

# 2020 Lawyers of the Year

## JOHN P. WARREN

Sole practitioner



JOHN P. WARREN (LEFT) WITH CLIENT EDWARD LONG

In a year in which social justice issues grabbed the headlines, Boston attorney John P. Warren succeeded in getting the Supreme Judicial Court to issue a landmark decision giving defense attorneys the tools to show when a traffic stop is discriminatory.

In *Commonwealth v. Long*, the court held that to establish a reasonable inference that a police officer's decision to initiate a stop was motivated by race or because the driver is a member of another protected class, the defendant must point to "specific facts from the totality of the circumstances."

The new standard, which significantly eases the burden on defendants, replaces the statistical evidence standard adopted by the court in its 2008 decision in *Commonwealth v. Lora*.

"In practice, providing statistical evidence sufficient to raise a reasonable inference that a motor vehicle stop was racially motivated, given the limitations of available police data, has proved infeasible for defendants," Justice Frank M. Gaziano wrote in the majority opinion in *Long*.

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But Justice Kimberly S. Budd in a concurring opinion joined by Justice Barbara L. Lenk wrote that the court needed to go further and hold that all pretextual stops are unconstitutional under Article 14 of the Massachusetts Declaration of Rights.

"I would hold that a traffic violation cannot replace the reasonable suspicion required to make an investigatory stop under art. 14," Budd wrote.

In *Long*, Warren represented a young Black man stopped by Boston police in November 2017. Superior Court Judge Joseph F. Leighton Jr. denied Edward Long's motion to suppress firearms found in the Mercedes sports utility vehicle he was driving at the time. Leighton found that statistical evidence presented by the defense and indicating that the traffic stop was the product of selective enforcement based on race was insufficient under the *Lora* standard.

Warren sees the decision in *Long* as a sea change

in the law on discriminatory traffic stops.

"To give courts and defendants the tools to look at a particular stop, and the factors arising out of that particular stop, to make their reasonable inference is a huge upgrade," he says.

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**Q. How serious of a problem are racially motivated traffic stops in Massachusetts?**

**A.** It's huge problem. In my experience as a defense lawyer, it is something I see time and time again. A client comes in, we look at the police report, and it is patently obvious that race played a role in the traffic stop.

**Q. Do you believe the SJC's decision in *Long* will go far in addressing the problem?**

**A.** The SJC has taken a huge step forward by giving the defense the "tool kit" to raise these claims in criminal cases. How that plays out on the street remains to be seen. I don't think it solves any of the bigger problems we have in our society [regarding race relations], but it's a step in the right direction.

**Q. Does the problem need a legislative solution?**

**A.** One part of the problem is that there is just no requirement that police keep track of all the traffic stops that are made. It's difficult to define what the scope of the

problem is. A lot of stops go unrecorded, so we have to use a hodgepodge of data [to show racial motivation]. In this case, we used cases in which police actually handed out citations and we used field interrogation observations. That made our job a lot tougher. It would have been great if every traffic stop had been recorded.

In our case, one of the officers testified that they conducted about a thousand traffic stops a year, but we only saw a handful of traffic citations. So what that really means is that there are a whole bunch of traffic stops that we know nothing about. So bringing a statistical case [under the *Lora* standard] really did prove to be difficult.

**Q. If the Legislature required police to document all traffic stops, would you prefer to go back to the *Lora* standard, or do you prefer the new standard for showing racial bias?**

**A.** The new standard is a huge upgrade. To require

each defendant to gather the statistics and hire a statistician [as an expert witness] to review them is a burdensome process.

**Q. In pursuing your client's appeal from the lower court's denial of the motion to suppress, did you ever envision that the SJC would use the case to throw out the *Lora* standard?**

**A.** The SJC in 2018 decided *Commonwealth v. Buckley*. In *Buckley*, the court took the unusual step of explicitly encouraging defense lawyers to bring claims under *Lora*. Based on that language, it was clear to us as defense lawyers that the court wanted to take another look at *Lora*. But I wasn't necessarily expecting that they would alter [the case law] as they did. I didn't know where they were going with it.

**Q. While deciding to adopt a new standard in *Long*, the SJC concluded that, notwithstanding the trial court's findings, you had produced sufficient evidence to meet the *Lora* standard. Doesn't your client's case demonstrate that the *Lora* standard is not as unworkable as the defense bar claims?**

**A.** It took a great of effort to make that statistical case. It took a lot of work on the part of the statistician in honing her analysis in order to bring the best statistical case possible.

It's not really practical for each defendant to make this statistical case in this way.

**Q. How well do you think the *Long* standard will work in practice?**

**A.** One of the tensions I think that is going to play out is the tension between the court's decision and Justice Budd's concurrence. With a lot of these stops, the question is going to be whether the stop was based on race or was it a pretextual stop? Was there a real underlying reason that the stop was being conducted? The commonwealth is going to argue that a stop was your typical pretextual stop, which under the full court's decision is still permissible.

Beyond that, Justice Budd's concurrence is really striking because part of what she's saying is that, even if everyone in the criminal justice system is doing their best and has the best intentions, it doesn't mean the system is working fairly and equally. It's really a call to be inward and forward looking.

— Pat Murphy