COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-12868

COMMONWEALTH OF MASSACHUSETTS,
Appellee
V.

EDWARD LONG,
Appellant

COMMONWEALTH'S BRIEF ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

Whether this Court should revisit the standard articulated in *Commonwealth v. Lora*, 451 Mass. 425 (2008), where the standard has seldom been successfully employed and the remedy does not redress the violation; and whether, in the interests of justice, this case should be remanded so that the motion judge can apply the new standard.

STATEMENT OF THE CASE

On February 9, 2018, a Suffolk County grand jury returned indictments charging the defendant, Edward Long, with carrying a firearm without a license, in violation of G.L. c. 269, § 10(a); carrying a loaded firearm, in violation of G.L. c. 269, § 10(n), while being an armed career criminal, in violation of G.L. c. 269, § 10G; possession of ammunition without an FID card, in violation of G.L. c. 269, § 10(h); and possession of a high capacity firearm, in violation of G.L. c. 269, § 10(m); receiving a defaced firearm, in violation of G.L. c. 269, § 11C (CA.4).[1]

[1] "(CA._)" herein refers to the Commonwealth's record appendix.

On June 4, 2018, the defendant filed a motion to suppress (CA.8). On January 17, 2019, he filed another motion to suppress raising a claim under *Commonwealth v. Lora*, 451 Mass. 425 (2008) (CA.12). On June 6, 2019, and evidentiary hearing was held before Judge Joseph Leighton (CA.14). On September 18, 2019, Judge Leighton denied the defendant's motion in a fourteen page decision (CA.15).

On October 15, 2019, the defendant filed a notice of appeal (CA.15). That same day he filed an application for interlocutory review under Mass. R. Crim. P. 15(a)(2) (CA.71). On December 26, 2019, the single justice (Lenk, J.), ordered that the case be transmitted to the Supreme Judicial Court (CA.71).

FINDING OF FACTS

After an evidentiary hearing during which Officers Joao Rodrigues and Samora Lopes and defense expert Dr. Mary Fowler testified the judge made the following factual findings as to the stop of the defendant:

> Officers Rodrigues and Lopes are members of the Youth Violence Strike Force, i.e., the 'Gang Unit,' which is a city-wide proactive unit within BPD primarily focused on reducing gang and gun violence, as well as

drug activity. Officer Rodrigues has been a member of that Unit for six years, and Officer Lopes for four and a half years. Officers in the Gang Unit have discretion as to where they patrol, but focus on 'hotspot' areas that include parts of Dorchester, Roxbury, and Mattapan. Officers generally determine where to patrol based on their experience, and from information gleaned from BPD's Intelligence Unit, during debriefings, and from other members of the Gang Unit.

On November 28, 2017, Officers Rodrigues and Lopes were patrolling Dorchester and Roxbury in an unmarked black Ford Explorer.[2] Both Officers were in plain clothes, but were wearing tactical vests with 'Boston Police' inscribed across the front, had their badges displayed on their hips, and were visibly carrying their firearms. At approximately 11 a.m., Officers Rodrigues and Lopes were waiting on aside street in Dorchester to turn right on to Savin Hill Avenue when a maroon Mercedes SUV passed in front of them. The Officers turned right onto Savin Hill Avenue directly behind the Mercedes. At that time, Officer Lopes ran a query of the vehicle's registration through the CJIS database and learned that the Mercedes was registered to Avanna Williams ('Williams'), an African American female. Officer Lopes also discovered that the vehicle did not have a current inspection sticker. The Officers decided to stop the Mercedes based on the inspection sticker infraction, and activated their lights and sirens.

The Mercedes pulled over without delay on Savin Hill Avenue near the intersection of Pleasant Street close to the curb and in a

[2] Both Officers usually work the night shift from 4:00 p.m. to 11:45 p.m. However, on November 28, 2017, they had swapped shifts and were working the day shift from 8:30 a.m. to 5:00 p.m.

lawful parking spot. Savin Hill Avenue is a well-travelled road that is approximately a mile and half long. The area where the stop was effectuated is primarily residential with a few businesses, and there is frequent pedestrian foot traffic. As Officers Rodrigues approached the driver's side of the Mercedes and Officer Lopes approached the passenger's side, they discerned that the defendant, who is an African American male, was the only person in the vehicle. The defendant opened the door to the vehicle and explained that the window did not work. Officer Rodrigues then explained the reason for the stop and asked for the defendant's driver's license and the vehicle registration. The defendant stated that he did not have a license, only a permit, and identified himself as Edward Long. Prior to this interaction, Officer Rodrigues had never personally encountered Long, but he was familiar with him because Long is listed in BPD's gang database and his photograph is included.

Officer Rodrigues asked Officer Lopes to remain with Long, and returned to the Explorer to run a CJIS query on the defendant's information. Upon learning that Long's license was suspended and that he had two outstanding warrants issued by Lynn District Court for operating without a license and failure to identify oneself, the Officers issued an exit order to Long and placed him in handcuffs. Officer Rodrigues brought Long over to sit on the curb in between the Mercedes and the Explorer. At that time, the Officers determined that they would have the Mercedes towed for safekeeping and, prior to the tow, would conduct an inventory search as required pursuant to BPD policy. Officer Rodrigues deemed towing the vehicle appropriate because of the risk of theft given that a Mercedes was a high-end vehicle and Long was

> not the vehicle's owner. Moreover, the Officers were aware of thefts, vandalism, and shootings in the vicinity. For instance, Officer Lopes testified that there was vandalism to a vehicle parked on Savin Hill Avenue just one month prior to the hearing in this case.
>
> Officer Lopes conducted the inventory search of the Mercedes starting on the driver's side and moving to the rear of the vehicle. During the search, Officer Lopes observed an open brown bag on a seat in the rear of the vehicle. He shined his flashlight inside the bag and saw what he recognized to be the handle of a firearm. Using a plastic bag found inside the vehicle, Officer Lopes moved the handle and confirmed that there was, in fact, a firearm inside the bag. The firearm was later determined to be loaded. Officer Lopes informed Officer Rodrigues of the firearm, and Officer Rodrigues read Long the Miranda warning from a BPD-issued card. Officer Rodrigues then asked Long if he had a license to carry a firearm and Long responded, 'for real man, I don't have one.'
>
> Officer Rodrigues then called in the stop to dispatch for the first time and requested transport for Long, a tow of the Mercedes, and that supervising detectives be dispatched to the Long was transferred to areaCl1 for booking. During booking, he was permitted to scene make a phone call and he contacted Williams, the vehicle's owner whom he identified as his girlfriend. Officer Lopes overheard Long's portion of the phone conversation. Long explained that he was arrested on traffic violations, and then Long said something to the effect of, 'yeah, they found it,' which Officer Lopes believed to be in reference to the firearm.

(CA.56-59).

As to the statistical evidence concerning selective enforcement, the judge found:

> The court qualified defense witness Dr. Fowler as an expert in statistics.[3] Dr. Fowler testified to and provided a report concerning an analysis that she conducted on two datasets in order to ascertain whether stops for motor vehicle violations conducted by Officers Rodrigues and Lopes were motivated in part by the race of the vehicle's driver. The first data set consisted of Field Interrogation Observations ("FIOs") reported by Officers Rodrigues and Lopes between January 1, 2011, and the date that Long was stopped, November 28, 2017, that were obtained from BPD ('FIO dataset'). The second dataset consisted of traffic citations issued by Officers Rodrigues and Lopes between December 14, 2011, and November 11, 2017, that were obtained from the Merit Rating Board ('citation dataset').
>
> **A. FIO Dataset**
>
> Dr. Fowler sought to determine 'if the probability of an individual being FIOed for violation of motor vehicle law, given that he is Black, is greater than the probability of an individual being FIOed for violation of motor vehicle law, given that he is not

[3] Dr. Fowler is a professor in Mathematics at Worcester State University and an applied statistician, meaning she applies the methods of theoretical statistics to real life problems. She holds a B.A. in Mathematics and Economics from New York University, and a M.S. and a Ph.D. in Statistics from Carnegie Mellon University. She has authored numerous professional publications and technical reports, and has previously testified as an expert witness in Suffolk and Hampden Superior Courts as well as Worcester District Court. *See generally* Ex. 12 (Fowler CV).

Black.' Ex.10 at 9 (Fowler Report). In conducting this analysis, Dr. Fowler first isolated only those FIOs reported by Officers Rodrigues and Lopes that concerned stops due to motor vehicle violations. Of the total 449 FIOs that met this criteria, 362 of the individuals stopped were black(80.62%), 10 were white (2.23%), 32 were Hispanic (7.13%), 5 were Asian (1.11%),and 40 were unknown (8.91%). *Id*. at 5.

For comparison purposes, Dr. Fowler then sought to determine the racial composition of the residents of the areas in which Officers Rodrigues and Lopes reported FIOs (this included all 1,375 FIOs reported by the two Officers, not just those pertaining to motor vehicle violations). To do so, Dr. Fowler plotted the location of each FIO on a map and then used data from the United States Census to determine the racial distribution of the populations in those areas. Specifically, Dr. Fowler relied on 'census block groups' which are geographical regions that contain between 600 to 3,000 people. In Boston, there are an average of six census block groups per square mile. Dr. Fowler then determined the racial distribution of the census block groups that contained an FIO, and concluded that 44.6% of the population in those groups was black. *Id*. at 8. She also considered the census block groups that contained an FIO or were within 300 feet, 600 feet, and 1000 feet of an FIO, respectively, and the racial composition of 59 municipalities the border Boston and/or are within 10 miles of the area where the Officers reported a FIO, and concluded that in none of those areas was the racial composition of the population more than 44.67% black.[4] Accordingly, Dr.

[4] At the hearing, Dr. Fowler testified that the racial composition of other municipalities up to 35

Fowler adopted that percentage for the purposes of her analysis.

Dr. Fowler then analyzed the resulting data using a z-test to compare the proportion of residents who are black to the proportion of individuals being FIOed for violation of motor vehicle laws who are black. *Id*. at 9. The z-test is used to calculate a p-value which reflects the probability of observing 80.62% or greater of FIOs for violations of motor vehicle laws related to drivers who are black when there is no racial profiling. Id. Based on this test, Dr. Fowler concluded that there was statistical evidence to support a situation consistent with racial profiling, i.e., that the probability that an individual is stopped, given that he or she is black, is greater than the probability that an individual is stopped, given that he or she is not black. *Id*. at 1. This was true where the racial composition of motorists was 44.67% black, as in the areas where Officers Rodrigues and Lopes had reported FIOs. *Id*. at 10-11. Upon further testing, Dr. Fowler concluded there would continue to be statistical evidence of racial profiling as long as the racial composition of motorists was less than 77% black. *Id*. at 11-12.

B. Citation Dataset

Dr. Fowler sought to determine if 'the probability of receiving a citation, given that the driver is Black, is greater than the probability of receiving a citation, given that the driver is not Black.' *Id*. at 17. To this end, Dr. Fowler first determined that 116 of the 205 citations (55.59%) issued by Officers Rodrigues and Lopes in Boston were given to black motorists. *Id*. at 18. Dr. Fowler again compared this

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miles outside of Boston also was not more than 44.67% black.

> percentage to census data, this time concerning the racial composition of Boston which reflects that 24.38% of the city's residents are black. *Id*. at 18-19.
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> After running a z-test comparing this data, Dr. Fowler concluded that there was statistical evidence of racial profiling, i.e., the probability that a driver receives a citation, given that he is black, is greater than the probability that a driver receives a citation, given that he is not black, when up to 50% of the driving population in Boston is black. *See id*.at 19-20. Dr. Fowler further broke down her analysis, and compared the citations issued in Brighton, Dorchester, Roxbury, and West Roxbury, to the census data concerning the racial composition of those areas of Boston. She concluded that there was statistical evidence of racial profiling on the basis that the driver was black in Roxbury and West Roxbury, but not in Dorchester or Brighton.[5] *See id*. at 20-27. Specifically with respect to Dorchester, Dr. Fowler found that 19 of 38 citations (50.00%) were issued to black drivers, and that the racial composition of Dorchester is 46.31% black per the census data. After running the z-test on this data, Dr. Fowler found that the resulting p-value 'does not cast doubt on the assumption of no racial profiling.' *Id*. at 22.

(CA.59-62).

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[5] With respect to Dorchester and Brighton, Dr. Fowler did find statistical evidence of racial profiling if the citations issued to black or Hispanic drivers was compared against the respective racial compositions of those areas. *See* Ex. IC at 27 (Fowler Report).

RULINGS OF LAW

As to the selective enforcement claim, the motion judge ruled:

> In *Commonwealth v. Lora*, 451 Mass. 425 (2008), the Supreme Judicial Court set forth the applicable framework for determining whether evidence recovered during an otherwise legitimate traffic stop must be suppressed on equal protection grounds because the stop itself was the product of selective enforcement predicated on race. *See id*. at 426. *See also Commonwealth v. Buckley*, 478 Mass. 861, 870-871 (2018) (recognizing the continued applicability of the *Lora* framework). In conducting this analysis, the court begins with the presumption that an officer effectuating a traffic stop based on probable cause has acted in good faith and without the intent to discriminate. *Lora*, 451 Mass, at 437. Given this presumption, the defendant bears the "initial burden of producing sufficient evidence to raise a reasonable inference of impermissible discrimination." *Id*. at 442. The defendant may satisfy this initial burden by presenting statistical evidence 'establish[ing] that the racial composition of motorists stopped for motor vehicle violations varied significantly from the racial composition of the population of motorists making use of the relevant roadways, and who therefore could have encountered the officer or officers whose actions have been called into question.' *Id*. If the defendant makes this showing, the burden shifts to the Commonwealth to rebut the inference of selective enforcement by providing a race-neutral explanation for the stop. *Id*. at 426, 438.
>
> Applying this framework, the court starts with the presumption that there was no

selective enforcement because Officers Rodrigues and Lopes had a valid basis for initiating the traffic stop, i.e., the inspection sticker infraction.[6] The court then turns to the statistical evidence presented by Long in support of his motion. In *Lora*, the SJC recognized that 'statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.' *Id*. at 440 (internal quotation and citation omitted). To this point, the SJC in *Lora* focused its discussion on the statistical evidence presented in two cases: on one hand, *State v. Soto*, 324 N.J. Super. 66 (1996), where the statistical evidence presented was sufficient to raise the inference of selective enforcement; and on the other, *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001), where the statistical evidence presented was insufficient to do so. *See Lora*, 451 Mass. at 440-442. A review of these cases dictates that the statistical evidence presented here is insufficient both with respect to the 'stop data' (FIO and citation datasets) and the 'benchmark data' (census data), such that it falls short of raising an inference of selective enforcement predicated on race.

A. Stop Data

Dr. Fowler gleaned stop data from two sources, 449 FIOs and 205 citations, which are not reflective of all stops made by Officers Rodrigues and Lopes for motor vehicle law infractions during the relevant time period. While Dr. Fowler testified that it was her understanding that officers complete an FIO to document every traffic

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6 Both Officers Rodrigues and Lopes testified that they did not observe the driver of the Mercedes prior to running the CJIS query on the vehicle's plate.

> stop, it is clear that this is not the case. FIOs are 'a mechanism to allow [BPD] to document and accumulate up-to-date information concerning known criminals and their associates, the clothing they may be wearing, the vehicles they use, the places they frequent, and persons suspected of unlawful design.' Ex. 5 at 1 (BPD Rules & Procedures, Rule 323). They are generated during field interactions/stops and frisks based on reasonable suspicion, and during observations and voluntary encounters where the information collected serves a legitimate intelligence purpose.[7] *See id*.at 4-5. Thus, they are only completed in limited circumstances, not in all instances where police stop a vehicle for a suspected motor vehicle law infraction.[8] Moreover, it is clear that Officers Rodrigues and Lopes did not issue citations every time that they conducted a motor vehicle stop. Officer Rodrigues testified that he had been involved of 'thousands' of traffic stops, and often addressed minor infractions without issuing a citation. Officer Lopes further testified that he might be involved

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[7] For observations, an officer may complete an FIO when he or she observes an individual who is known to be associated with a gang, is the subject of an ongoing investigation, or is known to be associated with a gang but present in an area frequented by rival gang members. For encounters, an officer may complete an FIO when he or she speaks with an individual who is known to be associated with a gang, known to be a felon, known to be associated with a gang but present in an area frequented by rival gang members, or present in an area at an inappropriate hour of the day or night. *See* Ex. 5 at 4 (BPD Rules & Procedures, Rule 323).

[8] There is no evidence in the record to suggest that an FIO was completed by the Officers as a result of the traffic stop in this case.

in 15 to 20 traffic stops during a given shift.

Here, the statistical evidence is not sufficiently reliable given the use of the FIO and citation datasets, which only represent some subset of the larger, unknown total number of motor vehicle stops made by these Officers. Notably, when asked at the hearing, Dr. Fowler was unable to opine on the correlation between the stop data used and the total number of stops, and this information is essential for determining the usefulness of these datasets. Moreover, both datasets fall well short of those used in *Soto* where the parties created a database reflecting all 3,060 stops and arrests made by State Police members patrolling the New Jersey Turnpike between specified exits on thirty-five randomly selected days. *See* 324 N.J. Super, at 69, 72 n.6 (recognizing that of the 3,060 stops, no tickets were issued in nearly 60% of the stops).

The datasets here are more reflective of those considered in *Chavez*. In *Chavez*, the court rejected the use of a dataset similar to the FIO dataset and concluded that it was inappropriate to derive any conclusions about the racial breakdown of all motorists stopped based on field reports that were selectively completed by law enforcement in limited circumstances.[9] *See* 251 F.3d at 643

[9] While not determinative here, the court notes that a study conducted by BPD based on FIOs reported from 2007 to 2010 (the four years immediately preceding the relevant time period of the statistical analysis in this case) demonstrated that "black males in Boston are disproportionately and repeatedly targeted for FIO encounters." *Commonwealth v. Warren*, 475 Mass. 530, 540 (2016). Specifically, of the 204,739 FIO reports, 89.0% of the subjects were male, 54.7% were 24 years old or younger, and 63.3% were black. *Id*. at 539 n.15.

(field reports are the "type of non-random sample [that] might undermine the reliability of the statistics"). While the *Chavez* court indicated that a citation dataset 'could potentially' be more reflective of total stops, this court concludes that the citation dataset here is deficient because there is no evidence that ticketed traffic stops constitute a random sample of all traffic stops, nor can it be shown where no information whatsoever was presented as to the total number of traffic stops. *Cf. Soto*, 324 N.J. Super, at 74 (evidence reflected that 63% of unticketed stops between turnpike exits 1 and 3, where selective enforcement was alleged to have occurred, involved black motorists, while 37% of unticketed stops between exits 1 and 7A involved black motorists). Accordingly, the court concludes that the FIO and citation datasets are insufficiently reliable to yield results that could raise a reasonable inference of impermissible discrimination.[10]

B. Benchmark Data

Dr. Fowler used census data to determine the racial composition of motorists who would have encountered Officers Rodrigues and Lopes on their patrol. Both *Lora* and *Chavez* rejected this use of 'census benchmarking,'

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[10] In reaching this conclusion, the court recognizes that it is unclear whether total stop data is collected. However, the court is left to apply the *Lora* framework and under that analysis, the data used is insufficient. *See Buckley*, 478 Mass. at 871 (acknowledging that there are "valid questions regarding the lasting efficacy of *Lora* for addressing the issue of pretextual stops motivated by race," but waiting to consider that issue until there is "a case where a driver has; actually alleged and laid a proper foundation for a claim under *Lora*").

concluding that it was unreliable and not accepted in the scientific community as a means of determining the racial composition of motorists travelling on a particular road. *See Lora*, 451 Mass. at 443; *Chavez*, 251 F.3d at 643-644. However, the court recognizes that *Lora* and *Chavez* considered the racial composition of drivers on interstate highways, and rejected the notion that census data from the surrounding communities was an accurate reflection of the drivers passing through on those interstates. *See Lora*, 451 Mass. at 443-444 (census data for town of Auburn not reflective of racial composition of drivers on a major interstate highway passing through that town); *Chavez*, 251 F.3d at 643-644 (census data for state of Illinois not reflective of racial composition of drivers on Illinois interstate highways).

Here, the court is presented with a slightly different scenario because the stop occurred on a primarily residential road in an urban area where census data might be more reflective of persons on the road. *But see Chavez*, 251 F.3d at 643 ('Even if it were entirely accurate, however, Census data can tell us very little about the numbers of Hispanics and African Americans driving on Illinois interstate highways, which is crucial to determining the population of motorists encountered by the [officers at issue]. Other surveyors have noted as much....'). Nonetheless, the court is not persuaded that census benchmarking is the appropriate means of assessing the racial composition of motorists on residential roads absent some independent verification as to this point. By way of example, in *Soto*, the parties verified the racial composition of motorists on the New Jersey Turnpike by conducting independent traffic and violator surveys designed by an expert in statistics and social psychology. *See*

> *Soto*, 324 N.J. Super, at 69-70 (detailing the traffic and violator surveys and their results). While *Soto* also involved a highway, the court recognizes that the methodology used there could be extended to residential roads and has been viewed approvingly by the SJC. *See Lora*, 451 Mass. at 445 ('The practical weight of [the defendant's initial burden in demonstrating selective enforcement] is admittedly daunting in some cases, but not impossible. It was done, and done well, in New Jersey.'). For these reasons, the court concludes that Long has failed to meet his initial burden of producing sufficient evidence to raise a reasonable inference of impermissible discrimination. Accordingly, suppression of the firearm is not warranted on equal protection grounds.

(CA.62-68).

As to the stop and ultimate search of the defendant's car, the judge ruled:

> Inventory searches are intended to be noninvestigatory and are conducted for the purpose of protecting property which may be within a vehicle in police custody. *See Commonwealth v. Alvarado*, 420 Mass. 542, 553 (1995). 'Because an inventory search is conducted without a warrant, the Commonwealth bears the burden of proving that the search was lawful.' *Commonwealth v. Oliveira*, 474 Mass. 10, 13 (2016). An inventory search is lawful only where: (1) the impoundment of the vehicle was reasonable; and (2) the search of the vehicle was in accord with standard police written procedures. *Id*. For the reasons that follow, the court concludes that the firearm was discovered and subsequently seized during the course of a valid and lawful inventory search of the Mercedes.

Where a vehicle's driver is under arrest, police may seize the vehicle for a legitimate, noninvestigatory purpose, including protecting the vehicle and its contents from theft or vandalism, and protecting the public from dangerous items that might be in the vehicle. *Id*. at 13-14. If such a legitimate purpose exists, the court must then consider whether the seizure was reasonably necessary based on the totality of the evidence. *Id*. at 14.

Here, the decision to impound the Mercedes was lawful and reasonable, and nothing in the record suggests that the Officers had an investigatory purpose for the impoundment of the vehicle. While it is true that the Mercedes was parked in a lawful spot during the day in a residential area, it would have been unreasonable to leave the vehicle given the concerns about theft and vandalism, and the fact that the location where the car was parked was dictated by police by virtue of the traffic stop. *See Commonwealth v. Crowley-Chester*, 476 Mass. 1030, 1031 (2017) (frequency of vandalism, theft, and break-ins to motor vehicles in the vicinity bears directly on the question of whether impoundment was reasonably necessary); *Oliveira*, 474 Mass. at 14 ('[W]here the vehicle was stopped by the police and the driver arrested, the police are responsible both for the location of the vehicle and for depriving the vehicle of its driver, and therefore might be held responsible if the vehicle's location created a risk to public safety or left the vehicle vulnerable to vandalism or theft.'). Moreover, no one was present to drive the vehicle and, while the defendant now suggests that the Officers should have contacted Williams to retrieve the vehicle, they were under no obligation to do so. *See, e.g., Oliveira*, 474 Mass. at 15 ('We have . . . made clear that the police have no obligation to locate or

telephone the registered owner to determine his or her wishes . . . or to wait with the vehicle until a licensed driver can be located.'). Further, there is no evidence that the defendant ever requested that the Officers contact Williams, or that he proposed any other alternative to impounding the vehicle, including leaving the vehicle as parked on Savin Hill Avenue. *See id*. ('Where the owner or authorized driver, for whatever reason, was unable to drive the vehicle away, we consider whether the owner or authorized driver offered the police a lawful and practical alternative to impoundment of the vehicle.'). Accordingly, the court concludes that the Officers acted reasonably in deciding to impound the Mercedes in these circumstances. *See Commonwealth v. Eddington*, 459 Mass. 102, 109-110 (2011) (impoundment was reasonably necessary where car was lawfully parked in a high crime area following a police stop, the owner was not present, and none of the occupants could drive the vehicle).

The court also concludes that Officer Lopes conducted the inventory search in accordance with the BPD Inventory Search Policy ('Policy'). He conducted the search prior to the towing of the vehicle as prescribed by the Policy. *See* Ex. 8 at 1 (BPD Motor Vehicle Inventory Search Policy). Pursuant to the Policy, Officer Lopes also was required to search the interior of the vehicle to discover valuable property, and any place in the passenger compartment that could contain such property. *See id*. at 2. This includes the search of open containers as well as 'closed, but unlocked, containers in the passenger compartment.' *Id*. Here, the bag was inside the passenger compartment of the vehicle, open and on a seat. Officer Lopes was permitted to look inside the bag and once he recognized that there was a firearm, he was not required to turn a blind

> eye to it. *See id*. at 1 (inventory search cannot be conducted to discover evidence, but any evidence of a criminal nature discovered during the inventory search may be seized under the plain view doctrine). Accordingly, the court finds no basis to suppress the firearm as it was discovered during the course of a lawful inventory search of the vehicle.

(CA.68-70).

ARGUMENT

THIS COURT SHOULD REVISE THE *LORA* FRAMEWORK BECAUSE THE APPROPRIATE REMEDY FOR A VIOLATION OF EQUAL PROTECTION OF THE LAW IS DISMISSAL AND THE CASE SHOULD BE REMANDED FOR APPLICATION OF THE NEW STANDARD.

Two years ago in *Commonwealth v. Buckley*, 478 Mass. 861, 871 (2018), this Court explained that there were "legitimate concerns regarding racial profiling and the impact of such practices on communities of color," and that "valid questions regarding the lasting efficacy of *Lora* for addressing the issue of pretextual stops motivated by race, given that in the near-decade since that decision, we are not aware of a single reported case suppressing evidence under its framework." In the case at bar, this Court has solicited amicus as to whether the framework set forth in *Lora* should be revisited. It should.

A. The *Lora* Framework.

In *Lora*, this Court concluded that "evidence of racial profiling is relevant in determining whether a traffic stop is the product of selective enforcement violative of the equal protection guarantee of the Massachusetts Declaration of Rights; and that evidence seized in the course of a stop violative of equal protection should, ordinarily, be excluded at trial." 451 Mass. at 426. This Court explained that in raising such a claim the defendant bore the initial burden to present evidence that raised the inference of impermissible discrimination "including evidence that 'a broader class of persons than those prosecuted has violated the law . . . that failure to prosecute was either consistent or deliberate . . . and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex' (citations omitted)." *Id*. at 427 (quoting *Commonwealth v. Franklin*, 376 Mass. 885, 894 (1977)). The burden then shifts to the Commonwealth to rebut that inference. *Id*.

The remedy adopted by this Court in *Lora* for such an equal protection violation was suppression. The

Court reasoned that suppression was the appropriate remedy first, because the defendant asked for suppression, and second, because the prime purpose of the exclusionary rule is deterrence. *Id*. The remedy adopted by the Court in *Lora* makes little sense, causes confusion, and should be set aside for three reasons.

First, exclusion of evidence as a remedy for a selective enforcement claim does little to ameliorate the equal protection violation. Under Massachusetts law and Federal law, the typical remedy for the violation of equal protection of the laws is dismissal of a criminal complaint. *See*, *e.g.*, *United States v. Mumphrey*, 193 F. Supp. 3d 1040, 1055 (N.D. Cal. 2016) (discussing that dismissal is appropriate remedy for a selective enforcement claim); *Commonwealth v. Washington W.*, 462 Mass. 204, 216 (2012) (defendant equal protection claim, if supported, would entitled him to dismissal); *Commonwealth v. King*, 374 Mass. 5, 22 (1977) (defendant brings selective enforcement claim in a motion to *dismiss*). That is because dismissal puts an individual in the same position he or she would have been in but for the improperly

motivated selective enforcement of the law. *See Mumphrey*, 193 F.Supp. 3d at 1059.

Exclusion of evidence, on the other hand, does not do that. Indeed, the exclusionary rule itself is a judicially created remedy the only purpose of which "is to deter future Fourth Amendment violations;" exclusion is not even "designed to 'redress' the injury occasioned by an unconstitutional search," *Davis v. United States*, 564 U.S. 229, 236-37 (2011), never mind redress the injury occasioned by an equal application of the laws, *see Mumphrey*, 193 F. Supp. 3d at 1058-1059; *see also Stone v. Powell*, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates *Fourth Amendment* rights.") (emphasis added).

Second, because the *Lora* framework requires the defendant to file a motion to suppress it causes confusion and the melding of legal standards. In the context of a pretextual traffic stop, a defendant would naturally be moving to suppress the stop on both equal protection and unreasonable search and seizure grounds. The witnesses – police officers – would be

the same as to both claims. For judicial economy, like here, evidence would be taken on the motions at the same time. The standards governing the two different motions, however, are vastly different.

The motion to suppress on an unreasonable search and seizure ground does not consider an officer's subjective intent at all and instead asks whether a particular stop and seizure was objectively reasonable. *See Buckley*, 478 Mass. at 867 (quoting *Commonwealth v. Santana*, 420 Mass. 205, 208 (1995) (quoting *Commonwealth v. Ceria*, 13 Mass. App. Ct. 230, 235 (1982))) ("both art. 14 and Fourth Amendment jurisprudence, that 'police conduct is to be judged "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved."'"). On the other hand, a motion to suppress on equal protection grounds expressly considers subjective intent. S*ee Buckley*, 478 Mass. at 870. When the two are heard together there is a potential for confusion. Indeed, the evidence at the motion hearing (in order to address the unreasonable search and seizure claim) would necessarily focus on the objective factors supporting the basis for the

stop itself. It is easy to envision how the Commonwealth could then point to those objective factors to rebut an inference that the stop was racially motivated. It is also easy to envision how a judge could minimize evidence suggesting that a stop was racially motivated where there was an objectively reasonable basis for the stop under art. 14 and Fourth Amendment grounds. Though easy, it ignores that an equal protection claim contemplates a remedy, whether it be suppression or dismissal, even where there is an objective basis for the stop if the stop itself was motivated by an improper motivation like race. *See United States v. Hare*, 308 F. Supp. 2d 955, 989 (D. Neb. 2004) ("An officer's reasonable belief that probable cause exists for a traffic stop does not affect the availability of a separate selective enforcement claim under the Equal Protection Clause.").

Finally, to the extent that the Court has expressed concerns about racial profiling and the insidious impact that such practices have on communities of color, *see Buckley*, 478 Mass. at 880 (Budd., J., concurring); *Lora*, 451 Mass. at 447

(Ireland, J., concurring), dismissal is the appropriate remedy. Historically, dismissal is the remedy for violations of equal protection on racial grounds. *See Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). Dismissal is also considered the most serious of remedies for claims of misconduct. *See, e.g.*, *Commonwealth v. Mason*, 453 Mass. 873, 877 (2009); *Commonwealth v. Woodward*, 427 Mass. 659, 680-81 (1998); *Commonwealth v. Olszewski*, 416 Mass. 707 (1993); *Commonwealth v. Clegg*, 61 Mass. App. Ct. 197, 200 (2004). As such, it should be and is reserved for the most serious of infractions. The unequal enforcement of the laws on the basis of race is the most serious of infractions, and dismissal is the most appropriate of remedies. *See Mumphrey*, 193 F. Supp. 3d at 105 ("[R]acial discrimination in enforcement of criminal laws is constitutionally as injurious as racial discrimination in prosecution. It is difficult to discern why selective prosecution warrants dismissal, but selective enforcement (upon which prosecution is necessarily predicated) would not.").

B. The New Framework.

For all the above stated reasons, this Court should revise the *Lora* framework and hold that dismissal is an appropriate remedy and that such a claim is properly brought in a motion to dismiss on equal protection grounds.[11] "The equal protection principles of the Fourteenth Amendment . . . and arts. 1 and 10 . . . prohibit discriminatory application of impartial laws." *Commonwealth v. Franklin Fruit Co.*, 388 Mass. 228, 229-230 (1983). These principles instill "'a direction that all persons similarly situated should be treated alike.'" *Cote-Whitacre v. Department of Pub. Health*, 446 Mass. 350, 376 (2006) (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)). Indeed, "[i]f government can effect a discrimination against any class of people through selective implementation of its laws, then

[11] "The review of an equal protection claim under the Massachusetts Constitution is generally the same as the review of a Federal equal protection claim," however, this Court has recognized that "'[t]he Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution . . . .'" *Cote-Whitacre v. Department of Pub. Health*, 446 Mass. 350, 376 (2006) (quoting *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 313 (2003)).

'the insertion of provisions to guard the rights of every class and person in . . . [our National Constitution] was a vain and futile act.'" *Franklin*, 376 Mass. at 894 (quoting *Yick Wo*, 118 U.S. at 362).

"'While some selectivity is permissible in criminal law enforcement, the Federal and Massachusetts Constitutions guarantee that the government will not proceed against an individual based on an unjustifiable standard such as race, religion, or other arbitrary classification' (quotation and citation omitted)." *Commonwealth v. Wilbur W.*, a juvenile, 479 Mass. 397, 409 (2018) (quoting *Commonwealth v. Washington W.*, 457 Mass. 140, 142 (2010)). It is presumed that such selection is undertaken in good faith. *Id*. That presumption is made because a selective-enforcement claim "asks a court to exercise judicial power over a 'special province' of the Executive." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

Because of that, the defendant bears the initial burden of coming forth with evidence that demonstrates a reasonable inference of selective enforcement. *Id*.

More specifically, a defendant currently must show: "(1) a broader class of persons than those prosecuted has violated the law; (2) the failure to prosecute was either consistent or deliberate; and (3) the decision not to prosecute was based on an impermissible classification such as race, religion, or sex." *Franklin Fruit Co.*, 388 Mass. at 230. Once a defendant has raised such an inference, the burden shifts to the Commonwealth to "rebut that inference or suffer dismissal of the underlying complaint." *Franklin*, 376 Mass. at 895.

More succinctly, this Court in *Lora* described a defendant's initial burden is to present "credible evidence that persons similarly situated to himself have been deliberately or consistently not prosecuted because of their race . . .." 451 Mass. at 438. Post-*Lora*, most recently in *Buckley*, this Court questioned how a defendant may ever meet that burden. *See* 478 Mass. at 880 (Budd, J., concurrence) ("We are not aware of any traffic stop cases in which a defendant has been able to gather and use statistics to prove that the stop violated equal protection principles; it

appears that *Lora* has not provided the opportunity for defendants that we had hoped it would.").

Other jurisdictions have questioned the ability of a defendant to meet this burden as well. *See, e.g.*, *Chavez*, 251 F.3d at 640 ("In a meritorious selective prosecution claim, a criminal defendant would be able to name others arrested for the same offense who were not prosecuted by the arresting law enforcement agency; conversely, plaintiffs who allege that they were stopped due to racial profiling would not, barring some type of test operation, be able to provide the names of other similarly situated motorists who were not stopped."); *United States v. Benitez*, 613 F. Supp. 2d 1099, 1101 n.3 (S.D. Iowa 2009) ("in the context of a traffic stop where the law imposes a nearly impossible burden on Defendant to show that the officer did not stop other motorists committing the same offense."); *United States v. Mesa-Roche*, 288 F.Supp. 2d 1172, 1186-1187 (2003) (same).

A selective enforcement claim in the context of a traffic stop is different than other alleged equal protection violations in that there is an unknown and hard to define class of individuals who could

conceivably be “similarly situated” to the defendant. *Compare Mesa-Roche*, 288 F.Supp. 2d at 1186-1187 (to show different treatment the defendant would need to prove that other drivers were not stopped and would need to prove similarly situated which is impossible on stretch of highway with unknown amount of drivers) *with Yick Wo*, 118 U.S. at 373 (200 Chinese applicants all denied building code exemption while all but 1 of 80 non-Chinese applicants were all allowed exemption) and *Armstrong*, 517 U.S. at 470 (defendant could show that similarly situated individuals were prosecuted in state court rather than Federal Court for certain crimes). Logically in order for a defendant to prove that he or she was treated differently than other similarly situated individuals, he or she would have to prove that others were not stopped. *See Mesa-Roche*, 288 F.Supp. 2d at 1186-1187. The problem inherent with such a standard is that “[l]aw enforcement agencies keep records of law enforcement activity,” not law enforcement inactivity. *See id*. at 1187.

In *Lora* itself, this Court acknowledged that “the initial burden rests on the defendant to produce evidence that similarly situated persons were treated

differently because of their race," and "[t]he practical weight of this burden is admittedly daunting in some cases, but not impossible." 451 Mass. at 445. At least in Massachusetts, it seems to have proved impossible. As such, going forward this Court should change the standard and hold that a defendant may meet that burden by making a credible showing either that those similarly situated were not stopped or that reliable statistics show a statistically significant variation in the racial composition of those stopped as compared to the racial composition of the population using the road. From these statistics a court may find a reasonable inference of impermissible discrimination. *See id*. at 442. The Commonwealth would then be called upon to rebut this inference. Any standard adopted should recognize that, as with all alleged equal protection violations, there must be a ruling that the selective enforcement had both a discriminatory effect and that it was motivated by a discriminatory purpose. *See Wayte v. United States*, 470 U.S. 598, 608 (1985).

In determining whether a hearing is required, the court should ask "whether the defendant, seeking

dismissal of the charges against him, has made a prima facie case of selective [enforcement]." *Commonwealth v. Bernardo B.*, 453 Mass. 158, 168-169 (2009). Such a determination should be similar to the analysis employed when a court determines whether to grant an evidentiary hearing based on a defendant's submissions in support of a motion for a new trial. *See Commonwealth v. Marrero*, 459 Mass. 235, 240 (2011) (court may consider both "the seriousness of the issue itself and the adequacy of the defendant's showing on that issue"). As with a motion for a new trial, "[i]f the theory of the motion, as presented by the papers, is not credible or not persuasive, holding an evidentiary hearing to have the witnesses repeat the same evidence (and be subject to the prosecutor's cross-examination further highlighting the weaknesses in that evidence) will accomplish nothing." *Commonwealth v. Goodreau*, 442 Mass. 341, 348-349 (2004). At the hearing the defendant would first be put to his burden of presenting evidence that supports a reasonable inference of discrimination; if that burden is met, the Commonwealth would be offered the opportunity to rebut that inference.

C. The Instant *Lora* Motion.

Recognizing that neither the parties nor the motion judge had the benefit of the standard articulated above, the Commonwealth asks that in the interests of justice the case be remanded to the Superior Court for further and full factual findings and rulings. At such a hearing, or any hearing on this issue going forward, a motion judge should look at both the discriminatory effect of an officer's particular actions and his subjective intent. An inference of discriminatory intent may be found in statistics alone, *see Yick Wo*, 118 U.S. at 374 (discriminatory intent inferred from denial of two hundred Chinese launderers from exemption of building ordinance where all but one of the eighty petitions of the non-Chinese allowed); *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (discriminatory intent found where a section of the Alabama Constitution made disenfranchisement of blacks at least 1.7 times more likely than disenfranchisement of whites was "indisputable evidence that the state law had a discriminatory effect on blacks as compared to similarly situated whites"); or may not, *McCleskey v.*

Kemp, 481 U.S. 279, 293 n. 12 (1987); *Hare*, 308 F. Supp. 2d at 992. Like all other evidence, the weight of statistical or expert evidence is left to the discretion of the judge. *See Chavez*, 251 F.3d at 638; *Franklin*, 376 Mass. at 898 (internal citations omitted).

Aside from statistics, a discriminatory intent "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). "An officer's discriminatory selective law enforcement may be inferred from evidence of the officer's pattern and method of performing traffic stops and arrests; relevant departmental policies and training governing the officer's conduct; failure to uniformly comply with the relevant training and supervisory instruction received; the questions presented and statements made by the officer to vehicle occupants; the specific events of the traffic stop at issue; and any other relevant information which may support an inference of discriminatory purpose in this context." *Hare*, 308 F. Supp. 2d at

992; *see also Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003) ("a police officer's pattern of traffic stops and arrests, his questions and statements to the person involved, and other relevant circumstances may support an inference of discriminatory purpose in this context").

Accordingly, the Commonwealth respectfully requests that this case be remanded for a full hearing under the new standard.[12]

[12] Recognizing that if the Court adopts the Commonwealth's proposed standard, dismissal would be the remedy, the Commonwealth asks that the equal protection claim be considered first and a decision on the separate Fourth Amendment claim be stayed pending that decision. The Commonwealth does not waive any claims with regards to the denial of the defendant's motion to suppress on Fourth Amendment grounds: it was a valid inventory search. *See Commonwealth v. Goncalves-Mendez*, 484 Mass. 80, 83-84 (2020); *Commonwealth v. Crowley-Chester*, 476 Mass. 1030, 1031 (2017); *Commonwealth v. Oliveira*, 474 Mass. 10, 13-14 (2016);

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court change the *Lora* standard and remand this case for full hearing during which the motion judge can apply the new standard.

Respectfully submitted
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ADDENDUM TABLE OF CONTENTS

ADDENDUM

G.L. c. 269, § 10. Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment.

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of

this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

****

(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

(2) Any person who leaves a firearm, rifle, shotgun or ammunition unattended with the intent to transfer possession of such firearm, rifle, shotgun or ammunition to any person not licensed under section 129C of chapter 140 or section 131 of chapter 140 for the purpose of committing a crime or concealing a crime shall be punished by imprisonment in a house of correction for not more than 21/2 years or in state prison for not more than 5 years.

****

(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his

control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid Class A or Class B license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

****

(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more

than 21/2 years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

G.L. c. 269, § 10G. Violations of Sec. 10 by persons previously convicted of violent crimes or serious drug offenses; punishment.

(a) Whoever, having been previously convicted of a violent crime or of a serious drug offense, both as defined herein, violates the provisions of paragraph (a), (c) or (h) of section 10 shall be punished by imprisonment in the state prison for not less than three years nor more than 15 years.

(b) Whoever, having been previously convicted of two violent crimes, or two serious drug offenses or one violent crime and one serious drug offense, arising from separate incidences, violates the provisions of said paragraph (a), (c) or (h) of said section 10 shall be punished by imprisonment in the state prison for not less than ten years nor more than 15 years.

(c) Whoever, having been previously convicted of three violent crimes or three serious drug offenses, or any combination thereof totaling three, arising from separate incidences, violates the provisions of said paragraph (a), (c) or (h) of said section 10 shall be punished by imprisonment in the state prison for not less than 15 years nor more than 20 years.

(d) The sentences imposed upon such persons shall not be reduced to less than the minimum, nor suspended, nor shall persons convicted under this section be eligible for probation, parole, furlough, work release or receive any deduction from such sentence for good conduct until such person shall have served the minimum number of years of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such

institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

(e) For the purposes of this section, ''violent crime'' shall have the meaning set forth in section 121 of chapter 140. For the purposes of this section, ''serious drug offense'' shall mean an offense under the federal Controlled Substances Act, 21 U.S.C. 801, et seq., the federal Controlled Substances Import and Export Act, 21 U.S.C. 951, et seq. or the federal Maritime Drug Law Enforcement Act, 46 U.S.C. App. 1901, et seq. for which a maximum term of imprisonment for ten years or more is prescribed by law, or an offense under chapter 94C involving the manufacture, distribution or possession with intent to manufacture or distribute a controlled substance, as defined in section 1 of said chapter 94C, for which a maximum term of ten years or more is prescribed by law.

G.L. c. 269, § 11C. Removal or mutilation of serial or identification numbers of firearms; receiving such firearm; destruction.

Whoever, by himself or another, removes, defaces, alters, obliterates or mutilates in any manner the serial number or identification number of a firearm, or in any way participates therein, and whoever receives a firearm with knowledge that its serial number or identification number has been removed, defaced, altered, obliterated or mutilated in any manner, shall be punished by a fine of not more than two hundred dollars or by imprisonment for not less than one month nor more than two and one half years. Possession or control of a firearm the serial number or identification number of which has been removed,

defaced, altered, obliterated or mutilated in any manner shall be prima facie evidence that the person having such possession or control is guilty of a violation of this section; but such prima facie evidence may be rebutted by evidence that such person had no knowledge whatever that such number had been removed, defaced, altered, obliterated or mutilated, or by evidence that he had no guilty knowledge thereof. Upon a conviction of a violation of this section said firearm or other article shall be forwarded, by the authority of the written order of the court, to the colonel of the state police, who shall cause said firearm or other article to be destroyed.

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k) and Mass. R. App. P. 20(a)(2)(F). The brief is in 12-point Courier New with 10 CPI and has a length of 39 pages.

/s/ Cailin M. Campbell
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COMMONWEALTH'S CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service on the defendant by e-filing a copy of the brief and record appendix and sending it to defense counsel via e-mail.

Respectfully submitted
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