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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 PRINCIPAL BRIEF

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Statement of Issues

(1) Is a sentence for murder in the second degree with consecutive sentences for nonhomicide offenses cruel, unusual, and/or unconstitutionally disproportionate for a juvenile, where that sentence results in a longer parole eligibility period for a juvenile offender convicted of murder in the second degree than a juvenile convicted of murder in the first degree?

(2) Given that both juvenile offenders sentenced for murder in the first degree and juvenile offenders sentenced to fifteen years or more for nonhomicide offenses are eligible for resentencing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655 (2013), and their progeny, is a juvenile offender sentenced to twenty-two years or more for murder in the second degree and nonhomicide offenses likewise entitled to an opportunity for resentencing?

(3) Should a juvenile offender sentenced for murder in the second degree and nonhomicide offenses in 1999—an era where the "superpredator myth" posited that juvenile defendants were uniquely remorseless threats to society—be entitled to a new sentencing

hearing based on new research that suggests that juveniles' poor self-control and failure to appreciate the consequences of their actions is a function of their biologically immature brains?

Statement of the Case

Defendant Sunil Sharma pleaded guilty in 1999 to second-degree murder, two counts of armed assault with intent to murder, and one count of illegal possession of a firearm. Three other indictments were placed on file with his assent. He was sentenced to life with the possibility of parole for second degree murder; he received two seven-to-ten year on-and-after sentences (to run concurrent with each other, but consecutive to the life sentence) for the assaults; and he was sentenced to one year to one year and one day for illegal possession of a firearm, to run concurrent with the sentence on the first assault charge. RAII/63-64. Counsel at sentencing noted that Sharma was a teenager at the time of the offenses, but made no specific arguments that Sharma should be sentenced more leniently or eligible for parole sooner because of his limited brain development and maturity. RAII/62-63.

Before pleading guilty, Sharma filed a motion to dismiss the charges against him because he alleged that he was sixteen years old,

not seventeen, at the time of the offenses, and thus should have been charged in Juvenile Court in the first instance. Sharma was born in India, where his birth was not officially registered. *See* RAII/15. Sharma presented evidence that he and his family had consistently listed his birth date as 1979 when he was younger, but that when he had become involved with the criminal justice system, he had started lying to police about his age in the belief that doing so would make it less likely for immigration authorities to find out he had been arrested. RAII/15-16, 29. Focusing on the evidence that Sharma had consistently used 1978 as his year of birth from 1993 to 1996 (although not, the court conceded, before that time), a Superior Court judge concluded that the Commonwealth had met its burden to show Sharma's age by a preponderance of the evidence and that Sharma was born in 1978. RAII/24-32. As such, the court denied Sharma's motion to dismiss. RAII/32. In pleading guilty, Sharma waived any appeal of this decision. RAII/47-49.

Sharma has been incarcerated since his original arrest in 1996. He was paroled from his life sentence on June 11, 2019, following his second parole hearing. RAII/6-9. The Parole Board noted that Sharma

"has not had a violent disciplinary report in over 10 years." RAII/7. The Board credited his testimony that he "has matured and . . . has been able to engage in additional programming" while incarcerated, and that contributing factors to his changed behavior included his "religious involvement, as well as being selective and respectful in regard to the people he interacts with." RAII/8. Accordingly, the Parole Board therefore formed "the unanimous opinion that Sunil Sharma is rehabilitated and, therefore, merits parole at this time," thereby releasing Sharma to his on-and-after sentences. RAII/9. Sharma is subject to an immigration detainer and order of removal to India that will apply upon the conclusion of all sentences. RAII/67-68.

On October 31, 2019, Sharma filed his first and only Rule 30 motion. RAI/13-16. Sharma requested that the Superior Court vacate his on-and-after sentences as unconstitutional and illegal, and resentence him concurrently on those charges. *Id.* Sharma also moved for a new sentencing hearing to determine whether his sentences should run concurrently, rather than consecutively, based on evidence about juvenile brain development, psychology and neuroscience, which was unavailable at his original sentencing. RAI/14-15. In addition,

Sharma filed an Ex Parte Motion for Funds for an Expert in Support of Resentencing. RAI/10.

The Superior Court held no hearing on either motion. On November 20, 2019, the motion for funds was denied without prejudice, pending the "issue being joined on Paper 31 [the Rule 30 motion]." (Roach, J.) RAI/10. On March 9, 2020, the Rule 30 motion was denied, by endorsement, "for all the reasons stated by the Commonwealth in its opposition filed 2/5/20. In particular, I agree with the Commonwealth that on this case the defendant's sentences pursuant to his plea remain lawful under *Miller* and *Diatchenko*." (Roach, J.) Add. 59-60; RAII/169-170.

Sharma filed his notice of appeal on March 30, 2020. RAII/171. The case was docketed in this Court on May 11, 2020.

Statement of Facts

On April 16, 1996, Sharma entered the Rainbow Restaurant in Boston's Chinatown and shot repeatedly at two men. RAII/53-55. While both his targets were gravely injured, one of the bullets Sharma fired struck and killed Ky Ung Shin, an eighteen-year-old woman seated nearby. RAII/6-7. At the time of the homicide, Sharma was a member of

a "crew" that extorted illegal gambling operations in Chinatown and his two intended targets were members of a rival crew. RAII/7. After the shooting, Sharma fled the scene, traveling to Detroit. RAII/55. He was arrested in July 1996 and transported back to Boston, where he promptly confessed to the murder and showed the police the location of the murder weapon. RAII/55-56.

At the time of Ms. Shin's murder, Sharma was a teenager whose "early developmental history was remarkable for significant attachment disruption and sadistic physical abuse." RAII/84 (Psychosocial Assessment). Born in India in August 1978 or 1979, Sharma's family attachments were limited: his mother left India for the United States in January 1981, leaving Sharma behind with his father and his two older siblings, a sister, Madhu, and a brother, Anil. RAII/15, RAII/84. Madhu Sharma joined her mother in the United States in 1984, while Sharma and his brother remained behind. RAII/15. Sharma's father was an alcoholic who played little role in his upbringing, instead placing Sharma and his brother in an informal boarding school or series of such schools. RAII/33. At one such school, Sharma was subjected to regular physical abuse: he was beaten by cable wires and had his head

submerged in a bucket of water as a form of punishment. *Id.* He was also deliberately burned on at least one occasion. *Id.* He was given little to eat and deprived of necessary medical care. RAII/71. After Sharma's father died of a heart attack in July 1989, Sharma and his brother were sent to the United States, where they were reunited with their mother and sister. *Id.*

Sharma struggled in the United States: he was barely acquainted with his mother and sister, who both worked hard to support the family and were therefore frequently absent from the home. RAII/71-2. He experienced race-based animus and violence in school. *Id.* He failed seventh grade twice; in 1993, during his penultimate year of formal education, a special education assessment indicated that his math skills were at a fourth-grade level, with reading and language skills at a third-grade level. RAII/88. He dropped out of a vocational high school in early 1994. RAII/89.

Instead of attending school, Sharma began to spend time in Chinatown with an acquaintance, eventually joining a "crew" that served as a surrogate family—he viewed his "leader" as a father figure and found identity and security within the group. RAII/75. The crew in

question extorted illegal Chinatown gambling joints, and Sharma worked as "security" or "muscle." RAII/73. He also began engaging in a range of criminal conduct. His juvenile record started in 1993 and included charges for trespassing, disorderly conduct, possession of burglarious tools, destruction of property, knowingly receiving stolen property, and use without authority. RAII/74. He spent time in and out of DYS detention. *Id.* In July 1995, Sharma was "viciously attacked and stabbed [by] a group of youth in East Boston." RAII/91. Contemporaneous records note that Sharma "was advised by the police to leave the area. Numerous threats towards his family were made after the arrest of the alleged defendants. It appeared that the assault may have been racially motivated. Surviving near mortal wounds [Sharma] was incapacitated for several months." *Id.* He then went AWOL from DYS supervision. *Id.*

Shortly before the underlying offense in this matter, the leader of Sharma's "crew" was arrested and Sharma believed that another "crew" was attempting to encroach on the territory of Sharma's crew. RAII/75. Sharma took it upon himself to eliminate any threat from the other crew. *Id.* In doing so, Sharma also believed he was demonstrating his

loyalty to his incarcerated leader. *Id.* Lacking mature problem-solving skills, Sharma decided he would try to shoot Mr. Nguyen and Mr. Lee, two members of the other crew. *Id.* Sharma did not appreciate or think through the consequences of an armed assault, including the harm to his intended victims or the possibility that he might injure or kill an innocent bystander, which is what ultimately happened. *Id.*

After Sharma was arrested and incarcerated, he struggled to adjust to the prison environment, with a poor institutional record through approximately 2008. RAII/11. His record includes "seven disciplinary reports for fighting during his time in jail awaiting trial" and, after his guilty plea, "nine disciplinary reports in his first year at the Department of Correction." *Id.* He stabbed or slashed other inmates twice, in 2000 and 2004, assaulted a fellow inmate in 2005, and fought with a corrections officer in 2008. *Id.*[1]

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[1] The Supreme Judicial Court has recognized that, "[i]n the case of juvenile homicide offenders, negative institutional behavior during the early years of their incarceration might . . . reflect, at least in part, the immaturity and recklessness characteristic of their age at the time." *Deal v. Comm'r of Correction*, 478 Mass. 332, 343 n.13 (2017). Juvenile inmates enter prison as teenagers and are surrounded by older inmates. They often "feel they have to establish a sense of toughness and

As the Parole Board recognized, Sharma's trajectory for the last decade has been positive and he has demonstrated his rehabilitation. Sharma has participated in numerous educational and rehabilitative programs; he has engaged in religious study and practice; he has established and maintained family relationships; and he has found employment. RAII/8. He has been transferred to the lowest level of security (medium) possible for an inmate with an ICE detainer. *Id.* He has completed more than two dozen programs, including the Correctional Recovery Academy (CRA), a six-month residential (i.e., separately-housed) program "focusing on developing personal accountability, responsibility and socially productive lives free of alcohol and other drugs and crime," which he finished in 2013. RAII/96, 138. After successfully completing CRA, Sharma was selected to serve in the CRA Graduate Support Program, and he served as a peer mentor in

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resiliency to secure their safety." A. Nellis, The Lives of Juvenile Lifers: Findings from a National Survey*,* The Sentencing Project 21 (2012). Younger inmates in adult prison "tend to act out in their early period of incarceration," but such " behavior dissipates as they age and grow accustomed to their environment." *Id.,* citing R. Johnson, Hard Time: Understanding and Reforming the Prison (2d ed. 1996).

this structured program for nearly a year and a half. RAII/81, 142. In recent years, he has continued to take leadership roles in prosocial programming and has endeavored to live by his religious values by behaving in a positive manner. RAII/81-82. In sum, Sharma has matured from a violent and impulsive adolescent to a thoughtful and responsible adult.

Summary of Argument

Sharma's consecutive sentences for second-degree murder and nonhomicide offenses amount to an aggregate sentence of twenty-two years to life which is unconstitutionally cruel, unusual, and/or disproportionate for a juvenile offender. After *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655 (2013) (*Diatchenko I*), juvenile offenders sentenced for first-degree murder became eligible for parole after fifteen years, or—for those with concurrent or consecutive sentences—to resentencing consistent with the considerations outlined in *Miller v. Alabama*, 567 U.S. 460 (2012). Juvenile sentences for nonhomicide offenses on which the aggregate parole eligibility date exceeds the parole eligibility date for murder are presumptively disproportionate, and juvenile offenders with such sentences are also

entitled to a *Miller* hearing and, potentially, to resentencing. *Infra* at 23-26.

Sharma's sentence structure—where a juvenile convicted of second-degree murder has a parole eligibility period that is longer than a juvenile convicted of first-degree murder—is presumptively disproportionate and therefore requires a *Miller* hearing to consider whether extraordinary circumstances warrant the sentence in question. *Infra* at 26-29. In this case, this Court can make the relevant determination on the record and should therefore amend Sharma's sentences to make them all concurrent, because the Commonwealth will not be able to meet its evidentiary burden to show that there is no reasonable possibility of rehabilitation. Alternately, this Court should remand for a *Miller* hearing, followed, if necessary, by resentencing. *Infra* at 30-34.

Even if Sharma's sentence structure is not presumptively disproportionate, Sharma's sentence is constitutionally disproportionate as applied to him. Sharma's history and personal characteristics, including his postconviction rehabilitation, support the conclusion that his sentence is disproportionate. Moreover, Sharma's sentence is

disproportionately severe compared to the sentence of a juvenile convicted of first-degree murder at the time Sharma was convicted; any such juvenile is entitled to seek parole after fifteen years, and any first-degree juvenile offender with a consecutive or lengthy concurrent sentence is entitled to resentencing, as the Commonwealth conceded below. First-degree murder should be punished more severely than second-degree murder, and as the SJC has recognized, a disparity for juvenile offenders convicted of the two degrees of murder raises both proportionality and equal protection concerns. Under the circumstances of this case, Sharma's sentence is unconstitutional. *Infra* at 34-38.

In the alternative, Sharma must be resentenced because changes in constitutional law have reshaped juvenile sentencing in a manner that Sharma's sentencing judge would not have foreseen when that judge exercised his discretion to sentence Sharma consecutively. *Miller* established that "'children are constitutionally different from adults for purposes of sentencing,' irrespective of the specific crime that they have committed." *Diatchenko I*, 466 Mass. at 670, quoting *Miller,* 567 U.S. at 471. That holding led to sweeping changes in juvenile sentencing that judges who sentenced juveniles before 2012 could not have anticipated.

Thus, the SJC has concluded that where, pre-*Miller*, a judge exercised discretion in sentencing a first-degree juvenile offender, that juvenile is now entitled to resentencing, regardless of whether the sentence in question was consecutive, as in *Commonwealth v. Costa*, 472 Mass. 139 (2015), or concurrent but lengthy, as in *Commonwealth v. Wiggins*, 477 Mass. 732, 747-48 & n.20 (2017). Sharma's sentence presents the same fundamental notice and fairness concerns as *Costa* and *Wiggins*, because the judge sentencing Sharma did not know when he exercised his discretion to sentence consecutively that doing so would result in Sharma's parole eligibility being substantially longer than that of a first-degree juvenile offender. As such, this Court should remand for resentencing consistent with *Costa*. *Infra* at 39-47.

Finally, in the alternative, Sharma should be granted a new sentencing hearing because developments in the study of the juvenile brain have dramatically changed the understanding of juvenile criminality and culpability. Sharma was sentenced in 1999, during a time period when the prevailing narrative about juvenile defendants was that they were remorseless superpredators, and that the country was facing an upcoming "bloodbath" from juvenile criminals. A new

scientific consensus that adolescent brains are very different from adult brains and that most juveniles will age out of impulsive criminal behavior raises serious questions about whether Sharma's sentencing would have been the same had the sentencing judge been presented with evidence underpinning the current understanding of juvenile culpability. As such, this Court should order a new sentencing hearing at which Sharma can present relevant evidence regarding juvenile brain development that was not available or discoverable at his first sentencing. *Infra* at 47-56.

Argument

Standard of review

This Court reviews the denial of a Rule 30 motion for abuse of discretion or error of law. *Commonwealth v. Perez*, 480 Mass. 562, 567 (2018) (*Perez II*). A court has abused its discretion where "the judge's decision resulted from a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). *Commonwealth v. Perez*, 477 Mass. 677, 682 (2017) (*Perez I*).

Where, as here, the error asserted has a "constitutional dimension," this Court "review[s] independently the application of constitutional principles to the facts found." *Perez II*, 480 Mass. at 567-68 (citations omitted).

Although the motion judge made no explicit findings, even had she done so, this Court would not defer to them, because this Court "independently" reviews findings based on a documentary record. *See Commonwealth v. Tremblay*, 480 Mass. 645, 654-55 (2018). *See also Perez II*, 480 Mass. at 568 (appellate court is in same position as hearing judge who was not the trial judge).

I. Sharma's Consecutive Sentence is Cruel, Unusual, and/or Unconstitutionally Disproportionate

A. A sentence for second-degree murder and consecutive nonhomicide offenses is presumptively disproportionate as applied to a juvenile where such sentence results in a longer timeframe for parole eligibility for a juvenile convicted of second-degree murder than first-degree murder.

Sharma's consecutive sentences for a homicide and nonhomicide offenses—which amount to an aggregate sentence of twenty-two years to life (fifteen years to life plus seven to ten years on and after)—are unconstitutionally disproportionate under the Eighth Amendment, art. 1, and art. 26, and as such, his consecutive sentences must be vacated.

A defendant who pleads guilty does not waive the right to bring a constitutional challenge to his sentence: 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 Rule 30(a) after guilty plea). *Cf.* Mass. R. Crim. P. 12 (enumerating with specificity those rights waived by a guilty plea).

In 2012, the Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), holding that Eighth Amendment concepts of proportionality render unlawful "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479. The Eighth Amendment requires that "punishment for crime should be graduated and proportioned to both the offender and the offense." *Id.* at 469 (quotation and citation omitted). One year later, the Supreme Judicial Court (SJC) applied *Miller*, and in doing so, "interpreted art. 26 more broadly than the United States Supreme

Court has interpreted the Eighth Amendment."[2] *Perez I*, 477 Mass. at 682 (2017) (describing *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 466 Mass. 655 (2013) (*Diatchenko I*)). "[T]he fundamental imperative of art. 26 [is] that criminal punishment be proportionate to the offender and the offense." *Diatchenko I*, 466 Mass. at 671.

After *Diatchenko I*, "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." *Perez II*, 480 Mass. at 568 (citation omitted). The SJC cautioned that *Diatchenko I* could give rise to serious constitutional concerns: for instance, where "a juvenile convicted of the lesser crime of murder in the second degree [is] sentenced to a lengthier minimum term than the juvenile convicted of the more severe crime of

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[2] Article 26 protects rights more expansively than the Eighth Amendment, because art. 26 prohibits punishments that are *either* cruel *or* unusual. *See District Attorney for the Suffolk Dist. v. Watson*, 381 Mass. 648, 676 (1980) (Liacos, J., concurring) (this "disjunctive phrasing" signifies "that a punishment may not be inflicted if it be either 'cruel' or 'unusual'"). *See also People v. Bullock*, 485 N.W.2d 866, 872 n.11 (Mich. 1992) ("The set of punishments which are *either* 'cruel' *or* 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' and 'unusual.'").

murder in the first degree," that could raise concerns about violations of both art. 26 and art. 1. *Commonwealth v. Brown*, 466 Mass. 676, 690 (2013). *See infra* at 37 (discussing distinction between first-degree and second-degree murder).

The SJC addressed art. 26 proportionality concerns for nonhomicide offenses in *Perez I*, holding that an "aggregate sentence for nonmurder offenses with parole eligibility exceeding that applicable to a juvenile defendant convicted of murder is presumptively disproportionate." *Perez I*, 477 Mass. at 686. Where a sentence is "presumptively disproportionate," a sentencing court must conduct a *Miller-Perez* hearing to assess whether "extraordinary circumstances warrant a sentence treating the juvenile defendant more harshly for parole purposes than a juvenile" convicted of first-degree murder. *Id.*

Sharma's sentence raises precisely the type of proportionality and equal protection concerns that the SJC foresaw in *Brown*. As sentenced, Sharma's earliest parole eligibility date for his aggregate sentence falls

twenty-two years after his crime of conviction,[3] whereas a juvenile convicted of first-degree murder and sentenced at the same time as Sharma would have become eligible for parole after fifteen years.[4] In addition, after *Diatchenko I*, a first-degree homicide offender with consecutive or lengthy concurrent sentences is entitled to resentencing. *Commonwealth v. Costa*, 472 Mass. 139 (2015) (resentencing for

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[3] Sharma's earliest parole eligibility on his aggregate sentences, as calculated at sentencing, is twenty-two years. While the Parole Board normally calculates a single parole eligibility date by aggregating parole-ineligibility periods for a defendant's underlying sentence, the Parole Board's regulations include an exception to that rule for a sentence "ordered to run consecutive to a life sentence." 120 Code Mass. Regs. § 200.08. Although Sharma was in fact paroled after a hearing on September 25, 2018—that is, based on a hearing conducted after more than twenty-two years of incarceration—because of the regulation separating parole for life sentences from other sentences, that parole determination only applied to his life sentence. The SJC is currently considering a statutory and constitutional challenge to the Parole Board regulation that creates a tiered parole process for individuals like Sharma, *Dinkins v. Massachusetts Parole Board*, SJC-12882, the outcome of which could potentially affect Sharma.

[4] After *Diatchenko I* and progeny, the legislature amended G.L. c. 279, § 24, to prescribe minimum sentences for juveniles convicted of first-degree murder that currently range from twenty to thirty years. However, a juvenile sentenced for first-degree murder *before* these amendments—including any juvenile convicted of first-degree murder in 1999, when Sharma was sentenced—became eligible for parole after fifteen years. *See Commonwealth v. Costa*, 472 Mass. 139, 140 (2015).

consecutive first-degree sentences); *Commonwealth v. Wiggins*, 477 Mass. 732, 747-48 & n.20 (2017) (resentencing for first-degree juvenile offender with concurrent nonhomicide sentences that exceed fifteen years).

A second-degree homicide offender should not be worse off than all first-degree offenders. This Court should address the constitutional concerns raised by this inequity as the SJC did in *Perez I* and *II*, and should conclude that *any* aggregate sentence that causes a juvenile convicted of a lesser crime than first-degree murder to be eligible for parole *after* a juvenile convicted of first-degree murder is presumptively disproportionate and therefore requires a *Miller-Perez* hearing.

At a minimum, this Court should conclude that Sharma's particular aggregate sentence, with its 22-year parole eligibility period, is presumptively disproportionate. *See Commonwealth v. Washington*, 97 Mass. App. Ct. 595, 601, 603 (2020) (remanding because sentence with parole eligibility date of 16 years was imposed "without the benefit of a *Miller* hearing"). *See also infra* Part I(C) (analyzing proportionality of Sharma's sentence without presumption of disproportionality). Although Sharma has already been incarcerated for more than twenty-

two years, the "presumption [of disproportionality] arises at the time of sentencing," and subsequent events, such as good time credits or a defendant's fate before the Parole Board, do not affect the constitutional analysis. *See Washington*, 97 Mass. App. Ct. at 601 (sentence is presumptively disproportionate regardless of defendant's repeated attempts at parole). *See also Commonwealth v. Lutskov,* 480 Mass. 575, 584 n.7 (2018) (sentence is presumptively disproportionate based "on the parole eligibility date at the time of sentencing," notwithstanding possibility that parole eligibility date might ultimately be less than fifteen years after good time credits).[5]

Because Sharma's twenty-two-year parole eligibility period, viewed at the time of sentencing, is presumptively disproportionate, he is entitled to a hearing or review consistent with *Miller-Perez*.

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[5] "Critically, the Eighth Amendment requires trial courts to exercise this discretion [to consider the mitigating qualities of youth] at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line." *State v. Houston-Sconiers*, 391 P.3d 409, 419 (Wash. 2017). Moreover, "[a] prisoner in the Commonwealth does not have a liberty interest in the future grant of parole." *Doe v. Massachusetts Parole Bd.*, 82 Mass. App. Ct. 851, 858 (2012). The prisoner is merely afforded the opportunity to present his case for release.

B. No extraordinary circumstances justify treating Sharma more harshly than a juvenile convicted of first-degree murder.

Where a sentence is presumptively disproportionate, only "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. Examining whether such circumstances exist requires weighing "(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 pressures may have affected him.'" *Perez I*, 477 Mass. at 686, quoting *Miller*, 567 U.S. at 477.

This Court can make the *Miller* determination on the record before it where "the Commonwealth will not be able to demonstrate that there is no reasonable possibility of rehabilitation." *See Perez II*, 480 Mass. at 573 (declining to remand for a second *Miller* hearing where record was sufficient to show Commonwealth could not meet its

burden). "[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 will not be able to meet its evidentiary burden when the Parole Board has already found "that Sunil Sharma is rehabilitated." RAII/9. Indeed, in its submission to the Superior Court, the Commonwealth noted that it "applauds the defendant for amending his life over the last decade." RAII/157. Sharma's rehabilitation has included education, religious study and practice, employment, and establishing and maintaining family relationships. RAII/8. As the Parole Board recognized, despite a challenging start, Sharma has followed a positive trajectory towards rehabilitation and maturity. RAII/6-9.

Other considerations relevant to the *Miller* factors fully support the conclusion that there are no "extraordinary circumstances" that justify a longer sentence for Sharma. Dr. Michelle Lockwood, Psy.D., who completed a psychosocial assessment in connection with parole, observed that Sharma's "particular attributes" include "early

attachment disruption and sadistic abuse coupled with [a] possible frontal lobe deficit of unknown etiology, culture shock, and exposure to racially charged community violence," which "all likely contributed heavily to the events that unfolded in April 1996." RAII/85. As Dr. Lockwood observed: "[e]arly attachment disruption and chronic childhood abuse can have long-lasting impact on development, including areas related to emotional control and executive functioning." *Id.* Sharma's "early childhood experiences likely made him ripe for affiliation in street/gang life. . . . Over time, as he became more deeply involved with antisocial activities, his own antisocial behavior only increased. Violence became a viable and acceptable means to an end for him," and he found "personal benefit in his affiliation with his 'crew' in Chinatown." *Id.*

Sharma's "early developmental history, was remarkable for significant attachment disruption and sadistic physical abuse." RAII/84. Around age 9, Sharma moved to the United States to live with a mother and sister he barely knew and struggled in school. RAII/71-72, 88-89. His peer environment furthered his exposure to violence. When he joined a Chinatown crew, his "leader" not only became his surrogate

father, but also an adult figure who explicitly required that Sharma engage in violence, tasking him with threatening and beating people up. RAII/73-74. "Adolescents are, by nature, disproportionately influenced by their peers in even the best of situations. With essentially few other competing significant attachments, it is not surprising that [Sharma] was drawn to the community and comradery of his 'crew' and street life." RAII/84-85. When Sharma believed his crew to be under threat, he took it upon himself to "problem solve" through violence, failing entirely to appreciate or think through the consequences of an armed assault, including the harm to his intended victims or the risk of harm to innocent bystanders. RAII/75.

In sum, Sharma demonstrates precisely the qualities that the United States Supreme Court has found diminish the culpability of juveniles who commit crimes, namely, immature judgment, lack of impulse control, an underdeveloped capacity for self-regulation, and vulnerability to negative influences. *See Roper v. Simmons*, 543 U.S. 551, 569-70 (2005); *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 471 Mass. 12, 30 (2015) (*Diatchenko II*). This Court should conclude that the Commonwealth cannot show "extraordinary circumstances"

that would justify a sentence, "prior to parole eligibility, longer than a juvenile convicted of [first-degree] murder." *Perez II*, 480 Mass. at 573. Sharma's sentence should "therefore [be] amended to conform his parole eligibility to that available to juveniles convicted of [first-degree] murder." *Id.* In the alternative, this Court should "remand [this] matter to the Superior Court for a *Miller* hearing to determine whether the sentence comports with the requirements of art. 26," and if it does not, for resentencing. *Perez I*, 477 Mass. at 679.

*C. **Even if Sharma's sentence is not presumptively disproportionate, Sharma's sentence is still cruel, unusual, and/or unconstitutionally disproportionate given the specific circumstances of this case.***

Even were this Court to conclude that Sharma's sentence structure is not itself presumptively disproportionate, that would not end the constitutional analysis. In assessing *any* challenge to the proportionality of a sentence, a court must consider three main factors: (1) the "nature of the offense and the offender in light of the degree of harm to society"; (2) "a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth"; and (3) "a comparison of the challenged penalty with the penalties prescribed for the same offense in other

jurisdictions." *Cepulonis v. Commonwealth*, 384 Mass. 495, 497-98 (1981). For a juvenile, the *Cepulonis* "tripartite analysis" must be "supplemented with the greater weight given to a juvenile defendant's age." *Perez I*, 477 Mass. at 684. Where a juvenile defendant faces consecutive sentences, "the constitutionality of the defendant's sentence, *including the aggregate term to be served before parole eligibility*, is to be evaluated in light of the particular facts presented." *Commonwealth v. LaPlante*, 482 Mass. 399, 403 (2019) (emphasis added).

As to the first factor (the nature of the offense and the offender), the offenses themselves are undeniably serious. Sharma has, however, served twenty-four years and, as the Parole Board unanimously found, he met the "appropriately high standard" of rehabilitation to be "a suitable candidate for parole." RAII/6-9. "The first prong of the disproportionality test also requires consideration of the particular offender," which, in Sharma's case, means considering the "unique characteristics of juvenile offenders." *Perez I*, 477 Mass. at 684. *See also Diatchenko I*, 466 Mass. at 669 (emphasizing that disproportionately is assessed "with regard to the particular offender"). A sentence for a

juvenile will "satisfy the first prong of the disproportionality test only if the factors described in *Miller* are considered by the sentencing judge." *Perez I*, 477 Mass. at 684-85 (citation omitted). Because those factors were not considered by the sentencing judge and weigh heavily in Sharma's favor (*see supra* Part I(B)), Sharma's aggregate sentence cannot satisfy the first prong of the disproportionality test.

Sharma's sentence likewise does not satisfy the second proportionality factor (a comparison to the sentences for more serious offenses), because it is disproportionately severe when compared to first-degree murder. A juvenile offender sentenced and convicted of first-degree murder at the same time as Sharma became parole eligible after fifteen years following *Diatchenko I*. *Perez II*, 480 Mass. at 568. A juvenile offender sentenced to consecutive life sentences for multiple first-degree homicides may be resentenced to fifteen years pursuant to *Costa*, 472 Mass. 139. A juvenile offender sentenced for first-degree murder with lengthy concurrent sentences for nonhomicide offenses (that are longer than fifteen years) is likewise entitled to resentencing. *Wiggins*, 477 Mass. at 747-48 & n.20. Indeed, the Commonwealth admitted below that had Sharma "been convicted of first-degree murder

and sentenced to life in prison without the possibility of parole, ***he would now be entitled to resentencing on all of his convictions***."
RAII/160 (emphasis added).

"The purpose of our murder statute, G. L. c. 265, [§] 1, is to gradate punishment and to categorize murder as murder in the first or second degree." *Commonwealth v. Matchett*, 386 Mass. 492, 502 (1982). First-degree murder should be punished more severely than second-degree murder, not less, because it requires proof of aggravating circumstances at trial that render the longest possible sentence appropriate. *See Commonwealth v. Riley*, 73 Mass. App. Ct. 721, 728-29 (2009). Sharma's sentence violates due process, equal protection, and the prohibition on cruel or unusual punishments because Sharma, having pleaded guilty to the lesser crime of second-degree homicide, must serve a longer sentence than a juvenile first-degree homicide offender without the benefit of a hearing to consider the *Miller* factors. *See Brown*, 466 Mass. at 690 (raising concerns that *Diatchenko I* could create such disparities, offending art. 26 and/or art. 1).

Indeed, the SJC has extended to second-degree juvenile offenders the same due process rights and procedural protections at parole

hearings that first-degree offenders received following *Miller*, because the SJC recognized that such protections are equally necessary to second-degree offenders if they are to have a "meaningful opportunity to obtain release." *See Commonwealth v. Okoro,* 471 Mass. 51, 62-63 (2015). Second-degree offenders with consecutive sentences should likewise receive the benefit of the other constitutional protections available to first-degree offenders since *Miller*, including the opportunity to have their sentences reassessed for proportionality in light of *Miller*.

The third factor in the proportionality inquiry, a comparison to the penalties applicable in other jurisdictions, is not meaningful in this instance, since Sharma's situation is specific to the facts of his case and to the murder statute in place at the time of his conviction, as it has been applied and revised in light of *Diatchenko I* and its progeny. *Cf. Perez I*, 477 Mass. at 686 (declining to reach third prong where juvenile's sentence failed first and second prongs).

Sharma's sentence does not satisfy the first two prongs of the proportionality analysis, and as such, this Court must remand for resentencing.

II. Sharma Must Be Resentenced Because Changes in Constitutional Law Have Reshaped the Sentencing Landscape in a Manner that His Sentencing Judge Could Not Have Anticipated When that Judge Exercised His Discretion to Sentence Sharma Consecutively

Sharma was sentenced in 1999, long before *Miller*, *Diatchenko I*, and progeny changed juvenile sentencing for homicide and other serious crimes. This Court must vacate Sharma's on-and-after sentences and order resentencing to consider whether his sentences should be imposed concurrently. *See Costa*, 472 Mass. at 143 (2015) (judge has power under Rule 30(a) to correct unconstitutional sentence originally imposed). A court must correct an unlawful or unconstitutional sentence at any time upon a defendant's proper written motion. *See* Mass. R. Crim. P. 30(a) (permitting challenge to unconstitutional or unlawful sentence "at any time, as of right"). A defendant may challenge a sentence as unlawful even after a plea. *See Commonwealth v. Azar*, 444 Mass. 72 (2005) (addressing merits of defendant's sentence challenge under Rule 30(a) following plea).

The Superior Court's decision not to resentence Sharma in light of *Miller* and progeny constitutes legal error. The Supreme Court concluded in *Miller* that "'children are constitutionally different from

adults for purposes of sentencing,' irrespective of the specific crime that they have committed." *Diatchenko I*, 466 Mass. at 670, quoting *Miller,* 567 U.S. at 471. "[C]hildren demonstrate a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking;" they "are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment; and they lack the ability to extricate themselves from horrific, crime-producing settings." *Diatchenko I* at 660, quoting *Miller*, 567 U.S. at 471 (quotations omitted). There are "fundamental differences between juvenile and adult minds." *Miller*, 567 U.S. at 471-72 (citation omitted). Thus, "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472. Nothing about children's "distinctive (and transitory) mental traits and environmental vulnerabilities [] is crime-specific." *Id.* at 473.

Indeed, dissenting from *Miller*, Chief Justice Roberts emphasized the breadth of the opinion: "the Court tells us [that] none of what [*Graham*] said about children . . . is crime-specific," and as such, "[t]he

principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently." *Id.* at 501 (Roberts, C.J., dissenting) (quotations and citation omitted). "In short, the Court banned the imposition of the sentence without considering the unique characteristics of the juvenile. . . . This shift in focus, away from the sentence imposed and the type of crime committed and towards the procedure used by courts to sentence children, marks a fundamental change in the Court's juvenile jurisprudence," from "a focus on a particular sentence . . . to the person being sentenced." Breen & Mills, Mandating Discretion: Juvenile Sentencing Schemes After *Miller v. Alabama*, 52 Am. Crim. L. Rev. 307 (2015).

That fundamental premise—that children are constitutionally different for the purpose of sentencing—has led to sweeping changes that judges who sentenced juveniles before 2012 could not have anticipated. In *Costa*, the SJC concluded that a defendant with two consecutive life sentences was entitled to resentencing for his juvenile crimes because his trial judge did not know "about the constitutional differences that separate juvenile offenders from adults." *Costa*, 472 Mass. at 144. The new, retroactive constitutional rule announced in

Miller and *Diatchenko* substantially changed the legal landscape in a manner that the *Costa* sentencing judge could not have predicted. *Id.* at 144. The SJC determined that resentencing was required specifically because the sentencing judge "did exercise discretion in deciding to impose consecutive rather than concurrent sentences." *Id.* at 145. Indeed, the Court emphasized that what distinguished *Costa* from *Diatchenko I*—where the SJC had concluded that the defendant was *not* eligible for resentencing—was the exercise of discretion: in *Diatchenko I*, the juvenile faced a statutorily mandated sentence even after *Miller*, whereas in *Costa*, a judge on resentencing would have an opportunity to exercise meaningful discretion. *Id.* at 144-45 (distinguishing *Diatchenko I*).

Applying *Costa*, the SJC likewise ordered resentencing in *Wiggins*, , where a juvenile defendant had been sentenced for first-degree murder and had received multiple concurrent sentences—all longer than fifteen years—for home invasion and robbery while masked. 477 Mass. at 747 & n.20. Although the juvenile's first-degree murder sentence had already been "revised" by the Department of Correction in light of *Diatchenko I*, the SJC concluded that he was eligible for further

resentencing on his concurrent sentences. *Id.* at 747-48 & n.20. Without reaching the merits of the defendant's constitutional claims about his concurrent sentences, the SJC vacated "the nonmurder sentences" and remanded those for resentencing. *Id.* at 747-48. The Court explained that resentencing was required because as in *Costa*, "the original sentencing judge could not have foreseen our decisions in *Diatchenko* and *Brown*," and thus the implications of the judge's discretionary sentencing choices would not have been clear at the time of sentencing. *Id.* at 748. *Cf. Perez II*, 477 Mass. at 687 (noting that *Costa* "was not decided on constitutional grounds").

Sharma's sentence presents the same fundamental notice and fairness concerns as in *Costa* and *Wiggins*. At the most fundamental level, the judge who sentenced Sharma did not know that, as a matter of constitutional law, juveniles must be sentenced differently than adults. On a practical level, the judge would not have been aware that Sharma's parole eligibility date—twenty-two years based on the judge's sentence—would be longer than the parole eligibility date for a first-degree offender. In 1999, neither the Superior Court, Sharma, nor defense counsel, could have known that Sharma's sentence would result

in a parole eligibility period almost fifty percent longer—at least seven years longer—than the period for individuals convicted of first-degree murder. As with *Costa* and *Wiggins*, the implications of discretionary sentencing choices would not have been apparent at the time of sentencing. Had Sharma's sentencing judge been aware of the changes coming under *Diatchenko I*, he might have chosen to sentence Sharma concurrently, to ensure that Sharma's sentence was appropriately calibrated as compared to sentences for first-degree murder.

The Commonwealth conceded below that had Sharma been convicted of first-degree murder, "he would now be entitled to resentencing on all of his convictions," RAII/160, but nonetheless suggested that because Sharma pleaded guilty to and was convicted of second-degree homicide, he is ineligible for relief. In other words, the Commonwealth suggested that Sharma should be uniquely penalized for failing in 1999 to anticipate changes in federal and state constitutional law more than a decade later. To suggest that Sharma should be in a *worse* position for having accepted responsibility and pleaded guilty to a lesser charge is fundamentally unfair. Consistent

with *Costa* and *Wiggins*, Sharma should be resentenced to avoid this inequitable result.

In addition, because after *Diatchenko I*, Sharma's sentence is longer than it would have been had he been sentenced for first-degree murder, Sharma has not received the "benefit of his bargain" for agreeing to plead guilty to a lesser charge. *Commonwealth v. Wallace*, 92 Mass. App. Ct. 7, 13-14 (2017) (Kafker, C.J.). When pleading guilty, Sharma surrendered his ability to appeal the denial of his challenge to the Superior Court's jurisdiction, which plea counsel believed had a substantial chance of success. RAII/143-44. That challenge would have raised a question of law that appears still to be undecided, namely the Commonwealth's burden of proof when establishing the defendant's age. A successful appeal would have given Sharma an opportunity to seek a disposition from the Juvenile Court, where the *maximum* penalty for second-degree murder was 15 years. *See Patrick P. v. Commonwealth*, 421 Mass. 186, 189 n.3 (1995) (outlining juvenile penalties in effect at the time). Moreover, a "basic assumption" underlying the plea agreement, was that Sharma would become eligible for parole *earlier* pursuant to his guilty plea than if he went to trial and

was convicted of murder. RAII/144. *See Commonwealth v. Santiago*, 394 Mass. 25, 28-30 (1985) (mutual mistake may be basis for reforming plea agreement).

This Court should vacate the order denying the Rule 30 motion and remand for resentencing, consistent "with the procedures set forth . . . in *Costa*," which "includes consideration of the *Miller* factors—among them, the 'possibility of rehabilitation'—as well as an assessment of the defendant's postsentencing conduct."[6] *LaPlante*, 482 Mass. at 404. In any such analysis, the Parole Board's finding of

[6] For the purposes of resentencing under *Costa*, the SJC has enumerated five *Miller* factors that sentencing judges "must consider," namely (1) the defendant's 'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences'; (2) 'the family and home environment that surrounds' the defendant; (3) 'the circumstances of the homicide offense, including the extent of [the defendant's] participation in the conduct and the way familial and peer pressures may have affected him' or her; (4) whether the defendant 'might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, [the defendant's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the defendant's] incapacity to assist his [or her] own attorneys'; and (5) 'the possibility of rehabilitation.'" *Costa*, 472 Mass. at 147, quoting *Miller*, 567 U.S. at 477-78.

rehabilitation should weigh heavily in favor of resentencing Sharma to concurrent, rather than consecutive, sentences.

III. Sharma's Consecutive Sentences Constitute Cruel or Unusual Punishment in Light of New Scientific Evidence Concerning the Cognitive Characteristics of Adolescents

Sharma should also be granted a new sentencing hearing based on newly discovered evidence because developments in psychology and neurology have radically altered the criminal justice system's view of adolescent criminality. A defendant seeking a new trial or sentencing hearing on this basis 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 its absence therefore "casts real doubt on the justice" of the prior proceeding. *See Commonwealth v. Epps*, 474 Mass. 743, 763-64 (2016) (quotation and citation omitted); *Commonwealth v. Cowels*, 470 Mass. 607, 616 (2015) (quotation and citation omitted). In considering scientific research and its evolution over time, the "touchstone must be to do justice, and that requires us to order a new trial where there is a substantial risk of a miscarriage of justice because a defendant was

deprived of a substantial defense." *Epps*, 474 Mass. at 767. "[I]f it appears that justice may not have been done, the valuable finality of judicial proceedings must yield to our system's reluctance to countenance significant individual injustices." *Commonwealth v. Brescia*, 471 Mass. 381, 388 (2015). A plea is no barrier to a Rule 30(b) motion. *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)).

Not only was the relevant information unknown to Sharma or defense counsel, but in 1999, when Sharma was sentenced, the academic understanding of juvenile criminality was very different than it is today: a perceived increase in juvenile crime had led to extreme stereotypes—since debunked—about predatory juvenile offenders. Professor John DiIulio Jr. of Princeton predicted an onslaught of "tens of thousands of severely morally impoverished juvenile super-predators." RAI/51.[7] Echoing this grim forecast, criminologist James Alan Fox of Northeastern University observed, "[u]nless we act today,

[7] DiIulio, Jr., The Coming of the Super-Predators, The Weekly Standard 26 (Nov. 27, 1995).

we're going to have a bloodbath when these kids grow up." RAI/54, 57.[8] *See also* RAI/66-67.[9] This "description of 'super-predators' in the mid-1990s captured the image of remorseless teenage criminals a major threat to society and was invoked repeatedly in the media and in the political arena" to justify tough treatment of juvenile offenders. RAI/80.[10] This led to new legislation across the country that "resulted in the wholesale transfer of youths into the adult criminal system—more than 250,000 a year by most estimates." RAI/81.[11] The Massachusetts Legislature and courts increased punishments in the juvenile justice system, including by passing the 1996 youthful offender law authorizing state prison sentences for juveniles—even though juvenile crime was

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[8] Garrett, Murder by Teens Soaring, Newsday A11 (Feb. 18, 1995); Hotz, Experts Warn of New Generation of Killers: Crime Researchers Blame 175% Rise in Homicides Among Teen-agers on the Growing Prevalence of Guns and the Crack Cocaine Industry, L.A. Times (Feb. 18, 1995) (quoting Fox using similar "bloodbath" language).
[9] McFarlane, Theories Vary on Why Kids Kill, Worcester Telegram & Gazette A1 (Apr. 25, 1999) (quoting Fox and noting a sharp increase in juvenile murders from 1984 to 1993).
[10] Scott & Steinberg, Adolescent Development and the Regulation of Youth Crime, 18 The Future of Children 17 (Fall 2008).
[11] Scott & Steinberg, at 18.

decreasing. RAI/62-63.[12] *See Commonwealth v. Clint*, 430 Mass. 219 (1999) (explaining that the Legislature enacted the 1996 youthful offender act "[i]n response to societal concerns about violent crimes committed by juveniles," and thereby "drastically altered" the transfer process for juveniles). In 1999, the *Boston Globe* reported: "Since 1992 in Massachusetts, the juvenile crime rate has declined, yet the number of minors committed to the Division of Youth Services has doubled. Minors are also receiving sentences twice as long as they were before the state passed the Youthful Offender Law in 1996." *Id.* In this environment, an offender's youth became an aggravating, rather than a mitigating, factor.

Scientific research has shown the fallacy of this "superpredator" myth. "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," for example, in "parts of the brain involved in behavior control." *Graham v. Florida*, 560 U.S. 48, 68 (2010). Using new technologies, like magnetic

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[12] Palmer, In Court, Youths Losing Their Innocence: Demands for Stricter Punishment Send More Juveniles to Adult Jails, Boston Globe A10 (Jan. 24, 1999).

resonance imaging (MRI), scientists have discovered that adolescent brains are further from full adult development than previously believed: "the frontal lobe undergoes great change between early adolescence and young adulthood." Soler, Shoenberg, & Schindler, Juvenile Justice: Lessons for a New Era, 16 Georgetown J. Poverty Law & Pol'y 483, 493 (2009) (citations omitted). "A part of the frontal lobe, the prefrontal cortex, governs 'executive functions' such as reasoning, planning, personality expression and regulating behavior. The prefrontal cortex is the last area of the human brain to mature. Research reveals that this maturation continues at a rapid pace until a person's early 20s." *Id.* (citations omitted). The National Academy of Sciences, to whose research the SJC has previously granted careful consideration, *see Commonwealth v. Gambora*, 457 Mass. 715, 726-27 (2010), issued a report confirming the scientific studies which "strongly suggest" that adolescents' poor self-control and failure to appreciate consequences are based upon the "biological immaturity of the brain" and "an imbalance among developing brain systems," National Research Council, Reforming Juvenile Justice: A Developmental Approach 2, 96 (R.J. Bonnie, R.L. Johnson, B.M. Chemers, & J.A. Schuck, eds., 2013).

Perhaps most importantly for sentencing purposes, "the science [has also] establishe[d] that for most youth, the qualities are transient. That is to say, they will age out," and only "[a] small proportion . . . will catapult into a career of crime unless incarcerated." *State v. Null*, 836 N.W.2d 41, 55 (Iowa 2013), citing E.S. Scott & L. Steinberg, Rethinking Juvenile Justice 53 (2008).

These developments have dispelled the myth of juvenile super-predators. By 2012, DiIulio (who coined the phrase "juvenile super-predators") and Fox (who warned of the coming "bloodbath") disavowed their earlier statements, even joining an amicus brief in support of the *Miller* petitioners that explained that empirical data has proven that "proponents of the juvenile superpredator myth . . . were wrong." *See* Br. of Jeffrey Fagan et al. as Amici Curiae, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647);[13] RAI/71-73.[14]

What has become the new scientific consensus was not available to or reasonably discoverable by Sharma in 1999. RAI/76-77 (noting, in

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[13] *Available at* https://eji.org/wp-content/uploads/2019/11/miller-amicus-jeffrey-fagan.pdf
[14] Haberman, When Youth Violence Spurred "Superpredator" Fear, N.Y. Times (Apr. 6, 2014).

2000, that "additional research is needed to examine normal brain function in adolescence," given the limited and "rather piecemeal observations" available at that time).[15] "Modern brain research technologies have developed a body of data from the late 1990s" on, with new imaging techniques that are "a quantum leap beyond previous methods for assessing brain development. Before the rise of neuroimaging, the understanding of brain development was gleaned largely from post-mortem examinations. Modern imaging techniques, however, have begun to shed light on how a live brain operates, and how a particular brain develops over time." Br. for the Am. Med. Ass'n and the Am. Academy of Child and Adolescent Psychiatry as Amici Curiae at 14-16, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).[16]

Defense counsel confirms that he did not know about this mitigating evidence at the time of Mr. Sharma's plea and sentencing hearing. RAII/144-45. Scant references by defense counsel to Sharma's

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[15] Spear, Neurobehavioral Changes in Adolescence, Current Directions in Psychological Science 113-14 (Aug. 2000).

[16] *Available at* https://eji.org/wp-content/uploads/2019/11/miller-amicus-american-medical-association.pdf.

youth at sentencing cannot substitute for substantive analysis or scientific review of the mitigating attributes of youth. *See Perez I*, 477 Mass. at 685 n.13 ("Although, as the dissenting opinion describes, the sentencing judge considered [in 2002] the factors relating to the defendant's age, competency, culpability, background, and familial influence, the judge did not have the benefit of current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior") (quotation and citation omitted). *See* RAII/145 (plea counsel avers that had this scientific evidence been available at the time, he would have sought and presented expert reports concerning adolescent brain development and pursued a more favorable plea bargain).

The new science casts real doubt on the justice of Sharma's consecutive sentences. "[B]ecause the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved." *Diatchenko I*, 466 Mass. at 670, citing *Graham*, 560 U.S. at 68. The dramatically altered scientific consensus around juvenile brains raises serious questions about

whether Mr. Sharma's sentences would have been the same had the sentencing judge heard expert testimony or reviewed an expert report, scientific publications regarding adolescent brain development, and/or other mitigating evidence about his youth and its attributes.

At a new sentencing hearing, Sharma should be permitted to develop the record regarding the relevant brain science. *Cf. Commonwealth v. Watt*, 484 Mass. 742, 756 (2020) (remanding to develop record in support of defendant's constitutional challenge to his sentence). Sharma should be permitted to introduce peer-reviewed scientific articles relating to discoveries about adolescent brain development. He should also be permitted to present evidence from an adolescent neurological or psychological development expert witness to explain the significance of recent scientific discoveries and offer an opinion about his neurological development at the time of the crimes and his capacity for rehabilitation. *See Epps,* 474 Mass. at 765-767 (defendant deprived of substantial defense because, if trial were conducted today, it would be manifestly unreasonable for counsel to fail to find and retain credible expert given evolution of scientific and medical research). *See also Okoro,* 471 Mass. at 66 (trial judge correctly

allowed expert to testify regarding "development of adolescent brains and how this could inform an understanding of this particular juvenile's capacity for impulse control and reasoned decision-making on the night of the victim's death").

Because the understanding of juvenile brains has changed fundamentally since Sharma was sentenced in 1999, Sharma should be permitted a full new sentencing hearing at which he can present scientific evidence not available or discoverable at his first sentencing.

Conclusion

For the reasons set forth above, this Court should vacate Sharma's consecutive sentences and amend them to make them concurrent, 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, followed by resentencing; 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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Addendum

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Article 1 of the Massachusetts Declaration of Rights
(as amended by art. CVI)

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.

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.

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 2019 and, according to Microsoft's wordcount tool, contains 10,249 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