COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No, SJC-13035
Appeals Court No. 2020-P-0550

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

SUNIL SHARMA,
Defendant-Appellant

BRIEF FOR THE COMMONWEALTH ON FURTHER APPELLATE REVIEW OF AN APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

RACHAEL ROLLINS
District Attorney
For The Suffolk District

PAUL B. LINN
Assistant District Attorney
BBO No. 559194
One Bulfinch Place
Boston, MA 02114
(617) 619-4070
Paul.linn@state.ma.us

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I. Whether the defendant's agreed-upon sentences of life in prison for second-degree murder with parole eligibility after fifteen years, followed by seven to ten years in prison for shooting two other people, pursuant to which he could have been released from prison on parole after twenty-two years, remain legal under *Miller* and its progeny.

II. Whether the defendant is entitled to a *Miller* hearing where his sentences remain legal and there is irrefutable evidence that he needed more than fifteen years to be rehabilitated.

III. Whether scientific advances regarding juvenile brain development are relevant to this case where the defendant's agreed-upon sentences gave him a chance to be released from prison on parole when he was only forty years old.

STATEMENT OF THE CASE

This case is before this Court on the appeal of the defendant, Sunil Sharma, from the denial of his motion for relief from unlawful confinement pursuant to Mass. R. Crim. P. 30(a).

In 1996, a Suffolk County grand jury indicted the defendant on seven charges: (1) murder, in violation of G.L. c. 265, § 1; (2-3) two counts of armed assault with intent to murder, in violation of G.L.

c. 265, § 18(b); (4-5) two counts of armed assault and battery, in violation of G.L. c. 265, § 15A(b); (6) illegal possession of a firearm, in violation of G.L. c. 269, § 10(a); and (7) illegal possession of ammunition, in violation of G.L. c. 269, § 10(h) (R.A. 1:5-7, 2:38-39).[1]

In 1998, the defendant filed a motion to dismiss the charges on the ground that he was only sixteen years old, not seventeen, at the time of the crimes (R.A. 1:8). After conducting an evidentiary hearing, Justice Margot Botsford issued a memorandum and order denying the motion, finding that the defendant was seventeen years old at the time of the crimes (R.A. 1:8-9; 2:13-32; C.A. 3-22).

On April 28, 1999, pursuant to a plea agreement, the defendant pleaded guilty to second-degree murder on the murder indictment (count 1) and guilty as charged on the indictments for armed assault with intent to murder (counts 2-3) and illegal possession of a firearm (count 6) (R.A. 1:9, 2:36-66; C.A. 23-53). By agreement, he was sentenced to life in prison for second-degree murder, with parole eligibility after fifteen years, *see* G.L. c. 265. § 2 (1996 ed); G.L. c. 127, § 133A (1996 ed.), followed by two concurrent sentences of seven to ten years in prison for the two counts of armed assault with intent to

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[1] "R.A. [vol.]:" herein refers to the defendant's record appendix; "D.Br." refers to his brief; and "C.A." refers to the Commonwealth's supplemental appendix.

murder, and a shorter concurrent sentence for possessing a firearm (R.A. 1:9, 2:63-64; C.A. 50-51). The other three indictments were placed on file with his assent (R.A. 1:9. 2:64; C.A. 51).

On November 4, 2019, the defendant filed his current motion for relief from unlawful confinement (R.A. 1:10, 13-175, 2:4-148). On February 6, 2020, the Commonwealth filed an opposition to the motion (R.A. 1:10, 2:149-68; pp. 36-51, below). On March 9, 2020, Justice Christine Roach denied the motion without a hearing "for all the reasons stated by the Commonwealth in its opposition," including that "the defendant's sentences pursuant to his plea remain lawful under *Miller* and *Diatchenko*" (R.A. 1:11, 2:169-70; pp. 34-35, below). On March 30, 2020, the defendant filed a timely notice of appeal (R.A. 1:11. 2:171-72).

STATEMENT OF FACTS

I. THE SHOOTING

At the plea hearing, the defendant admitted to the following facts.

On the evening of April 16, 1996, the murder victim, Kyung Shin, was eating dinner with several friends at the Rainbow Restaurant in the Chinatown section of Boston (R.A. 2:53; C.A. 40). Among her friends were the two armed assault victims, Rick Lee and Tuan Nguyen (R.A. 2:53; C.A. 40). Lee and Nguyen were planning to meet the

defendant and two of his friends -- a Mr. Moi and Kia Tia -- at the restaurant that evening (R.A. 2:53-54; C.A. 40-41).[2]

Shortly after 8:30 p.m., the defendant and his friends arrived, and Lee invited them to his table (R.A. 2:53-54; C.A. 40-41). Lee and Moi, speaking Cantonese, got into an argument that lasted several minutes (R.A. 2:54; C.A. 41). During this argument, the defendant went outside and retrieved a gun he had hidden under a car (R.A. 2:54; C.A. 41). He brought the gun into the restaurant and, a short time later, fired at least five shots at Lee and Nguyen (R.A. 2:54; C.A. 41). Lee was shot in the back, Nguyen was shot in the hand and groin, and Shin, who was sitting behind Lee, was shot in the chest (R.A. 2:54-55; C.A. 41-42).[3] The bullet that hit Shin pierced her heart and lung, killing her (R.A. 2:55; C.A. 42). The defendant and his friends then fled the restaurant (R.A. 2:55; C.A. 42).

A few months later, the defendant was arrested in Detroit, Michigan (R.A. 2:55; C.A. 42). While being booked there, he said, "I'm the one wanted for murder in Boston" (R.A. 2:55; C.A. 42).

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[2] According to the Parole Board, the meeting was gang-related: the defendant was a member of a "crew" that extorted money from illegal gambling operations in Chinatown, and Lee and Nguyen were members of a rival crew (R.A. 2:7, 10).

[3] The defendant denied that Shin was sitting behind Lee, claiming instead that Lee used Shin as a human shield (R.A. 2:57; C.A. 44).

After being returned to Boston and given his *Miranda* warnings, the defendant confessed to the shooting (R.A. 2:55; C.A. 42). He also took the police to a place in East Boston where he had thrown his gun into the water (R.A. 2:56; C.A. 43). A police dive team found a handgun in the water in that area (R.A. 2:56; C.A. 43). Ballistics testing established that this gun was consistent with the murder weapon (R.A. 2:56; C.A. 43).

II. THE DEFENDANT'S BIRTH DATE

The Commonwealth alleged that the defendant was born on August 12, 1978, making him seventeen years old (an adult for legal purposes) at the time of the shooting (R.A. 2:13; C.A. 3). The defendant, however, claimed to have been born on August 12, 1979, making him only sixteen (a juvenile) (R.A. 2:13; C.A. 3).[4]

There is apparently no official record of the defendant's birth in India (R.A. 2:15 & n.5: C.A. 5 & n.5), but the defendant's mother testified that the defendant's older brother Anil was born on January 5, 1978, and that the defendant was born on August 12, 1979 (R.A. 2:15 & n.3, 24; C.A. 5 & n.3, 14). She had written these birth dates on

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[4] The crimes in this case occurred three months before the enactment of the Youthful Offender Act, under which a juvenile could be indicted as an adult for a murder committed when he was sixteen. *See* St. 1996, ch. 200, § 2.

immigration documents in 1987 and 1996, but had written on a 1995 immigration document that that Anil was born on January 5, 1976, and that the defendant was born on August 12, 1978 (R.A. 2:15-16; C.A. 5-6). Similarly, the brothers' medical records contain conflicting information about the years in which they were born (R.A. 2:16-18; C.A. 6-8). Nonetheless, all of Anil's medical records from 1992 to 1995 say that he was born in 1976, and all of the defendant's medical records between 1993 and 1995 say that he was born in 1978 (R.A. 2:16-18; C.A. 6-8). On a 1993 medical record, the defendant's typed date of birth was changed by hand from 1979 to 1978 (R.A. 2:17; C.A. 7). In addition, the defendant consistently told the police after five arrests between 1993 and 1995 that he was born in 1978 (R.A. 2:18-21; C.A. 8-11).

Judge Botsford found the evidence that the defendant was born in 1978 more credible than the evidence that he was born in 1979 (R.A. 2:24-32; C.A. 14-22). Specifically, she noted that the defendant had consistently been using the 1978 birth date since 1995 (R.A. 2:24-32; C.A. 14-22), and that he had not moved to dismiss an adult extortion charge brought against him in August of 1995 on the ground that he was a juvenile (R.A. 2:30, C.A. 20).

As part of his plea bargain, the defendant waived his right to appeal from Judge Botsford's decision (R.A. 2:49-51; C.A. 36-38).

ARGUMENT

Generally, this Court will review a decision denying a motion for relief from unlawful confinement pursuant to Mass. R. Crim. P. 30(a), only for an abuse of discretion or an error of law. *Commonwealth v. Perez*, 480 Mass. 562, 567 (2018) ("*Perez II*") (citing *Commonwealth v. Wright*, 469 Mass. 447, 461 (2014)). Where the defendant claims that the motion judge "made an error of constitutional dimension," however, this Court will "review independently the application of constitutional principles to the facts found" by the motion judge. *Id.* (internal quotation marks and citations omitted). And where, as here, the motion judge was not the plea judge did not make any findings of fact, this Court is "in the same position as the [motion] judge" to review the law and the record, and thus will not afford the motion judge substantial deference. Nonetheless, the motion judge's ruling in this case should be affirmed, as the judge interpreted the law and applied it to the record correctly.

I. THE DEFENDANT'S AGREED-UPON SENTENCES OF LIFE IN PRISON FOR SECOND-DEGREE MURDER WITH PAROLE ELIGIBILITY AFTER FIFTEEN YEARS, FOLLOWED BY SEVEN TO TEN YEARS IN PRISON FOR SHOOTING TWO OTHER PEOPLE, PURSUANT TO WHICH HE COULD HAVE BEEN RELEASED FROM PRISON ON PAROLE AFTER TWENTY-TWO YEARS, REMAIN LEGAL UNDER *MILLER* AND ITS PROGENY.

A. The Defendant's Plea And Agreed-Upon Sentences Remain Valid Even Though *Miller* And Its Progeny Have Reduced The Time The Defendant Would Have Had To Serve In Prison Before Becoming Parole Eligible If He Had Gone To Trial And Been Convicted Of First-Degree Murder.

This case is unique among the Massachusetts cases that have addressed sentences for juvenile offenders in light of *Miller v. Alabama*, 567 U.S. 460 (2012), and *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 665 (2013), as it involves sentences that the defendant agreed to serve pursuant to a plea agreement. A defendant "is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended . . . the likely penalties attached to alternative courses of action." *United States v. Robinson*, 587 F.3d 1122, 1129 (D.C. Cir. 2009) (alteration in original) (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970)); *accord Commonwealth v. Fenton F.*, 442 Mass. 31, 39 n.13 (2004). Absent government misconduct, "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable

because later judicial decisions indicate that the plea rested on a faulty premise." *Salas v. Vazquez*, 773 Fed. Appx. 204, 205 (5th Cir. 2019) (quoting *Brady*, 397 U.S. at 757), *cert. denied*, 140 S. Ct. 1223 (2020). Nor is such a plea "subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered." *United States v. Simpson*, 430 F.3d 1177, 1193 (D.C. Cir. 2005) (quoting *Brady*, 397 U.S. at 757). "[T]he possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompany a guilty plea." *United States v. Sahlin,* 399 F.3d 27, 31 (1st Cir. 2005) (citing Brady, 397 U.S. at 757). Accordingly, the reduced sentences required by *Miller* and *Diatchenko* for juvenile offenders convicted of *first-degree* murder do not affect the validity of the defendant's pleas to *second-degree* murder and armed assault with intent to murder or the agreed-upon sentences imposed pursuant to the plea agreement.

The defendant's claim that *Diatchenko* has effectively deprived him of the "benefit of his bargain" (D.Br. 45) is both legally irrelevant and factually inaccurate. First, as shown above, changes in the law do not invalidate a plea agreement merely because they might have affected the defendant's decision whether or not to accept the plea offer if the defendant had been able to look into the future and see that the

changes were forthcoming. *See Sahlin*, 399 F.3d at 31 (defendant's agreement to serve sentence calculated under federal sentencing guidelines was not affected by later ruling that adherence to the guidelines is not mandatory). Second, the defendant ignores the fact that, if he had rejected the plea and been convicted of first-degree murder, he would have carried for thirteen years (until *Miller* was decided) the tremendous psychological burden of believing that he would never be released from prison. And even now, under *Miller* and its progeny, he would be entitled only to a *Miller* hearing, which, at best, would make him eligible for parole as soon as the *Miller* issue was decided: at least two years after he could have been released from prison on parole pursuant to his actual sentences (had he not been denied parole on his life sentence in 2012 (R.A. 2:5-7)). In these circumstances, the defendant's claim that he has been deprived of the benefit of his bargain borders on flippancy.

Furthermore, the defendant has made no showing "that a decision to reject the plea bargain would have been rational under the circumstances." *Commonwealth v. Lys*, 481 Mass. 1, 7 (2018) (ultimately quoting *Padilla v. Kentucky*¸ 559 U.S. 356, 372 (2010)). In particular, he does not dispute that the evidence of his guilt was overwhelming. His identity as the shooter was established beyond any doubt by his confession to the shooting and his ability to lead the police to the area where he had disposed of the gun (R.A. 2:55-56; C.A. 42-43), and his

admission that he had gone outside during the argument in the restaurant to get his gun (R.A. 2:54; C.A. 41) was strong evidence of deliberate premeditation, and thus first-degree murder. In these circumstances, the chances that the defendant would have been acquitted or convicted of a lesser degree of murder if he had rejected the plea offer were negligible.

The defendant counters by arguing that, if he had not pleaded guilty, he could have appealed from Judge Botsford's ruling regarding his age at the time of the crimes (D.Br. 45). He has made no showing, however, that such an appeal might have succeeded. Specifically, he has not cited any evidence of his purported 1979 birth date that his plea counsel did not find during the year he spent litigating the issue (*see* R.A. 2:143). Nor has he cited any authority in support of his suggestion that Judge Botsford may have used the wrong standard of proof in deciding the motion (D.Br. 45). In any event, since Judge Botsford saw and heard the witnesses testify at the hearing, her findings of credibility would be entitled to conclusive deference on appeal. *Commonwealth v. Bonnett*, 482 Mass. 838, 846-47 (2019) (citing *Commonwealth v. Sparks*, 433 Mass. 654, 661 (2001)). Thus, the defendant's argument regarding his motion to dismiss is baseless.

For all of these reasons, the defendant's guilty pleas and agreed-upon sentences remain valid.

B. The Defendant's Sentences Are Proportional To The Crimes Of Second-Degree Murder And Two Counts Of Armed Assault With Intent To Murder, Regardless Of The Fact That The Defendant Would Now Be Entitled To A *Miller* Hearing If He Had Been Convicted Of First-Degree Murder.

Granted, a guilty plea does not prevent a defendant from challenging a sentence that has been made illegal by subsequent changes in the law. *Se, United States v. Peppers*, 899 F.3d 211, 225-26 (3d Cir. 2018); Mass. R. Crim. P. 30(a). In this case, however, the defendant's sentences remain legal even after *Miller* and its progeny. All that is required by *Miller* and *Diatchenko* is that a juvenile offender be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Diatchenko*, 466 Mass. at 674 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)). Here, the defendant became eligible for parole on his life sentence in 2011, and thus could have become eligible for release from prison on parole on his consecutive sentences as early as 2018.[5] At that time, he had served

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[5] Pursuant to 120 Code Mass. Regs. § 200.08, a defendant sentenced to a term of imprisonment consecutive to a life sentence must be paroled on his life sentence before beginning to serve his consecutive sentence. This means that the defendant here could not have become eligible for release on parole until 2018 (or 2019 as a practical matter, given the time needed for the Parole Board to decide the matter twice).

The defendant was paroled to his consecutive sentence on June 11, 2019 (R.A. 2:6-9), meaning that he will become eligible for release from prison on parole in 2026. Notably, however, the Supreme Judicial

twenty-two years in prison and was only forty years old. That he did not become eligible for release from prison on parole in 2018 is due not to his original sentences, but to his "terrible" record of misconduct in prison (R.A. 2:11), which led the Parole Board to deny him parole to his consecutive sentence in 2012 (R.A. 2:10-12). Thus, his sentences are constitutional under *Miller* and *Diatchenko*.

The defendant's sentence is also legal under *Perez II*, as that decision applies only to sentences for crimes other than murder. Specifically, the *Perez II* Court ruled that, "where a juvenile is sentenced for a non-murder offense or offenses and the aggregate time to be served prior to parole eligibility exceeds that applicable to a juvenile convicted of murder," the sentence violates art. 26 of the Massachusetts Declaration of Rights, unless a judge finds pursuant to a *Miller* hearing that the juvenile deserves to be treated more harshly than a juvenile convicted of murder. *Perez II*, 477 Mass. at 679; *see Commonwealth v. Lutskov*, 480 Mass. 575, 583-84 (2018) (armed home invasion); *Commonwealth v. Washington*, 97 Mass. App. Ct. 595, 595, 601 (2020) (rape of a child, robbery, and kidnapping). Here, the defendant not only committed a murder but also fired gunshots that

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Court, has taken direct appellate review of an appeal challenging 120 Code Mass. Regs. § 200.08. *See Dinkins v. Massachusetts Parole Board*, No. SJC-12882. Were the SJC to rule in Dinkins's favor, the defendant here would become eligible for release on parole immediately.

seriously wounded and could easily have killed two other people. Thus, his case is not governed by *Perez II*.

The defendant's reliance on *Commonwealth v. Wiggins*, 477 Mass. 732 (2017), is also misplaced. In *Wiggins,* the juvenile offender Laporte was convicted of both first-degree murder and non-murder charges, including armed home invasion. *Id.* at 747. The judge sentenced the defendant to the mandatory term of life in prison without parole for murder, and to a concurrent term of thirty to thirty-five years in prison for armed home invasion. *Id.* Pursuant to *Diatchenko*, Laporte became eligible for parole on his murder conviction after serving fifteen years, but he would not become eligible for parole on his armed home invasion conviction until he served thirty years. *Id.* The Court vacated all of LaPorte's sentences and remanded the case for resentencing, reasoning that the original sentencing judge could not have foreseen *Diatchenko*, and thus "likely believed that the defendant would never be eligible for parole on his murder conviction." *Id.* at 748. In those circumstances, "the judge may not have given the same consideration to how the defendant's non-murder convictions would affect his eligibility for parole." *Id.* Here, in contrast, the sentencing judge knew that the defendant would become eligible for parole on his second-degree murder conviction after fifteen years, and thus knew that imposing consecutive terms of imprisonment on the armed assault convictions would lengthen

the time defendant had to serve before becoming eligible for release from prison on parole. Thus, this case bears no resemblance to *Wiggins*.

The defendant also argues that his sentences must be presumptively disproportionate to his crimes simply because, if he had been convicted of first-degree murder, he would now be entitled to resentencing on all of his convictions (D.Br. 28, 37-38). *See Commonwealth v. Costa*, 472 Mass. 139, 145 (2015). This argument suffers from several flaws. First, the Supreme Judicial Court has chosen the remedy of ordering resentencing on all charges in first-degree murder cases based on its "general approach to resentencing rather than on constitutional grounds." *Id.* "When an appellate court determines that one component of an integrated sentencing package is illegal," it makes sense to order a judge to reconsider all of the sentences, as they "constituted an integrated package, each piece dependent on the other, which cannot be separated." *Id.* at 144 (quoting *Commonwealth v. Renderos*, 440 Mass. 422, 434 (2003)). Here, in contrast, the defendant's sentence of life in prison with parole eligibility after fifteen years on his second-degree murder conviction remains legal under *Miller* and its progeny. As there was thus no error, there is no reason to resentence the defendant on any of his convictions.

Second, this case does not fall under the rationale of *Costa*. The basis of the *Costa* decision was that, when a juvenile offender was convicted of first-degree murder prior to *Miller*, the disposition of any

other charges of which he was convicted was largely symbolic. *Id.* at 144. No matter how long his other sentences were, or whether they were concurrent or consecutive, the juvenile offender would never be eligible for release on parole. That all changed in the early 2010s, when *Miller* and *Diatchenko* were decided. In the case at bar, however, nothing has changed. The sentencing judge knew at the time of sentencing that, by imposing consecutive sentences, he was increasing the time the defendant would have to serve before becoming eligible for release from prison on parole. For this reason too, this case is not governed by *Costa*.

Third, the fact that *Costa* gives juveniles convicted of first-degree murder a benefit that juveniles convicted of second-degree murder lack does not by itself render the defendant's sentence illegal. *Cf. Commonwealth v. Grassie*, 476 Mass. 202, 214 n.10 (2017) (noting that defendants convicted of second-degree murder, unlike defendants convicted of first-degree murder, do not have the benefit of plenary review under G.L. c. 276, § 33E). The defendant is not helped by the dicta in *Commonwealth v. Brown*, 466 Mass. 676 (2013) that art. 26 concerns might arise if a juvenile convicted of second-degree murder received a harsher sentence than a juvenile convicted of first-degree murder. *Id.* at 690. The *Brown* Court declined to rule in the abstract that this scenario would render a second-degree murder sentence that is longer than a first-degree murder unconstitutional. Furthermore, this

case does not present the situation envisioned in *Brown*, as the defendant was sentenced not only for second-degree murder, for which he received the same sentence that he would now face under *Diatchenko* if he had been convicted of first-degree murder, but also for two counts of armed assault with intent to murder: a crime that involves the same conduct and intent as murder. For this reason too, the defendant's sentences remain legal, *Costa* and *Brown* notwithstanding.

In sum, despite the defendant's troubled childhood and his youth at the time of the crimes, his sentences, which gave him a change to be released from prison on parole after twenty-two years, are not so disproportionate to the crimes of murdering one person and shooting two others that they "shock[] the conscience and offend[] fundamental notions of human dignity." *Commonwealth v. LaPlante*, 482 Mass. 399, 403 (2019) (quoting *Cepulonis v. Commonwealth*, 384 Mass. 495, 496 (1981) (quoting *Commonwealth v. Jackson*, 369 Mass. 904, 910 (1976))).[6]

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[6] It is also worth noting that, in 2014, in response to *Miller* and *Diatchenko,* the Legislature passed legislation requiring a juvenile offender convicted of first-degree murder by reason of extreme atrocity or cruelty to serve at least thirty years in prison before becoming eligible for parole. See *Watt*, 484 Mass. at 754 n.11 (citing G. L. c. 279, § 24). Although the defendant here was neither convicted of first-degree murder nor sentenced under the 2014 statute, the enactment of the 2014 statute nonetheless reflects a societal determination that it is neither cruel nor unusual to require a juvenile offender convicted of

For all these reasons, the defendant's sentences remain legal under *Miller* and its progeny.

II. THE DEFENDANT HAS NO RIGHT TO A *MILLER* HEARING WHERE HIS SENTENCES REMAIN LEGAL AND THERE IS IRREFUTABLE EVIDENCE THAT HE NEEDED MORE THAN FIFTEEN YEARS TO BE REHABILITATED.

The Supreme Judicial Court has consistently ruled that a juvenile offender convicted of second-degree murder may legally be sentenced to the mandatory term of life in prison with parole eligibility after fifteen years without receiving a *Miller* hearing. *Commonwealth v. Watt*, 484 Mass. 742, 753-54 (2020) (citing *Commonwealth v. Lugo*, 482 Mass. 94, 100 (2019), *and Commonwealth v. Okoro*, 471 Mass. 51, 55-63 (2015)). Accordingly, there is no merit to the defendant's argument that *Miller* invariably requires individualized consideration of a juvenile offender's circumstances during sentencing (D.Br. 39-41).

Furthermore, in order to justify a sentence that requires a juvenile offender to serve more than fifteen years before becoming eligible for release from prison on parole, the Commonwealth does not

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murder to serve more than fifteen years in prison without consideration of the offender's individual circumstances. See *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (disproportionality analysis turns in part on "objective indicia of society's standards, as expressed in legislative enactments").

have to prove "that the defendant exhibited "irretrievable depravity" or "irreparable corruption." *Perez II*, 480 Mass. at 571. Rather, the Commonwealth only has to prove "that the juvenile's personal characteristics make it necessary to delay parole eligibility for a time exceeding that available to juveniles convicted of murder," which under *Diatchenko* is fifteen years. *Perez II*, 480 Mass. at 571-72. Where a resentencing hearing occurs long after the original sentence was imposed, the judge must consider not only the circumstances at the time of the original sentence but also "the defendant's post-sentencing conduct, whether favorable or unfavorable." *Costa*, 472 Mass. at 149; *accord Renderos*, 440 Mass. at 435. In this case, there is irrefutable proof that fifteen years was not enough time to rehabilitate the defendant: his "terrible" record of violence in prison, which led the Parole Board to deny him parole on his murder sentence in 2012. Therefore, ordering a *Miller* hearing in this case, in addition to being unwarranted by the law, would be a waste of time.

Finally, there is no merit to the defendant's suggestion that his record of violence in prison can be minimized as a product of "the immaturity and recklessness characteristic of [his] age at the time." *Deal v. Commissioner of Correction*, 478 Mass. 332, 343 n.13 (2017) (cited at D.Br. 16 n.1). On the contrary, he committed at least three acts of serious violence in his mid to late twenties: slashing an inmate with a knife in 2004, at age 25; beating up an inmate in 2005, at age 27;

and assaulting a corrections officer in 2008, at age 29 (R.A. 6). The defendant has not cited any scientific evidence that brain development continues into a person's late twenties. Therefore, his record of violence fully justified the Parole Board's 2012 decision to deny him parole on his life sentence, which is the only reason why he is not eligible for release from prison on parole today.

III. THE SCIENTIFIC ADVANCES REGARDING JUVENILE BRAIN DEVELOPMENT ARE IRRELEVANT TO THIS CASE, SINCE THE DEFENDANT AGREED TO SENTENCES THAT GAVE HIM A CHANCE TO BE RELEASED FROM PRISON ON PAROLE WHEN HE WAS ONLY FORTY YEARS OLD.

At least for the purposes of this case, the Commonwealth accepts, *arguendo*, the defendant's exposition of the scientific advances regarding juvenile brain development that have come to light since he was sentenced in 1999 (D.Br. 47-56). Nevertheless, for the reasons set out in § I, above, the defendant's sentences remain proportional to his three violent crimes, despite these scientific advances and the case law which they have engendered. Had the defendant not continued to commit acts of violence in prison into his late twenties, long after his brain was fully developed, he would have become eligible for release from prison on parole in 2018, when he was only forty years old. *Cf. LaPlante*, 482 Mass. at 401 (sentencing scheme for juvenile offender must not be "so lengthy that it could be seen as the functional

equivalent of a sentence of life without parole"). Furthermore, the defendant agreed to the sentences pursuant to a still-valid plea agreement, which is unaffected as a matter of law by the intervening changes in the law regarding juvenile offenders convicted of first-degree murder or non-murder crimes. *See Sahlin,* 399 F.3d at 31(citing Brady, 397 U.S. at 757). In these circumstances, the defendant's sentences should not strike a person with full knowledge of the recent advances in the science regarding juvenile brain development as so unfair that they "shock[] the conscience and offend[] fundamental notions of human dignity." *LaPlante*, 482 Mass. at 403. Therefore, the defendant's motion for relief from unlawful confinement was properly denied.

CONCLUSION

For all of the foregoing reasons, the order denying the defendant's motion for relief from unlawful confinement should be affirmed.

Respectfully submitted
FOR THE COMMONWEALTH,

RACHAEL ROLLINS
District Attorney
for the Suffolk District

PAUL B. LINN
Assistant District Attorney
BBO No. 559194
One Bulfinch Place
Boston, MA 02114
(617) 619-4070
Paul.linn@state.ma.us

October 7, 2020

ADDENDUM

AUTHORITIES CONSTRUED

Massachusetts Declaration of Rights, Art. XXVI. Excessive Bails or Fines, and Cruel Punishments Prohibited.

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments….

G. L. c. 127, § 133A (1996 ed.): Eligibility for parole; notice and hearing; parole permits; revision of terms and conditions; revocation; arrest.

Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth, except prisoners confined to the hospital at the Massachusetts Correctional Institution, Bridgewater, and except prisoners serving a life sentence for murder in the first degree, shall be eligible for parole, and the parole board shall, within sixty days before the expiration of fifteen years of such sentence, conduct a public hearing before the full membership. . . . After such hearing the parole board may, by a vote of a majority of its members, grant to such prisoner a parole permit to be at liberty upon such terms and conditions as it may prescribe for the unexpired term of his sentence. If such permit is not granted, the parole board shall, at least once in each ensuing five year period, consider carefully and thoroughly the merits of each such case on the question of releasing such prisoner on parole, and may, by a vote of a majm1ty of its members, grant such parole permit. Such terms and conditions may be revised, altered and amended, and may be revoked, by the parole board at any time. The violation by the holder of such permit or any of its terms or conditions, or of any law of the commonwealth, may render such permit void, and thereupon, or if such permit has been revoked, the parole board may order his arrest and his return to prison, in accordance with the provisions of section one hundred and forty-nine.

G. L. c. 265, § 1. Murder.

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

G.L. c. 265, § 2 (1996 ed.): Punishment for murder; parole; executive clemency.

Whoever is guilty of murder committed with deliberately premeditated malice aforethought or with extreme atrocity or cruelty, and who had attained the age of eighteen years at the time of murder, may face the punishment of death pursuant to the procedures set forth in [G.L. c. 279, §§ 68-71]. Any other person who is guilty of murder in the first degree shall be punished by imprisonment in state prison for life. Whoever is guilty of murder in the second degree shall be punished by imprisonment in state prison for life. No person shall be eligible for parole under [G.L. c. 127, § 133A] while he is serving a life sentence for murder in the first degree, but if his sentence is commuted therefrom by the governor and council under the provisions of section one hundred and fifty-two of said chapter one hundred and twenty-seven he shall thereafter be subject to the provisions of law governing parole for persons sentenced for lesser offenses.

G. L. c. 265, § 18. Assault with Intent to Rob or Murder while Armed with Dangerous Weapon.

* * * *

(b) Whoever, being armed with a dangerous weapon, assaults another with intent to rob or murder shall be punished by imprisonment in the state prison for not more than twenty years. Whoever, being armed with a firearm, shotgun, rifle, machine gun or assault weapon, assaults another with intent to rob or murder shall be punished by imprisonment in the state prison for not less than five and not more than twenty years.

G. L. c. 278, § 33E. Capital cases; review by supreme judicial court

In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean: (i) a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

Mass. R. Crim. P. 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 law of the United States or of the Commonwealth of Massachusetts.

* * * *

Code of Massachusetts Regulations
TITLE 120: MASSACHUSETTS PAROLE BOARD
CHAPTER 200.00: PAROLE ELIGIBILITY

200.08: Consecutive ("From and After") Sentences

* * * *

(2) State Prison. Parole eligibility for an inmate serving consecutive state prison sentences shall be determined by calculating the parole eligibility date for each component sentence. This shall be accomplished by basing parole eligibility dates on the running of each component sentence from and after each other in the order imposed. The dates calculated shall be aggregated with the latest date controlling the parole eligibility date for the aggregate sentencing structure.

(3) Exceptions. The following exceptions to the above-provisions shall be recognized:

* * * *

> (c) A sentence for a crime committed on or after January 1, 1988 which is ordered to run consecutive to a life sentence shall not be aggregated with the life sentence for purposes of calculating parole eligibility on the consecutive sentence.

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R.A.P 16(k). This brief complies with the length limit of Mass. R.A.P. 20: it is written in 14-point Century Schoolbook font and contains fewer than 5,500 non-excluded words, as determined by Microsoft Word 2010.

/s/ Paul B. Linn

PAUL B. LINN
Assistant District Attorney

CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service of this opposition on the defendant by directing that two copies of this brief be served on his counsel by first-class mail, addressed as follows:

Emma Quinn Judge, Esq.
& David A. Russcol, Esq.
Zalkind, Dunkin & Bernstein, LLP
65a Atlantic Ave.
Boston, MA 02110

Respectfully submitted
For the Commonwealth,

RACHAEL ROLLINS
District Attorney
for the Suffolk District

PAUL B. LINN
Assistant District Attorney
BBO No. 559194
One Bulfinch Place
Boston, MA 02114
(617) 619-4070
Paul.linn@state.ma.us

February 8, 2021

No, SJC-13035
Appeals Court No. 2020-P-0550

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIA COURT

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

v.

SUNIL SHARMA,
Defendant-Appellant

BRIEF FOR THE COMMONWEALTH ON FURTHER APPELLATE REVIEW OF AN APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY