COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY NO. SJC-12482

JEFFREY ROBERIO

V.

PAUL TRESELER

SUPPLEMENTAL BRIEF FOR THE APPELLANT

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ISSUES PRESENTED

The Court has requested supplemental briefing on the following issues:

1. Whether, as a matter of statutory interpretation, the 1996 amendment to G.L. c.127, §133A, applies retroactively to sentences for offenses that were committed before the effective date of the amendment, including whether there is any indication in the language of the amendment or in the legislative history that the Legislature intended the amendment to apply retroactively.

2. What are the implications for Roberio, if any, of the fact that, at the time of his offense in 1986, juveniles who committed murder in the first degree were not eligible for parole consideration, and that it was not until this Court's decision in Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655 (2013), seventeen years after the 1996 amendment to G.L. c.127, §133A, that such juvenile homicide offenders first became parole eligible.

ARGUMENT

I.

Retroactive application of the 1996 amendment is prohibited by settled rules of statutory interpretation.

The parole board agrees that G.L. c.127, §133A, as amended by St. 1996, c.43 (the 1996 amendment), was applied retroactively in this case. PB Br. 17-18. Such application was unlawful because the 1996 amendment is a substantive penal law governed by the presumption against retroactivity, and because there is

no evidence of the unequivocal legislative intent necessary to rebut the presumption.[1/]

It is axiomatic that legislation "looks to the future, not to the past, and has no retroactive effect unless such effect manifestly is required by unequivocal terms." Commonwealth v. Dotson, 462 Mass. 96, 101 (2012) (citation omitted). In Lynce v. Mathis, 519 U.S. 433 (1997), the United States Supreme Court held that a statute retroactively cancelling prisoners' early release credits violated the ex post facto clause. Id. at 441-447. Before reaching the ex post facto issue, however, the Court took pains to emphasize that "[t]he presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen, . . . is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Id. at 439-440 (citations omitted). See Landgraf v. USI Film Products, 511 U.S. 244, 272 (1994) ("[P]rospectivity remains the appropriate default rule").

Although the presumption against retroactivity can be rebutted, to do so requires an expression of

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[1/]For the reasons stated in Roberio's reply brief, see Reply Br. 3-4, the Court should decide this issue even though it was not raised below.

legislative intent that is "unequivocal" and "clearly expressed." Commonwealth v. Dotson, 462 Mass. at 101. "Requiring clear intent assures that [the Legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the counter-vailing benefits." Landgraf v. USI Film Products, 511 U.S. at 272-273. Thus, even an inference that the Legislature "probably" intended that a new law would apply retroactively "is not enough." Commonwealth v. Bradley, 466 Mass. 551, 554 (2013).

The language of the statute is the "primary source of insight into legislative intent." Commonwealth v. Richards, 480 Mass. 413, 419 (2018). Here, the sum and substance of the 1996 amendment ("An Act Relative to Eligibility for Parole") is to replace the word "five" in §133A with the word "three." See Amicus Br. ADD 9. No language suggests that this change was intended to operate retroactively. Such legislative history as amici have found establishes that a primary goal of those who shepherded the bill through the Legislature was to ensure that lifers would have fewer parole hearings so victims would be required "to undergo the trauma of a parole hearing only once every five years instead of once every three years." Amicus Brief ADD 2

(Memorandum from Messrs. Denniston and Supple to Governor Weld) (Mar. 14, 1996).[2/] But nothing in the legislative history indicates -- clearly or otherwise -- that the 1996 amendment was intended to operate retroactively.

On the other hand, when §133A was amended in 1965 to make lifers eligible for parole after serving fifteen years (instead of twenty years), the Legislature made crystal clear that the change was to "apply to prisoners sentenced before as well as after the effective date of this act." St. 1965, c.766, §3.[3/] The Legislature thus obviously knows how to make an amendment to §133A retroactive when it wants it to operate in that way.

In Stewart v. Chairman of Massachusetts Parole Bd., 35 Mass. App. Ct. 843 (1994), the Appeals Court held that an amendment to §133A requiring that victims be given notice of parole hearings could be retroactively applied without violating ex post facto principles -- even though the legislation was silent on the question of retroactivity -- because such a change in the law was "merely procedur[al]" and did "not

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[2/]Counsel for amici informs Roberio that amici did not find any statutory history other than what is reproduced in the amicus brief at ADD. 1-9.

[3/]The 1965 amendment is reproduced in the supplemental addendum to Roberio's reply brief (Supp. Add. 1-2).

affect substantive rights." Id. at 846, citing Commonwealth v. Bargeron, 402 Mass. 589, 590-591 (1988). In contrast, a statutory amendment that increases how long prisoners may be required to wait before being entitled to see a parole board is "substantive" and "penal," see Jones v. Commissioner of Correction, 258 Conn. 804, 820 (Conn. 2002), and therefore falls squarely within the presumption of prospectivity. If legislation such as the 1996 amendment were merely procedural, the Supreme Court would not have needed to grapple with the merits of the ex post facto claims at issue in California v. Morales, 514 U.S. 499 (1995), and Garner v. Jones, 529 U.S. 244 (2000).

Finally, the conclusion that the 1996 amendment operates only prospectively is "guided" by G.L. c.4, §6, Second,[4/] see Watts v. Commonwealth, 468 Mass. 49,

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[4/] In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

* * *

Second, The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed.

G.L. c.4, §6, Second.

54 (2014), which codifies the presumption against prospectivity by "preserv[ing], even after legislative change of a statute, the liability of an offender to punishment for an earlier act or omission made criminal by the statute repealed in whole or in part." Id. at 55, quoting Nassar v. Commonwealth, 341 Mass. 584, 589 (1961).

This Court "tread[s] lightly" before applying a law implicating ex post facto concerns to conduct completed before that law's enactment. Commonwealth v. Davis, 380 Mass. 1, 16 (1980) (Kaplan, J.). See Commonwealth v. Fuller, 421 Mass. 400, 407-408 (1995) (recognizing that presumption of prospectivity is consistent with judicial "duty to construe statutes so as to avoid . . . constitutional difficulties, if reasonable principles of interpretation permit") (citation omitted). In the absence of any clearly expressed legislative intent to the contrary, the 1996 amendment works only prospectively. Therefore, it does not apply to this case, in which the governing offense predates the effective date of the legislation.

II.

It would be unconscionable if Roberio were denied ex post facto protection due to the fact that, until 2013, he expected to die behind bars under a cruel and unusual sentence.

Until Diatchenko I was decided in 2013, Roberio

had no reason to expect that he would not die in prison. This does not affect the ex post facto calculus. The prohibition against ex post facto laws "does not merely protect reliance interests." Peugh v. United States, 569 U.S. 530, 545 (2013). "It also reflects principles of 'fundamental justice.'" Id. at 546, quoting Carmell v. Texas, 529 U.S. 513, 531 (2000).[5/] Fundamental justice would hardly be served if Roberio were denied ex post facto protection because, for the first twenty-seven years of his life behind bars, he was imprisoned pursuant to a sentence that unconstitutionally deprived him of all "hope," Graham v. Florida, 560 U.S. 48, 79 (2010), and was "not merely erroneous, but . . . illegal and void, and [could not] be a legal cause of imprisonment." Montgomery v. Louisiana, 136 S. Ct. 718, 730 (2016) (holding that Miller v. Alabama, 567 U.S. 460 (2012), is retroactive under Teague). Such a result would be irreconcilable with Diatchenko I, in which this Court -- anticipating the Supreme Court's decision in Montgomery v. Louisiana, see 136 S. Ct. at 725 -- held

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[5/]If the absence of a reliance interest were dispositive, the protection against ex post facto laws would be a dead letter, "as there are few, if any, reliance interests in planning future criminal activities based on the expectation of less severe repercussions." Carmell v. Texas, 529 U.S. at 531 n.21.

that juvenile homicide offenders whose convictions became final before Miller was decided were nonetheless entitled to the benefit of Miller in order to ensure that they would no longer "face a punishment that our criminal law cannot constitutionally impose on them." Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 666 (2013), citing Schriro v. Summerlin, 542 U.S. 348, 352 (2004), and Bousley v. United States, 523 U.S. 614, 620 (1998). Justice requires that Roberio be treated for ex post facto purposes as if he had not been unconstitutionally sentenced in the first place.

Denying Roberio ex post facto protection on the grounds that the law only recently gave him any cognizable right to be considered for parole would also run headlong into Commonwealth v. Brown, 466 Mass. 676, 689 n.10 (2013), and Clay v. Massachusetts Parole Board, 475 Mass. 133, 134-135 (2016), in each of which this Court vindicated the ex post facto parole rights of a juvenile homicide offender whose governing offense was committed before the juvenile could reasonably have expected to ever see a parole board. "[E]venhanded justice," see Diatchenko I, 466 Mass. at 667, requires that Roberio be treated similarly.

CONCLUSION

For these additional reasons, the Court should grant the requested relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the rules of court that pertain to the filing of such briefs.

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