



## **Bias in Policing: How to Prepare for Court**

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***Commonwealth v. Long makes it easier for defendants to challenge traffic stops on the basis that they were motivated by bias.*** See *Comm. v. Long*, SJC-12868 (September 17, 2020).<sup>1</sup>

- **What happened on the street.** Two Boston Police officers assigned to the Youth Violence Strike Force were patrolling in an unmarked car. They turned onto a residential street just behind a Mercedes SUV driven by, as they had seen, a black man. An MDT check of the registration showed the vehicle's inspection sticker had expired. The officers stopped the car.

Edward Long presented a learner's permit, but officers learned that his right to drive was suspended. He had outstanding warrants too.

Officers decided to tow Long's "high end" vehicle because they did not want to leave it parked in a location plagued by vandalism and theft — especially since Long was not the registered owner. During the pre-tow inventory, officers found a handgun protruding from a bag in the passenger compartment. Long had no license to carry. He was arrested and charged.

- **What happened in court.** Long's attorney argued that the police stopped Long mainly because he was black. In support, an expert statistician researched seven years of data and concluded:
  - Field Investigation and Observation (FIO) reports **by these two Boston officers** for vehicles in that neighborhood involved 80% black drivers — even though the motorist population was only 44% black; and
  - **These officers gave 56% of their traffic citations to Black motorists** — even though only 24% of motorists in the city were black.

The chance of these patterns being random, according to the expert, was less than 1 in 100,000.

In rebuttal, the prosecutor presented:

- Testimony from the officers that Long's race had nothing to do with their decision to stop his vehicle; and
- The theory that black drivers may have been stopped more often because they committed more traffic offenses — although no studies were provided to support this claim.

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<sup>1</sup> This citation is to the "slip opinion," which is the version that appears on the SJC website when a case initially comes out.

The motion judge found that the stop and statistics did not prove, by a preponderance of the evidence, that Boston officers were motivated by racial bias. This was the standard under *Comm. v. Lora*, 451 Mass. 425 (2008).

On appeal, the SJC rejected the judge's reasoning and adopted a new procedure for evaluating allegations of police bias. The high court felt that Long showed his vehicle stop was, at least in part, motivated by intentional or implicit bias.

**From now on, if a defendant files a motion claiming police bias, the burden shifts to the prosecutor to disprove the allegation.**

- **Step 1: Defendant raises a reasonable inference of bias.** In a written motion based on “the totality of the circumstances,” defense counsel must raise a reasonable inference of biased policing. To do so, counsel may address:
  - **The officer's regular assignment** — e.g., Does the officer engage in general traffic patrol where repeated stops for all sorts of vehicle offenses might be expected? Or is the officer in a drug or gang unit where traffic stops are not the primary function?
  - **The officer's enforcement patterns.** Citation or other data may be presented for this purpose, but statistical proof is not required. In any case, the SJC expects that police departments will generally provide relevant data and policies to defendants during the discovery process.
  - **The sequence of events prior to the stop** — e.g., Did the officer follow the suspect vehicle for a long period of time? Could the officer see the operator (and thus be aware of his or her race or ethnicity) before the stop?
  - **The way the officer conducted the stop** — e.g., What did the officer say? What was his tone of voice? What was the basis for any exit orders, frisks, consent requests, evidentiary searches?
  - **The public safety interests at stake in enforcing the violation** — e.g., dangerous or impaired operation is less dependent on officer discretion than a technical equipment defect.
  - **The specific agency policies and procedures regarding traffic stops.**

**Step 2: Burden on prosecutor to rebut the inference.** If the prosecutor fails to rebut, the judge will typically suppress the evidence. It is legally insufficient to simply assert that an actual traffic violation occurred. There must be more proof than that.

My suggestion is for prosecutors to have police officers testify to the same factors listed above — with some additional points of emphasis — to disprove the allegations. This approach makes sense because judges tend to organize their findings based on the framework provided by the SJC in the leading case on the issue at stake.<sup>2</sup>

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<sup>2</sup> One collateral issue the SJC did not address is that a trial court's finding that an officer made a traffic stop influenced by the driver's race will require a “*Brady* disclosure” to defendants in future cases. It is potentially

**Testifying to rebut an inference of bias.**

- **Agency policy.** All police policies on bias say the same basic thing, and you should be able to articulate these principles in court:
  - Actual *or* perceived discrimination in policing is an ineffective and unconstitutional law enforcement strategy; it hurts the department's relationship with the community; and it is harmful and unfair.
  - Officers who engage in this behavior are subject to discipline, including termination, and supervisors must monitor their officers and intervene in situations where bias policing may be intentionally or unintentionally occurring.
  - Your agency requires that officers receive training so they can understand the nature of bias and avoid having it adversely affect their dealings with the public.
- **Personal commitment.** It is not enough to know your department's policy. You must be prepared to firmly state your personal and professional commitment to impartial policing<sup>3</sup> — e.g., "Counsel, I am personally and professionally committed to treating people fairly. I'm not naïve. I know there are police officers who don't, but that's not me. From my training, experience, and core values, I understand that bias policing is ineffective and unconstitutional, it hurts the community, and it's wrong."

You do not have to say these exact words, but you need to be able to communicate authentically.<sup>4</sup>

- **Assignment.** If you are in uniform and assigned to patrol, emphasize the public safety nature of traffic enforcement, and how and why it is one of your primary functions. Make sure that you are consistent about stopping all motorists for the same type of violations, and consciously avoid falling into patterns.

In *Long*, the SJC was assessing a traffic stop by officers from a specialized unit (Youth Violence Strike Force) in an unmarked car. The SJC implied that traffic stops by specialized units are more prone to abuse because officers may jump on a violator to play their hunches based on that motorist's racial or ethnic background. There are two responses to this point of view depending on the circumstances:

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unfair to use a subjective concept, like implicit bias, to determine the intent of an officer who stopped a vehicle engaged in a demonstrable traffic violation, and then have it shadow his or her entire career.

<sup>3</sup> Obviously, you must do more than memorize the words. You have to embrace this mindset and continually reflect on whether you are performing your duties impartially to the best of your ability.

<sup>4</sup> Again, everyone has their own style, but it seems perfectly reasonable for an officer to express sincere and professional offense — e.g., "Counsel, you are basically calling me a racist and it offends me. I don't target people based on their race."

- First, it is a misconception that specialized units never engage in general traffic enforcement. Explain how your unit members are assigned to specific areas and expected to engage in traffic enforcement as part of their public safety responsibilities — i.e., that you and your colleagues do make many random stops as a part of your agency’s overall strategy. It makes sense, in the wake of *Long*, for departments to adopt a policy which spells out these independent traffic enforcement responsibilities<sup>5</sup>; and
- Second, unit members may, in fact, strategically look for a traffic violation to justify a legal stop. There is nothing wrong with having an investigatory interest in stopping a motorist who also commits a traffic violation. It is only wrong if your investigatory interest stems from the racial and ethnic background of the people involved. See, e.g., *Comm. v. Buckley*, 478 Mass. 861 (2018) (detectives saw vehicle occupants enter and leave a multi-unit building in a way that suggested they were drug dealers; police could properly stop their vehicle for speeding *and* have investigatory motives).

In these cases, explain the suspicious behavior that you observed that was separate from the traffic violation that also supported your stop. I recently spoke to a drug/gang unit detective in Springfield who stopped a vehicle that he and his partner saw idling near a “vigil” for a deceased gang member. As his cruiser approached, the driver conspicuously looked back twice and immediately pulled away from the curb. The driver committed a stop sign violation and, seeing the blue lights, made two quick turns before pulling over. The net result of this traffic stop was the recovery of three guns and the arrest of rival gang members.

A defense attorney might argue, under *Long*, that these specialized investigators made a minor traffic stop, which they normally would not worry about, because they saw young black men in a vehicle.

The prosecutor, through the testimony of this knowledgeable detective, could show how gang vigils, regardless of race and ethnicity, may attract rival gang members seeking revenge. [What better place to get your enemy than at their shrine.] The sudden departure of the suspect vehicle added to the detective’s concern so, yes, any legitimate traffic violation would be and should be used as a lawful reason to stop the vehicle and its occupants. Be up front about this strategy and explain the context and “neutral behavior clues” (that have nothing to do with race and ethnicity) that supported your concerns.

I use the term “neutral behavior clues” as a way to clearly demonstrate the types of persuasive factors that officers rely on that have nothing to do with race or ethnicity (e.g., jiggling the door knob of a closed business; backing into a parking space to facilitate a quick getaway with the lights out; the “meaningless ride” consistent with drug deals; etc.).

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<sup>5</sup> In fact, *Long* pointed out that a defendant could argue that a stop in violation of a department’s policy suggested bias, and the example the SJC gave was a traffic stop initiated by officers in an unmarked cruiser.

- **Past patterns.** Attorneys will be seeking citation data to try to build a case that you have been motivated by bias in your enforcement patterns. *Long* was the rare case where the statistical distribution of officers' FIOs and citations suggested such a pattern. A much more common problem involves officers who fail to fill out their citations consistently or properly or, worse, are tempted to manipulate their data because they fear being labeled as racist. This is the worst thing you can do.

Just fill out your citations and reports thoroughly! If you are assigned to a particular area of your community, the court must consider its demographic makeup. See *Comm. v. Lora, supra.*<sup>6,7</sup>

Develop the habit of documenting all your traffic stops with a citation. You still can and should exercise discretion about whether to impose money fines or warnings. The point is — by documenting all your stops — you adopt a transparent approach to public safety. Testify about your practice — e.g., “Counsel, every vehicle stop I make is documented on a citation or in an incident report. Sometimes both. I do it to be completely transparent about when, where, why, and how I conduct any traffic stop with a member of the public. In most cases, my citation is written within minutes of my interaction with the motorist.”

- **Events prior to stop.** This is critical information that prosecutors and officers must present. Consider these issues:
  - ***Vantage point prior to the stop.*** It is impossible for officers to engage in biased decision making when they cannot see the driver or passengers before the stop. Most stops begin with officers driving behind the offending motorist's vehicle, unable to see more than the back of the driver's head. Many stops occur at night.<sup>8</sup> Officers should note these facts in their incident report. *Comm. v. Caudle*, 2019 WL 5092608 (Appeals Court) (the bicyclist's race was irrelevant because the trooper credibly testified that he could not see the race or ethnicity of the cyclist before this nighttime stop).
  - ***Running plates.*** Officers may check the status of registrations at any time, as long as they are not motivated by racial or ethnic bias. *Comm. v. Starr*, 55 Mass. App. Ct. 590 (2002). Police officers should testify that this is a legitimate, proactive strategy: “Your Honor, my department encourages us to constantly check registrations for public safety purposes. We discover unlicensed drivers, unregistered and uninsured vehicles, unsafe vehicles with invalid or expired inspection stickers, stolen vehicles, and motorists with outstanding arrest or default warrants.”

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<sup>6</sup> The *Long* decision did not change *Lora's* fundamental requirement that statistical evidence must take into account the racial and ethnic makeup of the driving population in the area where the police action occurred.

<sup>7</sup> Given the likelihood of more motions to suppress on this issue, it may be cost-effective for police agencies to gather their own data regarding the racial composition of their motoring population.

<sup>8</sup> In the *Long* case, the SJC mentioned a nationwide study which found that black motorists formed a smaller percentage of all motorists stopped at night, when officers presumably had a harder time seeing the race of motorists. This study suggests that once officers know a driver's race, it may become a factor in making a stop.

When challenged, see if your department can issue you a “run list” from the particular shift where you stopped the defendant or, also persuasive, from other shifts. If the run list shows that you check multiple plates during a shift on vehicles with occupants from different demographics, you rebut the inference that you ran the defendant’s plate for a discriminatory reason.

- **Nature of the violation.** *Long* emphasized that the more obvious the public safety risk, the less likely a court will be to draw an inference of officer bias. In other words, a stop for driving on the sidewalk is different from one for a defective plate cover.

At the same time, whatever the violation, emphasize that it occurred and should serve as the basis for a legal stop. Oftentimes, you have independent proof (e.g., the certified copy from the registry for the suspended license) or an admission from the defendant at the scene.

Always explain the public safety basis for traffic enforcement. In other words, how is the violation dangerous or potentially dangerous? — e.g., invalid inspection sticker means the vehicle is probably unsafe; following too closely is the leading cause of rear end collisions; vehicles without plate lights are virtually impossible for people to identify when they become involved in accidents or criminal behavior. You should be able to articulate good reasons for every motor vehicle violation you enforce and why you make these stops whenever you are on duty.

- **Following.** Most minority motorists convincingly provide accounts of times they were followed and improperly stopped by an officer — so this can be a “red flag” to a reviewing court. It goes without saying that officers should not consciously engage in this behavior. They should also reflect on whether they could be unconsciously falling into this pattern so they can stop it. [See “implicit bias” discussion below.]

Of course, randomly following a motorist because of their race or ethnicity is far different from having neutral behavior concerns about a vehicle (the gang vigil example mentioned previously). And, it bears repeating, when an officer was not in position to see who was in the car in the first place, it is hard to claim the stop was propelled by bias.

Officers can guard against this line of attack if they routinely initiate their stops as soon as they safely can after seeing a violation.

- **During the stop.** Naturally, a reviewing court is also going to consider your behavior during the traffic stop. It goes without saying that biased comments have no place in professional policing. See, e.g., *Comm. v. Palacios*, 66 Mass. App. Ct. 13 (2006) (after defendant was arrested, officer alleged to have stated to female passenger: “What’s a nice girl like you doing with a Spanish kid”).

Officers must even avoid comments likely to be *perceived* as biased. For example, asking a minority motorist, “Do you know why I stopped you?” will often seem biased because, in the past, it was used as a cover for discriminatory enforcement.

A good approach with all motorists, but especially those from minority groups, is for officers to identify themselves fully and explain the exact nature of the violation at the beginning of the stop — e.g., “Good evening. I am Officer John Maxwell of the Waltham Police. I stopped you because I saw your car make a turn onto Prospect Street without signaling.” Clear identification of the officer and violation have been found to go a long way toward diffusing suspicion.

Of course, officers will also need to communicate appropriately when the nature of the stop changes — e.g., exit orders become necessary, or frisks, or consent requests, or motor vehicle exception searches, or pre-tow inventories.

- **Implicit bias.** The *Long* case opened the door for defense attorneys to challenge police stops on the basis that they were motivated by “implicit bias.” It is important for officers to be trained in “implicit bias” and to understand how they can work to overcome it.
  - **Definition.** According to the Kirwan Institute at Ohio State University, “implicit bias” refers to the attitudes or stereotypes that affect our actions and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated without an individual’s awareness or intentional control. They cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages.
    - Implicit biases are pervasive. Everyone possesses them.
    - The implicit associations we hold do not necessarily align with our declared beliefs.
    - We generally tend to hold implicit biases that favor our own ingroup, though research has shown that we can still hold implicit biases against our ingroup.
    - Implicit biases can be modified. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of techniques.<sup>9</sup>
  - **Street test.** Given that “implicit bias” is a psychological phenomenon, it is probably unrealistic to think that officers, or any other human being, can overcome it through some technique. However, there is a practical, on-street mindset that will help officers counteract the influence of “implicit bias.”<sup>10</sup>

When engaging in any law enforcement function — whether it is a traffic stop, detention, frisk, consent request, etc. — ask yourself one question: “Would I be doing this if this person were not \_\_\_\_\_ [fill in the perceived race, ethnicity, religion, sexual orientation, etc.]?”

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<sup>9</sup> The information in this “definition” section is an edited excerpt from <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.

<sup>10</sup> I began teaching this “street test” to officers in 2007 when Law Enforcement Dimensions was contracted by the Executive Office of Public Safety and Security (EOPSS) to educate supervisors about bias policing.

If, in your mind, the answer is “no” or “I’m not sure,” then stop, because there is a good chance that bias is pulling you in the wrong direction.

On the other hand, if your answer is “absolutely yes,” then continue. A “yes” answer should enable you to point to “neutral behavior clues” that justify the police action. This simple test, honestly applied, is a real and practical way for officers to screen against unconscious bias, in the moment, on the street.<sup>11</sup>

- **Police testimony.** If you receive training in implicit bias and sincerely apply the “street test” previously mentioned, you are in a good position to serve fairly. Consider the following potential testimony during a motion hearing under *Long*:

ADA: “Officer Jones, are you familiar with the term ‘implicit bias’?”

Officer: “Yes, absolutely. It is a concept that everyone in our department has been trained on.”

ADA: “What does it mean?”

Officer: “All people, including police officers, have certain unconscious attitudes about other people based on age, gender, race, ethnicity, religion, region where they grew up, and so on. Because bias can be unconscious or implicit, it can affect all of us without our awareness.”

ADA: “How do we know that your traffic stop of John Defendant in this case, was not the product of your implicit or unconscious bias?”

Officer: “That’s the reason my Chief provides training on implicit bias. It is why I know I have to consciously and actively discount racial and ethnic judgements in everything I do.

What helps me, and many police officers in Massachusetts, is sincerely applying a simple test on the street. So, before I engage in a police function, I ask myself — ‘If this person were not African American, female, elderly, Hispanic, a teenager, Muslim — whatever characteristics are present — would I be doing what I’m doing?’ If the answer is ‘no’ or I hesitate, I stop myself because I know bias has somehow affected my judgment. On the other hand, if my answer is a strong ‘yes,’ and I can tell myself the ‘neutral behavior clues’ calling for my intervention, then I act.”

ADA: “Did you apply this mental assessment when you saw John Defendant in his vehicle?”

Officer: “Absolutely.”

ADA: “Describe how you did that.”

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<sup>11</sup> The other way to overcome implicit bias is to have positive interactions with members of historically targeted groups. That is why community policing has been so important in the evolution of officer attitudes towards groups served by their department.

Officer: "It was noon on a sunny day, so I noticed that Mr. Defendant and his male front seat passenger were probably in their 20s and African American. If that was all I had, I would have kept driving, but I had these neutral behavior clues too. The vehicle was a rental car and the parking lot was next to a closed business. It matched a description of a vehicle . . ."

OR

ADA: "Did you apply this mental assessment when you saw John Defendant's vehicle?"

Officer: "No."

ADA: "Why not?"

Officer: "There was no possibility that any bias would affect my judgment. I saw a vehicle following too closely on a state highway. I make this stop all the time because it is the leading cause of rear end collisions on our roadways. I couldn't see who was driving because the vehicle was in front of me when I first saw it on Route 60."

OR

ADA: "Was it when you approached the vehicle that you learned the driver, Mr. Defendant, was African American?"

Officer: "Yes."

ADA: "Did you factor that into your decision to request that Mr. Defendant grant you consent to search his vehicle?"

Officer: "No. I am always on guard against letting implicit bias affect how I treat people. I also recognize that many African American motorists, based on their experience and perspective, get nervous when stopped by police. So again, it's my job to actively discount a person's race and nervousness in a situation like this. But, during this stop, there were other things that I call 'neutral behavior clues' that made me believe that Mr. Defendant might be transporting drugs. To begin with, he [explain clues]." See, e.g., *Comm. v. Rosario-Santiago*, 96 Mass. App. Ct. 166 (2019) (Hispanic motorist seemed to make up answers in response to officer's basic questions about the origin of his trip, and he secretly reached toward a package in the back seat by faking a yawn, then denied doing so).

- **Conclusion.** I know it's easy to view the SJC's *Long* decision as overbroad. But I urge you to stay positive and recognize, bottom line, that it attempts to deal with a law enforcement and social problem that does exist. If you can continue to do your best to explain what happened and how you combat against bias policing, I know you will succeed on the street and in court.

Stay well,

*John Sofis Scheft*