COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12482

JEFFREY ROBERIO,
PETITIONER-APPELLANT,

v.

PAUL TRESELER, CHAIRMAN, MASSACHUSETTS PAROLE BOARD,
RESPONDENT-APPELLEE.

On Appeal from a Judgment of the
Suffolk County Superior Court

CORRECTED* AMICUS CURIAE BRIEF ON BEHALF OF:

MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JUVENILE LAW CENTER; PRISONERS' LEGAL SERVICES; NORTHEASTERN UNIVERSITY SCHOOL OF LAW, PRISONERS' RIGHTS PROJECT; HARVARD LAW SCHOOL, PRISON LEGAL ASSISTANCE PROJECT; and COALITION FOR EFFECTIVE PUBLIC SAFETY.

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INTERESTS OF THE *AMICI*

Amici have a shared interest in protecting juvenile homicide offenders from increased penalties from the *ex post facto* application of the 1996 amendment to G. L. c. 127, § 133A ("Section 133A"). *Amici* and their interests are as follows:

Massachusetts Association of Criminal Defense Lawyers (MACDL): MACDL is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their respective practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice. The

MACDL Board has determined that the *Roberio* matter is such a case.

Juvenile Law Center: The Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has participated in appeals to this Court addressing the protections that must be afforded to youth in the juvenile justice system, including as amicus curiae in *Commonwealth v. Brown*, No. SJC-11454; *Commonwealth v. Guthrie G.*, No. SJC-09805; *Commonwealth v. Juvenile "LN" G.*, No. SJC-12351 and *Commonwealth v. Lugo*, No. SJC-12546.

Prisoners' Legal Services (PLS): PLS, formerly known as Massachusetts Correctional Legal Services,

was established in 1972 to protect and promote the civil and constitutional rights of Massachusetts prisoners. PLS provides legal assistance through litigation, informal advocacy, and advice to prisoners on a wide variety of issues, including medical care, conditions of confinement, guard brutality, solitary confinement, access to rehabilitation programs, and parole. PLS receives over 2,000 requests for assistance each year, including many from prisoners who allege unfair and arbitrary treatment from the Parole Board. PLS has a longstanding commitment to ensuring that Massachusetts prisoners, including individuals with life sentences, have fair opportunity to be released on parole.

Northeastern Prisoners' Assistance Project ("Northeastern PAP"): Northeastern PAP was founded by Northeastern University School of Law students in 1979. Among other things, Northeastern PAP trains law students to represent prisoners at second-degree life sentence parole release hearings. Each year, Northeastern PAP represents more than twenty second-degree lifers, some of whom were juveniles at the time of their crime, at their parole release hearings. The vast majority of Northeastern PAP's clients committed

their crimes prior to 1996 when the amendment to G.L. c. 127, § 133A changed the maximum possible length of a setback after a parole denial from three years to five years. Northeastern PAP has a long-standing interest in limiting the application of this amendment because it hinders prisoners' rehabilitation and their timely re-entry and return to the community.

Harvard Prison Legal Assistance Project ("Harvard PLAP"): Harvard PLAP was founded by students at Harvard Law School over forty years ago. Harvard PLAP trains law students to represent incarcerated individuals in certain types of parole hearings, including parole revocation, rescission, and second-degree life sentence hearings. Harvard PLAP also represents prisoners in prison disciplinary hearings and commutation petitions and engages in other efforts to promote prisoner rights.

Coalition for Effective Public Safety (CEPS): CEPS is an organization of advocates, program providers, parolees, formerly incarcerated men and women, friends and relatives of prisoners, and human rights activists who have joined forces to promote and safeguard the human rights of all people across Massachusetts, with a focus on reforming parole,

solitary confinement and the medical release of prisoners. Many of CEPS' members have had their lives negatively impacted by the application of the challenged amendment to G.L. c. 127 § 133A to their or their family members' cases. The lengthening of the parole setback period frustrates rehabilitation, extends incarceration time, and impedes re-integration into the community.

I. STATEMENT OF AMICUS ISSUE

The issue on which the Court solicited amicus briefs is: "Where a juvenile homicide offender convicted of first-degree murder became eligible for parole in light of *Diatchenko v. Dist. Attorney*, 466 Mass. 655 (2013); where, at the time of the offense, G. L. c. 127, § 133A, provided that a prisoner eligible for but denied parole was entitled to a review hearing within three years; and where that statute was amended in 1996 to provide instead for a review hearing within five years, whether application of the five-year provision, rather than the three-year provision, to the juvenile homicide offender constitutes an *ex post facto* violation."

II. STATEMENT OF THE CASE

Jeffrey Roberio is a juvenile homicide offender. The offense for which he was convicted occurred on July 29, 1986, when Roberio was 17-years-old. He was taken into custody shortly after the homicide, and has been in custody ever since, a total of over 32 years.

Roberio was convicted of first-degree murder and armed robbery in August 1987, but his conviction was reversed by this Court in 1998. *See Commonwealth v. Roberio*, 428 Mass. 278 (1998). In January 2000, he

was retried and reconvicted, and sentenced to life in prison with no possibility of parole. His convictions were subsequently affirmed on appeal. *See Commonwealth v. Roberio*, 440 Mass. 245 (2003).

When this Court decided *Diatchenko v. Dist. Attorney*, 466 Mass. 655 (2013), (hereinafter "*Diatchenko I*"), it gave Roberio, as well as the approximately 60 other juveniles who were then serving sentences for first-degree murder in Massachusetts, hope, for the first time, that they might not die in prison. By holding that a life sentence without the possibility of parole for a juvenile homicide offender constituted "cruel and unusual punishment in violation of art. 26 of the Massachusetts Declaration of Rights," and by further holding that its decision would be applied retroactively, the Court provided Roberio, and the cohort of which he is a part, with the possibility of freedom. *Id.* at 667–71.

Following *Diatchenko I*, Roberio was resentenced to life in prison with parole eligibility after 15 years. Having already served well over 15 years in prison, he requested and received a parole hearing. On June 25, 2015, the Massachusetts Parole Board heard Roberio's first parole application. The application

was denied, and Roberio was given a five-year setback under an amendment to Section 133A that had gone into effect in 1996 (the "1996 Amendment"), ten years after Roberio's offense, and nine years after his initial conviction. The five-year setback was the maximum permitted by law. *See* R. at 17. Prior to 1996, including as of the time of Roberio's offense and conviction, the maximum potential parole setback was three years.

On August 24, 2016, Roberio filed a petition pursuant to G.L. c. 231A, seeking a declaration that the retroactive application of the five-year setback to his case violated his state and federal constitutional right not to be subject to an *ex post facto* law. On February 7, 2017, Roberio moved for summary judgment pursuant to Mass. R. Civ. P. 56(c) and the Parole Board moved for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c). On July 7, 2017 the Superior Court denied Roberio's motion, and granted judgment to the Parole Board. Roberio's appeal and this Court's solicitation of amicus briefs followed.

III. SUMMARY OF ARGUMENT

As a threshold matter, this Court need not reach the constitutional *ex post facto* issue presented on appeal, because the 1996 Amendment is substantive, not procedural, and there is no indication in the statute that it was ever intended to apply retroactively, either to adults or juveniles. *See infra*. § V.A.

If the Court reaches the constitutional issue, it should find that retroactive application of the 1996 Amendment to offenders whose offenses were committed prior to 1996 violates *ex post facto* precepts, most fundamentally because any such application would create a significant risk that these offenders would serve an increased term of imprisonment. *See infra*. § V.B. The litmus test for an *ex post facto* violation is the *risk* of increased punishment, not the certainty of it. This Court made that clear in *Commonwealth v. Brown*, 466 Mass. 676, 689 n.10 (2013), where it found that application of a 2012 amendment to Section 133A, which increased the initial term of parole eligibility for second-degree homicide offenders from 15 years to 15-25 years, constituted a constitutional *ex post facto* violation as applied to Brown, not because it would necessarily result in an increased sentence, but

because of the *risk* that it might. The result in *Brown* dictates the same result here. *See infra*. § V.C.

The risk here of an increased sentence is especially significant for first-degree juvenile homicide offenders, like Roberio, whose lives have only recently been transformed from hopelessness to hope by this Court's *Diatchenko I* decision, and whom this Court, the Supreme Court, and neuroscience have all found to be particularly capable of change, growth, and maturation. *See infra*. § V.B.3-4.

If parole for this cohort of juvenile homicide offenders were only a remote and speculative possibility, or the Parole Board had a practice of expediting parole review hearings based on changed circumstances, then the *ex post facto* result here might be different. But the empirical evidence of the past four years regarding the granting of parole to members of the cohort establishes the possibility of parole for them is anything but remote (just as one would expect based on the teachings of *Diatchenko I*). Further, the Board's apparent history of *never* granting expedited review hearings makes clear that misplaced five-year setbacks will not be undone.

Rather, they will result in unnecessarily and unconstitutionally increased sentences. *See infra.* § V.B.2-3.

The conclusion that the 1996 Amendment risks increasing the term of incarceration for those to whom it is retroactively applied is buttressed by the legislative intent of the Amendment, and the design of the Parole Board's implementation regulations. The legislative history of the 1996 Amendment shows that it was intended to increase punishment by increasing the time-period between parole hearings. And the Board's implementation regulations create a presumption that a five-year setback will be applied. *See infra*. § V.D.

In making the case against a finding of an *ex post facto* violation, Respondent-Appellee relies heavily on the *Supreme* Court's decisions in *California Dep't of Corr. v. Morales*, 514 U.S. 499 (1995) and *Garner v. Jones*, 529 U.S. 244 (2000), two cases in which the Court reject *ex post facto* challenges to statutes increasing the terms of parole setbacks for violent adult offenders. But both *Morales* and *Garner* are fundamentally distinguishable from this case, as both involved incorrigible adult double-murderers for

whom the chance of parole would never be anything other than remote and conjectural. In contrast, this case concerns juvenile offenders who are the very definition of corrigible and changeable. *See infra*. § V.E.

Even if this Court were to find that the retroactive application of the 1996 Amendment does not offend the *ex post facto* prohibition of the U.S. Constitution, it should follow the South Carolina Supreme Court and find that it offends the *ex post facto* provision of the state Constitution. Doing so would be in keeping with the teachings of *Diatchenko I* and its progeny, and help to fulfill the promise made by this Court in *Diatchenko I* that juvenile homicide offenders would receive a meaningful opportunity for parole. *See infra*. § V.F.

IV. STATEMENT OF FACTS

A. Jeffrey Roberio

As noted in his Parole Board Decision, Roberio had a difficult childhood. R. at 7. His "mother was emotionally distant and neglectful, and . . . his father was an alcoholic and typically unavailable for support." *Id*. By the age of 16, Roberio had dropped out of school, and was regularly drinking alcohol to

excess. *Id*. A year later, when he was 17, he committed the homicide offense for which he was later convicted. *Id*. at 3.

As of the time of the homicide, Roberio suffered from learning disabilities, attention deficit disorder, oppositional defiant disorder, two separate closed head injuries, lead poisoning, and alcohol and drug abuse. *Id*. at 7. The record indicates that Roberio's alcoholism as well as his neurological and developmental disabilities, including age-related impulsivity, contributed to his offense. *Id*.

Roberio was taken into custody shortly after the offense, and has now been incarcerated for over 32 years. *Id*. at 4. While in custody, Roberio has incurred 39 disciplinary reports, most of which have been for minor infractions, such as violations of "count procedure." *Id*. Notably, he has not been involved in an infraction involving fighting or violence of any sort since 1988, *i.e*., 30 years ago, when he was just 19-years-old. *Id*. And he has incurred no disciplinary reports whatsoever since November 2011, over seven years ago. *Id*.

By all accounts, Roberio has for many years expressed genuine remorse and accepted full

responsibility for his crimes. *Id*. at 7. He has also acknowledged and treated his alcoholism by, among other things, regularly attending AA/NA meetings for the past ten years. *Id*. at 6. There is no evidence that he has had a single drink of alcohol in the past three decades. And as for the impulsivity and various neurological and developmental disabilities from which he suffered as a child, two separate neuropsychologists have testified that his "delayed neurological maturation ha[s] resolved itself." *Id*. at 7. There is no evidence to suggest otherwise.

Until recently, indeed for virtually his entire term of imprisonment, Roberio was incarcerated at the Old Colony Correctional Center ("OCCC"). *Id*. at 6. For years he turned down opportunities to transfer elsewhere, because OCCC is only five minutes from where his family lives, and he wanted to be near them for support. *Id*. He recognized that other institutions may have offered more rehabilitative programs than OCCC, but as he told the Parole Board in 2015, he had "become very complacent" and "comfortable" at Old Colony." *Id*. Of course, it is hardly surprising or blameworthy that for years Roberio placed family and familiarity over ambition

and formal programmatic rehabilitation; after all, for virtually his entire stay in OCCC, that is until this Court's decision in *Diatchenko I* in December 2013, Roberio had no reason to believe he would ever again live outside the prison walls, *i.e.*, he had no reason to believe that he would ever experience a tangible benefit from rehabilitation programming.

Following *Diatchenko I*, Roberio immediately became parole eligible by virtue of the fact that he had already served not just 15, but nearly 28 years in prison. His initial hearing was held on June 25, 2015, and about four months later the Board denied him parole and gave him a five-year setback. Although it noted that Roberio's "overall conduct in prison does not raise heightened concern for violence and substance abuse," the Board found that he had been too "complacent in addressing these issues." *Id*. at 8. Noting that Roberio had completed very little formal anti-violence or substance abuse programming, the Board recommended that he "engage in rehabilitative programming that addresses substance abuse, anger, violence, and any potential mental health issues." *Id*.

Notwithstanding the fact that two independent psychologists had deemed his mental health issues

resolved, and the fact that he does not appear to have abused alcohol or drugs or engaged in any acts of violence for three decades, Roberio took the Board's recommendations to heart. While he may have been "complacent" in the years before this Court's decision in *Diatchenko I*, since his parole hearing he has been anything but. Soon after his adverse parole decision, he accepted a transfer from OCCC to MCI-Norfolk where he successfully completed numerous rehabilitation programs including programs regarding criminal addictive thinking, violence reduction, mental flexibility, and a non-violent conflict resolution program. *See Deal v. Comm'r of Correction*, 478 Mass. 332, 339 n.8 (2017). He also qualified for placement in minimum security prison based on the Department of Correction's ("DOC") objective classification scoring system. *Id*. at 338. Further, according to his counsel, Roberio was recently – on November 29, 2018 - transferred from MCI-Norfolk to MCI-Pondville, which is a minimum security prison. Roberio's counsel and *Amici* believe that Roberio's transfer to minimum security makes him the first inmate in Massachusetts to achieve minimum-security status without either a

positive vote from the Parole Board or a setback of three years or less.

B. The Massachusetts Parole Board

Roberio was one of the initial first-degree juvenile homicide offenders to be considered for parole by the Board. But, as illustrated in the following table, the Board has a long history of considering “lifers” for parole:

Parole Hearings for "Lifers," 1990-2018						
Year	Hearings	Parole Granted	Parole Denied	Parole Rate	> 3yr Setback	Appeals Granted*
1990	70	20	50	34%		ZERO
1991	60	14	46	23%		ZERO
1992	56	13	43	23%		ZERO
1993	79	17	62	22%		ZERO
1994	82	16	66	20%		ZERO
1995	66	8	58	12%		ZERO
1996	98	11	87	11%		ZERO
1997	78	5	73	6%		ZERO
1998	72	8	64	11%		ZERO
1999	102	22	80	22%		ZERO
2000	86	20	66	23%		ZERO
2001	96	31	65	32%		ZERO
2002	123	38	85	31%		ZERO
2003	101	41	60	40%		ZERO
2004	133	59	74	44%		1****
2005	106	33	73	31%		ZERO
2006	114	35	79	31%		ZERO
2007	109	29	80	27%		ZERO
2008	108	29	79	27%		ZERO
2009	88	35	53	40%		ZERO
2010	128	40	88	31%		ZERO
2011	106	12	94	11%	74 of 94 (79%)	ZERO
2012	133	25	108	19%	85 of 108 (79%)	ZERO
2013	101	25	76	24%	56 of 76 (74%)	ZERO
2014	101	41	60	41%		ZERO
2015	113	33	89	21%		ZERO
2016	122	33	89	27%	48 of 89 (54%)	3****
2017	128	33	95	26%	55 of 95 (58%)	ZERO
2018	25***	10	15	40%	8 of 15 (53%)	ZERO

SOURCES:
Yellow = Parole Board Website, Massachusetts Parole Board, Annual Statistical Reports for 2014 (at p. 16), 2015 (at p. 16), and 2016 (at p. 15).
Green = Parole Board Website, decision by decision review. *See* Addendum to this Brief ("ADD") at 14-17 (Affidavit ("Aff.") of James Pingeon ¶¶ 3-5);
Blue = *Boston Globe* articles dated 2/7/11 and 3/26/12. *See* ADD at 10-13;
Red = *See* ADD at 18-20 (Supplemental Affidavit of Patricia Garin ¶¶ 3-6).

* "Appeals" refers inclusively to all grants of administrative appeals, requests for reconsideration of parole denials, and requests for expedited review hearings. The Parole Board does not publish aggregate statistics regarding the success rates of such appeals and requests. The only way to assess these success rates is by reviewing Parole Board decisions individually, and by drawing on the experience of attorneys who have extensive experience with the Parole Board. The sources of the information

in this column are: ADD at 14 (Pingeon Aff.); and R. at 1-6 (Affidavit of Patricia Garin).

******* The 2018 statistics are incomplete. There were more than 25 lifer hearings in 2018, but to date only 25 decisions have been issued and listed on the Parole Board's Website.

******** Based on the collective experience of the *Amici*, and a review of multiple Parole Board decisions, we have been able to uncover four instances among the thousands of lifer cases considered by the Parole Board where appeals and/or requests for reconsideration were successful: (i) In 2004, Northeastern PAP appealed the parole denial and 5-year setback of David Sibinich. After appeal and rehearing, Sibinich's setback was reduced to two years. (ii) In 2016, Northeastern PAP appealed the parole denial and 4-year setback of Ralph Geary. After appeal and rehearing, Geary was paroled to the Interstate Compact (Ohio). (iii) In 2016, Harvard PLAP appealed a 1-year setback that had been given to Wilfred Dacier, who received a new hearing as a result of the appeal. (iv) PLS reviewed all lifer parole decisions from 2016 to date, and found only one successful request for reconsideration. That one occurred in 2016 on behalf of Roy White, whose parole had been revoked. Upon reconsideration, and new information regarding the problems White encountered while out on parole, he was re-paroled.

The statistical information regarding initial parole hearings for first-degree juvenile homicide offenders from 2014 (when the first such hearings took place) to date are as follows:

Initial Parole Hearings: Juvenile First-Degree Lifers, 2014-2018

Initial Hearings	Parole Granted	Parole Rate	Setbacks > 3 Years
35	**12**	**12 of 34* (35%)**	**9 of 22 (41%)**

Source: Respondent-Appellee's Brief ("Resp. Br.") at 13.
*One case remains under advisement.

Based on all of the above statistical information, the following facts, all of which bear on the *ex post facto* issue before the Court, appear to be undeniable:

- Lifer parole rates vary from year to year, and from administration to administration. Many political and other factors, unrelated to the merits of individual cases, contribute to parole decisions. For instance, it is no accident that parole rates plummeted in the period 1995-1996, and no accident that Section 133A was amended in 1996, at the exact time of public concern with "superpredators" (later debunked) – *see, e.g.*, Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, LA. L. Rev. 35, 36, n.6 (2010). Likewise, it is no accident that parole rates again plummeted in the immediate aftermath of Dominic Cinelli's murder of a Woburn police officer on December 26, 2010. *See* Maria Cramer, *Parole Board Still Slow to Release Inmates 8 Years After Ex-Convict Killed Officer, Critics Say,* BOSTON GLOBE, June 26, 2018.

- With the exception of 1995-1998, 2011 and 2012, the annual parole rate for lifers has always been between 20% and 44%, reaching 40% or higher in 2003, 2004, 2009, 2014, and 2018. The Parole Board's current assertion (*see* Resp. Br. at 30 n.9) that the 41% figure for 2014 was an "aberration" is simply not true.
- The chance that first-degree juvenile homicide offenders will be paroled is not remote. At their initial parole hearings this cohort has been paroled at a rate of 35%. If we were to include the results of the very few review hearings for first-degree juvenile offenders that have occurred to date, the positive parole rate would be even higher. *See, e.g.*, ADD at 14 (Pingeon Aff. ¶ 3).
- When first-degree juvenile homicide offenders have been denied parole, it has not been unusual for them to receive setbacks of greater than three years. This has occurred in 9 of 22 cases, *i.e.*, a rate of 41%. More generally for lifers, including second-degree juvenile homicide offenders, setbacks of greater than three years have been routine, occurring annually at rates of

50% to almost 80%. *See, e.g.,* R. at 9-14 (Garin Aff. ¶¶ 19-20).

- Although reconsideration and administrative appeals of parole denials as well as acceleration of review hearings, are all theoretical possibilities under the law and the Parole Board's regulations, as a practical matter, successful reconsideration requests, administrative appeals, and expedited review hearings almost never occur. Our research has uncovered only three successful administrative appeals and only one successful request for reconsideration. *See* R. at 9-14 (Garin Aff. ¶¶ 16-17, 23-24); ADD at 18-20 (Supp. Garin Aff. ¶¶ 4-6); ADD at 17 (Pingeon Aff. ¶ 5).

V. ARGUMENT

A. As a Statutory Matter, the 1996 Amendment Does Not Apply Retroactively.

As a threshold matter, this Court need not reach the Constitutional *ex post facto* issues raised on appeal, because as a pure matter of statutory interpretation there is no evidence that the 1996 Amendment was ever intended to apply retroactively. "Absent clear language to the contrary it is presumed that legislation is not intended to operate retroactively." *Commonwealth v. Fuller,* 421 Mass. 400, 408 (1995). Here, the 1996 Amendment includes no language to the contrary, let alone the requisite clear language. Without this language, the statutory amendment may not be applied retroactively.

Of course, retroactive application of statutes "relating merely to . . . procedure which do not affect substantive rights" is permissible. *Commonwealth v. Greenberg*, 339 Mass. 557, 578–79 (1959). For instance, statutes that provide notice to third parties but do not affect an offender's substantive rights may be applied retroactively. *See*, *e.g., Stewart v. Chairman of the Massachusetts Parole Bd.*, 35 Mass. App. 843, 847 (1994)(upholding

retroactive application of statute requiring that notice of parole hearing be given to victims' families). But, here, there can be no question that the 1996 Amendment's change of the maximum setback period for parole eligibility from three years to five years is substantive. *See, e.g., Johnson v. Comm'r of Correction*, 258 Conn. 804, 818–19 (2002)(amendment to statute changing parole eligibility date for violent offenders is substantive, not procedural, and, independent of *ex post facto* concerns, may not be applied retroactively without express indication of legislative intent). Two years of a man's life is substantive. Indeed, the Supreme Court recognized as much in *Garner*, 529 U.S. at 257, when it remanded the case to the lower courts for consideration of whether the increase in Georgia's parole setback period from three to eight years created a sufficient risk of extending incarceration. If setback rules were merely procedural, there would have been no need for a remand. This Court should reject the retroactive application of the 1996 Amendment to Roberio, and to all others (regardless of juvenile status) who have received parole eligible sentences for crimes

committed prior to the effective date of the 1996 Amendment.

B. The Retroactive Application of the 1996 Amendment to Roberio and Similarly Situated Juvenile Homicide Offenders Sufficiently Risks Increasing Their Terms of Incarceration So As To Violate the State and Federal Constitutional *Ex Post Facto* Provisions.

Even in cases where the retroactive application of a statutory amendment is permitted by the clear and express language of the statue, courts do "well to tread lightly" to ensure the application does not run afoul of the Constitutional prohibition against *ex post facto* laws. *Commonwealth v. Davis*, 380 Mass. 1, 16 (1980). Both "Article I, § 9, of the United States Constitution and art. 24 of the Massachusetts Declaration of Rights provide protection from the operation of *ex post facto* laws." *Commonwealth v. Kelley*, 411 Mass. 212, 214 (1991). These provisions forbid the enactment of any law "which . . . imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981)(citing U.S. Const. art. I, §§ 9, 10); *see Clay v. Massachusetts Parole Bd.*, 475 Mass. 133, 135 (2016)(prohibiting laws that retroactively increase the possible penalty for a

crime committed before the enactment of an applicable statute).

"Retroactive changes that apply to the denial of parole are a proper subject for application of the *ex post facto* clause." *Clay*, 475 Mass. at 135-36; *see also Garner*, 529 U.S. at 250 (changes in parole laws "may be violative of" the *ex post facto* precept); *Lynce v. Mathis*, 519 U.S. 433, 445–46 (1997) (Florida statute retroactively cancelling inmates' provisional release credits violated *ex post facto* clause); *Weaver*, 450 U.S. at 35 (statutory provision that "constricts the inmate's opportunity to earn early release . . . runs afoul of the prohibition against *ex post facto* laws"); *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 663 (1974) ("repeal of parole eligibility previously available to imprisoned offenders would clearly present [a] serious question under the *ex post facto* clause").

To prevail on an *ex post facto* claim, a party must demonstrate (1) that the challenged law has been applied to conduct that occurred before the law's enactment, and (2) "that it raises the penalty from whatever the law provided when he acted." *Clay*, 475 Mass. at 136; *see Lynce*, 519 U.S. at 441 (to violate

the *ex post facto* clause, law "must be retrospective, and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime")(citation omitted). Thus, the "two critical components of an *ex post facto* law are that it operate retrospectively and to the detriment of the defendant." *Fuller*, 421 Mass. at 408; *Kelley*, 411 Mass. at 215 (1991)(same).

Here, there is no dispute as to the first prong of the requisite analysis. The parties agree that as to Roberio and all similarly situated first-degree juvenile homicide offenders (hereinafter, the "Pre-1996 Juvenile Cohort" or the "Cohort"), the 1996 Amendment has been applied to conduct that occurred before its enactment, *i.e.*, it has been applied retroactively. *See, e.g.*, Resp. Br. at 17. Indeed, only by applying the 1996 Amendment retroactively was it possible for the Parole Board to give Roberio a setback of five years. The sole issue in dispute concerns the second prong of the analysis, *i.e.*, whether the retroactive application is to the detriment of Roberio and the other members of the Cohort.

The "detriment" determination here turns on

whether the 1996 Amendment "produces a sufficient ***risk*** of increasing the measure of punishment attached to the covered crimes," including the risk of an increased term of incarceration. *Morales*, 514 U.S. at 509(emphasis added); *see Clay*, 475 Mass. at 136–37 (same). "[T]here is no single formula for identifying which legislative adjustments, in matters bearing on parole, would survive an ex post facto challenge." *Garner*, 529 U.S. at 252; *Clay*, 475 Mass. at 137. Rather, challenged legislative adjustments are measured on a continuum, with certain and demonstrable detriment (*see, e.g. id*. at 250) at one end of the spectrum, and speculative, attenuated, and remote risk of detriment (*see, e.g., Morales*, 514 U.S. at 509) at the other end. Certain and demonstrable detriment violates the *ex post facto* prohibition. Speculative and remote risk does not. *Id.* Everything in between must be examined and evaluated case-by-case. *See id.* at 504-506, 509 (declining "to articulate a single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition" and instead emphasizing the need to

evaluate legislative changes for *ex post facto* violations individually).

A showing of actual detriment (*e.g.*, proof that a defendant's term of incarceration has been increased) is not required. *See, e.g.*, *Lindsey v. Washington,* 301 U.S. 397, 401 (1937)(what matters is "the standard of punishment prescribed by a statute, rather than the sentence actually imposed"); *Brown*, 466 Mass. at 689 n.10 (the mere *possibility* of a change in parole eligibility is enough to trigger *ex post facto* prohibition, regardless of whether the change is applied). The issue is one of degree or sufficiency of risk. Put differently, the issue is whether the retroactive application of the legislative change creates a reasonable chance or risk that defendant's sentence will be longer. *See Morales*,514 U.S. at 509; *Garner*, 529 U.S. at 251.

Here, for many "lifers," both adult and juvenile, who are subject to Section 133A, there is reasonable expectation that the retroactive application of the 1996 Amendment will increase their sentences. The risk of increase is especially great for Roberio and other members of the Cohort. For this group, at a minimum, there is an as-applied violation of the *ex*

post facto prohibition. There are at least six reasons that support this conclusion:

1. *Common Sense*: It is inevitable that when the potential setback for parole consideration is increased from three to five years that the total term of incarceration that some "lifers" will serve will be greater than the sentence they would serve otherwise. With the retroactive application of the 1996 Amendment, parole eligibility is delayed from a maximum of three years to a maximum of five years. If, upon further review, another five-year setback were applied, the delay in eligibility would become ten years rather than six. And with another setback of five years, the delay would be fifteen years rather than nine, and on and on, with ever increasing differences between parole eligibility under the retrospective application of the 1996 Amendment as opposed to the predecessor version of Section 133A. Common sense dictates that where eligibility is delayed further and further, there is, at a minimum, a significant *risk* that the period of imprisonment will also be longer. This increased risk constitutes an *ex post facto* violation. *See, e.g., Garner*, 529 U.S. at 261 (Souter, J. dissenting)("At some point, common

sense can lead to an inference of a substantial risk of increased punishment"); *Morales*, 540 U.S. at 525 (Stevens, J. dissenting)(increase to a parole setback "will almost inevitably delay the grant of parole in some cases").

2. Absence of Reconsideration or Expedited Review Hearings as Real Options: Common sense indicates that the 1996 Amendment, by its own terms, creates a significant risk of a longer period of incarceration. But even if that were not the case, the Parole Board's practical implementation of the Amendment, combined with the Board's consistent history of neither reconsidering the length of its setback decisions nor accelerating review hearings, makes clear that the retroactive application of the Amendment creates an increased risk of extending periods of incarceration. For instance, with regard to the Cohort, the statistical evidence noted above and/or cited in Respondent's Brief (Resp. Br. at 13) clearly shows that: (i) the Board often gives setbacks of four or five years, *i.e.*, setbacks that could not have been given under Section 133A prior to the 1996 Amendment; and (ii) the Board virtually *never* exercises its authority to reconsider its setback

decisions or provide for expedited review hearings based on changed circumstances.[1] While the Board certainly has the theoretical power to correct mistakes it makes in meting out lengthy setbacks, its track-record of effectively never granting requests for reconsideration or expedited review, makes clear that as a practical matter its retroactive decisions run a serious risk of extending the terms of incarceration for members of the Cohort.

3. The Possibility of Parole for Cohort Members Is Not Remote: If the possibility of parole for Roberio and the other Cohort members was remote or speculative, then giving them five-year setbacks pursuant to the 1996 Amendment would not run any

[1] The Parole Board does not track reconsiderations or the like, and, as noted above, our research has uncovered only one instance in the last 30 years where a request for reconsideration was successfully granted, and only three instances in that same timeframe where administrative appeals were granted. We are aware of no instance where requests for expedited review hearings have been granted. To the extent the Court determines that Petitioner has not adequately proven the futility of seeking reconsideration of setback decisions or expedited review hearings, the case should be remanded to the Superior Court for further discovery. *See Garner*, 529 U.S. at 257 (remanding to afford inmate the opportunity to obtain discovery showing that "in its operation" an amendment increasing a parole setback option "created a significant risk of increased punishment").

realistic risk of increasing the length of their sentences. But the statistical evidence pertaining to this Cohort – *e.g.*, 12 of 34 (or 35%) being granted parole after initial parole hearings - makes clear that members of the Cohort stand a very realistic chance of achieving parole. Indeed, Roberio's own development within the prison system, as discussed above, shows his very real potential to achieve parole. Under these circumstances, it stands to reason that delaying the review hearings of Cohort members, including Roberio, through retroactive application of the 1996 Amendment, without giving them the opportunity for more periodic guidance and advice, and without the realistic possibility of reducing the setback periods once set, runs the substantial risk of increasing their sentences.

4. The Teachings of Neuroscience and of the Roper, Graham, Miller, and Diatchenko Line of Cases: The statistical evidence of parole not being a remote possibility for juvenile homicide offenders is perfectly consistent with the lessons that neuroscience has taught us over the past 20 years about adolescent brain development, as recognized by the Supreme Court in the *Roper*, *Graham* and *Miller*

trilogy of cases, and by this Court in *Diatchenko I* and *Diatchenko v. Dist. Attorney*, 471 Mass. 12 (2015) ("*Diatchenko II*") and their progeny. Bolstered by scientific studies, the courts have recognized that children are constitutionally different from adults for sentencing purposes, as they have a far greater capacity to change, mature, and rehabilitate.[2] The retroactive application of the 1996 Amendment to the Cohort is antithetical to this recognition.

5. The Uniqueness of the Cohort, and the Import of Recognizing the Transformation that Occurs When Hopelessness Is Replaced With Hope: If anything, the risk of an increased punishment resulting from the application of the 1996 Amendment is uniquely enhanced for the Cohort, which is made up of juvenile homicide offenders, like Roberio, whose world was transformed

[2] *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 554 (2005)(by virtue of their age, juvenile offenders commit crimes when their personality traits are not fully fixed); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (juveniles are "more capable of change" than adults); *Miller v. Alabama*, 567 U.S. 460 (2012)(juveniles "have diminished culpability and greater prospects for reform" and are therefore "less deserving of the most severe punishments")(internal citations omitted); *Diatchenko I,* 466 Mass. at 668 (acknowledging that juveniles have "heightened capacity" for "positive change and rehabilitation" and, as such are entitled to a "meaningful opportunity to obtain release").

from one of hopelessness to hope by this Court's decision in *Diatchenko I*. Among the potentially parole eligible population, this Cohort is virtually unique in that it is made up of individuals who served years in prison — decades in the case of Roberio and most others in the Cohort — without any reasonable hope that they would ever again experience freedom. In this regard, these individuals are very different from almost all other inmates who become parole eligible, including second-degree lifers, all of whom enter prison knowing that someday they will be eligible to get out.[3] For *ex post facto* purposes, this difference is vitally important, because it means that once the switch from utter hopelessness to hope was flipped by *Diatchenko I*, every member of the Cohort, for the first time, had reason to behave differently in prison.

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[3] The only inmates from whom the Pre-1996 Juvenile Cohort is not unique are those first-degree juvenile homicide offenders who were convicted after the enactment of the 1996 Amendment, but before this Court's decision in *Diatchenko I*. This post-1996 group of juveniles also experienced the transition from hopelessness to hope. For this group, relief from the risk of an increased term of incarceration that comes with five-year versus three-year setbacks can only be achieved through legislative change, as it does not have the same constitutional *ex post* facto protection as the Cohort.

Indeed, prior to *Diatchenko I*, the individuals in the Cohort had little or no reason to engage in prison programming, rehabilitate themselves or otherwise prepare for life outside of prison, a life they had no reasonable expectation they would ever experience. The hopelessness and despair endemic to the status of life imprisonment without parole eligibility cannot be overstated. As one juvenile homicide offender has said, a sentence of life without the possibility of parole "makes you feel that life is not worth living . . . You have nothing to gain, nothing to lose, you are given absolutely no incentive to improve yourself as a person." Human Rights Watch, *"When I Die, They'll Send me Home," Youth Sentenced to Life without Parole in California* 60 (Jan. 2008). As another juvenile homicide offender has explained, in the pre-*Miller* world "life didn't matter." *Id.* A life sentence without the possibility of parole "'means denial of hope; it means that good behavior and character improvement are immaterial.'" *Graham*, 560 U.S. at 70 (quoting *Naovarath v. State*, 105 Nev. 525, 525 (1989)). In other words, it means that there is no reason to prove one's capacity for rehabilitation.

But, now that they have been given a reason to behave differently, there is every reason to believe, except possibly in the most extraordinary cases, that even if an individual member of the Cohort is not ready for parole upon an initial hearing, he will be ready at some point, and in many if not all instances within another three years.[4] Unlike parole-eligible adult lifers who have 15 or more years to prove themselves before their initial parole hearing, individuals in the Cohort, like Roberio, who sought parole close on the heels of *Diatchenko I*, had far less time, and perhaps not enough time. Still, there is no reason to doubt that with a shorter three-year setback, these individuals, all of whom have just recently tasted hope for the first time, will be able to act on their newfound sense of purpose, and show that they are ready to reenter society.[5] At a minimum,

[4] Certainly, a check-in no more than every three years so as to give the individuals guidance, direction, and positive reinforcement would be appropriate. *See* Nancy M. Campbell, *Comprehensive Framework for Paroling Authorities in an Era of Evidence Based Practices*, NAT'L INST. OF CORRECTIONS 1, 38 (2008).

[5] Indeed, Roberio himself is Exhibit A for this proposition. It is no mere accident that he was "complacent" and resisted rehabilitation programming in the years prior to *Diatchenko I*, while being

depriving them the chance increases the risk that their terms of incarceration will end up being longer than the terms would be otherwise, in violation of the constitutional prohibition against *ex post facto*.

6. *The Variability of Historic Parole Rates*: As evidenced by the statistics presented above (*see supra*. § V.B), the history of parole in Massachusetts appears to be as much political as it is just, with politics often playing as much of a role in parole decisions as individualized justice. While the parole rates over the past 30 years have generally been between 20% and 44%, they took a dramatic fall in the mid-1990s in response to the so-called "superpredator" scare (which was later debunked by science and other empirical evidence). *See, e.g.,* Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES, Apr. 6, 2014; Elizabeth Becker, *As Ex-Theorist on 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2004. And the rate then plummeted again in 2011 and 2012 in direct response to the outcry over the killing of a Woburn police officer by Dominic Cinelli, who had been paroled in 2008. *See supra*.

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actively engaged in such programming and achieving minimum-security status since. *See supra*. § IV.A.

§ V.B. In each case when the rates plummeted they gradually rose again, though with great variability over a 20-44% range depending on who the Governor happened to be, the make-up of the Board, and the background of the Board Chair. *See supra.* § V.B.

Even the most cursory review of parole rate statistics in Massachusetts makes clear that the rates change year to year, depending on variables that may have nothing whatsoever to do with the merits of the individual cases before the Board. *See supra.* § V.B. The parole rates of first-degree and other juvenile homicide offenders have not been immune to these external variables. *See, e.g.*, ADD at 14-17 (Pingeon Aff. ¶3).

For *ex post facto* purposes with regard to the retroactive application of the 1996 Amendment, all this matters because it illustrates how much can change over a period of five versus three years. For instance, in that two year period, Board make-up and political predilections may shift, with associated risks for prospective parolees. With the retroactive application of the 1996 Amendment, members of the Cohort (and others) cannot take advantage of these changes, with the very real and substantial risk that

their ability to obtain parole will be compromised, and their term of incarceration increased.

The whole point of our constitutional *ex post facto* protections is to fix in time the law with respect to punishment so that offenders will not fall prey to the winds of politics when it comes to sentencing and parole decisions. *See Morales*, 514 U.S. at 521 (Stevens, J. dissenting). It is bad enough that non-merits based externalities appear to affect all parole decisions. The risk that they negatively affect those whose offenses occurred before 1996, including the Cohort, should be reduced.[6]

C. This Court's *Ex Post Facto* Decision in *Commonwealth v. Brown* Dictates the Finding of an *Ex Post Facto* Violation Here.

In *Brown*, 466 Mass. at 689 n.10, this Court held that a 2012 amendment to Section 133A, which replaced mandatory parole eligibility after 15 years for those convicted of second-degree murder with parole eligibility of anywhere from 15-25 years at the

[6] Of course, if reconsideration of Parole Board decisions or acceleration of the timing of review hearings were a real option, this risk could be mitigated. But while parole rates have shifted with the political tides, the one constant over time has been that setback decisions, once made, are set in stone, with effectively no reconsideration or acceleration ever. *See* R. at 12-14 (Garin Aff. ¶¶ 16-17, 23-24); ADD at 14-17 (Pingeon Aff. ¶ 5).

discretion of the sentencing judge, could not be applied to a person whose crime was committed before the enactment of the current version of the statute without violating the *ex post facto* clause. The Court's conclusion in *Brown* dictates the same result here.

Both before and after the 1996 Amendment, Section 133A effectively established two parole eligibility dates ("p.e. dates") for second-degree murder offenders (and all juveniles convicted of first-degree murder): (i) an initial p.e. date of 15 years; and (ii) a second p.e. date at most three years later (pre-1996), but which under post-1996 law can take place as many as five years after the initial hearing. In *Brown*, the Court made clear that the initial p.e. date could not be retroactively changed from 15 years to 15-25 years without running afoul of the constitutional *ex post facto* prohibition. The Court reached this finding regardless of how remote the chance of parole at 15 years might have been for Brown and other homicide offenders who had committed their crimes before 2012, and notwithstanding the fact that the 2012 amendment still gave the sentencing judge the discretion to impose a low-end, 15 year, p.e. date.

It was the ***risk*** of a longer p.e. date that required, and that was the basis for, the Court's *ex post facto* finding.

Precisely the same reasoning applies here with regard to the second of the two p.e. dates. Just as the 2012 amendment left the low end of the range for parole eligibility in place, the 1996 Amendment left in place, at least theoretically, one, two and three years as options for subsequent parole eligibility after the initial denial, while simply adding four and five years as additional potential setback dates. Post-1996, the Parole Board still had the discretion to impose setback dates of three years or less just as it had pre-1996. But just as the discretion of judges post-2012 to retroactively impose the same 15-year pre-2012 p.e. date that they had been required to impose previously did not matter in *Brown* for the *ex post facto* analysis, the discretion of the Board post-1996 to retroactively impose no more than the same three-year maximum setback to which it had previously been limited should not matter. It is the ***risk*** of the extended setback that counts. And just as the risk of retroactively extending the initial p.e. date from 15 years to 15-25 years was an *ex post facto* violation in

Brown, the risk of extending the new maximum p.e. date from three to five years if parole is denied at the first hearing should be an *ex post facto* violation here.

D. A Finding of an *Ex Post Facto* Violation Is Supported By Evidence That the 1996 Amendment Was Designed With the Intent to Increase Punishment.

The conclusion that the 1996 Amendment created an increased risk of longer sentences is supported by the legislative intent behind the Amendment and the design of the Parole Board's regulations implementing the Amendment. While this evidence is not dispositive, it is at least informative on the *ex post facto* question before the Court. *See, e.g., Garner*, 529 U.S. at 256 ("At a minimum, policy statements . . . provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether, as a matter of fact, the amendment . . . created a significant risk of increased punishment"); *see also id*. at 262 (Souter, J. dissenting)("evidence of purpose certainly confirms the inference of substantial risk of longer sentences").

The 1996 Amendment was passed amidst the furor over "superpredators" in the mid-1990s. *See, e.g.,*

Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, LA. L. REV. 35, 36 n.6 (2010) (noting that the superpredator theory drove juvenile justice policy in the late twentieth century). And the intent of the Amendment was to extend the time offenders would serve in prison, and thereby spare victims the need to revisit the offenders' crimes as often as they otherwise would. *See* ADD at 2 (Memorandum from Messrs. Denniston and Supple to Governor Weld regarding House Bill No. 1894, dated March 14, 1996, noting that purpose of proposed amendment is to "benefit the families of the murder victims, for they would be required to undergo the trauma of a parole hearing only once every five years instead of once every three years"); ADD at 5 (Letter from Governor Weld to Ms. Hurlburt, dated May 5, 1994, noting proposed legislation will have result that "cases will be heard less frequently"); ADD at 6 (Fact Sheet for Section 133A, dated February 9, 1995, stating rule's purpose is to prevent victims from reliving difficult memories of the initial offense as often).

Consistent with the legislative purpose, the Parole Board's implementation regulations,

specifically, 120 Code Mass. Regs. §301.01(5), presume that the setback for parole eligible "lifers," whether juvenile or adult, will be for the maximum five-year term rather than the lower discretionary terms: "in cases involving inmates serving life sentences with parole eligibility, a parole review hearing occurs five years after the initial parole release hearing, except where the Parole Board members act to cause a review at an earlier time." This regulation could have been written to say that parole review hearings for eligible lifers would occur every one to five years after the initial parole release hearing at the discretion of the Parole Board. But it was not. It even could have been written like the parole setback statute at issue in *Morales*, which explicitly required the Board there to make a specific finding that it was unreasonable to expect that the prisoner would be paroled within the old maximum setback period, and to explain the bases for the finding, before extending the setback to the new maximum. *See Morales*, 514 U.S. at 503. But again it was not. Instead the regulation was designed and written to create a presumption of a five-year setback, with the discretion to go lower requiring affirmative Board action to the contrary.

Thus, like the evidence of legislative intent, the design of the implementing regulation shows that the purpose of the 1996 Amendment was to increase punishment for parole eligible lifers in deference to victims' families, as opposed to increasing the setback period out of consideration of the amount of time that would reasonably be needed, case-by-case, to give inmates a reasonable chance to achieve parole. If anything, the evidence of legislative purpose and implementing regulation design buttresses the conclusion that there is a substantial risk of increased punishment embedded in the 1996 Amendment.

E. Supreme Court Precedent In Non-Juvenile *Ex Post Facto* Parole Cases Is Readily Distinguishable.

Neither this Court nor the United States Supreme Court has addressed an *ex post facto* challenge to a parole setback statute as applied to juvenile homicide offenders. The Supreme Court has, however, considered and rejected *ex post facto* challenges to the parole setback statutes of two states — California and Georgia — as applied to adult offenders. *See Morales*, 514 U.S. 499; *Garner,* 529 U.S. 244. Both *Morales* and *Garner* have been discussed at length in the parties' briefs, and we will not repeat those discussions here.

Suffice to say that both cases are readily distinguishable from the current case in one overarching and dispositive respect: Whereas both *Morales* and *Garner* concerned not just adult offenders, but the absolute worst of the worst, double-homicide adult offenders who had proven themselves incorrigible,[7] this case concerns juvenile homicide offenders whom neuroscience and the Supreme Court's and this Court's established precedent have recognized to be different from adults, with far greater ability to change and grow and rehabilitate. *Morales* and *Garner* concerned the incorrigible. This case concerns the eminently corrigible. In *Morales* and *Garner,* the chance of either defendant or others like them (namely, murderers who, as fully formed adults, had killed more than one person on separate occasions) ever obtaining parole, regardless of the setback period, was remote and speculative at best. In sharp contrast, here, for members of the Cohort, if the law is applied fairly, parole is all but an inevitability except in extraordinarily few, if any, cases. For 99% of the Cohort members, with Roberio himself clearly

[7] Garner and Morales were both themselves double-murderers. And the California statute at issue in *Morales* applied only to double murderers.

being no exception (*see supra.* § V.A; and *Deal*, 478 Mass. at 338 & 339 n.8), the question of parole is not if, but when.[8] *See, e.g*. *Miller*, 567 U.S. at 479-480 (distinguishing between the typical juvenile offender whose crime reflects the "unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption"); *Diatchenko I*, 466 Mass. at 670 (noting that the "unformed nature of adolescent identity raises doubts about conclusion that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character") (internal quotations and citations omitted). The parole potential for members of the Cohort is the very opposite of remote and speculative, as empirically demonstrated by the rate at which members of the Cohort have been paroled to date (*e.g*., 35% of the

[8] Notably, in *Garner*, despite the fact that the defendant had proven himself incorrigible, the Supreme Court remanded for additional fact finding to determine if the parole board was giving setbacks of greater than three years only where there was no realistic chance of earlier release, and likewise permitting expedited review hearings if and when changed circumstances were established. *Garner*, 529 U.S. at 257. If anything, the remand in *Garner* means that *a fortiori* there should be a finding of an *ex post facto* violation here where both neuroscience and this Court have recognized the profound potential for virtually all juveniles to change, mature, and achieve rehabilitation.

Cohort members received positive parole votes at their initial parole hearings).

The contrast between the Cohort members and the defendants at issue in *Morales* and *Garner* could not be greater. As a result, the outcome of those cases cannot control the outcome here.

F. Even If This Court Finds No Federal Constitutional Violation, It Should, Like the South Carolina Supreme Court, Find An *Ex Post Facto* Violation Under the State Constitution.

Even if *Morales* and *Garner* were not readily distinguishable from this case, and even if this Court were to find that there was an inadequate basis for Roberio to succeed under the *ex post facto* clause of the U.S. Constitution, the Court should, nevertheless, find in favor of Roberio under the *ex post facto* provision of the Massachusetts Declaration of Rights.

As this Court recognized in *Diatchenko I*, the "Court has the inherent authority to interpret State constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Diatchenko I,* 466 Mass. at 668; *see Commonwealth v. Upton*, 394 Mass. 363, 372 (1985)(Massachusetts Constitution "preceded and is independent of the Constitution of the United

States"); Herbert P. Wilkins, *Remarks to Students at New England School of Law,* 31 NEW ENG. L. REV. 1205, 1213 (1997)("I think of the Supreme Court as describing a common base from which we can go up"); *Goodridge v. Dept. of Health,* 440 Mass. 309, 328 (2003)("Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution"). In fact, this Court often exercises its inherent authority in criminal cases, and "afford[s] criminal defendants greater protections under the Massachusetts Declaration of Rights than are available under corresponding provisions of the Federal Constitution." *Diatchenko I*, 466 Mass. at 668.[9]

[9] A non-exhaustive list of cases where the rights of individuals under the Massachusetts Constitution have been held by this Court to be broader than those under the federal Constitution includes the following: *Commonwealth v. Alexis*, SJC-12465, 2018 WL 6579421, at *1 (Mass. Dec. 14, 2018)(finding art. 14 provides greater protection from the creation of exigent circumstances to justify warrantless entry than the Fourth Amendment); *Commonwealth v. Martin,* 444 Mass. 213, 220 (2005)(rejecting Supreme Court's reasoning and requiring suppression of defendant's uncoerced but unwarned custodial statements under "the broader rights embodied in art. 12"); *Goodridge v. Dept. of Health,* 440 Mass. 309, 328 (2003) (holding Massachusetts Constitution protects same-sex marriage rights before issue considered under U.S.

To be sure, in the past, this Court has not exercised its authority to construe the *ex post facto* prohibition under the Massachusetts Constitution as affording criminal defendants greater rights than its federal counterpart. *See Santiago v. Com*monwealth, 428 Mass. 39, 42 (1998)(noting Massachusetts courts treat the *ex post facto* clauses under the federal and state Constitution identically); *Commonwealth v. Bruno*, 432 Mass. 489, 492 n.4 (2000)(noting *ex post facto* analysis under federal law would yield same result under Massachusetts law). But those prior *ex*

Constitution); *Commonwealth v. Mavredakis*, 430 Mass. 848 (2000)(holding that preventing a suspect under interrogation from being contacted by his/her attorney or third parties is unconstitutional under art. 12 despite earlier finding allowing practice under Fifth and Sixth Amendments); C*ommonwealth v. Gonsalves,* 429 Mass. 658, 662 (1999)(declining to follow federal law and granting search and seizure "protections to drivers and occupants of motor vehicles under art. 14" that are not recognized under the Fourth Amendment); *Commonwealth v. Amirault,* 424 Mass. 618, 629 (1997) (interpreting art. 12 as providing for broader confrontation rights than the Sixth Amendment); *Commonwealth v. Amendola,* 406 Mass. 592, 600-01 (1990)(adopting automatic standing rule that had been rejected by the U.S. Supreme Court to allow defendants automatically to contest the legality of searches and seizures resulting in evidence against them); *Dist. Attorney v. Watson,* 381 Mass. 648, 670 (1980)(death penalty unconstitutional under art. 26); *Moe v. Sec'y of Admin. & Fin.,* 382 Mass. 629, 651 (1981)(holding that statutes restricting payment of Medicaid funds for abortions necessary to prevent the death of the mother unconstitutional despite permissibility of restrictions under federal law).

post facto decisions did not involve the rights of juvenile homicide offenders, and they pre-dated the Court's decision in *Diatchenko I* which afforded greater protections to juvenile homicide offenders under the Massachusetts Declaration of Rights than they are afforded under the U.S. Constitution. *See Diatchenko I*, 466 Mass. at 666-71.

Since and/or contemporaneous with this Court's decision in *Diatchenko I*, the Court has twice considered *ex post facto* issues in the context of cases involving juvenile homicide offenders. *See Brown*, 466 Mass. at 689 n. 10; *Clay*, 475 Mass. at 135-142. In both instances, the Court held, without distinguishing between the federal and state Constitutions, that retroactive application of the new laws at issue to the defendants constituted as-applied violations of the Constitutional *ex post facto* prohibition. The result here should be no different. Indeed, here, even if the Court does not find a violation of the federal Constitution, it should find a violation of the *ex post facto* prohibition of art. 24 of the Massachusetts Declaration of Rights.

The South Carolina Supreme Court's decision in *Jernigan v. State*, 340 S.C. 256, 264 n.5 (2000) is

instructive. *Jernigan* involved a 1998 amendment to South Carolina's parole laws – an amendment that extended the setback period after parole denial from one to two years for violent offenders – and the retroactive application of that amendment to an adult offender whose offense had been committed in 1982. *Id*. at 258. The court discussed and distinguished both *Morales* and *Garner*. *Morales* was distinguished on the same basis we distinguish it above, namely that the case involved a defendant – indeed a class of putative defendants, all double-murderers – for whom parole would never be more than a remote and speculative possibility. *Id*. at 262. *Garner* was distinguished on the ground that, unlike the South Carolina statute at issue, which automatically increased the parole setback period, the statute in *Garner* permitted the parole board to exercise discretion before imposing a longer setback, while also allowing for expedited review hearings based on changed circumstances. *Id*. at 264 n.5. *Jernigan* further found that that even if application of the 1998 amendment to the defendant's case did not offend the federal Constitution, it offended South Carolina's state Constitution. *Id*.

If anything, the case here for an extension of *ex post facto* protection under the Massachusetts Constitution is even more compelling than was the case in *Jerigan* for protection under the South Carolina Constitution. *Jerigan*, after all, involved adult offenders, whereas this case involves juvenile offenders, whom this Court has recognized are different from adults, with far greater capacity for change. *See Diatchenko I*, 466 Mass. at 670; *Diatchenko II*, at 13.[10] Furthermore, although the 1996 Amendment allows for Board discretion in setting the maximum setback period, and, at least in theory, allows for the acceleration of review hearings, it operates very much like the South Carolina statute struck down in *Jernigan*. The statistical evidence discussed above (*see* § V.B) shows that the Parole Board frequently imposes setbacks of greater than three years, and apparently never expedites review

[10] *See also Commonwealth v. Perez*, 477 Mass. 677,682-684 (2017) (individualized consideration of characteristics attendant to youth required in sentencing); *Commonwealth v. Costa*, 472 Mass. 139, 148 (2015)(authorizing resentencing of juvenile originally sentenced to consecutive life terms for two homicides; requiring consideration at resentencing of age and other so-called "*Miller* factors" as well as post-conviction conduct in prison).

hearings upon a showing of changed circumstances or otherwise.

A finding here that the application of the 1996 Amendment to Roberio and the other members of the Cohort runs afoul of the state Constitution's *ex post facto* prohibition would be consistent with the teachings of *Diatchenko I* and its progeny, and would give life and effect to the promise of *Diatchenko I* that juvenile homicide offenders should be provided with "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Diatchenko I,* 466 Mass. at 674.[11] In contrast, permitting the retrospective application of the 1996 Amendment, and its five-year setback, to Roberio and the other members of the Cohort could, at a minimum, unnecessarily delay their ability to demonstrate their

[11] Such a decision would also be consistent with the post-*Miller* legislative enactments in a number of states which have extended the rights of juvenile homicide offenders by, among other things, requiring more frequent parole review hearings for this cohort. *See, e.g.*, NEB. REV. STAT. §83-1, 110.04 (2013)(requiring annual parole review); CONN. GEN. STAT. §54-125a (2015)(providing for a two-year setback); CAL. PENAL CODE § 3051 (West 2018)(extending parole opportunities for juveniles, and, consistent with scientific evidence that the adolescent brain is not fully formed until at least the age of 25, expanding the scope of those covered by juvenile protections to those whose offenses occurred when they were 25 or younger).

maturity and rehabilitation, and, thus, reduce and compromise the meaningfulness of the parole opportunity created by *Diatchenko I*. We ask that the Court not permit this to happen. We ask that the Court instead find that, at least as applied to the Cohort, the five-year setback provision of Section 133A constitutes an *ex post facto* violation under art. 24 of the Massachusetts Declaration of Rights.

VI. CONCLUSION

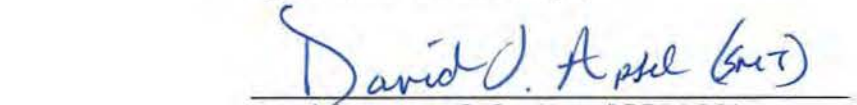
For all of the reasons stated above, *Amici* request that the decision of the Superior Court allowing Roberio's five-year setback to stand be reversed, and that the Court issue an Order mandating the Parole Board to impose no more than a three-year setback, consistent with the law that was in place at the time of Roberio's offense. *Amici* further request that the Court order that any application of the 1996 Amendment to members of the Cohort is prohibited by the *ex post facto* provision of the Massachusetts Constitution, whether or not it is prohibited by the U.S. Constitution.

Respectfully submitted,

On behalf of *Amici*:

MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS;
JUVENILE LAW CENTER;
PRISONERS' LEGAL SERVICES;
NORTHEASTERN UNIVERSITY SCHOOL OF LAW, PRISONERS' RIGHTS PROJECT;
HARVARD LAW SCHOOL, PRISON LEGAL ASSISTANCE PROJECT;
COALITION FOR EFFECTIVE PUBLIC SAFETY,

By their attorneys,



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Dated: December 31, 2018

MASS. R. APP. P. 16(K) CERTIFICATE OF COMPLIANCE

I, Marielle E. Sanchez, hereby certify that the foregoing Brief of *Amici Curiae* complies with the rules of court that pertain to the filing of amicus briefs, including but not limited to: Mass. R. A. P. 16(a) (contents of briefs); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 17 (amicus briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Marielle E. Sanchez (SMLT)

Marielle E. Sanchez,
BBO#703897

CERTIFICATE OF SERVICE

I, David J. Apfel, hereby certify that I have served the above corrected brief on both parties by email on this 31th day of December 2018 to all counsel of record:

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David J. Apfel (SMLT)

David J. Apfel, BBO#551139

ADDENDUM TABLE OF CONTENTS

ENACTED LEGISLATION
SENIOR STAFF REVIEW
URGENT

Bill Number: **H. 1894**

Relative to the Eligibility for Parole.

Today's Date: **March ~~15~~ 19, 1996**

This bill **MUST** be acted upon by: **March ~~17~~ 18, 1996**

Legislative Office Comments:

SIGN

Review of Agency Recommendations:

EOPS: SIGN

Legal: SIGN

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133
(617) 727-3600

WILLIAM F. WELD
GOVERNOR

ARGEO PAUL CELLUCCI
LIEUTENANT-GOVERNOR

MEMORANDUM

TO: William F. Weld, Governor
Paul Cellucci, Lieutenant Governor
Senior Staff
FROM: Brackett B. Denniston, Chief Legal Counsel
Christopher J. Supple, Deputy Legal Counsel
DATE: March 14, 1996
RE: House Bill No. 1894, "An Act Relative to Eligibility for Parole."

Summary:

Current law provides that prisoners serving life sentences for second degree murder shall be considered for parole sixty days prior to serving fifteen years of the sentence, and no less than once every three years thereafter. The bill would decrease the frequency with which such parole hearings must be held to once every five years.

The bill would reduce the workload of the parole board. More importantly, however, the bill would benefit the families of murder victims, for they would be required to undergo the trauma of a parole hearing only once every five years instead of once every three years.

Rep. Gray filed the bill on behalf of a constituent who also wrote to you in support of the bill. Your response (copy of letters attached) was supportive of the bill.

EOPS recommends that you sign the bill. We have not been informed of any opposition to the bill.

RECOMMENDATION:	Sign
BILL FILED BY:	Rep. Gray
OTHER AGENCIES REVIEWING:	EOPS
DATE SIGNED BY LEGISLATURE:	March 7, 1996
DATE DUE TO LEGISLATIVE OFFICE:	March 14, 1996

Dorothy C. Hurlburt
9 Bayberry Lane
Worcester, Massachusetts 01602

Dear Governor Weld:-

Now that murder seems to be the subject of the day - unfortunately - I would tell you of the murder of my daughter on Feb. 23, 1974. The murderer a drug-alcohol addict was in a near neighborhood being abusive to his pierson - the police were called and dispersed them. He then broke and entered a home and the home woman threw a lamp at him - from there he came in our vicinity and found a loose basement window in our home and entered. My elder daughter Pamela was alone and asleep when attacked - her entire body was jabbed with a cheese knife .. what a ghastly death! He is in prison on second degree through a technicality.

We have had two parole hearings

And the third is called for in November I've written the legislation Committee to consider House Bill #794 proposing a 5 year interval for the parole hearings. The murderer has shown no progress in prison in the 20 years he's been there. One would conclud there would be little change.

a little background - - - my husband (deceased) former President Peoples Savings Bank. Mr. Frank L. Harrington (deceased) my brother-in-law former President Paul Revere Life Ins. Co. Worcester. His three sons and their children have stood by both hearings with me. My youngest nephew George C. Harrington Framingham lawyer has arranged all details prior to our parole hearings. This past week on April 6th he attended the legislative committee meeting and spoke on behalf of House Bill #794.

Please support this bill.

Dorothy Hurlburt

4/8/94

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133
(617) 727-3600

WILLIAM F. WELD
GOVERNOR

ARGEO PAUL CELLUCCI
LIEUTENANT-GOVERNOR

May 5, 1994

Ms. Dorothy C. Hurlburt
Nine Bayberry Lane
Worcester, Massachusetts 01602

Dear Ms. Hurlburt:

Thank you for your recent letter in which you described your own tragic experience with violent crime and expressed support for House Bill 794, An Act Relative to Regulate Parole Eligibility. Lieutenant Governor Cellucci and I believe that this legislation merits serious consideration; we share your outrage at a system that too often places the criminal before the victim.

As you know, all prisoners serving a life sentence, except for prisoners at MCI-Bridgewater and those serving a life sentence for murder in the first degree, are eligible for parole after fifteen years. If a parole permit is not granted at the fifteen-year parole hearing, the Parole Board shall, at least once in each ensuing three-year period, reconsider the parole request.

House Bill 794 proposes an extension of the parole eligibility period from three to five years. The option to conduct a hearing after five years, as opposed to three, will decrease the number of times that victims and their families are required to face their perpetrators at hearings. In addition, this legislation will allow the Commonwealth to better utilize its limited resources, as cases will be heard less frequently.

Again, thank you for sharing your views about this important issue.

Sincerely,

Bill Weld

William F. Weld

cc: George C. Harrington

BARBARA E. GRAY
6TH MIDDLESEX DISTRICT
220 EDMANDS ROAD
FRAMINGHAM, MA 01701
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STATE HOUSE OFFICE
ROOM 134
TEL. (617) 722-2400

CHIEF OF STAFF
ALEXIA P. SORKIN

LEGISLATIVE AIDE
PETER A. SPELLIOS

The Commonwealth of Massachusetts
House of Representatives
Committee on Local Affairs
STATE HOUSE, BOSTON 02133-1053

Chair, Committee on Local Affairs

Divorce Commission
House Chairperson

Local Aid Commission

Special Commission
on MCI Framingham

FACT SHEET

BILL TITLE: AN ACT RELATIVE TO THE ELIGIBILITY FOR PAROLE

BILL #: H-1894 (1994 H-794)

COMMITTEE: PUBLIC SAFETY

HEARING: FEBRUARY 9, 1995

SPONSOR: REPRESENTATIVE BARBARA E. GRAY (ON BEHALF OF GEORGE HARRINGTON ESQ.)

PRESENT LAW: Section 133A of Chapter 127 of the General Laws relates to the eligibility for parole for prisoners who are serving a sentence for life in a correctional institution of the Commonwealth. Currently, the parole board is required to conduct a public hearing and review of eligibility for parole within 60 days before the expiration of fifteen years of the life sentence. If a parole permit is not granted, the parole board is required to consider eligibility for parole at least once in each subsequent three year period.

PROPOSAL: This bill would extend the required review for eligibility for parole period from at least once in each subsequent three year period to at least once in each five year period.

PURPOSE: The bill would benefit the victim and the victim's family and friends in that consideration for parole eligibility would take place within a five year period as compared to the current three year period.
The victim, family and friends would not have to relive the crime and accompanying memories

quite as often. This change would not affect the rights of inmates who are obviously not qualified for parole.

COST: There would be a slight cost savings for the Commonwealth in that consideration by the parole board and the expenses accrued during that process would take place less frequently.

Bill: H. 1894 **Sponsor(s):** Rep. Gray
Title: Relative to the Eligibility for Parole.

Date Received: Mar 7, 1996
Date Due: **3/17/96**

SENT TO:	RECEIVED	DATE & POSITION
~~Attorney General~~	☐	
Legal Counsel	☒	3/15 - SIGN
BOPS	☒	3/11 - SIGN
	☐	
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COMMENTS:

H 1894

Chapter 43.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Ninety-six

AN ACT RELATIVE TO ELIGIBILITY FOR PAROLE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 133A of chapter 127 of the General Laws, as appearing in the 1994 Official Edition, is hereby amended by striking out, in line 24, the word "three" and inserting in place thereof the following word:- five.

House of Representatives, February 27, 1996.

Passed to be enacted, , Speaker.

In Senate, March 7, 1996.

Passed to be enacted, , President.

19 March, 1996.

Approved,

11:20 AM

William F. Weld

Governor.

Boston Globe

The Boston Globe (Boston, Massachusetts) · Mon, Feb 7, 2011 · Page A1

https://bostonglobe.newspapers.com/image/444068973 Printed on Dec 26, 2018

SUPER BOWL XLV

PACKERS ARE CHAMPS

Hold off dogged Steelers, 31-25

ALSO IN SPORTS

Celtics outtrick the Magic, 91-80

VOLUME 279 NUMBER 38

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WINTRY, MIX

The Boston Globe

MONDAY, FEBRUARY 7, 2011

In the news

Drug giant Sanofi-Aventis SA ordered its "**due diligence**" **reviews** of Genzyme Corp. delaying an acquisition of the Cambridge-based biotechnology company **B5.**

Egyptian streets were calm as the push continued for the resignation of President Hosni Mubarak. An unprecedented government meeting with the outlawed Muslim Brotherhood brought no major changes **A3.**

The office of Suffolk District Attorney Daniel F. Conley is investigating payments to home health aides made by Boston's Veterans' Services Department **B1.**

Friends, colleagues, and others paid tribute to President Reagan on the 100th anniversary of his birth while scholars pondered how comfortable he would be with the current Republican Party **A2.**

Governor Deval Patrick is unlikely to transform the ideology of the Supreme Judicial Court as he fills a high number of vacancies on the bench, specialists said **B1.**

A trial began in Iran for three Americans, one of them an absentia, on spying charges 16 months after they were detained during what they said was a hiking trip **A4.**

Dana-Farber Cancer Institute scientists have identified four genetic markers that predict whether prostate cancer is likely to spread **B5.**

The White House is prepared to make "tough choices" by cutting funds in several environmental, service, and development programs, budget chief Jacob Lew said. **A8.**

Scientists focus on Jordan Basin in the Gulf of Maine as the possible secret mating ground for the endangered North Atlantic right whales. **B6.**

Have a news tip? E-mail newsdesk@globe.com or call 617-929-TIPS (8477). Other contact information, **B3.**

POINT OF VIEW

JAMES CARROLL

"The choice between stability that requires shoring up friendly tyrants and uncontrolled popular unrest has been shown to be false. Despotic stability is the ultimate cause of unrest, not its cure." **Opinion, A11.**

Inside

For breaking news, updated Globe stories, and more, visit:

boston.com

Rise of the charter schools

Approval may be near for many more campuses across Boston

Excel Academy sixth-graders showed their support for Maria Tavarona by snapping their fingers in English class.

By James Vaznis

As the students filed through the front door of Excel Academy Charter School, the principal greeted each one by name. She shook hands and inspected their uniforms — dark blue polo shirts and khakis — before allowing the next student inside.

"Socks?" Komal Bhasin, the principal at the East Boston middle school, asked one boy, who lifted up each pant leg, revealing the requisite dark pair.

Strict discipline, along with high expectations and intensive instruction, is a hallmark at Excel Academy and other Boston charter schools that are seeking to open nearly a dozen additional campuses across the city in the next few years.

The expansions, which state education officials will decide on this month, are shaping up to be the most aggressive growth of these independent public schools in at least a decade. Boston has emerged as the hottest market for new charter schools under a state law enacted last year that encourages the doubling of charter school seats in school districts with the lowest state standardized test scores.

Of the 26 proposals for new charter schools, 13 seek to locate in Boston. The Boston applications aim to create more than 6,000 seats over the next five years, but the state law caps new seats in the city at about 4,900 — meaning state education officials will have to reject some applications even if the proposals have merit.

Some schools, if approved by the state Board of Elementary and Secondary Education on Feb. 28, could open this fall, and several are already sending pamphlets and applications to prospective stu-

EXCEL, Page A8

More get waivers of health insurance

State panel cites economy as factor

Flexibility called model for US plan

By Kay Lazar

Massachusetts regulators granted more exemptions last year to residents who said they could not afford the health insurance required by the state, waiving the tax penalty for more than half of those who appealed, according to state data.

Of the 2,637 people who applied, 63 percent received an exemption with 107 cases pending, up from 44 percent the previous year.

State officials said they excused the majority of waiver applicants in large part because of the protracted sour economy, which made insurance unaffordable for more people. Under the 2006 state law that requires most residents to have coverage, regulators have significant latitude to authorize waivers by taking into account factors such as a home foreclosure.

The number of people seeking exemptions in 2010 was about the same as in 2009, and state figures show that roughly 98 percent of residents were insured last year.

Even as Republicans and many states wage a bitter battle in Congress and the courts to block the mandatory insurance requirement in the national health care

EXEMPTIONS, Page A8

Political shift poses test for Warren

Consumer watchdog faces newly business-friendly climate

For Elizabeth Warren, journey from academia.

By Donovan Slack

WASHINGTON — Harvard law professor Elizabeth Warren's biting criticism of Wall Street won her fans across the country and a powerful appointment from President Obama to oversee a new consumer protection agency.

But now that Warren has settled into her office near the White House and as she readies the agency to enforce rules on banks, loans, and credit cards that could affect every American family, she finds herself operating in a dramatically changed political climate. The Obama administration has shifted from bashing Wall Street "fat cats" to courting some of the same groups that fiercely opposed Warren and her agency.

That has left Warren with a pair of challenges: being a tough industry-watchdog in what is now characterized as a business-friendly administration and trying to quickly assemble and manage an agency when her skills are rooted in the powerful ivory tower at Harvard Yard.

"I know there are plenty of people with a handful of socks people just like me in my former life as an academic watching this consumer agency every step of the way," Warren said.

Indeed, just months after be-

CONSUMER AGENCY, Page A6

Soccer phenom opts to learn from the pros

By Frank DellApa

Young athletes often dream of becoming professionals. In some cases, they even forgo college to take their chances on the big time.

Leominster's Diego Fagundez is an even rarer exception. Fagundez is not only going to skip college, he will be bypassing much of high school as well to pursue a pro soccer career.

In November, Fagundez, 15, became the youngest player since Freddy Adu to sign a Major League Soccer contract when he joined the New England Revolution. And when he joins the Revolution first team for practice this month, Fagundez will be going head to head with veterans twice his age, including tough tackling midfielders such as Shalrie Joseph.

"I think it would be a fight for me and a challenge," Fagundez said of training sessions with the Revolution. "But I think I would do good. Even if I'm on the floor 100 times, I'll still get up, and I'll keep fighting."

SOCCER, Page A6

Diego Fagundez, 15, of Leominster, will bypass much of high school to pursue a pro career with the New England Revolution.

Parole records under Romney, Patrick similar

Data on releases reveal little about politics

By Jonathan Saltzman

The Christmas weekend slaying of a Woburn police officer by a recently paroled inmate renewed criticism in some quarters that Democratic Governor Deval Patrick, who had been in office two years when Dominic Cinelli was freed, is soft on crime.

But over the past 20 years, the percentage of inmates paroled while serving a life sentence like Cinelli's peaked in 2004, when all seven members of the state Parole Board had been appointed or reappointed by Republican governors, according to data obtained from the agency. Mitt Romney, a Republican, was governor that year but did not have a majority of the appointees on the board until late 2005.

Under both Romney and Patrick, the statistics show, the board had years when it approved 40 percent or more of so-called "lifers" for early release.

In contrast, the board in the 1990s under Governor William F. Weld, a Republican, never paroled more than 23 percent of lifers and in his last year paroled only 6

PAROLE, Page A6

THE BOSTON GLOBE MONDAY, FEBRUARY 7, 2011

Parole records of Romney, Patrick similar

▶ **PAROLE**
Continued from Page A1

percent. Weld is the former US attorney who famously vowed to "reintroduce Massachusetts prisoners to the joy of busting rocks."

Weld's opposition to parole earned praise from law enforcement officials, who had criticized his Democratic predecessor, Michael Dukakis, as too lenient. But his stance drew fire from defense lawyers. They said it kept people behind bars after they no longer posed a danger. And, they said, it resulted in some offenders serving out sentences and being released directly to the streets without the supervision of parole.

"In the early 1990s, the doors of our prisons were welded shut," said James Alan Fox, a criminology professor at Northeastern University, who characterized the parole rates of lifers under Romney and Patrick as similar. In the 2000s, he said, "The doors swung back open."

Eric Fehrnstrom, a spokesman for Romney, defended his boss's record. He noted that the Governor's Council rejected Romney's first two nominees to the Parole Board as too hard-line. He also said that Romney granted no commutations or pardons as governor, a power strictly at Romney's discretion, and tried to bring back the death penalty. And he noted that Cinelli first came up for parole in 2005, when Romney was governor, and the board rejected him.

"Mitt Romney was a law-and-order governor who time and again demonstrated his commitment to keeping the public safe from violent criminals," Fehrnstrom said in a statement last week. Romney, he said, tried to appoint board members with law enforcement backgrounds but met resistance from council members and legislators.

Mary Beth Heffernan, Patrick's public safety secretary, said Patrick intends to restore the public's faith in the parole system in the wake of the Woburn murder and has introduced a bill to increase the time served by habitual offenders like Cinelli. But she declined to address the statistics.

Weld did not return phone calls and e-mails.

The annual percentage of lifers who earn parole is an imperfect tool for gauging a governor's attitude toward crime and punishment, according to criminologists, a former board member, and advocates for parole.

The Parole Board holds about 100 hearings a year for lifers, who are eligible for parole after serving 15 years in prison. That represents barely 1 percent of the 9,000 to 10,000 hearings that the panel — appointed by the governor with the council's approval — holds annually for inmates convicted of various crimes.

And it can take time for a governor to put his or her stamp on the board. The board members serve staggered five-year terms and can be reappointed an unlimited number of times.

Also, a variety of factors can cause the percentage of lifers winning parole to surge. A pile of applications by inmates previously rejected can increase pressure to grant parole, especially if the prisoners have heeded advice to participate in programs to discourage violence and drug abuse.

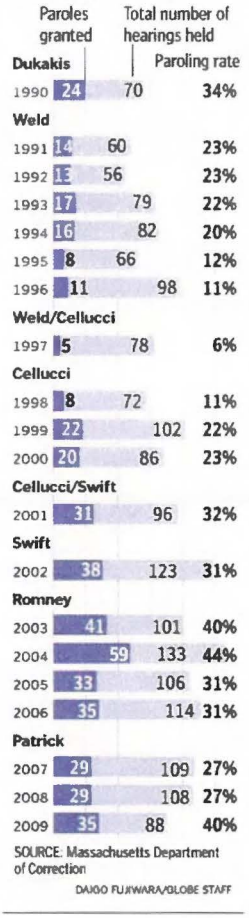
Still, the percentage of paroled lifers can serve as a measure of the board's attitude about freeing some of the most serious offenders, according to people familiar with the parole system. Most lifers have been convicted of second-degree murder. If paroled, they will spend the rest of their lives on supervised release. Lifer hearings mark the only time the full board sits.

"Lifers have the lowest recidivism rates of parolees, but it's perceived by the public as a higher-stakes, higher-risk decision," said Patricia Garin, a Boston defense lawyer who helps run a Northeastern University law clinic that provides law students as counsel for lifers seeking parole. "And so the board has to be composed of people who are strong in their belief of the importance of parole and the success of parole to have a high lifer[-release] rate."

The perils of paroling the wrong lifer became clear on Dec. 26 when Cinelli fatally shot Woburn police officer John Maguire during a jewelry heist. Cinelli, a violent career criminal who had received three concurrent life sentences, had been paroled in February 2009 as a result of a 6-0 vote the prior year by the board.

PRISONERS RELEASED

Prisoners paroled while serving a life sentence:



SOURCE: Massachusetts Department of Correction

DAIGO FUJIWARA/GLOBE STAFF

The slaying rekindled criticism in some quarters that Patrick was too lenient on crime. The six board members who voted to release Cinelli included two whom Patrick had appointed and two whom Romney had appointed and Patrick had reappointed, according to council records.

During his 2006 gubernatorial campaign, Patrick fended off accusations of leniency for having written letters to the board on behalf of a convicted rapist, Benjamin LaGuer, and for having donated to a legal fund to pay for DNA tests of evidence collected in the case against LaGuer.

On the defensive again after Maguire's slaying, Patrick released a damning review of how the board handled Cinelli's parole application and how staff supervised him on release. Five board members resigned under pressure from Patrick.

But the statistics show that the percentage of lifers to win parole peaked under Romney in 2004, when 44 percent of the 133 inmates who applied were freed. That compares with 40 percent of the 88 applicants in 2009, the highest percentage during Patrick's first term, according to the data. Statistics for 2010 were not available.

The data show that the parole rate for lifers plunged under Weld, then climbed under Cellucci. After reaching its apex in Romney's second year in office, it dipped before rising in Patrick's third year in office.

Fox theorized that many lifers who won parole in the Romney era had been rejected by Weld's board when they first became eligible and had reapplied five and perhaps 10 years later.

"There were likely inmates in the 1990s who would ordinarily be paroled but whose releases were being delayed by a very stringent board and pushed off to a subsequent board," Fox said.

Len Engel, managing associate for policy at the Crime and Justice Institute, part of the Boston-based nonprofit Community Resources for Justice, said the comparison of lifer parole rates over the past two decades is not particularly meaningful, given the small number of cases each year, nor is it surprising.

"We knew Bill Weld was going to come in and change the state's approach to offenders — the joy of busting rocks — and you see that corresponding decline in grant rates for lifers during those years," he said. "Then you see pretty much consistent percentages over the next nine or ten years."

Saltzman can be reached at jsaltzman@globe.com.

Boston Globe

The Boston Globe (Boston, Massachusetts) · Mon, Mar 26, 2012 · Page A1

https://bostonglobe.newspapers.com/image/444213403 Printed on Dec 26, 2018

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The Boston Globe

WELCOME OUR GUEST

MONDAY, MARCH 26, 2012

In the news

Lawyers have been training intensively for the upcoming three days of marathon Supreme Court arguments on the constitutionality of President Obama's health care law. **A2.**

The United States gave $50,000 to each of the families of 16 Afghan villagers who were killed in a rampage blamed on a lone soldier. **A4.**

The Food and Drug Administration is intensifying its scrutiny of monitors and other medical devices in an effort to reduce the "alarm fatigue" that has been linked to hundreds of deaths nationally. **B1.**

Prayers for healing wounded as Mattapan residents went to church three days after an acquittal and mistrial in the 2010 slayings of four people in the neighborhood. **B1.**

The heart transplant at age 71 for former vice president Dick Cheney rekindled a debate on whether rules should be changed to favor youth in giving out scarce organs. **A6.**

Islamists won a majority on the panel that will draft Egypt's new constitution, stoking concern about the eventual role of religion and minority rights. **A4.**

Talking with tellers by video links may be the next step for bank customers using ATMs, specialists say. **B5.**

State Police issued a caution about using the Charles River Esplanade after dark following a sexual assault early Friday. **B1.**

The Justice Department could bring a hate crime charge against the killer of black Florida teenager Trayvon Martin if it has evidence of racial bias, analysts said. **A2.**

Companies across the business spectrum are lobbying heavily over a proposed overhaul of the Postal Service. **B7.**

Have a news tip? E-mail newstips@globe.com or call 617-929-TIPS (8477). Other contact information, **B2.**

POINT OF VIEW:

"Ryan's budget is far from perfect, but this year's edition brings us a step closer to an honest debate about tax reform, something America hasn't had in nearly 30 years."

Opinion, A11.

Inside

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Lottery	B2	Crossword,
Weather	B12	Jumble, Sudoku,
		Movies, Travel pages

BostonGlobe.com

Employees take a stand

Citing health benefits, many abandon sitting while working

By Kathleen Pierce
GLOBE CORRESPONDENT

Jacquie Clermont's desk job as a software tester for Lunacon International in Watertown once left her cramped and sore.

"I used to get up and I'd be bent over and I'd say 'ouch, ouch, ouch,'" she recalled.

A month ago, Clermont joined a handful of co-workers who fashioned elevated desks out of cardboard boxes and wooden planks so that they can work while standing up. Since then her back pain has disappeared.

"My focus is much better," Clermont said. "I have more energy and I'm more alert."

Once quirky outliers in the office, employees who prefer to stand at their desks and in meetings, are multiplying in corporate America — and companies that supply office goods are reporting that sales of height-adjustable furniture are up significantly.

"Sit-stand desks have moved from a niche product category to one that is standard in the top commercial furniture retailers," said Ann Hall, a marketer for the Danish manufacturer Linak Group, which makes components that elevate desks. Sales of the devices have increased by triple-digits since 2000, Hall added.

"Now every major manufacturer has a height-adjustable desk. The market is booming," she said.

Other makers of office furniture have added to their lines of "sit to stand" desks and workstations, as have office suppliers such as Staples Inc., which offers in its online store four "height adjustable workstations, due to customer interest," said Cassie

STANDING, Page A4

Amanda Johnson at her workstation at the TripAdvisor office in Newton.

'You can see Christianity coming back, after . . . persecution and neglect.'

CARDINAL SEAN O'MALLEY

Cardinal heads to a changing Cuba

Papal visit raises hopes for greater freedoms

By Peter Schworm
GLOBE STAFF

When Cardinal Sean O'Malley first visited Cuba in the early 1980s, he made sure to greet with priests in loud, crowded areas, knowing the government had probably bugged rooms in the church. Outside of the elderly, anyone who tried to attend church services would receive a swift and sure warning to reconsider.

"Police would tap you on the shoulder and say 'I don't think this is a good idea,'" O'Malley recalled in an interview last week. "They made life impossible for you."

O'Malley prepared to accompany Pope Benedict XVI this week on a highly anticipated visit to the communist state, where the Roman Catholic Church has been reborn, slowly emerging from the shadows despite enduring oppression.

"You can see Christianity coming back, after a long winter of persecution and neglect," O'Malley said.

▶ Pope charms crowds in Mexico. A8.

On Monday, the pope will fly to Santiago de Cuba to mark the 400th anniversary of the discovery of the image of the Virgin of Charity, the country's patroness. On Wednesday he will celebrate Mass in Havana's Revolution Square.

O'Malley, noting the far-reaching im-

CUBA, Page A8

Foxborough, Krafts battle over billboards

Property dispute clouds casino issue

By Mark Arsenault
GLOBE STAFF

FOXBOROUGH — They seem like a pair of ordinary advertising billboards, competing for the attention of drivers amid the clutter of signs on busy Route 1.

But a disagreement over who controls these lumbering signs near Gillette Stadium is part of a bitter dispute that has damaged the 27-year relationship between the town's government and its largest taxpayer, The Kraft Group, founded by Robert Kraft.

The breakdown in relations comes as Kraft, owner of the New England Patriots, is asking Foxborough to consider the most controversial and far-reaching economic development proposal in its history, a $1 billion resort casino.

The Kraft Group insists the billboards are on its land. Foxborough officials say an easement gives the town control.

The town is threatening to settle the dispute by taking the billboards by eminent domain, which the company warns would be "a dangerous position" for the town.

"Unfortunately, what I see is the relationship with the Krafts getting worse and worse," said Larry Harrington, chairman of the Board of Selectmen. "It's

BILLBOARDS, Page A6

Foxborough is threatening to take two billboards by eminent domain.

Backlog follows parole overhaul

Inmates not told of rulings to release

By Michael Rezendes
GLOBE STAFF

Governor Deval Patrick's revamped Parole Board has voted since last April to grant early release to 17 serious criminal offenders most of them probably convicted murderers, but the panel has not notified any of the inmates or the families of their victims that they are on the path to freedom.

The delay in processing applications for parole by so-called lifers — inmates serving sentences of 15 years to life — is part of a broader backlog that has built up at the Parole Board since a paroled lifer fatally shot a Woburn police officer, triggering a shakeup at the agency. The Parole Board also has failed to notify more than 100 lifers that their requests for parole over the last year have been rejected.

Prisoner advocates say the delays, coupled with stricter standards for releasing other inmates on parole, have contributed heavily to a 58 percent drop in the number of inmates who are released under parole supervision — from 1,028 in 2010 to 435 in 2011 — putting upward pressure on the state prison population.

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FEWER PAROLED

The outcome of 139 parole hearings for inmates serving 15 years to life, from April 2011 to March 2012.

SOURCE: Massachusetts Parole Board

Fiscal pinch casts shadow on nuclear security push

By Bryan Bender
GLOBE STAFF

AK-ZHOL CROSSING, Kyrgyzstan — The bottleneck of grime-splattered cars and trucks loaded with food supplies and industrial goods snaked in both directions over the Chu River.

For centuries this outpost in Central Asia was a stop along the Silk Road, the ancient trade route from the Far East to Arabia. At dusk on a recent Tuesday, it was one point in a vast monitoring network being set up across the former Soviet Union and beyond to detect illicit nuclear materials that could fall into the hands of terrorists.

Yet, this interdiction effort, a major part of President Obama's ambitious plan to prevent nuclear terrorism, is in jeopardy. Administration officials, citing fiscal restraints and a need to reassess the campaign, want to cut funding for the project by 65 percent.

Nonproliferation specialists are denouncing the proposed cuts, contending the need for protection is as urgent as ever.

NUCLEAR, Page A6

Obama warns North Korea

A satellite launch could dampen Pyongyang's invitation, the president said. **A3.**

Boston Globe
The Boston Globe (Boston, Massachusetts) · Mon, Mar 26, 2012 · Page A9
https://bostonglobe.newspapers.com/image/444213578 Printed on Dec 26, 2018

Backlog in parole decisions follows overhaul at agency

▸ PAROLE
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The total effect is more people in prison overall, and fewer people released under supervision," said James B. Pingeon of Prisoners' Legal Services, a group that provides representation to inmates. "It's deadly bad."

The Parole Board chairman, Josh Wall, defends his agency's performance, arguing that the new board is simply being more careful while coping with a shortage of resources.

He attributed delays in notifying lifers about their parole requests to a backlog of cases left by the previous board, snowing across sections of parole application forms, and a staff shortage.

"The priority is public safety," Wall said, adding that he has chosen to leave several administrative posts vacant in favor of hiring more parole officers, who have been on the job for several months. "We have limited resources and limited personnel."

Wall took over as chairman in February 2011, following the Dec. 26, 2010, fatal shooting of a Woburn police officer, John Maguire, by Dominic Cinelli, a career criminal serving three life sentences at the time of his 2009 parole. Cinelli killed Maguire during a botched jewelry heist and was slain in the ensuing shoot-out.

Amid a public outcry, the five Parole Board members who participated in the 6-0 vote to release Cinelli resigned, as did the board's executive director.

Wall said the new board, which removed lifer parole hearings last April, has held 120 hearings for lifers and voted favorably in 17, an approval rate of 12 percent. By contrast, the board granted 31 percent of lifer parole requests in 2010, before Wall took over, and 40 percent of applications in 2009.

But the board has posted only 12 parole decisions on its website — all containing rejections of requests made by a collection of murderers and one rapist. That leaves 126 who are still waiting to learn the outcome of parole hearings up to 11 months later.

Wall, a former Suffolk County prosecutor, said he has attempted to improve parole practices by providing training to board members and leaving three agency positions as well as the executive director's post unfilled, to free up funds for additional parole officers, including those supervising ex-offenders.

To speed the process of notifying lifers of the outcome of their hearings, Wall said, he and the six other parole board members will begin writing decisions themselves.

"Decisions will be coming out at a steady rate beginning in April," he said.

Advocates say the delays the 12 lifers whose requests for parole were rejected typically waited six months for notification — are an unreasonable burden for inmates, especially those who the Parole Board has concluded are rehabilitated enough to be released. Most probably still have additional prison time in maximum-security and pre-release facilities before their release to the streets.

"The wait can be excruciating," said Patricia Garin, an attorney who helps run a Northeastern University law school clinic that provides representation for lifers seeking parole.

Victims' advocates say that families can suffer when the Parole Board takes so long to announce decisions. Victims' family members frequently testify at parole hearings. Then wait months to learn if their loved one's killer will be set free.

Laurie Street, the executive director of Commonwealth Victim Advocates, a child protection and victim advocacy organization, said "a little extra consideration" of lifer parole applications could enhance public safety. But she said unreasonable delays can be a disservice to victims and their families.

"The system owes it to [victims' families] to move speedily and give them whatever information it has so they can move forward with their lives," she said.

Inmate advocates say the Parole Board does taken much too long to decide whether parolees may have violated the terms of their parole and should go back to prison. They say parolees are often locked up for six months or more while awaiting a decision, far longer than the 60 days that advocates regard as reasonable.

"The delay in the revocation process is incrimnable and unlawful," said Pingeon, the Prisoners' Legal Services director. Pingeon cited a US Supreme Court ruling from the 1970s that calls for a ruling within a reasonable time.

In addition, inmate advocates say that new, tougher parole practices for all inmates — most parolees are not lifers — are contributing to prison overcrowding by making it more difficult to win parole. The state-wide prison population grew from 17,680 to 11,754 in 2011, but the population might have declined if the number of inmates released on parole had not dropped by 500.

Inmates who do not receive parole, or cannot fulfill conditions to qualify, such as the completion of drug treatment or sex offender programs, finish their sentences behind bars, so that when they are released they often have no one supervising their transition. Inmates released on parole, by contrast, must make regular contact with a parole officer and may need to pass drug and alcohol tests to remain free.

Last year only 10 percent of the state prison inmates who were released had parole supervision, compared with 38 percent in 2010, according to Department of Correction statistics.

Wall said a reduction in the parole approval rate for nonlifer inmates may not be the only factor contributing to an increase in the prison population. But he acknowledged it is important. The parole approval rate for nonlifers in state prisons since May 2011 was only 45 percent compared with 58 percent in 2010 and 66 percent in 2009.

Wall said the new board is taking steps to improve the inconsistent rate of nonlifer inmates new *story are released, an initiative* that can slow the process. The board is requiring some of them to serve additional time in lower-security facilities, where they may receive job training and other counseling to ease their transitions to the outside.

But prisoner advocates say that the additional requirements often bring additional delays because beds at lower-security facilities are in such short supply. According to the Department of Corrections, 1,665 inmates were being held earlier this month in minimum and pre-release facilities designed to house 1,326 inmates.

"Those beds are precious and there are not enough of them," said Leslie Walker, the executive director of Prisoners' Legal Services.

Wall insisted that the new board is compared to granting early release to inmates who are eligible for parole, and who show that they are ready to leave with out presenting a safety risk.

"We're being more careful," he said. "Being more careful is not a crackdown."

Michael Rezendes can be reached at mrezendes@globe.com. Follow him on Twitter @Rezendes.

PAROLE RATES

Hearing outcomes for inmates serving terms of 15 years to life

	Approved	Denied	Other decisions	Total hearings
'06	36 (32%)	78	1	114
'07	29 (27%)	78	2	109
'08	29 (27%)	77	2	108
'09	33 (38%)	53	85	
'10	43 (34%)	85		128
'11	17 (12%)	122		139

Years April 2011 to March 2012

SOURCE: Massachusetts Parole Board

"We're being more careful," said Josh Wall, parole board chairman, who defended the agency's performance.

'Unfortunately, what I see is the relationship with the Krafts getting worse and worse. It's like the Hatfields and McCoys right now.'

LARRY HARRINGTON, chairman of Foxborough's Board of Selectmen

Krafts, Foxborough at odds over billboards

▸ BILLBOARDS
Continued from Page A1

line the Hatfields and McCoys right now."

The dispute has spilled into town politics, setting town officials against each other at a moment when Foxborough is most in need of leadership, as the town considers a proposal from Wynn Resorts to build a gambling resort on land Kraft owns near the stadium.

"That casino is the elephant in the room, without a doubt," said Town Manager Kevin Paicos.

The Krafts presented their side of the billboard dispute over the weekend in a mailing sent to thousands of households. It answered "some tough funders" of slamming the relationship with the threat of land takings, an "extraordinary and unprecedented action" the company warns would hurt the taxpayers.

"We hope, for the sake of the relationship and for all taxpayers, that the town leaders who are driving this agenda choose a different path," The Kraft Group wrote.

The relationship began in 1985 when Robert Kraft secured an option on land surrounding the old Foxborough Stadium.

More than 25 years later, the relationship is seen two ways by local officials.

Some focus on what they view as Kraft's increasingly aggressive tactics over development and other issues, revealed in recently released minutes from closed meetings of the Board of Selectmen. "If you allow yourself to be supplicant," Paicos warned the board in private session, "this is how they will treat you."

Others choose to focus on the roughly $5 million a year The Kraft Group pays in host taxes, fees, and other mitigation, after replacing what was the NFL's worst stadium with one of the best, and then adding a hotel, movie theater, and mall.

"For a load majority in town, if Robert Kraft gave them a million dollars they'd complain it wasn't two million," said Harrington.

The billboards in dispute date back to agreements the town signed with the Kraft organization in 2007, as part of the approved process for Patriot Place, the retail mall next to Gillette Stadium.

Under the deal, the town agreed to ask the Legislature for a dozen more liquor licenses, with the expectation that restaurants planned for the mall would apply for them.

The Kraft organization agreed to dedicate $7.5 million to $10 million to sewer improvements for the town.

And both sides agreed to share revenue on two new billboards, which The Kraft Group built in 2008.

For the past four years, the Kraft organization has managed the marketing of billboard space, and the revenue is split the advertising revenue. Foxborough has received as much as $160,000 a year from the arrangement, according to The Kraft Group.

But other terms of the original plan were almost immediately forced to change.

Shortly after the agreements were signed in 2007, residents voted against the large sewer improvements, eliminating Kraft's money obligation. Town leaders then asked Kraft for equal value to cash payments, and those negotiations expanded to include an extension of the billboard deal, which expires this spring, town officials said.

During these talks, town officials came to believe that management of the billboards should go out to bid, because it is a contract involving a public entity.

"That is not a choice," Selectwoman Lorraine Rose said. "The deal has to go out to bid."

The Kraft Group strenuously disagrees with this assessment and maintains the deal can be extended through negotiations.

The town proceeded nevertheless, but the first solicitation turned up no bids. It will go out to bid again, said Paicos.

"Things were already a little tense because of the casino but when the [bad solicitation] went out, the Kraft organization was very, very upset," said Paicos.

The Kraft Group has sent multiple letters to town officials saying the bid process is fatally flawed because the billboards are on its private property.

"Krafts should tell you that's land we own," said Dan Krauss, director of site development for The Kraft Group. "We have a top-flight Boston legal firm that will tell you it's land we own, and I have a survey in hand that says it is land we own."

Kraft officials tried to assert their ownership to the Board of Selectmen at an open meeting on March 13. But Paicos objected and instructed them of trying to use the forum to "subvert a public bidding process" and scare off potential bidders.

Rather than resolving out the easement dispute in court, officials will ask voters at the May Town Meeting to consider settling the matter by eminent domain, Paicos said.

Krauss warned that the company would be entitled by law to fair compensation in a land taking, which he said would include the value of future advertising.

"I don't know how you put a number on that," he said. "It could be large. Very large."

The easy solution, said Paicos, is for the Kraft organization to just win the bid.

"Then all this goes away," he said. "There's no eminent domain and we go hand-in-hand into the sunset as full business partners, as we have been."

Mark Arsenault can be reached at marsenault@globe.com. Follow him on Twitter @bostonglobemark.

The town has cleared ad revenue from the billboards, receiving as much as $190,000 a year, according to The Kraft Group.

I, James R. Pingeon, state the following:

1. I have been the Litigation Director of Prisoners' Legal Services of Massachusetts since 2001.

2. I am submitting this affidavit to provide the court with data showing the parole rates of prisoners with life sentences, as well as data showing the length of the setback period established by the Board for lifers denied parole, including individuals who committed their crimes as juveniles.

3. The Parole Board posts life sentence decisions on its website. https://www.mass.gov/lists/life-sentence-decisions. I carefully reviewed all "lifer" decisions on the Massachusetts Parole Board's website for 2017 and 2018. Based on my decision-by-decision review I found that:

   a) In 2017, the Board conducted a total of 128 life sentence hearings and issued 33 favorable decisions for an overall parole rate of 26 percent.

      Of the 128 life sentence hearings, 13 were held for individuals serving sentences for a crimes

committed as a juvenile. The Board issued favorable decision in 6 of these cases, for a parole rate of 46 percent. Of the 13 juvenile life sentence hearings, 4 were for individuals serving first degree life sentences; 3 received favorable decisions for a parole rate of 75 percent.

b) For 2018, the Board has posted 25 decisions as of December 21. It issued 10 favorable decisions for an overall parole rate of 40 percent. The Board posts decisions as they issue, and since there is often a long time between the hearing and the decision, the 2018 data is not yet complete.

Of the 25 life sentence hearings, 5 were for individuals serving life sentences crimes committed as a juvenile. The Board issued favorable decision in 3 of these cases, for a parole rate of 60 percent. Of the 5 juvenile life sentence hearings, 3 were for individuals with first degree life sentences; all 3 received favorable votes, for a parole rate of 100 percent.

4. The Massachusetts Parole Board does not report annual statistics with regard to the length of the setbacks it gives to those lifers who are denied parole. The only way to determine the number of lifers who were denied parole and received setbacks of more than three years in any given year is to review every lifer decision, one by one. I did this for 2016, 2017, and 2018, and found:

    In 2016, 54 percent (48/89) of the prisoners denied parole received setbacks greater than 3 years. Of these, 35 percent (6/17) were juvenile lifers.

    In 2017, 58 percent (55/95) of the prisoners denied parole received setbacks greater than 3 years. Of these, 57 percent (4/7) were juvenile lifers.

    In 2018, 53 percent (8/15) of the prisoners denied parole received setbacks greater than 3 years. Two juvenile lifers were denied parole, and both received 3 year setbacks.

5. The Massachusetts Parole Board also does not report the granting of requests for

reconsideration or the granting of requests for expedited parole hearings or the success of administrative appeals of decisions denying parole. In order to determine whether such requests and appeals have been successful in lifer cases, one must review every lifer decision, one by one. Again, I did this for 2016, 2017, and 2018, and found no references to successful administrative appeals, and no indications that requests for expedited review hearings had been granted in those years. I found one reference to a successful request for reconsideration in 2016. That case involved Roy White, a lifer who had been paroled only to have his parole revoked. He requested reconsideration of the revocation decision, and upon reconsideration the Parole Board re-paroled him based on new information he provided concerning his problems while previously out on parole.

Signed under the pains and penalties of perjury this 31th day of December 2018

James R. Pingeon (SMT)

James R. Pingeon

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
SJC-12482

JEFFREY S. ROBERIO,
petitioner,

v.

PAUL M. TRESELER,
Chair, Massachusetts Parole Board,
respondent.

SUPPLEMENTAL AFFIDAVIT OF PATRICIA GARIN

I, Patricia Garin, state the following:

1. This affidavit is filed as a supplement to the affidavit I wrote that was filed in this case on July 21, 2016.
2. In 2011, the Parole Board, for the first time, began to publish its Records of Decision for lifer parole release hearings on its website.
3. In 2011, 2012 and 2013 I closely monitored these decisions as they were posted.
4. In 2011, based upon my review of the Records of Decision posted on the Board's website, the Board conducted 106 lifer hearings. Records of Decision were posted in all 106 cases when I collected this data. There were 12 positive votes for parole. There were 94 denials for a paroling rate of 11%. Of the 94 parole denials, 74 of the denials were

for setbacks of four or five years. Of the prisoners who received parole denials, 79% of them received a four-or five-year setback.

5. In 2012, based upon my review of the Records of Decision posted on the Board's website, the Board conducted 136 lifer hearings. Records of Decision were posted in 133 cases when I collected this data. (Two prisoners died waiting for a Record of Decision and one prisoner's case was continued pending appointment of counsel.) Of the 133 Records of Decision posted, there were 25 positive votes for parole. There were 108 denials for a paroling rate of 19%. Of the 108 parole denials, 74 of the denials were for setbacks of four or five years. Of the prisoners who received parole denials, 79% of them received a four-or five-year setback.

6. At the time I collected my data for the 2013 hearings, there were 101 Records of Decision posted on the Parole Board's website. Subsequently, the Parole Board removed the Records of Decision for the years 2011, 2012 and 2013 from its website and so not all the 2013 hearings that were conducted are included in these figures. Of the 101 posted Records of Decision for 2013 hearings that I studied, there were 25 positive votes for parole. There were 76 denials for a paroling rate of 25%. Of the 76 parole denials, 56 of

the denials were for setbacks of four or five years. Of the prisoners who received parole denials, 74% of them received a four-or five-year setback.

Signed under the pains and penalties of perjury this 27th day of December 2018.

Patricia Garin