COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT No. 13035

COMMONWEALTH
Appellee

v.

SUNIL SHARMA
Defendant/Appellant

On Appeal From an Order of the Suffolk Superior Court

BRIEF OF AMICI CURIAE

Committee for Public Counsel Services, Juvenile Law Center, & Massachusetts Association of Criminal Defense Lawyers

In Support of Appellant Sunil Sharma and Reversal

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Issues Presented

I. This Court has mandated that juveniles convicted of first degree murder, but not those convicted of second degree murder, receive the benefit of a sentencing hearing in which the judge considers the mitigating factors of youth and the constitutional difference between juveniles and adults. That discrepancy means that, in some cases, juveniles who committed second degree murder are now serving a sentence more severe than some juveniles who committed first degree murder. Is this difference in treatment fundamentally unfair and a violation of due process?

II. The science of juvenile brain development applies to all juveniles, regardless of the crimes they commit. The law, however, does not evenly apply this scientific reality. Given this, is it a violation of equal protection to allow the more severe sentences of some juveniles convicted of second degree murder to stand when juveniles convicted of first degree murder—who are distinct only insofar as they were convicted of a more serious crime—receive the benefit of that science, the change in the law, and a re-sentencing hearing?

III. Juveniles convicted of second degree murder and sentenced to life in prison are incarcerated before they have completed their psychological and social development, and thus have grown to adulthood in prison. Yet the Department of Correction does not have juvenile-specific programming to help these juvenile lifers address the deficiencies that contributed to their incarceration at such a

young age. Under such circumstances, does a longer sentence have any penological or rehabilitative benefit for these juvenile lifers?

Statement of Amici Curiae

The Committee for Public Counsel Services (CPCS) was created by the Legislature in 1983 "to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services" to indigent parties in the Commonwealth. St. 1983, c.673, codified in G.L. c.211D, s.1. Aside from the appointment of counsel for the indigent youth, CPCS has no financial interest in this case.

The Youth Advocacy Division (YAD) is the juvenile justice division of CPCS. YAD contracts with more than four hundred private attorneys who represent youth in a wide variety of proceedings, including delinquency and youthful offender proceedings, juvenile homicide trials and appeals, and juvenile parole hearings. Because YAD attorneys provide legal counsel to juvenile homicide offenders, the Court's decision in this case will affect the interests of YAD's present and future clients.

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 Massachusetts Courts 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*, No. SJC-12351; *Commonwealth v. Lugo*, No. SJC-12546; *Commonwealth v. Evelyn*, No. SJC-12808, and *Commonwealth v. Concepcion*, No. SJC-12382.

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. 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, like this one, raising questions of importance to the administration of justice.

Declaration Pursuant to Mass. R. App. P. 17(c)(5)

Neither party, nor their counsel, authored this brief in part or in whole. Neither party, nor their counsel, contributed money that was intended to fund the preparation or submission of this brief. Neither party has represented one of the parties to the present appeal in any other proceeding involving similar issues, or in

any proceeding that is at issue in the present appeal, except for the appointment of counsel for the indigent juvenile by CPCS.

Introduction and Summary of Argument

In 1999, 16-year-old Sunil Sharma was sentenced as an adult to life with the possibility of parole for second degree murder, and to an additional consecutive sentence of seven to ten years for crimes committed in the course of the murder. (A 23)[1] Mr. Sharma is now in a cohort of juveniles whose sentence structures are fundamentally unfair, which is illustrated by a simple comparison between his case and that of Mr. Louis Costa,[2] who was convicted of *first* degree murder for crimes committed as a juvenile.

After a trial, Louis Costa was convicted of two counts of first degree murder, committed when he was 16 years old. (A 37)[3] Mr. Costa and his co-defendants shot two victims a total of 23 times at close range. He was sentenced to two consecutive terms of life, without the possibility of parole. (A 37) After this Court's decisions in *Diatchenko v. District Attorney for the Suffolk Dist.*, 466 Mass.

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[1] Facts regarding Mr. Sharma's case are taken from his Record of Decision from the Parole Board, June 11, 2019. This decision is included in the addendum to this brief and is cited by page number as "A[page number]".

[2] Mr. Costa's case is unrelated to Mr. Sharma's case, but illustrates how two similarly situated juvenile murder defendants can receive unfair and disparate treatment.

[3] Mr. Costa's Record of Decision from the Parole Board, July 26, 2018, is included in the addendum and is cited by page number as "A[page number]".

655 (2013) ("*Diatchenko I")* and *Commonwealth v. Brown*, 466 Mass. 676 (2013), Mr. Costa's sentences were reduced to two consecutive life sentences with the possibility of parole. (A 37) After this Court's decision in *Commonwealth v. Costa*, 472 Mass. 139, 149 (2015), Mr. Costa was eligible for a new sentencing hearing and was re-sentenced to two *concurrent* life sentences, making him parole eligible after 15 years. (A 37) In 2018, after his second parole hearing, the Parole Board determined that he merited parole. (A 39) On July 31, 2018, he received parole to a home plan. (A 39) In short, after the Superior Court considered the juvenile-specific factors outlined in the recent case law and re-sentenced him accordingly, the Parole Board considered those same juvenile-specific factors to conclude that he had demonstrated maturity and rehabilitation; Mr. Costa was deemed ready for parole and released.

In contrast, Mr. Sharma pleaded guilty to one count of second degree murder, two counts of assault and battery, and two counts of armed assault with intent to murder, as well as unlawful possession of a firearm and unlawful possession of ammunition for crimes committed when he was 16 years old. (A. 32) He intentionally shot at and wounded two rivals, and a stray bullet accidentally killed an innocent bystander. (A 33) He was sentenced to life with the possibility of parole for the murder, as well as a seven to ten year sentence to be served consecutive to the life sentence (for the non-murder charges), making him parole eligible after serving 22 years. (A 32) He did not receive the benefit of

a re-sentencing hearing and he did not receive re-sentencing consideration, because, unlike Mr. Costa's life without parole sentence, Mr. Sharma's sentence had not been deemed unconstitutional.[4]

In June of 2019, after his second parole hearing on his life sentence, the Parole Board considered the juvenile-specific factors outlined in *Diatchenko I*, and determined that Mr. Sharma demonstrated maturity and rehabilitation, and merited parole. But he was paroled only to his consecutive sentence. In other words, Mr. Sharma was offered a meaningful opportunity to obtain release, and the Parole Board stated that he "will live and remain at liberty without violating the law and that [his] release is not incompatible with the welfare of society." G.L. c. 127, § 130. But, he is not free. Instead, Mr. Sharma remains incarcerated, and is now serving his seven to ten year sentence.[5]

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[4] In *Commonwealth v. Okoro*, 471 Mass. 51, 62 (2015), this Court determined that a sentence of life with the possibility of parole after 15 years was not unconstitutional as applied to juveniles convicted of second degree murder and did not require an individualized re-sentencing hearing, particularly because the defendant would have a meaningful opportunity for parole after 15 years where those factors could be taken into account. Importantly, Mr. Okoro received only one sentence, for one count of second degree murder. *Id.* at 52.

[5] As noted in Appellant Sharma's brief, p.27, n.3, the recent decision of *Dinkins v. Massachusetts Parole Bd.*, 486 Mass. 605 (2021), has changed Mr. Sharma's parole eligibility date. This Court held that the Parole Board's enabling statutes mandate that the Board aggregate all of the sentences prisoners are serving, and give those prisoners one parole-eligibility date. *Id.* at 620. This Court invalidated the Parole Board's regulation that made an exception to the aggregation statute for persons, like Mr. Sharma, serving life sentences. *Id.* at 620-621. However, *Dinkins* did not address the constitutionality of the actual sentences given, as Amici argue in this brief.

Both Mr. Costa and Mr. Sharma were juveniles when they committed murder, both were sentenced to consecutive sentences for crimes committed in conjunction with the murders, but only Mr. Costa, who was convicted of *two* counts of *first* degree murder, has been afforded an opportunity to be re-sentenced at a hearing where the judge could consider "the constitutional differences that separate juvenile offenders from adults." *Costa*, 472 Mass. at 144. Mr. Sharma never received that re-sentencing consideration, and remains incarcerated, serving his consecutive sentence, despite being paroled from his life sentence, effectively making his sentence more severe than Mr. Costa's sentences for two counts of first degree murder.

Recent changes in the law have benefitted Mr. Costa, but not Mr. Sharma. Since they were originally sentenced, both the United States Supreme Court and this Court have recognized the growing body of research that shows that there are fundamental differences between juvenile and adult brains, and both courts have held that juveniles are constitutionally different from adults for sentencing purposes. *See Miller v. Alabama*, 567 U.S. 460, 465, 471-472 (2012) (recognizing that science shows that juveniles have diminished culpability and a heightened capacity for change, and thus cannot be sentenced to the most severe punishment without an individualized hearing at which the mitigating evidence of youth can be

considered); *Diatchenko I*, 466 Mass. at 659-661, 667 (adopting the Supreme Court's analysis in *Miller*).[6]

The many cases decided after *Diatchenko I* have only reaffirmed this Court's recognition that juveniles are categorically and constitutionally distinct from adults for purposes of sentencing. This Court has held that it is disproportionate to sentence a juvenile convicted of first degree murder to consecutive life sentences without affording that juvenile a re-sentencing hearing that addresses the factors particular to youth outlined in *Miller* and *Diatchenko* (hereinafter referred to as a "*Miller* hearing").[7] *Costa*, 472 Mass. at 147-149. It is also unconstitutional to sentence a juvenile convicted of and sentenced for first degree murder and at the same time sentenced to consecutive non-life sentences, without conducting a *Miller* hearing that addresses the factors particular to youth. *Commonwealth v. Wiggins*, 477 Mass. 732, 747-748 (2017). Finally, this Court has held that it is unconstitutionally disproportionate to sentence a juvenile offender convicted of

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[6] After conducting a proportionality analysis, *Miller* held that a mandatory sentence of life without parole for juvenile offenders violated the Eighth Amendment's bar against cruel and unusual punishment. 567 U.S. at 489. *Diatchenko* went further, holding that *any* sentence of life without parole for juvenile offenders violated art. 26's prohibition against cruel or unusual punishments. 466 Mass. at 671.

[7] This Court outlined the factors, taken from *Miller*, 567 U.S. at 477, that a sentencing judge must consider in the new sentencing hearing, including the defendant's chronological age and its hallmark features, such as immaturity, impetuosity, and failure to appreciate risk, as well as the family/home environment, the circumstances of the homicide, and whether or not the defendant may have been charged with a lesser offense if not for the "incompetencies associated with youth." *Costa*, 472 Mass. at 147.

non-murder crimes to sentences that, in the aggregate, result in a parole eligibility date that exceeds that of the parole eligibility of a juvenile convicted of murder, without a *Miller* hearing that addresses the factors particular to youth. *Commonwealth v. Perez*, 477 Mass. 677, 685-686 (2017).

These cases are rooted in brain science that applies to *all* juveniles. Science is science, regardless of criminal conviction. But juveniles like Mr. Sharma—sentenced to second degree life and consecutive non-life sentences that were imposed prior to the change in the law announced by *Miller*, *Diatchenko*, and their progeny—are now the only juvenile defendants in Massachusetts[8] that have no opportunity to present the mitigating factors of youth and their attendant circumstances at a new sentencing hearing. This case presents an opportunity to rectify that injustice and answer the question contemplated but left unanswered in *Brown*, 466 Mass. at 688: whether discretion in sentencing is constitutionally required in instances where juveniles are convicted of second degree murder.

It violates both due process and equal protection to sentence a juvenile to life for second degree murder and to consecutive sentences for non-murder crimes, without the same benefit of a *Miller* hearing where the judge must consider the

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[8] Disposition in the juvenile courts is guided by the "best interests of the child" standard, which gives juvenile court judges broad discretion regarding disposition. *Police Com'r of Boston v. Municipal Court of Dorchester Dist.*, 374 Mass. 640, 666 (1978). Indeed, juvenile court judges are empowered to consider a comprehensive list of factors to "carefully take[] into account the specific circumstances of the [child's] case." *Commonwealth v. Lucret*, 58 Mass. App. Ct. 624, 629 (2003).

constitutional differences that separate juvenile offenders from adults. As Mr. Costa's case shows, this Court has already granted this hearing to juveniles convicted of first degree murder, who are only distinct from juveniles like Mr. Sharma insofar as they were convicted of a *more serious* crime. Without the benefit of a re-sentencing hearing that meaningfully applies the *Miller* factors, not only will juveniles like Mr. Sharma now be serving sentences that are disproportionate to the crime, as argued by Appellant Sharma in his brief, pp. 23-38, but those juveniles will also not be afforded the constitutionally-protected meaningful opportunity for release. Indeed, this cohort of juveniles (hereinafter the "second degree cohort") may now be serving sentences that were legal when they were imposed, but are more severe than some sentences being served by juveniles who committed first degree murder (hereinafter the "first degree cohort") who have received the benefit of a *Miller* re-sentencing hearing. For Mr. Sharma, of course, there is no need for a *Miller* hearing. The Commonwealth cannot possibly prove that "there is no reasonable possibility of the juvenile's being rehabilitated," *Commonwealth v. Perez*, 480 Mass. 562, 571-572 (2018), when he has already been granted parole. Thus, a sentencing court cannot permissibly

"delay [his] parole eligibility for a time exceeding that available to juveniles convicted of [first degree] murder." *Id*. at 571.[9]

Argument

I. Failure to Grant a *Miller* Hearing To Juveniles Convicted of Second Degree Murder Violates Due Process Because, Without a Re-Sentencing Hearing, These Juveniles May Now Be Serving a More Severe Sentence Than Those Serving a Sentence for First Degree Murder.

The second degree cohort are now serving sentences that are unfair and, in many cases, unduly severe. Constitutional due process requires that the government must act in a fair manner when the deprivation of liberty is at stake. *Doe v. Attorney General*. 426 Mass. 136, 140 (1997).[10] In 2013, this Court recognized that its decisions in *Diatchenko I* and *Brown* would make the sentences given to juveniles for first and second degree murder exactly the same, noting that the two decisions "apply one discretionary parole eligibility range to juveniles convicted of two different crimes", and suggested at that time that equal protection and due process rights may be implicated. *Brown*, 466 Mass. at 690. The legislature recognized this concern, and in 2014, amended the sentencing statute to

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[9] In this way, Mr. Sharma falls into a donut hole left behind by *Dinkins*—juveniles who have *already been paroled* to their consecutive sentence, a sequence of events no longer possible. As this Court said there, it "make[s] little sense" to continue to hold people who have already proven their rehabilitation. *Dinkins*, 486 Mass. at 623.

[10] The Fourteenth Amendment to the United State Constitution and art. 12 of the Massachusetts Declaration of Rights guaranteed that no person can be deprived of liberty without due process of law.

increase the penalties for juveniles convicted of first degree murder. *See* G.L. c. 279, § 24 (fixing the minimum term for a juvenile convicted of first degree murder to "not less than 20 years nor more than 30 years").

However, the 2014 legislation left untouched the current second degree cohort: that of pre-*Diatchenko* juveniles convicted of second degree murder, who received consecutive sentences for non-murder offenses committed in conjunction with the murder, but have no opportunity for a *Miller* re-sentencing hearing. The consequence for that second degree cohort, including Mr. Sharma: an unfair sentence structure resulting in a greater punishment than that of some juveniles in the first degree cohort, like Mr. Costa.

Indeed, in this circumstance, Mr. Sharma's meaningful opportunity for release is decidedly less meaningful than that of Mr. Costa's. It is inherently unfair because the science of juvenile brain development, the basis upon which our courts have determined that juveniles are different from adults for sentencing purposes, applies to all juveniles, regardless of the crimes they commit. *Diatcheko I*, 466 Mass. at 669-670; *see also Miller*, 567 U.S. at 473 (noting that none of the distinctive and transitory mental traits and environmental vulnerabilities are "crime specific" because "[t]hose features are evident in the same way, and to the same degree" when a botched robbery turns into a killing).

The inherent unfairness between these two cohorts of the pre-*Diatchenko* group of juveniles convicted of murder is realized in manifold ways. Importantly,

second degree murder is less culpable than first degree murder, which this Court recognized in *Brown* and the legislature recognized when it amended G.L. c. 279, § 24. *See Commonwealth v. Matchett*, 386 Mass. 492, 502 (1982) (noting that the purpose of the murder statute is to gradate punishment between first and second degree murder). Yet, because Mr. Costa received the benefit of a *Miller* hearing, and Mr. Sharma did not, Mr. Sharma's sentence structure is now harsher than Mr. Costa's sentence structure, even though Mr. Costa was convicted of two counts of first degree murder. Mr. Sharma was convicted of a lesser crime, but now has a greater sentence.[11]

Moreover, juveniles who pleaded guilty to second degree murder did so in many instances so that they would have a guaranteed chance for parole instead of risking the possibility of what was then a life without parole sentence for first degree murder if that juvenile had instead gone to trial and lost, as did Mr. Costa. These juveniles gave up their right to a trial, with all the attendant rights guaranteed to a criminal defendant on trial, also gave up the right for a plenary review of their case under G.L. c. 278, § 33E, and relieved the Commonwealth of its burden of proving them guilty beyond a reasonable doubt. In other words, juveniles like Mr. Sharma have lost the benefit of their bargain: they pled guilty to

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[11] To be clear, Mr. Sharma seeks a right to a *Miller* hearing, as opposed to a right to any particular sentence. The lesser severity of Mr. Costa's ultimate sentence just illustrates the unfairness that can readily follow from the fact that he received a *Miller* hearing but Mr. Sharma has not.

avoid a sentence that is no longer constitutional, and by pleading guilty they received the very sentence (life with parole after 15 years) that *Diatchenko I* says they would have received had they rolled the dice and been convicted of first degree murder anyway. But now, to add injury to this insult, those in the second degree cohort such as Mr. Sharma *still* must serve more time in prison even after the Parole Board has paroled them from their life sentences, while some in the first degree cohort who did not give up their rights and went to trial, like Mr. Costa, do not. Those in the second degree cohort not only did not get the benefit of avoiding the harshest possible penalty for first degree murder, they also do not get the benefit of a new, individualized sentencing hearing that takes the juvenile-specific factors into account, as the first degree cohort now does under *Costa* and *Wiggins*, even though the juvenile-specific factors apply regardless of the crime committed. *Miller*, 567 U.S. at 473.

Moreover, part of this Court's reasoning in allowing for a new sentencing hearing in Mr. Costa's case was that the sentencing judge did not have the benefit of the current scientific research on brain development and thus would not have known about the "constitutional differences that separate juvenile offenders from adults." *Costa*, 472 Mass. at 144. The same is certainly true in Mr. Sharma's case. He pled guilty in 1999; the Supreme Court had not struck the juvenile death penalty until 2005. See *Roper v. Simmons*, 543 U.S. 551, 575 (2005). He was

sentenced in a different jurisprudential universe. His sentencing long predates the recognition of this brain science and the case law that has emerged from it.

There is no reason to single out juveniles like Mr. Sharma for worse treatment. The mitigating and transient qualities of youth apply to all juveniles. *Miller*, 567 U.S. at 473; *Diatchenko I*, 466 Mass. at 669-670. At the time that both Mr. Costa and Mr. Sharma were sentenced, the sentencing judges did not consider the constitutional differences between juveniles and adults. It makes no sense, and so is fundamentally unfair, to grant a *Miller* hearing to the first degree cohort, but deny it to the second degree cohort, with the result of less culpable juveniles now serving a harsher penalty. This disparate treatment in sentence structure violates due process. *See Gagnon v. Scarpelli*, 411 U.S. 798, 790 (1973) (noting that fundamental fairness is the touchstone of due process); *Commonwealth v. Francis*, 477 Mass. 582, 585 (2017) (the principles of fundamental fairness are incorporated in the notions of due process); *Cf. Chalifoux v. Comm'r of Correction*, 375 Mass. 424, 427 (1978) (explaining that courts are guided by considerations of fairness and a proper sense of justice on sentencing issues if there is ambiguity or no controlling statute). Due process demands that the second degree cohort not be denied the benefit of the advancement of science that this Court has granted to the first degree cohort.

II. Allowing the Sentences of Mr. Sharma and the Second Degree Cohort to Stand Results in a Violation of the Constitutional Guarantee of Equal Protection of Laws, Because the Court is Treating Two Similarly Situated Cohorts Differently, to the Detriment of the Second Degree Cohort.

The Fourteenth Amendment to the United States Constitution and art. 1 of the Massachusetts Declaration of Rights guarantee equal protection of the laws to all people. *Commonwealth v. Weston W.*, 455 Mass. 24, 30 & n.8 (2009). If the law or a state action draws a distinction between similarly situated people, there must be a rational basis for the disparate treatment of those people. *Goodridge v. Department of Public Health*, 440 Mass. 309, 329-330 (2003).[12] For an equal protection challenge in this Court, "the rational basis test requires that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Id.* (quotation marks and citations omitted).

Here, there is no rational basis for the different legal treatment between the two cohorts of similarly situated juveniles who were convicted of murder prior to 2013. While both *Diatchenko I* and *Brown* held that a mandatory life sentence without the possibility of parole was unconstitutional for juveniles convicted of first degree murder, this Court did not differentiate between different cohorts of juveniles. Indeed, this Court held that parole eligibility was "an essential

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[12] The equal protection guarantee applies to judicial action as it does to any branch of government. *Shelley v Kraemer*, 334 U.S. 1, 14-15 (1948).

component of a constitutional sentence" under art. 26 for a juvenile homicide offender, and it extended the protections for a meaningful opportunity for release to juveniles convicted of second degree murder as well as first degree murder. *Diatchenko v. District Attorney for the Suffolk Dist.*, 471 Mass. 12, 33 (2015) ("*Diatchenko II")*. Thus, even though a second degree sentence for juvenile offenders was not made illegal by *Diatchenko I* and *Brown*, this Court treated the second degree cohort and the first degree cohort the same regarding the right to a meaningful opportunity for parole.

As noted, nothing in the science of adolescent brain development or in the case law makes the second degree cohort different from the first degree cohort for sentencing purposes, so there is no rational reason for the law to treat them so differently. *See id.* (noting that this decision applies to "all juvenile offenders convicted of murder); *see also Miller*, 567 U.S. at 473 (nothing about the distinctive characteristics of youth is crime-specific). Accordingly, *all juveniles* are less culpable than adults, and none can be considered irretrievably depraved when they are sentenced as juveniles, and accordingly, *all juveniles* in Massachusetts convicted of murder have a right to a *Miller* hearing. *Diatchenko II*, 471 Mass. at 33. There is no rational basis to determine that only *some* juveniles - those convicted of first degree murder before 2013 - are constitutionally different from adults for the purposes of sentencing, or that *some* juveniles, such as Mr. Sharma, are different from *other* juveniles such as Mr. Costa.

For the same reasons the sentences of the second degree cohort are now unfair. As explained above, failure to allow a *Miller* hearing for the second degree cohort also results in a violation of the right to equal protection of the laws, because the second degree cohort is harmed with disproportionate sentences as compared to the first degree cohort. As noted, Mr. Sharma and Mr. Costa are similarly situated: both were 16 years old when they committed their crimes, both were tried as adults under the law, and both were given sentences to be served from and after their life sentences.[13] At the time they were sentenced, the sentencing judges did not have the guidance of cases delineating the constitutional differences between juveniles and adults, and thus treated them as adults for sentencing purposes. They both received the meaningful opportunity for release that *Diatchenko I* guaranteed, and in both cases the Parole Board determined they were rehabilitated and ready for parole after their second parole hearing. There is no purpose and no principled reason to allow Mr. Costa a *Miller* hearing but deny one to Mr. Sharma. The result of this disparate treatment is that Mr. Sharma's sentence is now effectively at least seven years longer[14] than Mr. Costa's, because he still must serve his consecutive sentence. It is irrational to put Mr. Sharma in a worse

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[13] Although Mr. Sharma is "similarly situated" to Mr. Costa for equal protection purposes, he is also *different* than Mr. Costa in an important sense—he was convicted of a less serious crime.

[14] As noted, the Parole Board now must aggregate the sentences of all prisoners, which will result in a new parole eligibility date for Mr. Sharma, but he still has no opportunity for re-sentencing. *Dinkins*, 486 Mass. at 621-622.

position than Mr. Costa for sentencing purposes, especially because Mr. Sharma actually accepted responsibility for his crimes and pled guilty to a lesser count of murder.

Considering that the "signature qualities of youth", including biological and social immaturity, irresponsibility, impetuousness, and recklessness, are all qualities that are exhibited regardless of the crime, but that are "transient," *Miller*, 567 U.S. at 476, citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993), there is no purpose and no reason to deny the less culpable second degree cohort a *less* meaningful opportunity for release than the first degree cohort, resulting in a harsher sentence for a lesser crime.

III. Longer Incarceration Provides No Penological Benefit and Serves No Rehabilitative Purpose for the Second Degree Cohort.

"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. Once the Parole Board considers the *Diatchenko I* factors and grants parole, as it did in Mr. Sharma's case, the penological justification for his sentences has presumably been met. See G.L. c. 127, § 130 (outlining the Parole Board's mandate: "after consideration of a risk and needs assessment, that there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not

incompatible with the welfare of society"). There is no justification for requiring a second degree juvenile to be incarcerated longer than a first degree juvenile.

Unlike adults who were incarcerated after they had experienced their crucial psychological and social development, juveniles are neither neurologically, psychologically, nor socially mature. Both cohorts of juvenile homicide offenders have spent their entire adult lives in prison; they have effectively grown up in the Department of Correction ("DOC"). *Miller* and *Diatchenko I* outline the myriad factors and deficiencies that contribute to a juvenile's incarceration in the first place, which a long prison sentence does not remotely cure. "When the states impose a life sentence, they subject the incarcerated juvenile to an environment that frustrates personal development." Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release"*, 16 Berkeley J. Crim. L. 1, 34 (2011). The "meaningfulness" of a juvenile lifer's opportunity for release "is directly related to participation in whatever rehabilitative programs are available." *Id.* at 37. But DOC does not provide any programming specific to juvenile lifers. When the legislature amended the sentencing statute in 2014, it also amended G.L. c. 119, § 72B, to allow for expanded opportunity for prisoners who were convicted as juveniles to engage in programming and to be classified to a minimum security facility in order to better prepare for a meaningful opportunity for parole.

Yet there is no added programming, in any facility, regardless of the security level, to specifically benefit these juveniles. The change in the law only allows for juvenile offenders to qualify for the regular programming earlier than adult offenders. *See* G.L. c. 119, § 72B (prohibiting the DOC from limiting programming for juvenile offenders solely because of their crimes or the duration of their incarceration, and prohibiting the DOC from categorically barring placement in a minimum security facility because of a life sentence).

The 2020 edition of the DOC Program Description Booklet contains nothing specific to juvenile offenders. *See* Program Description Booklet, 2020, available at https://www.mass.gov/service-details/inmate-programming. Thus, even if juvenile lifers may qualify earlier in their sentences to engage in programming, there are no new or distinctive programming or treatment options for any juvenile offenders, including the first and second degree cohorts serving life sentences. As well, there are many fewer programming opportunities in minimum security facilities than there are in medium security facilities, making extra time spent in a minimum security facility no more likely to help a juvenile offender transition to living in society, for the first time ever, as an adult. *Id.*

Indeed, in some instances, the DOC uses its classification system to deny juvenile offenders even an opportunity to be transferred to minimum security, until they receive a positive parole vote. *See Deal v. Commissioner of Correction*, 478 Mass. 332, 333 (2017) (determining that despite the change in the law, the DOC

continues to block qualifying juvenile homicide offenders from placement in minimum security facilities). *See also* Male Objective Point Base Classification Manuel, available at https://www.mass.gov/doc/male-objective-point-base-classification-manual/download (allowing DOC officials to override objective classification scores to keep otherwise qualifying individuals from being transferred to lower custody).

In contrast to DOC's dearth of programming for juvenile lifers and dearth of any programming in minimum security facilities, if the second degree cohort were to receive an earlier parole eligibility date after a *Miller* hearing, the guaranteed assistance that *Diatchenko II* promises would enable that cohort to receive skilled and expert assistance to formulate a parole release plan that provides for appropriate, community-based support to assist with a meaningful transition into responsible, adult living in the community. *See* 471 Mass. at 24-28 (holding that a juvenile homicide offender's meaningful opportunity for release includes assistance of counsel and access to funds for expert witnesses). "[J]uvenile offenders should have the opportunity to demonstrate considerable change to whatever deficiencies contributed to their incarceration." Green, *supra*, at 35. If the promise of a meaningful opportunity for release means anything, it must include a chance for meaningful rehabilitation while in custody and a meaningful opportunity for the juvenile lifer to show he has transformed into a productive member of society. He cannot, however, even in a minimum security facility,

where there are no programs tailored to his or her specific deficits and needs. There is little doubt that living in the community with appropriate support tailored to the individual parolee has more rehabilitative benefit, and more opportunity for success on parole, than remaining in DOC custody with little to no programming to engage in.

At bottom, this lack of programming makes it harder for juvenile lifers to rehabilitate themselves while in custody so they can meet the parole standard—that they can live "at liberty without violating the law." G.L. c. 127, § 130. In other words, a lack of programming effectively extends their prison term by making it more difficult to receive parole. Given this lack of programming, longer incarceration for the second degree cohort serves no purpose. Indeed, the lack of any relevant programming that would add any benefit to the second degree cohort's rehabilitation actually impedes the second degree cohort's meaningful opportunity for release on parole otherwise guaranteed by art. 26.

Conclusion

This Court must find that it is fundamentally unfair and a violation of the constitutional guarantee of equal protection of the laws, to allow the second degree cohort to be the only juveniles in Massachusetts who have no opportunity to present the mitigating factors of youth at a sentencing hearing.

Respectfully Submitted,

Amici Curiae:

Committee for Public Counsel Services
Juvenile Law Center
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By their attorney,

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Dated: February 12, 2021

Certificate of Compliance

I, Rebecca Rose, certify that to the best of my ability, knowledge, and belief, this brief is in compliance with all of the Rules of Appellate Procedure, including Rule 16, Rule 17, and Rule 20. Pursuant to Rule 17(c)(9) and Rule 20(a)(3)(E), I certify that the brief is written in the proportionally spaced font of Times New Roman, 14 point size, with a total of 5,181 words, created on the word processing program of Pages version 10.1 created for an Apple, iMac computer.

Certificate of Service

I, Rebecca Rose, certify that on this 12th day of February, 2021, I served a copy of the "Brief of the Amici Curiae" electronically via the Odyssey System to:

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Addendum

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 1

Art. I. Equality of people; natural rights

Currentness

Art. I. All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Notes of Decisions (1245)

M.G.L.A. Const. Pt. 1, Art. 1, MA CONST Pt. 1, Art. 1
Current through amendments approved February 1, 2020

End of Document

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 12

Art. XII. Regulation of prosecutions; right of trial by jury in criminal cases

Currentness

Art. XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Notes of Decisions (8137)

M.G.L.A. Const. Pt. 1, Art. 12, MA CONST Pt. 1, Art. 12
Current through amendments approved February 1, 2020

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