COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC-12570

MIDDLESEX COUNTY

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COMMONWEALTH OF MASSACHUSETTS

v.

DANIEL LaPLANTE

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REPLY BRIEF FOR THE DEFENDANT

ON APPEAL OF THE ORDER OF THE MIDDLESEX SUPERIOR COURT AT THE DIRECTION OF THE SINGLE JUSTICE

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I. INTRODUCTION

The Commonwealth urges the Court not to decide the "new and substantial issue whether a juvenile homicide offender may be required to serve forty-five years in prison before his or her first opportunity to seek release based on rehabilitation" on which the single justice based his decision to direct entry of this case in the full Court. AD:12; see Com.Br:42 n.5.[1] This question "is not squarely presented," the Commonwealth says, by cases in which a juvenile homicide offender is resentenced following the invalidation of his or her life without parole sentences because a resentencing judge may properly assess whether the defendant is ready to be paroled and, if not, may extend the juvenile's minimum period of incarceration beyond that which would otherwise be constitutional.

This argument confuses the role of judges charged with ensuring that juvenile life sentences conform to art. 26 with that of the executive agency charged with

[1] Citations to the Defendant's Main Brief are identified as Def.Br:Page; citations to the Commonwealth's Brief are identified as Com.Br:Page; citations to the Defendant's Record Appendix are identified as RA:Page; citations to the Defendant's Addendum are identified as AD:Page.

determining whether a particular applicant meets the criteria for release on parole at a particular time. It misapprehends the considerations this Court has made applicable to resentencings of juvenile homicide offenders. And it ignores the now-settled legal principles that limit punishment of even those juvenile offenders who commit the most serious crimes. Contrary to the Commonwealth's assertions, Defendant's case does not present an exception to the rule of *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655 (2013) ("*Diatchenko I*"), but rather a necessary application of it. The Court should answer the question presented and hold art. 26 prohibits any sentence that requires a juvenile offender to serve forty-five years before consideration for parole, even when he or she has committed the most serious crimes.

II. REPLY TO THE COMMONWEALTH'S ARGUMENTS

1. The Commonwealth's Suggestion that Judges Conducting Post-*Diatchenko* Resentencings May Consider a Defendant's Present Suitability for Parole Confuses Judicial and Executive Functions and Would Defeat the Legislative Intent Underlying the Parole Statutes if Accepted

The Commonwealth insists "[t]he importance of individualized sentencing cannot be overstated," since otherwise "every juvenile will receive the same sentence as every other." Com.Br:25-26 (quoting *Miller v. Alabama*, 567 U.S. 460, 476, 480 n.8 (2012)). As a general matter, Mr. LaPlante agrees every juvenile (and adult) should be treated, and sentenced, as the individual he or she is. However, while this Court has acknowledged "that certain language in *Miller* can be read to suggest that individualized sentencing is required whenever juvenile homicide offenders are facing a sentence of life in prison," it has also "determined that a mandatory life sentence with the possibility of parole satisfies the constitutional requirements for juveniles convicted of murder in the first degree, on the understanding that it will be for the parole board…to take into account the unique

characteristics of such offenders." *Commonwealth v. Okoro*, 471 Mass. 51, 56-58 (2015).

Thus, under this Court's current juvenile sentencing jurisprudence, mandatory juvenile life sentences are constitutional so long as they afford "a meaningful opportunity to obtain release, so that [the] sentence is not effectively one of straight life in prison—an outcome that art.26 prohibits." *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 19 (2015) ("*Diatchenko II*"). The issue here is how long a juvenile offender may be required to spend in prison before individualized consideration of a juvenile's rehabilitation begins.

The Commonwealth does not address this question. Instead, it proffers the novel theory that constitutional limitations on juvenile sentencing are irrelevant here because the Defendant was resentenced while an adult, and the resentencing judge had access to evidence on which she "specifically found that the defendant needed further rehabilitation, more than twenty-nine years into his period of incarceration." Com.Br:51. Mr. LaPlante's "comprehensive resentencing hearing pursuant to [*Commonwealth v.*] *Costa*," 472

Mass. 139 (2015), the Commonwealth asserts, provided him with the meaningful opportunity for release mandated by *Diatchenko I* and *II*, and the resentencing judge could therefore lawfully determine at that hearing that an additional sixteen years in prison was needed before the Defendant should be considered for parole. Com.Br:40.

This claim misconstrues both *Costa* and the respective responsibilities of sentencing courts and the Parole Board. In *Costa* this Court was at pains to emphasize that its decision was not constitutionally based, but rather was an application of more general principles applicable when one component of an integrated sentencing package is deemed unlawful. See 472 Mass. at 143-45. At a post-*Diatchenko I* resentencing, *Costa* said, judges "should consider: (a) the *Miller* factors; (b) evidence regarding the defendant's psychological state at the time of the offense; and (c) evidence concerning the defendant's postsentencing conduct, whether favorable or unfavorable." *Id*. at 149. Here, however, the Commonwealth urges the Court to find art. 26 satisfied by a sentence with a forty-five year parole horizon

not because of the resentencing judge's assessment of Mr. LaPlante's psychological state *at the time of the crime* or postsentencing *conduct*, but rather on her view of his rehabilitative progress, or lack thereof, on the date of resentencing. See Com.Br:40-45.

Even if the Court were inclined to generously read *Miller* factor (5)—the possibility of rehabilitation—as allowing judges to consider the extent to which such possibilities had been realized in a particular case as of the date of resentencing, the use of a negative finding on that question to decide a defendant should serve forty-five, rather than thirty, years before parole consideration would blur the lines between judicial and executive functions in a way this Court has rejected. See *Commonwealth v. Perez*, 480 Mass. 562, 574 (2018) ("*Perez II*") (defendant's "years [in prison] have presumably provided the defendant with the opportunity to demonstrate his own capacity for redemption and rehabilitation. After making its evaluation [of that rehabilitative work], the parole board retains the power to allow or deny parole in the exercise of its own judgment"); cf. *Commonwealth v. Amirault*, 415 Mass. 112, 117 (1993) (court may not

retroactively shorten sentence because it disagrees with Parole Board's judgment regarding defendant's rehabilitation). Moreover, the Commonwealth's claim a resentencing hearing can constitutionally stand in for an initial parole hearing, even when it occurs close to the time such a hearing would occur under one of two resentencing options presented, is based on a facile conception of the parole process itself and the difference between "determin[ing] how many years [a] defendant must serve before becoming eligible for parole [and t]he decision whether to grant parole" itself. *Costa*, 472 Mass. at 149 n.6.

The parole eligibility date within a criminal sentence does, of course, determine the minimum amount of time a defendant must spend in prison. It also, however, represents the date on which a juvenile homicide offender begins a periodic set of appearances before the Parole Board at which the Board assesses whether he or she "will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society" and grants parole only upon such a finding. See G.L. c.127 §130. For juvenile homicide offenders, once this process

begins the Board must consider their parole suitability at least once every five years, see G.L. c.127 §133A, and for persons like Mr. LaPlante as frequently as every three years,[2] until the offender is either granted parole or dies. Thus, as contemplated by the Legislature, a juvenile's parole eligibility date marks the commencement of an interactive process of assessment and feedback on which an unsuccessful parole applicant builds the next steps in his or her rehabilitative work, not merely the minimum time the offender must serve in prison.

If accepted, the Commonwealth's suggestion that the resentencing of juvenile homicide offender some years into his or her sentence can provide the constitutionally required meaningful opportunity for release would substitute the judgment of a lone Superior Court judge for that of a seven-member panel composed of persons with the varied educational backgrounds and professional expertise the Legislature

[2] The Court is presently considering whether juveniles convicted of murders committed before 1996 are entitled to parole 'setbacks' of no more than three years in light of the language G.L. c.127 §133A in effect before the date of amendments that extended the permissible period to five years. See SJC-12482 (argued January 8, 2019).

deemed necessary to evaluation of parole applications. See G.L. c.27 §4; see also *Diatchenko II*, 471 Mass. at 45 (Spina, J., dissenting) ("Not only are courts ill-equipped to decide whether parole should be granted but such a decision—both historically and legally—has been reserved for the executive branch"). Moreover, despite his or her lack of the expertise relevant to parole determinations, such a judge would be empowered to impose not a three- or five-year setback but a fifteen-year one, meaning a defendant like Mr. LaPlante would be deprived of between three and five opportunities for release at minimum—each of which, if it was unsuccessful, would provide him with feedback on how to continue working towards rehabilitation.

The Commonwealth rejects the idea a 'meaningful opportunity for release' has any substantive content, and insists it is only a procedural requirement that precludes sentences with parole eligibility dates "so excessive as to make clear that a defendant has no hope for any release during his lifetime." Com.Br:50. But the contention the Defendant's claim to an opportunity for release that holds out the possibility of some level of productive reengagement with society

"collapses" because "there can never be a guarantee of any particular quality of life upon release," Com.Br:50, only makes sense if one ignores that *Diatchenko I* and its progeny are premised not on guarantees, but on concepts of possibility and hope applicable to even those juveniles who have committed the worst crimes. See *Graham v. Florida*, 560 U.S. 48, 79 (2010) (prohibiting juvenile sentences that "give[] no chance for fulfillment outside the prison walls" and "den[y juveniles] any chance to later demonstrate that [they are] fit to rejoin society"). The Commonwealth's contention that an opportunity for release is meaningful so long as it affords a juvenile the possibility of leaving prison in time to die outside it cannot be reconciled with these concepts or the greater protections this Court has said art. 26 affords in the realm of juvenile punishment.

2. Contrary to the Commonwealth's Contention, *Perez II's* 'Extraordinary Circumstances' Framework Does Not Permit Resentencing Courts to Retroactively Find a Particular Juvenile Is Incorrigible or to Extend Parole Eligibility Beyond Constitutional Limits

"The Commonwealth notes the similarity of the extraordinary circumstances framework provided in

Perez II," under which a sentencing court may determine a particular juvenile non-homicide offender should have a longer parole eligibility horizon than that of a similarly situated juvenile convicted of murder, to the 'irretrievable depravity' analysis used under federal law "to determine whether a life without parole sentence may be given." Com.Br:43. "There is no danger of such [a] finding being premature" here, the Commonwealth argues, since Mr. LaPlante was resentenced well into adulthood and a 'finding of irreparable corruption' as to his teenage self could therefore be made without violating *Diatchenko I*. Com.Br:41; see also Com.Br:30 (asking Court to consider whether Defendant "may be among the rare 'irreparably corrupt' juvenile offenders").

The procedures set forth in *Perez II* are intended to ensure proportionality between the parole eligibility horizons of juvenile homicide and non-homicide offenders, not to allow rare juveniles to be sentenced to the functional equivalent of life without parole. See 480 Mass. at 571 n.7 (noting "that the United States Supreme Court, in focusing on 'irreparable corruption' and 'irretrievable

depravity,' was considering life without parole, not shorter parole eligibility periods" and citing, *inter alia*, *Miller* and *Graham*). The Commonwealth is thus correct that this Court has not addressed the applicability of the *Perez II* procedures "in the context of sentencing juvenile homicide offenders," Com.Br:42, but the applicability of *Perez II* is not at issue here because the sentencing of a non-homicide offender is not at issue. The Defendant has already conceded the resentencing judge had discretion to impose the longest constitutional period before parole eligibility, see Def.Br:10, 20, and nothing in *Perez II* suggests 'extraordinary circumstances' can justify a juvenile sentence that does not provide a meaningful opportunity for release. Indeed, *Diatchenko I* addressed and rejected that claim. See 466 Mass. at 669-70 ("a conclusive showing of traits such as an 'irretrievably depraved character' can never be made, with integrity, by the Commonwealth [even] at an individualized hearing") (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). The only question here is whether the parole eligibility date in the sentence actually imposed violates art. 26. As the Defendant

shows in his main brief, his sentence is unconstitutional because parole eligibility after forty-five years and around the time he can be expected to die does not hold out the possibility of reengagement with society required to make an opportunity for release meaningful. See Def.Br:22-34.

In a related vein, the Commonwealth insists "the key inquiry is to distinguish amongst [juvenile] murder defendants to determine which are the most serious. The number of lives lost is a crucial factor in determining both the extraordinary nature of the crimes and the offender" and posits "an anti-deterrent effect" that may apply "if further crimes can be incurred without additional consequence." Com.Br:34-36. Of course, both the Supreme Court and this Court have noted the lessened relevance of deterrence as a justification for imposition of the most extreme punishments on juveniles, and this Court has rejected "the idea[] that certain offenders should be imprisoned permanently because they have committed the most serious crimes" as incompatible with art. 26 in juvenile cases. *Diatchenko I*, 466 Mass. at 670-71 (citing *Graham*, 560 U.S. at 71-73, and *Miller*, 567

U.S. at 472-74); see also *Roper*, 543 U.S. at 572 ("the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of [imposition of the most severe adult punishment] is so remote as to be virtually nonexistent") (quotation omitted).[3]

Nevertheless, the Commonwealth contends, juvenile parole eligibility horizons of forty-five years or beyond must be maintained for use "in the context of terrorism, school shootings," or other mass casualty acts lest juveniles believe themselves entitled to a "volume discount" when they commit many crimes or harm many victims. Com.Br:36. While the idea of ever-increasing punishment for those who harm more people or commit more crimes has some intuitive appeal, the examples proffered by the Commonwealth demonstrate how its application is fundamentally incompatible with the heightened protections this Court has found art. 26 provides to juvenile offenders. Even in the context of

[3] The Commonwealth claims without analysis the lessened deterrent effect of the most severe punishments on juveniles is "tenuous when applied to murder," Com.Br:35, but overlooks that *Diatchenko I*, *Miller*, and *Roper*, each of which acknowledged this fact and relied on it in part for their holdings, were all murder cases.

the fifteen-year parole eligibility increments made applicable to juvenile homicide offenders pursuant to the *Diatchenko I* remedy, no one could seriously contend that consecutive sentences for crimes that claimed four or five lives—with corresponding parole eligibility horizons of sixty or seventy-five years—provided the "hope for some years of life outside prison walls" embodied in the concept of a meaningful opportunity for release. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736-37 (2016).

Thus, as the Defendant has acknowledged, "the categorical rule established by *Diatchenko I* means the retributive impulse will be left to some extent unsatisfied by any sentence, particularly if it precludes a separate period of minimum punishment attributable to each life lost." Def.Br:21-22. Still, the notion that limits on juvenile sentencing effectively confer a 'volume discount' on those who commit the most serious crimes is based on a misunderstanding of the sentences at issue, and one abetted by the Commonwealth's unfortunate claim this case is about whether "a juvenile may never be sentenced to a term of forty-five (and perhaps not

even thirty) years." Com.Br:23 (parenthetical in original).[4] The mandatory sentence for all juveniles convicted of murder—whether first- or second-degree, whenever committed, and regardless of the number of victims—is life in prison. The issue here is not sentence length but the number of years until first parole consideration—something this Court has emphasized does not mean a particular juvenile will not spend the rest of his or her life in prison. See *Diatchenko II*, 471 Mass. at 29-30 ("the art. 26 right of a juvenile homicide offender in relation to parole is limited. To repeat: it is not a guarantee of eventual release").

The limitations art. 26 places on criminal punishment—its elimination of the death penalty for all offenders and of life without parole for juveniles—necessarily means there will be cases in which sentencing dispositions feel insufficient in comparison to the crimes from which they arise. But a

[4] The Commonwealth goes so far as to claim "the defendant seems to question in his brief whether even a thirty-year sentence is necessary or permissive." Com.Br:51. In fact, the Defendant has asked that he be resentenced to an aggregate term of life with parole eligibility at thirty years. See Def.Br:42; see also *infra* at Part III.

categorical prohibition on juvenile sentences that do not grant a meaningful opportunity for release is the only way to prevent the otherwise "unacceptable likelihood" that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth" and allow the functional return of juvenile life without parole sentences. *Roper*, 543 U.S. at 573. As the Defendant has acknowledged, his is such a case. Def.Br:15. The Court should apply the rule of *Diatchenko I* in these difficult circumstances and ensure that Mr. LaPlante's sentences of life in prison conform to art. 26.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in the Defendant's main brief, the Court should vacate the sentence imposed by the Superior Court and remand the case for resentencing with parole eligibility after thirty years. The Court should further hold that an aggregate sentence structure that requires a juvenile homicide offender to serve forty-five years before consideration for parole does not provide a meaningful opportunity for release, and therefore violates art. 26.

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Mass. R. A. P. 16(k) that the foregoing complies with the rules applicable to the filing of briefs.

Merritt Schnipper

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

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CERTIFICATE OF SERVICE

On February 21, 2019 I filed Defendant Daniel LaPlante's reply brief through the Court's electronic filing system and served ADA Crystal Lyons, counsel for the Commonwealth, electronically via that same system.

February 21, 2019 Respectfully Submitted,

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