COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12546

COMMONWEALTH OF MASSACHUSETTS,

Appellee,

v.

NATHAN LUGO,

Appellant.

ON APPEAL FROM NORFOLK SUPERIOR COURT

BRIEF OF AMICI CURIAE THE LOUIS D. BROWN PEACE INSTITUTE AND FAMILIES FOR JUSTICE AS HEALING

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INTRODUCTION

This Court stated in Commonwealth v. Okoro that it would "leave for a later day the question whether juvenile homicide offenders require individualized sentencing." 471 Mass. 51, 58 (2015). That day has arrived. The Eighth Amendment and article 26 of the Massachusetts Declaration of Rights safeguard the basic and fundamental concept of a civilized society, that there should be human dignity in punishment. To date, children in the Commonwealth convicted of second-degree murder have been denied that right, due to the mandatory imposition of life sentences. See Okoro, 471 Mass. at 61-62; G.L. c. 265 § 2; G.L. c. 279 § 24; G.L. c. 119 § 72B. These mandatory sentences violate both the Eighth Amendment to the United States Constitution and article 26 of the Massachusetts Declaration of Rights, and the time has come for this Court to make that pronouncement.

The Supreme Court held in Miller v. Alabama, 567 U.S. 460 (2012), that, absent an individualized analysis of the attendant facts and circumstances during sentencing, a mandatory life sentence without the possibility of parole for juvenile defendants is unconstitutional under the Eighth Amendment. Id. at

465. A key principle underlying this holding is that the developing brains of juveniles make them "constitutionally different from adults for purposes of sentencing," Id. at 471. Thus, when a State imposes its "most serious penalties" on a juvenile defendant, it must consider the specific circumstances of the offense in the context of "youth (and all that accompanies it)." Id. at 465, 479. In this case, Massachusetts' mandatory sentencing regime ensured that neither Nathan Lugo's age nor the particular circumstances of his case were considered before he was sentenced to life in prison.

While this Court has acknowledged Miller's recognition that "children are different," it has nonetheless held that individualized sentencing is not required for juveniles who receive a mandatory life sentence with the possibility of discretionary parole. See Diatchenko v. Dist. Att'y for Suffolk Dist., 466 Mass. 655, 670-671 (2013)("Diatchenko I"); Diatchenko v. Dist. Att'y for Suffolk Dist., 471 Mass. 12, 17-18 (2015)("Diatchenko II"); Okoro, 471 Mass. at 57-58. Instead, this Court has determined that it is constitutionally sufficient for a parole board to account for the "unique characteristics" of juvenile

offenders when deciding if early release from a life sentence is appropriate. Okoro, 471 Mass. at 57-58. In reaching that conclusion, this Court may have assumed, as did the Supreme Court in Solem v. Helm, that "[a]ssuming good behavior, [parole] is the normal expectation in the vast majority of cases," and that "it is possible to predict, at least to some extent, when parole might be granted." 463 U.S. 277, 278-279, 301 (1983). But, as demonstrated below, even if that belief may have been sound thirty years ago, the notion that the parole system can serve as an adequate substitute for the context-sensitive, individualized consideration that Miller requires is not well-founded today.

The Massachusetts Parole Board is an executive agency that operates differently than a sentencing judge. Not only is the Board subject to substantial political pressures that a judge is not, but the standard of review employed in determining parole eligibility is very different than that used in judicial sentencing. Indeed, a review of recent parole decisions involving juvenile offenders reveals a largely pro forma process in which written decisions lack substantive application of the Miller factors to

the circumstances of a given case. These decisions are effectively unappealable in substance: review by a court is highly deferential to the Board's discretion, examining only whether the board failed to consider the relevant factors and not its ultimate conclusion, and provides the opportunity only for a remand rather than for reversal of the Board's decision. See Diatchenko II, 471 Mass. at 30-31. The result is a highly discretionary parole process that places juvenile offenders like Mr. Lugo at "too great a risk of disproportionate punishment." See Miller, 567 U.S. at 479.

The cruel and unusual nature of mandatory life sentences for children is further illustrated by the growing trend outside of the Commonwealth towards individualized sentencing for juveniles. While a number of States have abolished mandatory life sentences for juveniles entirely, many of the States that retain such sentences have now entrusted judges (not parole boards) with the discretion to grant early release. This trend extends outside the United States, where other developed nations have taken even more substantial steps towards individualized sentencing for juveniles. In short, Massachusetts'

lengthy and mandatory juvenile-sentencing regime lags far behind the current practices of juvenile sentencing both at home and abroad.

Mr. Lugo's sentence also violates article 26 of the Massachusetts Declaration of Rights. This Court has held that article 26 affords greater protections than the Eighth Amendment, see Dist. Att'y for Suffolk Dist. v. Watson, 381 Mass. 648, 666-70 (1980), as is clear from the plain text of article 26, which bars the imposition of a sentence that is "cruel or unusual." Mass. Decl. Rights, art. 26 (emphasis added). Furthermore, the scope of article 26 in this context is guided by "developments in the area of juvenile justice...at the State, Federal, and international levels," Okoro, 471 Mass. at 61, which as described above, indicate a growing consensus towards individualized sentencing. Imposing a life sentence on Mr. Lugo without an individualized hearing that takes into account his youth and other mitigating circumstances is thus at least "cruel" or "unusual" for purposes of article 26.

For all of the reasons provided below, now is the time for this Court to reconsider its prior holdings and rule that mandatory life sentences, even with the

possibility of discretionary parole, are constitutionally inappropriate for juvenile offenders like Mr. Lugo.

STATEMENT OF THE ISSUES

1. Whether the mandatory imposition of a sentence of life imprisonment with the possibility of parole at the discretion of the Massachusetts Parole Board on an individual convicted of committing second-degree murder as a child constitutes a violation of the Eighth Amendment of the United States Constitution or article 26 of the Massachusetts Declaration of Rights.[1]

[1] This brief will address only the constitutionality of Mr. Lugo's mandatory sentence. Amici offer no argument regarding any procedural defects that may have occurred during Mr. Lugo's trial.

STATEMENT OF INTEREST OF AMICI

The Louis D. Brown Peace Institute ("Peace Institute") is a center of healing, teaching, and learning for families and communities impacted by murder, trauma, grief, and loss. The Peace Institute offers emotional and practical support to families who have suffered losses from homicide. It also provides support, guidance, and advocacy to those whose loved ones have been incarcerated for murder or attempted murder, with a goal of helping families and communities impacted by homicide and, moreover, *preventing* homicide and violence. Individuals released on probation or parole are often the most susceptible to being victimized by violence and homicide, particularly when they return to their communities without adequate support. Thus, the Peace Institute works tirelessly to advocate for a collaborative process that engages the family, community, and justice system when individuals are released from prison.

Families for Justice as Healing works to end the incarceration of women and girls through, *inter alia*, campaigns to transform the criminal punishment system and to create alternatives to the current system that

will better meet the needs of women and families.

As organizations devoted to advancing and improving the criminal justice system, amici recognize that a one-size-fits-all approach to sentencing children to spend their entire life in prison with no right or expectation of parole is inconsistent with the values articulated in the United States Constitution, the Massachusetts Declaration of Rights, and transcending notions of human justice. The proper resolution of this case is thus a matter of substantial interest to amici.

STATEMENT OF THE CASE

Amici adopt Defendant-Appellant's Statement of the Case. See Brief of Defendant-Appellant Nathan Lugo ("Red Brief") at pp. 9-14.

SUMMARY OF ARGUMENT

The Eighth Amendment's prohibition of cruel and unusual punishment requires a system of sentencing that is "graduated and proportioned to both the offender and the offense." Miller, 567 U.S. at 469. And because of children's "diminished culpability and greater prospects for reform," children are "constitutionally different from adults for purposes of sentencing." Id. at 471. Imposing a mandatory

life sentence on children convicted of second-degree homicide, as the Commonwealth does through chapters 265 § 2, 279 § 24, and 119 § 72B, is inconsistent with the Supreme Court's holding in Miller that States cannot impose their harshest penalties on children without affording the sentencer the opportunity to conduct an individualized sentencing analysis. 567 U.S. at 465. See Section I, pp. 10-17, infra.

The unconstitutional nature of such mandatory life sentences is not ameliorated by the potential eligibility for discretionary parole because a parole hearing is an inadequate substitute for the individual sentencing required for juvenile homicide offenders by Miller. The Massachusetts Parole Board is part of the Commonwealth's Executive Branch and subject to significant political pressure that judges are not. And further, parole is an entirely discretionary decision that is effectively insulated from substantive judicial review. See Section II, pp. 17-35, infra.

Furthermore, the constitutional deficiency of Massachusetts' mandatory juvenile-sentencing regime is underscored by a growing trend, both domestically and abroad, toward individualized sentencing for juveniles

who face harsh penalties. See Section III, pp. 35-41, infra.

Finally, Massachusetts' mandatory juvenile-sentencing regime at the very least violates article 26 of the Massachusetts Declaration of Rights, which offers greater protection than the Eighth Amendment to the U.S. Constitution, as it is most certainly cruel or unusual, if not both. See Section IV, pp. 41-45, infra.

ARGUMENT

I. Imposing A Mandatory Life Sentence On A Juvenile Offender Violates the Eighth Amendment, Irrespective Of The Possibility Of Discretionary Parole.

Mr. Lugo's mandatory life sentence is inconsistent with the Supreme Court's determination in Miller that the State cannot impose its harshest penalties on children without affording the sentencer the opportunity to conduct an individualized sentencing analysis.

A. Juveniles Are Constitutionally Different From Adults For Purposes Of Sentencing.

The Supreme Court has repeatedly recognized that "children are constitutionally different from adults for purposes of sentencing." Miller, 570 U.S. at 471; accord Graham v. Florida, 560 U.S. 48, 68 (2010);

Roper v. Simmons, 543 U.S. 551, 569-570, 572-573 (2005). This Court has "fully accepted" this "critical tenet of Miller." See Okoro, 471 Mass. at 57 (citing Diatchenko I, 466 Mass. at 669-671).

As "any parent knows," and "developments in psychology and brain science continue to show," there are "fundamental differences between juvenile and adult minds." Miller, 570 U.S. at 471 (quoting Roper and Graham). Children have a "proclivity for risk, and [an] inability to assess consequences" due to a "lack of maturity and an underdeveloped sense of responsibility." Miller, 570 U.S. at 471-472 (quoting Roper, 543 U.S. at 569); see also Thompson v. Oklahoma, 487 U.S. 815, 837-838 (1988) ("The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."). Children are also far more vulnerable to "negative influences and outside pressures, including from their family and peers"; they have a limited ability to control "their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." Miller, 570 U.S. at 471 (quotation mark omitted).

Accordingly, a child's immaturity is "transient," id. at 479; his "character is not as 'well formed' as an adult's" and "his traits are 'less fixed.'" Id. at 471 (quoting Roper, 543 U.S. at 570).

Because of these differences, "a sentencing rule permissible for adults may not be so for children." Miller, 570 U.S. at 481. Children cannot be subjected to the harshest sentences in the same way that adults can, because children are inherently less culpable than adults. See id. at 465 (sentencing cases "have specially focused on juvenile offenders, because of their lesser culpability"); Graham, 560 U.S. at 92 (Roberts, J., concurring) ("[H]is lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing noted by the majority, all suggest that he was markedly less culpable than a typical adult who commits the same offenses." (citation omitted)).[2] Similarly, as amici have found through their own work with communities and families affected by violence, individuals who were

[2] The Supreme Court's acknowledgment in Miller that "children are different" is not unique to sentencing; it reflects a broader understanding that "children cannot be viewed simply as miniature adults" and our justice system must account for that reality. J.D.B. v. N. Carolina, 564 U.S. 261, 274 (2011); see id. at 272-277 (providing examples).

incarcerated as children may have different re-entry needs upon release to ensure a successful and supported reintegration into society than individuals who were incarcerated as adults. What amici's work has demonstrated is that an individualized approach is necessary, particularly with respect to children who are part of the criminal justice system.

The Supreme Court has applied these principles in the sentencing context for decades. In Eddings v. Oklahoma, 455 U.S. 104, 115 (1982), and Johnson v. Texas, 509 U.S. 350, 367 (1993), the Court held that in a capital case, the sentencer must be permitted to consider the mitigating qualities of youth. A few years after Eddings, a plurality held that the Constitution prohibits the execution of a person younger than 16 at the time of the offense, Thompson, 487 U.S. at 838, and in Roper, the Court held that "[t]he logic of Thompson extends to those who are under 18," 543 U.S. at 574. In Graham, the Court extended this principle to the non-capital context, holding that the Eighth Amendment prohibits children who commit non-homicide crimes from being sentenced to life without parole. 560 U.S. at 69-74.

B. Massachusetts' Juvenile-Sentencing Regime Mandates That All Children Convicted Of Certain Crimes Receive A Life Sentence.

Relying on its reasoning in Roper and Graham, the Supreme Court recognized in Miller that even where the Eighth Amendment does not categorically forbid the State from imposing a certain sentence on any child (as in Roper and Graham), it may still limit the State from automatically imposing "the most severe punishments," Graham at 471, on every child convicted of a particular offense. Thus, in Miller, the Court held that a child who "confronts a sentence of life (and death) in prison" must receive an individualized sentencing determination that permits the sentencer to consider the child's age and the "wealth of characteristics and circumstances attendant to it," such as whether the child was from a stable or chaotic household, was a shooter or an accomplice, or was affected by peer or familial pressure. Id. at 476-477. Unless the sentencer has the ability and opportunity to "examine all of these circumstances" to determine whether the harshest penalty available is appropriate for the defendant, there is simply "too great a risk of disproportionate punishment." Id. at 479.

The Supreme Court further clarified in Montgomery v. Alabama, 136 S. Ct. 718, 734 (2016) that Miller did not simply prescribe procedural protections for children but rather "announced a substantive rule of constitutional law" and must be applied retroactively. Montgomery also made clear that penological justifications almost never justify an individual spending his life in prison for a crime he committed as a child. See id. at 726 ("[A] lifetime in prison is a disproportionate sentence for all but the rarest of children...").

At sentencing, a juvenile convicted of second degree murder in Massachusetts will necessarily "confront a sentence of life (and death) in prison," Miller, 570 U.S. at 477. Yet the sentencing judge cannot consider the defendant's age or criminal history, the level of the defendant's participation in the crime, the adversity that characterized the defendant's childhood, the probable effects of peer and/or familial pressure from others who may have participated in the crime, whether the defendant's age made it difficult for him to extricate himself from a crime-producing situation, or any other circumstances that could have shed light on whether a life sentence

was appropriate. This means that every juvenile convicted of second-degree murder in Massachusetts will receive the same mandatory sentence of life with the possibility of discretionary parole after 15 years, regardless of any potentially mitigating circumstances. See Okoro, 471 Mass. at 61-62; G.L. c. 265 § 2; G.L. c. 279 § 24; G.L. c. 119 § 72B. As the Supreme Court noted in Miller, this scheme "misses too much":

> [E]very juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile...will receive the same sentence as the vast majority of adults committing similar homicide offenses...

570 U.S. at 477.

In this case, Mr. Lugo's sentence was entered without any judicial discretion or individualized consideration. Red Brief at 15-16. At no time was Mr. Lugo's youth ever taken into account—not when he was transferred to stand trial as an adult, and not when he was sentenced. Id. Following his conviction, Mr. Lugo moved for a continuance prior to sentencing in order to present mitigation evidence, including testimony from an expert in juvenile psychology. Id.

But this motion was denied because the sentencing court had no discretion to consider such evidence. Id. The judge who denied Mr. Lugo's subsequent motion for resentencing similarly held that under Okoro, Mr. Lugo was not "in a position to argue that he must receive an individualized sentencing." Id.

In short, the only relevant consideration in determining Mr. Lugo's sentence was that he was a juvenile convicted of second-degree murder. None of the individualized considerations that animated Miller's holding mattered: not his age, not his mental and emotional development, not his family and home environment, and not the particular circumstances of his offense. Cf. Miller, 570 U.S. at 478. Massachusetts' mandatory sentencing scheme for second-degree murder is thus incompatible with Miller because it "mak[es] youth (and all that accompanies it) irrelevant" to the imposition of the Commonwealth's harshest sentences and thus "poses too great a risk of disproportionate punishment." Id. at 479.

II. The Future Possibility Of Parole Does Not Ameliorate The Constitutional Defects Of A Mandatory Life Sentence.

This Court has previously held that for juveniles convicted of second-degree murder, a sentence of life

with the possibility of parole after 15 years provides all the protection that the Eighth Amendment requires. See Okoro, 471 Mass. at 58, 62. In Okoro, this Court narrowly read Miller's individual sentencing requirement to apply only to "instances where a State seeks to impose life in prison without parole eligibility on a juvenile." Id. at 58-59 (emphasis in original). But this interpretation is undercut by the realities of the Massachusetts parole system, which is inherently incapable of providing an adequate Eighth Amendment safeguard against disproportionate juvenile sentencing.

The Supreme Court has repeatedly rejected States' attempts to restrictively read its precedents that afford additional protections for juvenile offenders. Indeed, Miller itself recognized that the principle that "children are constitutionally different from adults for sentencing purposes" was not unique to the specific crimes or sentences at issue in Graham or Roper; instead, those cases more broadly established that "they are less deserving of the most severe punishments." 570 U.S. at 471; see id. at 474 (defining "Graham's (and also Roper's) foundational principle" as "imposition of a State's most severe

penalties on juvenile offenders cannot proceed as though they were not children.").

It can hardly be disputed that a life sentence, even with the potential for future discretionary parole, is a severe punishment. A 17-year-old child—who has been able to read and write for only a decade, has never lived on his own, and is not legally permitted to drink or vote or join the military—confronting such a sentence may never see his family or friends outside of prison, go on a date, have children, enjoy a celebratory dinner, or travel to another city absent a prison transfer. Indeed, the presumption is that none of these things will ever happen unless the executive branch makes the entirely discretionary decision to release him early.

Indeed, in Massachusetts, as elsewhere, a life sentence with parole eligibility is the most severe punishment imposed on any juvenile, and the most severe punishment imposed on any person convicted of second-degree homicide. Imposing the same sentence on all such individuals, irrespective of their age and age-attendant characteristics, the nature of the crime, or their participation therein cannot be squared with Miller's central principle that "children

are constitutionally different for sentencing purposes" when that sentence could confine the child in prison forever. By making youth and its attendant circumstances irrelevant to the imposition of a severe sentence, a mandatory sentencing scheme "poses too great a risk of disproportionate punishment." Miller, 570 U.S. at 479. For at least the four reasons discussed below, parole does not and cannot ameliorate this risk.

A. Parole Boards Are Highly Susceptible To Political Pressures.

Unlike judges, who are neutral decisionmakers bound to safeguard the constitutional rights of juveniles who come before them, parole boards are highly susceptible to political pressure. The Massachusetts Parole Board is, like most boards, part of the executive branch—the branch responsible for prosecuting defendants and pursuing lengthy prison sentences. See Diatchenko II, 471 Mass. 12, 35 (2015) ("Parole is an executive action separate and distinct from a judicial sentence."); id. at 28 ("[T]he power to grant parole, being fundamentally related to the execution of a prisoner's sentence, lies exclusively within the province of the executive branch.").

Parole board members are appointed by the Governor, 120 C.M.R. 101.01, and external political dynamics can play a major role in determining who (if anyone) is released on parole. Indeed, the American Law Institute ("ALI") recently observed when revising the Model Penal Code, "The American history of parole boards as releasing authorities has been bleak...and in recent years parole boards have proven highly susceptible to political influences," where "a telephone call from the governor can materially change release practices." ALI, Model Penal Code: Sentencing, Discussion Draft No. 2, at 90 (Apr. 8, 2009)[3] ("ALI 2009"); see also ALI, Model Penal Code: Sentencing, Discussion Draft No. 3, at 4 (Mar. 29, 2010)[4] ("ALI 2010") ("There are many instances in which the parole-release policy of a jurisdiction has changed overnight in response to a single high-profile crime.").

Massachusetts is not immune from this issue. In 2011, after a parolee killed a policeman, Governor Deval Patrick faced "intense pressure from police chiefs, rank-and-file officers, and lawmakers to take

[3] Attached in Addendum (ADD 43).

[4] Attached in Addendum (ADD 50).

action against the Parole Board"; he responded by demanding resignations from every board member who voted for release and appointing a new board. Jonathan Saltzman, Patrick overhauls parole, Boston Globe, Jan. 14, 2011.[5] Thereafter, overall parole rates in Massachusetts plummeted—from 78% in 2009 to just 26% under the new board. See Patricia Garin, et al., White Paper: The Current State of Parole in Massachusetts, 2-3 (Feb. 2013)("Garin").[6] The parole grant rate for inmates serving life sentences was even lower at 18.5%, with only two individuals actually released in the 18 months after the new parole board was installed. Id. at 4-5. Furthermore, the average wait time for a decision after a parole hearing increased from 30-60 days to 262 days. Id. at 6.

The capriciousness of the parole process is not unique to Massachusetts. "What in the middle decades of the 20th century was a meaningful process in which parole boards seriously considered individual claims of rehabilitation has become in most cases a

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[5] Available at http://archive.boston.com/news/politics/articles/2011/01/14/five_out_as_governor_overhauls_parole_board/.

[6] Available at https://www.cjpc.org/uploads/1/0/4/9/104972649/white-paper-addendum-2.25.13.pdf.

meaningless ritual in which the form is preserved but parole is rarely granted." Sharon Dolovich, Creating the Permanent Prisoner, in Life Without Parole: America's New Death Penalty? 96, 110-11 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012). In Ohio, for example, the parole grant rate was 6.9% in 2011; in Florida, the grant rate was 3.5% in 2011-2012. Sarah French Russell, Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment, 89 Ind. L.J. 373, 397 (2014).

In Maryland, juveniles serving life sentences were regularly paroled in the 1990s, but not one has received a positive parole decision in the past two decades. Alison Knezevich, Maryland Parole Commission to Hold Hearings for Hundreds of Juvenile Lifers, Washington Post, Oct. 15, 2016.[7] In California, "[t]he grant rate has fluctuated over the last 30 years—nearing zero percent at times and never rising above 20 percent." Robert Weisberg, et al., Stanford Criminal Justice Center, Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California (Sept.

[7] Available at http://wapo.st/2e7uEoh.

2011) ("Weisberg") at 4.[8] See also id. at 12-15 (charts showing variations in parole statistics over time).

A juvenile's right to a constitutionally proportionate sentence should not be subject to institutions that shift with the political winds. But that is exactly the nature of parole boards. Indeed, the ALI recently deemed parole boards "failed institutions" and observed that "no one has come forward with an example in contemporary practice, or from any historical era, of a parole-release agency that has performed its function reasonably well." ALI 2010, at 4. The possibility of future discretionary parole simply cannot serve as an Eighth Amendment backstop.

B. Parole Board Rulings Are Not An Effective Substitute For Judicial Sentencing.

A parole board's decisionmaking process bears little resemblance to that of a judge imposing a constitutionally sound sentence. "Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to

[8] Available at http://stanford.io/2dZtCuM.

take account of the human existence of the offender and the just demands of a wronged society." Graham, 560 U.S. at 77. But the Massachusetts Parole Board does not exercise nearly the same "diligence and professionalism" during parole hearings. See Garin at 11-12 (discussing the negative and confrontational attitude of parole board members, including such statements as, "[Y]ou don't have a snowball's chance in hell of getting a parole board to let you walk out that door"); cf. Beth Schwartzapfel, How parole boards keep prisoners in the dark and behind bars, Washington Post, July 11, 2015 (average parole board makes 35 decisions per day and some members spend "two to three minutes" per decision).[9]

Furthermore, a sentencing judge and the Massachusetts Parole Board apply markedly different criteria in determining the release date of a juvenile offender. A sentencing judge is charged with entering a just and constitutional punishment "by applying generally accepted criteria to analyze the harm caused or threatened to the victim or society, and the culpability of the offender." Graham, 560 U.S. at 96

[9] Available at https://www.washingtonpost.com/national/the-power-and-politics-of-parole boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8eaa61_story.html.

(Roberts, C.J., concurring) (quotation marks omitted). Conversely, the Parole Board does not consider culpability or other issues of proportionality, and instead evaluates whether "there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." 120 C.M.R. 300.04.

A key consequence of these differences for juvenile offenders is that the Parole Board's inquiry necessarily accounts for events occurring after the initial sentence was entered. While the Board is required to consider how the "distinctive attributes of youth" impacted the underlying crime, it has substantial discretion to consider other information, including the defendant's conduct while incarcerated, in making its final decision. Diatchenko II, 471 Mass. at 30. This means that even if the Parole Board determines that the defendant's age may have mandated a lesser sentence at the outset, it may still deny parole based on other circumstances that are unrelated to the "distinctive attributes of youth" and were not present at the time of sentencing. Accordingly, a Parole Board hearing cannot be a sufficient safeguard

against disproportionate juvenile sentences. See Graham, 560 U.S. at 73 ("Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset.").

All of these considerations counsel that, in order to pass constitutional muster, the Miller factors must be considered at the time of sentencing. A parole hearing a minimum of fifteen years after the fact is simply not a substitute for that constitutional right.

C. Limited Judicial Review of Parole Decisions Does Not Remedy Disproportionate Sentencing.

In Diatchenko II, this Court instituted a very cabined role for judicial review of parole decisions involving juveniles serving life sentences. 471 Mass. at 30-31. Denials of parole may be appealed and subsequently reviewed for abuse of discretion, which will be found "only if the board essentially failed to take [the distinctive attributes of youth] into account, or did so in a cursory way." Id. There is no opportunity for substantive review of the Board's ultimate decision. Furthermore, a reviewing court has

no power to reverse the Board's decision, and instead may only issue "a remand to the board for rehearing." Id. This review process, despite its laudable intentions, provides far too much deference to the Parole Board and therefore has not advanced the principles established in Miller.

Since Diatchenko II, denials of parole to Massachusetts juveniles serving life sentences have failed to live-up to the standards elucidated in that decision. These decisions are typically comprised of three sections: a recitation of the facts, a summary of the parole hearing, and an explanation of the Board's decision to deny parole in light of the applicable legal standards. See, e.g., In The Matter of Ken Yatti Jordan, W-66096 (January 28, 2016).[10] While the first two of these sections are carefully tailored to each defendant, the pivotal "Decision" section is decidedly not. Id. at 3-4.

Here, the Board's decision to deny parole consists almost exclusively of pro forma text that dutifully recites the Diatchenko II standard but then fails to provide any substantive analysis of the relevant factors as applied to the parole applicant.

[10] Attached to Addendum (ADD 1-4).

See, e.g., id.; In The Matter of Christopher Berry, W-51267 (February 11, 2016) at 2-3; In The Matter of Keyon Sprinkle, W-80055 (February 11, 2016) at 3-4; In The Matter of Viseth Sao, W-82005 (March 8, 2016) at 3-4; In The Matter of Val Mayfield, W-40860 (May 16, 2016) at 3-4; In The Matter of Albert Johnson, W-80324 (August 24, 2016) at 4.[11] These parole denials all contain near-identical language in their respective "Decision" sections despite having very different fact patterns. Id. Furthermore, these pro forma decisions provide little guidance to incarcerated individuals interested in obtaining parole release in the future about how they might modify their behavior or activities in prison, or whether parole is even a realistic future possibility. Id.

Practices like these are plainly in conflict with Diatchenko II, which requires the Board to apply the Miller factors in each case "as they relate to the particular circumstances of the juvenile homicide offender seeking parole" and forbids conducting this analysis in a "cursory way." 471 Mass. at 31. But under the current judicial review construct, the only

[11] Full copies of each decision are attached to the Addendum (ADD 1-23).

motivation for the Board has to comply is the threat of a remand in which its discretion is never really placed at risk. Id. Put simply, as long as the Parole Board has checked the correct boxes by listing the factors it is required to consider, its decision is functionally immune from challenge.

This situation is particularly concerning because a juvenile offender serving a life sentence has no right to early release and presumptively will be imprisoned for the rest of his life. See Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979). This court recently recognized as much, noting that "there is no constitutionally protected expectation that a juvenile homicide offender will be released to the community after serving a statutorily prescribed portion of his sentence." Deal v. Comm'r of Corr., 475 Mass. 307, 309 (2016); accord Diatchenko II, 471 Mass. at 18-19 (juvenile has no "expectation of release through parole").

A highly discretionary Parole Board parole decision, through which a juvenile offender has "no expectation of release," cannot possibly serve the Eighth Amendment safeguard function that is necessary to ameliorate the risk of disproportionate sentencing

identified in Miller. That is not what parole was designed to do, and juvenile offenders should not be expected to rely on parole boards for this purpose. Just as it would be unthinkable to suggest that a prosecutor's discretion to seek a particular sentence would be an adequate Eighth Amendment substitute for a judge's considered determination, discretionary parole by a board that is also part of the Executive Branch simply involves "too great a risk" that juvenile offenders will serve disproportionate sentences. See Miller, 570 U.S. at 479.

Furthermore, the fundamental structural and functional deficiencies described above persist despite this Court's efforts in Diatchenko I and Diatchenko II. Amici understand perhaps better than anyone, through their work with individuals imprisoned for crimes committed as children and their work with victims of violence and homicide, just how "bleak" the parole system is, as the American Law Institute has recognized. ALI 2009, at 90. In addition to the structural and functional deficiencies discussed above, the parole and probation systems also fail to view offenders as individuals; fail to provide them with adequate support upon release; fail to ensure

collaboration between them, their families, their communities, and the judges and prosecutors involved in their case. This lack of support often leaves individuals released on probation or parole vulnerable to being victimized by violence or homicide themselves, which is why amici have advocated for re-entry services that include violence prevention and that engage the family and community in the parole and probation process in an individualized way.

This Court cannot rectify all of these deficiencies in this case, but it can take an important first step by concluding that children cannot be sent to prison for life without an individualized sentencing. The opportunity for discretionary parole simply cannot serve as an adequate Eighth Amendment safeguard given the realities of the parole system in practice.

D. Release On Parole Is Not The Same As Completion Of A Sentence.

Finally, yet critically important, parole is not an adequate substitute for an individualized sentencing hearing because the Parole Board cannot commute a sentence. Parole is merely a means by which the defendant can serve the remainder of his sentence

outside of prison, subject to various, life-restraining conditions and under the threat of revocation and a return to incarceration. See G.L. c. 127 §§ 130, 133, 133A.

Accordingly, there is a tremendous difference between a fifteen-year sentence and a life sentence in which parole is granted after fifteen years because the liberty interest of a juvenile offender remains impaired for the duration of his natural life. The parolee may be prevented from traveling, from taking certain jobs, or from participating in certain community activities. Though the Parole Board technically has the power to terminate parole (and, thus, end the sentence), there is no guarantee it will do so, and its decision is subject to even less guidance than the decision to grant parole in the first place. See G.L. c. 127 § 130A (majority of the board may terminate parole, subject only to vague requirement that the decision is in the "public interest").[12] Parole, therefore, is not a meaningful opportunity for release from the sentence and is not

[12] This standard is substantially more vague than that used to grant parole in the first place. See p. 26, supra.

sufficient to provide the constitutional protections mandated by Miller.

Arguments to the contrary, including this Court's decision in Diatchenko II, have misinterpreted the Supreme Court's reference in Miller to the "meaningful opportunity to obtain release" language in Graham, 560 U.S. at 75. As other courts have pointed out, the reference in Miller to the "meaningful opportunity" language was merely a "cf." cite, not meant to indicate a clear, all-encompassing solution to the constitutional issue. See People v. Gutierrez, 58 Cal. 4th 1354, 1386 (2014) (citing Miller, 570 U.S. at 479); People v. Hernandez, 232 Cal. App. 4th 278, 288 (2014) (same). What is more, this "cf." citation to Graham "occurred in the context of prohibiting 'imposition of that harshest prison sentence [life without parole]' on juveniles under a mandatory [sentencing] scheme," Gutierrez, 58 Cal. 4th at 1386, thus serving just to highlight that when a juvenile defendant is mandatorily sentenced to life without parole, there is no opportunity for release under any circumstances.

Miller does not stand for the proposition that a state can avoid a constitutional issue just by

providing a "meaningful opportunity to obtain release" at some point. Rather, individualized sentencing, comporting with the Eighth Amendment, is required in the first instance. See Hernandez, 232 Cal. App. 4th at 288-89. Accordingly, the limited judicial review of parole board decisions contemplated in Diatchenko II cannot remedy the constitutional deficiency in Mr. Lugo's sentence.

III. The Growing Trend Toward Individualized Sentencing For Juveniles Underscores The Unconstitutionality Of Mr. Lugo's Sentence.

In Okoro, this Court cited the "evolving" and "unsettled" law of juvenile sentencing as a reason to postpone reexamination of its initial interpretation of Miller in Diatchenko I. 471 Mass. at 61. Since then, there has been a growing trend toward individualized sentencing for juveniles who face harsh penalties. These developments, described below, illustrate the constitutional risks posed by Massachusetts' mandatory-sentencing scheme and strongly indicate that the time is ripe for this Court to reconsider its prior holding.

Other States have shed statutes with mandatory life sentences for children and replaced them with discretion for the sentencing judge. In New Mexico, a

judge must be given discretion to sentence children convicted of first- and second-degree murder to a term-of-years sentence or a life sentence. N.M. Stat. Ann. § 31-18-13 (enacted 2011). In Montana, Washington, and Iowa, many mandatory minimums and mandatory life sentences no longer apply to children. See Wash. Rev. Code Ann. § 9.94A.540 (enacted 2014); Mont. Code Ann. §46-18-222 (enacted 2013); State v. Lyle, 854 N.W.2d 378 (Ia. 2014). In South Dakota, no child may receive a life sentence. S.D.C.L. § 22-6-1.3 (enacted 2016).

State Supreme Courts in Washington and Florida have similarly relied on Miller to require individual sentencing for juveniles convicted of serious crimes. In Atwell v. State, 197 So. 3d 1040, 1041 (Fla. 2016), the Florida Supreme Court vacated a mandatory sentence of life imprisonment with the possibility of parole after 25 years imposed on a juvenile because the State's juvenile-sentencing regime did "not provide for individualized consideration of Atwell's juvenile status at the time of the murder, as required by Miller." And more recently, in State v. Houston-Sconiers, 188 Wash. 2d 1, 9 (2017), the Washington Supreme Court held that that the Eighth Amendment

requires sentencing courts to have "absolute discretion" to depart below mandatory minimum when sentencing individuals convicted of committing serious crimes as children. Finally, the recent revisions to the Model Penal Code likewise embrace judicial discretion for juvenile sentences, providing that "[t]he court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law." ALI, Model Penal Code § 6.11A(f) (Proposed Final Draft, April 10, 2017).[13] As the drafters of the revisions noted, "An unusual degree of flexibility, and power to individualize sentences, ought to be part of adult penalty proceedings under the age of 18. No provision in law stands farther removed from this principle than a mandatory minimum penalty." Id., comment on § 6.11A(f).[14]

Several other States that still permit mandatory life sentences for children at least permit a neutral judge, rather than an arm of the executive branch, to determine whether early release is appropriate. See, e.g., Del. Code Ann. Tit. 11, § 4209 (enacted 2013);

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[13] Attached in Addendum (ADD 26).

[14] Attached in Addendum (ADD 33).

Fla. Stat. Ann. § 921.1402 (enacted 2014). And while numerous States have increased judicial discretion over juvenile sentences, no States are countering with an increased use of mandatory minimums for children.

These courts and state legislative enactments recognize what amici know to be true: that children in this country deserve special solicitude, even children who have committed serious crimes. A one-size-fits-all approach to sentencing children is inconsistent with this foundational principle and deeply harmful to a properly functioning juvenile justice system.

The laws and treaties of other nations similarly demonstrate a trend in favor of individualized sentencing for children. The United Nations Convention on the Rights of the Child (Nov. 20, 1989) ("CRC")[15], which the Supreme Court looked to in Roper, states in Article 37(b) that the "imprisonment of a child... shall be used only as a measure of last resort and for the shortest appropriate period of time." It mandates that a "variety of dispositions ...be available to ensure that children are dealt with in a manner appropriate to their well-being and

[15] Available at https://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

proportionate both to their circumstances and the offence." CRC Art. 40(4). A mandatory life sentence, even with a possibility of parole, is incompatible with the CRC's standard.

The sentencing laws of most countries afford much greater protection to children than the mandatory life-sentencing regime under which Mr. Lugo was sentenced. Many nations provide judges with discretion over juvenile offenders' sentences. See, e.g., Ley Orgánica Para La Protección Del Niño y Del Adolescente, 1998, arts. 2, 528, 532, 551, 620 (Venezuelan judges retain wide discretion in sentencing children)[16]; CRC/C/8/Add.44, 27 February 2002, par. 1372 (Israeli minimum-sentencing legislation inapplicable to juveniles)[17]. Many other countries limit the maximum sentence that can be imposed on children to a term much shorter than life imprisonment. See, e.g., Juvenile Act of Japan, Act No. 168 of 1948, Ch. III, Sec. 3, Art. 51(2) (15-year

[16] Available at https://www.unicef.org/venezuela/spanish/LOPNA(1).pdf.

[17] Available at https://unispal.un.org/DPA/DPR/unispal.nsf/0/CF2615A74F16B41D85256C47004A10BC.

maximum)[18]; Youth Courts Law (Germany), Sec. 18 (10-year maximum)[19].

Indeed, as several comprehensive analyses of juvenile sentencing laws demonstrate, Massachusetts' lengthy and mandatory juvenile-sentencing regime is increasingly out of step with the rest of the world. See, e.g., Human Rights Advocates, Extreme Criminal Sentencing for Juveniles: Violations of International Standards at 5 (Feb. 2014) (of 164 countries surveyed, 127 sentence children to determinate, rather than life, sentences, and 92 have determinate sentences that are 25 years or less)[20]; Connie de la Vega, et al., Univ. of S.F. Sch. of Law, Cruel and Unusual: U.S. Sentencing Practices in a Global Context 47-59, Appendix (May 2012)[21]; Michele Deitch, et al., LBJ Sch. of Pub. Affairs, Univ. of Tex. at Austin, From Time

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[18] Translation attached in Addendum (ADD 54).

[19] Available at https://germanlawarchive.iuscomp.org/?p=756#18.

[20] Available at http://www.humanrightsadvocates.org/wp-content/uploads/2014/03/HRC-25-EXTREME-CRIMINAL-SENTENCING-FOR-JUVENILES.pdf.

[21] Available at http://www.cpcjalliance.org/wp-content/uploads/2013/04/Cruel-And-Unusual.pdf.

Out to Hard Time: Young Children in the Adult Criminal Justice System 73-75, Appendix A (2009)[22].

The clear trend in juvenile sentencing, both here and abroad, is increasingly to provide sufficient judicial discretion in juvenile sentencing such that the particular circumstances of each case may be considered. Massachusetts' failure to recognize the growing international consensus towards individualized sentencing further underscores the cruel and unusual nature of Mr. Lugo's life sentence.

IV. Imposing A Mandatory Life Sentence On A Juvenile Offender Violates Article 26's Prohibition Against Cruel Or Unusual Punishment.

Mr. Lugo's mandatory life sentence is also unconstitutional under article 26 of the Massachusetts Declaration of Rights. This Court noted several times in Okoro that the defendant in that case failed to argue that his mandatory life sentence ran afoul of article 26, as opposed to the Eighth Amendment. 471 Mass. at 56 n.6; 58 n.8. Thus, this case offers the Court the opportunity to consider and decide the

[22] Available at http://lbj.utexas.edu/archive/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf.

proprietary of Massachusetts' mandatory juvenile-sentencing regime under article 26 for the first time.

Article 26 "stands on its own footing" and may be interpreted more broadly than the Eighth Amendment. See Watson, 381 Mass. at 676-77 (Liacos, J., concurring); see also Att'y Gen. v. Colleton, 387 Mass. 790, 795-96 (1982) ("when interpreting the Massachusetts Constitution, we are not bound by Federal decisions which are less restrictive in some aspects than our Declaration of Rights . . . [and] we have exercised our prerogative to interpret our Constitution more broadly."); Commonwealth v. Colon-Cruz, 393 Mass. 150, 159 n.11 (1984) ("[A] statute may be ruled unconstitutional under art. 26 although it might not be construed as unconstitutional under the Eighth Amendment to the United States constitution."); Robert J. Cordy, Criminal Procedure and the Massachusetts Constitution, 45 New. Eng. L. Rev. 815, 817-33 (Summer 2011) (describing instances in which the Supreme Judicial Court has found that the Declaration of Rights provides more substantive protections to criminal defendants than the United States Constitution).

Whereas the Eighth Amendment prohibits "cruel and unusual punishment," article 26 proscribes the use of "cruel or unusual punishment" (emphasis added in both). Such a textual difference cannot be ignored. See, e.g., Commonwealth v. Mavredakis, 430 Mass. 848, 859 (2000) ("'[a]ll [the] words [of the Constitution] must be presumed to have been chosen advisedly'") (citation omitted). Basic principles of English grammar require that the word "and," which is conjunctive, be read as more limiting than the disjunctive word "or." See, e.g., Bleich v. Maimonides Sch., 447 Mass. 38, 46-47 (2006) ("It is fundamental to statutory construction that the word 'or' is disjunctive unless the context and the main purpose of all of words demand otherwise.") (quotations and citations omitted).

Furthermore, this Court has held that article 26 "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Michaud v. Sherriff of Essex Cnty., 390 Mass. 523, 533-534 (1983). This means that the definition of what article 26 protects with respect to juvenile sentencing is informed by "developments in the area of juvenile justice in judicial opinions and legislative

actions at the State, Federal, and international levels." Okoro, 471 Mass. at 61. Given the clear trend both domestically and internationally against the imposition of mandatory life sentences on juvenile homicide offenders, see pp. 35-41, supra, there is no question that Mr. Lugo's sentence is at the very least "unusual" under article 26.

Finally, Massachusetts has long been a leader in juvenile justice-affording juveniles "a unique and protected status," one which is "primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders, and geared toward the correction and redemption to society of delinquent children." See Commonwealth v. Walczak, 463 Mass. 807, 814 (2013) (quotations and citations omitted) (Lenk, J., concurring); see also Commonwealth v. A Juvenile (No. 1), 389 Mass. 128, 132 (1983) (interested adult rule); Commonwealth v. Guyton, 405 Mass. 497, 502 (1989) (noting the "traditional policy of affording minors 'a unique and protected status'" and the "special caution" required when "evaluating a juvenile's purported waiver of Miranda rights") (citation omitted); Commonwealth v. Magnus M., 461 Mass. 459, 466-68 (2012) (permitting the imposition of

a continuance without a finding after jury trial although such a disposition would be prohibited in a comparable adult case).

Imposing a mandatory life sentence on a juvenile, even with the possibility for parole, therefore violates both international norms and the long-standing Massachusetts policy of according "a unique and protected status" to juveniles. Because Massachusetts' mandatory sentencing scheme for second-degree murder prevents sentencing courts from taking into account juveniles' unique characteristics, it is at least cruel or unusual, and is certainly both unacceptable and unconstitutional.

CONCLUSION

For the reasons explained above, this Court should vacate Nathan Lugo's life sentence and at a minimum remand for an individualized sentencing hearing during which the sentencing court must consider all relevant mitigating factors, including but not limited to those set forth in Miller.

Dated: October 22, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel states that this brief complies with the applicable rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(e), 16(f), 17, and 20.

Nicholas K. Mitrokostas ETR
Nicholas K. Mitrokostas 10/22/2018

CERTIFICATE OF SERVICE

I, Nicholas K. Mitrokostas, hereby certify that on October 22, 2018, I caused two copies of the foregoing Brief Amici Curiae by the Louis D. Brown Peace Institute and Families for Justice as Healing to be delivered via first-class U.S. Mail, postage prepaid, to each party separately represented as identified below:

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DECISION

IN THE MATTER OF

KEN YATTI JORDAN

W66096

TYPE OF HEARING:	**Initial Hearing**
DATE OF HEARING:	**October 29, 2015**
DATE OF DECISION:	**January 28, 2016**

PARTICIPATING BOARD MEMBERS: Paul M. Treseler, Dr. Charlene Bonner, Sheila Dupre, Tonomey Coleman, Ina Howard-Hogan, Tina Hurley, Lucy Soto-Abbe.

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, the age of the inmate at the time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by unanimous vote that the inmate is not a suitable candidate for parole. Parole is denied with a review scheduled in four years from the date of the hearing.

I. STATEMENT OF THE CASE

On February 8, 1999, in Suffolk Superior Court, Ken Yatti Jordan was convicted of the first degree murder of Joseph Dozier and unlawful possession of a firearm. A sentence of life in prison was imposed on Mr. Jordan for the murder of Mr. Dozier. Mr. Jordan was also sentenced to a concurrent term of not more than 5 years and not less than 4 years in prison, for the conviction of unlawful possession of a firearm. Mr. Jordan was 17 years old at the time of Mr. Dozier's murder. Currently, he is 39 years old.

During February of 1994, Mr. Jordan was living at the Ambrose House, a facility for juvenile delinquents administered by the Department of Youth Services. On the day of Mr. Dozier's death, February 21st, Mr. Jordan signed himself out of the Ambrose house.

Later that evening Mr. Jordan and his co-defendant, Antonio Jones, met Mr. Dozier near the Boston Latin Academy in Roxbury. Just prior to being shot and killed by Mr. Jordan and Mr. Jones, Mr. Dozier yelled "Oh no, man no". Mr. Dozier turned and attempted to flee the scene but collapsed. When police arrived on the scene they discovered Mr. Dozier already deceased. Subsequent investigation indicated Mr. Dozier had been shot eighteen times.

II. PAROLE HEARING ON OCTOBER 29, 2015

Mr. Jordan came before the Parole Board on October 29, 2015 for an initial hearing. Mr. Jordan gave an opening statement to the Board, in which he apologized for his actions. Mr. Jordan was represented by Attorneys Harris Krinsky and Scott M. Hulgan during his appearance before the Board.

During the course of the hearing, he spoke about the night of the murder. According to Mr. Jordan, he had spent the afternoon preceding the homicide with Mr. Jones. At approximately 6:00 PM, Mr. Jordan and Mr. Jones were at Mr. Jones' house listening to music when Mr. Jones received a phone call. After the phone call, Mr. Jones told Mr. Jordan that he needed to go meet Mr. Dozier at the Boston Latin Academy. Before leaving, both he and Mr. Jones armed themselves with pistols. When they arrived at Boston Latin Academy, Mr. Jordan and Mr. Jones stood on a platform between two staircases.

After Mr. Dozier approached, he and Mr. Jones began to argue as Mr. Jordan stood off to the side. The argument escalated when Mr. Jones removed his pistol and fired 2 to 3 rounds into Mr. Dozier's chest. Mr. Jordan then drew his weapon as well, shooting Mr. Dozier multiple times. Mr. Dozier turned and ran as Mr. Jordan and Mr. Jones continued to fire as they chased him down the stairs. Mr. Dozier collapsed on the street, at which point Mr. Jordan fired 2 to 3 more times. Mr. Jones then re-loaded his pistol, stood over Mr. Dozier, and fired until his gun was empty. Mr. Jordan and Mr. Jones then fled the scene. When they returned to Mr. Jones' house they hid their pistols behind a baseboard. At some point Mr. Jones received a second phone call. Both Mr. Jordan and Mr. Jones then socialized with two female acquaintances at Mr. Jones' house. After a few hours Mr. Jordan left and returned to the Ambrose House, where he signed himself back in. Later that night Mr. Jordan confided in a friend regarding what had happened to Mr. Dozier.

When questioned by the Board, Mr. Jordan addressed his behavior prior to and during his incarceration. Mr. Jordan explained to the Board that he had been doused with gasoline earlier in his life and severely burned during an attempted robbery when he was 13 years old. He cited this experience as a turning point in his life and the time when he started to gravitate toward criminal behavior. According to Mr. Jordan, he was involved in multiple robberies and shootings for which he was never prosecuted. He also explained that witnesses would rarely appear to testify against him in court. While serving his sentence, Mr. Jordan has been involved in numerous disciplinary incidents, including an escape attempt.

Mr. Jordan admitted to the Board that he has not taken advantage of many programming opportunities during his incarceration. Mr. Jordan explained his lack of motivation as being the result of his expectation that he would remain in custody for the entirety of his life. Of the programs Mr. Jordan has taken advantage of, he described an educational course in philosophy as being the most beneficial. More recently in 2014 and 2015, Mr. Jordan has engaged in programming designed to address violence reduction and his anger management issues. Mr. Jordan explained that this programming has helped him to learn that he cannot allow other people's attitudes to effect his own, and to think before he acts. According to Mr. Jordan, there are no additional programs available to him at his current correctional facility.

In addition to Mr. Jordan, the Board also received live testimony from numerous witnesses, both in support of and in opposition to Mr. Jordan's petition for parole. The Board considered testimony from members of Mr. Jordan's family, all of whom expressed support for his release. Mr. Jordan's mother described the transition he has gone through since his incarceration began. Mr. Jordan's sister expressed the emotional loss she felt from not having his presence in her life. Mr. Jordan's other sister expressed her willingness to support Mr. Jordan's re-entry back into society. Mr. Jordan's grandfather explained the bond he developed with him during his childhood.

Mr. Jordan also presented testimony from Kimberly Mortimer, a Forensic Mental Health Clinician, who expressed her professional opinion that Mr. Jordan was a good candidate for parole. Ms. Mortimer based her opinion on an evaluation of the static and dynamic risk factors affecting Mr. Jordan's risk of recidivism. According to Ms. Mortimer, Mr. Jordan's activities during his incarceration have reduced the dynamic factors affecting his risk of recidivism and thus improved the probability of his success on parole. Specifically, Ms. Mortimer highlighted Mr. Jordan's pursuit of his education, abstinence from substance abuse, and the positive relationships he has developed during his incarceration as factors that have improved the likelihood of his successful reentry into society. Ms. Mortimer also noted that Mr. Jordan's family support network, his plans to move out of state and obtain employment as a chef and his intent to engage re-entry services as being important to Mr. Jordan's success on parole.

Testimony from members of Mr. Dozier's family and the Suffolk County District Attorney's Office was also taken under consideration. Mr. Dozier's grandmother described the emotional process she experienced in coming to peace with Mr. Dozier's murder. Mr. Dozier's uncle discussed his experiences with Mr. Dozier as a child and described the emotional toll Mr. Dozier's death took on his mother. Assistant District Attorney (ADA) Paul Linn testified on behalf of the Suffolk County District Attorney's Office. ADA Linn highlighted the violent nature of Mr. Dozier's murder and Mr. Jordan's criminal history as the basis for his argument to deny parole.

III. DECISION

The Board is of the opinion that Mr. Jordan has not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. The Board believes a longer period of positive institutional adjustment and programming would be beneficial to Mr. Jordan's rehabilitation.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." *120 C.M.R. 300.04.* In the context of an offender convicted of first or second degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation". *Diatchenko v. District Attorney for the Suffolk District,* 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro,* 471 Mass. 51 (2015). The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own

environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older". *Id.* The Board also recognizes the petitioner's right to be represented by counsel during his appearance before the Board. *Id. at 20-24.*

After applying this standard to the circumstances of Mr. Jordan's case, the Board is of the opinion that Mr. Jordan is not yet rehabilitated and his release is not compatible with the welfare of society. Mr. Jordan, therefore, does not merit parole at this time. Mr. Jordan's next appearance before the Board will take place in four years from the date of the hearing related to this decision. During the interim, the Board encourages Mr. Jordan to continue working towards his full rehabilitation.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing. Pursuant to G.L. c. 127, § 130, I further certify that all voting Board Members have reviewed the applicant's entire criminal record. This signature does not indicate authorship of the decision.

Michael J. Callahan, Executive Director

January 28, 2016
Date

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Michael J. Callahan
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DECISION

IN THE MATTER OF

CHRISTOPHER BERRY
W51267

TYPE OF HEARING: **Initial Hearing**

DATE OF HEARING: **November 19, 2015**

DATE OF DECISION: **February 11, 2016**

PARTICIPATING BOARD MEMBERS: Paul M. Treseler, Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Ina Howard-Hogan, Tina Hurley, Lucy Soto-Abbe

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, age of the inmate at time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by unanimous vote that the inmate is not a suitable candidate for parole. Parole is denied with a review in five years from the date of the hearing.

I. STATEMENT OF THE CASE

On October 4, 1991, in Essex Superior Court, Christopher Berry was convicted of the first degree murder of Virginia Woodward, as well as burglary with assault. Subsequently, he was sentenced to concurrent terms of life in prison. Mr. Berry was 16-years-old at the time of Ms. Woodward's murder.

In December 1987, Mr. Berry was living with his father and sister in Saugus. On December 26, the evening of Ms. Woodward's death, Mr. Berry hosted a small party at his home. At the party, Mr. Berry was drinking beer and smoking marijuana, as well as ingesting Xanax and mescaline. The party concluded at approximately 11 p.m., and Mr. Berry left the apartment with his friends. When he returned alone at midnight, Mr. Berry and his father became involved in an argument that escalated into a physical confrontation. Mr. Berry's father physically removed him from the apartment and told him not to come back.

Ms. Woodward's home was located across the street from Mr. Berry's residence. Mr. Berry decided to break into Ms. Woodward's home to steal property and money. After gaining entry by breaking a window at the rear of the house, Mr. Berry went into Ms. Woodward's kitchen and drank vodka. He also ate a piece of pie, ripped a phone off the wall, and smoked multiple cigarettes that he discarded on the kitchen floor. Next, Mr. Berry went to a second floor bedroom, where he found Ms. Woodward lying in bed. With a butcher knife, Mr. Berry stabbed Ms. Woodward eight times in her head, chest, abdomen, upper arms, and hands. Mr. Berry then smoked a cigarette, which he extinguished on Ms. Woodward's forehead.

After gathering some valuable items from Ms. Woodward's home, Mr. Berry secreted what he had stolen to a wooded area across the street from her house. Mr. Berry then returned home, where he continued to argue with his father. Saugus police arrived on the scene and, after some discussion, Mr. Berry agreed to voluntarily spend the night at the police station. At the time, the officers were unaware of Ms. Woodward's death. Officers learned of her death the following day. Mr. Berry was arrested shortly thereafter.

II. PAROLE HEARING ON NOVEMBER 19, 2015

Christopher Berry, now age 44, appeared before the Parole Board on November 19, 2015 for an initial hearing and was represented by Attorneys Melissa Dineen and Courtney Bradley. In Mr. Berry's opening statement, he apologized for his actions. During the course of the hearing, he spoke about the night of the murder. According to Mr. Berry, he broke a window to gain entry into Ms. Woodward's home. At the time, he did not expect anyone else to be in the house. After entering, Mr. Berry went into Ms. Woodward's kitchen and drank vodka. He then entered an upstairs bathroom and stole prescription medication. After exiting the bathroom, Mr. Berry walked through the first door on his left leading to an unlit room. Mr. Berry described this room as being very dark. He told the Board that he was unable to see anything, but could detect movement. Mr. Berry then stabbed someone lying in a bed inside that room. Aside from these scant recollections of Ms. Woodward's murder, Mr. Berry reported to the Board that his memory is very hazy.

Over the course of the hearing, Mr. Berry communicated to the Board that he was not rehabilitated. Mr. Berry referred to his petition for parole as "delusional." He based this assessment on his involvement in an armed assault on two correctional officers in 2009, when he stabbed one of the guards in the face. Mr. Berry has been housed in a Department of Correction Disciplinary Unit since that time. Particularly telling was an exchange between Mr. Berry and the Board in which he expressed his opinion that he needed more time in custody to participate in programming. When asked if he thought he was ready to be released immediately, Mr. Berry responded, "If I could do the programs that I need to do, I think five years, maybe even more." Mr. Berry then requested that he be paroled to an on and after sentence he received for his involvement in the stabbing of a correctional officer in 2009.

III. DECISION

The Board is of the opinion that Christopher Berry has not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. The Board believes that a longer period of positive institutional adjustment and programming would be beneficial to his rehabilitation.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." *120 C.M.R. 300.04.* In the context of an offender convicted of first or second degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation." *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015). The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.* The Board also recognizes the petitioner's right to be represented by counsel during his appearance before the Board. *Id at 20-24.* The Board has also considered whether risk reduction programs could effectively minimize Mr. Berry's risk of recidivism.

After applying this standard to the circumstances of Mr. Berry's case, the Board is of the opinion that he is not yet rehabilitated and his release is not compatible with the welfare of society. Christopher Berry, therefore, does not merit parole at this time. Mr. Berry's next appearance before the Board will take place in five years from the date of the hearing related to this decision. During the interim, the Board encourages Mr. Berry to continue working towards his full rehabilitation.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing. Pursuant to G.L. c. 127, § 130, I further certify that all voting Board Members have reviewed the applicant's entire criminal record. This signature does not indicate authorship of the decision.

Gloriann Moroney, General Counsel

2/11/16
Date

Charles D. Baker
Governor

Karyn Polito
Lieutenant Governor

Daniel Bennett
Secretary

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Paul Treseler
Chairperson

Michael J. Callahan
Executive Director

DECISION

IN THE MATTER OF

KEYON SPRINKLE
W80055

TYPE OF HEARING: **Initial Hearing**

DATE OF HEARING: **November 19, 2015**

DATE OF DECISION: **February 11, 2016**

PARTICIPATING BOARD MEMBERS: Paul M. Treseler, Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Ina Howard-Hogan, Tina Hurley, Lucy Soto-Abbe

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, age of the inmate at the time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by unanimous vote that the inmate is not a suitable candidate for parole. Parole is denied with a review in four years from the date of the hearing.

I. STATEMENT OF THE CASE

On March 27, 2002, in Suffolk Superior Court, Keyon Sprinkle was convicted of the first degree murder of Charles Taylor, as well as unlawful possession of a firearm. Sprinkle was sentenced to life in prison for the murder of Mr. Taylor. Sprinkle was also sentenced to a concurrent term of not more than 5 years, and not less than 3 years, in prison for his conviction of unlawful possession of a firearm. At the time of Mr. Taylor's murder, Sprinkle was 17-years-old.

In November 1999, Keyon Sprinkle was living with his grandmother in the Roxbury neighborhood of Boston. On the afternoon of Mr. Taylor's death, November 16, 1999, Sprinkle was home with his brother and three friends when Mr. Taylor's wife, Orquida Amparo-Taylor, made an unannounced visit. Ms. Taylor had become acquainted with Sprinkle in July or August 1999 through her relationship with Sprinkle's cousin, Clarence Williams. At the time, Ms. Taylor was married to Mr. Taylor. On or about late October 1999, Ms. Taylor moved in with Mr.

Williams at his home, which was located near the corner of Humboldt Avenue and Martin Luther King Boulevard.

On the day of his death, Mr. Taylor had made arrangements to meet Ms. Taylor at the corner of Humboldt Avenue and Martin Luther King Boulevard at 5:00 p.m. The purpose of this meeting was for Mr. Taylor to retrieve some personal belongings from Ms. Taylor. Earlier in the day, the couple had argued at a local hospital where their son was receiving treatment. At approximately 4:30 p.m., on November 16, 1999, Ms. Taylor was driving home when she observed Mr. Taylor waiting for her at the corner of Humboldt Avenue and Martin Luther King Boulevard. Ms. Taylor stopped at the home of Sprinkle, which was located in the area. Ms. Taylor contacted Mr. Williams at his home by telephone. Mr. Williams was able to see Mr. Taylor through his window and relayed his movements to Ms. Taylor. Mr. Williams and Sprinkle then spoke on the phone. After conversing with Mr. Williams, Sprinkle retrieved a dog leash and another item from a closet in his home. Sprinkle placed the second item in the front of his pants and walked outside with his three friends. Sprinkle then returned to his apartment with the same three friends. Ms. Taylor continued to speak on the telephone with Mr. Williams, who said that "if your baby's father gets killed, it's your fault." Mr. Williams and Sprinkle then spoke for a second time. Sprinkle left his home again. He was outside alone for approximately three to five minutes. When he returned to his apartment after his second trip outside, Sprinkle handed something to his brother with instructions that it be placed in his dresser.

As Sprinkle walked toward Humboldt Avenue, he bumped into an acquaintance that was in the area to visit the home of Mr. Williams. When Sprinkle saw his friend, he said that he was going up the street to "see Old Boy," and lifted up his shirt exposing a firearm. The acquaintance then visited Mr. Williams at his home. Mr. Williams told the acquaintance that he just sent Sprinkle up the street. Minutes later, multiple gunshots were heard. The acquaintance left Mr. Williams home when he encountered Sprinkle for a second time. Sprinkle stated that "he got it," as he entered Mr. Williams' home. Investigators later determined that Mr. Taylor died as a result of six gunshot wounds.

II. PAROLE HEARING ON NOVEMBER 19, 2015

Keyon Sprinkle, now age 33, appeared before the Parole Board on November 19, 2015 for an initial hearing. In Sprinkle's opening statement to the Board, he ultimately denied his involvement in Mr. Taylor's death, but offered an apology to Mr. Taylor's family for his "actions and inactions" on the night of his death. During the course of the hearing, he spoke about the day of the murder. According to Sprinkle, he could not recall what he had been doing earlier that day. At the time of Ms. Taylor's arrival, some of Sprinkle's friends were present in his home, where he lived with his grandmother and little brother. Sprinkle was aware of Ms. Taylor's relationship with Mr. Williams, but was surprised to see her at his home, as he had not provided her with the address and she had never been there before. He said that Ms. Taylor told him that she was trying to avoid having contact with Mr. Taylor, who was outside on a nearby street corner.

Sprinkle stated that Mr. Williams spoke with Ms. Taylor and him multiple times on the phone. During their conversation, Mr. Williams told Sprinkle that he was concerned that Mr. Taylor may be in possession of a gun. Sprinkle stated that, at the time, Ms. Taylor did not tell him the true reason for Mr. Taylor's presence. At Mr. Williams' request, Sprinkle went outside

with his friends to watch Mr. Taylor for 5 to 10 minutes. After returning to his home, Sprinkle and Mr. Williams spoke again on the telephone. Sprinkle stated that he then watched television, while Ms. Taylor smoked by the window. Mr. Taylor's friends were still present in the home. Sprinkle said that, a short time later, he and the others were startled by the sound of multiple gun shots coming from outside his apartment. Sprinkle said he learned that Mr. Taylor had been killed a few days later, when Mr. Williams was questioned by police.

When questioned by the Board, Sprinkle addressed his behavior prior to and during his incarceration. According to Sprinkle, he was involved in selling marijuana and, on at least one occasion, crack cocaine, before Mr. Taylor's death. While serving his sentence, Sprinkle has been involved in numerous disciplinary incidents, including fights with other inmates. Sprinkle discussed with the Board statements he made in the past, in which he expressed his desire to participate in violent attacks on correctional staff for the purpose of overthrowing their control of the prison. However, Sprinkle cited his faith and religious experience as one of the reasons why his behavior is different today than it has been in the past. He also discussed the benefits that have come from his recent involvement in programming during his incarceration.

The Board also received testimony from numerous witnesses, both in support of and in opposition to, Sprinkle's petition for parole. The Board considered testimony from members of Mr. Sprinkle's family and others, all of whom expressed support for his release. The Board also noted the presence of friends and/or family who appeared in support of Sprinkle, but who did not testify. Mr. Sprinkle's cousin described the growth that Sprinkle has experienced since his incarceration, including obtaining his certificate of high school equivalency and engaging in other programming beneficial to his rehabilitation. Other supporters echoed these statements, citing Sprinkle's demonstrated maturity and responsibility. Another cousin spoke about the supportive role that Sprinkle played in her childhood. Mr. Sprinkle's wife spoke about the supportive nature of their relationship and expressed her support for his release.

Testimony from members of Mr. Taylor's family and the Suffolk County District Attorney's Office, all of whom expressed opposition to Mr. Sprinkle's petition for parole, was also taken under consideration. The mother of Mr. Taylor's son described the emotional effect that his murder has had on their son. A letter from Mr. Taylor's son was also read to the Board. In addition, Suffolk County Assistant District Attorney Zachary Hillman highlighted the nature and severity of Mr. Taylor's murder, the opposition from Mr. Taylor's family, and Sprinkle's poor disciplinary record as the basis for his argument to deny parole.

III. DECISION

The Board is of the opinion that Keyon Sprinkle has not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. The Board believes that a longer period of positive institutional adjustment and programming would be beneficial to Sprinkle's rehabilitation.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." *120 C.M.R. 300.04.* In the context of an offender convicted of first or second degree

murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation." *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015). The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.* The Board also recognizes the petitioner's right to be represented by counsel during his appearance before the Board. *Id at 20-24.* The Board has also considered whether risk reduction programs could effectively minimize Mr. Sprinkle's risk of recidivism.

After applying this standard to the circumstances of Sprinkle's case, the Board is of the opinion that Keyon Sprinkle is not yet rehabilitated and his release is not compatible with the welfare of society. Mr. Sprinkle, therefore, does not merit parole at this time. His next appearance before the Board will take place in four years from the date of the hearing related to this decision. During the interim, the Board encourages Sprinkle to continue working towards his full rehabilitation.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing. Pursuant to G.L. c. 127, § 130, I further certify that all voting Board Members have reviewed the applicant's entire criminal record. This signature does not indicate authorship of the decision.

Gloriann Moroney, General Counsel

2/11/16
Date

Charles D. Baker
Governor

Karyn Polito
Lieutenant Governor

Daniel Bennett
Secretary

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Paul Treseler
Chairperson

Michael J. Callahan
Executive Director

DECISION

IN THE MATTER OF

VISETH SAO
W82005

TYPE OF HEARING: **Initial Hearing**

DATE OF HEARING: **December 1, 2015**

DATE OF DECISION: **March 8, 2016**

PARTICIPATING BOARD MEMBERS: Paul M. Treseler, Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Ina Howard-Hogan, Tina Hurley, Lucy Soto-Abbe

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, the age of the inmate at the time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by unanimous vote that the inmate is not a suitable candidate for parole. Parole is denied with a review scheduled in four years from the date of the hearing.

I. STATEMENT OF THE CASE

On June 2, 2003, in Suffolk Superior Court, Viseth Sao pled guilty to the second degree murder of Charles Ashton Cline-McMurray. He was sentenced to a term of life in prison with the possibility of parole. At the time of Mr. Cline-McMurray's murder, Mr. Sao was 17-years-old.

In October 2000, Mr. Sao was living in Chelsea. On October 13, the evening of Mr. Cline-McMurray's murder, Mr. Sao met with approximately 10-15 young men at a residence in Revere. All of the men present at the meeting were associated with a known gang (Group 1). The purpose of the meeting was to discuss an ongoing feud between Group 1 and another gang (Group 2). Also present at the meeting were Mr. Sao's co-defendants Savoeun Heng, Loeun Heng, and Savoun Po. Earlier that day, the feud had escalated when Group 1 members were attacked by Group 2 classmates at a local school. In a separate incident, Group 1 and Group 2 members had become embroiled in a verbal confrontation. Both groups agreed to meet for a fight later that evening. Under the leadership of Viseth Sao, it was decided that all

of the young men would arm themselves and proceed to the streets to attack Group 2 members. Mr. Sao armed himself with a large cane knife that he had been seen carrying on prior occasions. Other Group 1 members carried bannister legs, golf clubs, broom handles, and pad locks. At approximately 9:30 p.m., Mr. Sao led Group 1 members to a house in Revere occupied by Group 2 members. Mr. Sao challenged some Group 2 members (who were standing on an outdoor porch) to a street fight. At the time, Mr. Cline-McMurray and 2 other young men were standing further down the street dressed in red clothing, the color associated with Group 2. Mr. Cline-McMurray was 16-years-old and disabled from cerebral palsy.

At some point, the Group 1 members converged on Mr. Cline-McMurray's location, causing the men standing with him to flee the scene. As they did so, one of the men handed Mr. Cline-McMurray a baseball bat. Mr. Cline-McMurray, whose disability prevented him from running away, was quickly surrounded by Group 1 members. Mr. Cline-McMurray dropped the baseball bat to the ground and stated "chill" to the Group 1 members, who then attacked him with clubs and knocked him to the ground. Mr. Sao then stabbed him 4 times with the cane knife he had been carrying. A short time later, Mr. Sao and the Group 1 members were chased off by Mr. Cline-McMurray's friends, who had returned to the scene armed with weapons of their own. Mr. Cline-McMurray was able to stand up and walk a short distance, but soon collapsed. Subsequent investigation revealed that one of the stab wounds entered 6 inches into Mr. Cline-McMurray's body, puncturing his heart and lung. Shortly thereafter, Mr. Cline-McMurray succumbed to his wounds.

On October 15, 2000 Mr. Sao was arrested. In an interview with detectives, Mr. Sao admitted to being a Group 1 member, as well as to stabbing Mr. Cline-McMurray with his cane knife, despite Mr. Cline-McMurray having already been knocked to the ground by other Group 1 members.

II. PAROLE HEARING ON DECEMBER 1, 2015

Mr. Sao, now age 33, appeared before the Parole Board on December 1, 2015 for an initial hearing and was represented by Attorney Rebecca Rose. Presently, a deportation order from the Immigration and Customs Enforcement Agency is lodged against Mr. Sao for his return to Cambodia.

In Mr. Sao's opening statement to the Board, he apologized to Mr. Cline-McMurray's family. During the course of the hearing, Mr. Sao spoke about the night of the murder. According to Mr. Sao, he had smoked marijuana and consumed alcohol earlier that evening. Mr. Sao told the Board that he took on a leadership role when he attended a meeting of approximately 20 other Group 1 members at a house in Revere. Mr. Sao also told the Board that he received the cane knife he used to kill Mr. Cline-McMurray from one of his co-defendants on the night of the stabbing. After the meeting, Mr. Sao led a group of approximately 8 Group 1 members to the house occupied by Group 2 members. Mr. Sao was engaged in a verbal confrontation with a Group 2 member standing on the porch of a house when other Group 1 members ran down the street. Mr. Sao then went down the street to help the other Group 1 members. It was at this time that Mr. Sao murdered Mr. Cline-McMurray. Mr. Sao reported to the Board that he was unaware that the stab wounds he inflicted on Mr. Cline-McMurray were life threatening. A few days later, Mr. Sao was arrested at his mother's home.

Mr. Sao discussed the circumstances of his background and upbringing with the Board. Mr. Sao was born in a refugee camp in Thailand after his family fled the Khmer Rouge in Cambodia. Mr. Sao's family settled in Chelsea when he was 2-years-old, after immigrating to the United States from Thailand. According to Mr. Sao, he experienced problems in school due to language barriers. He also reported being cognizant of racial tensions in his neighborhood. Mr. Sao cited his abusive father as one of the factors that influenced his decision to join Group 1 at age 12.

When questioned by the Board, Mr. Sao addressed his behavior prior to, and during, his incarceration. Mr. Sao admitted to his association with Group 1 and to having carried weapons in the past. While serving his sentence, Mr. Sao has been involved in numerous disciplinary incidents, including fighting with other inmates. Mr. Sao addressed the 29 disciplinary reports he acquired by explaining that he went through a transformation approximately 4 years ago, after he started to engage in programming. The Board notes that despite these assurances, Mr. Sao received multiple disciplinary reports in 2012, 2013, and 2014 for offenses that include fighting with other inmates and possession of contraband, among other violations. During his incarceration, however, Mr. Sao has engaged in a variety of programs that address violence reduction, emotional awareness, and the development of cognitive skills. Mr. Sao also earned his certificate of general equivalency (GED) and completed the Correctional Recovery Academy. By Mr. Sao's own admission, his active participation in programming opportunities has only occurred within the last 4 of the 15 years he has spent in prison. The Board acknowledges the considerable strides Mr. Sao has made toward his rehabilitation over this period of time.

The Board heard testimony from numerous witnesses, including members of Mr. Sao's family, all of whom expressed support for his release and their willingness to assist Mr. Sao during his transition back into society. In addition, Mr. Sao presented testimony from Clinical Nurse Specialist Marguerita Reczycki, who conducted his psychological evaluation.

The Board considered testimony in opposition to Mr. Sao's petition for parole from a representative of the Suffolk County District Attorney's Office.

III. DECISION

The Board is of the opinion that Mr. Sao has not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. The Board believes a longer period of positive institutional adjustment and programming would be beneficial to Mr. Sao's rehabilitation.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." *120 C.M.R. 300.04.* In the context of an offender convicted of first or second degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation." *Diatchenko v. District Attorney for the Suffolk District,* 471 Mass. 12, 30

(2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015). The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.* The Board also recognizes the petitioner's right to be represented by counsel during his appearance before the Board. *Id at 20-24.* The Board has also considered whether risk reduction programs could effectively minimize Mr. Sao's risk of recidivism.

After applying this standard to the circumstances of Mr. Sao's case, the Board is of the opinion that Mr. Sao is not yet rehabilitated and his release is not compatible with the welfare of society. Mr. Sao, therefore, does not merit parole at this time. Mr. Sao's next appearance before the Board will take place in four years from the date of this hearing. During the interim, the Board encourages Mr. Sao to continue working towards his full rehabilitation.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing. Pursuant to G.L. c. 127, § 130, I further certify that all voting Board Members have reviewed the applicant's entire criminal record. This signature does not indicate authorship of the decision.

Gloriann Moroney, General Counsel

3/8/16
Date

Charles D. Baker
Governor

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Lieutenant Governor

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Paul M. Treseler
Chairman

Michael J. Callahan
Executive Director

DECISION

IN THE MATTER OF

VAL MAYFIELD
AKA KHALID A. MAYFIELD
AKA VAL MATEEN
W40860

TYPE OF HEARING: **Initial Hearing**

DATE OF HEARING: **December 17, 2015**

DATE OF DECISION: **May 16, 2016**

PARTICIPATING BOARD MEMBERS: Paul M. Treseler, Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Ina Howard-Hogan, Tina Hurley, Lucy Soto-Abbe

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, the age of the inmate at the time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by unanimous vote that the inmate is not a suitable candidate for parole. Parole is denied with a review scheduled in five years from the date of the hearing.

I. STATEMENT OF THE CASE

On November 3, 1984, in Suffolk Superior Court, Val Mayfield was convicted of the first degree murder of 11-year-old Mary Ann Hanley. Subsequently, he was sentenced to life in prison without the possibility of parole. At the time of Ms. Hanley's death, Mr. Mayfield was 17-years-old. In April 1984, Mr. Mayfield had been tried for the rape and murder of Ms. Hanley. Mr. Mayfield was found not guilty of the rape, but the jury could not reach a verdict on the murder indictment.

On December 24, 2013, the Supreme Judicial Court issued a decision in *Diatchenko v. District Attorney for Suffolk District & Others*, 466 Mass. 655 (2013) in which the Court determined that the statutory provisions mandating life without the possibility of parole are

invalid as applied to juveniles convicted of first degree murder. Further, the Court decided that *Diatchenko* (and others similarly situated) must be given a parole hearing. Accordingly, Mr. Mayfield is now before the Massachusetts Parole Board.

During August 1983, Mr. Mayfield was living with Ms. Hanley and her family in the Dorchester neighborhood of Boston. Mr. Mayfield and Ms. Hanley's half-sister had a child together. On the day of her death, August 1, 1983, Ms. Hanley had been reported missing at 9:00 p.m. Earlier in the day, she had pointed Mr. Mayfield out to a person from whom Mr. Mayfield had stolen a gym bag and sneakers. Mr. Mayfield returned the property when confronted about the theft. Later that evening, Mr. Mayfield joined a group of youths who had gathered on the porch of a house across the street from a park. Ms. Hanley was present in the group. When most of the group left to see a movie, both Mr. Mayfield and Ms. Hanley left for home in different directions.

Ms. Hanley's body was discovered the following morning, at approximately 2:00 a.m., by a neighbor. Initial observations indicated Ms. Hanley had been beaten about her face, head, and neck. She was also found to be bleeding from her vaginal area. An autopsy revealed the cause of Ms. Hanley's death to be strangulation with a ligature. Subsequent investigation indicated that Mr. Mayfield followed the victim into the park and confronted her about exposing his theft earlier that day. Mr. Mayfield started to hit the victim multiple times, eventually knocking her to the ground with a tree limb. When she would not get up, Mr. Mayfield smashed her head into the tree limb four times. After turning Ms. Hanley on her back, Mr. Mayfield placed his fingers under her nose to check if she was breathing. Mr. Mayfield then removed Ms. Hanley's clothing and raped her.

II. PAROLE HEARING ON DECEMBER 17, 2015

Mr. Mayfield, now 50-years-old, appeared before the Parole Board on December 17, 2015 for an initial parole hearing and was represented by Attorneys Steven Maidman and Darren Griffis. In Mr. Mayfield's opening statement, he apologized for his actions and expressed his remorse. During the course of the hearing, he spoke about the murder. According to Mr. Mayfield, the murder was related to the theft of a pair of sneakers that he had stolen earlier in the day. Mr. Mayfield told the Board that he had gone swimming earlier in the day with his girlfriend and other friends. When they arrived at the pool, Mr. Mayfield noticed another male with a new pair of Nike sneakers and a bag that he liked. Mr. Mayfield left the pool early and stole the sneakers and the bag. Mr. Mayfield put the sneakers on and threw away the remaining items in the bag before leaving the area.

Mr. Mayfield stopped at the home of his girlfriend (where he lived) to check in on their infant daughter. He next went to his sister's house before traveling to an area near a park he frequented with his friends. It was at this point that Mr. Mayfield learned that the individual he had stolen the sneakers from was aware of the theft. Both that individual and a counselor were looking for Mr. Mayfield. As Mr. Mayfield started to walk toward the home where he lived with his girlfriend, he saw Ms. Hanley getting into a car. When Ms. Hanley saw Mr. Mayfield, she stopped and pointed at him. The counselor that had been looking for Mr. Mayfield then exited the driver's seat of the car and started to approach Mr. Mayfield. According to Mr. Mayfield, he killed Ms. Hanley because she pointed him out to the counselor.

When questioned by the Board, Mr. Mayfield described his childhood. When he was a young child, both his parents were arrested and Mr. Mayfield was sent to live in a foster home. Mr. Mayfield explained that his parents were both heroin addicts and dealers. Mr. Mayfield was able to leave the foster home by moving in with his grandmother. Subsequently, Mr. Mayfield's grandmother was arrested for narcotics and firearm offenses. In addition to his parents and his grandmother, Mr. Mayfield's brother was also incarcerated during Mr. Mayfield's youth. Mr. Mayfield revealed to the Board that he was molested by his brother between the age of 5 or 6 to the age of 14 or 15. Mr. Mayfield also explained to the Board that he suspected that his older sisters were being molested by his father.

Mr. Mayfield attended school until age 14 or 15. He recalled that he received below average grades and was held back at least once. Mr. Mayfield explained to the Board that he switched schools numerous times due to frequent changes in his residency. When asked about the sexual nature of Ms. Hanley's murder, Mr. Mayfield initially denied being a sexually deviant person. Mr. Mayfield told the Board that during his incarceration, a doctor recommended he attend the Sex Offender Treatment Program. Mr. Mayfield, however, successfully challenged the doctor's findings in court on the grounds that he was found not guilty at trial of the rape of Ms. Hanley. Despite prevailing over the doctor's recommendation for treatment, Mr. Mayfield admitted to the Board that he did, in fact, rape Ms. Hanley and that his ability to rape a child, who was potentially dead at the time, raised questions of sexual deviance. Mr. Mayfield then stated that he would be open to attending sex offender treatment and agreed that his sexual deviance was an issue that needed to be addressed.

The Board considered testimony from Mr. Mayfield's friends and from Lisa Gigliardi, Coordinator for Sentencing Advocacy in the Youth Advocacy Division of the Committee for Public Counsel Services, all of whom expressed support for his release. The Board also considered testimony from Ms. Hanley's sisters and Suffolk County Assistant District Attorney Helle Sachse, all of whom expressed opposition to Mr. Mayfield's parole.

III. DECISION

The Board is of the opinion that Mr. Mayfield has not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. The Board believes that a longer period of positive institutional adjustment and programming would be beneficial to Mr. Mayfield's rehabilitation.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." *120 C.M.R. 300.04.* In the context of an offender convicted of first or second degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation." *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015). The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility,

leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.* The Board also recognizes the petitioner's right to be represented by counsel during his appearance before the Board. *Id at 20-24.* The Board has also considered whether risk reduction programs could effectively minimize Mr. Mayfield's risk of recidivism.

After applying this standard to the circumstances of Mr. Mayfield's case, the Board is of the opinion that Mr. Mayfield is not yet rehabilitated and his release is not compatible with the welfare of society. Mr. Mayfield, therefore, does not merit parole at this time. Mr. Mayfield's next appearance before the Board will take place in five years from the date of this hearing. During the interim, the Board encourages Mr. Mayfield to continue working towards his full rehabilitation.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing. Pursuant to G.L. c. 127, § 130, I further certify that all voting Board Members have reviewed the applicant's entire criminal record. This signature does not indicate authorship of the decision.

Gloriann Moroney, General Counsel

5/16/16
Date

Charles D. Baker
Governor

Karyn Polito
Lieutenant Governor

Daniel Bennett
Secretary

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Paul M. Treseler
Chairman

Michael J. Callahan
Executive Director

DECISION

IN THE MATTER OF

ALBERT JOHNSON
W80324

TYPE OF HEARING: **Initial Hearing**

DATE OF HEARING: **April 19, 2016**

DATE OF DECISION: **August 24, 2016**

PARTICIPATING BOARD MEMBERS: Paul M. Treseler, Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Ina Howard-Hogan, Tina Hurley, Lucy Soto-Abbe

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, the age of the inmate at the time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by unanimous vote that the inmate is not a suitable candidate for parole. Parole is denied with a review scheduled in five years from the date of the hearing.

I. STATEMENT OF THE CASE

On May 17, 2002, in Plymouth Superior Court, Albert Johnson pled guilty to the second degree murder of Michael Grosso. He was sentenced to life in prison with the possibility of parole. On October 13, 2009, Mr. Johnson moved to withdraw his guilty plea, and he moved for a new trial. The judge, who presided over Mr. Johnson's plea colloquy, denied this request on November 4, 2009. Mr. Johnson appealed. On December 3, 2010, the Appeals Court of Massachusetts affirmed the order denying his motion to withdraw his guilty plea and his motion for a new trial.

In the early morning hours of June 26, 1999, Mr. Johnson and two other men, Richard Bradley and Antoine Burton, entered the apartment of Felicia Damon. Ms. Damon owed Mr. Johnson money for crack cocaine that he had given to her in the past. Mr. Johnson was armed with a loaded handgun at the time. Ms. Damon demanded that Mr. Johnson and his accomplices leave her apartment. After her requests were ignored, Ms. Damon left her home to

seek help. Ms. Damon returned to her apartment with her brother and the victim, Michael Grosso. Mr. Grosso and Ms. Damon's brother (both of whom were unarmed) repeatedly asked Mr. Johnson and his companions to leave the apartment. They did not raise their voices, nor block the door to the apartment. After Mr. Johnson exchanged words with Ms. Damon, he turned his attention toward Mr. Grosso and yelled, "Who the (expletive) are you?" At the time, Mr. Grosso was standing with his arms folded across his chest. Mr. Johnson then produced his pistol and shot Mr. Grosso once in the upper left chest.

Mr. Grosso was rushed to Brockton Hospital, where he succumbed to his injuries. The medical examiner later determined the cause of death to be massive internal bleeding caused by a gunshot wound to his lung. Mr. Johnson was 17-years-old on the date of the murder. Subsequent investigation revealed that Mr. Johnson, Mr. Bradley, and Mr. Burton had been dealing crack cocaine out of Ms. Damon's apartment on a regular basis.

II. PAROLE HEARING ON APRIL 19, 2016

Albert Johnson, now 34-years-old, appeared before the Parole Board on April 19, 2016, for an initial hearing and was represented by Attorney John Rull. In Mr. Johnson's opening statement to the Board, he apologized to Mr. Grosso's family and expressed his remorse. He also apologized to his own family and friends. The Board asked Mr. Johnson what had caused him to pursue a criminal lifestyle. Mr. Johnson described the troubled circumstances of his youth. Mr. Johnson told the Board that he had a strained relationship with his mother, and that he did not have a father. Despite these difficult circumstances, however, Mr. Johnson acknowledged having positive influences and family support. Mr. Johnson spoke fondly of his grandmother, who taught him positive values and raised him until age 15. Mr. Johnson also acknowledged his aunt, with whom he and his little brother went to live after his grandmother lost her home and moved away. Mr. Johnson told the Board that he always felt like an outsider, in spite of his aunt's efforts to care and support him during the time he lived with her (first in Randolph and then in Brockton). Mr. Johnson acknowledged that he was already involved in selling drugs at age 15, and told the Board that he first started getting arrested after his grandmother moved away. Mr. Johnson cited negative influences, including people from his neighborhood, as his introduction to a criminal lifestyle.

During the course of the hearing, Mr. Johnson discussed the events that precipitated Mr. Grosso's murder. Three months prior to Mr. Grosso's murder, Mr. Johnson had been introduced to Ms. Damon through a mutual acquaintance, Mr. Bradley. Mr. Johnson had been dealing crack cocaine out of Mr. Bradley's apartment, which was located on the second floor of 33 Harvard Street in Brockton. Mr. Johnson then began supplying crack cocaine to Ms. Damon, who lived on the first floor below Mr. Bradley. Subsequently, Mr. Johnson, Mr. Bradley and another friend, Mr. Burton, began dealing drugs out of Ms. Damon's apartment.

On the day of the murder, Mr. Johnson has been hanging out with Mr. Bradley and Mr. Burton. That evening, Mr. Johnson, Mr. Bradley, and Mr. Burton gathered at Ms. Damon's apartment for approximately one hour (sometime between 7 p.m. and 9 p.m.). While inside Ms. Damon's apartment, all three men smoked marijuana and drank alcohol, and then left to go to a nearby bar. When they returned to Ms. Damon's apartment at approximately 2:00 a.m., the three men were accompanied by three unidentified females. The group continued to drink and smoke marijuana at Ms. Damon's apartment. At some point, a verbal altercation occurred

between Mr. Johnson and Ms. Damon when he refused her request for crack cocaine (since she had owed him money). Ms. Damon asked Mr. Johnson to leave, and then threw a vase at him when he refused. Mr. Johnson then fired a shot into the floor, at which point Ms. Damon left the apartment.

When Ms. Damon returned to the apartment, she was accompanied by Mr. Grosso and her brother, Edwin Damon. Mr. Damon and Mr. Bradley were known to each other. According to Mr. Johnson, Mr. Damon and Mr. Bradley became engaged in a heated exchange. It was during this time that he (Mr. Johnson) approached Mr. Grosso and shot him in the chest. Mr. Johnson could not provide an explanation as to why he decided to shoot Mr. Grosso. He described his actions to the Board as a senseless and irresponsible crime. After shooting Mr. Grosso, Mr. Johnson pointed the gun at Mr. Damon. Mr. Johnson claimed that he did not attempt to shoot Mr. Damon, despite testimony during the criminal prosecution that he was pulling the trigger of the gun at this time. Mr. Johnson said that his intent in pointing his gun at Mr. Damon was to prevent Mr. Damon from tackling him or running out the door of the apartment. Mr. Johnson then fled the scene. The following day, Mr. Johnson turned himself into the Boston Police Department. Mr. Johnson told the Board that he did this because he knew he was wrong. During his pre-trial detention, Mr. Johnson discussed his attempts to thwart the criminal investigation into Mr. Grosso's murder. Mr. Johnson admitted to the Board that he had attempted to persuade another inmate to give false testimony in order to exculpate himself from the crime.

The Board asked Mr. Johnson to describe the process of his rehabilitation. Mr. Johnson told the Board that this process began in 2005, when he started to realize the magnitude of his actions and the effect that Mr. Grosso's murder had on his family. Mr. Johnson then described the programs that he participated in. Since 2011, Mr. Johnson completed the Correctional Recovery Academy, Substance Abuse Education, Money Management, Beacon Program, Criminal Thinking, and Health Awareness. Presently, he is employed and works four hours per day. Mr. Johnson is also currently enrolled in various programs, including Path to Freedom.

The Board asked Mr. Johnson about his disciplinary history within the Department of Correction. Most recently, in August 2014, Mr. Johnson received a disciplinary report for being insolent to staff and refusing a direct order. Mr. Johnson admitted to refusing an order from a staff member and encouraging other inmates to do the same. Mr. Johnson explained that at the time of the incident, he had just concluded a visit with a family member who gave him troubling news about a loved one. He said that he was in a bad mood. Later that same day, Mr. Johnson received a second disciplinary report for the same offense. Mr. Johnson also addressed two disciplinary reports he received (in July 2012 and September 2013) for attempting to smuggle narcotics into a correctional facility. In July 2012, Mr. Johnson's wife was arrested after she attempted to pass two balloons of marijuana to Mr. Johnson during a visit at MCI-Concord. Mr. Johnson told the Board that he had convinced his wife to smuggle marijuana into MCI-Concord (in 2012) because of the stress he was experiencing from personal issues at the time. Subsequently, in September 2013, a female acquaintance of Mr. Johnson's was arrested after attempting to smuggle suboxone into Souza-Baranowski Correctional Center. The female, who was scheduled to visit Mr. Johnson on the day of her arrest, had also visited him on two occasions in the previous month. Mr. Johnson told the Board that, in 2013, his intent was to retrieve marijuana (not suboxone) from the female who was arrested at Souza-Baranowski Correctional Center. According to Mr. Johnson, the marijuana was never recovered

because the woman discarded it prior to the security screening process. Mr. Johnson stated that his plan was to split the marijuana with another inmate.

The Board considered oral testimony from Mr. Johnson's mother, cousin, brother, and two aunts, all of whom expressed support for Mr. Johnson's parole. The Board also considered testimony from the victim's son and granddaughter, as well as from Plymouth County Assistant District Attorney Keith Garland, all of whom expressed opposition to Mr. Johnson being granted parole. The Board received numerous letters in opposition to Mr. Johnson's parole, including one from the victim's daughter that was read into the record at the hearing.

III. DECISION

The Board is of the opinion that Mr. Johnson has not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. The Board believes that a longer period of positive institutional adjustment and programming would be beneficial to Mr. Johnson's rehabilitation.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." 120 C.M.R. 300.04. In the context of an offender convicted of first or second degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation." *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015).

The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.* The Board has also considered whether risk reduction programs could effectively minimize Mr. Johnson's risk of recidivism. After applying this standard to the circumstances of Mr. Johnson's case, the Board is of the opinion that Mr. Johnson is not yet rehabilitated, and his release is not compatible with the welfare of society. Mr. Johnson, therefore, does not merit parole at this time. His next appearance before the Board will take place in five years from the date of this hearing. During the interim, the Board encourages Mr. Johnson to continue working towards his full rehabilitation.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing. Pursuant to G.L. c. 127, § 130, I further certify that all voting Board Members have reviewed the applicant's entire criminal record. This signature does not indicate authorship of the decision.

Gloriann Moroney, General Counsel

8/24/16
Date

Submitted by the Council to the Members of
The American Law Institute
for Consideration at the Ninety-Fourth Annual Meeting on May 22, 23, and 24, 2017

THE AMERICAN LAW INSTITUTE

Model Penal Code: Sentencing

Proposed Final Draft

(April 10, 2017)

SUBJECTS COVERED

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As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.

Community-Based Corrections, 38 Crim. Justice & Beh. 386, 400 (2011) (finding that a four-to-one ratio between rewards and punishments promotes highest success rates on community supervision); National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 39 ("Positive incentives for compliance are important complements to sanctions for violations. Less intrusive supervision and the remission of previously collected fines are both likely to be valued by releasees, but a wide variety of rewards, such as tickets to sporting events, may also have a role. The benefits of even small reductions in recidivism can easily cover the costs of such rewards").

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§ 6.11A. Sentencing of Offenders Under the Age of 18.[45]

The following provisions shall apply to the sentencing of offenders under the age of 18 at the time of commission of their offenses:

(a) When assessing an offender's blameworthiness under § 1.02(2)(a)(i), the offender's age shall be a mitigating factor, to be assigned greater weight for offenders of younger ages.

(b) Priority shall be given to the purposes of offender rehabilitation and reintegration into the law-abiding community among the utilitarian purposes of sentencing in § 1.02(2)(a)(ii), except as provided in subsection (c).

(c) When an offender has been convicted of a serious violent offense, and there is a reliable basis for belief that the offender presents a high risk of serious violent offending in the future, priority may be given to the goal of incapacitation among the utilitarian purposes of sentencing in § 1.02(2)(a)(ii).

(d) Rather than sentencing the offender as an adult under this Code, the court may impose any disposition that would have been available if the offender had been adjudicated a delinquent for the same conduct in the juvenile court. Alternatively, the court may impose a juvenile-court disposition while reserving power to impose an adult sentence if the offender violates the conditions of the juvenile-court disposition.

(e) The court shall impose a juvenile-court disposition in the following circumstances:

(i) The offender's conviction is for any offense other than [a felony of the first or second degree];

(ii) The case would have been adjudicated in the juvenile court but for the existence of a specific charge, and that charge did not result in conviction;

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[45] This Section was originally approved in 2011; see Tentative Draft No. 2.

(iii) There is a reliable basis for belief that the offender presents a low risk of serious violent offending in the future, and the offender has been convicted of an offense other than [murder]; or

(iv) The offender was an accomplice who played a minor role in the criminal conduct of one or more other persons.

(f) The court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law.

(g) No sentence of imprisonment longer than [25] years may be imposed for any offense or combination of offenses. For offenders under the age of 16 at the time of commission of their offenses, no sentence of imprisonment longer than [20] years may be imposed. For offenders under the age of 14 at the time of commission of their offenses, no sentence of imprisonment longer than [10] years may be imposed.

(h) Offenders shall be eligible for sentence modification under § 305.6 after serving [10] years of imprisonment. The sentencing court may order that eligibility under § 305.6 shall occur at an earlier date, if warranted by the circumstances of an individual case.

(i) The sentencing commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, for the sentencing of offenders under this Section.

(j) No person under the age of 18 shall be housed in any adult correctional facility.

[(k) The sentencing court may apply this Section when sentencing offenders above the age of 17 but under the age of 21 at the time of commission of their offenses, when substantial circumstances establish that this will best effectuate the purposes stated in § 1.02(2)(a). Subsections (d), (e), and (j) shall not apply in such cases.]

Comment: [16]

a. Scope. This provision governs the sentencing of offenders under the age of 18, regardless of whether they would normally be considered "juveniles" within the ordinary jurisdiction of the state's juvenile court. Large numbers of such offenders are sentenced in the adult criminal courts each year, and there are alarming disparities by race and ethnicity among transferred youths. Under existing law in most states, youths under 18 who are convicted in the criminal courts are subject to the same penalties as older offenders. Adult sentencing codes generally lack specialized provisions for offenders at the borderline between the juvenile and adult justice systems and, where such provisions exist, they are piecemeal and fail to reflect comprehensive policy choices concerning this important age group.

[16] This Comment has not been revised since § 6.11A's approval in 2011. All Comments will be updated for the Code's hardbound volumes.

Offenders under 18 reach the adult criminal courts by many different routes. There is some variation among states in the age limits for juvenile-court jurisdiction. There is also great diversity in state law and practice concerning waiver and other mechanisms to remove particular cases from the juvenile to the criminal courts. Section 6.11A is built on the policy judgment that, no matter what road is taken to the adult courtroom, special considerations attach to the sentencing and correction of offenders below the age of 18.

b. Setting the legal boundary at age 18. No fixed age boundary of the type recommended in this provision will fit every individual who comes before the courts. Research in developmental psychology, however, supports the majority view of state legislatures that offenders under the age of 18 are, as a group, distinguishable from older offenders. A defined age cutoff provides a useful benchmark for large numbers of cases, and avoids the costs of individualized psychological evaluations.

Under the revised Code's general scheme, which carefully preserves judicial sentencing discretion in individual cases, see § 1.02(2)(b)(i) (Tentative Draft No. 1, 2007), a statutory age cutoff need not create a "cliff effect" that subjects offenders just above and below the age limit to radically different sentence regimes. Where offenders above the age of 18 display personal attributes of developmental immaturity, sentencing courts have discretion to treat this as a mitigating factor under the Code's provisions for adult sentencing—whether or not the factor is expressly recognized in sentencing guidelines, see § 6B.02(7) (id.) ("The guidelines may not prohibit the consideration of any factor by sentencing courts unless the prohibition reproduces existing legislation, clearly established constitutional law, or a decision of the state's highest appellate court."). In an extraordinary case, a young adult's developmental deficits may even provide grounds for departure from any mandatory penalty affixed to the offense of conviction, or might supply the basis for a proportionality ceiling on the severity of any punishment prescribed by law. See §§ 7.XX(3)(b) (id.), 7.09(5)(b) (id.) (draft provision submitted for informational purposes only).

For jurisdictions that desire greater age flexibility in the application of this Section, subsection (k), given as an option in bracketed language, would grant trial judges discretion to extend most of the substance of the provision to offenders under the age of 21 at the time of their offenses.

c. Purposes of sentencing and offenders under 18. The Code's framework of utilitarian sentences within limits of proportionality is applicable to offenders under the age of 18. See § 1.02(2)(a) and Comment *b* (Tentative Draft No. 1, 2007). Special considerations arise in cases involving young offenders, however. Subsection (a) provides that offenders under 18 should be judged less blameworthy for their criminal acts than older offenders—and age-based mitigation should increase in correspondence with the youthfulness of individual defendants.

Offender blameworthiness is one of the key indicia of proportionate penalties under § 1.02(2)(a)(i) (stating that proportionality is to be measured by "the gravity of offenses, the

harms done to crime victims, and the blameworthiness of offenders"). Subsection (a) will therefore exert downward pressure on the ceiling of permissible sentence severity for cases under § 6.11A. This is especially important because, under the revised Code, no utilitarian sentencing goal may ever justify the imposition of a disproportionate punishment. See § 1.02(2)(a)(ii) and Comment *b*. And, under the Code, the judicial branch has final statutory authority to make proportionality determinations in individual cases, see §§ 6B.03(4) (Tentative Draft No. 1, 2007), 7.XX(2), 7.XX(3)(b), 7.09(5)(b). This subconstitutional power of proportionality review is designed to be considerably more exacting than the courts' infrequently exercised authority to strike down penalties as "grossly disproportionate" under the federal constitution.

The mitigating effect of subsection (a) may be offset or overridden by other circumstances in specific cases. The provision is not intended to foreclose the judge's ability to find, when supported by the facts, that an offender under 18 acted with an unusually high degree of personal blameworthiness. For instance, a sentencing judge might find an offender unusually culpable—despite his youth—if guilty of a violent offense committed only for a thrill, or for sadistic purposes, or out of racial animus. It is also important to recognize that proportionality determinations under § 1.02(2)(a)(i) are not based solely on offender blameworthiness. The courts must also attend to "the gravity of offenses" and "the harms done to crime victims" when reaching final judgments of proportionality. The seriousness of victim injuries does not diminish when their assailants were underage.

Subsections (b) and (c) speak to the rank ordering of utilitarian objectives to be applied to the sentencing of offenders under the age of 18. Section 1.02(2)(a)(ii) embraces the utilitarian goals of "offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community," but sets forth no hierarchy among these goals that must be applied across the board, to every individual sentencing. However, the Code contemplates that, for definable classes of cases, specification of priorities among utilitarian goals will often be desirable. This task is commended to the Sentencing Commission as part of its guidelines-drafting responsibilities; see § 6B.03(5) and Comment *e* (Tentative Draft No. 1, 2007) (providing that "[t]he [sentencing] guidelines may include presumptive provisions that prioritize the purposes in § 1.02(2)(a) as applied in defined categories of cases, or that articulate principles for selection among those purposes."). It is appropriate for the legislature to perform this function, as well, when it is prepared to lay down firm policy judgments that should not be delegated to the commission and the courts. Subsections (b) and (c) state theoretical principles that are sufficiently fundamental to be enshrined in statutory language. Other examples of the statutory prioritization of utilitarian purposes may be found (in future drafting) in provisions dealing with drug courts and mental-health courts, and creating special alternative "restorative justice" sentencing procedures for selected cases.

Subsection (b) addresses the vast majority of cases that will arise under this provision, and requires that the goals of offender rehabilitation, and offender reintegration into the law-

abiding community, must normally be assigned priority over all other utilitarian aims in § 1.02(2)(a)(ii). Thus, while considerations of general deterrence, incapacitation of dangerous offenders, and restitution for crime victims remain operative, they are subsidiary to the pursuit of rehabilitation and reintegration. This approach is consistent with the statutorily defined purposes of most juvenile codes in the United States.

As an exception to the general rule of subsection (b), subsection (c) recognizes that the goal of incapacitation of dangerous offenders will and should be given highest priority in some cases involving defendants under the age of 18. Based on the overall patterns of criminal behavior among juveniles, this will be true in only a small percentage of all cases. Most juvenile criminal careers last a very short time, and the typical injury done by juvenile offenders is less grave than in cases of adult offending. But the unfortunate truth is that some young offenders pose unacceptable risks of serious reoffending and, even giving great weight to the factor of their age, the countervailing moral claims of prospective crime victims rise to a compelling level.

Subsection (c) places restrictions on the incapacitation-based sentencing of offenders under 18, and is intended to regulate such reasoning more closely than existing law. The subsection erects threshold requirements that the offender must have been convicted of a serious violent offense, and there must also be a reliable basis for belief that the offender presents a high risk of serious offending in the future. The "reliable basis" standard does not pretend to be exact. It is, however, meant to rule out conjecture or intuition about an offender's future dangerousness—and this will preclude much contemporary sentencing practice across the United States today. The reliable-basis standard could be satisfied by the use of validated actuarial risk-assessment instruments, which are consistently shown to be more reliable than professional clinical judgments in individual cases, see § 6B.09 and Comment *b* (this draft). The courts of each jurisdiction will be required to give specific content to the standard, and its application can be expected to evolve with advancing knowledge in the prediction sciences.

One notable effect of subsections (b) and (c) in combination is that the policy of general deterrence can never be treated as the primary goal in the sentencing of offenders under the age of 18. Just as such offenders are considered less blameworthy as a group, they are also viewed as less deterrable. This prescription is addressed to legislatures and sentencing commissions under the Code's scheme, as judges are not authorized to impose penalties in individual cases based on considerations of general deterrence; see § 6.06(2) and Comment *f*.

The policy judgments reflected in subsections (a) through (c) are based on current research in psychology and criminology. The key findings are summarized below.

(1) Blameworthiness. While normally developing human beings possess a moral sense of morality from their early years, important capacities of abstract moral judgment, impulse control, and self-direction in the face of peer pressure, continue to solidify into early adulthood. The developmental literature suggests that offenders under 18 may be held morally accountable for their criminal actions in most cases, but assessments of the degree of personal culpability should

be different than for older offenders. This principle of reduced blameworthiness has been recognized by the Supreme Court in recent decisions under the Eighth Amendment, holding that the sanction of life without parole may not be imposed on juvenile offenders for non-homicide offenses, and that the death penalty may never be imposed.

(2) Potential for rehabilitation. Many believe that adolescents are more responsive to rehabilitative sanctions than adult offenders. While the evidence for this proposition is mixed, it is clear that some rehabilitative programs are effective for some juvenile offenders. Success rates are at least comparable to those among programs tailored to adults. Moreover, natural desistance rates—uninfluenced by government intervention—are higher for youths under 18 than for young adults whose criminal careers extend into their later years. Subsection (b) takes the policy view that society has a greater moral obligation to attempt to rehabilitate and reintegrate young criminal offenders, and that the benefits of doubt concerning the efficacy of treatment should normally be resolved in favor of offenders under 18.

(3) Harm prevention. Longitudinal studies show that the great majority of offenders under 18 will voluntarily desist from criminal activity with or without the intervention of the legal system. For this large subset of youthful offenders, a primary goal of the legal system should be to avoid disruption of the normal aging progression toward desistance.

There is reason for concern that criminal-court interventions might derail an otherwise natural progression toward law-abiding adulthood for many youths. The research literature suggests that transfer of juvenile offenders to the adult courts can itself be criminogenic. There is reason for concern, therefore, that punishments meted out in pursuit of public safety may have the opposite of the intended effect—and that this danger arises in the ordinary case of an adolescent offender, not the unusual case.

(4) Small group of serious violent offenders. Pushing in the opposite direction of considerations of reduced blameworthiness and high probabilities of desistance among younger offenders, it must also be recognized that a minority of adolescents and young adults commit serious crimes at very high rates. Age-crime curves, developed to track criminal careers over the life course, show that the peak years of criminal involvement are in the late teens and early 20s. Longitudinal research has documented time and again that a small fraction of all juvenile delinquents, roughly only 6 or 8 percent, go on to become "chronic" or "persistent" offenders who commit outsized numbers of serious crimes. For this subgroup, offenders' moral claims to reduced assignment of personal culpability come into tension with the moral claims of past and prospective crime victims, whose injuries are equally serious regardless of the age of the criminal.

(5) Deterrence. Section 6.11A would in every case relegate general deterrence to a subsidiary position among the utilitarian purposes of sentencing. For offenders of any age, there is no persuasive empirical support for the proposition that increased punishment severity acts as an effective deterrent of criminal acts. The prospects of a general deterrence effect are especially

remote for offenders under the age of 18. Even more than older criminals, they are unlikely to know the state of the law and the likely consequences attached to specific crimes, are more likely to engage in risk-taking behavior despite known costs and benefits, and are more vulnerable to behavior bred of impulsivity and peer pressure.

If enacted into legislation, § 6.11A's proscription would be addressed primarily to the sentencing commission when fashioning systemwide policy. Sentencing courts are not authorized to impose penalties in individual cases based on considerations of general deterrence; see § 6.06(2) and Comment *f*. Rather, the evidence for and against the effectiveness of policies of general deterrence are best weighed as a matter of statewide sentencing policy, by a body competent to undertake the necessary factfinding, research, and study.

d. Availability of juvenile-court sanctions. The age group addressed in this Section falls at the uncertain borderline between the adult criminal-justice system and the juvenile courts. While the revised Code always protects the courts' discretion to tailor sentences to the facts of particular cases, § 6.11A supplies the courts with a number of specialized tools to individualize sentences for offenders under 18, greatly expanding their sentencing discretion in such cases. Subsection (d) grants sentencing judges discretion in every case to impose a juvenile-court disposition as an alternative to an adult sanction. The court may also select a juvenile-court sanction while reserving authority to impose an adult sentence if the offender violates the conditions of the juvenile disposition. This is one form of "blended sentencing," which exists in numerous permutations across American jurisdictions.

The Code's policy choice locating blended sentencing authority in the adult criminal courts is motivated in part by the conclusion that power to impose a blended sentence should not reside in the juvenile courts. Giving juvenile-court judges the power and responsibility to pronounce adult sentences stretches and distorts the juvenile-court mission away from its traditional groundings in rehabilitation and the best interests of the child. There is much about the unique character of juvenile courts that is worth preserving. Over the last several decades, the juvenile courts have charted a remarkably different course than the adult courts in their responses to criminal conduct. Juvenile institutional populations have increased only slowly in years when the adult prisons have seen explosive growth, and in recent years those populations have declined substantially. Rates of transfer to the adult system have shown similar changes, but only a tiny fraction of juvenile cases as a whole have ever been removed to the adult courts. Indeed, the history of American juvenile justice, dating to the late 19th century, shows longstanding commitment to a less punitive, more rehabilitative, set of values than applied to adult criminals. Subsection (d) helps to preserve the unique character of the juvenile court, while conceding that some of its cases must and should be removed to the adult system.

e. Mandatory juvenile disposition. Section 6.11A does not address transfer decisions itself, which is one process that brings a juvenile offender into the adult court system, nor does it speak to the powers of the adult courts—such as "reverse waiver"—to return a case involving a

young offender to the juvenile system. The provision assumes that a case involving an offender under the age of 18 has reached the stage of conviction in the adult courtroom, and speaks only to the sentencing decision that follows on the heels of such a conviction. Even so, as a matter of substantive sentencing law, the trial court should have discretion to evaluate whether societal interests are best served by the continued treatment of the offender as an adult criminal for purposes of the sanctions that will be administered. Subsection (d) gives the court two important options: First, the court may impose any sanction that would have been available in a juvenile court for the same offense. Second, the court may impose such a sanction while holding an adult sentence in reserve, to be available if the offender violates the terms of the juvenile disposition.

Subsection (e) defines several scenarios in which an adult penalty is inappropriate. In each instance, the sentencing judge must impose a juvenile-court disposition. These circumstances include, in subsection (e)(i), cases in which the conviction obtained is for a crime at the middle or low end of graded severity among felonies. Because the revised Code would allow for a number of different grading schemes, see § 6.01 and Comment *c* (this draft), the grading cutoff in subsection (e)(i) is set forth in bracketed language. A state legislature may prefer to express the cutoff descriptively, such as a limitation to cases of "a serious violent felony."

Subsection (e)(ii) applies in cases where a charge requisite to the adult court's jurisdiction has not resulted in conviction. In most states, only certain charges may support waiver to the adult system, or permit direct filing by the prosecutor in the adult courts. Consistent with the policies of those limitations, an adult punishment should no longer be available when the predicate charge has been dismissed or has resulted in an acquittal.

Subsection (e)(iii) mandates a juvenile disposition for low-risk offenders, with the exception of offenders who have committed crimes of such gravity that proportionality concerns standing alone would support an adult punishment. There must be a reliable basis for the assessment of low risk, which may be established through the use of a validated actuarial risk-assessment instrument, see Comment *c* above. The offense or offenses to be included in subsection (e)(iii)'s proviso can be selected only by consideration and debate of contestable retributive values. The bracketed language reflects a conclusion that murder, as defined in the Model Penal Code, see Model Penal Code and Commentaries, Part II, §§ 210.0 to 213.6, § 210.2 (1980), is such an offense.

Finally, subsection (e)(iv) speaks to the situation in which a young offender has been convicted of a serious crime, but played only a minor and fractional role in its commission. Most serious juvenile offenses are committed in groups, much more so than with adult offenders, and the inability to resist peer pressure is one of the best-documented features of adolescence. Nonetheless, the substantive criminal law makes all accomplices equally liable for the primary offense, as though all were primary actors. For adult offenders, this crude one-size-fits-all premise is justified in part on the premise that sentencing courts will differentiate among

complicitors according to their true levels of responsibility. For juvenile offenders, the same assumption should operate, but in a more formalized way. Subsection (e)(iv) leaves room for fact-specific debate, and judicial discretion, concerning what degree of participation by a juvenile accomplice should qualify as a "minor role" in a group offense. Once the court has made such a finding in good faith, however, the extraordinary measure of an adult criminal penalty for an underage offender should no longer be permitted.

f. Authority to deviate from mandatory penalties. Both the original Code and the revised Code assert the Institute's unqualified policy that no mandatory-minimum penalty should be authorized for any offense; see § 6.06 and Comment *d* (this draft). Despite this longstanding policy, however, every American jurisdiction has enacted numerous mandatory-penalty provisions. The revised Code, while continuing the Institute's categorical disapproval of such laws, also seeks to soften their scope and impact wherever possible. Within the instant provision, subsection (f) recommends that, even when a state legislature has seen fit to adopt mandatory penalties into its criminal code, it should exempt underage offenders from the rigid force of such laws. A dominant theme of § 6.11A is that an unusual degree of flexibility, and power to individualize sentences, ought to be part of adult penalty proceedings for offenders under the age of 18. No provision in law stands farther removed from this principle than a mandatory-minimum penalty.

g. Cap on severity of prison sentences. As a matter of constitutional law, the maximum penalties permissible for juvenile offenders are sometimes lower than for adult offenders who commit the same acts. For all non-homicide offenses, the Supreme Court has found that a sentence of life without parole violates the Eighth Amendment when imposed on offenders under the age of 18. The Court has also held that the death penalty may never be imposed on juvenile offenders. These holdings rest in part on the strong presumption that juvenile offenders are less culpable than adults, see subsection (a), and the empirical conclusion that prospective juvenile offenders are less likely to be deterred by the threat of harsh punishments than adults. In addition, the Court has recognized that juvenile offenders are generally seen as more amenable to rehabilitation than older individuals, so that their criminal propensities may change markedly during a lengthy period of incarceration.

As a matter of legislative policy, these principles require that lowered maximum penalties should be established for youthful offenders at the highest level of the sentence-severity scale, even if not—or not yet—constitutionally mandated. The Court has made it clear that such judgments normally reside with state legislatures, and that the constitution prohibits only the most egregious instances of disproportionality in punishment. Given the fundamental values involved in the setting of juvenile crime and punishment, which command a high degree of consensus in our society, a responsible legislature should aspire to lawmaking that is well above the constitutional minimum standard. Subsection (g) therefore recommends an approach of staggered maximum penalties for any offense, with the absolute ceiling to be set according to the age group of the offender.

The maximum terms in subsection (g) are set out in bracketed language, to indicate that no ineluctable formula has been employed to generate the ceilings specified for each age group. The maximums suggested are far lower than existing penalty ceilings for juveniles tried as adults in any U.S. jurisdiction. In setting these absolute limits on punishment severity, it is important to consider that they will apply to the most serious offenses, including homicide, and that they regulate the cumulative severity of sentences for multiple counts of conviction. At the highest level of case gravity, difficult moral judgments of proportionality are required: the harms to victims may be as great as for any adult offense, yet we may assume in most cases a reduced level of offender blameworthiness. How those concerns translate into specific absolute maximum penalties for different age groups cannot be resolved in a model code for all jurisdictions. What is most important in subsection (g) is its recommendation that each state should adopt some such framework of staggered maximum penalties.

h. Eligibility for sentence modification. Subsection (h) accelerates eligibility for sentence modification under § 305.6 (this draft) for underage offenders sentenced to extremely long prison terms. First eligibility is to occur after 10 years of time served, set forth in bracketed language, rather than the 15-year period in force for adult prisoners. The use of brackets is meant to indicate that no mathematical calculation has been used to derive the 10-year time period. Its length is set in reference to the adult eligibility requirements under § 305.6, and reflects a policy judgment that first eligibility should occur substantially earlier for offenders under 18 at the time of their offenses. Nor is the 10-year period written in stone, or even in indelible ink. Sentencing courts are given discretion in individual cases to order a shorter eligibility period under § 305.6.

This provision recognizes that adolescents can generally be expected to change more rapidly in the immediate post-offense years, and to a greater absolute degree, than older offenders. It also responds to the need to provide courts with maximum flexibility when sentencing underage offenders. Such cases may present a range of considerations not present in adult prosecutions. For instance, although subsection (h) does not propose staggered periods for different age groups, shorter times to § 305.6 eligibility may be justified for younger defendants.

i. Sentencing guidelines. Specially formulated sentencing guidelines are needed for the age group that falls under this provision. Subsection (i) provides that the sentencing commission will author such guidelines, governed by Article 6B of the revised Code. As with all sentencing guidelines in the revised Code, those promulgated under subsection (i) may carry no more than presumptive force, subject to a generous judicial departure power, see §§ 6B.02(7) (Tentative Draft No. 1, 2007), 7.XX(2) (id.), to ensure that the greatest share of sentencing authority always remains with the courts.

j. Prohibition on housing juveniles in adult institutions. This provision is consistent with the policy of the American Bar Association, yet states a principle that is frequently overlooked by most American jurisdictions. Over 10,000 youths under the age of 18 were housed in the adult prisons and jails on any given day in 2009. Roughly 7500 were held in adult jails in more than 40

states, and another 2800 in adult prisons. Youths are especially vulnerable to victimization in adult institutions, and are at greater risk than adult inmates of psychological harm and suicide. They are often in need of age-specific programming that is unavailable in adult institutions. Research indicates that incarceration in adult prison substantially increases the risk that a young person will reoffend in the future. Although substantial resources will be needed to fully segregate young offenders from adults in the nation's prisons and jails, there are compelling moral and instrumental reasons for doing so.

k. Selective extension of this provision to older offenders. The psychology of human development does not translate neatly into sharp age-based cutoffs such as the 18-year threshold in this provision. The sentencing structure of the revised Code gives the courts tools to avoid a "cliff" effect for offenders slightly over 18, or even for offenders into their 20s whose acts are partially explicable by their stage of development toward full adulthood. As explained in Comment *b*, many of the substantive results available to sentencing judges under § 6.11A may be reproduced in the sentencing of offenders older than 18 through use of judicial departure discretion from sentencing guidelines and mandatory-minimum-penalty provisions. The bracketed language of subsection (k) would extend still more flexibility to sentencing courts in cases involving defendants who were under the age of 21 at the time of their offenses. It would allow the courts to render most of the provisions of § 6.11A expressly applicable to this older age group, provided there are "substantial circumstances" supportive of the conclusion that application of § 6.11A will best effectuate the purposes of sentencing in § 1.02(2)(a). Subsections (d) and (e), which authorize or mandate the imposition of a juvenile-court disposition, would not apply to the older age group.

REPORTERS' NOTE [47]

a. Scope. The overall framework of § 6.11A, providing for specialized sentencing rules and mitigated treatment of juvenile offenders sentenced in adult courts, owes much to Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court (1999), at 289-290, 302-315 (proposing "an age-based 'youth discount' of sentences [in adult courts]—a sliding scale of developmental and criminal responsibility—to implement the lesser culpability of young offenders in the [adult] legal system"). Professor Feld wrote that, "Such a policy would entail both shorter sentence durations and a higher offense-seriousness threshold before a state incarcerates youths than older offenders." Id. at 315.

By one estimate, more than 250,000 youths under the age of 18 are tried each year in the criminal courts and sentenced as adults. Barry C. Feld, A Slower Form of Death: Implications of *Roper v. Simmons* for Juveniles Sentenced to Life Without Parole, 22 Notre Dame J.L. Ethics & Pub. Pol'y 9, 11 (2008). See also American Bar Association, Report, Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners (2001), at 1 (estimating "at least two hundred thousand" offenders under 18 sentenced in adult courts each year).

[47] This Reporters' Note has not been revised since § 6.11A's approval in 2011. All Reporters' Notes will be updated for the Code's hardbound volumes.

Many of these cases reach the adult criminal courts through a variety of mechanisms that exist in the states to remove offenders otherwise subject to juvenile-court jurisdiction. The three most common vehicles are judicial waiver (juvenile court is authorized or required to transfer certain cases), concurrent jurisdiction (prosecutor has discretion to file in juvenile or criminal court), and statutory exclusion (certain classes of cases must by statute be filed in adult criminal court). See U.S. Dept. of Justice, Office of Justice Programs, Delinquency Cases Waived to Criminal Court, 2005 (2009), at 1. There has been large year-by-year variation in the use of these transfer mechanisms. For example, the number of cases waived to criminal courts by juvenile-court judges grew from 7200 in 1985 to 13,000 in 1994, but then declined by 2005 to 6900. Id. at 2. Large racial and ethnic disparities exist in the groups selected for transfer from the juvenile to the adult system. See Neelum Arya et al., America's Invisible Children: Latino Youth and the Failure of Justice (2009) (Latino youth are "43% more likely than white youth to be waived to the adult system"); Amanda Burgess Proctor, Kendal Holtrop, and Francisco A. Villarruel, Youth Transferred to Adult Court: Racial Disparities (2008), at 9-10 (collecting studies showing that African American youths are more likely to be transferred than their white counterparts).

In most states, the juvenile court's jurisdiction over delinquency cases extends to youths under the age of 18. Twelve states, however, set the upper limit at age 16 (Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, South Carolina, Texas, and Wisconsin) or at age 15 (New York and North Carolina). Roughly two million 16- and 17-year-olds live in those states. See U.S. Dept. of Justice, Office of Justice Programs, Juvenile Offenders and Victims: 2006 National Report (2006), at 103, 114; Alison Lawrence, State Sentencing and Corrections Legislation: 2007 Action, 2008 Outlook (Washington: National Conference of State Legislatures, 2008), p. 10 (Connecticut recently increased its juvenile-court age limit from 15 to 17). In these states, there is a regular flow of offenders under 18 to the criminal courts, all of whom are classified as "adults" rather than "juveniles" for purposes of state criminal law. See Juvenile Offenders and Victims: 2006 National Report, at 114 ("it is possible that more youth younger than 18 are tried in criminal court in this way than by all other transfer mechanisms combined").

c. Purposes of sentencing and offenders under 18.

(1) Blameworthiness. See Roper v. Simmons, 543 U.S. 551, 569-571 (2005) (discussing reduced culpability of juveniles); Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) ("developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence"); Jeffrey Fagan, Adolescents, Maturity, and the Law, Why Science and Development Matter in Juvenile Justice, The American Prospect (August 14, 2005) ("[T]he new science reliably shows that adolescents think and behave differently from adults, and that the deficits of teenagers in judgment and reasoning are the result of biological immaturity in brain development. . . . Studies of brain development show that the fluidity of development is probably greatest for teenagers at 16 and 17 years old, the age group most often targeted by laws promoting adult treatment."); Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court (1999) ("Young people's inexperience, limited judgment, and restricted opportunities to exercise self control partially excuse their criminal behavior."); Franklin E. Zimring, American Youth Violence (1998), at 75-81 (arguing for a doctrine of "diminished responsibility" for adolescents because of their still-developing cognitive abilities to comprehend and apply moral and legal rules, powers of impulse control, and abilities to resist peer pressure). Studies confirm that normal children by the age of nine have the capacity for

intentional behavior and a developed moral sense of the difference between right and wrong. See James Rest, Morality, in John H. Flavell and Ellen M. Markman, Handbook of Child Psychology, vol. 3, Cognitive Development (1983). Typically, however, the full range of human capabilities continues to expand dramatically from ages 12 to 17. See Laurence Steinberg and Elizabeth Cauffman, A Developmental Perspective on Jurisdictional Boundary, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (2000), at 383 ("the period from twelve to seventeen is an extremely important age range . . . [O]ther than infancy there is probably no period of human development characterized by more rapid or pervasive transformations in individual competencies, capabilities, and capacities.").

A presumption of mitigation similar to that stated in subsection (a) has been recognized in Canadian constitutional law. The Supreme Court of Canada has ruled that, under § 7 of the Canadian Charter of Rights and Freedoms, juveniles cannot be assigned the burden of showing that they should receive the benefit of Canada's youth sentencing provisions. Instead, the onus of showing that a juvenile should be tried and sentenced as an adult must always be on the government. The court grounded its ruling on the "principle of fundamental justice" that "young people are entitled to a presumption of diminished moral blameworthiness or culpability flowing from the fact that, because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgment." R. v. D.B., 2008 SCC 25 (2008), Slip Op. at 3.

(2) Potential for rehabilitation. Empirical research has long shown that rehabilitative programming can succeed for some criminally involved juveniles. See Peter W. Greenwood and Susan Turner, Juvenile Crime and Juvenile Justice, in James Q. Wilson and Joan Petersilia eds., Crime and Public Policy (2011); Mark W. Lipsey, The Primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta-Analysis, 4 Victims and Offenders 124 (2009); Department of Health and Human Services, Youth Violence: A Report of the Surgeon General (2001); Delbert S. Elliott series ed., Blueprints for Violence Prevention: Promoting Alternative Thinking Strategies (PATHS) (1998). There is no persuasive evidence, however, that rehabilitation success rates are higher for juveniles than adults. Laurence Steinberg and Elizabeth Cauffman, A Developmental Perspective on Jurisdictional Boundary, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 403 ("Despite our optimistic notions about the inherent malleability of young people, or our pessimistic notions about the inability of old dogs to learn new tricks, there is no research that supports either of these contentions"). Efforts at "primary prevention," usually aimed at very young children, or even at mothers in the prenatal period, yield much larger reductions of future criminal behavior than interventions aimed at older youths who have already become involved in criminal activity. See David P. Farrington and Brandon C. Welsh, Saving Children from a Life of Crime (2007); Peter W. Greenwood, Changing Lives: Delinquency Prevention as Crime Control (2006).

(3) Harm prevention. Overall rates of criminal behavior are high, especially among males, in the teenage years, yet rates of desistance from crime are also very high as youths mature into their teens and early adulthood. Survey research indicates that 30 to 40 percent of males have committed at least one act of violence by age 18. Delbert S. Elliott, Serious Violent Offenders: Onset, Developmental Course, and Termination, 32 Criminology 1 (1994), at 9. Involvement in property offending and vandalism by this age group is still more commonplace. U.S. Dept. of Justice, Office of Justice Programs, Juvenile Offenders and Victims: 2006 National Report (2006), at 70; Lewis Yablonsky, Juvenile Delinquency: Into the Twenty-First Century (2000), at 562-566. Despite high rates of

criminal involvement, most youths discontinue their criminal behavior of their own accord. Self-report research indicates that only one-quarter of juveniles who offended at ages 16 to 17 continued to offend at ages 18 to 19. See 2006 National Report at 71 ("most of the youth who reported committing an assault in the later juvenile years stopped the behavior, reporting none in the early adult years"). Another study, based on official record data, found that 46 percent of males aged 10 through 17 who had committed a crime desisted after a single offense, and, of the group who did not stop with one offense, an additional 35 percent desisted after a second offense. Marvin E. Wolfgang, Robert M. Figlio, and Thorsten Sellin, Delinquency in a Birth Cohort (1972), at 160-163 (cohort of males born in Philadelphia in 1945). See also Paul E. Tracy, Marvin E. Wolfgang, and Robert M. Figlio, Delinquency Careers in Two Birth Cohorts (1990), at 104 table 8.3 (for later cohort of males born in Philadelphia in 1958, 42 percent of offenders 10 to 17 desisted after one offense and, among those continuing to offend, 28 percent stopped after a second offense).

On the criminogenic effects of transfer, see Angela McGowan, et al., Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Systematic Review, 32 Amer. J. Preventive Med. S7 (2007) (reporting findings of the Centers of Disease Control, Task Force on Community Preventive Services), at S15 (finding "strong evidence that juveniles transferred to the adult justice system have greater rates of subsequent violence than juveniles retained in the juvenile justice system"); Department of Health and Human Services, Youth Violence: A Report of the Surgeon General (2001), at 118 ("Evaluations of these programs [of waiver to adult courts] suggest that they increase future criminal behavior rather than deter it, as advocates of this approach had hoped"); Donna Bishop and Charles Frazier, Consequences of Transfer, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 261 (surveying studies and concluding that "transferred youths are more likely to reoffend, and to reoffend more quickly and more often, than those retained in the juvenile justice system"); Jeffrey Fagan, Separating the Men From the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders, in James C. Howell et al. eds., Sourcebook on Serious, Violent & Chronic Juvenile Offenders 238 (1995).

Franklin Zimring has argued that the dominant historical purpose of the juvenile-court system has been to avoid the harms inflicted upon young offenders when they are adjudicated and sentenced in the adult criminal-justice system, and that this underpinning has survived during increasingly punitive eras of adult criminal-justice policy. See Franklin E. Zimring, The Common Thread: Diversion in the Jurisprudence of Juvenile Courts, in Margaret K. Rosenbaum, Franklin E. Zimring, David S. Tanenhaus, and Bernardine Dohrn eds., A Century of Juvenile Justice (Chicago: University of Chicago Press, 2002). See also Henry Ruth and Kevin R. Reitz, The Challenge of Crime: Rethinking Our Response (2003), at 262-266.

(4) Small group of serious violent offenders. On the age-crime curve, see Michael R. Gottfredson and Travis Hirschi, A General Theory of Crime (Palo Alto: Stanford University Press, 1990), at 124-130 (noting that "the shape or form of the [age-crime] distribution has remained virtually unchanged for about 150 years"). The original Model Penal Code focused § 6.05 on the age group 17 to 21, in part because this group manifested "high offense rates," "serious forms of criminality," and "high rates of recidivism, with repetition persistent over extended periods of time." Model Penal Code and Commentaries, Part I. §§ 6.01 to 7.09, § 6.05 (1985), at 74.

Longitudinal research into the criminal careers of large cohorts of American males yielded the finding that only a tiny fraction became serious, repeat offenders. See Marvin E. Wolfgang, Robert M. Figlio, and Thorsten Sellin, Delinquency in a Birth Cohort (Chicago: University of Chicago Press, 1972), at 89 tables 6.1 and 6.2 (finding that a small group of chronic offenders, who made up 6.3 percent of the total cohort of 14,313 males born in Philadelphia in 1945, and 18 percent of cohort offenders, committed 52 percent of the offenses committed by the entire cohort from ages 10 through 17); Paul E. Tracy, Marvin E. Wolfgang, and Robert M. Figlio, Delinquency Careers in Two Birth Cohorts (New York: Plenum Press, 1990), at 15 (reporting that "chronics [6.3 percent of the 1945 birth cohort] had committed 63% of the Uniform Crime Report (UCR) index offenses, including 71% of the homicides, 73% of the rapes, 82% of the robberies, and 69% of the aggravated assaults"), id. at 83, 90 (among a second cohort of males born in Philadelphia in 1958, 7.5 percent of the total cohort, and 23 percent of those ever adjudged delinquent, were chronic offenders; this group committed "68% of the index offenses, 60% of the murders, 75% of the rapes, 73% of the robberies, [and] 65% of the assaults" committed by the entire cohort from ages 10 through 17).

(5) Deterrence. See Roper v. Simmons, 543 U.S. 551 (2005) (discussing reduced deterrent efficacy of penalties aimed at juvenile offending); Graham v. Florida, 130 S. Ct. 2011 (2010) (same). See also Bonnie L. Halpern-Felsher and Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults, 22 J. Applied Developmental Psychol. 257 (2001). The efficacy of general deterrence strategies that turn on the severity of criminal penalties, rather than their probability of being imposed, is in grave doubt even for adult offenders. See Cheryl Marie Webster and Anthony N. Doob, Searching for Sasquatch: Deterrence of Crime Through Sentence Severity, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (forthcoming 2011); Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and Per-Olof H. Wikström, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research. (1999). On the known propensity of adolescents to engage in risk-taking behaviors, see Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court (1999), at 310-312 ("Youths' developmentally influenced cost-benefit calculus may induce them to weigh benefits and consequences differently and to discount negative future consequences in ways that may systematically skew the quality of their choices.").

d. Availability of juvenile-court sanctions. Seventeen states give adult sentencing courts a blended sentencing option for transferred juveniles. This allows the court to impose a sanction that would ordinarily be available only in the juvenile court. Often the juvenile sanction is conditional, however, and is accompanied by an adult suspended sentence. See National Center for Juvenile Justice, National Overviews: Which States Try Juveniles as Adults and Use Blended Sentencing?, http://70.89.227.250:8080/stateprofiles/overviews/transfer_state_overview.asp (last visited Mar. 11, 2011) (current through 2009 legislative term); Patrick Griffin, State Juvenile Justice Profiles, National Overviews: Which States Try Juveniles as Adults and Use Blended Sentencing?, National Center for Juvenile Justice (2011), available at http://70.89.227.250:8080/stateprofiles/overviews/transfer_state_overview.asp (last visited Mar. 11, 2011) (current through 2009 legislative term).

e. Mandatory juvenile disposition. Numerous states give adult sentencing courts discretion to impose a juvenile disposition as an alternative to an adult criminal penalty. Subsections (e)(i) through (iv) would go further to make imposition of a juvenile disposition mandatory in some circumstances. Subsection (e)(ii) addressing cases in

which the offender's presence in the adult courtroom was predicated on the existence of one or more serious felony charges, yet those charges did not result in conviction in the adult court, was inspired by Barry C. Feld, Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 112 (advocating transfer back to the juvenile court in such cases).

f. Authority to deviate from mandatory penalties. Washington State bars the application of mandatory-minimum penalties to juvenile offenders in adult courts. Wash. Rev. Code § 9.94A.540(3). Montana and Oregon exempt juveniles in adult criminal courts from mandatory penalties in some instances. Mont. Code §46-18-222; Or. Rev. Stat. §161.620.

g. Cap on severity of prison sentences. The numbers of young offenders receiving extremely long prison sentences has been increasing in recent decades. See Ashley Nellis and Ryan S. King, No Exit: The Expanding Use of Life Sentences in America (The Sentencing Project, 2009), at 16 ("There are currently 6,907 individuals serving life sentences for crimes committed when they were a juvenile. Among these, 1,755 have a sentence of life without parole."). More than two-thirds of juvenile offenders serving life sentences are African American or Hispanic. Id. at 21, 23.

j. Prohibition on housing juveniles in adult institutions. See Department of Health and Human Services, Youth Violence: A Report of the Surgeon General (2001), at 118 ("Results from a series of reports indicate that young people placed in adult correctional institutions, compared to those placed in institutions designed for youth, are eight times as likely to commit suicide, five times as likely to be sexually assaulted, twice as likely to be beaten by staff, and 50 percent as likely to be attacked with a weapon."). Some state laws speak to age limitation in adult institutions, but no state has passed legislation in full compliance with subsection (j). See, e.g., Cal. Penal Code § 1170.19(a)(2) ("The person shall not be housed in any facility under the jurisdiction of the Department of Corrections, if the person is under the age of 16 years").

k. Selective extension of this provision to older offenders. See Laurence Steinberg and Elizabeth Cauffman, A Developmental Perspective on Jurisdictional Boundary, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 384:

> [A]dolescence is a period of tremendous intra-individual variability. Within any given individual, the developmental timetable of different aspects of maturation may vary markedly, such that a given teenager may be mature physically but immature emotionally, socially precocious but an intellectual late bloomer. . . .
>
> Variability *among* individuals in their biological, cognitive, emotional, and social characteristics is more important still . . . . [M]ost research suggests that, from early adolescence on, chronological age is a very poor marker for developmental maturity—as a visit to any junior high school will surely attest.

See also Elizabeth R. Sowell et al., Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation, 21 J. Neurosci. 8819 (2001);

Jeffrey Jensen Arnett, Emerging Adulthood: Theory of Development from the Late Teens Through the Twenties, 55 Am. Psychologist 46 (2000).

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§ 6.14. Victim-Offender Conferencing; Principles for Legislation. [48]

The Institute does not recommend a specific legislative scheme for carrying out the victim-offender conferencing permitted by this provision, nor is the provision drafted in the form of model legislation. The text of this provision is included in an Appendix containing Principles of Legislation. *See page 555.*

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§ 6.15. Violations of Probation or Postrelease Supervision.[49]

(1) When there is probable cause to believe that an individual has violated a condition of probation or postrelease supervision, the supervising agent or agency shall promptly take one or more of the following steps:

(a) Counsel the individual or issue a verbal or written warning;

(b) Increase contacts with the individual under supervision to ensure compliance;

(c) Provide opportunity for voluntary participation in programs designed to reduce identified risks of criminal re-offense;

(d) Petition the court to remove or modify conditions that are no longer required for public safety, or with which the individual is reasonably unable to comply;

(e) Petition the court to impose additional conditions or make changes in existing conditions designed to decrease the individual's risk of criminal re-offense, including but not limited to inpatient treatment programs, electronic monitoring, and other noncustodial restrictions; or

(f) Petition the court for revocation of probation or postrelease supervision.

(g) If necessary to protect public safety, the agency may ask the court to issue a warrant for the arrest and detention of the individual pending a hearing

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[48] This Section has been approved by the Council and is presented to the membership for a vote for the first time in this draft.

[49] This Section was originally approved in 2014; see Tentative Draft No. 3.

PLEASE BRING THIS DRAFT TO THE ANNUAL MEETING

Submitted by the Council to the Members of
The American Law Institute
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Model Penal Code: Sentencing

Discussion Draft No. 2

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SUBJECTS COVERED

PART I General Provisions
- ARTICLE 6 Authorized Disposition of Offenders (§§ 6.01, 6.06, 6.07 (deleted), 6.08, 6.09 (deleted), 6.10, 6.10A)
- ARTICLE 6B Sentencing Guidelines (§ 6B.09)
- ARTICLE 7 Authority of the Court in Sentencing (§§ 7.03 (deleted), 7.04 (deleted), 7.09)

PART III Treatment and Correction
- ARTICLE 305 Prison Release and Postrelease Supervision (§§ 305.1, 305.6, 305.7)

GENERAL PLAN FOR REVISION: Parts III and IV of the 1962 Model Penal Code

APPENDIX: 1962 Model Penal Code, Parts III and IV

This Discussion Draft is being circulated for discussion at the 2009 Annual Meeting of The American Law Institute. Other comments on the draft are also welcome. As of the time of publication of this Draft, neither the Council nor the membership of the Institute has taken a position on the material contained within it; therefore, the views expressed here do not represent the position of the Institute.

survive the scrutiny of a "second look," this will not invariably be the case. The retributive and utilitarian premises that supported an original sentencing may change materially over a long span of time, and the possibility of transformation in an offender's character or circumstances increases with the passage of many years. See § 6.10A, Comment *b*.

b. Identity of the official decisionmaker. The Institute cannot with confidence recommend any one set of institutional arrangements to carry out the functional principles set out in this Section. In the preparation of § 305.6, a number of alternatives were discussed. A selection of possibilities are presented below, with the caveat that the Model Code contemplates there will be substantial state-by-state experimentation in jurisdictions that act upon the recommendations in § 305.6. This Comment is by no means intended to be an exhaustive catalogue of legislative options.

(1) *Newly created agency or tribunal.* Creation of a wholly new agency or tribunal to act as official decisionmaker may be a promising route for implementation of § 305.6. As explored below, no existing official actor or institution can be recommended for the role without reservation. In particular, the sentence-modification authority should be insulated from political pressure to the extent possible. Parole boards, elected judges, parole or pardon board members who serve at the pleasure of the governor, and even sentencing commissioners can be expected to face political consequences for decisions that result in the early release of long-term prisoners. Perhaps a newly conceived official decisionmaker could be set apart from familiar political incentive structures. For example, a state may choose to create a panel of three or more trial judges to serve as a sentence-modification tribunal on the theory that multiple decisionmakers can spread the political risk attending reductions of sentences. Alternatively, a panel of retired trial judges might be convened, subject to discretionary review by the trial courts or appellate courts of the state.

(2) *Parole board.* Many states will be tempted to place existing parole boards in charge of sentence-modification decisions under this Section—or reconstitute parole boards if they formerly were removed from the prison-release process. This option should be explored with caution. The American history of parole boards as releasing authorities has been bleak, see Reporter's Study (this draft), and in recent years parole boards have proven highly susceptible to political influences. If a telephone call from the governor can materially change release practices of the official decisionmaker under § 305.6, then the second-look mechanism will lack rationale, integrity, and credibility.

(3) *Trial courts.* Trial courts might be designated as official decisionmakers under paragraph 1 of this Section, although no trial bench in the country now holds comparable authority.

A minority of states recognize no judicial power whatsoever to modify a prison sentence once execution has commenced. Most states grant the courts a general sentence-modification power that expires several months after the original sentencing. Section 305.6, in

contrast to majority practice, creates a sentence-modification authority that comes into being many years after the original sentencing. Only a handful of states have created a judicial sentence-modification mechanism that extends years into the execution of a prison term, and only two of these impose periods of delay before the court's authority may be exercised—with waiting periods generally much shorter than the 15 years recommended in the revised Code. There is at least slim precedent, however, for the notion that judicial sentencing discretion, selectively exercised, may play an important role deep into the execution of a long prison term.

Most states provide for change in prisoners' sentences for reasons of old age or infirmity, and this power typically exists throughout a prison sentence. The subject of "compassionate release" is treated separately in the revised Code, in § 305.7 (this draft). Nonetheless, "compassionate" sentence-modification provisions are related to the general modification power in § 305.6. Eligibility for compassionate release depends on a material change in the offender's circumstances and a need to revisit the continuing rationality of the use of incarceration. Compassionate release might be seen as a special case of the concerns embraced in § 305.6, calling for different considerations of timing.

[For an illustration of a black-letter provision that designates the trial courts as the official decisionmakers under paragraph 1, see the Reporter's Note following this Section.]

(4) *Sentencing commission.* The purview of sentencing commissions historically has extended to the entire sentencing system and whole categories of cases within the system. No existing commission has ever exercised decisional authority at the case-specific level. In theory, a commission or a sub-branch of a commission could be asked to assume such a task in the sentence-modification setting. A principal danger of this arrangement would be the potential sacrifice of the commission's perceived status as a neutral and nonpartisan body equally responsive to all sectors of the criminal-justice system. See § 6A.01 and Comment *g* (Tentative Draft No. 1, 2007). In addition, from a pragmatic perspective, the expertise, facilities, and personnel needed to discharge a sentence-modification function in particular cases—where hearings may be required and the submissions of counsel entertained—will be lacking in existing sentencing commissions. A designation of a commission as responsible decisionmaker under paragraph 1 would thus bear resemblance to the undertaking of creating a wholly new agency or tribunal to implement § 305.6, but may carry disadvantages that the chartering of a new official actor would not.

(5) *Department of Corrections.* Departments of Corrections hold sentence-modification power in a number of jurisdictions, particularly with respect to the "compassionate" release of aged or infirm inmates. Like parole boards, Departments of Corrections have typically exercised these powers with little due process provided to the prisoner, no record of proceedings, no binding legal regulation, and no review of decisions. Many states will consider vesting the authority contemplated in § 305.6 in Departments of Corrections, but they should take care to create new standards and processes consistent with

the principles of legislation stated in § 305.6. Some of these call for operational attributes far different from those now in existence in most Departments.

(6) *Board of Pardons.* Boards of pardons, once important players in prison-release decisions in many American jurisdictions, have become largely dormant in the late 20th and early 21st centuries. If a state chooses to invest sentence-modification power in such a board under paragraph 1 of § 305.6, close attention must be paid to the overall composition of the agency, and its ability to discharge the core functions of the provision. There may be some need for a "reinvention" of an existing board to enable it to function with the degree of political insulation envisioned by this Section, and to provide minimal procedural safeguards as required under paragraphs 4 through 8.

c. Minimum term before eligibility. Only a small fraction of prison sentences are long enough to result in a continuous period of incarceration of 15 years. Given the Code's good-time provision, see § 305.1, and given that it may take months to rule on a sentence-modification application, only inmates serving sentences greater than 18 years are likely to be affected by this Section—and meaningful reductions in term can occur only for sentences substantially in excess of 18 years. See § 6.10A, Comment *a*.

d. Recurring eligibility. The sentence-modification authority in this Section will create administrative burdens however it is implemented. Some balance must be found between the costs of reassessment of lengthy prison sentences and the importance of doing so as more and more time has elapsed since the original sentencing. Paragraph 2 states that a prisoner's eligibility to apply for sentence modification should recur at least every 10 years after denial of an initial application. States are free to provide for shorter intervals consistent with the Institute's recommendations.

e. Gatekeeping authority. Depending on the identity of the official decisionmaker designated under paragraph 1, it may be appropriate to craft a gatekeeping mechanism to ensure that only colorable applications for sentence modification are presented to the official decisionmaker for consideration.

f. Appointed counsel. Under paragraph 4, the legislature must create an adequate mechanism for the discretionary appointment of counsel to represent an indigent prisoner during the sentence-modification proceedings. Normally such an appointment will not be made until the official decisionmaker, or the gatekeeping institution, has determined that a hearing on the application is warranted. In some instances, however, it may be appropriate to authorize the appointment of counsel to assist an indigent prisoner in the preparation of an application or amended application. This may occur if a potentially meritorious application is incomplete or unskillfully drafted.

g. Minimum procedural requirements. The procedural modesty of § 305.6 is in recognition of the need for experimentation and flexibility across jurisdictions.

Submitted by the Council to the Members of
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THE AMERICAN LAW INSTITUTE

Model Penal Code: Sentencing

Discussion Draft No. 3

(March 29, 2010)

SUBJECTS COVERED

I. Determinate versus Indeterminate Sentencing
II. Prison-Release Mechanisms Within a Generally Determinate Structure (§§ 305.1, 305.7, 305.6)
III. Life Sentences
IV. Needs and Risk Assessments of Offenders at Sentencing (§ 6B.09)
V. Sentencing Juveniles Convicted in Adult Court (§ 6.11A)
VI. Post-Release Supervision Terms

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Model Penal Code: Sentencing
Discussion Draft No. 3

Kevin R. Reitz

Reporter

March 2010

The purpose of this Discussion Draft is to apprise the membership of a series of major policy discussions that are moving forward in the Model Penal Code: Sentencing ("MPCS") project. New black-letter provisions on these subjects will be included in Tentative Draft No. 2, which may be brought forward for approval at the next Annual Meeting. Many of the policy questions canvassed below have occasioned lengthy debate within and outside the Institute.[1] Guidance from the membership on these key issues is critical at this stage, to inform the final crafting of Tentative Draft No. 2.

I. Determinate versus Indeterminate Sentencing.

The Advisers, Members Consultative Group ("MCG"), and Council are in broad agreement that the MPCS should recommend a generally *determinate* sentencing system to the states. In a determinate structure, the durations of prison terms actually served by inmates bear a close and predictable relationship to the terms imposed by sentencing courts. In the current language of American sentencing policy, "determinate" systems are defined as those that have eliminated the prison-release authority of the parole board.[2]

[1] In addition to the thorough consideration of drafts within the ALI process, two journals have published special-theme issues on questions arising from ongoing MPCS drafting, see Model Penal Code Symposium, 61 Fla. L. Rev. 665-826 (2009) (articles by Christopher Slobogin, Kevin R. Reitz, Douglas A. Berman, Alice Ristroph, Michael Marcus, Nora V. Demleitner, and Robert Weisberg); ABA Roundtable on "Second Look" Sentencing Reforms, 61 Fed. Sent'g Rptr. 149-225 (2009) (articles by Margaret Colgate Love, Rachel E. Barkow, Daniel T. Kobil, Stephen R. Sady & Lynn Deffebach, Mary Price, Nora V. Demleitner, Dora Schriro, Douglas A. Berman, Sylvia Royce, Richard S. Frase, and Mark Bergstrom, Frank Dermody, Steven L. Chanenson, and Jordan Hyatt). Current work on the project has been greatly influenced by these contributions.

[2] See John Wool and Don Stemen, Aggravated Sentencing: *Blakely v. Washington*: Practical Implications for State Sentencing Systems (Vera Institute of Justice, August 2004), at 2 (defining "determinate sentencing system" as "a system in which there is no discretionary releasing authority and an offender may be released from prison only after expiration of the sentence imposed (less available good or earned time).").

(Note that the issue of discretionary *release* is wholly separate from questions relating to postrelease *supervision*, which the MPCS retains and views as critically important to the successful reintegration of offenders into the community, however their release dates are determined.) Determinate systems privilege the "front-end" sentencing discretion of the courts over the "back-end" authority of parole boards.[3]

The competing model, endorsed by the original Model Penal Code, is an "indeterminate" framework in which judicially imposed prison sentences are subject to a great deal of later-in-time discretion. The distinctive feature of American indeterminate systems is a powerful parole board with broad prison-release authority.[4] Under the original MPC scheme, for example, the parole board was given considerably more discretion to determine actual lengths of prison stays than the sentencing courts.[5] When indeterminate systems were pioneered in the U.S., their designers assumed that sentencing judges were poorly positioned to set incarceration terms with any degree of precision. Their underlying theory was that imprisoned offenders were on the path to rehabilitation, and that only the parole board—many months or years after judicial sentencing proceedings—would be capable of discerning when rehabilitation had occurred in individual cases.[6]

The MPCS proposal in favor of a determinate sentencing structure has considerable precedent in current law, follows American Bar Association policy,[7] but is the minority view among American legislatures.[8] About one-third of U.S. jurisdictions

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[3] Kay A. Knapp, Allocation of Discretion and Accountability Within Sentencing Structures, 64 U. Colo. L. Rev. 737 (1993).

[4] See Wool & Stemen, supra, at 2 (defining "indeterminate sentencing system" as "a system in which a discretionary releasing authority, such as a parole board, may release an offender from prison prior to expiration of the sentence imposed. It may also, but need not, allow judges to impose a sentence range (such as, three-to-six years) rather than a specific period of time to be served.").

[5] Report 18-26 (2003). Nationwide in 2005, the average time served by prisoners was less than 40 percent of the maximum term imposed by the sentencing court. U.S. Dept. of Justice, Bureau of Justice Statistics, National Corrections Reporting Program: Sentence Length of State Prisoners, by Offense, Admission Type, Gender, and Race, table 10 (2010), http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2056 (last visited Mar. 17, 2010).

[6] This occurred in the late 19th and the first third of the 20th centuries. See David R. Rothman, Conscience and Convenience: The Asylum and its Alternatives in Progressive America (1980), chapter 5 ("A Game of Chance: The Condition of Parole").

[7] See American Bar Association, Standards for Criminal Justice: Sentencing, Third Edition (1994), Standards 18-2.5, 18-3.21(g), and 18-4.4(c).

[8] Other Western nations have not embraced indeterminacy to the same extent as American governments, even at the height of indeterminacy's reign in the middle third of the 20th

have abrogated the prison-release discretion of the parole board for most cases—a number that has been slowly growing over the past several decades—while two-thirds of the states adhere to the model of indeterminacy for most prison cases.[9]

For a full discussion of the issues, see MPCS, Discussion Draft No. 2 (2009), Reporter's Study, at pp. 1-31. A summary of the main points of the study is as follows:

- A parole board is not in a better position than a sentencing court to determine proportionate lengths of prison terms in specific cases in light of offense gravity, harm to victims, or offender blameworthiness. Judicial determinations of proportionality should not be superseded by a parole board's different view.
- Based on a review of current research and technology, there is no persuasive evidence that a parole board can better effectuate the utilitarian goals of sentencing systems than a sentencing court. In particular, there is no persuasive evidence that parole boards can separate those inmates who have been rehabilitated from those who have not.[10] Likewise, there is no persuasive evidence that parole boards can assess the risk of future offending in individual cases with any greater accuracy than sentencing courts.[11]

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century. Although indeterminate sentences are occasionally meted out in some European legal systems, they are restricted to narrow classes of offenders. See, e.g., Andrew Ashworth, Sentencing and Criminal Justice, Fourth Edition (Cambridge: Cambridge University Press, 2005), at 211-212 (2003 legislation in England and Wales created indeterminate sentences for serious offenders who meet statutory requirements of predicted future dangerousness).

[9] See Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (2003), at 66-67 table 3.1.

[10] Recidivism rates do not vary in any discernible pattern according to the determinacy or indeterminacy of U.S. sentencing schemes. California, a determinate state, experiences very high reoffending rates among released prisoners. Looking to the remaining 49 states, however, the chances of an ex-prisoner's success following release are slightly higher in determinate as opposed to indeterminate systems. MPCS, Discussion Draft No. 2 (2009), Reporter's Study, at 12-13. See also William D. Bales, Gerry G. Gaes, Thomas G. Blomberg, & Kerensa N. Pate, An Assessment of the Development and Outcomes of Determinate Sentencing, Justice Research & Policy (forthcoming 2010) (finding that recidivism rates for released prisoners dropped after Florida switched from an indeterminate to a determinate system for prison release).

[11] See MPCS, Discussion Draft No. 2 (2009), Reporter's Study, at 9-10 (footnotes omitted):

> Although there has been much hope for the development of risk assessments that incorporate consideration of inmates' in-prison activities, to improve upon predictions prior to confinement, these technologies remain unproven. Today, the

- The procedural protections available to prisoners in the parole-release context are minimal when compared to those attendant to the judicial sentencing process. The parole process lacks transparency, is a wide-open discretionary regime with no enforceable decision rules, generates little or no record of proceedings, has no requirement that reasons be given for decisions, carries no right to appointed counsel, and provides no meaningful prospect of appeal. Even if all else were equal, considerations of fairness and regularity would favor decisionmaking by courts.

- Research, historical inquiry, and the experience of Advisers and others supports the judgment that parole boards as release authorities are failed institutions. During the MPCS drafting process, no one has come forward with an example in contemporary practice, or from any historical era, of a parole-release agency that has performed its function reasonably well. We are lacking a salutary real-world model for the formulation of model legislation.

- In the last three decades, parole boards have shown themselves to be highly susceptible to political pressure. There are many instances in which the parole-release policy of a jurisdiction has changed overnight in response to a single high-profile crime.

- Parole-release discretion should not be favored as an ostensible check on the size or growth of prison populations. Over the past 30 years, the leading prison-growth states in the U.S. have been those operating with indeterminate sentencing systems. In contrast, two-thirds of the states that have adopted determinate structures have experienced below-average

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most used and most successful risk-prediction instruments rely on static factors. In the research community, there is disagreement over how close we are to valid dynamic models that may be applied to prison inmates, but researchers agree that the development of prediction models that incorporate dynamic variables remains an important horizon for future research.

See also Anthony J. Glover, Diane E. Nicholson, Toni Hemmati, Gary A. Bernfeld & Vernon L. Quinsey, A Comparison of Predictors of General and Violent Recidivism Among High-Risk Federal Offenders, 29 Criminal Justice and Behavior 235, 236, 247 (2002) ("Most currently available actuarial approaches use primarily static or historical predictors . . . Future work could focus on dynamic factors (e.g., criminal attitudes, antisocial associates) relating to high-risk individuals"); Stephen C. P. Wong & Audrey Gordon, The Validity and Reliability of the Violence Risk Scale: A Treatment-Friendly Violence Risk Assessment Tool, 12 Psychology, Public Policy, and Law 279, 279 (2006) ("The development of risk assessment tools that use dynamic variables to predict recidivism and to inform and facilitate violence reduction interventions is the next major challenge in the field of risk assessment and management").

prison growth when compared to other states. Every state that has operated with sentencing guidelines, while also eliminating the release authority of the parole board (the proposed MPCS structure), has experienced below-average prison growth.[12]

The preference for a generally determinate sentencing system is the central policy recommendation of the current MPCS drafting cycle, and the most important issue that will be put to the membership in the next Tentative Draft.

Questions Recommended for Discussion:

Should the MPCS recommend that states adopt or maintain a determinate sentencing system?

If an indeterminate model is thought preferable, what examples of successful indeterminate sentencing systems may the Institute consult as bases for the new MPCS scheme?

II. Prison-Release Mechanisms Within a Generally Determinate Structure

There is no such thing as a *pure* determinate sentencing system. In such a system, the sentencing judge would fix an exact length of stay for each prisoner, and there would be no official actor with later-in-time discretion to lengthen or shorten that term. Even in U.S. systems that classify themselves as determinate because of the elimination of parole-release authority, judicial prison sentences are rarely immutable. American determinate systems retain good-time or earned-time provisions that offer reductions in time served to most inmates, compassionate-release provisions that allow early release based on an inmate's poor health or other compelling circumstances, and executive clemency powers that can override the trial court's sentence or erase an offender's conviction entirely. In addition, determinate sentences imposed at one point in time may later be amended because of unforeseen exigencies, as when states engage in the emergency release of inmates to combat prison overcrowding (e.g., as now contemplated in California), or when jurisdictions adopt retroactive changes in criminal penalties for certain offenses (as recently occurred for some crack cocaine penalties in federal law).

The systemic importance of these mechanisms, separately and in combination, depends on the legal particulars of how they are defined and the realities of how they are implemented in practice. The key questions for the MPCS project include: What qualifications and adjustments should be made in the generally determinate MPCS

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[12] See MPCS, Discussion Draft No. 2 (2009), Reporter's Study, at 15-30.

Juvenile Act

(Act No. 168 of July 15, 1948)

Chapter I General Provisions

(Purpose of this Act)

Article 1 The purpose of this Act is to subject delinquent Juveniles to protective measures to correct their personality traits and modify their environment, and to implement special measures for juvenile criminal cases, for the purpose of Juveniles' sound development.

(Juvenile, Adult and Custodian)

Article 2 (1) In this Act, the term "Juvenile" refers to a person under 20 years of age; the term "Adult" refers to a person of 20 years of age or older.

(2) In this Act, the term "Custodian" refers to a person with a statutory obligation to have custody of and provide education to a Juvenile, or a person who has actual custody of a Juvenile.

Chapter II Juvenile Protection Cases

Section 1 General Rules

(Juveniles subject to hearing and decision)

Article 3 (1) A Juvenile to whom any of the following items applies shall be referred to a hearing and decision of the family court.

(i) A Juvenile who has committed a crime

Article 47 (1) The statute of limitations for prosecution shall be suspended during the period from the time when the ruling prescribed in Article 21 is rendered as in the case in the first sentence of Article 8, paragraph (1) or from the time of the referral as in the case in the second sentence of Article 8, paragraph (1) to the time when the ruling imposing protective measures becomes final and binding.

(2) The provisions of the preceding paragraph shall apply to a case in which the Juvenile reaches 20 years of age after the ruling prescribed in Article 21 or the referral concerning the Juvenile.

(Detention)

Article 48 (1) No detention warrant may be issued against a Juvenile except when the detention is unavoidable.

(2) When a Juvenile is detained, he or she may be detained in a Juvenile classification home.

(3) The provisions of the preceding paragraph shall remain applicable after the Juvenile reaches 20 years of age.

(Separation of treatment)

Article 49 (1) A Juvenile suspect or defendant shall be separated from other suspects or defendants to prevent the Juvenile from coming into contact with them.

(2) The proceedings against the Juvenile defendant shall be separated even from the related case of another defendant as long as the proceedings are not obstructed.

(3) At a penal institution, detention facility or coast guard detention facility, a Juvenile, except for a sentenced person as prescribed in Article 2, item (iv) of the Act on Penal Detention Facilities and Treatment of Inmates and Detainees (Act No. 50 of 2005) (excluding any such person with the status of unsentenced person as prescribed in item (viii) of the same Article), shall be committed separately from Adults.

(Proceedings policy)

Article 50 The proceedings of a criminal case of a Juvenile shall be conducted in compliance with the purport of Article 9.

Section 3 Dispositions

(Mitigation of death penalty and life imprisonment)

Article 51 (1) In case a person who is under 18 of age at the time of commission of an offense is to be punished with death penalty, life imprisonment shall be

imposed.

(2) In case a person who is under 18 of age at the time of commission of an offense is to be punished with life imprisonment, imprisonment with or without work for a definite term may be imposed. In this case, the term of imprisonment imposed shall be neither less than 10 years nor more than 15 years.

(Indeterminate sentence)

Article 52 (1) In case a Juvenile is to be punished with imprisonment with or without work for a definite term with the maximum term of three years or more, the Juvenile shall be given a sentence which prescribes the maximum and minimum imprisonment terms determined within the limit of said penalty; provided, however, in case the Juvenile is to be punished with imprisonment with the minimum term exceeding five years, the minimum term shall be reduced to five years.

(2) No punishment imposed pursuant to the provisions of the preceding paragraph shall have a minimum term of longer than five years or a maximum term of longer than ten years.

(3) The provisions of the preceding two paragraphs shall not apply in the case where suspension of execution of sentence is given.

(Number of days of custody in a juvenile classification home)

Article 53 When the measures prescribed in Article 17, paragraph (1), item (ii) are implemented, the number of days of custody to a juvenile classification home shall be deemed as the number of days of pre-sentencing detention.

(Prohibition on disposition in lieu of penalty)

Article 54 No Juvenile shall be sentenced to detention in a workhouse for payment of fines.

(Transfer to a Family Court)

Article 55 A court shall, by a ruling, transfer a case to a family court if it is found appropriate to subject the Juvenile defendant to protective measures as a result of the examination of the facts.

(Execution of imprisonment with or without work)

Article 56 (1) Regarding a Juvenile sentenced to imprisonment with or without work (excluding a person subject to execution of punishment at a juvenile training school pursuant to the provisions of paragraph (3)), the punishment shall be executed in a specially established penal institution or a specially partitioned area within a penal institution or detention facility.

(2) After the Juvenile reaches 20 years of age, the execution pursuant to the provisions of the preceding paragraph may be continued until the Juvenile reaches 26 years of age.

(3) Notwithstanding the provisions in Article 12, paragraph (2) of the Penal Code or in Article 13, paragraph (2) of the same Code, a punishment against a Juvenile under 16 years of age sentenced to imprisonment with or without work may be executed at a juvenile training school until he or she reaches 16 years of age. In this case, correctional education shall be given to the Juvenile.

(Execution of punishment and educational and supervisory measures)

Article 57 If a sentence of imprisonment with or without work or misdemeanor imprisonment without work becomes final and binding in the course of execution of a protective measure, the sentence shall be executed in preference. The same shall apply in cases where a protective measure is implemented before the execution of a sentence of imprisonment with or without work or misdemeanor imprisonment without work that has become final and binding.

(Parole)

Article 58 (1) A person sentenced to imprisonment with or without work when he or she was a Juvenile shall be given parole after the passage of the following period listed.

(i) Seven years in case of life imprisonment

(ii) Three years in case of imprisonment for a definite term imposed pursuant to the provisions of Article 51, paragraph (2)

(iii) One-third of the minimum term in case of a penalty imposed pursuant to the provisions of Article 52 paragraph (1) or (2)

(2) The provisions of item (i) in the preceding paragraph shall not apply to a person sentenced to life imprisonment pursuant to the provisions of Article 51, paragraph (1).

(Termination of a parole period)

Article 59 (1) In case a person sentenced to life imprisonment when the person was a Juvenile has been paroled and a period of ten years has passed without rescission of the parole, the person shall be deemed to have finished serving the sentence.

(2) In case of a person sentenced to imprisonment for a definite term when the person was a Juvenile pursuant to the provisions of Article 51, paragraph (2) or Article 52, paragraphs (1) and (2) the person shall be deemed to have finished serving the sentence when either the same period as the period during which the person serves the punishment until parole is given, the term of sentence prescribed in Article 51, paragraph (2) or the maximum term

prescribed in Article 52, paragraphs (1) and (2), whichever is shortest, has passed without rescission of the parole since the person is given parole.

(Application of laws and regulations concerning personal qualification)

Article 60 (1) With respect to application of laws and regulations regarding personal qualification, a person who has served a sentence imposed for a crime committed when the person was a Juvenile or who has been exempted from execution of the sentence shall be deemed thereafter as not to have been sentenced.

(2) Where a person has been penalized for an offense that the person committed while a Juvenile, but the execution of the penalty has been suspended, the person shall be governed by the provisions of the preceding paragraph during the suspension period, and the execution of the sentence of the person shall be deemed finished.

(3) If, in the case of the preceding paragraph, the suspension of execution of the sentence is rescinded, the person shall be deemed to have been sentenced at the time of its rescission with respect to the application of laws and regulations regarding personal qualifications.

Chapter IV Miscellaneous Provisions

(Prohibition on publication in articles, etc.)

Article 61 No newspaper or other publication may carry any article or photograph from which a person subject to a hearing and decision of a family court, or against whom public prosecution has been instituted for a crime committed while a Juvenile, could be identified based on name, age, occupation, residence, appearance, etc.