COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Appeals Court No. 2020-P-0550

Supreme Court No. SJC 13035

COMMONWEALTH,

Appellee,

v.

SUNIL SHARMA,

Defendant-Appellant.

On Appeal from the Suffolk Superior Court

DEFENDANT / APPELLANT'S REPLY BRIEF

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November 24, 2020

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Introduction

"'[C]hildren are constitutionally different from adults for purposes of sentencing,' irrespective of the specific crimes that they have committed." *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 466 Mass. 655, 670 (2013), quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Thus, "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. Applying *Miller* and *Diatchenko,* appellate courts have fundamentally reexamined sentencing for juvenile offenders: life without parole has been eliminated; first degree offenders with consecutive sentences or lengthy concurrent sentences are eligible for resentencing; and sentences for nonhomicide offenders with aggregate parole eligibility dates that are longer than the parole eligibility date for first degree murder are presumptively disproportionate under art. 26.

This case presents novel legal questions, because the appellate courts of the Commonwealth have not yet addressed the implications of *Miller* and progeny for a second-degree offender with a consecutive

sentence, such as Defendant Sunil Sharma. The Commonwealth therefore seeks in its opposition to distinguish away the resentencing cases that apply *Miller* and the fundamental constitutional principles those cases articulate, refusing to consider that those principles might be relevant to a second-degree offender with a consecutive sentence. After *Miller* and *Diatchenko*, this Court and the Supreme Judicial Court ("SJC") have always concluded that a juvenile sentenced pre-*Miller* to more than fifteen years is eligible for a hearing on the legality of that sentence or for resentencing. The Commonwealth provides no principled basis for excluding second-degree juvenile offenders with consecutive sentences such as Sharma from the protections of *Miller*.

I. Sharma is Permitted to Challenge the Legality of His Sentence Under Rule 30(a) and to Seek Resentencing Under Rule 30(b)

Relying on federal cases applying federal law and a single state court decision analyzing Rule 29, the Commonwealth suggests that Sharma cannot seek relief because he pleaded guilty. These arguments and citations to inapposite case law are an irrelevant distraction.[1]

[1] *See* CB 14-15. The federal cases cited and quoted to do not apply Rule 30 or any analogous standard. *United States v. Robinson*, 587 F.3d 1122, 1128-29 (D.C. Cir. 2009) analyzes withdrawal of a guilty plea

Rule 30 permits the relief Sharma is seeking notwithstanding his guilty plea. Sharma is challenging the constitutionality and legality of his sentence under Rule 30(a). On its face, Rule 30(a) provides that a defendant may challenge an unconstitutional or unlawful sentence "at any time, as of right." Mass. R. Crim. P. 30(a). *See, e.g., Commonwealth v. Cole*, 468 Mass. 294 (2014) (permitting constitutional challenge under

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under Fed. R. Crim. P. 11, and quotes the portion of *Brady v. United States*, 397 U.S. 742, 757 (1970), that addresses voluntariness of a guilty plea under 28 U.S.C. § 2255. *Salas v. Vazquez*, 773 F. App'x 204, 205 (5th Cir. 2019) is an unpublished decision affirming dismissal of a habeas corpus petition seeking to withdraw a plea under 28 U.S.C. § 2241. The Commonwealth also cites two cases that stand for the proposition that future changes in the law (changes that are forward-looking, not retroactive), do not alter the voluntariness of a plea. *See United States v. Simpson*, 430 F.3d 1177, 1193 (D.C. Cir. 2005) (Silberman, J., concurring) (noting that a plea remains voluntary even where the defendant fails to foresee *future* developments in the law); *United States v. Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005) (similar). But Sharma is not challenging the voluntariness of his plea; he is challenging the legality of his sentence pursuant to Rule 30(a), based on *retroactive* changes in the law, and seeking resentencing under Rule 30(b), based on newly-discovered evidence. Indeed, in a different portion of its brief, the Commonwealth concedes that under state and federal law, a defendant can withdraw an unlawful plea. *See* CB 18 (citing *United States v. Peppers*, 899 F.3d 211, 225 (3d Cir. 2018) (affirming that even under federal law, a defendant can challenge a "now-unlawful sentence" where "a new rule of constitutional law" supports his "claim that his guilty plea was unconstitutionally invalid")). Finally, the Commonwealth cites *Commonwealth v. Fenton F.*, 442 Mass. 31, 39 n.13 (2004) (CB 14), a case discussing the sixty-day time limit in Rule 29 for motions to revise and revoke, that does not mention Rule 30(b).

Rule 30(a) after guilty plea). *Cf.* Mass. R. Crim. P. 12 (enumerating rights waived by guilty plea).

Sharma is also seeking a new sentencing hearing based on newly-discovered evidence about juvenile brain development that casts doubt on the justice of the prior sentencing. This is treated as a motion for postconviction relief under Rule 30(b). *See, e.g.*, *Commonwealth v. Camacho*, 483 Mass. 645, 648 (2019) ("A motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R. Crim. P. 30(b)." (citation omitted)); *Commonwealth v. Talbot*, 444 Mass. 586, 593 (2005) ("We treat the defendant's motion for resentencing . . . as a motion for postconviction relief under Mass. R. Crim. P. 30(b)."). Under both Rule 30(a) and Rule 30(b), Sharma may seek relief regardless of his guilty plea.

II. Sharma's Sentence Is Unconstitutional Based on His Aggregate Parole Eligibility at the Time of Sentencing

The Commonwealth—recycling an argument that has already been rejected by this Court—argues that *Miller* and progeny merely require a "meaningful opportunity to obtain release," which Sharma has had, because he could have been paroled on his entire sentence by 2018 or 2019, 22 or 23 years after he was first incarcerated in 1996. (CB at 18

& n.5.) This is precisely the argument the Commonwealth advanced in *Commonwealth v. Washington*, 97 Mass. App. Ct. 595, 601 (2020):

> The Commonwealth replies that [*Commonwealth v. Perez*, 477 Mass. 677 (2017) ("*Perez I*")] at most affords the defendant a "meaningful opportunity to obtain release" and the "defendant has already had the benefit of that opportunity, having been before the Parole Board several times since 2002 and having been released on parole in 2005."

Id.[2]

As this Court explained in *Washington*, the Commonwealth's argument "misses the mark." *Id.* Whether Sharma's sentence as imposed in 1996 is lawful turns on the parole eligibility date at sentencing, *not* the entirely distinct process of obtaining parole. Proportionality is determined "*at the time of sentencing*." *Id.* at 601 (emphasis in original). Thus, in *Washington*, notwithstanding the defendant's parole history, this Court concluded that because the

[2] Moreover, this Court granted reconsideration in another case involving a juvenile with a lengthy sentence for nonhomicide offenses, based on *Washington*'s application of *Perez I* and its reminder that "this presumption arises *at the time of sentencing*." *See Commonwealth v. Rambert*, 98 Mass. App. Ct. 1105 (2020) (unpublished) (emphasis in *Rambert*). The Commonwealth's applications for further appellate review in *Washington* and *Rambert* were both denied. *See Commonwealth v. Washington*, FAR-27595 (Oct. 1, 2020); *Commonwealth v. Rambert*, FAR-27240B (Oct. 1, 2020).

sentence as imposed was presumptively disproportionate, the defendant was entitled to remand for a *Miller* hearing. *Id.* at 603. *See also State v. Houston-Sconiers*, 391 P.3d 409, 419 (Wash. 2017) (Eighth Amendment requires trial courts to consider mitigating qualities of youth "at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line").

The SJC rejected an analogous argument when the Commonwealth suggested that a defendant's sentence was not presumptively disproportionate because good time credits reduced it to less than fifteen years. *Commonwealth v. Lutskov*, 480 Mass. 575, 584 n.7 (2018). Whether the sentence is proportionate, the SJC explained, turns on "the parole eligibility date at the time of sentencing, not future computation of 'good time,'" which is "controlled by the Department of Correction, not the sentencing judge." *Id.* Just as good time credits are not set by the sentencing judge, parole is not determined by the sentencing judge, but rather, falls under the jurisdiction of the Parole Board, which applies its own legal standards. *See, e.g.*, G.L. c. 27, § 4 (Parole Board members, appointment, powers, and duties); G.L. c. 127, § 130 (standard and process for granting parole); G.L. c. 127, § 133A

(eligibility for parole, notice and hearing); 120 Code Mass. Regs. § 300.04 (parole release decision making); 120 Code Mass. Regs. § 300.05 (information considered in parole release decisions).

This Court should once again reject the Commonwealth's arguments because they fail to acknowledge binding precedent establishing that disproportionality is evaluated at the time of sentencing. *See Adamowicz v. Ipswich*, 395 Mass. 757, 759 n.4 (1985) (Appeals Court decisions entitled to full precedential effect).

III. Appellate Courts Have Ordered Some Form of *Miller* Hearing in Every Case Where a Juvenile Sentenced Pre-*Miller* Received a Sentence of More Than Fifteen Years

This case presents novel legal questions, because the appellate courts of the Commonwealth have not yet applied *Miller* to a juvenile sentenced for second-degree murder with a consecutive sentence. The Commonwealth relies on the novelty of this case in attempting to distinguish *Miller* and progeny. In doing so, the Commonwealth fails to address the underlying principles that animate the post-*Miller* jurisprudence in Massachusetts. In particular, the Commonwealth ignores the fact that following *Miller* and *Diatchenko*, this Court and the SJC have always concluded—regardless of the crime of conviction—

that a juvenile sentenced pre-*Miller* to more than fifteen years is eligible for a hearing on the legality of that sentence or for resentencing. It is, after all, the fact of a juvenile's age—and the distinctive and transitory characteristics of youth—that has propelled a fundamental reexamination of juvenile sentencing.

After *Diatchenko*, "a sentencing statute prescribing life without the possibility of parole [for murder in the first degree] in effect became a statute prescribing, for juvenile offenders, life with the possibility of parole after fifteen years." *Commonwealth v. Perez*, 480 Mass. 562, 568 (2018) (citation omitted) ("*Perez II*"). First-degree offenders with consecutive sentences or concurrent sentences longer than fifteen years are eligible for resentencing. *Commonwealth v. Costa*, 472 Mass. 139 (2015) (first-degree juvenile offender with consecutive life sentences eligible for resentencing); *Commonwealth v. LaPlante*, 482 Mass. 399, 402 (2019) (Commonwealth conceded that first-degree juvenile offender with consecutive life sentences eligible for resentencing under *Costa*); *Commonwealth v. Wiggins*, 477 Mass. 732, 747-48 & n.20 (2017) (first-degree juvenile offender with concurrent sentences for nonhomicide offenses that exceeded fifteen years entitled to resentencing).

Nonhomicide juvenile offenders whose aggregate sentence is longer than the sentence permitted for first-degree murder—fifteen years in the pre-*Miller* context—are eligible for a *Miller-Perez* hearing to see whether "extraordinary circumstances" will "warrant a sentence treating the juvenile defendant more harshly for parole purposes than a juvenile" convicted of first-degree murder. *See Perez I*, 477 Mass. at 686. *See also Lutskov*, 480 Mass. 575 (lengthy nonhomicide sentence for juvenile presumptively disproportionate); *Washington*, 97 Mass. App. Ct. 595 (same); *Commonwealth v. Rambert*, 98 Mass. App. Ct. 1105 (2020) (unpublished) (same).

Courts have declined provide an opportunity for resentencing after *Miller* only where juveniles are sentenced to sentences that are no longer than the sentence for first-degree murder. Thus, in *Diatchenko*, the SJC declined to order the defendant resentenced where he was subject to the mandatory sentencing scheme for first-degree murder. *Diatchenko*, 466 Mass. at 674; *see also Costa*, 472 Mass. at 144-45 (noting that resentencing in *Diatchenko* would have served no purpose without an opportunity for a judge to exercise discretion). In two cases involving second-degree offenders sentenced to life with the possibility

of parole after fifteen years, the SJC declined to require individualized sentencing. *See Commonwealth v. Okoro*, 471 Mass. 51, 58 (2015); *Commonwealth v. Lugo*, 482 Mass. 94, 96 (2019).[3] The SJC recently declined to revisit "*Okoro*'s holding that a mandatory life sentence with parole eligibility after fifteen years for a juvenile homicide offender . . . is constitutional," this time in a case involving a first-degree juvenile offender. *Commonwealth v. Watt*, 484 Mass. 742, 754 (2020).[4] Thus, the SJC has treated first- and second-degree offenders with minimum fifteen year sentences equally. But neither the SJC nor this Court has declined to grant an opportunity to seek resentencing to any juvenile sentenced pre-*Miller* to a sentence with an aggregate parole eligibility date longer than fifteen years.

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[3] Lugo was convicted of second-degree murder and several nonhomicide offenses and was parole eligible after 15 years. 482 Mass. at 95 & n.1. Lugo received concurrent sentences of no longer than fifteen years for all nonhomicide offenses. *See* Commonwealth's Brief at 3-4, *Commonwealth v. Lugo* (SJC-12546).

[4] *Watt* involved two defendants convicted of first-degree murder, a seventeen year old and an eighteen year old. 484 Mass. at 745. While both defendants were also convicted of nonhomicide offenses, they were sentenced concurrently on those offenses to sentences that did not exceed fifteen years. *See* Commonwealth's Brief at 16, *Commonwealth v. Watt* (SJC-11693).

Notwithstanding this body of law, the Commonwealth suggests that second-degree offenders with consecutive sentences should be treated differently. Sharma's charges are both more serious than nonhomicide offenses (CB 19-20) *and* not serious enough to be compared to first-degree murder (CB 20-23). The overall thrust of the Commonwealth's argument is that second-degree offenders with consecutive sentences should be the only juvenile offenders with pre-*Miller* sentences longer than fifteen years who are not eligible for resentencing consideration. That position requires a cramped interpretation of the post-*Miller* jurisprudence that would unjustifiably deny a small class of second-degree offenders the same due process and equal protection rights extended to other juveniles with serious sentences following *Miller*.

As Sharma argued in his opening brief, this Court should do one or more of the following: (1) extend *Perez* and hold that *any* juvenile sentence with an aggregate parole eligibility date longer than the parole eligibility date for first-degree murder is presumptively disproportionate (DB 23-29); apply the standard proportionality analysis under *Cepulonis v. Commonwealth*, 384 Mass. 495, 497-98

(1981), appropriately modified for a juvenile, *Perez I*, 477 Mass. at 684, to Sharma and conclude that his sentence is disproportionate (DB 34-38); and/or apply *Costa* and progeny and conclude that fundamental fairness and notice concerns require resentencing because Sharma's sentencing judge exercised his discretion unguided by *Miller* and *Diatchenko*, and without the ability to foresee retroactive constitutional changes in juvenile sentencing (DB 39-47).

Sharma is seeking the same opportunity as other juveniles sentenced before *Miller* to an aggregate sentence of more than fifteen years parole eligibility: he is seeking an opportunity to have the *Miller* factors considered and appropriately applied to his circumstances.

IV. Sharma Is Eligible for a Hearing on Resentencing Regardless of the Ultimate Outcome of that Hearing

Sharma contends that he is eligible for resentencing under Rule 30(a) applying *Perez*, *Cepulonis*, and/or *Costa*. The procedural mechanisms for relief differ slightly under these cases: for instance, under *Perez*, Sharma would be entitled to a hearing at which the Commonwealth would seek to overcome the presumption of disproportionality (a *Miller-Perez* hearing), and then to resentencing if he prevailed at the first hearing, *Perez I*, 477 Mass. at 688; under

Costa, Sharma would simply be eligible for resentencing, and any judge at resentencing would have to consider the *Miller* factors and any post-sentencing conduct, *see, e.g., Costa*, 472 Mass. at 147-48 (describing resentencing procedure). In other words, Sharma seeks the right to a hearing at which he would be considered for resentencing, one way or another.

The Commonwealth suggests that Sharma "has no right" to such a hearing where there is "irrefutable evidence" that he needed more than fifteen years to be rehabilitated. (CB 24-26). In doing so, the Commonwealth conflates the right to process with the outcome of the process, fails to apply the relevant legal standard, and presents a highly selective view of the record.

First, the primary question before this Court is whether Sharma is entitled to some form of resentencing proceeding. Whether he is entitled to such a proceeding is a separate question from the result of the proceeding. Not every resentencing hearing will lead to a different sentence, but the ultimate outcome does not affect the right to obtain such a hearing. *See, e.g., LaPlante*, 482 Mass. at 402, 407 (defendant entitled to resentencing hearing pursuant to *Costa*, but judge's decision

after hearing to reimpose original sentence was lawful). The Commonwealth's arguments on the evidence thus have no bearing on Sharma's eligibility for a resentencing hearing and to accept the Commonwealth's argument would deprive Sharma of his right to a fair resentencing process.[5]

Second, in arguing that Sharma could not prevail on the merits of a hearing, the Commonwealth fails to weigh *all* of the relevant factors, namely "(1) the particular attributes of the juvenile, including 'immaturity, impetuosity, and failure to appreciate risks and consequences'; (2) 'the family and home environment that surrounds [the juvenile] from which he cannot usually extricate himself'; and (3) 'the circumstances of the . . . offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer

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[5] Sharma argued in his opening brief that applying *Perez II*, this Court can decide on the papers that Sharma's sentence is disproportionate, and that his sentence should "therefore [be] amended to conform his parole eligibility to that available to juveniles convicted of [first-degree] murder." (DB 30-34 (quoting *Perez II*, 480 Mass. at 573).) In making this argument, Sharma relied on an undisputed fact—the fact of the Parole Board's rehabilitation finding. To the extent that the Commonwealth has raised a dispute of material fact, due process would require that Sharma be given an opportunity to have the question decided at an evidentiary hearing.

pressures may have affected him.'" *Perez I*, 477 Mass. at 686, quoting *Miller*, 567 U.S. at 477. "[R]elevant evidence of the defendant's 'particular attributes' of youth"—the first *Miller* factor—includes "evidence of postconviction rehabilitation, including any good behavior in prison since he was sentenced as a juvenile." *Lutskov*, 480 Mass. at 584.

The Commonwealth mentions *only* Sharma's poor record in prison during the first part of his incarceration (DB 25-26), ignoring, among other things, the Parole Board's observation in June 2019 that Sharma had not had a "a violent disciplinary report in over 10 years." RAII/7. The Commonwealth also ignores all other *Miller* factors, including Sharma's personal characteristics, such as his "early developmental history [which] was remarkable for significant attachment disruption and sadistic physical abuse," RAII/84, his educational struggles, RAII/88-89, and his exposure to extreme violence, RAII/91. Having previously "applaud[ed] the defendant for amending his life over the last decade," RAII/157, the Commonwealth now selectively focuses on the least favorable and most stale evidence.

The Commonwealth also faults Sharma for not citing scientific evidence that brain development continues into an individual's late twenties.[6] Sharma sought and was denied funds for an expert on adolescent brain development and related areas. RAI/10. "Because [Sharma] was prepared to present additional evidence on this issue, it would be manifestly unjust to reject [his] constitutional argument based on the insufficiency of the record." *Watt*, 484 Mass. at 756 (remanding to Superior Court "for development of the record with regard to research on brain development after the age of seventeen").

The Commonwealth's misleading preview of the substantive arguments and evidence it expects at any resentencing hearing have no place in this Court's determination of Sharma's procedural right to such a hearing.

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[6] *See, e.g.*, Somerville, Searching for Signs of Brain Maturity: What Are We Searching For?, 92 Neuron 1164 (Dec. 31, 2016), https://www.cell.com/neuron/fulltext/S0896-6273(16)30809-1 (discussing evidence that brains mature up to and even past age 30, and that "for several brain regions, structural growth curves had not plateaued even by the age of 30").

V. The Commonwealth Effectively Concedes that Sharma Is Entitled to a New Sentencing Hearing Based on Newly-Discovered Evidence

A defendant seeking a new trial or sentencing hearing based on newly-discovered evidence must establish first, that the evidence was unknown to him or his defense counsel and not reasonably discoverable at the time of sentencing; and second, that the newly-discovered evidence "would probably have been a real factor" in the outcome, and that its absence "casts real doubt on the justice" of the prior proceeding. *See Commonwealth v. Epps*, 474 Mass. 743, 763-64 (2016) (quotation and citation omitted). The Commonwealth does not contest any element of this legal standard, and as such, effectively concedes that Sharma is entitled to the relief requested.

The Commonwealth does not contest Sharma's "exposition of the scientific advances . . . that have come to light since he was sentenced." (CB 26 (accepting, *arguendo*, the scientific evidence).) The Commonwealth does not contest Sharma's showing that such evidence is newly discovered, unknown to him or his defense counsel, and not reasonably discoverable at the time of sentencing in 1999. (CB 26-27 (ignoring these points).) The Commonwealth does not contest Sharma's

argument that such evidence "would probably have been a real factor" in the judge's sentencing decision or that its absence "casts real doubt on the justice" of the prior proceeding. (CB 26-27 (making no argument on these points).)

The Commonwealth only argues that on the facts of Sharma's case, his sentences would not "strike a person with full knowledge" of the relevant scientific advances as "so unfair that they shock[] the conscience and offend[] fundamental notions of human dignity." (CB 26-27 (citing *Laplante*, 482 Mass. at 403).) But the "shock the conscience" standard does not apply to a Rule 30(b) motion raising newly-discovered evidence. It applies to constitutional claims of cruel or unusual punishment. *LaPlante*, 483 Mass. at 403 (discussing the threshold at which punishment becomes unconstitutionally disproportionate); *Diatchenko*, 466 Mass. at 669 (same). It also appears in Rule 30 case law discussing substantive due process. *See, e.g.*, *Commonwealth v. Ly*, 450 Mass. 16, 23 (2007).

Rule 30(b), by its own terms, asks whether "it appears that justice may not have been done." Mass. R. Crim. P. 30(b). On a newly-discovered evidence claim, the question is—and has long been—whether

the absence of the newly-discovered evidence "casts real doubt on the justice of the conviction." *See, e.g.*, *Epps*, 474 Mass. at 764; *Commonwealth v. Cowels*, 470 Mass. 607, 616 (2015); *Commonwealth v. Grace*, 397 Mass. 303, 305 (1986); *see also Commonwealth v. Brescia*, 471 Mass. 381, 389 (2015) (describing the "latticework of more specific standards" for Rule 30(b) motions addressing "various types of situations," but emphasizing that these specific standards "have not eclipsed the broader principle that a new trial may be ordered if 'it appears that justice may not have been done'").

Given the Commonwealth's failure to contest Sharma's showing that he meets the relevant standard (*see* DB 47-56), this Court should order a new sentencing hearing under Rule 30(b).

Conclusion

For the reasons set forth above and in Sharma's principal brief, this Court should vacate Sharma's consecutive sentences and amend them to make them concurrent with his life sentence, consistent with the relief granted in *Perez II*. In the alternative, this Court should vacate the order denying the Rule 30 motion and (a) remand for a *Miller-Perez* hearing; or (b) for resentencing consistent with *Costa*; or

(c) for a new sentencing hearing in light of newly-discovered evidence. Defendant respectfully requests that this Court grant all other relief that is just and proper.

Respectfully submitted,
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November 2, 2020

Addendum

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Article 26 of the Massachusetts Declaration of Rights

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

Eighth Amendment to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Massachusetts Rule of Criminal Procedure 30

Post Conviction Relief

(a) Unlawful Restraint. Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

(c) Post Conviction Procedure.

(1) *Service and Notice.* The moving party shall serve the office of the prosecutor who represented the Commonwealth in the trial court with a copy of any motion filed under this rule.

(2) *Waiver.* All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

(3) *Affidavits.* Moving parties shall file and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

(4) *Discovery.* Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

(5) *Counsel.* The judge in the exercise of discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule. The court, after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule.

(6) *Presence of Moving Party.* A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) *Place and Time of Hearing.* All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever the judge is then sitting. The parties shall have at least 30 days notice of any hearing unless the judge determines that good cause exists to order the hearing held sooner.

(8) *Appeal.* An appeal from a final order under this rule may be taken to the Appeals Court, or to the Supreme Judicial Court in an appropriate case, by either party.

> (A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.
>
> (B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may

> determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

(9) *Appeal under G.L. c. 278, § 33E.* If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

98 Mass.App.Ct. 1105
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH

v.

Christopher RAMBERT.[1]

18-P-1282
|
Entered: July 27, 2020

By the Court (Blake, McDonough & Hand, JJ.[2])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** In 1983, when he was sixteen years old, the defendant was convicted by a jury and also pleaded guilty to numerous crimes for which he received eleven life sentences, two thirty- to forty-year sentences, and sentences to various lesser terms of imprisonment, all to run concurrently. Although the defendant was eligible for parole after serving fifteen years of his life sentences, he was not eligible to apply for parole on the thirty- to forty-year sentences until 2001, after he had served eighteen years. The defendant appeared for hearings before the parole board in 2001, 2008, and 2013. Parole was denied each time.

In 2018, the defendant filed a motion pursuant to Mass. R. Crim. P. 30 (a), as appearing in 435 Mass. 1501 (2001), for release from unlawful restraint (rule 30 motion). The defendant claimed that his thirty- to forty-year sentences are presumptively disproportionate under the Federal Constitution and the Massachusetts Declaration of Rights because there was never a hearing before they were imposed to consider the factors articulated in Miller v. Alabama, 567 U.S. 460, 477-478 (2012). See Commonwealth v. Perez, 477 Mass. 677, 686 (2017) (Perez I). A Superior Court judge denied the rule 30 motion, and this panel affirmed that decision in a memorandum and order dated December 10, 2019, issued pursuant to our former rule 1:28. Commonwealth v. Rambert, 96 Mass. App. Ct. 1112 (2019).

On December 24, 2019, the defendant sought reconsideration of the panel's decision in light of the pendency of a decision by our court in a case that raised similar issues and which was argued on September 13, 2019. See Mass. R. A. P. 27 (a), as appearing in 481 Mass. 1656 (2019). On June 9, 2020, our decision in that pending case issued. See Commonwealth v. Washington, 97 Mass. App. Ct. 595 (2020). In that decision, we reiterated that, under Perez I, "a juvenile sentence for a nonmurder offense that commands more time be served before parole eligibility than that required for a murder, without more, is presumptively disproportionate under art. 26." Washington, supra at 601. We also emphasized that "[t]his presumption arises at the time of sentencing." Id. In Washington, "[t]here was nothing like a Miller hearing, either at the time that the defendant was sentenced originally or at the time the motion judge made her ruling" on Washington's motion for release from unlawful restraint, "[t]hus, no judge ha[d] made a finding that the circumstances warrant[ed] treating [Washington] more harshly for parole purposes than a juvenile convicted of murder in the first degree." Id. The order denying Washington's rule 30 motion was vacated, and the case was remanded to the Superior Court "for a Miller hearing and, if necessary, for resentencing." Id. at 603.

In our view, this case is controlled in all material respects by our decision in Washington. Accordingly, the defendant's motion for reconsideration is allowed, and the Memorandum and Order Pursuant to Rule 1:28, dated December 10, 2019, is vacated. The motion judge's order denying the motion for relief from unlawful restraint is vacated, and the case is remanded to the Superior Court for further proceedings consistent with this decision in accordance with the requirements of Washington, supra.

***2** The order denying the defendant's motion for relief from unlawful restraint is vacated. The case is remanded for further proceedings consistent with the memorandum and order of the Appeals Court.

All Citations

98 Mass.App.Ct. 1105, 150 N.E.3d 1163 (Table), 2020 WL 4432597

Footnotes

1 Also known as Thomas Brown.

2 The panelists are listed in order of seniority.

773 Fed.Appx. 204 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

Michael Lara SALAS, Petitioner-Appellant

v.

N. VAZQUEZ, Warden,
Federal Correctional Institute
Beaumont, Respondent-Appellee

No. 18-40999
|
Summary Calendar
|
FILED July 10, 2019

Appeal from the United States District Court for the Eastern District of Texas, USDC No. 1:18-CV-276

Attorneys and Law Firms

Michael Lara Salas, Pro Se

Before REAVLEY, JONES, and HIGGINSON, Circuit Judges.

Opinion

PER CURIAM:*

Michael Lara Salas, federal prisoner # 56427-080, appeals the dismissal of his federal habeas corpus petition under 28 U.S.C. § 2241. We review the district court's legal conclusions de novo and its factual findings for clear error. *Padilla v. United States*, 416 F.3d 424, 425 (5th Cir. 2005). Because Salas filed his petition under § 2241, he does not need a COA to appeal its dismissal. *See id.*

The district court dismissed the petition as not being properly brought under § 2241. Salas correctly notes that, under *Burrage v. United States*, 571 U.S. 204, 218-19, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014), he was allowed to file a § 2241 petition rather than a § 2255 motion. *See* § 2255(e); *Santillana v. Upton*, 846 F.3d 779, 783-84 (5th Cir. 2017). But we may affirm the dismissal of the § 2241 petition on any ground supported by the record. *See Hunter v. Tamez*, 622 F.3d 427, 430 (5th Cir. 2010).

Burrage ultimately provides Salas no relief. In *Burrage*, the Supreme Court held that a defendant cannot be subject to a life sentence under 21 U.S.C. § 841(b)(1)(C) unless the use of drugs provided by the defendant "is a but-for cause of the death or injury." *Burrage*, 571 U.S. at 218-19, 134 S.Ct. 881 (emphasis added); *see Santillana*, 846 F.3d at 783-84. *Burrage* thus made it more difficult for the Government to prove that drugs provided by a defendant caused a user's death. *See Santillana*, 846 F.3d at 783-84. In *Santillana*, we held that the Government's inability to prove "but for" causation under *Burrage* meant that the defendant had "satisfied her burden to show that she was potentially convicted of a nonexistent offense." *Id.* at 785.

But Salas was not sentenced to life under § 841(b)(1)(C); he was sentenced to 288 months in prison pursuant to a written plea agreement. Salas contends only that his plea is invalid because he pleaded guilty due to the *threat* of a life sentence under § 841(b)(1)(C), which threat proved to be illusory because it did not account for the increased burden of proof imposed by *Burrage*. Salas also asserts that, in light of *Burrage*, his counsel was ineffective for advising him to plead guilty.

Salas's otherwise voluntary and valid plea "cannot subsequently be invalidated on contentions that it was made through subjective fear of receiving a heavier penalty if convicted after trial, or because, in the light of hindsight, competent counsel failed to anticipate a change in the law that would have enhanced his bargaining position." ***205** *Morse v. Texas*, 691 F.2d 770, 773 (5th Cir. 1982); *see also Brady v. United States*, 397 U.S. 742, 757, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (holding that "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise"). Further, Salas's plea counsel in 2010 did not have the benefit of the 2014 *Burrage* decision and was not required to anticipate developments in the law. *See Nelson v. Estelle*, 642 F.2d 903, 908 (5th Cir. 1981); *Cooks v. United States*, 461 F.2d 530, 532 (5th Cir. 1972) ("Clairvoyance is not a required attribute of effective representation."). *Burrage* does not establish that Salas was "imprisoned for conduct that was not prohibited by

law." *Reyes-Requena v. United States*, 243 F.3d 893, 903 (5th Cir. 2001). The judgment is AFFIRMED.

All Citations

773 Fed.Appx. 204 (Mem)

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Certificate of Compliance

I, Emma Quinn-Judge, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). I further certify that this brief complies with Rule 20's length limit in that it was prepared in 14-point Century font using Microsoft Word for Mac Version 16.42 and, according to Microsoft's wordcount tool, contains 3,849 words.

/s/ Emma Quinn-Judge
Emma Quinn-Judge

Certificate of Service

I, Emma Quinn-Judge, hereby certify that I will cause the above brief to be served on all counsel in this case through the Massachusetts e-filing system and by email.

/s/ Emma Quinn-Judge
Emma Quinn-Judge