, J., dissenting) (considering constitutionally of exit order while "recognizing that law enforcement officials may have little time in which to avert the sometimes lethal dangers of routine traffic stops" [quotation and citation omitted]). See also Commonwealth v. Silvelo, 486 Mass. 13, 16 (2020) ("Even

where the officers ask the defendant to get out of the vehicle, they may reasonably fear for their safety because any other occupant may access a weapon left behind by the defendant, or the defendant may access a weapon left behind upon returning to the vehicle").

As previously mentioned, the officers' suspicion that Paris's behavior was a diversion was compounded by the fact that the officers knew him from previous encounters and found his behavior to be especially uncharacteristic.[8] The dissenting

[8] In Commonwealth v. Torres-Pagan, 484 Mass. 34, 40 (2020), we distinguished between furtive behavior that would warrant a suspicion that an individual may be armed and dangerous and surprising behavior. "[S]urprise in response to unexpected behavior is not the same as suspicion that the person is armed and dangerous." Id. Here, the defendant's behavior was not just surprising, it was aggressive. As Paris became more agitated, officers noticed that he took "a bladed stance" and appeared to be preparing "to attack [one officer]." Officers also observed that Paris had "a closed, clenched fist." Paris's behavior was one factor that gave rise to a heightened awareness of danger during the stop.

In Torres-Pagan, we did not consider whether the furtive or aggressive movements of one passenger may warrant reasonable suspicion that another passenger may be armed and dangerous. Given the officers' reasonable inference that Paris's behavior was a diversion, it is reasonable to conclude that this factor was an important part of the totality of the circumstances analysis relating to the defendant. See Commonwealth v. Stampley, 437 Mass. 323, 326 (2002), quoting Commonwealth v. Gonsalves, 429 Mass. 658, 665 (1999) ("the officer need point only to some fact or facts in the totality of the circumstances that would create in a police officer a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car").

justices attempt to lessen the weight of this factor by explaining that even on occasions when Paris was involved in criminal activity, he was polite and cooperative, suggesting that his behavior is no indication of whether he was engaged in criminal activity. However, Paris had been cooperative and friendly even during field interrogations that did not result in criminal charges. Additionally, as previously discussed, Fortes was a school resource officer and had known Paris for many years. Fortes testified that, in all his encounters with Paris over the years, "[i]t's always been pretty much the same. He's been respectful. We've always had . . . a good rapport, him and I." The officers observed that his behavior during this stop notably was different from his behavior during all past encounters. Paris did not merely question the reason for the stop. He became angry and uncooperative. He took "a bladed stance," and appeared to be preparing to attack one officer. Even when one officer explained that the reason for the stop was a traffic violation, he refused to get back into the car. These facts support our conclusion that the officers' inference that Paris was attempting to create a diversion objectively was reasonable. See Commonwealth v. Jones, 83 Mass. App. Ct. 296, 299-300 (2013). Cf. United States v. Soares, 521 F.3d 117, 122 (1st Cir. 2008) (defendant's "movements could easily be seen as an attempt to create a diversion and confusion amongst the

officers while he and the other passengers created an environment that was unsafe for the officers").

The facts discussed supra have a direct nexus both to Paris and to the other individuals in the car. See Gomes, 453 Mass. at 513. See also Narcisse, 457 Mass. at 12 ("neither the defendant nor his companion did anything that would arouse suspicion that criminal activity was 'afoot'"). Accordingly, there is nothing to suggest that the judge's findings were clearly erroneous or that he erred in concluding that it was reasonable for the officers to conclude that Paris's behavior at the time of this stop was unusual and was an attempt to divert the officers' attention from the vehicle and its contents.

Generally, the acts of a suspect's companions are not enough to establish a reasonable suspicion without more, but they may be considered in assessing whether a reasonably prudent person would be warranted in concluding that a suspect may be armed and dangerous. See Commonwealth v. Douglas, 472 Mass. 439, 443 (2015) (defendant shifting automobile into "drive" during course of stop should be "considered in the totality of the circumstances and in light of other information known to the officers"). See also Vazquez, 426 Mass. at 103 ("We have upheld searches and orders for occupants to leave an automobile when, given other suspicious circumstances which justified a stop, an officer had no information whatsoever that a gun may have been

in the vehicle, but still had reason to be concerned with his and others' safety"); Commonwealth v. Wing Ng, 420 Mass. 236, 239-241 (1995) (officers justified in pat frisking defendant during execution of warrant to arrest alleged criminal riding in defendant's vehicle despite defendant's cooperation with police during stop); Moses, 408 Mass. at 144 (officers can take reasonable precautions for their own protection that are "minimally necessary to learn whether the suspect is armed and to disarm him once the weapon is discovered" [citation omitted]); United States v. Rice, 483 F.3d 1079, 1085 (10th Cir. 2007) ("A reasonable officer can infer from the behavior of one of a car's passengers a concern that reflects on the actions and motivations of the other passengers. The backseat passenger's behavior could only heighten [the officer's] concern that this was anything but a routine traffic stop"). When objectively viewed in light of the information known to the officers, Paris's actions were one important factor that contributed to the officers' reasonable suspicion that the defendant may be armed and dangerous. See Terry, 392 U.S. at 28 ("We cannot say [the officer's] decision at that point to seize [the defendant] and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of [an officer] who in the course of an investigation had to make a

quick decision as to how to protect himself and others from possible danger, and took limited steps to do so").

Of course, the fact that a person has a criminal history is not "suspicious" automatically and at a certain point the effect of a previous conviction carries no weight in a reasonable suspicion analysis. However, in appropriate circumstances, it is a factor that may be considered. The circumstances of this stop warranted consideration of the passengers' criminal history. As earlier mentioned, two of the officers had been involved in an incident approximately eighteen months earlier in which Paris had been arrested on two firearms-related charges. Officers had information that the back seat passenger, Cortes, had posted pictures of a firearm on social media within the last month. Finally, officers were aware that the defendant had a three year old juvenile adjudication for an offense involving a firearm.

The defendant's relevant criminal history is relatively remote in time; however, an individual's criminal history may weigh more heavily in the analysis if it involves an offense close to the conduct at issue. Although the initial stop resulted from a traffic violation, officers quickly became concerned that there may be a firearm in the vehicle. The defendant's prior adjudication, and the other male passengers' previous interactions with law enforcement, all involved

firearms. See, e.g., Commonwealth v. Mendez, 476 Mass. 512, 518 n.7 (2017). Alone, this evidence of the defendant's criminal record would not be sufficient to establish reasonable suspicion that the defendant may be armed and dangerous. See United States v. Torres, 987 F.3d 893, 904 (10th Cir. 2021), citing United States v. Hammond, 890 F.3d 901, 906–907 (10th Cir.), cert. denied, 139 S. Ct. 390 (2018). However, the dissenting justices do not give this factor sufficient weight in the context of the totality of the circumstances.

Additionally, evidence of gang membership may be considered as a factor in the determination of reasonable suspicion, although, standing alone, it does not necessarily support a reasonable suspicion that a person may be armed and dangerous. This is especially true where, as here, the Commonwealth introduced no evidence regarding any known or ongoing gang violence in the area of the stop, police were not investigating gang-related crime when they initiated the traffic stop, and the Commonwealth did not link any efforts by Paris to distract the officers from the vehicle and its contents to any gang activity.

Nonetheless, "where . . . the circumstances of the stop itself interact with an individual's criminal history to trigger an officer's suspicions, that criminal history becomes critically relevant for Terry-purposes." Torres, 987 F.3d at 904, quoting Hammond, 890 F.3d at 907. Paris was known to the

gang unit officers as a member of both the United Front and Bloods gangs. The officers also were aware that the defendant "was validated as a Blood gang member" and that Cortes was a member of a gang in Fall River. The passengers' gang affiliations, combined with their previous involvement with firearms, are a factor that must be considered in the context of the totality of the circumstances analysis.

Finally, the fact that the stop occurred in a high crime area is a factor in the reasonable suspicion calculus, albeit one that contributes minimally. Although this factor should be given minimal weight, Justice Gaziano, in his dissent, see post at , places too much focus on the fact that location alone does not suggest that the defendant may be armed and dangerous without considering the factor in the totality of the circumstances. See Narcisse, 457 Mass. at 13. See also DePeiza, 449 Mass. at 372 ("judge appropriately considered the high crime setting of the encounter, together with other factors, to conclude that the officers had reasonable suspicion that the defendant was committing a crime"). Much of the judge's findings regarding the high crime area related to the fact that Paris's previous firearm arrest took place approximately one-half mile away from the location of this stop. In considering the high crime area, the judge also noted that

the stop occurred in a location known to be United Front gang territory.[9]

The dissents emphasize that the defendant was cooperative and sat quietly in the vehicle before the exit order and the patfrisk. The dissenting justices suggest that because the defendant's conduct itself did not give rise to a reasonable suspicion, the other factors previously discussed, when considered as a whole, did not amount to specific articulable facts that the defendant might be armed and dangerous. "[T]he frisk of a person is constitutionally permissible if the arresting officer can point to specific, articulable facts that warrant a reasonable suspicion that the particular individual might be armed and a potential threat to the safety of the officer or others" (emphasis added). Wing Ng, 420 Mass. at 237. It is entirely possible that even where a defendant did not him- or herself behave in a suspicious manner at the time of the stop, other factors, including a companion's behavior, might be sufficient in light of the other factors to create specific, articulable facts that warrant a reasonable suspicion that the defendant may be armed and dangerous.

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[9] Specifically, the judge found that the "United Front Housing Development" was located near the point of the stop at issue in this case. The housing development was actually called "United Front Homes"; however, in 2011, it was renamed "Temple Landing."

As discussed supra, although "mere propinquity" is insufficient, Ybarra v. Illinois, 444 U.S. 85, 91 (1979), "[a] suspect's companionship with or propinquity to an individual independently suspected of criminal activity is a factor to be considered in assessing the reasonableness of a seizure," United States v. Silva, 957 F.2d 157, 161 (5th Cir.), cert. denied, 506 U.S. 887 (1992). See United States v. Bell, 762 F.2d 495, 500-502 (6th Cir.), cert. denied, 474 U.S. 853 (1985), citing United States v. Sink, 586 F.2d 1041, 1047-1048 (5th Cir. 1978), cert. denied, 443 U.S. 912 (1979) (patfrisk of defendant justified where defendant in car with individual known to be potentially armed and dangerous, defendant could not be ruled out as that individual's accomplice in previous incident, vehicle was parked in relatively crowded place, and defendant was noncompliant with officer's commands). To conclude, as the dissents imply we should, that every factor must be particularized directly to the conduct of the defendant at the time of the stop would defeat the purpose of the totality of the circumstances analysis. Furthermore, there is no doubt that the defendant's prior firearm adjudication and his known gang membership are sufficiently particularized to the defendant, even under the dissent's narrow interpretation of the requirement.

We must be careful not to overstate the distinction between the factors that justify an exit order and the factors that

justify a patfrisk. The standard required to justify a patfrisk is not the same as that which is required to justify an exit order, see Torres-Pagan, 484 Mass. 38-39; however, the factors that justify an exit order also may be part of the consideration in the patfrisk analysis. The two standards are linked inextricably. See Commonwealth v. Washington, 449 Mass. 476, 482 (2007) ("under our State Constitution, neither an exit order nor a patfrisk can be justified unless 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" [quotation and citation omitted]). The defendant no longer challenges the exit order. Although the patfrisk, unlike the exit order, requires that police "have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous," the factors justifying an exit order are not necessarily insufficient to meet this standard. See Torres-Pagan, supra. Cf. Commonwealth v. Wilson, 441 Mass. 390, 394-395 (2004) (same facts that justified stop established reasonable suspicion that defendant may be armed and dangerous).

Both this court and the United States Supreme Court have recognized that "traffic stops are especially fraught with danger to police officers" (quotation and citation omitted). Arizona v. Johnson, 555 U.S. 323, 330 (2009). See Stampley, 437 Mass. at 326, quoting Gonsalves, 429 Mass. at 665. See also

Moses, 408 Mass. at 142 ("[W]hen approaching a stopped car, a police officer is to some degree impaired in seeing whether a person therein may be drawing a gun" [citation omitted]).

This court is very concerned about the disparate impact automobile stops have on persons of color and the national statistics on the fatalities suffered by such communities at the hands of police officers. See post at (Lowy, J., concurring); (Wendlandt, J., concurring); (Budd, C.J., dissenting); (Gaziano, J., dissenting). "All too frequently . . . the prohibition against facially discriminatory laws has been inadequate to address the role played by racism and other invidious classifications in the way facially neutral laws actually are enforced." Commonwealth v. Long, 485 Mass. 711, 716 (2020). See Commonwealth v. Evelyn, 485 Mass. 691, 701 (2020). In announcing the "stop and frisk" rule in Terry, the Supreme Court concluded that "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." Terry, 392 U.S. at 23. Similarly, this court has made clear that we do not require police "to accept the risk of [an objective] ambiguity." Commonwealth v. Johnson, 454 Mass. 159, 164 (2009).

Balancing the constitutional rights of all motorists, the objective of public protection, and police officer safety is difficult under the best of circumstances. In the context of a

quickly evolving traffic stop, it is particularly difficult. We emphasize that the reasonable suspicion analysis is fact specific. This case does not stand for the proposition that every occupant of a vehicle may be pat frisked after a legal exit order based only on the conduct of a companion.[10] Here, the evidence established that police stopped the vehicle because of a traffic violation and did not, at that time, have reasonable suspicion that a crime had been committed or that any of the occupants of the vehicle were armed and dangerous. However, once Paris got out of the vehicle and angrily confronted the officers, the nature of the stop changed. Although this is a close case, Paris's erratic, uncharacteristic behavior, combined with the officers' knowledge of the three male passengers' prior involvement with firearms, their gang affiliations, and the high crime area in which the traffic stop occurred, and the fact that the officers were in jeopardy of losing control of the scene,[11]

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[10] Whether the driver properly was pat frisked is not before us.

[11] In his dissent, Justice Gaziano concludes that the officers were no longer in jeopardy of losing control of the scene at the time the defendant was pat frisked because Paris was handcuffed and secured at the rear of the vehicle. See post at . Detective Fortes stayed with Paris while the other officers approached the other occupants of the vehicle. Only then did the officers recognize the other passengers of the vehicle to be gang affiliated and to have prior involvement with firearms. Although Paris was handcuffed at the time, that did not change the fact that officers believed he had been attempting to distract them from criminal activity afoot in the

created a reasonable suspicion that the defendant might have been armed and dangerous.

The denial of the defendant's motion to suppress is affirmed.

So ordered.

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vehicle. Furthermore, from the time Paris had gotten out of the car to the time the defendant was asked to get out of the car, only ninety seconds had elapsed.

LOWY, J. (concurring). I agree with all the important concerns that the dissents raise. For example, there are issues of racial disparities in, and concerns about the of unreliability of, gang databases. Alleged gang membership and prior gun offenses alone are insufficient bases to give rise to the reasonable suspicion needed to exercise a patfrisk. In addition, the concerns raised by Chief Justice Budd regarding the impact of traffic stops on Black and brown people are serious ones that must be recognized and addressed.

I differ with the dissents on whether the inference that Raekwan Paris was attempting to divert attention from the car was reasonable. Since I believe that it was, I agree with the court's affirmance of the lower court's denial of the motion to suppress. See, e.g., United States v. Soares, 521 F.3d 117, 122 (1st Cir. 2008) (defendant's "movements could easily be seen as an attempt to create a diversion and confusion amongst the officers while he and the other passengers created an environment that was unsafe for the officers"); United States v. Rice, 483 F.3d 1079, 1085 (10th Cir. 2007) ("A reasonable officer can infer from the behavior of one of a car's passengers a concern that reflects on the actions and motivations of the other passengers. The backseat passenger's behavior could only heighten [the officer's] concern that this was anything but a routine traffic stop"); United States vs. Goebel, U.S. Dist.

Ct., No. 18-CR-2752 KG (D.N.M. Nov. 15, 2018), report and recommendation adopted, No. 18-CR-2752 KG (D.N.M. Dec. 19, 2018), aff'd, 959 F.3d 1259 (10th Cir. 2020) ("[Front seat passenger's] conduct lends further credence to [officer's] suspicion that the occupants of the car might be engaged in criminal activity. After [officer] parked his car north of the driveway, [passenger] -- without [officer] asking -- exited the Lincoln and approached the patrol car to speak with [officer]. [Officer] testified, 'From my previous experience with encounters with more than one suspect . . . when one suspect or one subject approaches an officer, it's sometimes to divert the attention away from somebody else on-scene. . . . It's unusual for people to get out and come towards my car'").

The officers were entitled to rely on their training and familiarity with Paris in drawing this inference. See, e.g., United States v. Arvizu, 534 U.S. 266, 273 (2002) (reasonable suspicion determination "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person" [quotation and citation omitted]); Terry v. Ohio, 392 U.S. 1, 30 (1968) ("We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the

persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him"); United States v. Zambrana, 428 F.3d 670, 677 (7th Cir. 2005) ("It goes without saying, of course, that, in assessing the evidence presented by law enforcement officers, a district court should be mindful of the officers' experience, their training and the pressure-filled circumstances under which they fulfill their duties").

Because in my view the officers' inference that Paris was intentionally creating a distraction from weapons in the car or on the persons of the other occupants was reasonable, the motion judge's adoption of that inference was not clearly erroneous. I therefore agree with the court that, in the totality of the circumstances, there was reasonable suspicion that the defendant was armed and dangerous. I respectfully concur.

WENDLANDT, J. (concurring). As the studies and statistics cited by Chief Justice Budd in her dissent and by others indisputably show, there are racial disparities in the criminal justice system, including in who is stopped, who is pat frisked, and who is incarcerated.[1] The disparities are both stark and unacceptable. But today's decision does not allow officers to stop and pat frisk drivers or passengers simply because they are Black or brown, and today's decision does not rest on stereotypes. It neither solves systematic racism nor contributes to it. Indeed, the defendant does not contend that the traffic stop at issue was motivated by racial profiling or discrimination, see Commonwealth v. Long, 485 Mass. 711, 713 (2020); and, on appeal before this court, he no longer presses the issue whether the police officers' order that he exit the vehicle was grounded in a reasonable fear for officers' safety, see Commonwealth v. Gonsalves, 429 Mass. 658, 662-663 (1999). Instead, today we are called upon only to apply, to the rapidly evolving events of this case, the familiar test set forth by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 27 (1968), and repeated recently by this court in Commonwealth v.

[1] See, e.g., E.T. Bishop, B. Hopkins, C. Obiofuma, F. Owusu, Criminal Justice Policy Program at Harvard Law School, Racial Disparities in the Massachusetts Criminal System (Sept. 2020); Fagan, Braga, Brunson, & Pattavina, Stops and Stares: Street Stops, Surveillance, and Race in the New Policing, 43 Fordham Urb. L.J. 539, 540, 598 (2016).

Torres-Pagan, 484 Mass. 34, 37 (2020), that an officer may not pat frisk an individual unless the officer has reasonable suspicion, based on specific articulable facts, that the individual is dangerous and may have a weapon. See Commonwealth v. Wing Ng, 420 Mass. 236, 237, 239 (1995) (permissibility of patfrisk under Federal and State constitution governed by same standard).

In our application, we are guided by the principle that reasonable suspicion to conduct a patfrisk exists where, based on the totality of the circumstances, see Commonwealth v. Fraser, 410 Mass. 541, 545 (1991), including the officers' training and experience, see Commonwealth v. DePeiza, 449 Mass. 367, 373 (2007),[2] a reasonably prudent person would be warranted in the belief that the suspected individual is armed and dangerous, see Terry, 392 U.S. at 27; Commonwealth v. Narcisse, 457 Mass. 1, 7 (2010). Reasonable suspicion deals with degrees of likelihood; it "is not a requirement of absolute certainty." New Jersey v. T.L.O., 469 U.S. 325, 346 (1985). It requires more than an "inchoate and unparticularized suspicion or

[2] "[W]e appropriately grant respect to the ability of trained and experienced police officers to draw from the attendant circumstances inferences that would 'elude an untrained person'" (footnote omitted). United States v. Tiru-Plaza, 766 F.3d 111, 116 (1st Cir. 2014), cert. denied, 575 U.S. 952 (2015), quoting United States v. Cortez, 449 U.S. 411, 418 (1981).

'hunch,'" Terry, supra, but it is a less exacting requirement than probable cause, which itself requires only "a fair probability that contraband or evidence of a crime will be found," United States v. Sokolow, 490 U.S. 1, 7 (1989), quoting Illinois v. Gates, 426 U.S. 213, 238 (1983). Ultimately, reasonable suspicion is "a pragmatic inquiry -- one that 'must be based on commonsense judgments and inferences about human behavior.'" United States v. Tiru-Plaza, 766 F.3d 111, 121-122 (1st Cir. 2014), cert. denied, 575 U.S. 952 (2015), quoting Illinois v. Wardlow, 528 U.S. 119, 125 (2000). See Ornelas v. United States, 517 U.S. 690, 695 (1996) (reasonable suspicion is "commonsense, nontechnical" conception dealing with "the factual and practical considerations of everyday life" [citation omitted]).

The specific articulable facts in this case are not hunches, speculations, or mere beliefs. They are instead as follows. Officers stopped a vehicle in which the defendant was a rear seat passenger after it cut off another vehicle, causing the latter vehicle abruptly to slam on its brakes. Within ninety seconds, the routine traffic stop transformed.

Before officers could approach the stopped vehicle to issue a civil citation for the traffic violation, Raekwan Paris, the front seat passenger, stepped out of the vehicle, flailing his arms, pacing away from the vehicle, and refusing to obey one of

the officers' commands that he return to the vehicle. He continued to step away from the vehicle, an act reminiscent of his conduct eighteen months earlier during which two of the same three officers present here saw him walking away from a vehicle in which a firearm was found. Charges from that incident were pending at the time of this stop.

The officers, one of whom had known Paris for many years and since Paris was a "young kid", observed that Paris's erratic behavior not only was unusual, but also was unusually combative, even after officers had assured him that the reason for the stop was a traffic violation. Despite this explanation, Paris escalated his conduct, clenched his fists, and assumed a fighting stance toward the one officer whom he had known for years and with whom he ordinarily had a "good rapport." Far from protesting continued harassment at the hands of police, the officers believed (reasonably so) that Paris was actively creating a distraction from the vehicle. See Terry, 392 U.S. at 27 (reasonable suspicion does not require absolute certainty).[3]

[3] Importantly, as the court notes, ante at , this case does not authorize officers automatically to pat frisk an individual based solely on the actions of the individual's companion. See Wing Ng, 420 Mass. at 237-238 (police do not have automatic right to pat frisk companion of lawfully arrested individual). See also United States v. I.E.V., 705 F.3d 430, 438 (9th Cir. 2012) (driver's "fidgety" behavior, without more, not enough to justify patfrisk of passenger); United States v. Wilson, 506 F.3d 488, 495 (6th Cir. 2007) (driver's "undeniably

The distraction worked, at least temporarily. It was not until after Paris had drawn the attention of all three officers and had been handcuffed that the officers could attend to the validly stopped vehicle and its remaining occupants.

The officers found in the rear passenger compartment of the vehicle two other individuals. Each, like Paris, had engaged in either recent or remote firearms-related conduct. The officers knew that one passenger recently had been seen in a video recording holding what appeared to be a real firearm; additionally, one of the officers knew that the other passenger, the defendant, had a three year old juvenile adjudication for an offense involving a firearm. And, as mentioned, the officers

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suspicious" behavior, without more, not enough to justify patfrisk of passenger).

However, a companion's actions cannot be ignored when conducting the totality of the circumstances analysis required by the reasonable suspicion standard. See Wing Ng, 420 Mass. at 241; United States v. Flett, 806 F.2d 823, 827 (8th Cir. 1986); United States v. Bell, 762 F.2d 495, 500 (6th Cir.), cert. denied, 474 U.S. 853 (1985). See also Tiru-Plaza, 766 F.3d at 121 (following traffic stop, discovery of firearm concealed in driver's waistband supported reasonable suspicion to pat frisk passenger); United States v. Lyons, 733 F.3d 777, 780 (7th Cir. 2013), cert. denied, 572 U.S. 1041 (2014) (driver's two recent firearms arrests, as well as his decision to drive through red light after police activated lights, supported reasonable suspicion to pat frisk passenger); United States v. Rice, 483 F.3d 1079, 1085 (10th Cir. 2007) (behavior of one passenger can reflect on actions or motivations of other passengers); United States v. Dardy, 128 F. Supp. 3d 400, 411 (D. Mass. 2015) (flight of one passenger can inform officer's assessment of threat posed by remaining passengers).

knew that Paris had been arrested on firearms charges just eighteen months earlier and was currently out on bail awaiting trial.

In addition to the reasonable inference that Paris was distracting the officers from what lay in the vehicle and that the distraction regarded a firearm, the officers also knew, based on their years of training and experience,[4] and their knowledge of these particular individuals, that each of the three passengers had gang affiliations and that Paris and the defendant belonged to the same gang.[5] Moreover, the stop took

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[4] The officers had approximately thirty-eight years of collective experience as police officers in New Bedford, including ten years of collective experience in the gang unit of the New Bedford police department.

[5] While I recognize that research has shown that gang lists held by police departments may be overly inclusive, racially biased, or otherwise mistaken, see Blitzer, How Gang Victims Are Labelled as Gang Suspects, New Yorker (Jan. 23, 2018), https://www.newyorker.com/news/news-desk/how-gang-victims-are-labelled-as-gang-suspects [https://perma.cc/V64R-VTDN]; Citizens for Juvenile Justice, We Are the Prey: Racial Profiling and Policing of Youth in New Bedford (Apr. 2021), https://www.cfjj.org/s/We-Are-The-Prey-FINAL.pdf [https://perma.cc/F522-2RVJ]; Dumke, ProPublica, Chicago's Gang Database Is Full of Errors -- And Records We Have Prove It (Apr. 19, 2018), https://www.propublica.org/article/politic-il-insider-chicago-gang-database [https://perma.cc/55KV-55ZV], this is not a case where the defendant was either misidentified as a gang member or identified as a gang member based solely on his race. Indeed, the defendant's race is not in the record before us. Moreover, the officers collectively had multiple encounters with the defendant, and one of the officers had known him for years. One of the officers testified that he knew the defendant "from being around," that the defendant was "[a]ssociated" with other parties with whom the officer had spoken, and that he knew that

place in a high-crime area,[6] within one-half mile of the location where Paris had been arrested eighteen months earlier for the aforementioned firearms charges. These facts, while seemingly innocuous in isolation, when taken together, and considering that they transpired within one minute and thirty seconds, warranted a reasonably prudent person's belief that the defendant was armed and dangerous.

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the defendant was a "Blood" gang member. Another officer testified that he previously had encountered the defendant around a particular area of New Bedford and that he too knew that the defendant had ties to the Bloods gang. The third officer testified, moreover, that the defendant was a "validated" Bloods gang member; the defendant had been seen in pictures demonstrating well-known, documented Bloods gang hand signs and wearing red bandanas, as well as in pictures with other Bloods gang members. In fact, after the defendant was arrested, the defendant acknowledged his membership in the Bloods gang.

[6] See Commonwealth v. Gomes, 453 Mass. 506, 512 (2009) ("We caution that while the character of a neighborhood as a high crime area can be considered as part of the aggregate circumstances that provide reasonable suspicion to justify a protective frisk, this factor must be considered with some caution because many honest, law-abiding citizens live and work in high-crime areas. Those citizens are entitled to the protections of the Federal and State Constitutions, despite the character of the area" [quotation and citations omitted]).

BUDD, C.J. (dissenting). A Black man got out of a vehicle that had just been pulled over for a traffic infraction. Despite the officers' orders to return to the vehicle, the man, Raekwan Paris, paced back and forth while flailing his arms, clenching his fists, and accusing the officers of harassment. Consequently, the officers placed Paris in handcuffs. They then pat frisked each of the vehicle's three other occupants (among them, the defendant here), none of whom had done anything on this night to arouse the officers' suspicions.

The court holds that the patfrisk of the defendant was constitutional because the officers had developed a reasonable suspicion that the defendant was armed following Paris's behavior. I believe that this decision, by deeming the officers' suspicion here objectively reasonable, allows for an encroachment upon an individual's right to be free from unreasonable search and seizure provided for in both art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution. I therefore dissent.

1. The standard. A patfrisk constitutionally is "permissible only where an officer has reasonable suspicion that the suspect is armed and dangerous." Commonwealth v. Torres-Pagan, 484 Mass. 34, 36 (2020), citing Arizona v. Johnson, 555 U.S. 323, 326-327 (2009), and Terry v. Ohio, 392 U.S. 1, 27 (1968). "Reasonable suspicion is measured by an objective

standard . . . ." Commonwealth v. Meneus, 476 Mass. 231, 235 (2017). That is, an officer's belief qualifies as a reasonable suspicion where that belief arises from objectively reasonable inferences drawn from specific facts. See Terry, supra at 21 ("it is imperative that the facts be judged against an objective standard"); Commonwealth v. DePeiza, 449 Mass. 367, 371 (2007).

An inference is objectively reasonable where either it is based on an officer's special training or personal experience, see United States v. Arvizu, 534 U.S. 266, 273 (2002), or it is a matter of commonsense judgment, see Kansas v. Glover, 140 S. Ct. 1183, 1189-1190 (2020); Illinois v. Wardlow, 528 U.S. 119, 125 (2000). Conversely, where what an officer infers merely has some conceivable connection to the facts before the officer, that inference is pure speculation and cannot justify a patfrisk. See, e.g., Commonwealth v. Villagran, 477 Mass. 711, 718 (2017); Commonwealth v. Martin, 457 Mass. 14, 20-21 (2010); Commonwealth v. Gomes, 453 Mass. 506, 507-508, 513-514 (2009). See also Terry, 392 U.S. at 28 (officer's suspicion that person is armed must be more than "the product of a volatile or inventive imagination").

2. Application. The conduct that precipitated the defendant's patfrisk is as follows.[1] The defendant, his

[1] The officers testified that, but for Paris's conduct, described infra, they would not have conducted the patfrisks.

companion Paris, and a third male were passengers in a vehicle that made an improper lane change. Officers activated their lights and followed the vehicle into the parking lot of a fast food restaurant. Paris stepped out of the vehicle and refused to step back inside, despite the officers' orders to do so. He appeared angry and, with a raised voice, questioned the reason for the stop and accused the officers of harassing him. Paris stood "with one foot slightly in front of the other" and his fists clenched, which made the officers concerned that he was going to throw a punch. He "flailed his arms a few times" and paced back and forth, walking away from the vehicle and back. In response, the officers handcuffed Paris, after which Paris continued to talk about the legality of the stop and to question why the officers had stopped him. These events transpired in less than ninety seconds.

From this behavior, interpreted in light of the location of the stop and the suspected gang affiliations and histories of weapon possession of the vehicle's three male occupants, the officers inferred that Paris intended to distract the officers from the vehicle. They further inferred that the reason that he sought to do so was because there was contraband in the vehicle, that the contraband was a weapon, and that the weapon might be on the defendant's person.

The court concludes that it was reasonable, given the totality of the circumstances, to infer from Paris's behavior that he sought to distract the officers from the vehicle in order to prevent them from discovering a weapon therein. However, because this inference was grounded in pure speculation rather than the officers' training, experience, or commonsense judgment, it objectively was not reasonable. Contrast Glover, 140 S. Ct. at 1189-1190; Arvizu, 534 U.S. at 273; Wardlow, 528 U.S. at 125.

The officers did not testify that they had received any training that informed the inference that they drew from Paris's behavior. Contrast Arvizu, 534 U.S. at 273; DePeiza, 449 Mass. at 373. And although the officers testified that they were familiar with Paris, they likewise described no experiences with him that would support the reasonableness of inferring from his behavior that there was a weapon in the vehicle. The officers testified that Paris generally had been cooperative and cordial whenever they had previously encountered him. They also testified as to one specific encounter with Paris that resulted in the recovery of a firearm. During that encounter, Paris obeyed the officers' instructions and made no attempt to distract them from the vehicle in which he had been despite

knowing that it contained a firearm.[2] Thus, because the officers previously had never experienced Paris either acting confrontationally or attempting to distract them from hidden contraband, their past experiences with Paris provided no basis for them to infer that his confrontational behavior here was an attempt to distract them from the vehicle because it contained a firearm.

As for common sense, it cannot seriously be maintained that it was simply a matter of common sense to interpret Paris's behavior as a ruse to draw the officers' attention away from the vehicle in order to avoid their detection of a firearm hidden therein. A commonsense inference is one that "does not require any specialized training" but rather "is a reasonable inference made by ordinary people on a daily basis." Glover, 140 S. Ct. at 1189 (considering it common sense to infer "that the driver of a car is its registered owner"). An ordinary, reasonable person would not interpret Paris's "uncharacteristic" behavior as such a ruse,[3] especially in light of the alternative,

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[2] See Commonwealth v. Paris, 97 Mass. App. Ct. 785, 786-788 (2020) (describing this previous encounter and determining that officers had lacked reasonable suspicion at that time to stop Paris). It is ironic that the court relies upon the fruits of an unconstitutional stop to support the constitutionality of the patfrisk in this case.

[3] That officers perceived his behavior as "uncharacteristic" on this occasion is of no moment -- it is not difficult to

straightforward explanation that Paris contemporaneously provided for this behavior: his belief that the police were harassing him and that the stop was unfair. Given the well-documented history of the role that racial profiling plays in traffic stops throughout this country,[4] a Black man's expression of frustration at being stopped for a lane-change violation is readily comprehensible. Cf. Mandala v. NTT Data, Inc., 988 F.3d 664, 669 (2d Cir. 2021) (Pooler, J., dissenting) ("Most Americans understand that the criminal justice system has quite clear racial biases that create disparate outcomes for [B]lack Americans"). To conclude that the commonsense judgment here was that Paris was feigning frustration at being stopped as a tactical maneuver to distract the officers from hidden

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imagine that a Black person may eventually express frustration at perceived racial profiling.

[4] See, e.g., Fagan, Braga, Brunson, & Pattavina, Stops and Stares: Street Stops, Surveillance, and Race in the New Policing, 43 Fordham Urb. L.J. 539, 540 (2016) ("Minority neighborhoods [in Boston] experience higher levels of field interrogation and surveillance activity, controlling for crime and other social factors. Relative to [w]hite suspects, Black suspects are more likely to be observed, interrogated, and frisked or searched controlling for gang membership and prior arrest history"); Hetey, Monin, Maitreyi, & Eberhardt, Data for Change: A Statistical Analysis of Police Stops, Searches, Handcuffings, and Arrests in Oakland, Calif., 2013-2014, Stanford University, SPARQ: Social Psychological Answers to Real-World Questions, at 10 (2016) (after controlling for various factors, finding that Oakland police stop, search, handcuff, or arrest Black people at higher rates than white people).

contraband is to not only ignore the reality of race-based policing, but also perpetuate it. See Commonwealth v. Evelyn, 485 Mass. 691, 708 (2020) ("long history of race-based policing likely will remain imprinted on the group and individual consciousness of African-Americans for the foreseeable future").

Nor is this inference transformed into a commonsense judgment when the totality of the circumstances is considered. First, the court concedes that the location of the stop deserves minimal weight in the officer's reasonable suspicion calculus. I agree. This is the case even though Paris was arrested for unlawful firearm possession several blocks from the fast food restaurant parking lot where the stop occurred and even though this location is near the housing development associated with Paris's gang. Neither aspect of this location made it a commonsense judgment (when, as explained supra, it otherwise was not) to interpret Paris's behavior as a ruse to distract the officers from a hidden firearm.

Second, the three male occupants' histories of firearm possession and suspected gang affiliations similarly do not transform into a commonsense judgment the inference from Paris's behavior to the defendant's weapon possession. The court disagrees because, in its view, the circumstances of this stop "interact with" these factors, making them "critically relevant" to the officers' suspicion that the defendant was armed. Ante

at . See United States v. Torres, 987 F.3d 893, 904 (10th Cir. 2021), quoting United States v. Hammond, 890 F.3d 901, 907 (10th Cir.), cert. denied, 139 S. Ct. 390 (2018). I do not see how this is so.

A person's suspected gang affiliation or criminal history is minimally relevant on its own. See Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 841 (2010) ("gang membership alone does not provide reasonable suspicion"). Cf. United States v. Mathurin, 561 F.3d 170, 177 (3d Cir. 2009) ("a past criminal conviction, never mind an arrest record, is not sufficient alone for reasonable suspicion" for investigatory stop). But these factors may significantly contribute to an officer's suspicion that a person is armed where there is a connection between the person's gang affiliation or criminal history and the circumstances of the particular stop. See Hammond, 890 F.3d at 907.

In Hammond, for example, the fact that the defendant was "a gang member who had recently been arrested for weapons possession" interacted with the fact that, at the time that the defendant was stopped and frisked, he was "wearing colors commonly associated with [his] gang" and "there was a feud ongoing" between his gang and a rival gang. Id. Likewise, in Torres, 987 F.3d at 905, the defendant not only was believed to be a gang member but also had "recently refused to cooperate

with the police after being shot" in a gang-related incident. Because the defendant's suspected gang affiliation interacted with this recent occurrence, the United States Court of Appeals for the Tenth Circuit determined that "the police could reasonably infer" that the defendant may have been carrying a gun for protection at the time that he was stopped and frisked. Id. at 904. The reasonableness of the officers' inference that the defendant may have been armed was bolstered by the fact that the police had, just prior to the stop, observed him "drive[] [his] passenger to a place where she had tried to buy heroin." Id. at 904-905. In contrast, here, nothing about the male companions' suspected gang affiliations or histories of firearm possession "interacted with" Paris's behavior such that either of these factors should have significantly contributed to the officers' suspicion that the defendant was armed given that behavior.

Because none of the prior incidents of firearm possession known to the officers involved conduct similar to Paris's during this traffic stop, those prior incidents provided no reason for the officers to understand Paris's behavior as an indication that a firearm was in the vehicle. Cf. Commonwealth v. Cordero, 477 Mass. 237, 239, 244, 246 (2017) (motorist's prior convictions for drug offenses did not make it reasonable for officer to interpret motorist's evasive answers about his

travels as indication of his engagement in illegal drug activity).[5] Although the officers' knowledge of the companions' histories of firearm possession may have rationally predisposed the officers to suspect that the companions might be armed, whatever the circumstances in which the officers encountered them, see, e.g., Commonwealth v. Mendez, 476 Mass. 512, 518 n.7 (2017), this knowledge did not make it any more reasonable for the officers to infer from Paris's behavior that the defendant was armed.

The companions' suspected gang affiliations similarly do not interact with Paris's behavior so as to render any more reasonable the officers' inference from that behavior to the defendant's weapon possession. Although the officers' knowledge of the companions' gang affiliations likewise may have

[5] The court errs when it additionally includes as a relevant similarity between the male occupants' histories of firearm possession and the conduct at issue here the fact that this challenged patfrisk revealed that the defendant had a firearm. Because the officers only learned that the defendant possessed a firearm after they pat frisked him, that possession cannot justify their decision to conduct the patfrisk. See Commonwealth v. Gentile, 466 Mass. 817, 826 (2014) ("our analysis of reasonable belief must not be influenced by what was learned after" challenged search).

To the extent that the court means to include as a relevant similarity between the male occupants' histories of weapon possession and the facts of this case that the officers here suspected (prior to the patfrisk) that the defendant was armed, that would problematically beg the ultimate question of this appeal.

rationally predisposed them to suspect that the companions might be armed, whatever the circumstances in which the officers encountered them, this knowledge did not make it any more reasonable for the officers to infer from Paris's behavior that the defendant was armed. Nothing about Paris's behavior suggested gang activity, nor did the officers otherwise suspect that any gang activity was ongoing. Compare State v. Abel, 68 A.3d 1228, 1238 (Del. 2012) (defendant's gang affiliation did "not support a finding of reasonable, articulable suspicion that [defendant] was armed and dangerous" where "[officer] was aware of no facts that indicated gang activity was occurring nearby"). Contrast Torres, 987 F.3d at 905; Hammond, 890 F.3d at 907.

Thus, even considering the location of the stop and the histories of firearm possession and gang affiliations of the three male companions, it was not common sense to infer from Paris's behavior that the defendant was armed.[6] Compare Cordero,

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[6] Justice Lowy disagrees. See ante at . However, in none of the cases that he cites did a court determine that an officer reasonably interpreted behavior like Paris's as a distraction from a hidden weapon in the absence of any other conduct directly leading up to or during the stop that suggested that a weapon was on the scene. See United States v. Soares, 521 F.3d 117, 118, 120-121 (1st Cir. 2008) (defendant made unusual, furtive movements that suggested weapon concealment and disobeyed orders to keep hands still and in sight); United States v. Rice, 483 F.3d 1079, 1081, 1084 (10th Cir. 2007) ("Based on the time of night [(2:30 A.M.)] and the unusual driving pattern, [officer] suspected [vehicle's] occupants might be preparing for a burglary or drive-by shooting," and "computer check identified [occupant] as 'known to be armed and

477 Mass. at 244-247 (even considering that motorist was traveling from "drug 'source city'" and that motorist had prior convictions for drug offenses, officer's suspicion that motorist was engaged in illegal drug activity because of motorist's evasive answers about his travels was not reasonable).

Because the officers' inference from Paris's behavior to the defendant's weapon possession did not result from their training and experiences, contrast Arvizu, 534 U.S. at 273; DePeiza, 449 Mass. at 373, nor from the application of commonsense judgment, contrast Glover, 140 S. Ct. at 1189-1190, that inference was not objectively reasonable and therefore did not properly contribute to the officer's suspicion that the defendant was armed,[7] see DePeiza, supra at 371.

This conclusion is bolstered by the fact that the inferential leap from Paris's behavior to the defendant's weapon possession is unlike any that we have previously accepted as

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dangerous'"); United States vs. Goebel, U.S. Dist. Ct., No. 18-CR-2752 KG (D.N.M. Nov. 15, 2018), report and recommendation adopted, No. 18-CR-2752 KG (D.N.M. Dec. 19, 2018), aff'd, 959 F.3d 1259 (10th Cir. 2020) ("[officer] found it suspicious that at [2:45 A.M.], in an area . . . known for high crime rates, with the vehicle parked askew, [defendant] bypassed the home's front door and entered the back yard through a closed gate").

[7] Once Paris was handcuffed, the safety concerns directly presented by his behavior dissipated. Thus, after Paris was handcuffed, the officers were not justified in pat frisking each one of the vehicle's occupants on the ground that Paris's behavior had been aggressive.

objectively reasonable support for an officer's suspicion that a suspect is armed. Heretofore we have held that an officer had reasonable suspicion that a defendant was armed where the defendant's movements directly suggested that the defendant was carrying, concealing, or reaching for a weapon. See, e.g., Commonwealth v. Goewey, 452 Mass. 399, 407 (2008) (defendant appeared to "hide or retrieve something"); DePeiza, 449 Mass. at 373 (defendant walked with "straight arm" gait and attempted to hide pocket from view); Commonwealth v. Stampley, 437 Mass. 323, 327 (2002) (defendant appeared to reach for object on floor of vehicle); Commonwealth v. Fraser, 410 Mass. 541, 545-546 (1991) (defendant appeared to "pick[] something up or put[] something down, and then . . . confronted the officer with his hands in his pockets"); Commonwealth v. Silva, 366 Mass. 402, 407 (1974) ("Most important of all, the defendant made a gesture as if to conceal something in his automobile and one of the officers thought it was a gun"). Cf. Torres-Pagan, 484 Mass. at 39 (patfrisk unjustified where defendant "was not secreting anything, nor was he attempting to reach for anything").

Where an individual has not made any movements directly suggesting that he or she was carrying, concealing, or reaching for a weapon, we nevertheless have determined that an officer had reasonable suspicion to pat frisk that individual for weapons where the officer had preexisting suspicion that the

individual was a participant in recent or ongoing violent criminal activity. See Commonwealth v. Douglas, 472 Mass. 439, 441, 446 (2015) (defendant had been under surveillance by police for potential involvement in ongoing violence between rival groups); Commonwealth v. Wing Ng, 420 Mass. 236, 240-241 (1995) (defendant suspected to have participated in armed home invasion that occurred one week prior).

This case involves neither scenario. The officers did not observe any of the vehicle's occupants move in a manner suggesting that they were carrying, concealing, or reaching for a weapon. See Torres-Pagan, 484 Mass. at 39. Nor did the officers have suspicion prior to initiating the stop that any of the occupants were engaging in, or recently had engaged in, violent criminal activity. Contrast Douglas, 472 Mass. at 446; Wing Ng, 420 Mass. at 240-241.

In short, without Paris's behavior, the officers, per their own admission, would have lacked reasonable suspicion to pat frisk the defendant. But as explained supra, this behavior did not give rise to an objectively reasonable inference that the defendant was armed. The inferences that the officers drew from Paris's behavior and that led the officers to conclude that the defendant may have been armed were the product of pure speculation rather than of training, experience, or common sense. The patfrisk was accordingly unlawful.

Today's decision greatly and, I believe, unwisely expands the circumstances in which officers may conduct a patfrisk. This expansion erodes critical constitutional protections against arbitrary searches and seizures by the police and unjustifiably broadens what is meant to be an officer's "narrowly drawn authority" to perform what has been described as a "severe . . . intrusion upon cherished personal security [that] must surely be an annoying, frightening, and perhaps humiliating experience." Torres-Pagan, 484 Mass. at 36 n.3, 39, quoting Terry, 392 U.S. at 24-25, 27.

3. Implications of the court's decision. I write also to emphasize the adverse implications of today's decision for communities of color. "[A]nyone's dignity can be violated" by an unconstitutional search; however, "it is no secret that people of color are disproportionate victims of this type of scrutiny." Utah v. Strieff, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting).[8] This disparity is due in part to the "powerful racial stereotype" that Black men are "violence prone." Buck v. Davis, 137 S. Ct. 759, 776 (2017), quoting Turner v. Murray, 476 U.S. 28, 35 (1986).[9]

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[8] See note 4, supra.

[9] See Harrison & Willis Esqueda, Race Stereotypes and Perceptions about Black Males Involved in Interpersonal Violence, 5 J. Afr. Am. Stud. 81, 82 (Mar. 2001) (reviewing literature on negative stereotypes of Black men).

Today's decision will worsen this disparity. It does not, of course, expressly authorize officers to pat frisk a person simply because of his or her race. The racial disparities in our criminal justice system are decreasingly the product of overt racism or facially discriminatory rules. These persistent disparities are, rather, more and more the product of neutral rules of deference that affirm the decisions of racially biased actors. Cf. Commonwealth v. Long, 485 Mass. 711, 716 (2020) ("All too frequently . . . the prohibition against facially discriminatory laws has been inadequate to address the role played by racism and other invidious classifications in the way facially neutral laws actually are enforced"). Today's decision augments the considerable deference already afforded officers by uncritically accepting as reasonable the officers' suspicion that the defendant was armed because his companion aggressively confronted the officers about the legality of the stop. The court accepts this inference as reasonable although the officers provided no reasonable basis for it. The court thereby invites officers to pat frisk first and invent explanations later, for it assures that as long as officers can articulate a reason -- any reason -- for which a person's behavior indicated that a

weapon was on the scene, that reason will be accepted and the patfrisk condoned.[10]

This court should require more. Such uncritical deference provides the space into which seeps the damaging influence of racial bias. Creating greater space for officers to act on their ungrounded intuitions that people are dangerous increases the risk that people of color will be subjected disproportionately to unjustified patfrisks.

If we have any hope of mitigating racial disparities in our criminal justice system, it is imperative that we pay close attention to the effect that our law of search and seizure has on people of color.

The court's sanctioning of patfrisks founded upon objectively unreasonable suspicion is both unjustified and unjust. I therefore dissent.

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[10] See Harris, Frisking Every Subject: The Withering of Terry, 28 U.C. Davis L. Rev. 1, 32-36 (1994) (urging judges not to uncritically accept officers' reasons for believing that suspect is armed and dangerous, and highlighting officers' incentives to engage in "creative hindsight or even perjury"); Rudovsky & Harris, Terry Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data, 79 Ohio St. L.J. 501, 505 (2018) (expressing concern about judge's uncritical acceptance of officers' empirically unmoored assumptions, especially because such assumptions "may be problematically reinforced by the fact that incriminating evidence was actually seized").

GAZIANO, J. (dissenting, with whom Georges, J., joins). The court today concludes that the police officers who stopped a vehicle in which the defendant was a rear seat passenger had a reasonable suspicion, based in large part on the behavior of the front seat passenger, that the defendant was armed and dangerous, such that they could order the defendant out of the vehicle and pat frisk him. The court's view of what a police officer must believe in order to establish "a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous," Commonwealth v. Torres-Pagan, 484 Mass. 34, 38-39 (2020), eviscerates the standard of a reasonable police officer and replaces it with subjective, speculative beliefs that an officer might have, contrary to both our jurisprudence under art. 14 of the Massachusetts Declaration of Rights and that of the United States Supreme Court under the Fourth Amendment to the United States Constitution, see Arizona v. Johnson, 555 U.S. 323, 326-327 (2009) ("to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous"); Commonwealth v. Wing Ng, 420 Mass. 236, 237 (1995), citing Terry v. Ohio, 392 U.S. 1, 27 (1968). It also finds reasonable suspicion that the defendant was armed and dangerous, based on the actions of another individual, without any of the narrow indicia that the individuals might have been acting jointly, which this court

previously has required be established, as it must to pass constitutional muster, that a suspicion is particularized and individual. Accordingly, I dissent.

In this case, the court reasons that the officers' inference that Raekwan Paris, the front seat passenger, was trying to distract them from the vehicle and its contents was objectively reasonable. Although the officers' beliefs were specific and articulable, they did not identify specific and articulable facts upon which to ground this inference. "Reasonable suspicion may not be based on good faith or a hunch . . . ." Commonwealth v. Grandison, 433 Mass. 135, 139 (2001). See Commonwealth v. Lyons, 409 Mass. 16, 19 (1990), quoting Commonwealth v. Wren, 391 Mass. 705, 707 (1984) ("To meet the 'reasonable suspicion' standard in this Commonwealth, police action must be 'based on specific, articulable facts and reasonable inferences therefrom' rather than on a 'hunch'"). See also Vasquez v. Maloney, 990 F.3d 232, 240 (2d Cir. 2021), quoting Terry, 391 U.S. at 27 (speculation that warrant "might" be outstanding "is the quintessential 'inchoate and unparticularized suspicion or "hunch"'").

In particular, here, although Paris was acting in a manner that the officers perceived as notably different from the multiple other times in which they had encountered him, the fact that his behavior was different, and could be viewed as

potentially threatening, did not lead to a reasonable, objective inference that he was attempting to distract the officers from a weapon concealed in the vehicle.[1] Indeed, the officers who conducted the stop and testified at the hearing on the motion to suppress had specific, actual knowledge and experience to the contrary. On a prior occasion when Paris actually had concealed a firearm in a vehicle, he calmly and cooperatively walked back to the vehicle to speak with the officer who had called him to a scene where he almost certainly was aware that he would be arrested, and was calm and polite while being arrested. During this stop, however, in addition to his noncooperation behavior and a confrontational physical posture, Paris argued loudly and angrily that police were harassing him, and repeatedly challenged the reason for the stop.[2]

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[1] One of the officers testified that, but for Paris's actions, he "absolutely" would not have removed any of the other occupants of the vehicle and would have had no reason to do so based on their own actions, but as a result of Paris's behavior, he had a "hunch" that Paris was "using tactics to distract [the officers]." Another testified similarly that absent Paris's conduct, he would not have had any reason to order anyone from the vehicle. A third testified that, based on Paris's actions ("[i]t felt to me that he was trying to distract us for -- for something within that vehicle), he removed the other rear seat passenger and the other two officers removed the remaining occupants from the vehicle.

[2] According to testimony by all three officers at the hearing on the motion to suppress, after he got out of the front seat, Paris "was becoming more angry towards [a detective], questioning the stop, accusing [the officers] of harassing him"; Paris argued as he walked away from the vehicle "something to

An inference indeed may be objectively reasonable where it is based on an officer's specialized training or personal experience, see United States v. Arvizu, 534 U.S. 266, 273 (2002), or is a matter of common sense, apparent to any lay person, see Illinois v. Wardlow, 528 U.S. 119, 125 (2000). See, e.g., Commonwealth v. Villagran, 477 Mass. 711, 717-718 (2017); Commonwealth v. Martin, 457 Mass. 14, 20-22 (2010). Here, however, whatever the officers speculated were Paris's motives for his unusual and confrontational behavior on this occasion were subjective, and too speculative to permit a reasonable inference. To conclude that, this time, when in possession of an unlicensed weapon, Paris would be likely to act in a confrontational and agitated manner to conceal evidence of a firearm would be "essentially random and arbitrary." Commonwealth v. Bartlett, 41 Mass. App. Ct. 468, 472 (1996). See United States v. Noble, 762 F.3d 509, 522 (6th Cir. 2014) ("If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects, only in the discretion of the police" [citation omitted]). Guesswork and hunches, regardless of good faith, do not equate to

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the effect of 'Why you guys stopping us? You're harassing us"; and even after finally moving to the rear of the vehicle, "he calmed down a little, but he continued asking, you know, why we had stopped them and so on and so forth."

objective reasonable suspicion. The court's holding broadens what heretofore has been an officer's "narrowly drawn authority" to conduct what has been described as a "severe . . . intrusion upon cherished personal security [that] must surely be an annoying, frightening, and perhaps humiliating experience." See Torres-Pagan, 484 Mass. at 36 n.3, 39, quoting Terry, 392 U.S. at 24-25, 27.

Even assuming that the officers' inferences were objectively reasonable, the court makes an unjustified leap from the supposition that Paris was attempting to distract the officers to the belief that the defendant was armed and dangerous. A determination of reasonable suspicion that a suspect is armed and dangerous must be particularized and individual. See Commonwealth v. Narcisse, 457 Mass. 1, 10-13 (2010), and cases cited. See also Wing Ng, 420 Mass. at 237, citing Terry, 392 U.S. at 27. "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." Ybarra v. Illinois, 444 U.S. 85, 91 (1979). As the United States Supreme Court observed more than seventy years ago, it was "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." United States v. Di Re, 332 U.S. 581, 587 (1948). Rather, and as the court

acknowledges, this factor should be "considered in the totality of the circumstances and in light of other information known to the officers." See Commonwealth v. Douglas, 472 Mass. 439, 443 (2015).

To be sure, in limited circumstances, where a clear link exists between the individual and the known criminal activity, this court has recognized that one individual's actions may be undertaken on behalf of a group, thereby making the actions of others in the group of relatively lesser importance in justifying a patfrisk of each of them. In Wing Ng, 420 Mass. at 240-241, for example, the court concluded that police were justified in pat frisking the driver of a vehicle where the driver was the brother of a person suspected of having committed an armed home invasion, that person was a passenger in the vehicle, and police reasonably could have inferred, from that and other factors, that the driver might have participated in the armed home invasion with his brother. In that case, the patfrisk of the driver was upheld notwithstanding the absence of any conduct by the driver himself that would have raised a reasonable suspicion that he was armed and dangerous. See id. See also, e.g., Villagran, 477 Mass. at 718 ("principal's hunch combined with [officer]'s observations of the defendant's nervousness and [officer]'s testimony that both the principal and the vice-principal appeared to be 'rattled' still did not

establish a 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").

Here, the court concludes that Paris's motive in undertaking his actions (insofar as it was understood in the subjective belief of the officers) could be imputed to the defendant, thereby providing reasonable suspicion that the defendant was armed and dangerous, and that Paris was attempting to distract police from becoming aware of this fact. Interpreting Paris's interactions with police, however, as motivated by a desire to protect a fellow gang member who was in possession of a gun, rather than, as he claimed them to be during the interaction, a request for information concerning the reasons for the stop and a protest of perceived police harassment, is too speculative to give rise to a reasonable suspicion.[3] See Commonwealth v. Stampley, 437 Mass. 323, 326

[3] In his concurrence, Justice Lowy argues that, based on similar facts to those here, courts in other jurisdictions properly have concluded that police had a reasonable suspicion that an individual was armed and dangerous. See ante at . The circumstances in those cases, however, are quite distinct. Unlike the facts here, for example, the police who conducted the patfrisk at issue in United States v. Soares, 521 F.3d 117, 118, 122 (1st Cir. 2008), observed the defendant and his companions engage in movements consistent with concealing something inside the vehicle in which they were traveling. Moreover, the defendant himself exhibited "erratic and uncooperative behavior," id. at 121, in marked contrast to the defendant's

(2002) (defendant's initial behavior during routine traffic stop, although "peculiar" and "unusual," was not threatening).

While, in certain circumstances, those in a vehicle together reasonably might be viewed as being engaged in a collective action, see Wyoming v. Houghton, 526 U.S. 295, 304-305 (1999), here, the officers were aware that three of the occupants of the vehicle belonged to three different gangs, and the driver, as far as they knew, was not associated with any gang. There was no evidence of recent gang violence, and the officers were not investigating any gang-related activity when they stopped the vehicle for an abrupt lane change as it pulled into the parking lot of a fast food restaurant. In the totality of the circumstances of which the officers were aware, there was nothing to suggest the likelihood of collective action by the passengers. Compare Wing Ng, 420 Mass. at 241. Contrast United

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calm and cooperative behavior in this case. The circumstances in United States v. Rice, 483 F.3d 1079, 1085 (10th Cir. 2007), also are dissimilar. In that case, "[b]ased on the time of night and the unusual driving pattern, [the officer who initiated the vehicle stop] suspected the occupants might be preparing for a burglary or drive-by shooting." Id. at 1081. Similarly, in United States vs. Goebel, U.S. Dist. Ct., No. 18-CR-2752 KG (D.N.M. Nov. 15, 2018), report and recommendation adopted, No. 18-CR-2752 KG (D.N.M. Dec. 19, 2018), aff'd, 959 F.3d 1259 (10th Cir. 2020), the involved officers had grounds to suspect that the defendant and his companions were engaged in criminal activity. The officers who initiated the traffic stop at issue here expressed no such suspicions at the hearing on the motion to suppress, and the Commonwealth has provided no foundation for any such suspicion.

States v. Thomas, 997 F.3d 603, 607, 610-611 (5th Cir. 2021) (officers reasonably suspected defendant and three others gathered around stolen vehicle were involved in criminal activity, where vehicle matched description of one stolen during armed robbery in which two men fled scene, license plate matched that of stolen vehicle, there were two men in vehicle, defendant was standing closest to driver, and all six men appeared to be talking to each other).

"[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his [or her] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of [the officer's] experience." Terry, 392 U.S. at 27. As the United States Supreme Court has emphasized, although what constitutes reasonable suspicion is not "self-defining," the "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." United States v. Cortez, 449 U.S. 411, 417, 418 (1981), quoting Terry, supra at 21 n.18. "The vice in interrogations and searches based on a hunch is their essentially random and arbitrary nature, a quality inconsistent, under constitutional norms . . . with a free and ordered society." Bartlett, 41 Mass. App. Ct. at 472. See Ybarra, 444

U.S. at 90-91, 93 (patfrisk was unconstitutional where patron of bar, unknown to police, "made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening"); Torres-Pagan, 484 Mass. at 39 (patfrisk was not justified where defendant "was not secreting anything, nor was he attempting to reach for anything"). Contrast United States v. Belin, 868 F.3d 43, 46, 50-51 (1st Cir. 2017), cert. denied, 138 S. Ct. 703 (2018) (reasonable suspicion for stop and for frisk where officer knew defendant previously had carried firearm unlawfully, defendant was identified as gang member, and he had been acting "unusually nervous[ly]"); United States v. Roelandt, 827 F.3d 746, 748-749 (8th Cir. 2016), and cases cited (reasonable suspicion for patfrisk where known felon and gang member was walking quickly through high crime area and looking around suspiciously).

Furthermore, nothing in the defendant's own actions gave rise to a reasonable suspicion that he was armed and dangerous. It is undisputed that the defendant obeyed the officers' instructions, was quiet and polite, and sat in the vehicle without any movements or gestures to suggest that he was in possession of a firearm. So, too, with the driver and the other rear seat passenger. Contrast United States v. Bell, 762 F.2d 495, 496-497, 501 (6th Cir.), cert. denied, 474 U.S. 853 (1985) (reasonable suspicion to pat frisk defendant, front seat

passenger in parked car officers approached to arrest driver pursuant to warrant, where defendant repeatedly refused to obey officers' instructions to keep his hands on dashboard where they could be seen, and later to leave vehicle, so officers safely could execute arrest of driver; driver was being arrested for operating large scale food stamp trafficking ring and was known to have accomplice whose physical description roughly matched defendant's). Contrast also Commonwealth v. Johnson, 454 Mass. 159, 161-164 (2009) (defendant's refusal to take hands out of pockets as officers asked gave rise to reasonable concern for officer safety, where officers saw six young men, including defendant, standing in group outside apartment building, recognized one who had received no-trespass notice to stay away from building, and arrested him, while defendant stood nearby).

The court also emphasizes the gang affiliations of the vehicle's occupants. As the court points out, in some circumstances, such as where police are investigating gang-related violence or otherwise are aware of ongoing gang activity such as a feud among rival gangs in the area, gang affiliations may be highly relevant to a determination of reasonable suspicion. See, e.g., Commonwealth v. Smith, 450 Mass. 395, 398-399, cert. denied, 555 U.S. 893 (2008); United States v. Rios, 830 F.3d 403, 421 (6th Cir. 2016), cert. denied, 138 S. Ct. 2701 (2018). In this context, however, these affiliations

were of limited relevance. See Douglas, 472 Mass. at 441 (defendant had been under surveillance by police for potential involvement in ongoing violence between rival groups); Wing Ng, 420 Mass. at 240-241 (defendant was suspected of having participated in armed home invasion that took place one week earlier).

This case involves neither scenario. The officers did not observe any of the vehicle's occupants move in a manner suggesting that they were carrying, concealing, or reaching for a weapon. Nor did the officers have a preexisting suspicion that any of the occupants were engaging in, or recently had engaged in, violent criminal activity. Rather, the officers explained that they pat frisked the defendant because Paris's behavior precipitated in their minds a chain of inferences: they inferred from Paris that he sought to draw their attention away from the vehicle; they further inferred that this was because the vehicle contained contraband; and, finally, they inferred that this contraband was a weapon. Contrast Arvizu, 534 U.S. at 273; Commonwealth v. DePeiza, 449 Mass. 367, 373 (2007).

Moreover, the Commonwealth introduced no evidence concerning recent gang violence in the vicinity of the stop, police were not investigating gang-related crime when they initiated the traffic stop, and the Commonwealth did not link

any efforts by Paris to distract the officers from the vehicle and its contents to any gang activity. Compare United States v. Samnang Am, 564 F.3d 25, 32 (1st Cir. 2009), cert. denied, 559 U.S. 986 (2010) (reasonable suspicion justified patfrisk where defendant was affiliated with gang, had lengthy criminal history, was on probation, and had established proclivity to carry weapons, and officer noted unusual occurrence of defendant walking alone in rival gang's territory), and United States v. Elmore, 382 F. Supp. 3d 136, 140-141 (D. Mass. 2019) (reasonable suspicion to justify patfrisk where defendant was near vehicle matching description of vehicle seen at recent gang shooting in high crime area linked to gang suspected to have been involved in earlier shootings; defendant moved away suddenly when officers approached; and defendant grabbed at his waistband several times), with State v. Abel, 68 A.3d 1228, 1237-1239 (Del. 2012) (no reasonable suspicion for patfrisk despite defendant's affiliation with motorcycle gang, in part due to absence of facts "that indicated gang activity was occurring nearby").

In Abel, 68 A.2d at 1237-1238, the Supreme Court of Delaware considered the extent to which gang membership alone supported a reasonable belief that an individual was armed and dangerous. An officer testified that he had stopped the defendant, who was riding a motorcycle and wearing Hells Angels

insignia ("colors"). The experienced officer knew that Delaware is considered territory controlled by the rival Pagans motorcycle club. On the basis of an ongoing feud between these groups, the prosecution argued that "[a] gang member traveling unarmed through a rival gang's territory is subject to a serious risk to [his] safety; consequently, a police officer encountering a Hells Angels member flying colors in Pagans territory faces a heightened concern that the person has access to a weapon." Id. at 1235. The court rejected this argument; it reasoned that the prosecution's position would sanction a patfrisk for weapons whenever a Hells Angels member was stopped for a motor vehicle violation anywhere in Delaware, because the entire State was rival gang territory. Id. Here, the varied gang affiliations of the defendant and two of his companions did not significantly contribute to the supposition that the defendant was armed and dangerous.

Finally, I share the concerns articulated by Chief Justice Budd in her dissent, see ante at ; the court disregards the adverse impact its decision will have on individuals and communities of color. It is an unfortunate reality that gang membership may serve as a pretext for racial bias. See Commonwealth v. Evelyn, 485 Mass. 691, 708-709 (2020); Commonwealth v. Warren, 475 Mass. 530, 538-540 (2016). In neighborhoods where gangs are present, the risk of racial

disparities in police stops is heightened by the increased numbers of encounters between police and residents, many of whom are law-abiding citizens, and all of whom are entitled to the same protections against unreasonable searches and seizures as those who live in other areas. See Warren, supra at 539-540. See, e.g., Commonwealth v. Meneus, 476 Mass. 231, 238 (2017); Commonwealth v. Jones-Pannell, 472 Mass. 429, 434-435 (2015); Commonwealth v. Gomes, 453 Mass. 506, 512-513 (2009). Cf. Commonwealth v. Wardsworth, 482 Mass. 454, 468-471 (2019).

In sum, the court's decision that, at the time of the patfrisk of the defendant, "'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,'" ante at , quoting Commonwealth v. Torres, 433 Mass. 669, 675-676 (2001), because the defendant was armed and endangering them, improperly blurs the distinction between a subjective belief and reasonable suspicion to the point that establishing reasonable suspicion by an ordinary, reasonable officer no longer is the bedrock determination to be made. When the defendant was ordered out of the rear passenger seat and pat frisked, Paris was in handcuffs and surrounded by other officers at the rear of the vehicle. None of the other occupants of the vehicle had made any suspicious or nervous movements since the initiation of the stop, nor was there any reason to believe that

they had instigated Paris's uncooperative or belligerent behavior. There was nothing that would have hindered the officers from returning to the purpose of the traffic stop -- the abrupt lane change -- and proceeding accordingly.

Because I would not veer from the well-established standard of Terry, 392 U.S. at 27, and Torres-Pagan, 484 Mass. at 38-39, I respectfully dissent.