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February 22, 2019

LaSella Hall
NAACP
95 Cedar Street
New Bedford, MA 02740

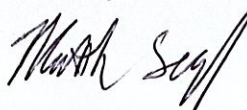
Re: 2013 ACLUM, NAACP, LCCR statement re Malcolm Gracia

Dear Mr. Hall:

We received a request from Ray Patnod of your New Bedford chapter for a copy of the 2013 ACLUM, NAACP AND LCCR joint report regarding the shooting and death of 15-year old Malcolm Gracia. Enclosed please find the report, as well as the DA's report.

If you have any questions, please don't hesitate to contact us.

Sincerely,



Matthew R. Segal

Encl.

**DISTRICT ATTORNEY'S FINDINGS AND CONCLUSIONS
REGARDING THE POLICE SHOOTING DEATH OF
MALCOLM GRACIA IN NEW BEDFORD ON MAY 17, 2012**

BACKGROUND

On Thursday, May 17, 2012 at approximately 8:30 p.m., a New Bedford Police Department detective assigned to the New Bedford Police Department gang unit approached Malcolm Gracia and Gracia's companion as they were walking northbound on Cedar Street, an area which has been harmed by violence and gang activity. The detective wanted to "meet and greet" the two young men, which is gang unit parlance for an encounter with unknown individuals to determine their identities and activities in the area. Detectives engage in these types of encounters frequently each day and they are designed to keep the detectives aware of who is in the area and give them early warning if gang-related problems are developing. Three other detectives assigned to the gang unit were nearby. Detective Tyson Barnes, the second detective at the location, was a short distance toward the south. The two remaining detectives were getting out of their cruiser, parked to the south of Detective Barnes's location. The brief encounter with the two young men quickly turned deadly when Gracia repeatedly stabbed Detective Barnes and moved on towards a third detective while he was still armed. After repeatedly ordering Gracia to get down and drop his knife, and after an attempt to subdue Gracia by non-lethal means through the use of a Taser device, two detectives at the scene shot and killed Malcolm Gracia.

An investigation by the Massachusetts State Police and the District Attorney's office, pursuant to the obligations of MGL ch. 38, sec. 4, followed. The New Bedford Police Department likewise conducted their own independent investigation. The findings and conclusions of that review were made separate and apart from the District Attorney's investigation. The findings and conclusions of that review were not provided to the District Attorney.

An autopsy was performed on Gracia by the Office of the Chief Medical Examiner. At autopsy, the medical examiner determined that the cause of Gracia's death were gunshot wounds.

THE INVESTIGATION

New Bedford Police and Massachusetts State Police immediately responded to the area of Cedar Street on the first reports of the incident. Even though the first responding officers arrived at the location within seconds, a crowd was already forming at the site. The first responding officers established a secure perimeter and, as investigators arrived, they quickly began to interview

people in the area. From all of these interviews, investigators could only find two non-police witnesses to the incident.¹ One of these people was Malcolm Gracia's friend and companion on May 17, 2012 (hereinafter referred to as the Companion). The other person was a man standing outside of an apartment at 69-75 Cedar Street (herein after referred to as the Cedar Street witness).

In the course of this investigation, the Massachusetts State Police interviewed the two civilian witnesses who are known to have witnessed the incident, all of the involved police officers, including the four gang unit detectives and the gang unit supervisor. All of the interviews of the police and eyewitnesses were recorded. Investigators received some additional information from other individuals who declined to submit to formal interviews. Investigators also consulted with the office of the Chief Medical Examiner, and the Department of Mental Health. The District Attorney and members of his staff met on two separate occasions with community-based leaders who raised their concerns about the incident.

In addition to the taking of witness statements and expert consultations, investigators conducted a physical examination of the scene, and took custody of physical evidence which was present there, including the knife used to assault the detectives and an additional knife located a short distance away. Screening tests were also performed on items of clothing of Mr. Gracia's companion. Surveillance video of Temple Landing was preserved. This surveillance footage includes the area of Magnet Park which was actively being viewed by detectives prior to the incident as well as digital video from Temple Landing's sixteen recorded security cameras. None of the recorded video includes the area of the incident on Cedar Street, because that area was not covered by video surveillance on May 17, 2012. A personal computer used by Gracia and his companion was recovered and images were copied. Investigators recovered information from Facebook postings made prior to the incident.

The investigation results are drawn from the sources listed above. Every effort has been made to expedite the conclusion of this investigation which involves issues of serious community concern. Statements made by some of the witnesses during interviews sometimes conflict with statements of other witnesses or with the physical evidence. Where this occurs, efforts have been made to point out what other evidence exists to help resolve the conflict in recollected facts.

MALCOLM GRACIA

Malcolm Gracia was born on December 9, 1996. He was fifteen years old at the time of his death. According to the information provided to investigators, in the weeks before he died

¹ In the days following May 17, 2012, newspaper articles reported statements by persons, other than the two non-police witnesses, indicating that they witnessed the incident. In some cases, investigators had already spoken with these individuals and had been informed by them that they were not present; in other cases investigators were able to confirm through people who had been with the purported eyewitness that the person had not been at Cedar Street; in other cases the person simply refused to meet with investigators to provide a statement. Notwithstanding repeated calls by investigators, the District Attorney, and the Mayor of the City of New Bedford for any eyewitness to come forward, no *additional* eyewitnesses have been identified and interviewed.

Malcolm Gracia had been living on his own, having run away from his family. His mother was no longer his custodian as she suffered from a mental condition which prevented her from parenting him. He sometimes stayed with the young man that was his companion on May 17, 2012, but would not confide in his friend where he was living when he was not staying at the friend's house. When pressed by his companion he responded simply, but cryptically, saying only that he had a spot. According to Gracia's guardian, who spoke briefly with the police but has declined to be further reinterviewed, Gracia ran away from home on May 7, 2012. No report that Gracia had run away from home was made to the police. However, investigators could not locate any adult who claimed to have been in supervision of Gracia in the days and weeks leading up to this incident.

Malcolm Gracia did not have contact with his biological father but the impact upon him of his father's death appears to be significant. On August 11, 2009, Gracia's father, Joseph Ramos, was killed by a single gunshot when he attacked two Dartmouth Police officers with a homemade weapon. The District Attorney's investigation into that shooting revealed that Ramos suffered from a long history of mental illness. The Dartmouth police came into contact with him when neighbors, concerned about his incoherent actions, called for emergency assistance and the two Dartmouth officers arrived.

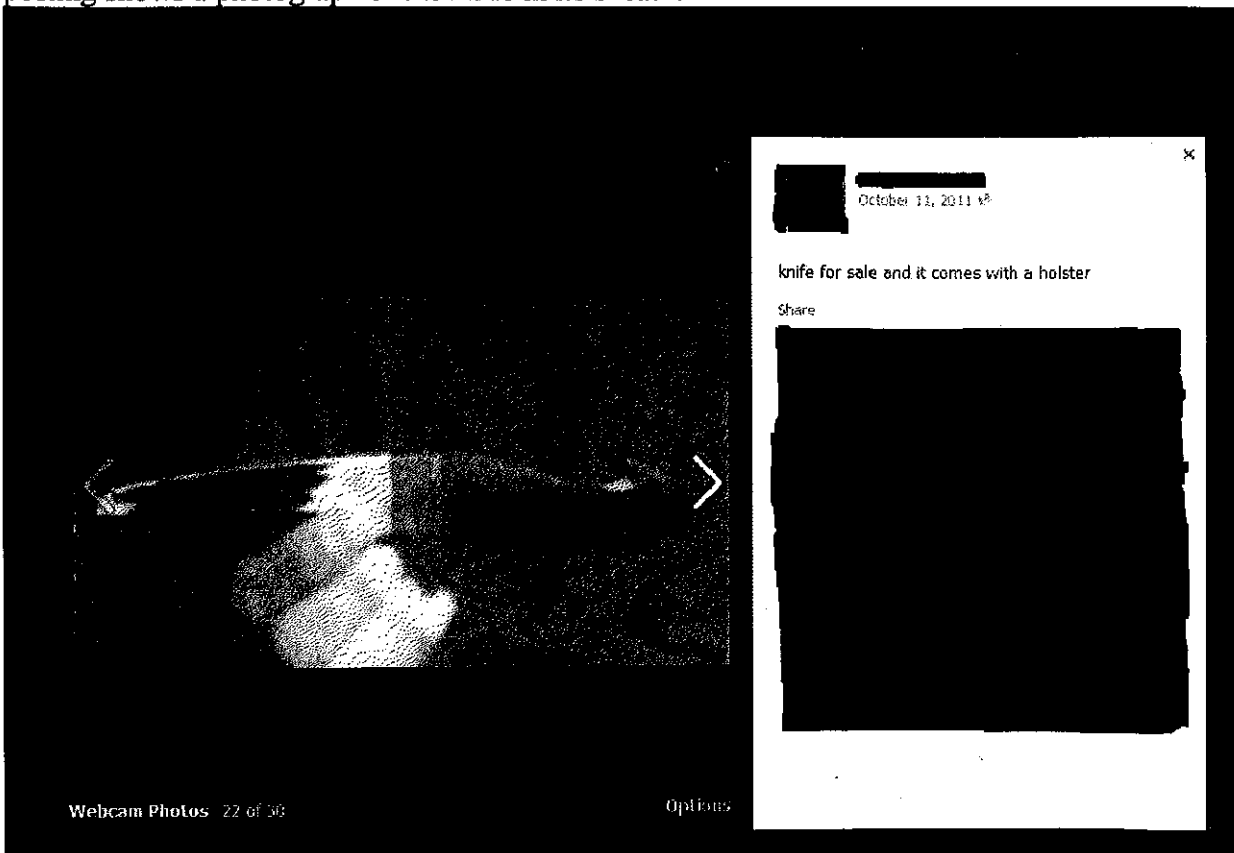
According to Gracia's companion, Gracia spoke about his father's death and confided to him that he blamed the police for the death. Gracia told him that "his father got killed by the police and that's why he hated them." Gracia told his companion and others that he (Gracia) had sold his soul to the devil and was going to go out of this life in a way that made him famous. Other people who knew Gracia, described that Gracia had problems with his mental health and stated that Gracia claimed to have made a pact with the devil. Gracia told an acquaintance that not only was he not afraid to die, but he would die and come back and haunt people. This acquaintance thought that Gracia was suicidal. In February, 2011, during a contentious conversation with a police officer at school, Gracia threatened to kill the police officer, stating that he would put three bullets into the officer.

Gracia had a history of absenting himself from the home. In 2010 he was reported as a runaway after he had been gone from the house for two days. Three days later the New Bedford Chief of Police Ronald Teachman found him on Kempton Street and had him taken into custody on a court warrant as a runaway.

Like both of his parents, Gracia also experienced mental health problems. He confided to his companion that he had been recently admitted to an inpatient mental-health facility. This investigation showed that on April 12, 2012 Gracia was taken into custody on a warrant and brought in for medical care. This information is consistent with the information provided to investigators by other sources. It is also consistent with prescription pill bottles recovered from the house of Gracia's guardian. The recovered prescription pill bottles showed that Gracia had been prescribed both anti-depressant and anti-psychotic medications which he, evidently, stopped taking approximately nine days before May 17, 2012. Of particular note was the dosage of anti-psychotic medications prescribed to Gracia which directed him to take 60 mg. per day, only 4 mg. less than the maximum allowable dosage for adults.

Gracia's guardian told police that Gracia was being treated for "psych" issues, but she did not know what they were. She said that when he ran away from home on May 7th, he did not take his psych medications with him. Investigators also learned from Gracia's family that they felt that he may be unstable when he was not taking his medications. Gracia's companion reported that Gracia was schizophrenic and heard voices. Gracia frequently and obsessively spoke about secret groups, whom he referred to as Illuminati, who controlled the world through a conspiracy. Gracia was described as forcing conversations about this topic. Gracia's belief that the Illuminati controlled the world was a central and important aspect of his daily life. According to his companion, Gracia frequented the Internet looking for information on the Illuminati. A search on Illuminati on the Internet shows posts that attribute plans to take over the world by force, responsibility for the September 11th attacks and various other irrational conspiratorial theories to this group.

Gracia's companion also told investigators that in addition to statements about killing himself, Gracia made attempts to do that. His companion reported that Gracia had made cuts to his left arm and the inside of his left wrist. He reported that he had bandaged these wounds for Gracia approximately two weeks before the May 17, 2012 incident. He described one of the injuries as very deep. At or about this time, Gracia's companion gave him the knife that was used in the attack on Detective Barnes. The knife has a hook at its tip that is used to gut animals. Although Gracia's companion initially denied that he ever owned the knife, he eventually admitted that it was his until a few weeks before the incident on May 17th. In October of 2011, before giving the knife to Gracia, Gracia's companion attempted to sell the knife on Facebook. This Facebook posting shows a photograph of the knife in its sheath.



When the medical examiner performed an autopsy on Gracia, in addition to numerous well-healed scars, he found a number of recent (made within a short time prior to death) incised² wounds on Gracia's left wrist. The nature of these wounds indicated that they were self-inflicted cuts made on the day of his death. The cuts were so recent that the medical examiner described them as peri-mortem or having occurred at or around the time of death.

When Gracia's companion was interviewed and he looked back over the time that he had known Gracia, he remarked just how far into mental illness Gracia had gone over the years. "He is not killing himself, like, out of depression or nothing I don't think. I think [it] was just in his head he believed like this was going to happen, he was going to see the devil, and make a deal with him or something, and then sell his soul and he would be famous and all this."

By May 13th, 2012, four days before his death, Gracia had cut himself numerous times, in a manner consistent with suicide attempts. He had been, once again, on the run from his house and living without any adult supervision and without his medication. No report that this mentally ill fifteen year old had run away was ever made. He turned to his friends and acquaintances who knew how troubled he was, but lacked the ability to get him help from people who could help. On May 13th, Gracia made the following post on his Facebook account. The caption reads "ready to kill." In the photograph, Gracia is holding the knife he used to stab Detective Barnes on May 17th. Two people responded that they "liked" his posting. No one took any steps to prevent him from acting on his statement.



² Incised wounds are wounds that are longer than they are deep.

FIELD INTERVIEWS AND OBSERVATIONS, "MEET AND GREET"

Community policing requires that police officers have frequent contact with citizens. Not all of these contacts, not even all contacts initiated by the police, implicate a citizen's individual rights. Encounters which do not interfere with citizens' rights are important means by which law enforcement officers communicate with them, obtain information about people and activity in the local area and provide a reassuring presence in the community.

Experienced and trained police officers rely on their ability to engage citizens in a non-custodial environment as a means of interdicting gang-related activity. Anti-gang and violence prevention policing requires officers to establish their presence in areas where violent crimes occur, and encounter the very people who may be engaged in the violent or gang activity. During these encounters, officers get out of their cars and meet with individuals to learn the identities and affiliations of people in the area. This type of information provides early warning of the possibility of problems when gang-affiliated outsiders suddenly appear in areas they are not known to frequent and helps build the framework of police understanding of the issues and people involved if violence does occur.

The New Bedford Police Gang Unit was formed to engage in this type of police activity. The manner in which the unit accomplishes this task is through what they term a "meet and greet." This involves an approach to an individual or a group of individuals by a single detective who attempts to engage the target in conversation. These approaches happen at night and in areas known to have experienced prior violent crimes. Because of this, the gang unit detectives work as a unit and detectives who are not engaged in conversation provide assistance and back-up by positioning themselves in the area of the encounter.

The legal authority and limitations on these encounters are prescribed by law. Our Courts have repeatedly ruled that "[s]treet encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life." Terry v. Ohio, 392 U.S. 1, 13 (1968). "Not every encounter between a law enforcement official and a member of the public constitutes an intrusion of constitutional dimensions that requires justification." Commonwealth v. Gomes, 453 Mass. 506, 510 (2009). The particular character of such an encounter will determine whether it is an intrusion of constitutional dimensions by law enforcement officials such that justification is required. See Commonwealth v. Stoute, 422 Mass. 782, 789 (1996).

The United States Supreme Court makes clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free "to disregard the police and go about his business," California v. Hodari D., 499 U.S. 621, 628 (1991), the encounter is consensual and no reasonable suspicion is required. The encounter does not trigger Fourth Amendment scrutiny unless it loses its consensual nature. The Court made precisely this point in Terry: "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

"The particular character of such an encounter will determine" what level of justification, if any, is required. Commonwealth v. Lyles, 453 Mass. 811, 814 (2009). Thus, police officers may approach individuals on the street to ask them about their business without implicating the balance between State power and individual freedom. See Florida v. Bostick, 501 U.S. 429, 434 (1991), quoting Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion) ("law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or another public place"); Lyles, 453 Mass. at 815. Such interactions as field interviews and observations properly are deemed consensual encounters because the individual approached remains free to terminate the conversation at will. See Id. at 814-815. That is, they are constitutionally insignificant, and a police officer may initiate such an encounter without any information indicating that the individual has been or is presently engaged in criminal activity.

Within the Commonwealth, the Supreme Judicial Court has held that a person 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). "[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) (officer did not seize defendant when he approached defendant, identified himself as police officer, and asked defendant to remove hands from pockets); Commonwealth v. Lopez, 451 Mass. 608, 610-612 (2008) (no seizure where officers merely asked to speak with citizen in absence of intimidating circumstances); Commonwealth v. Thomas, 429 Mass. 403, 405-407 (1999) (no seizure where officer only asked questions during field interview without show of authority).

However, once the officers act in such a way that they intend to pat frisk an individual, that person is seized within the meaning of the Fourth Amendment and art. 14. DePeiza, 449 Mass. at 371 (defendant seized when officers announced their intention to frisk him). The constitutional question then becomes whether the officers possessed the requisite justification to seize the defendant at that particular moment, as well as whether the officers possessed the necessary justification to frisk the defendant. Commonwealth v. Wilson, 441 Mass. 390, 393-394 (2004). As the Supreme Court of the United States recently reaffirmed, a "stop and frisk [is] constitutionally permissible if two conditions are met. First, the investigatory stop must be lawful. That requirement is met in an on-the-street encounter. Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous." Arizona v. Johnson, 129 S. Ct. 781, 784 (2009). This is true even where the officer comes into contact with an individual solely to conduct a consensual interview. See United States v. Burton, 228 F.3d 524, 527 (4th Cir. 2000), quoting United States v. Sokolow, 490 U.S. 1, 7 (1989) ("A police officer may elevate a police-citizen encounter into an investigatory detention only if the officer has a 'reasonable suspicion supported by articulable facts that criminal activity "may be afoot"").

Decisions in these cases are highly fact specific. See Commonwealth v. Knowles, 451 Mass. 91 (2008). Police officers may not escalate a consensual encounter into a protective frisk absent a reasonable suspicion that an individual is armed and dangerous. In such cases, to lawfully pat-

frisk an individual during a consensual encounter the officer must possess a reasonable belief that an individual has a weapon and appears inclined to use it. When an individual appears to be ready to commit violence, either against police officers or bystanders, it is reasonable to believe that he is "about to commit a crime," Commonwealth v. Wilson, 441 Mass. 390, 394 (2004). The individual's conduct simultaneously gives rise to a reasonable belief that he is armed and dangerous, satisfying the second. Commonwealth v. Pagan, 63 Mass. App. Ct. 780, 783 (2005) (defendant reached for waistband indicating he "might be drawing or concealing a weapon").

MAY 17, 2012

On May 17, 2012 five members of the New Bedford Police Department gang unit were located at New Bedford Police Department headquarters on Rockdale Avenue. The officers were having their dinner. While the detectives ate, Sergeant Brian Safioleas, the gang unit supervisor monitored the live video surveillance of Temple Landing from his desktop computer. Sergeant Safioleas recognized a number of people in the area of the basketball courts, but could not place two young men who were interacting with them. Unable to identify the two, Sergeant Safioleas asked other members of the unit if they recognized them, and none of the detectives were able to. The two young males were later identified as Malcolm Gracia and his 16 year old companion.

While observing the two, the officers saw the two young men exchange a handshake with the others that appeared to be a gang handshake. This raised the concern of the members of the unit that they had unknown, possibly gang-involved, people at Temple Landing and they determined that the appropriate course was to go to the location and attempt to identify the two.

Four detectives left the station in two unmarked police cruisers. As the detectives later told investigators, they drive these two vehicles through the area dozens of times a day and the two vehicles are readily identifiable as police cruisers. The detectives, while not wearing formal police uniforms, all displayed identification as police officers, either by wearing shirts, prominently displaying the words police or by badges on their chest areas or both.

As the two vehicles approached the area of the basketball courts, the crowd which the detectives were observing at the station dispersed. The two unidentified youths walked to the north along Cedar Street. The two were easily identifiable by the detectives by the clothes they were wearing and the detectives continued to watch the two individuals as they also headed in their vehicles to Cedar Street.

The lead vehicle drove past Gracia and his companion as they walked north on the sidewalk and then stopped ahead of them. The detective in the passenger got out and walked to the front of the cruiser and then turned toward the south to face Gracia and his companion.

As this Detective approached the sidewalk, he called out to the two, "Hey guys, what's going on tonight. I just want to talk to you."³ The detectives engage in these kinds of interactions, dozens

³ The Cedar Street eyewitness did not hear the detective attempt to engage the two. The first words that he heard the detective speak amounted to an instruction to the two individuals to stop and put their hands up. The witness said he was not sure what the exact wording of this command was.

of times a night. In a normal encounter, a conversation would follow. Sometimes, such as when the person is armed with an unlawful weapon or possesses contraband, the person will take off from the scene and elude the officers. The detective, who first made contact with the two, told investigators that he had recently had an encounter with a person who fled when he approached. As this person ran, he discarded a firearm. This specific encounter began differently. Both young men had their hands in their pockets.⁴ As the aforementioned detective approached the two individuals they grew noticeably tenser and their previously normal walking gait changed.⁵ Gracia's companion would not make eye contact with the officer. Based on the detective's training⁶ and experience he immediately perceived a threat. He asked Gracia and his companion to remove their hands from their pockets, but they did not do so in the face of multiple requests. They said nothing to the detective.

The detective determined that he wanted to pat-frisk both of them and he closed the distance between him and the two of them.⁷ As he got near them, he put one of his hands on each of their shoulders and waited for Detective Barnes, the driver of the vehicle, to come and assist him. The two detectives in the other cruiser had parked their vehicle farther to the south, along the sidewalk, and they were together, walking north towards the encounter. Gracia and his companion continued to face north themselves and likely were not aware of the three detectives approaching from their south.

The detective told Gracia and his companion to put their hands on a nearby car. They did not comply. He then tried to guide Gracia and his companion towards a car parked along the sidewalk. As they moved towards the car, Gracia suddenly turned and ran south and easterly towards the row of Cedar Street residences. Gracia was then faced with the two detectives approaching together from the south. Gracia abruptly stopped and backed up towards his initial direction. He now appeared to be grasping at his waist or pocket with both of his hands. The detectives are trained, in particular, that this motion is consistent with a person trying to unholster or retrieve a weapon and it appeared that way to Detective Barnes who approached Gracia from the west. It also appeared that way to all of the other detectives and the Cedar Street

⁴ Both young men were carrying knives in their pockets.

⁵ The Cedar Street eyewitness described that the two picked up the pace when the officer approached them.

⁶ T The detective received specific trainings on the characteristics of armed felons.

⁷ When he was interviewed, Gracia's companion told investigators that the detective who approached the two engaged did not attempt to engage them in conversation and instead told them only to put their hands behind their backs. This description of the initial encounter is not believable since it describes a method entirely inconsistent with officer safety and the purpose of the encounter. It is undisputed that the detective approached the two from the front. Among other things, the detective's fear for his own safety was heightened by his inability to observe the hands of Gracia and his companion. Simply telling the two to put their hands behind their backs would have done nothing to address that concern and is entirely inconsistent with known police behavior. In fact, in repeated street encounters, officers instruct subjects to show their hands because by observing the subject's hands, an officer can see that the subject is not arming himself.

Eyewitness who was standing on the doorstep of one of the houses facing Cedar Street. Barnes came face to face with Gracia and placed his hands on Gracia's shoulders in an attempt to control his movement.

Gracia put his left hand on Barnes's back and immediately thrust the knife he was holding in his right hand into Barnes's abdomen. Barnes, all the other detectives present and the Cedar Street eyewitness now realized that Gracia had a knife. Before Barnes could get away Gracia thrust the knife at Barnes's abdomen again striking Barnes. According to Cedar Street eyewitness there were multiple attempts by Gracia to stab Barnes. Barnes backed up slightly and fell to the ground. The Cedar Street eyewitness corroborates this sequence of events. He stated that the stabbing of Barnes was, in his observation, consistent with an intent to injure Barnes.

Gracia put his left hand on Barnes's back and immediately thrust the knife he was holding in his right hand into Barnes's abdomen. Barnes, all the other detectives present and the Cedar Street Eyewitness now realized that Gracia had a knife. Before Barnes could try to get away Gracia thrust the knife at Barnes's abdomen again striking Barnes. According to Cedar Street Eyewitness there were multiple attempted by Gracia to stab Barnes. At this point, Barnes backed up slightly and fell to the ground. The Cedar Street eyewitness corroborates this sequence of events. He stated that the stabbing of Barnes was, in his observation, consistent with intent to injury Barnes.

Gracia then moved toward the south. He again faced the two detectives coming from the southern cruiser. He ran towards one of these detectives, who was located near the sidewalk. Both of these detectives instructed Gracia to stop, drop his knife and get on the ground. Gracia advanced. The Cedar Street eyewitness heard the detectives repeatedly yelling to Gracia to stop. One of these two detectives was now located on Gracia's right. As Gracia advanced, this used his Taser in an attempt to bring Gracia under control by non-lethal means.⁸ A Taser can prevent an attacker from advancing by overriding neuro-muscular impulses and causing the attacker to lose control over his own muscles. The type of Taser employed by New Bedford police uses two probes connected to the Taser electrical supply by means of two electrical wires. In order to be effective, both Taser probes must come into contact with the target. When this happens, electrical impulses pass between the two probes and interfere with muscle operation. When deployed by the New Bedford Police detective at this juncture in the incident, the Taser had no effect, probably because one probed missed striking Gracia. One probe and wire were recovered from the scene. The other probe and portions of the wire were recovered from Gracia's sweatshirt at the hospital.

Gracia continued to advance on the detective directly in front of him. According to the Cedar Street eyewitness who was standing outside of his apartment in the 69-75 area of Cedar Street, Gracia continued to ignore both of the detectives' commands and was advancing toward one of them. The other detective, who had tried to stop Gracia with his Taser, was now located behind Gracia. Both of these detectives had their service weapons drawn and pointed at Gracia. They both continued to yell at Gracia to stop. Gracia ignored their commands to stop. Based on the

⁸ The shooting was a dynamic event and during its brief duration the relative positions and angles between the two detectives and Gracia changed.

detectives' prior observation of Gracia stabbing Detective Barnes, Gracia's refusal to respond to commands to stop and drop the knife, and fear for the safety of the detective towards whom Gracia was advancing, both Detectives decided to fire at Gracia. Initially three shots were fired and the firing of those shots were recorded by Shot Spotter and observed by the Cedar Street eyewitness. This initial firing momentarily halted Gracia's advance and he stumbled to the ground. At this point, it appeared to the detective who had been firing from the grass that Gracia was within a few feet of his partner. Both detectives again instructed Gracia to drop the knife and stay on the ground. The Cedar Street eyewitness heard the detectives telling Gracia to "stay down, stay down." According to this eyewitness, Gracia fell when he was shot and then got up on one knee with his other foot planted on the ground. According to all eyewitnesses, he was still holding his knife. That is when the second set of three shots were fired. These three shots were also recorded by Shot Spotter. Both detectives made their own independent determinations that the use of deadly force was necessary and fired Gracia nearly simultaneously.

Three shots were fired initially at Gracia which caused him to stumble to the ground. When he started to get up, three more shots were fired. In total, three projectiles were recovered. Because of insufficient indications on the recovered projectiles, however, it is not possible to determine which bullets were fired by which detective.

Subsequent attempts by first responding Emergency Medical Service personnel and medical personnel at St. Luke's Hospital to revive Gracia were unsuccessful. At 9:21 p.m. Malcolm Gracia was pronounced dead.

The knife that Gracia used and a sheath that covered it was recovered at the scene.

Gracia's companion fled north on Cedar Street and then through an alleyway. He was located at his home early the next morning and he agreed to come to the police station. There he was interviewed, in the presence of his mother. He told investigators that he discarded the knife that he was carrying next to a church along his line of flight. This knife was also recovered by investigators.

Detective Barnes was transported to Rhode Island Hospital. There he was treated for the stab wound to his chest and abdomen area and the stab wound to his arm. The stab wound to the chest and abdomen area was within inches of his heart.

AUTOPSY

Dr. Peter Cummings of the Office of the Chief Medical Examiner performed an autopsy on the body of Malcolm Gracia on May 18, 2012. The autopsy included an external and internal examination of the body as well as toxicological screening of blood to determine the presence of illicit drugs.

On external examination of the body Dr. Cummings noted a number of well-healed scars at a number of locations on the body. At certain locations of the body, there were instances of multiple scars. The location and frequency of these scars is consistent with at least some of them being self-inflicted.

The autopsy showed that Gracia had been shot four times. None of the wounds indicated any damage to skin from either gun-powder or the gases associated with the escape of a projectile from the gun. Consequently, all of the wounds came from some distance and the wounds are not close-contact or near gunshot wounds.

One gunshot wound is a barely penetrating wound of the lower right back. The projectile passed under the skin of the lower back without striking any organs for a distance of approximately two inches. The projectile then exited the body and continued on. Because of the nature of the wounds associated with this, the medical examiner was not able to determine the direction of travel of this projectile.

One gunshot wound was an entrance into the right side of the head just below the right ear. The bullet then travelled through the skull and exited the left side of the head at the level of the left ear. No bullet which could be associated with this wound was recovered during the autopsy. This wound was independently fatal and likely would have had a very quick effect on Gracia's ability to continue to function.

One gunshot entered on the right side of the upper back, approximately one inch from backbone. After passing through a portion of the vertebrae and the upper lobe of the right lung, the bullet became lodged in the right collar bone. This bullet was recovered.

The fourth gunshot wound entered the left-side of the lower back. The bullet passed through a rib, the left lung and exited on the left-side of the chest. No bullet was recovered.

Dr. Cummings could not provide an opinion, with a medical certainty, how long Gracia could continue to function after the infliction of these latter two gunshot wounds.

The autopsy also discovered recently inflicted sharp force injuries or cuts on three of Gracia's extremities. There were multiple incised wounds on the left wrist and forearm. There was a two inch long incised wound of the left thigh. There was a single incised wound on the right wrist.

Dr. Cummings also noted areas of abrasions or bruising consistent with the incident on the body. The toxicology screen showed the presence of marijuana which was consistent with Gracia's companion's description of Gracia obtaining and using marijuana on May 17, 2012.

Dr. Cummings determined that the cause of death was by gunshot.

NEW BEDFORD POLICE DEPARTMENT USE OF FORCE POLICIES

There are three New Bedford Police Department use of force policies applicable to the May 17, 2012 incident.

General Order 12-1 Use of Deadly Force states police officers are equipped with firearms as a means of last resort to protect themselves and others from the immediate threat of death or serious bodily injury. Police officers are required to exhaust all other reasonable means for apprehension and control before resorting to the use of firearms.

Pursuant to policy and existing law, police officers are authorized to use a firearm to protect themselves from immediate danger of death or serious bodily injury.

General Order 12-2 Use of Less Lethal Force, states that whenever deadly force is not authorized, officers should assess the situation in order to determine which less lethal use of force technique will best de-escalate the incident and bring it under control in a safe manner. Officers may not use more force than is reasonably necessary to gain control of an individual.

Pursuant to policy and existing law, police officers are authorized to use approved less lethal force to protect themselves or another from physical harm, to place a resistant individual into custody or to bring an unlawful situation safely and effectively under control.

General Order 12-3 Electronic Control Weapons controls the use of Taser weapons. This policy specifically describes that Tasers are not a substitute for lethal force. Officers are not expected to respond to a lethal force threat with a less lethal force option such as a Taser.

CONCLUSION

The attempt by a single detective of the New Bedford police to engage Malcolm Gracia and his companion in conversation on May 17, 2012, was consistent with the New Bedford police department approach to provide a community-based police effort in areas of the city that have experienced violent crime.

Officers, however, must be careful not to transform an encounter justified only on the basis of consent into a seizure of the person without reasonable suspicion. Here, to the extent that the detective inhibited Malcolm Gracia's freedom to end the encounter, that action was balanced by the detective's observations. In the fact-specific circumstances of these encounters, it is difficult to articulate all of the circumstances and the exact moment when the officer determines his safety is in danger. Here, the detective had special training and experience to recognize the responses and behavior of armed individuals who present an immediate danger. The detective relied on this training and experience when he recognized these characteristics in Gracia and his companion, both of whom were armed with knives.

The characteristics of those who simply want to avoid consensual contact with the police can be difficult to distinguish from those who are, in fact, armed. Where the actions of a person in a fast-moving street encounter are subject to either interpretation, an officer must quickly decide whether to make a constitutional intrusion or take a chance that no harm will come. In hindsight, it would have been easy to predict that any individual with a mental illness, unmedicated, possessing obsessive conspiratorial thoughts, and a deep animosity toward the police, who has stated that he is "ready to kill" and is armed with a knife presented an imminent danger to a police officer. Although this information was not known to the detective when he approached Gracia and his companion, this detective took graduated steps of minimally intrusive actions to dispel his perception of danger. However with each step, the resulting behavior of the two individuals he was encountering only increased his concerns. When he asked the two armed individuals to remove their hands from their pockets where their knives were secreted, they refused. When they would not respond, the detective asked the two to put their hands on a car.

Again they did not comply. The detective's perception of danger, in our view, was real and the precautionary steps that he undertook were designed to prevent the violence that ensued.

Determining whether the officer's perception of danger met the threshold for a minimal constitutional intrusion is not a matter for the ambit of this investigation. Gracia's violent assault on Detective Barnes and his threatening advance on another detective was the sole cause of the escalation of this incident and was independent of any action of the police.

The use of deadly force by two members of the New Bedford Police gang unit resulted only after Malcolm Gracia attempted to kill Detective Barnes by stabbing him and then advanced in a threatening manner towards another detective while Gracia was still armed with a knife. After witnessing the stabbing of Barnes, the police continued to avoid the use of deadly force by using verbal commands and a Taser. When these attempts failed, the police fired three shots at Gracia to end his attack. He stumbled. The police yelled at him to stay down. He started to get up, continuing to wield the knife that he used to attack Detective Barnes. He was within several feet of the detective, towards whom he had been advancing, when the first three shots were fired. At this juncture, the police fired three additional shots. It is our conclusion, taking into consideration all of the aspects of this incident and mindful of how rapidly events proceeded after the stabbing of Detective Barnes, that this shooting, although tragic, was justified under the circumstances.

Statement of the American Civil Liberties Union of Massachusetts, the New England Area Conference NAACP, the New Bedford Branch of the NAACP, and the Lawyers Committee for Civil Rights and Economic Justice on the Stop and Shooting of Malcolm Gracia

I. Introduction

On the evening of May 17, 2012, fifteen-year-old Malcolm Gracia was fatally shot by two New Bedford police officers after he had stabbed another officer. The incident began when officers stopped and seized two teen-age boys as they left a neighborhood basketball court and escalated quickly to the shooting and death of Gracia. After Gracia's death, the Office of Bristol County District Attorney Samuel Sutter (DA) conducted an investigation of the shooting and the events leading up to it.¹ In a report released to the public, the DA concluded that the shooting was justified under the circumstances and provided a legal rationale for the stop that precipitated it. The ACLU of Massachusetts, the New England Area Conference NAACP, the New Bedford Branch of the NAACP and the Lawyers Committee for Civil Rights and Economic Justice have reviewed the findings and conclusions set forth in the DA's Report. Based on that review, we have concluded that the investigation was inadequate and that its conclusions were not supported by the evidence. The DA's report is deficient in two critical respects: (1) it fails to provide an adequate justification for the second and ultimately fatal shots fired at Gracia; and (2) its analysis of the initial stop of the two boys fails to examine critical evidence and is wrong as a matter of law.

For these reasons, we are today requesting that the Attorney General of the Commonwealth exercise her legal authority to require a judicial inquest concerning the death of Malcolm Gracia. We believe that an inquest is necessary to resolve unanswered questions and conduct a thorough analysis of the circumstances surrounding Gracia's death. In addition, we have asked the Attorney General, through her Civil Rights Division, to examine the stop and frisk procedures and the meet-and-greet program of the New Bedford Police Department.

A. Facts according to the DA's report

The following facts are taken from the DA's report:

On the evening of May 17, 2012, five officers of the New Bedford Police Gang Unit, three of whom remain unidentified,² were having dinner inside police headquarters on Rockdale Avenue. Sergeant Brian Safioleas, the Gang Unit supervisor, was watching live video surveillance of Temple Landing, a neighborhood park with two basketball courts and a grassy area on his desktop computer. From this computer video feed, Sergeant Safioleas saw a group of people near the basketball courts, including two teens whom he did not recognize. He showed the feed to a few other officers, who also did not recognize the teens. The two teens were Malcolm Gracia and an unnamed companion. From the view on Sergeant Safioleas's desktop

¹ A separate review of the shooting was conducted by the New Bedford Police Department. The findings and conclusions of that review were not provided to the District Attorney. On October 16, 2012, ACLUM made a public records request pursuant to Mass. Gen. Laws ch. 66, § 10 to Chief Provencher of the New Bedford Police Department for the report of the results of that review. The Police Department has not responded to that request.

² The DA fails to name any of the officers involved in the incident, save Detective Barnes, who was stabbed.

computer, the officers saw the two greet the others with what "appeared to be a gang handshake." DA Report at 8. Based on this greeting, viewed on the video feed, four officers drove to Temple Landing to investigate.

As the two unmarked — but readily identifiable — cruisers approached the basketball courts, the group of teens dispersed. The officers followed the two teens, Gracia and his friend, as they walked north on Cedar Street. The lead vehicle drove past the boys, stopping ahead of their path. The officer in the passenger seat got out of the car and walked south to face them. It is unclear what, if anything, the officer said as he walked toward them. According to the officer he yelled out, "Hey guys, what's going on tonight. I just want to talk to you." *Id.* Gracia's friend, however, stated that the officer never attempted to engage them in conversation before telling them to "put their hands behind their backs." *Id.* at 9, n. 7. Similarly, a bystander witness standing on Cedar Street stated (when interviewed) that the officer said nothing to the boys before ordering them to "stop and put their hands up." *Id.* at 8, n.3.

As the officer approached, the boys did not call out to him, but simply continued walking in the same direction. According to the officer, "they grew noticeably tenser and their previously normal walking gait" quickened. *Id.* at 9. The officer claimed that on account of the boys' alleged nervousness, he "immediately perceived a threat" and told the teens to take their hands out of their pockets. When the teens did not remove their hands, the officer decided he wanted to pat frisk both of them and proceeded to walk toward them. Reaching them, the officer put a hand on each of their shoulders and waited for Officer Barnes to get out of the car and assist him.

Meanwhile, a second pair of unnamed officers had parked their cruiser farther to the south of the boys "along the sidewalk, and they were together, walking north towards the encounter." *Id.* The officer with the teens told Gracia and his friend to put their hands on a nearby car; when they did not comply the officer "tried to guide Gracia and his friend towards a car parked along the sidewalk." *Id.* As the officer "guided" them, Gracia:

suddenly turned and ran south and easterly towards the row of Cedar Street residences. Gracia was then faced with the two detectives approaching together from the south. Gracia abruptly stopped and backed up towards his initial direction. He now appeared to be grasping at his waist pocket with both of his hands.

Id. Officer Barnes grabbed Gracia's shoulders "in an attempt to control his movement." Gracia then stabbed Barnes twice, and fled south along Cedar Street. *Id.* at 10.

As he ran, he was confronted by the two officers who had been approaching from the south; they directed him to stop but "Gracia advanced" toward one of the officers. *Id.* The Report does not make clear the nature of Gracia's advance toward the unnamed officer, whether the officer was attempting to block Gracia's escape or whether it was Gracia who was forcing a confrontation. At some point, the other detective, standing to Gracia's right, fired a Taser at him but missed. *Id.* At that point, both detectives in Gracia's general vicinity had their guns drawn and pointed at Gracia; both continued yelling at him to stop advancing. Gracia's refusal to stop and drop the knife led both officers to fire at Gracia. *Id.* at 11. Three shots were fired.

One or more of these shots struck Gracia, causing him to fall to the ground. The detectives told Gracia to stay down, but, still holding the knife, he attempted to get back to his feet. As he got on one knee with his other foot on the ground, three more shots were fired, one of them going through his head. *Id.*

II. The Report does not adequately support the conclusion that the fatal shots were justified

With respect to the second set of shots, the DA's Report states that each of the detectives determined independently that the use of deadly force was necessary. Without further analysis, the DA concluded that the shooting was justified. The essential flaw in the DA's Report is that it fails to distinguish between the justification for the first and second set of shots fired. Without careful analysis of this critical distinction, the DA's conclusion that the shooting was justified simply does not follow from his recitation of the facts. Ultimately, the DA's conclusion may prove to be correct. However, an inquest is necessary to ensure that, under the applicable legal standard, the conclusion is supported by the facts.

A. The DA's Report leaves unexamined or unanswered critical questions concerning the justification for the shooting.

It is undisputed that after the officers witnessed Gracia stab Officer Barnes, they had probable cause to seize Gracia and effectuate an arrest. The question is whether they used excessive—indeed, deadly—force to do so. *See Parker v. Town of Swansea*, 310 F. Supp. 2d 356, 366 (D. Mass. 2004) (quoting *Jarrett v. Town of Yarmouth*, 331 F.3d 140, 149 (1st Cir. 2003)) (In case where arrest was warranted, the question remained: “whether the amount of force used was objectively reasonable under the circumstances. . . . [I]n the Fourth Amendment context, ‘under clearly established law,’ the use of deadly force ‘is constitutional only if, at a minimum, a suspect poses an immediate threat to police officers or civilians.’”).

Where, as here, the police have already used deadly force to subdue a dangerous individual, there must be *separate* justification for using additional force likely to result in death.³ Thus, the second, and fatal, set of shots fired at Gracia can be justified only where, *at the time those shots were fired*, the detectives had a basis for believing that Gracia posed a threat to their safety and that the use of deadly force was necessary and not excessive. *See Hopkins v. Andaya*, 958 F.2d 881, 886-87 (9th Cir. 1992) (second round of shots fired at wounded attacker was not justified where time elapsed between first and second shots and threat to officer's life was avoidable).

The DA's Report wholly fails to examine whether this *second* round of *deadly* gunfire was justified. Instead, it conflates the justification for the first and second set of shots, noting only in its concluding paragraph that Gracia was “within several feet of the detective . . . when

³ *See Parker*, 310 F. Supp. 2d at 367 (“[A]ssuming, arguendo, [Officer] Roussel acted reasonably in firing the initial shots at Parker, the jury could have found that he was not justified in continuing to shoot. . . . The testimony from all officers was that the shooting continued uninterrupted until Parker finally fell down. Thus, the jury could reasonably have concluded that Officer Roussel did not reassess whether, and to what extent, Parker constituted a threat while he continued to shoot.”); *cf. Napier v. Town of Windham*, 187 F.3d 177, 185-87 (1st Cir. 1999) (analyzing each series of shots separately).

the *first* three shots were fired” and that events proceeded rapidly. A number of unanswered questions are readily identifiable in the report:

- the nature of the threat that existed after Gracia had been felled by the first shots,
- how far he was at that time from either of the detectives,
- what were the extent of his injuries from the first shots,
- how long he was on the ground,
- how much time had actually elapsed between the first shots and the second shots, and
- where the detectives were situated in relation to Gracia when the second shots were fired.

These are critical facts. The weapon carried by Gracia was a knife, not a gun. If he posed a threat to the detectives, it was only because his injuries were not disabling and he was close enough to inflict a wound with the knife. This issue, however, has not been addressed.

Moreover, the summary of the autopsy report suggests the possibility that neither of the detectives may have been at risk of immediate harm when the second shots were fired. The autopsy report indicates that four bullets struck Gracia, but none of these shots were fired at him head-on. Three entered his back and were apparently fired from behind him. The trajectories of two of these bullets suggest that they were fired from directly behind him and that one may have been fired while he was on the ground and bent forward. The fourth was a shot to the head which appears to have been fired from Gracia’s right. It entered just below his right ear and passed directly through his head, exiting at the level of the left ear. The DA did not address these facts, nor their potential relationship to the threat Gracia allegedly posed to the officers after he was on the ground.

Finally, this possibility—that the officers were *not* in imminent danger after the first set of shots—is underscored by the medical examiner’s finding that none of the wounds indicated any damage to skin from gunpowder or gases associated with the escape of a projectile. This finding led the examiner to conclude that the shots were not near gunshot wounds but were fired at some distance. How this physical evidence squares with the account of the shooting and the conclusion that it was justified was simply not discussed.

B. An inquest is necessary to determine whether Gracia’s death was justified

An inquest is necessary to address the outstanding questions about the shooting described above. In addition, an inquest would answer why it was determined that no ballistics tests could usefully be performed. Answering these questions, in addition to providing for a more careful analysis of the forensic evidence, including testimony by the individual who performed the autopsy, would be the focus of an inquest.

Indeed, some of these questions appear unanswered in the DA’s Report because certain information may not have been provided to the DA by the New Bedford Police Department. The Report notes that the New Bedford Police Department conducted an independent investigation of the shooting, but the findings and conclusions of that investigation were not provided to the DA.

In addition to the Police Department's review, there are likely other police records that may have been of use to the DA, such as: the reports that each detective is required to file as a matter of course; Shot Spotter records which may have disclosed the exact time that shots were fired; the Taser records which are electronically recorded by the weapon whenever it is fired; records which would show how many shots were fired by each of the officers; the recordings of police radio traffic at the time of the incident; and any witness statements taken by the New Bedford police. None of these records are mentioned in the DA's report. An inquest would fill these gaps in the evidence as well.

III. The stop was unlawful, and may be representative of potentially systemic problems with the New Bedford Police Department's "meet-and-greet" program

The description in the DA's Report of the police response to Malcolm Gracia's presence at Temple Landing suggests an aggressive and unlawful use of stop and frisk tactics by the New Bedford police. And it was not an isolated incident. The encounter that led to the tragic events of May 17, 2012 appears to be representative of police tactics which have prompted increased complaints to the New Bedford Branch of the NAACP about the New Bedford Police Department's treatment of young men of color.⁴ The facts, as presented in the DA's Report, do not support a justification for a Fourth Amendment seizure. It begs the question whether, had the encounter been executed properly, both the stabbing and the shooting could have been avoided.

The purpose of a "meet-and-greet" program cannot be to routinely force teenagers into "consensual stops" that are no more than unconstitutional seizures. Balancing the need to police at-risk communities with the mandate to respect the constitutional rights of law-abiding members of those same communities is a challenge. Yet, the Commonwealth must protect against the systematic erosion of constitutionally protected rights, even on the good faith assumption that it is being done in the interest of safety. Teenagers in low-income or disadvantaged neighborhoods, known in police parlance as "high-crime" neighborhoods, must not endure a Fourth Amendment double-standard under the guise of keeping their communities safe. The SJC has been clear—merely because one lives in a so-called "high crime" area cannot justify a stop. *See Commonwealth v. Cruz*, 459 Mass. 459, 467 (2011) (stop may not solely be justified on basis of high crime "because many honest, law-abiding citizens live and work in high crime areas.") (internal citations omitted).⁵ Systemic violations mainly occur in so-called "high-crime" areas in

⁴ The increase in complaints is anecdotal, as the New Bedford Branch does not keep formal statistics, however, Juan Cofield, President of the New England Area Conference of the NAACP, has confirmed this observation. As part of the ACLUM's public records request on October 16, 2012, *see supra* fn. 1, it asked for "[a]ny rules, regulations, policies, directives, standing orders or similar records concerning . . . [inter alia] (e) Reporting stops by New Bedford police officers, other than motor vehicle stops, which do not result in arrest; (f) Reporting stops by New Bedford police officers, other than motor vehicle stops, which do not result in arrest; (g) To the extent separate from that described in paragraphs e and f, reporting of encounters with civilians pursuant to the New Bedford Police Department "Meet and Greet" program; (h) Review by the New Bedford Police Department of the stops or encounters described in Paragraphs e, f and g." As of the date this petition was submitted, no records have been provided.

⁵ *See also Commonwealth v. Cheek*, 413 Mass. 492, 496-97 (1992) ("Where there is a report of a crime in a neighborhood which police consider to be a "high crime area," law enforcement officials may not conduct a broad sweep of that neighborhood stopping individuals who happen to live in the area and be about, hoping to apprehend a suspect. To permit police investigative stops under the sparse facts present in this case would be to encourage unduly intrusive police practices. The problems that may face the Grove Hall section of Roxbury or any other similar 'high crime area' will not be resolved any more readily by excluding the individuals who live there from the protections afforded by our Constitution.").

part because communities thus categorized have a larger police presence. But, constitutional violations are also occurring in those neighborhoods because the police are looking for, and thus, expecting, criminal activity.⁶

Nor can police infer criminal activity merely from a disadvantaged youth's display of "nervous" or "tense" behavior. Many of the "facts" on which police officers tend to rely as a basis for their suspicion are inherent in all members of this population they are meant to be protecting. If it is typical for youth in Gracia's neighborhood to spend time in the evening at basketball courts, unmonitored by parents, and distrustful of police officers, these traits should not represent clues to potential criminal behavior. Moreover, teenagers from disadvantaged backgrounds like Gracia's are likely to appear tense, nervous, and skittish even out of the presence of police.

Children from disadvantaged neighborhoods are more likely to experience any number of major family stressors, such as family chaos, conflict, violence and dissolution, victimization/incarceration and/or death of a family member, and neglect and/or maltreatment than children raised in more affluent communities. They are also prone to live through financial instability, residential instability and/or homelessness, parental mental illness and/or substance abuse.

See Laurel J. Kiser, Protecting Children from the Dangers of Urban Poverty, 27 *Clinical Psychology Rev.* 211, 212 (2007). Teenagers in low-income, predominantly minority neighborhoods will often exhibit heightened responses to police presence, even when no criminal activity is present, simply because their senses are attuned to stress.⁷ Using factors such as "nervousness," "averting eye contact," or "unresponsiveness" to infer criminal activity among disadvantaged youth will not only return many false positives, but is an unreasonable inference. See *Commonwealth v. Martin*, 457 Mass. 14, 21 (2010) ("That the defendant became nervous when questioned by Officer Henriquez does not add much to the equation, particularly in light of his young age.") (citing *United States v. McKoy*, 428 F.3d 38, 40 (1st Cir. 2005) ("Nervousness is a common and entirely natural reaction to police presence . . .")). See also *Cruz*, 459 Mass. at 468 ("[A] myriad number of innocent reasons other than hiding criminal contraband may more readily explain why a nineteen year old man would appear nervous while being addressed by a police officer.").

A. The DA did not properly analyze the facts that led up to Gracia's seizure

⁶ See Andrew Guthrie Ferguson & Damien Bernache, The "High Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis, 57 *Am. U. L. Rev.* 1587, 1624 (2008) (citing *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("[T]he fact that an individual officer sees crimes every day does not mean that these areas should necessarily be areas of lesser Fourth Amendment protection. The Fourth Amendment is in part meant to act as a check on the interests of officers 'engaged in the often competitive enterprise of ferreting out crime.'")).

⁷ See also Kiser, *Clinical Psychology Rev.* 27 at 212 ("Once exposed to trauma, evidence suggests that 23-29% of children display symptoms of posttraumatic stress disorders (PTSD). Of children victimized by violence this percentage increases to 70% [citation omitted]. Symptoms of PTSD form three clusters: re-experiencing the event, avoidance of stimuli associated with the trauma and numbing of responsiveness, and increased arousal [citation omitted].").

The DA concluded that the stop, and attempted search, of Gracia and his friend was a permissible seizure, and in keeping with Massachusetts law. In fact, the stop was not preceded by any reasonable suspicion that Gracia or his friend was engaged in any criminal activity, and, was thus unconstitutional.⁸ See *Arizona v. Johnson*, 555 U.S. 323, 326 (2009).

The relevant inquiry is what facts were known to the officers prior to the seizure. Reasonable suspicion must be articulated at the time the seizure is made. See *Commonwealth v. Mercado*, 422 Mass. 367, 369 (1996). The tragic sequence of events that occurred moments later do not justify the unlawful stop.⁹ The DA's report, full of specific details about Gracia's serious mental health problems and Facebook postings, fails to indicate what relevance those problems had on the initial stop. No matter how much Gracia's back-story colors the night in question, ex post reasoning to justify a seizure is not permissible. See *Commonwealth v. Barros*, 435 Mass. 171, 178 (2001) (citing *Commonwealth v. Thibeau*, 384 Mass. 762, 764 (1981) ("[A]n [officer's] suspicion must be reasonable before the [stop] begins. Were the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion.")). If the officers noticed facts that raised any suspicion that Gracia's mental state was volatile, the officers certainly did not articulate them. Looking only at the facts known to the officers at the time the actual seizure occurred, the stop was unlawful. Whether Officer Barnes's injuries and Gracia's death are explained by Gracia's severe mental health problems and home-life is completely irrelevant to whether the initial stop was justified.

Before the seizure occurred, the facts — as articulated by the unnamed officer — were the following: (1) two teens greeted their acquaintances at a well-populated basketball court around dinner time with an alleged "gang handshake;" (2) neither was readily recognizable via a desktop computer video feed; (3) upon the officers' arrival at the park, the group dispersed; (4) after trailing Gracia and his friend, the teens did not respond to the unnamed officer saying "Hey guys, what's going on tonight;" (5) as the officer walked toward the teens they grew more tense and began to walk more quickly; and (6) the teens failed to comply with the officer's order that they remove their hands from their pockets.

⁸ The DA also attempts to justify the stop as a "consensual" encounter but fails to conduct any real analysis on this point. Although the SJC has "held that the police may follow in a cruiser someone whom they observe engage in suspicious conduct to further their investigation," *Commonwealth v. Franklin*, 456 Mass. 818, 822 (2010), the police may not force an individual into conversation without transforming the encounter into a seizure. See *id.* Plainly, there was nothing (even objectively) consensual about this encounter. Even crediting the unidentified officer's claim that he merely asked to speak with the boys, the encounter quickly lost any consensual nature. After receiving no answer to his initial entreaty ("Hey guys, what's going on tonight") it was clear that the teens were exercising their right to not speak to the officer. See *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (An individual has a "right to go about his business or to stay put and remain silent in the face of police questioning."); see also *United States v. Burton*, 228 F.3d 524, 527 (4th Cir. 2000) (citing *Terry v. Ohio*, 392 U.S. 1, 33, (1968) (Harlan, J., concurring) ("The authority of police officers to initiate such 'police-citizen encounters' is the same as, but no greater than, the authority of an ordinary citizen to approach another on the street and ask questions. By the same token, the citizen encountered in this manner has the 'right to ignore his interrogator and walk away.'")). That the officer continued to pursue the boys "after being rebuffed is highly relevant in determining whether a reasonable person, in view of all the circumstances, would have felt free to terminate the encounter and leave." *Barros*, 435 Mass. at 175-176.

⁹ Whether the subsequent stabbing is a sufficient intervening act to dissipate the taint of the initial unlawful seizure is irrelevant for our purposes. The fatal shooting makes this determination unnecessary, as there are no pending charges against Gracia requiring a suppression determination. Instead, this seizure must be seen for what it is — unlawful. Recognizing it as such is not only owed to the Gracia family, but will help end this kind of unlawful conduct by police.

These facts, even examined as a whole, do not come close to demonstrating a *reasonable* suspicion that *criminal* activity was afoot. See *Commonwealth v. Bacon*, 381 Mass. 642, 643-44 (1980) (quoting *Commonwealth v. Silva*, 366 Mass. 402, 406 (1974) (“Simple good faith on the part of the officer is not enough. The test is an objective one.”)). First, the basis for the officers’ initial interest in Gracia and his friend rests on incomplete, if not implausible, facts. It was dusk when the officers first saw the teens through their video-feed, and the report fails to give any description of the quality of the video-feed relied on by the officers, or the location of the cameras in the park. Aside from the alleged gang handshake, the officers claimed interest in the teens because they were “unrecognizable.” Yet, being unknown to police officers is typically considered a point in one’s favor, as it undermines any suggestion that officers knew of any prior criminal activity by the person. See *Martin*, 457 Mass. at 21 (weighing against factors that led toward suspicion was that “the defendant was not known to the officers as someone having previously been arrested for criminal activity.”). Moreover, Gracia and his friend were not even spotted near a recent crime scene, but, rather in a place one might expect to find teenage boys — a basketball court. Even if the boys had been near a crime scene, that alone is not enough.

Next, the fact that two New Bedford teenagers did not voluntarily engage the officer is innocuous, and indeed, understandable. Even assuming the officer first approached the teens in the conversational manner he claims, the teens were within their rights to ignore the officer and continue on their way. A lack of response to an officer’s attempt to engage a citizen in conversation cannot be the basis for suspicion that the individual is, or is about to, commit a crime. *Barros*, 435 Mass. at 178 (citing *Silva*, 366 Mass. at 406-07 (“The Commonwealth argues that . . . we should consider the defendant’s suspicious activities, including his breaking eye contact with the officer and his refusing to answer the officer’s initial questions. Such factors cannot provide reasonable suspicion for justification of a detention or seizure. It was the defendant’s right to ignore the officer.”)). See also *Commonwealth v. Grandison*, 433 Mass. 135, 139 (2000).

Nor can the fact that the teens walked with their hands in their pockets, without more, suffice to arouse suspicion. See *Narcisse*, 457 Mass. at 11 (citing approvingly, *Burton*, 228 F.3d at 528-29, which held “that a citizen’s refusal to answer questions and to take his hands out of his pockets was not enough. ‘[A]n individual’s ‘refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for detention or seizure.’”); *Commonwealth v. DePeiza*, 449 Mass. 367, 372 (2007) (exhibiting nervous or furtive movements not enough to satisfy the standard when these factors are considered in isolation).

The facts here are similar to those in *Martin*:¹⁰

¹⁰ In *Martin* officers were looking to serve a warrant on a particular juvenile. Seeing a juvenile in the area wearing a hooded sweatshirt, the officers drove alongside the youth “who ignored them and continued walking with his head down.” *Martin*, 457 Mass. at 16. After the officers rolled down a window and asked the defendant his name, it became clear to the officers that he did not resemble the juvenile for whom they were looking. Nevertheless, they proceeded to ask the juvenile his birthdate and age. When those answers did not square, one officer left the cruiser, approached the defendant, and attempted to frisk him. *Id.* at 16-17. “[The officer] asked the defendant if he had any weapons. When [the officer] received no answer, he attempted to pat frisk the defendant, informing him that ‘for safety,’ he was going to conduct a pat frisk. The defendant pushed the officer’s hands away, and stated, ‘You can’t touch me.’ [The officer] told the defendant to ‘calm down’ and proceeded with the pat frisk, which revealed a loaded gun.” *Id.* at 17.

[N]othing about the circumstances supported a belief that the defendant might be armed or engaged in criminal activity; Officer Henriquez had no report involving the defendant, or any criminal or suspicious activity occurring in this particular location. . . . Although the defendant appeared nervous, he made no furtive gestures. . . . Although the defendant did not respond to Officer Henriquez's inquiry concerning weapons, he was under no obligation to do so, and his silence in response to the question, by itself, did not legitimately give rise to a reasonable fear for safety because his silence was not accompanied by circumstances or conduct that gave rise to a belief that he was inclined to act out violently.

457 Mass. at 20.

Finally, the fact that Gracia and his friend did not immediately flee from the officer specifically weighs against a finding of reasonable suspicion to make the stop. In the report, the DA states that "[s]ometimes, such as when the person is armed with an unlawful weapon or possesses contraband, the person will take off from the scene and elude the officers." DA's Report at 9. Likewise, it appears that the officer relied on the teens' quickening gait as a signal that they might be attempting to elude him. Yet, the report states that at the time their pace allegedly quickened, they were walking *toward* the officer. *Id.*

Thus, it is unclear how this factor is relevant to suspicion of criminal activity, unless the officer suspected the teens were intending to harm him. That theory, however, is also not supported by the evidence. The officer continued to walk toward Gracia and his friend, even after they failed to heed his order and remove their hands from their pockets. Had the officer believed Gracia to be imminently violent, he could have waited for back-up before approaching. *See Terry*, 392 U.S. at 32 ("Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence."). Instead, upon reaching the boys, the officer put a hand on each of their shoulders even before his partner was out of the cruiser.

B. An investigation into the New Bedford meet-and-greet program will shed light on the circumstances surrounding the initial encounter with Gracia and prevent such unlawful conduct in the future

An investigation is necessary not only to determine whether the stop here was lawful, but also to help assess whether the New Bedford Police Department's meet-and-greet program is being improperly executed on a regular basis, as it would appear from the complaints in the New Bedford community. The Attorney General has the authority to investigate and bring enforcement actions to protect the civil rights of the Commonwealth's citizens, which are guaranteed by the Massachusetts Constitution and the Civil Rights Act, Mass. Gen. Laws ch. 12, §§ 11H-J.

Section 11H of [Mass. Gen. Laws ch.] 12 authorizes the Attorney General to seek equitable relief to protect the peaceable exercise of rights secured by law when threats, intimidation, or coercion interfere or attempt to interfere with rights secured by law. There is no explicit, and no justification for finding an implicit, exception for officers of the law, although the defendant police officers' status may be relevant in determining whether to issue a particular injunction. . . . In appropriate circumstances, a judge has discretion to enjoin future police misconduct. A single, egregious incident involving a collective violation of a citizen's rights and a collective failure to prevent or to report that violation would warrant issuance of an injunction where, as here, the judge found that, without any injunction, the defendants "will regard themselves as free to continue" their unlawful conduct.

Commonwealth v. Adams, 416 Mass. 558, 566 (1993).

An investigation into the policies, practices, and (potentially) training of New Bedford police officers would help to ensure disadvantaged youth do not suffer a Fourth Amendment double-standard. An investigation may also help set forth the permissible factors on which police officers may rely when deciding whether to stop a teenager for a "meet-and-greet."

IV. Independent examination of the Firearms Training and the Firearms Discharge Review Procedures of the New Bedford Police Department

Separate and apart from any inquiry into the death of Malcolm Gracia in the course of a judicial inquest, there are substantial questions concerning the New Bedford Police Department's review of the shooting, and the training the Department provides to its officers in the use of firearms. According to the DA's Report, the New Bedford Police Department conducted its own investigation of the shooting of Malcolm Gracia. Yet neither the purpose of that investigation nor its results have been made available to the public. Indeed, the Department has failed to respond to a public records request which sought not only the report of the investigation but the Department's rules and regulations concerning the use of firearms by police officers and any internal review of firearms discharges. In view of the lack of public access to these records, we believe that an independent inquiry into the department's procedures and training is needed.

The value of independent inquiry into these issues is demonstrated, and perhaps framed, by the 2008 RAND Corporation study of firearms use and review by the New York Police Department. That study, "Evaluation of the New York City Police Department Firearm Training and Firearm-Discharge Review Process," set forth comprehensive recommendations for improvements in that department's training and review procedures. See http://www.nyc.gov/html/nypd/downloads/pdf/public_information/RAND_FirearmEvaluation.pdf. Given the lack of transparency in New Bedford, we cannot say for certain that New Bedford would benefit from consideration of those recommendations. However, if the DA's Report and the apparent concurrence of the New Bedford police are any guide, better training and oversight of the use of deadly force would seem to be warranted.

As we have requested an investigation by the Attorney General's Civil Rights Division of the New Bedford Police Department's meet and greet program, we believe that inquiry should extend as well to the training in the use of firearms received by police officers and the review of firearms discharges by the Department.

V. Conclusion

For the reasons we have outlined above, we believe that the events of May 17, 2012, have not been adequately investigated or explained. The death of Malcolm Gracia should be the subject of a formal judicial inquest under the provisions of Mass. Gen. Laws ch. 38, §§ 8-13. Because the District Attorney has concluded that the Gracia shooting was justified and has terminated his investigation, we are requesting that the Attorney General exercise her authority under the statute to notify the Chief Judge of the New Bedford District Court that an inquest into Malcolm Gracia's death is required and that her office assist in this proceeding to ensure that there is a thorough and independent investigation of Gracia's death.

We believe as well that there are important factual and legal questions concerning the practices of the New Bedford Police Department which require further investigation. We are therefore requesting that the Civil Rights Division of the Office of the Attorney General undertake an inquiry into the New Bedford Police Department's "meet and greet" program and, if warranted, seek remedial relief by consent or by the institution of an action for injunctive relief pursuant to Mass. Gen. Laws ch. 12, § 11H. Given the questions that we have raised about the shooting, we have also suggested that it would be appropriate, in the course of such an inquiry, for the Civil Rights Division to consider the adequacy of the current training of New Bedford police officers with respect to the use of firearms and of the Department's review of the use of firearms by its officers.

January 14, 2013

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