COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS. NO. SJC-12482

JEFFREY ROBERIO,
Petitioner-Appellant,

v.

PAUL TRESELER,
Respondent-Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK COUNTY SUPERIOR COURT

SUPPLEMENTAL BRIEF OF THE RESPONDENT-APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

I. The 1996 amendment applies retroactively to offenses committed prior to its enactment.

In its order of January 9, 2019, this Court asked the parties to address whether "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." The plain text of § 133A, as well as its legislative history and purpose, confirm that it does.[1]

At the outset, Roberio's reliance on the presumption against retroactivity is misplaced. That presumption does not apply when a new law makes only a procedural change and does not affect substantive rights. Such procedural laws, unlike substantive changes, "'are generally held to operate retroactively.'" *Commonwealth v. Bargeron*, 402 Mass. 589, 594 (1988) (quoting *Commonwealth v. Greenberg*, 339 Mass. 557, 578-79 (1959)). The 1996 amendment is just such a law: it affects only the procedures by which the Parole Board exercises its discretion (*i.e.*, the timing between parole hearings), and does not alter the substantive punishment imposed. *See California Dept. of Corrections v. Morales*,

[1] At page 3 of his reply brief, Roberio's counsel recognizes that "this claim could and should have been raised below." This Court should deem this argument waived. *See Commonwealth v. Keevan*, 400 Mass. 557, 562 n.4 (1987) (rejecting, on waiver grounds, a defendant's attempt to raise an ineffective assistance of counsel claim for the first time in his reply brief).

514 U.S. 499, 507-08 (1995) ("Rather than changing the sentencing range applicable to covered crimes, the 1981 amendment simply 'alters the method to be followed' in fixing a parole release date under *identical substantive standards*." (emphasis added) (quoting *Miller v. Florida*, 482 U.S. 423, 433 (1987)); *Stewart v. Chairman of Massachusetts Parole Bd.*, 35 Mass. App. Ct. 843, 846 (1994) (deeming changes "relating to the persons to whom notice of hearings is required and access of the public to those hearings" as "essentially procedural in nature," because they "do not affect any inmate's parole eligibility date or requirements for parole"). Moreover, as already discussed in the Parole Board's principal brief on appeal, the 1996 amendment does not significantly risk prolonging any prisoner's incarceration. *See* Resp. Br. at 22-40. Thus, the 1996 amendment is procedural, not substantive, and no presumption against retroactivity should apply.[2]

[2] Roberio and Amicus each cite to a Connecticut case, *Johnson v. Comm'r of Correction*, 258 Conn. 804, 820 (2002), to support their argument that the 1996 amendment affects a person's substantive rights. Pet. Supp. Br. at 5; Amicus Br. of Assoc. of Mass. Crim. Defense Lawyers et al. at 19. This citation is inapt. The statute at issue in *Johnson* delayed a prisoner's *initial parole eligibility*, which meant that the Connecticut Parole Board had no opportunity to consider that person's suitability for parole for a longer period of time. Such a law was indeed substantive, as the Connecticut Supreme Court so held. The 1996 amendment is different, however, in that it "'has no effect on the date of any prisoner's initial parole suitability hearing; it affects the timing only of *subsequent* hearings.'" Resp. Br. at 27 (quoting *Morales*, 514 U.S. at 511).

In any event, even if the presumption against retroactive application of statutes is potentially implicated here, it "is not absolute," and can be overcome when—as here—retroactive application is consistent with "the manifest intent of the [Legislature]" or when failing to do so would be "repugnant to the context of the same statute." *Commonwealth v. Bradley*, 466 Mass. 551, 553 (2013) (quoting G.L. c. 4, § 6).

A. Retroactive application of the amended version of § 133A is consistent with the manifest intent of the Legislature.

"In seeking to interpret a statute, the starting point is its language." *Commonwealth v. Cory*, 454 Mass. 559, 562 (2009). "[T]he intent of the Legislature [is] ascertained from all [the statutory] words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished." *Garney v. Massachusetts Teachers' Ret. Sys.*, 469 Mass. 384, 388 (2014) (quoting *Hanlon v. Rollins*, 286 Mass. 444, 447 (1934)). "In determining whether a statute operates retroactively or prospectively, the whole statute . . . must be considered." *Commonwealth v. Bruno*, 432 Mass. 489, 497 (2000) (citing 2 N.J. Singer, Sutherland Statutory Construction § 41.04 n.26 and accompanying text (5th ed.1993)); *cf. Moe v. Sex Offender Registry Bd.*, 467 Mass. 598, 537 (2014) (court must assess "whether the law, as amended, has a retroactive effect").

The text of the amended version of § 133A, read as a whole, presents "'a clearly expressed intention' of the Legislature that the new statute apply retroactively," *i.e.*, to sentences stemming from offenses that pre-dated its enactment. *Bradley*, 466 Mass. at 554. At the time the Legislature enacted the 1996 amendment, G.L. c. 127, § 133A read, in pertinent part, as follows:

> *Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth*, [with exceptions not pertinent here] shall be eligible for parole, and the parole board shall, within sixty days before the expiration of fifteen years of such sentence, conduct a public hearing before the full membership.
>
> [. . .]
>
> After such hearing the parole board may, by a vote of a majority of its members, grant to such prisoner a parole permit to be at liberty upon such terms and conditions as it may prescribe for the unexpired term of his sentence. If such permit is not granted, the parole board shall, *at least once in each ensuing three year period*, consider carefully and thoroughly the merits of each such case on the question of releasing such prisoner on parole, and may, by a vote of a majority of its members, grant such parole permit.
>
> Such terms and conditions may be revised, altered and amended, and may be revoked, by the parole board at any time. . . .

(emphasis added). The 1996 amendment changed one word of this statute: it struck the word "three" and inserted in place thereof the word "five." St. 1996, c. 43. While that one-word change does not say anything one way or the other about retroactivity, that issue can be resolved by reference to the *entire text* of the amended statute. It is as though the 1996 Legislature adopted an act stating that, for "[e]very prisoner who is serving a sentence for life in a correctional institution of the commonwealth, . . . [i]f [parole] is not granted, the parole board shall, at

least once in each ensuing five year period, consider carefully and thoroughly the merits of each such case on the question of releasing such prisoner on parole . . . ."

The first sentence of the amended version of § 133A defines the statute's intended reach: it applies to "[e]very prisoner who *is serving* a sentence for life" (emphasis added). The Legislature's use of the present participle (*i.e.*, the words "is serving") necessarily refers to prisoners who, as of the 1996 amendment's effective date, had *already* been convicted of crimes and sentenced to life, and who were still serving those sentences on that effective date.[3] The amended statute thus affects two categories of people: (1) prisoners who were already serving life sentences on the date the amended version of § 133A took effect in 1996, and (2) prisoners who were sentenced to life after that effective date, regardless of when the underlying crimes were committed.[4]

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[3] The 1996 amendment took effect ninety days following its approval by the Governor on March 19, 1996.

[4] Roberio appears to fall within *both* categories: he committed his crime in 1986, and was already "serving a sentence for life" on the effective date of the 1996 amendment. However, in 1998, this Court reversed his convictions and ordered a new trial. *See Commonwealth v. Roberio*, 428 Mass. 278 (1998). On retrial in 2000, Roberio was again convicted of, inter alia, first-degree murder and sentenced to life in prison, and this Court affirmed his convictions and sentence in 2003. *See Commonwealth v. Roberio*, 440 Mass. 245 (2003). Because punishment is deemed incurred at the date of the offense, *see Bradley*, 466 Mass. at 553, these procedural details do not affect the analysis of the question posed by the Court.

This Court's grammatical analysis in *Cory*, 454 Mass. at 563, is instructive. There, the Court held that a probation statute applied to the defendant, even though his crime pre-dated the statute's effective date. The probation statute at issue in *Cory* applied to any person who "is placed on probation," and the Court concluded that "[b]ecause the Legislature used the present tense verb 'is placed' before the word 'probation,' . . . [the statute] by its strict terms applies to [those] who are sentenced to probation after the effective date of the statute, regardless of whether the crimes at issue were committed before or after the statute's effective date." *Id.* The same grammatically-focused analysis of § 133A is appropriate here. Like the probation statute at issue in *Cory*, the amended version of § 133A applies to crimes that were committed before its enactment. Based on the meaning of the words "is serving a sentence for life," the Court should conclude that the amended version of § 133A applies retroactively.[5] *See Bargeron*, 402 Mass. at 592 ("[W]e have approved retrospective application of statutes which contain no language calling for their retrospective application.").

[5] The Legislature was apparently satisfied with the reach of § 133A—had it wished that the amended statute apply only prospectively, it could have used different language. *See Gaffney v. Contributory Retirement Appeal Bd.*, 423 Mass. 1, 6 (1996) (interpreting statute which provided that it "shall apply only to criminal offenses committed on or after the effective date of this act").

B. Applying the 1996 amendment only to crimes committed after its effective date, as Roberio asks, would be repugnant to the context of the statute.

Furthermore, to limit the application of the 1996 amendment to only offenses that were committed *after* its enactment would be "repugnant to the context of [§ 133A]." *Bradley*, 466 Mass. at 555 (quoting G.L. c. 4, § 6). A prospective-only application of a statute is "repugnant" to its context "where it would be contrary to the purpose of the statute to delay the accomplishment of that purpose." *Id.* at 556. Here, that standard is met.

The legislative proposal which became the 1996 amendment was filed on behalf of a constituent whose relative was murdered over twenty years before, in 1974. *See* Amicus Br. of Mass. Assoc. of Crim. Defense Lawyers et al. at Add. 2-7. The victim's mother wrote to Governor William F. Weld that she would soon have to endure a third parole hearing, even though her daughter's killer "has shown no progress in prison in the 20 years he's been there," and "[o]ne would conclude there would be little change" at this next hearing. *Id.* at Add. 3-4. When then-Representative Barbara Gray filed the bill, at the request of this same family, her office prepared a "Fact Sheet" that said that its primary purpose was to "benefit the victim and the victim's family and friends" so that they "would not have to relive the crime and accompanying memories quite as often." *See id.* at Add. 6-7 ("Fact Sheet" outlining the proposed legislation and its purpose). The "Fact Sheet" further

states the sponsor's intent that the change "would not affect the rights of inmates who are obviously not qualified for parole." *Id.* at Add. 7.[6]

In light of this legislative history, it is clear that the 1996 amendment was intended to ease the burdens *which were already being faced* by the families and friends of murder victims. A retroactive application of the amended statute to past criminal conduct—supported by its plain text, as described above—makes sense given the obvious purpose underlying its enactment. Conversely, it would make very *little* sense to apply the statute only prospectively, because that would essentially be saying that the 1996 amendment was not intended to apply even to the very case which prompted its introduction and enactment.

For the above reasons, a prospective-only application of the amended version of § 133A would be against the manifest intent of the Legislature and also repugnant to the context of the statute. The Court should therefore hold that the 1996 amendment applies to "sentences for offenses that were committed before the

[6] Undersigned counsel represents that he has searched the 1995-1996 House and Senate journals. The original petition, titled, "An Act relative to parole eligibility" (House, No. 1894) was filed by then-Representative Barbara Gray, and was subsequently enacted by both the House and Senate in its original form, with no amendments offered, no emergency preamble, and no floor debate.

effective date of the amendment." Docket #24 (order for supplemental briefing dated January 9, 2019).[7]

II. The fact that parole eligibility for juvenile first-degree murder offenders postdated the 1996 amendment by 17 years carries no negative implications for Roberio or others in his position.

The 1996 amendment is not the type of change that implicates the chief harm which the Ex Post Facto Clause guards against: the "lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver v. Graham*, 450 U.S. 24, 30 (1981). That is primarily true because the retroactive application of the 1996 amendment does not pose a significant risk of increasing the punishment that Roberio (or anyone else in his situation) would have expected to receive, and any non-substantive, procedural changes to § 133A following the date of his crime

[7] If this Court holds, despite the Parole Board's position, that the 1996 amendment does *not* apply to sentences for offenses committed before its enactment, it would be calling its own recent decision in *Clay v. Massachusetts Parole Bd.*, 475 Mass. 133 (2016) into serious question. *Clay*, like this case, involved a juvenile offender who committed first-degree murder before the enactment of the amendment in question, *i.e.*, the 2012 supermajority amendment to the same statute, § 133A. That amendment also changed only one term: it replaced "a majority" with the words "two-thirds," while leaving the rest of § 133A untouched. *See* St. 2012, c. 192, § 39. Although the question of whether the 2012 supermajority amendment was intended to operate retroactively was not squarely presented in *Clay*, the Court concluded that it had indeed been applied retroactively in that case. *See Clay*, 475 Mass. at 136.

were merely the type of changes which Roberio subjected himself to when he incurred a punishment that included (or should have included) parole eligibility.

Roberio had more than adequate notice of what the punishment for first-degree murder was at the time he committed that crime in 1986. At that time, of course, the punishment for first-degree murder in juvenile cases was life without parole, and that is precisely how he was sentenced. It was not until this Court decided *Diatchenko v. Dist. Att'y for the Suffolk Dist.*, 466 Mass. 655 (2013) that he had, for the first time, any expectation of parole. Simply put, no one—neither Roberio nor any other juvenile who committed first-degree murder prior to *Diatchenko*—could have anticipated, on the date of their crime, that any parole-related laws applied or would *ever* apply to them.[8] *See id.* at 663 ("At the time Diatchenko's conviction became final, there was no suggestion in existing Federal or State law that the imposition of a mandatory sentence of life in prison without the possibility of parole on an offender who was under the age of eighteen at the time he committed murder was constitutionally suspect."). None of these offenders, therefore, can viably claim that they were unfairly deprived of notice of

[8] Roberio appears to accept this proposition. He argues that, pre-*Diatchenko*, he "had no reason to expect that he would not die in prison," and that "[t]his does not affect the ex post facto analysis." Pet. Supp. Br. 7.

any subsequent changes to § 133A, a statute that exclusively addresses parole matters.

Of course, as *Diatchenko* recognized, Roberio and other juvenile first-degree homicide offenders *should have* been eligible for parole after fifteen years. But this does not change the result in this case. That is because the 1996 amendment is not an ex post facto law at all. *See* Resp. Br. at 22-40. *Garner* makes clear that changes such as the 1996 amendment, which only modify the manner in which a parole board exercises its discretion, are part of the normal evolution in parole procedures—something that is inherent in any discretionary parole system such as Massachusetts's. *Garner v. Jones*, 529 U.S. 244, 253 (2000) ("[W]here parole is concerned[,] discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised. The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience. New insights into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender's release, along with a complex of other factors, will inform parole decisions."). The possibility that such procedures might subsequently change is itself something of which every offender is on notice when he commits a crime that includes a sentence with parole eligibility. *See id.* at 259 (Scalia, J., concurring) ("[W]here, as here, the length of the reconsideration period is entrusted *to the discretion of the same body that has discretion over the ultimate*

parole determination, any risk engendered by changes to the length of that period is merely part of the uncertainty which was inherent in the discretionary parole system, and to which [the prisoner] subjected himself when he committed his crime.").

Thus, even if the Court examines any reliance or "fair notice" interest by treating Roberio based on how things *should have* stood in terms of his parole eligibility, the analysis remains the same. Roberio would not have been entitled to expect that the non-substantive, procedural provisions of § 133A would remain unchanged following the date of his crime. *See id.* at 253 (explaining that not every change to a parole board's procedures implicates the Ex Post Facto Clause's interest in "actual or constructive notice to the criminal before commission of the offense of the penalty"); *see also Doe v. State*, 688 N.W.2d 265, 269 (Iowa 2004) (quoting *Garner* and noting that "ex post facto principles are less stringent in cases of parole eligibility than in others"). When Roberio committed first-degree murder in 1986, he subjected himself to the parole system and any subsequent procedural adjustments thereto which do not violate the Ex Post Facto Clause.

Roberio points to two cases, *Clay v. Massachusetts Parole Bd.*, 475 Mass. 133 (2016) and *Commonwealth v. Brown*, 466 Mass. 676 (2013) as two cases in which this Court granted ex post facto relief to other juvenile homicide offenders, and argues that the Court should not deny him relief simply because the law only

recently recognized his right to be eligible for parole. *See* Pet. Supp. Br. at 8-9. This argument does not hold. The Parole Board's primary argument in this case is that there is no ex post facto violation here at all. *That* is what makes this case different from both *Clay* and *Brown*. In *Clay*, the Court found a substantive ex post facto violation on the unique facts of that particular case. 475 Mass. at 140-42 (holding that, as applied to the individual petitioner, the retroactive application of a 2012 amendment increasing the voting threshold violated his ex post facto rights where he would have been granted parole under the old rule, but was denied parole under the new rule). But more relevant here is the fact that the Court *rejected* Clay's facial ex post facto claim: This demonstrates that an amendment to § 133A which pre-dated *Diatchenko* does not inherently violate the ex post facto rights of juvenile first-degree homicide offenders whose crimes were committed prior to the amendment's enactment. *See Clay*, 475 Mass. at 138-40. That principle holds true here as well. And in *Brown*, the Court addressed, in a footnote, the straightforward question of whether a substantive change—not a procedural change—to § 133A could be applied retroactively, and held that it could not.[9] 466 Mass. at 689 n.10. Neither of those cases requires or even justifies granting relief in this case.

[9] The *Brown* Court held that a law permitting a sentencing judge to delay initial parole eligibility by up to ten years could not be retroactively applied to the defendant in that case, and that the defendant was entitled to parole eligibility after fifteen years, pursuant to the law that was in effect on the date of his crime.

In sum, because the 1996 amendment does not significantly risk prolonging his incarceration, Roberio was not entitled to "fair notice" of the change it made to § 133A. Even if the Ex Post Facto Clause's notice requirement somehow extended beyond the substantive guarantee of the Clause itself—a proposition that no court has ever recognized—Roberio had no such interest as to the 1996 amendment, which merely adjusted the Parole Board's procedures under "identical substantive standards." *Morales*, 514 U.S. at 508.

CONCLUSION

This Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Matthew P. Landry, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure, as well as this Court's January 9, 2019 order which limited its length to 20 double-spaced pages.

_____
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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2019, two true copies of the foregoing brief will be served upon counsel for the petitioner, via U.S. mail, first-class postage prepaid, to the following:

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