

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

S.J.C. No. 10271

SUFFOLK COUNTY

COMMONWEALTH OF MASSACHUSETTS,

Appellant,

v.

OSCAR LYLES,

Defendant-Appellee.

**BRIEF AND APPENDIX OF AMICUS CURIAE ON FURTHER REVIEW
OF A RULING OF THE ROXBURY DISTRICT COURT**

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QUESTION PRESENTED

Whether the motion judge correctly ruled that police officers' encounter with the defendant was not a field investigation interrogation, but rather a *Terry* stop based on a hunch; whether the contraband found on the defendant's person after his arrest on an outstanding warrant after he had furnished his identification to the police officers as requested should have been suppressed.

STATEMENT OF FACTS

Amicus relies on the Statements of Facts submitted by the Defendant-Appellee.

STATEMENT OF AMICUS INTEREST

Suffolk Lawyers for Justice, Inc. ("SLJ") was incorporated on March 31, 2000 as a Massachusetts non-profit corporation for the purpose of administering the delivery of criminal defense services to indigent persons accused of crimes in Suffolk County, Massachusetts.¹ SLJ manages over 300 private attorneys who handle approximately ninety percent of the indigent criminal defense cases in 11 Boston area courts, including the Superior Court and the Juvenile Court. SLJ is under contract to manage this program with the Committee for Public Counsel Services, the state agency that oversees the assignment of all indigent criminal defense services in Massachusetts.

STATEMENT OF THE CASE

Two armed police officers saw an adult male walking alone, on a public way, in broad daylight. They drove up to him, got out of their car, and stopped

¹ The Attorney for the Defendant-Appellant in this case, and before this Court, is a member of the Board of Directors of Amicus Curiae Suffolk Lawyers for Justice, Inc.

him by their own admission *for no reason*. The officers observed nothing unusual or suspicious concerning him, and they had received no report of a specific crime or even person of interest in the area. The officers did not know the man and had never before encountered him. The officers identified themselves as police, showed their badges, and the man identified himself. He engaged in no furtive or evasive actions. Although there was still no suspicion concerning him, the police did not tell him he could leave. Instead, the officers demanded identification from him. The encounter continued while police retained the man's identification.

These facts, according to the Commonwealth, describe an utterly routine prosaic encounter between armed officers and a civilian that is constitutionally unrestricted. Amicus submits that, in the absence of a legal requirement to carry identification or to identify oneself upon request, at least when the police do not inform a civilian that he need not remain and prolong the encounter, and when they take identification from the civilian, these facts amount to an unlawful seizure under Article 14 of the Declaration of Rights. Amicus further submits that the characterization by the Commonwealth of these facts as an "FIO" adds nothing to this inquiry.

ARGUMENT

I. WHETHER AN ENCOUNTER IS SUFFICIENTLY INTIMIDATING THAT A REASONABLE PERSON WOULD NOT FEEL FREE TO TURN AWAY FROM THE POLICE SHOULD DEPEND ON CONCRETE AND OBJECTIVE FACTORS, AND THESE CONFIRM THE CORRECTNESS OF THE TRIAL COURT'S DECISION.

A. The sole constitutional restriction on police-civilian encounters short of seizures is that they not become seizures, thus the test for a seizure should be clear and easy to apply.

One has been “seized” by a police officer “if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Commonwealth v. Borges*, 395 Mass. 788, 791 (1985), quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). “So long as the police do not employ words or conduct from which a reasonable person might conclude that he is not free to leave, the police do not need a constitutionally adequate basis, or any basis, to approach an individual, strike up a conversation, and request information.” *Commonwealth v. Murphy*, 63 Mass.App.Ct. 11, 17 (2005). See *Commonwealth v. Thomas*, 429 Mass. 403, 406-407 (1999). An unprovoked “conversation” with two armed officers in which one must prove his identity is hardly an idle chat.

“[T]he police do not effect a seizure merely by asking questions unless the circumstances of the encounter are sufficiently intimidating that a reasonable person would believe he was not free to turn his back on his interrogator and walk away.” *Commonwealth v. Fraser*, 410 Mass. 541, 544 (1991). Intimidation, of course, can be explicit or implicit. *Commonwealth v. Murdough*, 428 Mass. 760, 763 (1999). “Of course, a person also may be seized in a constitutional sense

when, having been accosted by law enforcement officials, he remains and responds to a police officer's inquiries." *Commonwealth v. Stoute*, 422 Mass. 782, 785 note 5 (1996).

These concrete, objective circumstances in this case suggest an encounter sufficiently intimidating that a reasonable person would not feel free to end it:

- Initiating questioning without any obvious basis;
- Initiating questioning without explanation;
- Initiating questioning without indicating the civilian could leave;
- Demanding a civilian's identity without explanation;
- Demanding that the civilian document his identity; and
- Taking the identity documentation.

How long would a reasonable person, innocuously walking in public, be expected to answer unexplained questions from armed officers and to prove the accuracy of his or her answers without becoming uncomfortable or anxious? How long should he or she?

B. The freedom to terminate an encounter cannot be presumed without a warning of this right from the officer.

While the fact that a civilian continues an encounter with police after being warned that he may terminate it might support an inference that continuation of the encounter was voluntary, there can be no such inference without such a warning. This Court suggested such warnings over a decade ago. *Commonwealth v. Cao*, 419 Mass. 383, 390 note 9 (1995) ("the better practice would be for officers conducting FIOs to inform the individuals approached that the encounter is consensual and that they are free to leave at any time"). It is long past time for the simple rule that absent a warning that a civilian may leave, an encounter with police must be presumed a seizure. In the analogous context of

voluntariness of consent the U.S. Supreme Court has expressly noted the significance of just such a warning. *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (airport traveler who accompanied DEA agents across concourse to DEA office voluntarily consented to luggage search and “it is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it”). Without such a warning, only those most knowledgeable or most openly antagonistic to the police are protected. The civilian who treats officers with respect and responds to their inquiries is unprotected.

C. Three objective factors suggest this encounter was sufficiently intimidating that a reasonable person would believe that he was not free to turn his back on his interrogator and walk away: the officers’ physical actions were disproportionate to the complete absence of suspicion, the officers took a vital item of government-issued property from the civilian, and they gave no explanation for their actions.

1. Disproportionate physical actions by law enforcement officers in encounters with civilians transform a threshold inquiry into a seizure.

How officers approach an individual can be a significant factor in assessing whether a seizure has occurred. When an officer does not approach an individual, or does not get out of a vehicle to approach an individual, there is no seizure. *Commonwealth v. Barros*, *supra* 435 Mass. at 174 (initial request by police officer that defendant stop for questioning not a seizure where officer remained in cruiser and did not restrict defendant’s freedom of movement); *Commonwealth v. Murdough*, 428 Mass. 760, 763 (1999) (“officers may make inquiry of anyone they wish . . . so long as they do not implicitly or explicitly assert that the person inquired of is not free to ignore their inquiries”).

When faced with “disorderly and unorthodox conduct,” officers may make a “brief threshold inquiry” that is proportional to the conduct witnessed without effecting a seizure. *Commonwealth v. Fletcher*, 52 Mass.App.Ct. 166, 170 (2001). Such a “threshold inquiry,” however, is disproportionate when officers observe utterly law abiding and routine conduct. When, as here, there was no attempt to avoid the encounter, no furtive reactions, nor any “suspicious conduct,” the facts cannot support a “threshold inquiry.” *Commonwealth v. Grandison*. 435 Mass. 135, 139-140 (2001).

A civilian who disregards an officer’s opening or comment thereby suggests a subjective readiness to leave, and this might inform whether a reasonable person would have felt free to terminate the encounter. See *Fletcher*, *id.*, at 171 (readiness of one of three men approached by police to ignore officer’s request and walk away supports conclusion that defendant’s response in approaching officer did not transform encounter into a seizure). If officers see only someone engaged in routine law abiding conduct, they can always continue their observation and see if they witness something that would make a “threshold inquiry” more appropriate. The Defendant here had no opportunity to show a readiness to leave since the officers prolonged and escalated the encounter despite his stopping, identifying himself, and even providing identification.

2. An officer’s taking an important government document from a civilian strongly suggests a seizure has occurred.

As noted, the officers took the Defendant’s identification. An officer’s taking of an important government document essential for daily activities and transactions weighs very heavily as effecting a seizure of the person. While

responding to a request by police for one's name and address may not convert every encounter into a seizure, *Commonwealth v. Thomas*, 429 Mass. 403, 406 (1999), and even volunteering one's identification to police may not transform an encounter into a seizure, *Commonwealth v. DePeiza*, 449 Mass. 367, 370 (2007), complying with an officer's request for *verification* of one's identity by providing identification is quite different. A "demand that [defendant] produce identification, made as [another officer] conducted a first patfrisk, was not a request for voluntary cooperation, but a show of authority with which a reasonable person would feel compelled to comply." *Commonwealth v. Murphy*, 63 Mass.App.Ct. 11 (2005). Asking a person's name is hardly the same as asking that they produce documents to prove it.

Whether phrased as a "request" or a "command," taking a person's identification precludes that person's leaving. *Commonwealth v. Santana*, 67 Mass.App.Ct. 1107 (2006) (unpub.), 2006 WL 2739703 , *4 ("officer's actions, in requesting and then pocketing the defendant's license identification, in circumstances where the defendant was backing up and had no place to go, amounted to a seizure of the defendant"). A taking of almost anything from an individual by police can effect a seizure of the person. See *Commonwealth v. Richards*, 65 Mass.App.Ct. 1104 (2005) (unpub.), 2005 WL 3096535, *2 (taking bicycle tire defendant was carrying from him effected a seizure of defendant).

The significance of taking an individual's identification, recognized by the U.S. Supreme Court in *Florida v. Royer*, 460 U.S. 491 (1983), has only grown as identification is increasingly a necessity for travel and commercial transactions.

Regardless of the encounter's brevity, taking a person's identification in order to run a warrants check, even when the officer does so in the civilian's presence, has been held to constitute a seizure in appellate courts of at least seven states.

In *State v. Daniel*, 12 S.W.3d 420, 428 (Tenn. 2000), the Tennessee Supreme Court held that taking an identification amounted to a seizure under the Fourth Amendment's totality-of-the-circumstances test *without* addressing whether the officer left the defendant's presence to run the warrants check.:

[W]hat begins as a consensual police-citizen encounter may mature into a seizure of the person. While many of the circumstances in this case point in the direction of a consensual police-citizen encounter, one circumstance reflects a distinct departure from the typical consensual encounter--Officer Wright's retention of Daniel's identification to run a computer warrants check. Without his identification, Daniel was effectively immobilized. Abandoning one's identification is simply not a practical or realistic option for a reasonable person in modern society. Contrary to the State's assertion, when an officer retains a person's identification for the purpose of running a computer check for outstanding warrants, no reasonable person would believe that he or she could simply terminate the encounter by asking the officer to return the identification.

12 S.W.3d at 427 (citations omitted). See also *People v. Mitchell*, 355 Ill.App.3d 1030, 291 Ill.Dec. 786, 824 N.E.2d 642, 644-47, *appeal denied*, 215 Ill.2d 611, 295 Ill.Dec. 525, 833 N.E.2d 7 (2005) (seizure when officer takes pedestrian's license in street encounter to squad car to run warrant check because "a reasonable person simply would not leave his identification behind and go about his business"); *City of Roswell v. Hudson*, 141 N.M. 261, 154 P.3d 76, 81 (N.M.App. 2007) (passenger sitting in legally parked car with driver seized when officer asked for identification); *State v. Soto*, 143 N.M. 631, 179 P.3d 1239, 1243 (N.M.App. 2008) (same, defendant on bicycle when police pulled up beside him and asked for identification and retained it during warrants check); *Salt Lake City*

v. Ray, 998 P.2d 274, 278-81 (Utah Ct.App. 2000) (permissive encounter when officer sought identification from defendant outside store became a seizure when he moved away from her for five minutes to run warrant check on his personal radio); *Piggott v. Commonwealth*, 537 S.E.2d 618, 619 (Va. App. 2000) (“consensual aspect of the encounter ceased when Detective Langford retained Piggott's identification while he ran a warrant check [. . . b]y retaining Piggott's identification, Detective Langford implicitly commanded Piggott to stay”), cf. *McCain v. Commonwealth*, 545 S.E.2d 541, 546 (Va. 2001) (no seizure where defendant produced identification, allowed search of his car and simultaneously walked away); *State v. Thomas*, 91 Wash.App. 195, 955 P.2d 420, 423 (Wash.App. 1998) (defendant sitting in legally parked car seized when officer took a few steps because “once an officer retains the suspect’s identification or driver’s license and takes it with him to conduct a warrants check, a seizure within the meaning of the Fourth Amendment has occurred”). Even the momentary delay for a warrants check *without* a civilian having provided an identification has been held to convert an “accosting” by police into a seizure. *Reynolds v. State*, 746 A.2d 422, 443-444 (Md. Ct. Spec. App. 1999) (five minute delay while awaiting a warrant check for a defendant stopped upon no suspicion, who gave his name and date of birth but had no identification, became a seizure).

A divided Florida Supreme Court recently found in a per curiam opinion that retaining an identification for a warrants check, under the totality of the circumstances, did not amount to a seizure, though it candidly acknowledged “the notion that a ‘reasonable person’ would feel free to end his encounter with the

police and risk abandoning his identification is somewhat vulnerable to honest intellectual challenge and discourse.” *Golphin v. State*, 945 So.2d 1174, 1190 (Fla. 2006). Though recognizing decisions from other jurisdictions, the Court held it was bound “by Florida constitutional mandate [so] we are not free to follow the interpretive path of those other states and must be firmly tied to the interpretive construct of our United States Supreme Court decisions.” Three justices concurred specially only in the result, finding instead that when an officer unilaterally retained a defendant’s identification to conduct a warrants check, a seizure occurred. *Id.*, 945 So.2d at 1196-1203 (Pariente, J., concurring specially) (noting “necessity of having government-issued identification to navigate contemporary American life”).

There are undoubtedly circumstances in which officers might properly seek a person’s identification while trying to assist him as part of the “community caretaking function.” See, e.g., *Commonwealth v. Evans*, 436 Mass. 369, 375 (2002) (requesting license from sleeping driver of car pulled over in isolated rural area late at night not a seizure). But this Court has carefully refrained from allowing the “community caretaking function” to authorize police intrusion into every potentially curious circumstance they confront. Thus in *Commonwealth v. Smigliano*, 427 Mass. 490, 493-94 (1998), the Court rejected the concurring justice’s argument that the community caretaking function permitted seizure of the driver of an already stopped car, based on a report of earlier erratic driving, because it “proposes that police officers have discretion that is essentially standardless.” This, the Court explained, “would leave the police with no

limitations, trial judges with no guidance, and citizens with no effective constitutional protection.”

The U.S. Supreme Court has held that a state may, by law, constitutionally require a person who is stopped by police based upon reasonable suspicion to identify himself. *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 188 (2004). This proposition is dramatically different than the idea that the police, without statutory authorization or any degree of suspicion whatsoever, may stop and require someone to identify himself. While the U.S. Supreme Court has not held that a demand for identification upon a suspicionless stop would itself be unreasonable, it has held that “an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop.” *Hiibel, id.* at 188. *A fortiori* a demand for identification based upon *no* suspicion should be at least as constitutionally suspect as that not reasonably related to circumstances justifying the intrusion.

Massachusetts is in the majority of states that lack a “stop and identify” statute like the one at issue in *Hiibel*. *Hiibel, id.* at 182. The logical consequence of finding the encounter in this case to be lawful based on its characterization as a “non-seizure” would be the judicial creation of a “stop and identify” law. It would be irrelevant that the Commonwealth lacks a stop and identify statute, if police could simply engineer encounters with civilians that involved taking their identification yet were not seizures, since these would be immune from constitutional scrutiny.

3. There can be no presumption that compliance with police authority is voluntary when civilians are given no reason for its exercise.

While “officers may make inquiry of anyone they wish and knock on any door, so long as they do not implicitly or explicitly assert that the person inquired of is not free to ignore their inquiries,” *Commonwealth v. Barros*, 435 Mass. 171, 174 (2001) (citing *Commonwealth v. Murdough*, 428 Mass. 760, 763 (1999)), compliance with an unexplained exercise of authority hardly demonstrates voluntariness. Explanation by police officers of their identity and their authority informs civilians with *whom* they are dealing, but not *why*.

According to the Community Ombudsman Oversight Panel (CO-OP) of the Boston Police Department’s Internal Affairs Division, it is *not* the policy of the Boston Police Department to tell persons why they have been stopped. CO-OP, *Annual Report* 31, ¶ 9 (July 31, 2008) (available at http://www.cityofboston.gov/police/co-op/pdfs/CO-OP_Annual_Report_2008.pdf). The CO-OP has recommended this policy be abandoned. *Id.* at 36, “Recommendations in Regard to Police Conduct” (“Citizens should be made aware of the reason an officer has stopped them when that information is requested.”). The policies of other comparable urban police departments regarding police-civilian encounters include explaining the reason for the encounter. *Seattle Police Department Policies and Procedures*, §6.220 I.A.1.d. (“To the extent that safety considerations allow, employees will introduce themselves to all citizens they contact. . . . Introductions should be formulated so

that they provide: . . . (d) The reason for the contact or stop.”)² The lack of explanation for an encounter with police is a factor strongly suggesting a person would be intimidated.

D. Race and ethnicity can be some of “all the circumstances” taken into account to determine whether a person felt free to leave.

Since the U.S. Supreme Court’s decision in *United States v. Mendenhall*, 446 U.S. 544 (1980), the race of the civilian and of the officer involved in an encounter have been recognized as relevant circumstances in assessing whether a seizure has occurred. 446 U.S. at 557 (Factors that defendant was African-American and female and that officers were white males were “not irrelevant”). Members of this Court have expressed concern about police-civilian encounters, undertaken with the best of intentions, in minority communities. *Commonwealth v. Feyenord*, 445 Mass. 72, 87 (2005) (Greaney, J., concurring) (“In our democratic society, special concern must be vigilantly exercised by the courts to balance the rights of the police under the principles of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (which have expanded considerably over the years since Terry was decided), with the protections afforded less powerful citizens who often feel the brunt of Terry-type stops.”). This Court has recently held that the exclusionary rule is a proper method of deterring behavior that violates the equal protection of the laws. *Commonwealth v. Lora*, 451 Mass. 425, 439 (2008).

Empirical data suggest civilians of different races experience police-civilian encounters very differently, and these differences could affect the degree

² Amicus Curiae Appendix at A-5.

to which civilians feel free to ignore requests of the police. Police-civilian encounters necessarily carry a risk of force, and the small but significant number of police-civilian encounters that involve the use or threatened use of force disproportionately involve young men who are members of racial or ethnic minorities. A 2005 U.S. Department of Justice survey of 80,000 U.S. residents found that while only 1.6% of police-civilian encounters involved force, civilians in encounters involving force were nearly 3½ times as likely to be African-American as white, and nearly twice as likely to be Hispanic as white.³ Bureau of Justice Statistics, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005 (April 2007, NCJ 215243). A civilian's concern about the potential use of force in an encounter with police is particularly well-founded when police initiate the encounter. "Police-initiated contacts were 60.4% of the 43.5 million contacts in 2005, but 81.4% of the 707,520 contacts involving use of force."⁴ The presumption of voluntariness seems extraordinarily inappropriate under these circumstances.

³Table 10, Bureau of Justice Statistics, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005 at 9 (April 2007, NCJ 215243), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp05.pdf>). Percentages of persons having contact with police in 2005 were: White (75.7%), African-American (9.7%), Hispanic/Latino (9.5%), Other (4.4%) and Two or more races (1.1%). Among contacts in which force or the threat thereof was used, characteristics by race were: White (56.8%), African-American (26.3%), Hispanic/Latino (13.7%), Other (<0.5%) and Two or more races (2.7%). Comparing percentage ratios of contacts in which force was used over total contacts yields: White (56.8/75.7) = 0.7503; African American (26.3/9.7) = 2.711 and Hispanic (13.7/9.5) = 1.44.

⁴ *Id.*, at 8, citing Table 11.

II. THERE IS NO LEGAL SIGNIFICANCE TO THE “FIELD INTERROGATION OBSERVATION” CATEGORY OF POLICE-CIVILIAN ENCOUNTER.

A. Any police-civilian encounter short of a seizure constitutionally requires no suspicion, but labeling an encounter as an “FIO” does not thereby render it a non-seizure.

Thirteen years ago, this Court first discussed a police-civilian encounter that it characterized, using Boston Police Department terminology, as a “Field Interrogation Observation,” and held that it could be constitutional where it did not amount to a seizure. *Commonwealth v. Cao*, 419 Mass. 383, 384-90 (1995). The stop of three youths suspected of gang involvement, long enough to learn their names and identifying information, and to photograph them, was permissible for one reason: “Our holding in the instant case is based solely on the fact that, under the circumstances, the defendant was not seized.” 419 Mass. at 390, note 9.

This Court cautioned:

Since the cases are often so fact specific, we suggest that the better practice would be for officers conducting FIOs to inform the individuals approached that the encounter is consensual and that they are free to leave at any time. We also suggest that the police department develop clear guidelines for the application of the FIO procedure so that officers are given guidance as to the permissible scope of such encounters.

Id.

The first recommended “better practice” has been ignored by the police (as in this case), and the second has been followed on paper but has been ignored in practice. As one treatise author has explained, “merely applying the ‘field interrogation’ label does not insulate the encounter from constitutional scrutiny.”

KENT B. SMITH, MASSACHUSETTS PRACTICE – CRIMINAL PRACTICE AND PROCEDURE, §5.5 (citing *Commonwealth v. Murphy*, 63 Mass.App.Ct. 11 (2005)).

Curiously enough, the cases are legion in which persons who possess contraband, and thus would presumably have a strong incentive to terminate any such encounter immediately, fail to do so. This self-defeating behavior could be an attack of conscience or an inflated belief in an ability to fool the police. Or, it could be that the “circumstances of the encounter are sufficiently intimidating that a reasonable person would believe he was not free to turn his back on his interrogator and walk away.” *Commonwealth v. Fraser, supra* at 544. Whether an “FIO” was done does not inform this judgment.

B. Boston Police Department policy governing FIOs is unknown or ignored by officers, and does not prevent arbitrary, unlimited or baseless intrusions because its terms afford unconstrained discretion in deciding to make an FIO.

Despite testimony in this case,⁵ current Boston Police Department policy governing “Field Interrogation, Observation, Frisk, and/or Search Reports” (“FIOFS”) has existed for over three years, and is set forth in Rule 323 of the *Boston Police Department Rules and Procedures*.⁶ The policy governing the FIOFS’s predecessor, the FIO, has existed since 1980. Defendant’s Record Appendix at 16. These rules apply to Boston Housing Police, who are specially detailed officers of the Boston Police Department, MA. GEN. LAW, Ch. 121B, §7,

⁵ Transcript of Suppression Motion Testimony (Sept. 13, 2005), Defendant’s Record Appendix at 10.

ADA (re-direct): Officer, what is the standard, if you know, to FIO an individual when you come across them in the field?

Officer: I’m not sure what the standard is, if there is one.

ADA (inaudible)

Officer: This is just a basic encounter to identify somebody, we don’t have any reasonable suspicion or probable cause that any crime was being committed at the time.

We just identify him. He was in the area of the development with high levels of drug activity. That’s simply what it was. He was free to leave at any time.

⁶ Amicus Curiae Appendix at A1-A4.

and are under its authority. “The BHA Police fall under the command of the Boston Police Department.” Boston Housing Authority, Public Safety (at <http://www.bostonhousing.org/detpages/deptinfo31.html>.)

FIOFS’s, which replaced “FIO’s” on June 3, 2005, “play an important role in the department’s intelligence efforts to collect and disseminate activities and whereabouts of known and suspected criminals and their associates in the city.” Indeed, “[f]or these reasons it is important for all sworn personnel to know how to properly complete and file such a report and how to access information contained in an FIOFS report.” Amicus Curiae Appendix at A1.

While it is unquestionably valuable for police to collect information on suspected criminal activity, the value of guidelines for doing this would be the protection they afford against arbitrary intrusions for data collection or intrusions for collection on inappropriate bases. The FIOFS policy directs unrestrained discretion for information collection by stating:

An officer should, if practicable, complete an FIOFS report whenever:
-he/she observes an individual who the officer knows to have a criminal record
-he/she observes this person in more than one location or with different associates.
The officer should complete an FIOFS report for each observation made.

Rule 323, *Boston Police Department Rules and Procedures* (June 3, 2005) Sec. 3, Amicus Curiae Appendix at A1-A2.

It is unrealistic to assume that officers follow this policy and literally prepare an FIOFS report for every encounter with someone known to have a criminal record that occurs multiple times or with different associates. There are

an estimated 2.8 million individual criminal records in Massachusetts⁷ – a state with a 2008 population of only around 6,480,000.⁸ Every year, about 60,000 people in the Commonwealth are convicted of a crime and added to the number of persons with criminal records. Thus, it would seem impossible that police complete FIOFS reports on any significant number of persons they observe who have criminal records in multiple places or with different associates.

Additionally, as noted in the present case,⁹ officers do not necessarily adhere to the guidelines in the FIOFS document. *Commonwealth v. Murphy*, *supra* at 324 (officer “described a ‘field interrogation observation’ as an interaction in which police identify a person and ‘find out their business in the areas’”).

C. This case demonstrates how readily officers ignore FIOFS policy: Lyles did not satisfy either FIOFS criteria for even completing a form.

Current FIOFS policy provides two bases for collecting the information for a FIOFS report: either observing someone the officer knows to have a criminal record in more than one place or with different associates. Rule 323, *Boston Police Department Rules and Procedures* (June 3, 2005) Sec. 3, Amicus Curiae Appendix at A1-A2. The officer who encountered Lyles testified that he did not know Lyles, had never had contact with him, and that Lyles was alone. Transcript of Suppression Motion Testimony (Sept. 13, 2005), Defendant’s Record

⁷ *CORI: Opening Doors of Opportunity - A Workforce and Public Safety Imperative*, Report of the Task Force on CORI Employer Guidelines (The Boston Foundation, 2007) at 7 (http://cjinstitute.org/files/cori_may2007_1.pdf).

⁸ U.S. Census Bureau State & County QuickFacts (2006). Accounting for increases in population of about 44, 050 people every two years. *See*: <http://quickfacts.census.gov/qfd/states/25000.html>.

⁹ Transcript of Suppression Motion Testimony, *supra*, note 5.

Appendix at 6. Nevertheless, both the officer involved and the Commonwealth's attorney believed that simply filing a piece of paper after the fact would make the encounter lawful.¹⁰

D. Police-civilian encounters that actually adhere to written police FIOFS policy would unquestionably be seizures.

The time required for an officer to gather the information necessary to fully complete an FIOFS form unavoidably involves a seizure. The FIOFS form requires entry of over forty pieces of information that extend well beyond a person's name to his or her date of birth, social security number, driver's license number, alias or nickname, sex, race, ethnicity, height, weight, complexion, scars/deformities/peculiarities/facial hair, clothing, details concerning any vehicles involved, occupation, employer or school, as well as details about the encounter. While obtaining this information would not necessarily require taking possession of a person's identification, it would likely require a person to at least consult his or her own identification. After being stopped for no reason, and being subjected to numerous questions in order to enable completion of an FIOFS report, it is difficult to imagine anyone *not* feeling that they were "not free to turn

¹⁰ Transcript of Suppression Motion Testimony (Sept. 13, 2005), Defendant's Record Appendix at 12 (emphasis supplied).

ADA: I would respectfully disagree with the interpretation of the law in respect to FIO, as the officer states, the defendant was not in custody, and was not even sought, your Honor, at the time . . . (inaudible) . . . BMC, the officer testifies from his knowledge of FIO's and exactly what that entails, and stated that he did not believe that he needed reasonable suspicion to make an FIO and I would also join him in that belief. He did state, however, that in performing his FIO's, which I believe to the best of my recollection he said he performed almost everyday, *he stated a card would have to be filled out and submitted back to the police station after an FIO is made. That, your Honor, I would argue is all that needs to be . . . (inaudible).*

...

It's much like as I've approached in hundreds of cases in this court. Officers patrolling in a cruiser doing registry checks on license plates, your Honor. *They are free to that so long as they fill out said card and supply it to the police station.*

his back on his interrogator and walk away.” *Commonwealth v. Fraser, supra* at 544.

CONCLUSION

For the foregoing reasons, Amicus Curiae Suffolk Lawyers for Justice, Inc. respectfully urges the Court to affirm that the encounter in this case was an unlawful seizure under Article 14 of the Massachusetts Declaration of Rights.

Respectfully submitted,

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DATED:

CERTIFICATION OF SERVICE

I hereby certify that this brief complies with the MA Rules of Appellate Procedure and that I have today mailed two copies of this Brief and Appendix, first class prepaid postage, to Macy Lee, Assistant District Attorney, One Bullfinch Place, Boston, MA 02114 and to Chrystal Murray, Esq., P.O. Box 301502, Jamaica Plain, MA 02130.

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APPENDIX OF AMICUS CURIAE

Rule 323, *Boston Police Department Rules and Procedures* (June 3, 2005)...A1

Section 6.220, *Seattle Police Department Policies and Procedures* (Nov. 15, 2007).....A5