COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

SUFFOLK COUNTY 2019 SITTING

No. SJC-12570

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT,

V.

DANIEL LAPLANTE,
PETITIONER.

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

BRIEF FOR THE COMMONWEALTH

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ISSUE PRESENTED

1. May a sentencing judge exercise her discretion to impose consecutive life sentences for three first degree murders committed by a juvenile offender, amounting to a forty-five-year period before parole eligibility, consistently with art. 26, where the defendant received the full benefit of a Miller/Costa hearing and was found to have antisocial personality disorder and was in need of further rehabilitation nearly 30 years after the murders occurred?

STATEMENT OF THE CASE

Prior Proceedings

On January 12, 1988, a Middlesex grand jury returned an indictment in thirty-one parts against the defendant, Daniel LaPlante, involving several criminal episodes from December of 1986 through December 3, 1987, to wit:

No. 88-19 (Murder of Priscilla Gustafson, by shooting, on December 1, 1987 at Townsend);
No. 88-20 (Murder of William Gustafson, by drowning, on December 1, 1987 at Townsend);
No. 88-21 (Murder of Abigail Gustafson, by drowning, on December 1, 1987 at Townsend);
No. 88-22 (Breaking and entering in the daytime a building, the property of Andrew Gustafson with felonious intent, on December 1, 1987 at Townsend);
No. 88-23 (Armed assault in a dwelling of Pamela Makela on December 3, 1987 at Pepperell);
No. 88-24 (Assault by means of a dangerous weapon on Jonathan Lang on December 3, 1987 at Pepperell);
No. 88-25 (Assault by means of a dangerous weapon to wit: a gun on Edward Gallant on December 3, 1988 at Ayer);
No. 88-26 (Kidnapping of Pamela Makela on December 3, 1987 in Pepperell);
No. 88-27 (Breaking and entering in the day time the building of Paul and Lynne McGovern with intent to commit a felony);
No. 88-28 (Larceny under the property of Paul McGovern to wit a jacket, a cartridge belt and ammunition, on December 3, 1987 in Pepperell);
No. 88-29 (Larceny of a firearm the property of Paul McGovern on December 3, 1987 in Pepperell);
No. 88-30 (Carrying a firearm without complying with the requirement of the firearms laws on December 3, 1987 in Pepperell and Ayer);
No. 88-31 (Larceny of a motor vehicle the property of Gilbert Levesque on December 3, 1987 at Pepperell)
No. 88-33 (Receiving stolen property of Raymond Pindell, to wit: a firearm value exceeding $100 at Townsend);

No. 88-34 (Receiving stolen property the property of Andrew Gustafson to wit: a cordless Tandy phone, two television cable boxes and coins, with a value exceeding $100 on divers days in November and December of 1987 in Townsend);
No. 88-35 (Breaking and entering in the daytime the building of Raymond Pindell with felonious intent and did steal two Ruger handguns the value exceeding $100 on October 14, 1987 at Townsend);
No. 88-36 (Breaking and entering in the daytime a building the property of Andrew Gustafson with felonious intent and larceny therein on November 16, 1987 at Townsend)
No. 88-37 (Armed Burglary the dwelling house of Francis Bowen and armed assault on an occupant in Pepperell on December 8, 1986);
No. 88-38 (Entering without breaking in the nighttime a building of Francis Bowen on December 8, 1986 in Pepperell, persons therein being placed in fear);
No. 88-39 (Assault by means of a dangerous weapon to wit a hatchet on December 8, 1986 at Pepperell– four counts: Count 1 – Francis Bowen, Count 2 – Tina Bowen, Count 3 – Karen Bowen, and Count 4 – Kathy Knapp);
No. 88-40 (Kidnapping of Francis Bowen in Pepperell on December 8, 1986);
No. 88-41 (Kidnapping of Karen Bowen in Pepperell on December 8, 1986);
No. 88-42 (Kidnapping of Tina Bowen in Pepperell on December 8, 1986);
No. 88-43 (Kidnapping of Kathy Knapp in Pepperell on December 8, 1986);
No. 88-44 (Larceny in a building the property of Francis Bowen, one coat valued over $100 in Pepperell on December 8, 1986);
No. 88-45 (Breaking and entering in a building of Francis Bowen with felonious intent on or about December 10, 1986 at Pepperell);
No. 88-46 (Malicious destruction of property of Francis Bowen over $100 on December 10, 1986 at Pepperell). RA 1, 25-27; AD 86-112.[1]

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[1] References in this brief are cited as follows: to the Record Appendix as "RA #;" to the Commonwealth's Supplemental Record Appendix as "SRA #", to the Addendum as “AD #”, and to the defendant's brief as "D.Br. #." For the Court’s convenience, the Commonwealth has maintained the defendant’s numbering for the Addendum.

On September 7, 1988, the Court, Barton J, ordered the three murder indictments and the related breaking and entering in the daytime indictments (Nos. 88-19 through 88-22) severed from all the other indictments for trial. RA 7. On October 3 and 4, 1988, a jury was empaneled in Hampden Superior Court in Springfield. RA 10. Thereafter the trial before a jury comprised of Hamden County residents was held in Lowell Superior Court, Barton, J. presiding, starting October 5, 1988. The trial covered 17 volumes of transcript and 224 exhibits were entered into evidence. RA 13. Several of the other indictments were relevant to the murder charges and evidence of those charges was admitted during the trial, including as prior and subsequent bad act evidence. Those indictments included LaPlante's course of conduct in the six weeks preceding the murders (Nos. 88-32 and 88-34 through 88-36) and his violent course of conduct and actions stemming from his efforts to evade detection and arrest in the two days following the murders (Nos. 88-23 through 88-31).

At the close of evidence, on October 21, 1988, the Commonwealth filed a nolle prosequi on indictment 88-22, so that the jury was charged only with the three murder indictments. On October 25, 1988, the jury returned verdicts of guilty on each of the three indictments as charged: the separate murders of

Priscilla Gustafson and her two young children, Abigail and William Gustafson. The defendant committed the murders in December 1987, when he was seventeen and one-half years old. AD 1.

The court, Barton J., sentenced the defendant to the mandatory term of life without the possibility of parole on each of the three murder indictments, to be served consecutively. RA 11, 35. On November 16, 1993, this Court affirmed the murder convictions after plenary review. See Commonwealth v. LaPlante, 416 Mass. 433 (1993). On February 4, 1994, following the affirmance of the defendant's conviction and three consecutive life sentences, the Commonwealth filed a nolle prosequi of each of the remaining twenty-seven indictments (Nos. 88-23 through 88-46) for which the defendant stood accused, stemming from allegations of separate incidents as well as crimes preceding and following the murder of the Gustafsons and which included several serious violent crimes and firearm offenses. AD 26.

Following the Supreme Judicial Court's decisions in Diatchenko v. District Attorney for the Suffolk District, 466 Mass. 655 (2013) (Diatchenko I), and Commonwealth v. Brown, 466 Mass. 676 (2013), the defendant's sentence was automatically restructured so that each of his three life sentences were converted to terms of life with parole eligibility following

fifteen years so that he would become eligible for parole after serving a sentence of forty-five years. On June 12, 2015, the defendant filed a motion pursuant to Mass. R. Crim. P. 30(a), arguing that his restructured sentence of forty-five years before attaining parole eligibility was unconstitutional and amounted to the functional equivalent of a life sentence. RA 17; AD 35. The defendant also sought a resentencing hearing during which the trial court could consider the factors set forth in the Supreme Court's decision in Miller v. Alabama, 567 U.S. 460 (2012).

Subsequent to the filing of the defendant's motion, the Supreme Judicial Court decided Commonwealth v. Costa, 472 Mass. 139 (2015), which held that juvenile defendants who were sentenced to consecutive terms of life were entitled to a resentencing hearing wherein the trial court could follow the procedure set forth in that opinion and determine whether such sentences should be served concurrently or consecutively. Id. at 149.

The Commonwealth then filed its response to the defendant's Rule 30(a) motion, highlighting that the Costa decision controlled and conceding the defendant was entitled to a resentencing hearing, but arguing he should be again sentenced to three consecutive terms of life for the Gustafson murders. See AD 78. The Commonwealth also sought and was granted orders for (1)

school records of the defendant, (2) records from Bridgewater State Hospital, (3) records from the Department of Youth Services, and (4) the defendant's juvenile probation records. AD 82. On October 6, 2015, the trial court entered an order allowing the defendant's motion for a resentencing by agreement. RA 17. The defendant and Commonwealth each engaged in discovery and obtained expert evaluations and opinions following the procedure established in Costa. The Commonwealth sought and was granted an order to disclose the grand jury minutes for each of the indictments, Nos. 88-19 through 88-46, to both experts. RA 18.

Both the defendant and the Commonwealth filed sentencing memorandums addressing the Miller/Costa factors and the constitutionality of imposing three consecutive life sentences. RA 19-20. On March 22, 2017, following an evidentiary hearing during which the expert opinion and testimony of forensic psychiatrist Dr. Fabian M. Saleh was offered, several exhibits were offered, victim impact statements were made by the victims' surviving family members, and the defendant made a statement to the court, the Middlesex Superior Court, Kazanjian, J., sentenced the defendant to three consecutive life sentences. RA 20; AD 3, 10.

The defendant filed his notice of appeal on April 10, 2017. RA 21. The defendant filed his gatekeeper petition with the Single Justice on January 10, 2018.

RA 23. On July 10, 2018, the Single Justice, Lowy, J., directed entry of the appeal on the "new and substantial question 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." RA 24; AD: 12. The case entered this Court on July 27, 2018.

Statement of Facts

The following facts are derived from the Sentencing Memorandum issued by the Superior Court and adopted by the parties as their agreed-upon statement of facts pursuant to single justice's order, AD 1-10, 13, supplemented by facts contained within this Court's opinion affirming the convictions.

> The Court has considered the fact that Mr. LaPlante was 17½ years old at the time he committed the Gustafson murders. While at 17½ he was still a juvenile by virtue of his age, the evidence submitted at the hearing did not reflect that at the time of the murders he displayed the 'hallmark features' of a juvenile, that is, immaturity, impetuosity and failure to appreciate risks and consequences. This is notable in a variety of ways.
>
> Specifically, Mr. LaPlante's criminal history leading up to the Gustafson murders reflects deliberated and well calculated actions. He repeatedly broke into homes, terrorized families, and ultimately murdered Priscilla, Abigail, and William. His actions were goal driven and demonstrated a desire to exercise control over his victims.
>
> Mr. LaPlante's family and home environment was also relatively unremarkable. While his mother recounts having a difficult relationship with her first husband, she did not think that

Mr. LaPlante witnessed any violence. Mr. LaPlante described his childhood as 'pretty good.' His mother worked hard. She remarried and her second husband served as a father figure to Mr. LaPlante. Mr. LaPlante struggled with learning disabilities and attention deficit disorder. However, he had significant support systems in place at school and consistently tested above average intellectually.

[The defendant lived with his family in October, 1987. The evidence showed that the defendant engaged in a series of daytime burglaries in the neighborhood, including a burglary of the Gustafson home in November,1987. On October 14, 1987, between 12 P.M. and 2:15P.M., someone broke into 38 Elm Street, the home of Raymond Pindell and his family. Two Ruger .22 caliber guns and their holsters were stolen, as was a sizable amount of cash. Approximately three weeks later, the defendant's stepfather discovered one of Pindell's stolen guns and its holster in the defendant's laundry basket. When confronted by his parents, the defendant claimed he had obtained the gun a year earlier from Westminster. The second of the two firearms stolen from the Pindell house later proved to be the weapon used to kill Priscilla Gustafson. During this same time period, the defendant's brother, Stephen LaPlante, and Michael Polowski both saw the defendant with a few hundred dollars in cash, although the defendant was unemployed at the time.

On November 16, 1987, between 11:30 A.M. and 3:30 P.M., someone broke into the Gustafson home. Among other things, the thief took a cordless telephone, two cable television boxes, a cable television remote control device, and some coins from a Liberty silver dollar collection. The defendant placed the Gustafsons' cordless telephone and a cable box in his brother's tool cabinet. The defendant told his brother that he was putting them there to prevent his parents from seeing them. At that time, the defendant's brother also saw the defendant with some silver coins similar to those reported missing from the Gustafson home, including a Statue of Liberty coin in a box.

During this period, the defendant asked both his brother and Polowski for bullets. The defendant told them he wanted to make a large bullet and sell it. Toward the end of November, Polowski gave the defendant a number of .22 caliber bullets from a carton he owned . . . . the same brand, caliber class, and casing composition of the ones used in the murder of Priscilla Gustafson. LaPlante, 416 Mass. at 435–36.]

The facts of these homicides are reflected in the trial transcripts and in Mr. LaPlante's description of the murders to Dr. Saleh. Those facts clearly establish that Mr. LaPlante acted deliberately and intentionally on December 1, 1987, and that he did not act impulsively or out of a place of immaturity. He carefully planned his intrusions into the Gustafson's home; first breaking in on November 16, 1987, and stealing items. While he could have stopped there, he decided to return. He obtained a gun and lied to his brother's friend in order to get bullets. He practiced loading and unloading the gun. On December 1, 1987, Mr. LaPlante broke into the Gustafson's house for the second time, carrying the loaded weapon. When he heard Priscilla Gustafson and her 5 year-old son William entering the house, he said that his first thought was to jump out the window. But he decided not to. He confronted them with the gun, brought them to the bedroom, put William in the closet and tied Priscilla to the bed. Mr. LaPlante said that after he tied Priscilla to the bed, his plan was to leave. But once again he decided not to. Instead, he made the decision to rape her. [Investigators recovered from the bedroom a used condom, several ligatures, a gag, and pornographic materials in the kitchen. LaPlante, 416 Mass. at 434-435] After raping her, he acknowledged that he could have left. Instead, he decided he would kill her. After he killed Priscilla, Mr. LaPlante made the decision to take William into the bathroom and drown him. As he was leaving, he encountered Abigail. He lured her into the bathroom and made the decision to murder her as well. These facts reflect three distinct acts of murder, carried out deliberately and thoughtfully. Finally, Mr. LaPlante's conduct after the

murders confirms that he acted with deliberation. After fleeing the scene, he went home, ate and then attended his niece's birthday party as if nothing had happened.

[The defendant left his home on the evening of December 2, 1987, after State police arrived and asked to speak with him. The next afternoon, the defendant unlawfully entered two homes in Pepperell, stole a .32 caliber revolver, and unsuccessfully tried to gain admittance into a third home. At the home of Pamela Makela in Pepperell, the defendant ordered Makela at gunpoint to drive him in her van to Fitchburg. Makela jumped out of the van, and the defendant continued on in her van. The defendant was arrested in an Ayer industrial park dumpster. At police barracks, while searching the defendant, police found a loaded .32 caliber revolver hidden in the defendant's underwear, and a .32 caliber bullet inside his right sneaker. LaPlante, 416 Mass. at 436–37.]

Likewise, there is no evidence in the record that Mr. LaPlante demonstrated any youthful incompetencies that resulted in harsher charges or that his youthfulness affected his ability to work with his attorney. In fact, the Court has the benefit of multiple evaluations that were conducted around the time of these offenses, all of which concluded that Mr. LaPlante understood his circumstances and was capable of assisting his attorneys with his defense.

The last *Miller* factor is the possibility of rehabilitation. The records reflect that despite initial difficulties, Mr. LaPlante has shown signs of improved behavior, particularly in the last few years. He has positively engaged in many activities, earned his GED, tutored others and run a variety of programs and activities.

Mr. LaPlante did express remorse to Dr. Saleh, and in the courtroom yesterday. The Court hopes that those sentiments are genuine. However, Mr. LaPlante's recent description of the murders to Dr. Saleh reflects an extraordinary lack of empathy. The Court agrees with Dr. Saleh's opinion that Mr. LaPlante has not yet been rehabilitated and his prognosis for reha-

bilitation in the future is ‘guarded.’

In sum, while the Court cannot say that Mr. LaPlante is incapable of rehabilitation, there is insufficient evidence for the Court to find that there is a likelihood that he will be able to rehabilitate.

***

The Court found the testimony of Dr. Saleh credible. After a thorough evaluation, Dr. Saleh’s opinion is that Mr. LaPlante currently suffers from Antisocial Personality Disorder, and that the Gustafson murders were a result of Conduct Disorder, Childhood onset Type, rather than any adverse childhood experiences, learning disabilities or immaturity.

Mr. LaPlante’s psychiatric history reflects that he has never suffered from psychotic illness, such as schizophrenia, or a mood disorder, such as bi-polar illness. Moreover, he has not suffered from anxiety disorder or an impulse control disorder. Mr. LaPlante has never been treated for any significant period of time with any psychiatric medication. Finally, Mr. LaPlante was not under the influence of alcohol or drugs at the time of the murders nor has he ever struggled with substance abuse.

The Court also reviewed the psychosocial evaluation of Kimberly Mortimer, M.S., L.M.C.H., submitted by the defense. Ms. Mortimer accurately points out that Mr. LaPlante has made progress during his time in prison. She also makes some important points generally about the current research regarding the development of the brains of juvenile offenders. However, the Court is not persuaded that Mr. LaPlante’s conduct can be attributed to any of his childhood experiences or to immaturity, impetuousness or recklessness.

As the Court has noted, it is true that Mr. LaPlante appears to have made significant progress while in prison. His disciplinary infractions in the later part of his incarceration have been relatively minor and have not involved violent conduct. He has taken advantage of educational opportunities, receiving his GED and volunteering as a tutor. He was transferred to MCI Norfolk where he ultimately was elected to

take on leadership roles involving a variety of activities. And most recently, he voluntarily entered the sexual treatment program at Bridgewater State Hospital. While the Court considers these facts as positives, they do not in the Court's judgment outweigh the other factors.

***

Finally, the Court has carefully assessed the information before it in light of the recognized goals of criminal sentencing: punishment of the defendant that is fairly proportional to the culpability of his crime, general deterrence, specific deterrence, protection of the public and rehabilitation of the defendant, and considered whether there are mitigating circumstances that would warrant less than the maximum penalty in this case.

It is the responsibility of this Court to consult her conscience and exercise sound judicial discretion in order to punish the defendant justly. Judicial discretion does not permit the sentencing judge to act impulsively to satisfy any personal or public desire for vengeance. Judicial discretion does not permit the sentencing judge to punish the offender for conduct other than that which has resulted in a conviction. Ultimately the sentence imposed must be based on an individualized consideration of Mr. LaPlante's circumstances.

Based on the totality of the evidence submitted to the Court, the Court is persuaded that Mr. LaPlante's relative youth did not play a role in the Gustafson murders. This case does not involve a single act that resulted in three deaths. Mr. LaPlante committed three distinct and brutal murders. He killed a 33 year old pregnant mother and her 5 and 7 year old children. He left a family and a community devastated. The Court finds that the maximum penalty is warranted.

Accordingly, the Court will impose a life sentence for the murder of Priscilla Gustafson. The Court will impose a life sentence for the murder of William Gustafson to run consecutive to the previously imposed sentence. The Court will impose a life sentence for the murder of Abigail Gustafson to run consecutive to the two

> previously imposed sentences. Each sentence carries parole eligibility of fifteen years. Based on the Court's sentence of three consecutive life sentences, Mr. LaPlante is not eligible for parole until he has served 45 years.

AD 5-10.

SUMMARY OF THE ARGUMENT

In this case, the resentencing judge validly exercised her discretion to impose consecutive life sentences for three distinct intentional and brutal first degree murders committed by the defendant, a juvenile offender, after finding the defendant's crimes were not the result of transient immaturity, but rather that the defendant was found to have antisocial personality disorder and was in need of further rehabilitation nearly thirty years after the murders occurred. Individualized sentencing is a cornerstone in the administration of justice and should not be cabined, nor should a judge's discretion to impose consecutive sentences. (23-26).

The defendant's aggregate sentence, amounting to a forty-five-year period before parole eligibility, is consistent with art. 26. The juvenile proportionality test developed in Perez I and Perez II is satisfied in this case. The defendant met nearly all of the aggravating factors recommended in the Advisory Sentencing Guidelines. An examination of the circumstances of the crime and the defendant's characteristics show that

his actions did not bear the hallmark features of youth, but were extraordinary in nature and bear little resemblance to the diminished culpability displayed in either Perez II or Miller itself.

The defendant committed the most serious crime. The distinctions amongst the circumstances of different offenses and offenders should not be collapsed to prevent a determination of who is the most culpable amongst juvenile offenders, or to prevent consecutive sentencing, such that the worst kind of offenses could actually escalate without the ability to increase consequences.

Existing case law from other jurisdictions does not adequately address the defendant's circumstances where consecutive life sentences for murder were imposed after a resentencing hearing which provided the full protections of Miller/Costa and found that youth did not play a role in the defendant's offenses, and thus does not counsel a different result. (26-38).

The extra weight accorded to the unique characteristics of juveniles also does not require a different result. The defendant benefited from the categorical prohibition on juvenile sentences of life without parole eligibility. His resentencing hearing not only comported with the requirements of Miller and Costa, but also satisfied the extraordinary circumstances inquiry of Perez II. The requirement for a "meaningful

opportunity" to demonstrate rehabilitation is procedural in nature and does not grant substantive rights to any personal fulfillment following the defendant's incarceration. Similarly, his sentence is not the functional equivalent of a life without parole sentence where it comports with Diatchenko I by providing the likelihood of some years of life outside prison and not the absolute denial of parole. (39-52).

Where the defendant's sentence is constitutional, any further change to juvenile sentencing, or additional relief to the defendant in particular, should be made through legislative action. (52-54).

ARGUMENT

I. A SENTENCING JUDGE MAY EXERCISE HER DISCRETION TO IMPOSE CONSECUTIVE LIFE SENTENCES FOR THREE FIRST DEGREE MURDERS COMMITTED BY A JUVENILE OFFENDER, AMOUNTING TO A FORTY-FIVE-YEAR PERIOD BEFORE PAROLE ELIGIBILITY, CONSISTENTLY WITH ART. 26, WHERE THE DEFENDANT RECEIVED THE FULL BENEFIT OF A MILLER/COSTA HEARING AND WAS FOUND TO HAVE ANTISOCIAL PERSONALITY DISORDER AND WAS IN NEED OF FURTHER REHABILITATION NEARLY 30 YEARS AFTER THE MURDERS OCCURRED

The defendant asserts that, categorically, a juvenile may never be sentenced to a term of forty-five (and perhaps not even thirty) years, which he claims is the functional equivalent of a life without parole sentence denying him a substantive "meaningful opportunity" to productively participate in society "during working maturity." See D.Br. 8-10, 21, 24, 31.

The defendant's argument elevates his status as a juvenile offender, giving it primacy over any other consideration and foreclosing the discretion of a sentencing judge to impose a consecutive sentence even in what he concedes were intentional and "profoundly heinous" crimes causing "grievous harms" that "left a family and a community devastated," and "even when a judge finds the juvenile does not display hallmark features of youth." See D.Br. 10, 21. He further contends that the "only rationale" which could support such sentence is punishment, D.Br. 19, and that this Court is obligated to cabin the discretion of trial judges in the Commonwealth to prevent such an outcome, D.Br. 39. The defendant does not raise any claim about the sentencing judge's discretionary decision to impose consecutive sentences, nor does he make any evidentiary or factual claim *at all*, candidly admitting that the defendant's sentence is unconstitutional *only* if a forty-five-year sentence may never be imposed following *any* individualized sentencing decision. D.Br. 40.

The defendant's paradigm upends centuries of sentencing wisdom. Sentencing is a "quintessential judicial power." Commonwealth v. Plasse, 481 Mass. 199 (2019). "Few, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence

and professionalism to take account of the human existence of the offender and the just demands of a wronged society." Plasse, 481 Mass. 199, quoting Commonwealth v. Rodriguez, 461 Mass. 256, 259 (2012), quoting Graham v. Florida, 130 S. Ct. 2011, 2031 (2010). "A sentencing judge is given great discretion in determining a proper sentence." Rodriguez, 461 Mass. at 259, quoting Commonwealth v. Lykus, 406 Mass. 135, 145 (1989). “Generally, ‘in the exercise of her sentencing discretion, a judge may consider a variety of factors including the defendant’s behavior, family life, employment history, and civic contributions, as well as societal goals of punishment, deterrence, protection of the public, and rehabilitation.’” Costa, 472 Mass. at 147, quoting Commonwealth v. Donahue, 452 Mass. 256, 264 (2008); see Commonwealth v. Goodwin, 414 Mass. 88, 92 (1993). Each of these sentencing rationales continues to have ongoing importance in the sentencing of juvenile homicide offenders. See id.

The importance of individualized sentencing cannot be overstated. “The sentencing hearing is not a static proceeding in which the result is predictable . . . . [i]t is a crucial stage in the system of justice.” Lykus, 406 Mass. at 145–46. Both Miller and the ongoing debate surrounding criminal justice reform reinforce the importance of allowing judges to “tak[e] account of an offender's age and the wealth of charac-

teristics and circumstances attendant to it," including the degree to which the defendant was impacted by the hallmarks of juvenile brain development. See Miller, 567 U.S. at 476, 480 at n.8 (noting that where individualized sentencing is precluded, "every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one" rather than reserving the strongest sentences "only for the most culpable defendant committing the most serious crimes"); Montgomery v. Louisiana, 136 S. Ct. 718, 733-734 (2016); cf. Commonwealth v Calvaire, 476 Mass. 242, 247 (2017) (illustrating importance of individualized discretion to the interests of justice).

An important component of individualized sentencing is the discretion of a court to impose sentences concurrently or consecutively. Lykus, 406 Mass. at 145-146; see also Commonwealth v. Lucret, 58 Mass. App. Ct. 624, 628 (2003) (judicial discretion to impose concurrent or consecutive sentences is "firmly rooted in common law").

A. The Defendant's Sentence Satisfies the Juvenile Proportionality Test

The defendant's argument is ultimately a challenge to the proportionality of his sentence under art. 26 of the Massachusetts Declaration of Rights.

> Where a defendant claims that a judge has made an error of constitutional dimension, "we accept the judge's subsidiary findings of fact absent clear error and leave to the judge the responsibility of determining the weight and credibility to be given ... testimony presented at the motion hearing" but "review independently the application of constitutional principles to the facts found." Commonwealth v. Villagran, 477 Mass. 711, 713 (2017).

Commonwealth v. Perez, 480 Mass. 562, 567–68 (2018) (Perez II); see Commonwealth v. Perez, 477 Mass. 677, 682 (2017) (Perez I) ("it is not within the power of this court to review an otherwise lawful sentence").

"[A] heavy burden is on the sentenced defendant to establish that the punishment is disproportionate to the offense for which he was convicted. It must be so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity." Commonwealth v. Alvarez, 413 Mass. 224, 233 (1992) (internal citations omitted); accord Perez I, 677 Mass. at 683-684 (defendant's burden to "establish a disproportionality of constitutional dimensions"); Commonwealth v. Obi, 475 Mass. 541, 546 (2016).

The ruling in Diatchenko I, which examined the constitutionality of a life without parole sentence imposed at the time of conviction of a juvenile offender committing a single murder, without the protections of a Miller hearing, leaves open the question of the constitutionality of a lengthy term of years sentence prior to parole eligibility for a juvenile homi-

cide offender where that sentence is imposed well into adulthood, is a discretionary imposition of consecutive sentences for three first degree murders, and is only imposed following a Miller hearing determining that the defendant's crime was not a reflection of the defendant's youth or transient immaturity.

This Court has announced a juvenile proportionality test which requires a three-part examination of:

> [F]irst the nature of the offense and the offender, with regard to the degree of danger present to society. Second, a comparison is made of the challenged sentence with those imposed for juveniles convicted of more serious crimes. Third, the challenged sentence is compared with those imposed for the same offense in other jurisdictions. The unique characteristics of a juvenile defendant weigh more heavily in the proportionality calculus under art. 26.

Commonwealth v. Lutskov, 480 Mass. 575, 583 (2018) (internal citations omitted), citing Perez I, 477 Mass. at 683-685. The juvenile proportionality test was applied in Perez I and II and Lutskov to examine the constitutionality of aggregate consecutive sentences of juvenile nonhomicide offenders with a parole eligibility date exceeding that applied to juvenile homicide offenders, concluding such sentences are only permissible where, in an individualized process examining the Miller factors, the sentencing judge finds that both the nature of the crime and the juvenile's characteristics are extraordinary such that a longer

parole eligibility period is justified. See Perez II, 480 Mass. at 569. Application of the juvenile proportionality test supports the constitutionality of the defendant's sentence.

1. The Nature of the Offense and the Offender Support the Defendant's Sentence

The resentencing hearing followed the process established by Costa. Costa, 472 Mass. at 147-149. In addition to normal sentencing considerations and evidence (see above), the court also considered:

> First, the Miller factors:
> (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;
> (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) of the defendant's incapacity to assist his own attorneys; and
> (5) The possibility of rehabilitation.
> Second, the court should consider evidence concerning the defendant's then-extant psychological state at the time of the offense.
> Third, the court should consider information about a defendant's subsequent, post-sentencing conduct, whether favorable or unfavorable.

Id. at 148-149; AD 2-3.

The defendant raises no challenge to the sentenc-

ing judge's exercise of her discretion to impose consecutive sentences (only challenging her authority to do so under art. 26), and similarly raises no claim about the scope or sufficiency of the Miller/Costa evidence presented at the hearing. See D.Br. 40. Nevertheless, a limited examination of the offense and offender characteristics supporting the judge's exercise of her sentencing discretion is useful in this case to examine both the proportionality of the defendant's sentence and also whether his circumstances demonstrate he may be among the rare "irreparably corrupt" juvenile offenders, or, as this Court set forth in Perez II, needs a lengthier term of years prior to parole eligibility to achieve rehabilitation. Perez II, 480 Mass. at 571, citing Miller, 567 U.S. at 479-480.[2]

The facts of the murder and the defendant's characteristics satisfy nearly all of the aggravating factors identified by the Sentencing Commission, and easily illustrate the type of extraordinary circumstances

[2] The Commonwealth acknowledges that the record as designated by the Single Justice does not include sentencing memoranda filed by the Commonwealth or the defendant, the evidence and exhibits supporting those memorandums, including the two expert reports, nor the trial or sentencing hearing transcripts. Should this Court wish to further understand the Miller/Costa evidence and other sentencing considerations presented to reach its decision, the Commonwealth would seek to expand the record to include its Sentencing Memorandum filed in the Superior Court on March 15, 2017. See RA 19.

considered relevant to increased sentencing by this Court in Perez II, and by the Supreme Court in Miller.

The November 2017 Advisory Guidelines of that Massachusetts Sentencing Commission (hereinafter "Guidelines) identify a non-exclusive list of mitigating and aggravating factors judges should use to guide their sentencing discretion. See Guidelines at 57. The aggravating circumstances include:

> 1. The victim was especially vulnerable due to age or physical or mental disability. 2. The victim was treated with particular cruelty. 3. The defendant used position or status to facilitate commission of the offense, such as a position of trust, confidence, or fiduciary relationship. 4. The defendant was a leader in the commission of an offense involving two or more criminal actors. 5. The defendant committed the offense while on probation, on parole, or during escape. 6. The defendant has committed repeated offenses against the same victim. 7. The defendant's criminal history category understates the seriousness of the defendant's prior record.

Guidelines at 57.

Nearly all of the factors identified are highly relevant to this case. The victims in this case were a pregnant mother and her five- and seven-year-old children. LaPlante raped Priscilla in front of her young son before killing her, and allowed William to witness the rape of his mother before killing him. He "desire[d] to exercise control over his victims." AD 6. He deceived Abigail into complying with his demands. While working and planning alone, he deceived others

into unintentionally abetting his crimes. He committed the murders while he was released on bail for other serious charged crimes. SRA 1. LaPlante had previously broken into the Gustafson home the previous month and stolen items from them. And finally, where the Commonwealth filed a nolle prosequi of twenty-seven indictments only following this Court's affirmance of the defendant's murder conviction and sentence of three consecutive life sentences, and where the defendant also had a significant juvenile record, the seriousness of his prior record was understated. By comparison, the only mitigating circumstances applicable were the defendant's age at the time of the offense, and possibly his recent voluntary enrollment in sex offender treatment. See Guidelines at p. 57 ("5. The age of the defendant at the time of the offense. 6. The defendant verifies current involvement in, or successful completion of, a substance abuse or other treatment program that began after the date of the offense.").[3]

[3] The March 2016 Criminal Sentencing in the Superior Court, Best Practices for Individualized Evidence-Based Sentencing Report by the Superior Court Working Group on Sentencing Best Practices (hereinafter "Sentencing Report"), which was also incorporated into the Guidelines, identifies several additional principles important to sentencing decisions. Principle No. 2 of the Sentencing Report specifically directs courts to "impose a sentence that seeks to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, [and] restoration of crime vic-

LaPlante's offender and offense characteristics present a very different picture than either of the defendants in Perez II or Miller. The defendant had an extensive history of criminal activity at the time of the murders. "He repeatedly broke into homes, terrorized families, and ultimately murdered Priscilla, Abigail, and William. His actions were goal driven and demonstrated a desire to exercise control over his victims." AD 6. The sentencing judge found his childhood to be relatively unremarkable. AD 6. He acted alone in planning and carrying out his crimes; rather than being subject to peer or familial pressure he deceived others into helping him complete and conceal his crimes. See supra 16-17. While he struggled with a childhood learning disability and attention deficit disorder, he was well supported and highly intelligent and never suffered any mood disorders or engaged in substance use. Compare Perez II, 480 Mass. at 572-573

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tims and communities…" Sentencing Report at 5. The comments to that principle direct the court to consider the "harm done to victims and the blameworthiness of the offender." Id. It then explains "blameworthiness encompasses the level of intentionality related to the criminal conduct (degree of planning, type and degree of force or violence, disregard for foreseeable harm or injury, or taking pleasure in it) and the offender's criminal record." Id. "The need for punishment may arise from the facts of a particular case: the harm or injury to victims or their particular susceptibility for abuse; the level of planning and manipulation involved; or the societal harm caused by the defendant." Sentencing Report at 10.

(defendant had no criminal history, experienced horrific upbringing, was susceptible to co-defendant uncle's negative influence, and had low intelligence coupled with multiple mental health diagnoses); Miller, 567 U.S. at 478-479 (defendant experienced horrific upbringing and had a history of suicide attempts starting at age six, yet had very limited criminal history prior to murder).

As the sentencing judge found, the defendant's actions required careful planning and intentionality inconsistent with transient immaturity. He committed three distinct murders of vulnerable victims, carried out thoughtfully, deliberately, and brutally. His actions devastated a family and a community.

2. The Defendant Committed the Most Serious Crime

"[M]urder in the first degree is the gravest of charges." Sharris v. Commonwealth, 480 Mass. 586, 592-593 (2018), citing Commonwealth v. Francis, 450 Mass. 132, 135 (2007), S.C., 477 Mass. 582 (2017) ("It is reasonable for the Legislature to treat defendants facing a charge of murder in the first degree differently from other defendants"). Adults convicted of murder continue to face a mandatory sentence of life without the possibility of parole. G.L. c. 265, § 2.

For juvenile homicide offenders, the key inquiry is to distinguish amongst murder defendants to determine which are the more serious. The number of lives

lost is a crucial factor in determining both the extraordinary nature of the crimes and the offender: the discretion of a sentencing judge to impose consecutive sentences must be upheld. See Commonwealth v. Sanchez, 405 Mass. 369, 379-380 (1989) (imposition of two consecutive life sentences and two other concurrent sentences for defendant was not disproportionate given extent of psychological harm, stigma, and lasting injuries suffered by victims and society).

An analogous principle prevents defendants from banking time—awarding sentencing credit which can be applied to other crimes committed. Banking time is a "matter of great concern" because it could grant "a license to commit future criminal acts with immunity." Commonwealth v. Milton, 427 Mass. 18, 25 (1998). "Only recidivists would benefit from such a system." Commonwealth v. Holmes, 469 Mass. 1010, 1013 (2014). While the Supreme Court has posited a diminished deterrent effect for at least juvenile nonhomicide offenders, noting they are less likely to consider punishment especially when strict sentences are rarely imposed, see Graham, 560 U.S. at 72, such arguments are tenuous when applied to murder. A determination that multiple murders cannot be sentenced more severely than a single murder, and that any other crimes committed prior to attaining majority would also not increase any penalty, runs the risk of creating an anti-deterrent ef-

fect,[4] particularly in the most concerning, and often planned crimes, such as in the defendant's case where he killed three persons before engaging in a violent course of conduct stemming from his efforts to evade detection and arrest (see indictment Nos. 88-23 through 88-33). More lives may have been lost and could be lost if further crimes can be incurred without additional consequence, as could be imagined in the context of terrorism, school shootings, and gang violence, as well as crimes by juveniles already serving committed sentences. See Commonwealth v. Foust, 2018 PA Super 39, 180 A.3d 416, 434–35 (2018) ("defendants convicted of multiple offenses are not entitled to a 'volume discount' on their aggregate sentence"); Carter v. State, 461 Md. 295, 358 (2018), quoting O'Neil v. Vermont, 144 U.S. 323, 330 (1892) ("It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life"); see also Kuanliang, Sorenson & Cunningham, *Juvenile Inmates in an Adult Prison System: Rates of*

[4] Such a holding would also create confusion where additional crimes or murders are not discovered or prosecuted until a later point in time. Cf. Commonwealth v. Shelley, 477 Mass. 642 (2017) (defendant convicted in 2013 of murder committed in 1969, when he was seventeen).

Disciplinary Misconduct and Violence, CRIMINAL JUSTICE AND BEHAVIOR, Vol. 35 No. 9, September 2008 (finding prevalence and frequency of prison misconduct and violence are higher among juveniles); but see St. 2018, c. 69 §§ 76-89 (addressing housing juveniles separately, but leaving open housing of juvenile first degree homicide offenders with adult population).

3. The Defendant's Serious Crimes and Consecutive Sentences Imposed After a Miller Hearing have Not been Examined by Other Jurisdictions

Beginning with the Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), accelerating following its decisions in Graham and Miller, and continuing through its clarification in Montgomery, nationwide judicial and legislative activity addressing the sentencing of juvenile offenders has proceeded at a frenzied pace. The outcomes of those cases has varied depending on whether the court was seeking to apply the protections afforded in Graham (prohibiting sentence of life without parole for nonhomicide offenders) or Miller (requiring procedural protections to screen out juvenile offenders suffering transient immaturity before imposing sentence of life without the possibility of parole), and depending on when the decision was made relative to the Supreme Court's further guidance in Montgomery (holding that providing parole eligibility satisfies Miller), or was relying

on its own state legislative action in the wake of those decisions. See, e.g., Carter, 461 Md. At 347-355 (discussing various frameworks adopted by states and collecting cases before holding fifty-year sentence prior to parole eligibility for nonhomicide case was excessive under Graham).

The varied approaches taken to determine whether a particular sentence satisfies the strictures of Graham or Miller makes it difficult to rely on those cases as indicia of a state's determination of what is the appropriate penalty for a juvenile offender convicted of multiple murders--thankfully a rare occurrence. The Commonwealth is aware of no case evaluating a term of years sentence prior to parole eligibility, after a defendant has received the benefit of a resentencing hearing well into adulthood which provided Miller protections and found that the defendant's youth did not play a role in his crimes. Cf. Foust, 2018 PA Super 39, 180 A.3d at 435 (upholding consecutive thirty-year sentences for double murder); State v. Zuber, 227 N.J. 422, 453 (2017) (directing court to consider Miller factors when resentencing juvenile nonhomicide offender before deciding whether to impose consecutive sentences). Of note, twenty-nine states continue to permit a life without parole sentence for juvenile homicide offenders post-Miller. See State v. Bassett, 192 Wash. 2d 67, 86-87 and nn. 3-7 (2018)

(collecting statutes); see also infra 51-52.

4. The Unique Characteristics of Juveniles

a. The defendant benefitted from the categorical prohibition of a life without parole sentence

While this Court and the Supreme Court have taken a categorical approach to youthful offenders as pertains to their diminished culpability (particularly as applied to nonhomicide offenders) and capability for rehabilitation, the categorical approach is somewhat modified for youthful offenders. The concern is most pertinent, and only categorical, for those juveniles for whom continued development will lead to diminished criminality. See Montgomery, 136 S. Ct. at 733-734. This is different than developmental disabilities that are immutable characteristics. See Atkins v. Virginia, 536 U.S. 304, 306-307 (2002). However, as the Supreme Court has recognized, there is a small percentage of juveniles for whom their criminality is a product of irreparable corruption or irretrievable depravity rather than transient immaturity, see Miller, 567 U.S. at 479-480, and for those offenders there is greater culpability and diminished likelihood of rehabilitation. If after full consideration of the Miller factors, a sentencing judge determines an offender is incorrigible, a lengthier sentence proportionate to their crime is appropriate. See Montgomery, 136 S. Ct.

at 734. The decision in Diatchenko I seemed to permit a similar approach-- while prohibiting a sentence of life without the possibility of parole and thus categorically cabining a judge's discretion--this Court found the art. 26 violation was only "the *absolute denial* of any possibility of parole." Diatchenko I, 466 Mass. at 671 (emphasis added); compare Graham 560 U.S. at 78. Diatchenko I also expressed concern that while the defendant was yet a juvenile, a sentencing court may not be able to find conclusively or with confidence that he or she was irretrievably depraved. Id. at 669-670 ("a judge cannot find with confidence that a particular offender, *at that point in time*, is irretrievably depraved") (emphasis added).

The defendant here has benefitted from a comprehensive resentencing hearing pursuant to Costa, replete with evidence of the defendant's youth and then-extant characteristics and functioning, as well as examination of the entirety of his period of incarceration and rehabilitative efforts, supported by expert psychiatric reports and testimony. The sentencing court concluded that the defendant's criminality was not the product of transient immaturity but was instead most attributable to childhood conduct disorder which ripened into antisocial personality disorder. AD 8-9. Such a finding was made not when he was a juvenile, at the outset, but nearly thirty years after

his original sentencing. See Miller, 567 U.S. at 479 (noting difficulty of making finding at an "early age" but permitting a sentence of life imprisonment without the possibility of parole upon a finding that "transient immaturity" was not a factor); Graham, 460 U.S. at 75 (prohibiting court from making such a finding in nonhomicide offenses "at the outset"); Diatchenko I, 466 Mass. at 669-670 (judge sentencing juvenile cannot find irretrievable depravity "at that point in time"). There is no danger of such finding being premature, indeed, as this Court has noted, a finding of antisocial personality disorder or psychopathy cannot be made prior to an individual turning eighteen years old. See Perez II, 480 Mass. at 572 (noting such finding can support a determination that a longer period of rehabilitation is necessary), citing Roper, 543 U.S. at 573, citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. rev. 2000). The defendant also benefitted from the Diatchenko I categorical ban on life without parole for juvenile offenders. The defendant received the benefit of a full resentencing history in adulthood with substantial evidence supporting that he was not operating from the transient characteristics of youth but was highly intelligent, capable of planning, and carried out his plan alone. In these circumstances the rationale supporting the categorical dif-

fering treatment of juveniles is twice diminished: his crimes do not represent transient immaturity and his crimes involved the intentional taking of three lives. Compare Graham, 460 U.S. at 69 ("a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" based on [1] the "age of the offender and [2] the nature of the crime"). This case is thus outside of the concerns animating unduly harsh sentencing of juveniles.[5]

b. The resentencing process satisfied the requirements of Miller, Costa, and Perez II

This Court has not previously had the opportunity to examine whether the extraordinary circumstances framework outlined in Perez II has applicability in the context of sentencing juvenile homicide offenders to consecutive sentences. Perez I endorsed a judge's discretion to impose consecutive sentences, whether in homicide or nonhomicide cases, even where an aggregate sentence would exceed that available for a juvenile murder defendant. Perez I, 477 Mass. at 687-688 ("[t]he court emphatically did not hold that Costa was entitled to be resentenced to concurrent life terms"),

[5] The Court need not decide at this juncture if a forty-five-year sentence before parole eligibility would have been permissible at the defendant's initial sentencing when he was eighteen as that question is not squarely presented.

citing Costa, 472 Mass. at 144.[6] Costa has already extended Miller protections to the discretionary imposition of consecutive sentences for juvenile homicide offenders. See Costa, 472 Mass. at 149.

The Commonwealth notes the similarity of the extraordinary circumstances framework provided in Perez II to that propounded by the Supreme Court in Miller and Montgomery to determine whether a life without parole sentence may be given in a sentencing judge's discretion for a single homicide offender. See Montgomery, 136 S. Ct. at 733-734 (comparing "ordinary adolescent development" to a finding that a juvenile's crime reflects irreparable corruption rather than transient immaturity); Perez II, 480 Mass. at 572 (noting a finding of psychopathy, also known as antisocial personality disorder, could support need for longer period of rehabilitation). The extraordinary circumstances framework may help guide the discretionary imposition of a lengthy term of years sentence before parole eligibility in cases of multiple homicides, or a homicide coupled with other serious offenses, by juvenile offenders. The defendant's alternative proposition of "[p]recluding a judge from en-

[6] The conclusions in Perez I were not limited to only those juvenile offenders whose crimes were committed prior to Diatchenko/Brown, therefore the Court has at least implicitly endorsed the availability of a sentence with parole eligibility unavailable until thirty years or longer in nonhomicide cases.

tering consecutive sentences for these serious offenses, particularly when a judge had already closely considered the defendant's youth and its signature features, would unduly hamper a judge's sentencing discretion." Perez I, 477 Mass. at 689 (Lowy, J., dissenting), citing Lucret, 58 Mass.App.Ct. at 628.

c. The requirement of a meaningful opportunity for release is procedural

While the Supreme Court has certainly indicated that a juvenile defendant should have some hope for an eventual release, the defendant relies on dicta commentary in an attempt to construct a collection of allegedly prescribed substantive components of "meaningful opportunity for release." (See D. Br. at 27, citing Graham, 560 U.S. at 79). The defendant also heavily cites dicta in Casiano v. Commissioner of Correction, 317 Conn. 52, 77-78 (2015) in support of that state's decision to apply Miller protections to a defendant not eligible for parole who was serving a felony murder sentence of fifty years. But see State v. Williams-Bey, 167 Conn. App. 744, 766 (2016) (noting Casiano was decided before Montgomery and describing it "noteworthy that our Supreme Court declined to extend Miller to apply to sentences of less than fifty years"). That phrase, however, as interpreted both by this Court and the Supreme Court refers only to the *process* that needs to be provided to adequately con-

sider the Miller factors. See e.g., Miller, 567 U.S. at 483 (clarifying decision was imposing procedural requirement), Montgomery, 136 S.Ct. at 736 (holding granting defendant parole eligibility is an adequate substitute for Miller hearing at sentencing or resentencing), Diatchenko I, 466 Mass. at 671 (juvenile offenders "should be afforded, in appropriate circumstances, the opportunity to be considered for parole eligibility"); Williams-Bey, 167 Con. App. at 771 (noting federal case law not persuasive where parole is not available federally). As intended, the "meaningful opportunity" language looks to whether a judge has real discretion and a defendant has a true individualized hearing before he receives a sentence of life imprisonment without the possibility of parole. See Miller, 567 U.S. at 479-480, 483.

In Diatchenko I, the defendant received a meaningful opportunity by the process afforded in his parole hearing allowing any demonstrated maturity and rehabilitation to be considered. See Diatchenko I, 466 Mass. at 674; see also Diatchenko v. District Attorney for the Suffolk District, 471 Mass. 12, 29-30 (2015) (Diatchenko II) (prescribing what must be considered at a juvenile offender parole hearing to ensure a "meaningful opportunity" is provided). It does not encompass any quantum of "opportunity" that must be available to a defendant upon his or her eventual re-

lease. See id. (no guarantee of eventual release).

The Commonwealth is of course "cognizant that those being released from extended periods of incarceration will likely face greater obstacles in establishing a career, marrying, raising a family, or voting than those who have not been incarcerated." Williams-Bey, 167 Conn. App. At 764 n. 11. Those are unfortunate effects often attendant to imprisonment even for a moderate number of years; however, not all harms are constitutionally cognizable and where the defendant's deprivation of liberty flows from his actions in intentionally murdering the Gustafson family members and did not involve any due process violation, the Court should not look to remedy those harms through its decision in this case. Cf. United States v. Macdonald, 456 U.S. 1, 8-9 (1982). This is particularly true where both the Supreme Court and this Court have repeatedly reiterated that there is no requirement that the defendant ever receive parole or be released from prison. See Graham, 560 U.S. at 75; Diatchenko I, 466 Mass at 674.

No person--incarcerated or otherwise--can be guaranteed a fulfilling career or family life and indeed many face substantial difficulties in achieving

such due to illness or disability, discrimination,[7] unfortunate circumstances, and their own personal choices; while conversely incarcerated persons can live meaningful lives through educational, vocational, and leadership opportunities, as well as personally fulfilling relationships and spiritual practices. See Costa, 472 Mass. 139, 148-149 (2015) (describing defendant's perfect disciplinary record, college degree, and founding of Restorative Justice program to reconcile prisoners with victims' families); Montgomery, 136 S. Ct. at 736 (defendant "helped establish an inmate boxing team, of which he later became a trainer and coach. . . contributed his time and labor to the prison's silkscreen department and . . . strives to offer advice and serve as a role model to other inmates"). This is even more true with recent changes to make programming opportunities more widely available to those serving life sentences. See G.L. c. 119, section 72B; Commonwealth v. Okoro, 471 Mass. 51, 62 (2015); see also Graham 560 U.S. at 74, 79 (linking access to programming opportunities in prison to personal development of juvenile offenders).

To be clear, it is the Commonwealth's hope that every juvenile offender is able to take advantage of

[7] See, e.g., Age Discrimination in Employment Act of 1967 (Pub. L. 90-202) (ADEA)(preventing employment discrimination against persons age forty or greater).

expanded rehabilitative opportunities while incarcerated, and it expects that in the great majority of cases juvenile homicide offenders will be able to demonstrate rehabilitation and receive parole, allowing them to make positive contributions to society and pursue personal goals. That opportunity is already available to each juvenile offender convicted of first degree murder, and each juvenile offender convicted of two first degree murders prior to the enactment of G.L. c. 279, § 24, between fifteen and thirty years into their period of incarceration; the Commonwealth is unaware of any other triple murder juvenile offender or any double murders occurring after the passage of that statute. The defendant's offense--and consecutive sentence-- is indeed rare, if not unique, in the Commonwealth. Judicial discretion should be preserved to engage in individualized sentencing and to impose consecutive sentences in appropriate circumstances.

d. The defendant's sentence is not the functional equivalent of a life without parole sentence where it provides the likelihood of some years of life outside prison and not the absolute denial of parole

The defendant also raises a related argument that the defendant's parole eligibility must be examined to determine whether it is the "functional equivalent of a life sentence." As that phrase has been applied most often, however, is in the context of whether the

protections of Miller or Graham can be avoided by a sentence of a term of years rather than life without the possibility of parole. See, e.g., Brown, 466 Mass. at 691, n. 11, citing People v. Caballero, 282 P.3d 291, 295 (Cal. 2013) (110 year sentence), State v. Ragland, 836 N.W.2d 107 (Iowa 2013) (defendant still entitled to Miller hearing where governor commuted life sentence to sixty years after Miller), State v. Null, 836 N.W.2d 41 (Iowa 2013) (defendant entitled to Miller hearing where mandatory sentence of seventy-five years, with parole eligibility after 52.5 years, imposed). Ensuring that the Miller protections-- individualized discretionary sentencing that requires consideration of the defendant's youth-- are extended to all eligible juvenile defendants is an admirable and important aim. Miller, however, permitted the continued sentencing of a juvenile homicide defendant to life without the possibility of parole where such protections were afforded. Where Massachusetts law has already extended Miller's protections beyond what was required by the Supreme Court's 8th Amendment jurisprudence by prohibiting all juvenile sentences of life without the possibility of parole, the impetus to determine any certain number of years which is the functional equivalent of such sentence to establish eligibility for a Miller hearing is not present.

This Court used the phrase in Brown in a similar

context-- warning that any legislative fix imposing a new mandatory minimum term of years must not circumvent the holding of Diatchenko I by being so great as to be the functional equivalent of a life without parole sentence. See Brown, 466 Mass. at 691, n. 11. In other words, a mandatory sentence to a term of years which will in all likelihood exceed the natural life of the juvenile is indistinguishable from a mandatory life sentence without the possibility of parole.

That inquiry, however, is not meant as the defendant now propounds: to guarantee a defendant a particular number of years or percentage of his life following his period of incarceration. As noted above, where there is no requirement that the defendant ever be released, and where there can never be a guarantee of any particular quality of life upon release, this argument collapses. What is required under Diatchenko I is an assessment of whether a term of years before parole eligibility is so excessive as to make clear that a defendant has no hope for any release during his lifetime. See Montgomery, 136 S. Ct. at 737; Graham, 560 U.S. at 79 (nonhomicide offender was unable to seek release even after fifty years imprisonment).

The defendant will be eligible for parole after serving a fifteen-year sentence for each murder, after forty-five years, when he is sixty-two years old. The defendant retains an opportunity for release at age

sixty-two and is not serving the functional equivalent of a life sentence without the possibility of parole. He is certainly not facing the "absolute denial of any possibility of parole." Diatchenko I, 466 Mass. at 671. The possibility of receiving parole at age sixty-two provides the defendant with hope (but not a guarantee) of "some years of life outside of prison walls" with sufficient demonstrated rehabilitation. Montgomery, 136 S.Ct. at 737. Notably, while the defendant seems to question in his brief whether even a thirty-year sentence is necessary or permissive (see D. Br. 18; 22 at n. 4), the resentencing judge specifically found that the defendant needed further rehabilitation, more than twenty-nine years into his period of incarceration. Indeed, the timing of his rehabilitative efforts, made close in time to his resentencing hearing, evince self-interested behavior but not necessarily a sincerely-held rehabilitative motive.

While this Court may reach its own conclusion as to the number of years served before parole eligibility that would be the equivalent of a life sentence without the possibility of parole, it should rely on its own pronouncement in Diatchenko I that forbids only the "absolute denial of any possibility of parole." Diatchenko I, 466 Mass. at 671. The Court should not rely on inapposite precedent either relying on or collapsing the distinctions between the protections af-

forded in Graham and Miller, or whose decisions preceded the further guidance in Montgomery, or simply relying on the state's own legislative action post Graham and Miller. See, e.g., State v. Cardehialac, 293 Neb. 200, 219-220 (2016) (collecting cases); see also Virginia v. LeBlanc, 137 S. Ct. 1726, 1729 (2017) (not unreasonable interpretation of Graham to permit nonhomicide offenders to petition for parole at age sixty).

B. Any Further Change to Juvenile Sentencing Should Proceed Through Legislative Action

"It is the province of the Legislature to define crimes and set penalties in the first instance." Brown, 466 Mass. at 684-685, accord Commonwealth v. Laltaprasad, 475 Mass. 692, 703 (2016). The defendant has not shown that the legislative sentencing scheme resulting in the defendant serving a term of forty-five years for three first degree murders before receiving parole eligibility violates art. 26 (the penalties for juvenile first degree murder certainly comply with 8th Amendment jurisprudence under Miller). Moreover, the statutes governing juvenile prosecution and sentencing continue to evolve, in the Commonwealth and around the country. Many states have enacted blanket parole eligibility dates or calculations for juvenile offenders, or have permitted resentencing hearings after a certain point (and indeed the defendant

has received such a resentencing here). See, e.g., Cal. Penal Code § 1170(d)(2) (providing mechanism for qualified juvenile offenders sentenced to life without the possibility of parole to petition for resentencing after serving fifteen years, but excluding cases involving torture or where victims were public safety or law enforcement officers).

Our Legislature has been active by establishing the new juvenile homicide sentencing structure, mandating juvenile life offender eligibility for program opportunities during their incarceration (addressing concerns of Graham), permitting juvenile life offender placement in a minimum security correctional facility, raising the age of juvenile jurisdiction, and encompassing many new and substantial protections in the Criminal Justice Reform Act addressing such areas as diversion, detention, and compassionate release of prisoners facing terminal illness or permanent incapacitation (which is available to those convicted of murder in the first degree). See St. 2018, c. 69 § 97; St. 2018, c. 72; G.L. c. 119, § 72B; see also Okoro, 471 Mass. at 62; Sharris, 480 Mass. at 601. The Legislature continues to explore additional reform, including further raising the age of juvenile jurisdiction.

As it did in Brown, this Court should allow the Legislature to make continued and considered reforms with "considerable latitude." Diatchenko I, 466 Mass.

at 671-672, quoting Alvarez, 413 Mass. at 233; Brown, 466 Mass. at 691, n. 11; see Zuber, 227 N.J. at 429-430, 452 (encouraging state legislature to examine possibility of enacting sentencing review of lengthy juvenile terms). For example, the Legislature could choose to extend good time credit to juvenile homicide offenders to decrease the time necessary to achieve parole eligibility for rehabilitative efforts (cf. St. 2018, c. 72, §§ 5, 7) or provide a differentiated term of years for juvenile first degree murder offenders scaled based on the age of the defendant at the time of the murder.

The defendant's sentence violates neither the letter or spirit of Diatchenko I and satisfies the proportionality requirement of art. 26; any further sentencing relief should be granted only by the Legislature.

CONCLUSION

The defendant was seventeen and one-half years old at the time he individually and intentionally murdered three vulnerable victims; he has received a robust resentencing hearing consistent with Costa and Perez II. There is no allegation of any abuse of discretion or failure to consider any evidence in the resentencing judge's determination that consecutive sentences were merited. A determination by this Court that the defendant's sentence is cruel or unusual

would mean that the defendant's chronological age is the only relevant, and in fact dispositive, factor and that individualized sentencing based on the defendant's other characteristics and the circumstances of the offense, or even the number of murders or degree of harm caused, is irrelevant. For the foregoing reasons, the order of the Middlesex Superior Court sentencing the defendant to consecutive life sentences for each of his three first degree murder convictions, with parole eligibility after forty-five years, should be affirmed.

Respectfully Submitted
For the Commonwealth,

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Dated: February 8, 2019

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 8881CR00019
8881CR00020
8881CR00021

COMMONWEALTH

vs.

DANIEL LAPLANTE

SENTENCING MEMORANDUM

I. INTRODUCTION

It is the duty of this Court today to re-sentence Daniel LaPlante in light of recent case law. In 1988, Mr. LaPlante was convicted of three counts of first degree murder for the murders of Priscilla, Abigail and William Gustafson. He was sentenced to three consecutive terms of life imprisonment without the possibility of parole. The murders occurred on December 1, 1987. Mr. LaPlante was 17 ½ years old at the time.

II. RECENT CASE LAW

In 2012, the United States Supreme Court held in *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012), that the imposition of mandatory life sentences without the possibility of parole on juvenile offenders, violates the Eighth Amendment to the United States Constitution's prohibition on "cruel and unusual punishment." The Supreme Court noted that mandatory life sentences without the possibility of parole for juveniles does not allow the sentencing judge to consider the juveniles' "'lessened culpability' and greater 'capacity for change.'" *Id.*, at 2460 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2026-2027, 2029-2030 (2010)). In 2013, the

Massachusetts Supreme Judicial Court held in *Diatchenko v. District Attorney for Suffolk*, 466 Mass. 655, 666 (2013), that the *Miller* holding applies retroactively to cases on collateral appeal, and that art. 26 of the Massachusetts Declaration of Rights prohibits the discretionary imposition of a sentence of life without the possibility of parole on juvenile offenders.

The result of the *Miller* and *Diatchenko* cases is that the maximum statutory sentence applicable to each of Daniel LaPlante's convictions for first degree murder is now life with the possibility of parole after fifteen years.

In *Commonwealth v. Costa*, 472 Mass. 139, 149 (2015), the Supreme Judicial Court held that juvenile offenders sentenced to multiple consecutive mandatory life sentences were entitled to a resentencing hearing, at which the judge ***may*** impose concurrent rather than consecutive sentences. *Id.* The Supreme Judicial Court further held that in order to make the determination as to whether to impose concurrent or consecutive sentences, the resentencing judge must consider the following factors in addition to the factors generally considered at any sentencing:

First, the factors the Supreme Court identified in *Miller*, which are:

- The defendant's chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences;
- The family home environment that surrounded the defendant;
- 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;
- Whether the defendant might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – e.g., the defendant's inability to deal with police officers or prosecutors (including on a plea agreement) of the defendant's incapacity to assist his own attorneys;
- The possibility of rehabilitation.

Second, evidence concerning the psychological state of the defendant at the time he committed the murders.

Third, evidence of the defendant's post-sentencing conduct, whether favorable or unfavorable.

III. BASIS FOR SENTENCE

A sentencing hearing was held March 22, 2017. In advance of the hearing, counsel for the Commonwealth and counsel for Mr. LaPlante submitted to the Court sentencing memoranda and a variety of supporting materials, all of which have been marked in evidence for purposes of the sentencing hearing.

At the hearing, the Court heard the testimony of Dr. Fabian M. Saleh, M.D.

The Court also heard victim impact statements from Carole Gustafson, Christine Morgan, William Morgan and Elizabeth Williams.

Finally, the defendant, Daniel LaPlante made a statement to the Court.

The Court has considered all of these materials. I will not touch on each and every material fact in this decision but will highlight the more significant ones.

The Court has not considered any evidence of Mr. LaPlante's religious beliefs or evidence that he exercised his constitutional rights either by filing lawsuits against the Department of Corrections or by seeking resentencing in this case.

IV. ANALYSIS

A. Recommendations

The Commonwealth asks the Court to impose the maximum possible penalty of three consecutive life sentences, which would result in parole eligibility for Mr. LaPlante after 45 years.

Mr. LaPlante's attorneys argue on his behalf that such a sentence would violate art 26 of the Massachusetts Declaration of Rights because it would be the equivalent of a life sentence without the possibility of parole. In the alternative, the defense argues that if the Court rules that a sentence of three consecutive life sentences is not unconstitutional, it is inappropriate under all of the circumstances for the Court to impose consecutive sentences. The defense asks that the Court sentence Mr. LaPlante to two consecutive life sentences and that he be sentenced on the third count to a concurrent life sentence. The result of that sentence would be that Mr. LaPlante would be eligible for parole after serving 30 years.

B. <u>The Constitutionality of Three Consecutive Life Sentences</u>

With respect to the defendant's legal argument, the Court finds that a sentence of three consecutive life sentences with the possibility of parole at 15 years per sentence, for a total of 45 years, is not categorically unconstitutional under either the United States Constitution or art. 26 of the Massachusetts Declaration of Rights. Certainly sentencing must be individualized and the Court must consider all of the relevant factors as discussed in *Miller, Diatchenko* and *Costa* before imposing such a sentence. In particular, the Court must consider if and how Mr. LaPlante's age and maturity impacted his commission of these crimes in light of the recent research on the development of the juvenile brain. In making this assessment the Court must keep in mind as the Supreme Court said in *Miller* that "youth . . . . is a time of immaturity, irresponsibility, 'impetuousness and recklessness.'" 132 S. Ct. at 2467 (alteration and citation omitted). That being said, the Court does not read the cases cited by the defense categorically to foreclose three consecutive life sentences with the aggregate parole eligibility at 45 years.

In *Costa*, the Supreme Judicial Court was clear that the sentencing court must hold a resentencing hearing to consider whether a defendant who received consecutive mandatory life

sentences should be sentenced to concurrent terms in light of the enumerated factors. The Supreme Judicial Court did not mandate concurrent life sentences or eliminate the sentencing court's discretion to impose consecutive life sentences in the appropriate case. *Costa*, 472 Mass. at 141. The defense cites cases from other jurisdictions in support of its argument that three consecutive life sentences with parole eligibility at 45 years is the functional equivalent of a life sentence without parole. These cases, however, are not dispositive on this point, as they are distinguishable on their facts and also on the legal issue presented.[1] Moreover, in *Costa*, the Supreme Judicial Court clearly contemplated that on resentencing, after considering a defendant's individual circumstances in the context of all the relevant factors, a court might find consecutive life sentences appropriate.

C. ***Costa* Factors**

1. ***Miller* Factors**

The Court has considered the fact that Mr. LaPlante was 17 ½ years old at the time he committed the Gustafson murders. While at 17 ½ he was still a juvenile by virtue of his age, the

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[1] From a legal standpoint the cases cite by the defendant deal with whether the particular sentence imposed brings the case under the *Miller* holding, thus, entitling the defendants to a resentencing hearing *See e.g., State v. Zuber*, 227 N.J. 422, 448 (Jan. 11, 2017) (aggregate of consecutive sentences with parole eligibility after fifty years and sixty-eight years for non-homicide offenses was the functional equivalent of life sentences, thereby triggering the protections of *Miller*); *Casiano v. Commissioner of Corr.*, 317 Conn. 52, 79 (2015) (fifty-year term for one murder is functional equivalent of life sentence, therefore *Miller* applied); *Bear Cloud v. State*, 334 P.3d 132, 141-143 (Wyo. 2014) (aggregate consecutive sentences (one homicide, two non-homicide) making defendant eligible for parole after forty-five years was the functional equivalent of a sentence of life without parole requiring an individualized sentencing hearing under *Miller*); *State v. Ragland*, 836 N.W.2d 107, 122 (Iowa 2013) (After *Miller*, Governor commuted defendant's life sentence without parole to sentence of sixty years without parole; that sentence was the functional equivalent of a life sentence without parole, thereby requiring resentencing under *Miller*); *State v. Null*, 836 N.W.2d 41, 72-73 (Iowa 2013) (consecutive sentences for second-degree murder and first-degree robbery totaling seventy-five years with parole eligibility after 52.5 years is functional equivalent of a life sentence that triggers individualized sentencing hearing under *Miller*); *State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013) (consecutive sentences totaling fifty years with parole eligibility after thirty-five years for non-homicide offenses violated *Miller* and required an individualized sentencing hearing); *People v. Caballero*, 55 Cal. 4th 262, 268 (Cal. 2012) (consecutive sentences for non-homicide crimes making defendant parole eligible after 110 years was cruel and unusual punishment under *Graham v. Florida*, 560 U.S. 48 (2010)). The parties agree in this case that Mr. LaPlante is entitled to an individualized resentencing hearing.

evidence submitted at the hearing did not reflect that at the time of the murders he displayed the "hallmark features" of a juvenile, that is, immaturity, impetuosity and failure to appreciate risks and consequences. This is notable in a variety of ways.

Specifically, Mr. LaPlante's criminal history leading up to the Gustafson murders reflects deliberate and well calculated actions. He repeatedly broke into homes, terrorized families, and ultimately murdered Priscilla, Abigail and William. His actions were goal driven and demonstrated a desire to exercise control over his victims.

Mr. LaPlante's family and home environment was also relatively unremarkable. While his mother recounts having a difficult relationship with her first husband, she did not think that Mr. LaPlante witnessed any violence. Mr. LaPlante described his childhood as "pretty good". His mother worked hard. She remarried and her second husband served as a father figure to Mr. LaPlante. Mr. LaPlante struggled with learning disabilities and attention deficit disorder. However, he had significant support systems in place at school and consistently tested above average intellectually.

The facts of these homicides are reflected in the trial transcripts and in Mr. LaPlante's description of the murders to Dr. Saleh. Those facts clearly establish that Mr. LaPlante acted deliberately and intentionally on December 1, 1987, and that he did not act impulsively or out of a place of immaturity. He carefully planned his intrusions into the Gustafson's home; first breaking in on November 16, 1987, and stealing items. While he could have stopped there, he decided to return. He obtained a gun and lied to his brother's friend in order to get bullets. He practiced loading and unloading the gun. On December 1, 1987, Mr. LaPlante broke into the Gustafson's house for the second time, carrying the loaded weapon. When he heard Priscilla Gustafson and her 5 year-old son William entering the house, he said that his first thought was to

jump out the window. But he decided not to. He confronted them with the gun, brought them to the bedroom, put William in the closet and tied Priscilla to the bed. Mr. LaPlante said that after he tied Priscilla to the bed, his plan was to leave. But once again he decided not to. Instead, he made the decision to rape her. After raping her, he acknowledged that he could have left. Instead, he decided he would kill her. After he killed Priscilla, Mr. LaPlante made the decision to take William into the bathroom and drown him. As he was leaving, he encountered Abigail. He lured her into the bathroom and made the decision to drown her as well. These facts reflect three distinct acts of murder, carried out deliberately and thoughtfully. Finally, Mr. LaPlante's conduct after the murders confirms that he acted with deliberation. After fleeing the scene, he went home, ate and then attended his niece's birthday party as if nothing had happened.

Likewise, there is no evidence in the record that Mr. LaPlante demonstrated any youthful incompetencies that resulted in harsher charges or that his youthfulness affected his ability to work with his attorney. In fact, the Court has the benefit of multiple evaluations that were conducted around the time of these offenses, all of which concluded that Mr. LaPlante understood his circumstances and was capable of assisting his attorneys with his defense.

The last *Miller* factor is the possibility of rehabilitation. The records reflect that despite initial difficulties, Mr. LaPlante has shown signs of improved behavior, particularly in the last few years. He has positively engaged in many activities, earned his GED, tutored others and run a variety of programs and activities.

Mr. LaPlante did express remorse to Dr. Saleh, and in the courtroom yesterday. The Court hopes that those sentiments are genuine. However, Mr. LaPlante's recent description of the murders to Dr. Saleh reflects an extraordinary lack of empathy. The Court agrees with Dr.

Saleh's opinion that Mr. LaPlante has not yet been rehabilitated and his prognosis for rehabilitation in the future is "guarded."

In sum, while the Court cannot say that Mr. LaPlante is incapable of rehabilitation, there is insufficient evidence for the Court to find that there is a likelihood that he will be able to rehabilitate.

2. Psychological State of the Defendant at the Time He Committed the Murders

The Court found the testimony of Dr. Saleh credible. After a thorough evaluation, Dr. Saleh's opinion is that Mr. LaPlante currently suffers from Antisocial Personality Disorder, and that the Gustafson murders were a result of Conduct Disorder, Childhood onset Type, rather than any adverse childhood experiences, learning disabilities or immaturity.

Mr. LaPlante's psychiatric history reflects that he has never suffered from a psychotic illness, such as schizophrenia, or a mood disorder, such as bi-polar illness. Moreover, he has not suffered from anxiety disorder or an impulse control disorder. Mr. LaPlante was never been treated for any significant period of time with any psychiatric medication. Finally, Mr. LaPlante was not under the influence of alcohol or drugs at the time of the murders nor has he ever struggled with substance abuse.

The Court also reviewed the psychosocial evaluation of Kimberly Mortimer, M.S., L.M.C.H., submitted by the defense. Ms. Mortimer accurately points out that Mr. LaPlante has made progress during his time in prison. She also makes some important points generally about the current research regarding the development of the brains of juvenile offenders. However, the Court is not persuaded that Mr. LaPlante's conduct can be attributed to any of his childhood experiences or to immaturity, irresponsibility, impetuousness or recklessness.

3. LaPlante's Post-Sentencing Conduct, Whether Favorable or Unfavorable

As the Court has noted, it is true that Mr. LaPlante appears to have made significant progress while in prison. His disciplinary infractions in the later part of his incarceration have been relatively minor and have not involved violent conduct. He has taken advantage of educational opportunities, receiving his GED and volunteering as a tutor. He was transferred to MCI Norfolk where he ultimately was elected to take on leadership roles involving a variety of activities. And most recently, he voluntarily entered the sexual treatment program at Bridgewater State Hospital. While the Court considers these facts as positives, they do not in the Court's judgment outweigh the other factors.

D. Imposition of Sentence

Finally, the Court has carefully assessed the information before it in light of the recognized goals of criminal sentencing: punishment of the defendant that is fairly proportional to the culpability of his crime, general deterrence, specific deterrence, protection of the public and the rehabilitation of the defendant, and considered whether there are mitigating circumstances that would warrant less than the maximum penalty in this case.

It is the responsibility of this Court to consult her conscience and exercise sound judicial discretion in order to punish the defendant justly. Judicial discretion does not permit the sentencing judge to substitute its personal values for the public values. Judicial discretion does not permit the sentencing judge to act impulsively to satisfy any personal or public desire for vengeance. Judicial discretion does not permit the sentencing judge to punish the offender for conduct other than that which has resulted in a conviction. Ultimately the sentence imposed must be based on an individualized consideration of Mr. LaPlante's circumstances.

Based on the totality of the evidence submitted to the Court, the Court is persuaded that Mr. LaPlante's relative youth did not play a role in the Gustafson murders. This case does not

involve a single act that resulted in three deaths. Mr. LaPlante committed three distinct and brutal murders. He killed a 33 year old pregnant mother and her 5 and 7 year old children. He left a family and a community devastated. The Court finds that the maximum penalty is warranted.

Accordingly, the Court will impose a life sentence for the murder of Priscilla Gustafson. The Court will impose a life sentence for the murder of William Gustafson to run consecutive to the previously imposed sentence. The Court will impose a life sentence for the murder of Abigail Gustafson to run consecutive to the two previously imposed sentences. Each sentence carries parole eligibility of fifteen years. Based on the Court's sentence of three consecutive life sentences, Mr. LaPlante is not eligible for parole until he has served 45 years.

Hélène Kazanjian
Justice of the Superior Court

DATE: March 23, 2017

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2018-0016

Middlesex Superior Court
No. 8881CR0019
No. 8881CR0020
No. 8881CR0021

COMMONWEALTH

v.

DANIEL LAPLANTE

ORDER

This case came before the Court, Lowy, J., on the defendant's application for relief pursuant to G. L. c. 278, § 33E, to allow his appeal arising from a resentencing by a Superior Court judge in light of this Court's decision in Diatchenko v. District Attorney for the Suffolk District, 466 Mass 655, 667 (2013). The defendant has also filed a motion for direct entry of appeal.

The defendant was convicted in 1988 of three separate murders and was sentenced to three consecutive life sentences. The defendant's convictions were affirmed by this court after plenary review. Commonwealth v. LaPlante, 416 Mass. 433 (1993).

The defendant was seventeen years old at the time he committed the murders.

While I recognize that there is a preliminary issue of whether review of the defendant's sentence is subject to the gatekeeper provision of G. L. c. 278, § 33E, I need not reach this preliminary issue. I find that the defendant raises a 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. Therefore, I am allowing direct entry of this appeal before the full court.

The record before the full court shall consist of the following:

1. defendant's motion for direct entry of appeal or, in the alternative, for leave to file late gatekeeper petition;

2. defendant's gatekeeper petition;

3. Commonwealth's response to defendant's motion for direct entry of appeal, leave to file a gatekeeper petition, and gatekeeper petition;

4. defendant's reply to Commonwealth's response to defendant's motion for direct entry of appeal, leave to file late gatekeeper petition, and gatekeeper petition;

5. letter from Attorney Merritt Schnipper;

6. letter from the Commonwealth of Massachusetts, Middlesex District Attorney, Crystal L. Lyons, Assistant District Attorney;

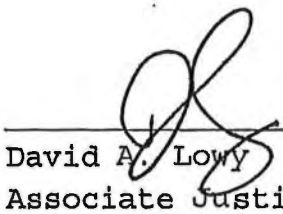
7. statement of agreed facts;

8. docket sheets in SJ-2018-0016; and

9. this Order.

This matter shall proceed in conformance with the Massachusetts Rules of Appellate Procedure. The petitioner is designated the appellant.

The parties shall confer with the Clerk of the Supreme Judicial Court for the Commonwealth regarding a scheduling for the filing and service of briefs.



David A. Lowy
Associate Justice

Entered: July 10, 2018

Article 26 of the Declaration of Rights of the Massachusetts Constitution

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

Eighth Amendment to the United States Constitution

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

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK, ss. No. SJ-2018-0016

COMMONWEALTH OF MASSACHUSETTS

v.

DANIEL LAPLANTE

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION FOR DIRECT ENTRY OF APPEAL, LEAVE TO FILE LATE GATEKEEPER PETITION, AND GATEKEEPER PETITION

Now comes the Commonwealth and responds to the late-filed gatekeeper petition of the defendant, Daniel LaPlante, as well as his requests for a direct entry of appeal or, alternatively, leave to file a late gatekeeper petition. The Commonwealth contends that the gatekeeper process established by G.L. c. 278, §33E, unquestioningly applies to defendant's challenge to the Middlesex Superior Court's resentencing of the defendant pursuant to the filing of his Mass. R. Crim. P. Rule 30(a) motion. The Commonwealth further contends that the defendant has not established good cause for the late filing of his gatekeeper petition.

Procedural Background

In 1988, the defendant was convicted of murder in the first degree for the separate murders of Priscilla Gustafson and her

two young children, Abigail and William Gustafson. The defendant committed the murders in December 1987, when he was seventeen and one-half years old. The defendant was sentenced to three consecutive terms of life imprisonment. Following the Supreme Judicial Court's plenary review and affirmance of his convictions, see Commonwealth v. LaPlante, 416 Mass. 433 (1993), the Commonwealth filed a nolle prosequi of the remaining twenty-seven indictments for which the defendant stood accused, stemming from allegations of separate incidents as well as crimes preceding and following the murder of the Gustafsons and which included several serious violent crimes and firearm offenses. See Appendix A (Commonwealth Nolle Prosequi).

Following the Supreme Judicial Court's decisions in Diatchenko v. District Attorney for the Suffolk District, 466 Mass. 655 (2013), and Commonwealth v. Brown, 466 Mass. 676 (2013), the defendant's sentence was automatically restructured so that each of his three life sentences were converted to terms of life with parole eligibility following fifteen years so that he would become eligible for parole after serving a sentence of forty-five years. On June 12, 2015, the defendant filed a motion pursuant to Mass. R. Crim. P. 30(a), arguing that his restructured sentence of forty-five years before attaining parole eligibility was unconstitutional and amounted to the functional equivalent of a life sentence. See Appendix B

("Docket"); Appendix C (Defendant's Rule 30(a) Motion). The defendant also sought a resentencing hearing during which the trial court could consider the factors set forth in the Supreme Court's decision in Miller v. Alabama, 567 U.S. 460 (2012).

Subsequent to the filing of the defendant's motion, the Supreme Judicial Court decided Commonwealth v. Costa, 472 Mass. 139 (2015), which held that juvenile defendants who were sentenced to consecutive terms of life were entitled to a resentencing hearing wherein the trial court could follow the procedure set forth in that opinion and determine whether such sentences should be served concurrently or consecutively. Id. at 149. The Commonwealth then filed its response to the defendant's Rule 30(a) motion, highlighting that the Costa decision controlled and conceding the defendant was entitled to a resentencing hearing, but arguing he should be again sentenced to three consecutive terms of life for the Gustafson murders. See Appendix D (Commonwealth Response).

On October 6, 2015, the trial court entered an order that the defendant's motion for a resentencing was allowed by agreement. See Docket. The defendant and Commonwealth each engaged in discovery and obtained expert evaluations and opinions following the procedure established in Costa. Both the defendant and the Commonwealth filed sentencing memorandums addressing the constitutionality of imposing three consecutive

life sentences. On March 23, 2017, following an evidentiary hearing during which expert opinion was presented, the trial court sentenced the defendant to three consecutive life sentences. The defendant filed his notice of appeal on April 10, 2017. On June 19, 2017, the defendant's resentencing counsel withdrew and appellate counsel filed his notice of appearance on June 22, 2017. See Docket. The defendant filed his gatekeeper petition with the Single Justice on January 10, 2018.

Argument

The defendant alternatively claims that the gatekeeper provision does not apply to the appeal of his resentencing because his resentence constitutes a "new judgment" not based on the decision of a "motion," because the Commonwealth agreed that he was entitled to a resentencing hearing, and, that if the gatekeeper provision does apply, his good faith belief to the contrary constitutes good cause to extend the time by which to file his petition. The gatekeeper provision unquestionably applies to his appeal and he has not established good cause for his delay in filing.

On August 1, 2017, the Supreme Judicial Court decided Commonwealth v. James, 477 Mass. 547 (2017), which resolved any potential ambiguity on the applicability of the gatekeeper provision to the resentencing of a juvenile first degree murder

offender. The Court clarified that "irrespective of subsequent resentencing" a juvenile homicide offender "remains convicted of murder in the first degree," "and the same rationale for the gatekeeper provision continues to apply." James, 477 Mass. at 550, 552 & n.3. The defendant here at all times remained convicted of three counts of murder in the first degree, for which judgment he has already received plenary review. No new "judgment" has entered as his convictions remain undisturbed. The cases cited by the defendant do not support any contrary result but instead address only the question of at what point finality attaches in the first instance, for purposes of permitting an initial appeal or evaluating the Commonwealth's rights. See Brown, 466 Mass. at 679 (determining when initial judgment was final for purpose of appeal and application of new decisional law); Commonwealth v. Dascalakis, 246 Mass. 12, 19 (1923) (examining whether judgment was final before sentencing for purposes of determining whether the Commonwealth retained the right to enter a nolle prosequi). Judgment here entered once, at the time of the defendant's initial conviction and sentencing.

The defendant's argument that he is not seeking to appeal a "motion" and is therefore outside the scope of the gatekeeper provision is similarly unavailing. The defendant's sentence was automatically restructured following the decisions in Diatchenko

and Brown to permit his parole eligibility following forty-five years. The defendant's resentencing hearing was prompted only by his filing of a motion pursuant to Mass. R. Crim. P. 30(a), in which he argued that his restructured sentence was unconstitutional, and that he was also entitled to a resentencing hearing applying the Miller factors. See Appendix C. The defendant's motion foreshadowed and followed the procedure outlined in Costa for resentencing of a juvenile homicide offender originally sentenced to consecutive life sentences. See Costa, 472 Mass. at 149 & n.5 (permitting a defendant to file a written motion pursuant to Mass. R. Crim. P. 30(a) "to correct the unconstitutional sentence originally imposed"). While the Commonwealth conceded—as it must—that the defendant was entitled to a resentencing hearing, the relief the defendant ultimately sought in his motion, at his resentencing hearing, and which he still seeks on appeal, was not granted: the defendant was again sentenced to three consecutive terms of life imprisonment. The impetus of the defendant's resentencing hearing and his current appeal was the motion he filed. See James, 477 Mass. at 550, 552 & n.3 (elaborating on rationale supporting requirement of gatekeeper petition); see also Commonwealth v. Francis, 411 Mass. 579, 583 (1992) (reaffirming that the gatekeeper provision applies to all post-conviction appeals in capital cases, even those sought by the

Commonwealth). The defendant cites no authority for the proposition that his appeal is exempt from the mandatory gatekeeper provision.

The defendant also does not establish good cause for the delay in filing his gatekeeper petition. The defendant filed a timely notice of appeal in the trial court, but failed to file his gatekeeper petition until more than nine months after his resentencing, more than six months after his appellate counsel appeared, and more than five months after the Court's decision in James. He cites no reason for his delay other than an alleged ambiguity in the applicability of the gatekeeper provision, which, as illustrated above, is clearly applicable. The defendant does not show that the trial court's discretionary imposition of consecutive terms of life for three distinct murders should be held to a different standard than any other gatekeeper petition.

While the defendant argues that the importance of the question he raises—whether a term of forty-five years before parole eligibility is the functional equivalent of a life sentence—alone merits either waiving the gatekeeper provision altogether or an extension of time by which to file his amended petition, his argument is unsupported. In Mains v. Commonwealth, 433 Mass. 30 (2000), which established the 30-day requirement for filing a gatekeeper petition, waiver occurred

where a pro se defendant failed to timely file a gatekeeper petition despite raising a claim of plain structural error based on decisional law occurring after his plenary review. Id. at 32-36. The defendant's contention—challenging a discretionary determination made by the trial court—is less availing than that raised in Mains.

The defendant's petition argues that the trial court's discretionary sentencing decision to impose three consecutive life sentences is prohibited as the functional equivalent of a life sentence. His argument misapplies juvenile sentencing jurisprudence. In Brown, the Supreme Judicial Court upheld the imposition of mandatory life sentences for juvenile homicide offenders, but cautioned the legislature in a dicta footnote to avoid prospectively establishing a mandatory term of years before parole eligibility so great as to be the functional equivalent of a life sentence (and by doing so pretextually attempting to reverse the holdings in Diatchenko and Brown). Brown, 466 Mass. at 691 n.11. That caution has no applicability to the defendant's case, where he was first sentenced prior to those decisions and the legislative fix.[1] The defendant has received the benefit of a full Miller/Costa hearing and the

[1]The Costa decision followed and cited the legislative "fix" of the statute, which requires a mandatory term of life imprisonment with parole eligibility not before thirty years for murder committed in the first degree with extreme atrocity and cruelty. See Costa, 472 Mass. at 145; G.L. c. 279, §24.

trial court was given discretion to impose concurrent sentences. No court has limited the discretion of a judge to impose a sentence of forty-five years for three distinct convictions of murder in the first degree following such a hearing. Indeed, a judge's discretion in determining whether sentences are to be served concurrently or consecutively is "firmly rooted in the common law." Commonwealth v. Perez, 477 Mass. 677, 689 (2017) (Lowy, J., dissenting), citing Commonwealth v. Lucret, 58 Mass. App. Ct. 624, 628 (2003), citing Commonwealth v. Celeste, 358 Mass. 307, 310 (1970) ("judge is permitted great latitude in sentencing"). The defendant raises no claim that the trial court did not follow the procedure established in Costa. The defendant has not established good cause for failing to timely file his gatekeeper petition.[2]

For the aforementioned reasons, the Commonwealth requests that the Single Justice deny the defendant's untimely gatekeeper petition.

Respectfully Submitted
For the Commonwealth,

MARIAN T. RYAN
DISTRICT ATTORNEY

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[2] Should the Single Justice grant the defendant's request to file an amended late petition, the Commonwealth respectfully requests the opportunity to respond to that petition on the question of whether the defendant raises a "new and substantial question which ought to be considered by the full court." G.L. c. 278, §33E.

/s/ CRYSTAL L. LYONS
Crystal L. Lyons (BBO 677931)
Assistant District Attorney
Office of the Middlesex District Attorney
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Dated: February 2, 2018

Appendix A

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT DEPARTMENT
NOS. 88-23 through 88-46

COMMONWEALTH

v.

DANIEL J. LAPLANTE

NOLLE PROSEQUI

Now comes the Commonwealth in the above-captioned matter and respectfully states that it will not prosecute Indictment Nos. 88-23 through 88-46 any further.

As grounds therefor, the Commonwealth states that the defendant is presently serving three (3) consecutive life sentences for convictions on Indictment Nos. 88-19 through 88-22, which convictions have been affirmed on appeal by the Supreme Judicial Court. Commonwealth v. LaPlante, 416 Mass. 433 (1993).

2/4/94 Filed in open court

Respectfully Submitted
For the Commonwealth,

THOMAS F. REILLY
DISTRICT ATTORNEY

by: David E. Meier

DAVID E. MEIER
Assistant District Attorney
Lowell Regional Office
44 Church Street
Lowell, MA 01852
(508)458-4440

Dated: February 4, 1994
0068G/lt

Appendix B

8881CR00019 Commonwealth vs. LaPlante, Daniel J

Case Type	Indictment	**Initiating Action:**	MURDER c265 §1
Case Status	Closed	**Status Date:**	01/12/1988
File Date	01/12/1988	**Case Judge:**	Barton, Robert
DCM Track:	I - Inventory	**Next Event:**	

All Information | Party | Charge | Event | Docket | Disposition

Party Information

Commonwealth - Prosecutor

Alias

Party Attorney

Attorney	Lynch, Esq., Adrienne C
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Phone Number	(781)897-8505
Attorney	Lyons, Esq., Crystal Lee
Bar Code	677931
Address	Middlesex District Attorney's Office 15 Commonwealth Ave Woburn, MA 01801
Phone Number	(781)897-6855

More Party Information

LaPlante, Daniel J - Defendant

Alias

Party Attorney

Attorney	Schnipper, Esq., Merritt Spencer
Bar Code	676543
Address	Schnipper Hennessy 25 Bank Row Suite 2S Greenfield, MA 01301
Phone Number	(413)325-8541

More Party Information

Party Charge Information

LaPlante, Daniel J - Defendant

Charge # 1 :

265/1-0 - Felony MURDER c265 §1

Original Charge	265/1-0 MURDER c265 §1 (Felony)
Indicted Charge	
Amended Charge	

Charge Disposition

Disposition Date	Disposition
10/25/1988	Guilty Verdict

Events

Date	Session	Location	Type	Event Judge	Result
11/03/2015 02:00 PM	Criminal 2 Rm 530	Courtroom 530	Motion Hearing		Held as Scheduled
04/06/2016 02:00 PM	Criminal 2 Rm 530		Motion Hearing	Desmond, Hon. Kenneth V	Held as Scheduled
06/15/2016 02:00 PM	Criminal 2 Rm 530	Courtroom 530	Conference to Review Status	Desmond, Hon. Kenneth V	Held as Scheduled
11/30/2016 09:00 AM	Criminal 1 Rm 430	Courtroom 430	Conference to Review Status	Pierce, Hon. Laurence D	Held as Scheduled
01/25/2017 09:00 AM	Criminal 1 Rm 430	Courtroom 430	Conference to Review Status	Pierce, Hon. Laurence D	Not Held
01/25/2017 09:00 AM	Criminal 4 Rm 630		Conference to Review Status		Rescheduled
02/16/2017 02:00 PM	Criminal 6 Rm 730		Scheduling Conference	Kazanjian, Hon. Helene	Held as Scheduled
03/22/2017 09:00 AM	Criminal 4 Rm 630		Hearing for Sentence Imposition		Rescheduled
03/22/2017 09:00 AM	Criminal 1 Rm 430	Courtroom 430	Motion Hearing	Pierce, Hon. Laurence D	Not Held
03/22/2017 09:00 AM	Criminal 6 Rm 730		Hearing for Sentence Imposition	Kazanjian, Hon. Helene	Held as scheduled
03/23/2017 09:00 AM	Criminal 6 Rm 730	Courtroom 730	Hearing for Sentence Imposition	Kazanjian, Hon. Helene	Held as scheduled

Docket Information

Docket Date	Docket Text	File Ref Nbr.
01/12/1988	Indictment returned (INDICTMENTS 0019-0046) ALL SCANNED UNDER 0019 (DUE TO AGE OF THE CASE)	1
10/25/1988	See Docket Sheet for Previous Entries]	
10/25/1988	Case disposed as of this date	
11/04/2011	cert copies sent on 11/4/2011 to Kara Morello-Quinn, DOC Legal Div. Boston	
03/16/2012	copies sent on 3/16/2012 to Daniel LaPlante, DA's Office	
06/12/2015	Defendant 's Motion to Vacate illlegal Sentence	2
06/12/2015	Daniel J LaPlante's Memorandum in support of Defendant's Motion To Vacate ILLegal Sentence	3
06/12/2015	Affidavit of Ryan M.Schiff	4
06/12/2015	Affidavit of Robert L Sheketoff	5
06/12/2015	Affidavit of Elaine Moore	6
06/12/2015	Defendant 's Motion for Funds To Retain Expert Expert In Adolescent Brain Development (SENT UP TO JUDGE TUTTMAN)	7
06/12/2015	Affidavit of Counsel in Support Of Defendant's Motion For Funds To Retain Expert In Adolesecent Brain Development (SENT UP TO JUDGE TUTTMAN)	8
06/22/2015	Endorsement on Motion for funds To Retain Expert In Adolescent Brain Development, (#7.0): ALLOWED	

Docket Date	Docket Text	File Ref Nbr.
	Not to exceed $5,000.00. (COPY MAILED TO D/C RYAN SHIFF,ESQ)	
07/02/2015	Order: PROCEDURAL ORDER: The defendant has filed a motion for post-conviction relief. The court ORDERS that the Commonwealth file a response to the defendants pending motion on or before September 23,2015. Charge: Murder; ADA Thomas Reilly; Motion Filed By: Ryan Schiff; Sentencing Judge: Barton. By The Court (Tuttman,J.) Mary Aufiero Deputy Assistant Clerk (COPIES MAILED BOTH SIDES ADA BETHANY STEVENS, AND D/C RYAN SCHIFF,ESQ.)	9
09/23/2015	Commonwealth 's Response to Defendant's Motion To Vacate Illegal Sentence	10
09/24/2015	General correspondence regarding (P# 2,3,4,5,6, 7, 8, 9, and 10) SENT UP TO JUDGE TUTTMAN	
10/05/2015	ORDER: ORDER OF ASSIGNMENT: The defendant has filed a motion for post-conviction relief. Justice Kenneth Desmond is assigned to this matter. The clerk's office shall notify all counsel of record. (COPIES MAILED BOTH SIDES ADA BETHANY STEVENS AND D/C RYAN SCHIFF,ESQ.)	11
10/06/2015	Endorsement on Motion to Vacate Illegal Sentence, (#2.0): ALLOWED Motion to Vacate and for resentencing is ALLOWED by Agreement. Matter to be put on for status rescheduling (COPIES MAILED BOTH SIDES ADA BETHANY STEVENS AND D/C RYAN SCHIFF,ESQ.)	
10/27/2015	Defendant 's EX PARTE Motion for funds and Affidavit Of Counsel In Support Of Motion For Funds	12
11/02/2015	Endorsement on Motion for funds , (#12.0): ALLOWED (COPY MAILED TO D/C RYAN SCHIFF,ESQ)	
11/03/2015	Event Result: The following event: Motion Hearing scheduled for 11/03/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled Appeared: Attorney Stevens, Esq., Bethany Attorney Schiff, Esq., Ryan Erika Goldberg CR	
04/06/2016	Event Result: The following event: Motion Hearing scheduled for 04/06/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled	
05/05/2016	Commonwealth 's Motion for a Court Order Authorizing Disclosure Of Grand Jury Minutes For Limited Pursposes (SENT UP TO JUDGE DESMOND IN COURTROOM 710)	13
06/02/2016	ORDER: ORDER AUTHORIZING DISCLOSURE OF GRAND JURY MINUTES LIMITED PURPOSES: Pursuant to the Commonwealth's Motion to Disclose Grand Jury Minutes pursuant to Mass.R.Crim.P.5 (d), it is hereby ordered that the grand jury minutes that provide the basis of Indictments 1988-19-46 be disclosed to (1) the Commonwealth's retained expert, Fabian Saleh,M.D., (2) the defendant's retained expert, Frank DiCataldo,Ph.D., and (3) defense counsel. It is also ordered that these parties do not further disclose the grand jury minutes to any other parties without prior court approval. By The Court (Kenneth V.Desmond,Jr., Associate Justice Massachusetts Superior Court) (CERTIFIED COPY MAILED TO ADA ADRIENNE LYNCH)	14
06/15/2016	Event Result: The following event: Conference to Review Status scheduled for 06/15/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled	
09/29/2016	Defendant 's EX PARTE Motion for Supplemental Funds (SENT UP TO COURTROOM 430)	15
09/29/2016	Affidavit of Counsel In Support Of EX Parte Motion For Supplemental Funds (SENT UP TO COURTROOM 430)	16
10/17/2016	Endorsement on Motion for Supplemental Funds, (#15.0): ALLOWED (CERTIFIED COPY MAILED TO D/C RYAN SCHIFF,ESQ.)	

Docket Date	Docket Text	File Ref Nbr.
10/17/2016	Defendant 's Joint Motion to Assign Case to New Justice and Schedule a Status Conference SENT TO COURTROOM 430	17
11/10/2016	The following form was generated: Notice to Appear Sent On: 11/10/2016 15:23:44	
11/29/2016	ORDER: ORDER OF ASSIGNMENT: The defendant has filed a motion to vacate his consecutive life sentences. Justice Laurence D. Pierce is assigned to this matter. The clerk's office shall notify all counsel of record. (Laurence D. Pierce, Regional Administrative Justice) Dated: November 29,2016 (COPIES MAILED BOTH SIDES ADA CRYSTAL LYONS AND D/C RYAN SCHIFF,ESQ.)	18
11/30/2016	Event Result: The following event: Conference to Review Status scheduled for 11/30/2016 09:00 AM has been resulted as follows: Result: Held as Scheduled	
12/19/2016	Event Result: The following event: Conference to Review Status scheduled for 01/25/2017 09:00 AM has been resulted as follows: Result: Not Held Reason: Transferred to another session	
12/19/2016	Event Result: The following event: Motion Hearing scheduled for 03/22/2017 09:00 AM has been resulted as follows: Result: Not Held Reason: Transferred to another session	
01/24/2017	Habeas Corpus for defendant issued to MCI - Cedar Junction (at Walpole) returnable for 01/25/2017 09:00 AM Conference to Review Status. Applies To: LaPlante, Daniel J (Defendant)	
01/24/2017	ORDER: ORDER OF ASSIGNMENT: The defendant has filed a motion to vacate his three consecutive life sentences. Justice Helene Kazanjian is assigned to this matter. The clerk's office shall notify all counsel of record. (Laurence D.Pierce, Regional Administrative Justice) Dated: January 24,2017 (COPIES MAILED BOTH SIDES ADA CRYSTAL LYONS AND D/C RYAN SCHIFF,ESQ.)	19
01/25/2017	Event Result: The following event: Hearing for Sentence Imposition scheduled for 03/22/2017 09:00 AM has been resulted as follows: Result: Rescheduled Reason: Transferred to another session	
01/25/2017	Event Result: The following event: Conference to Review Status scheduled for 01/25/2017 09:00 AM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date	
02/16/2017	Habeas Corpus for defendant issued to Bridgewater State Hospital returnable for 03/22/2017 09:00 AM Hearing for Sentence Imposition.	
02/16/2017	Event Result: The following event: Scheduling Conference scheduled for 02/16/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled C/R: Cindy Hart	
02/16/2017	Commonwealth 's Assented to Motion for a Court Order Authorizing Disclosure of Commonwealth's Expert Report in Advance of Sentencing Hearing.	20
02/16/2017	Endorsement on Motion for a Court Order Authorizing Disclosure of Commonwealth's Expert Report in Advance of Sentencing Hearing., (#20.0): ALLOWED	
02/22/2017	Habeas Corpus for defendant issued to Massachusetts Treatment Center - Bridgewater returnable for 03/22/2017 09:00 AM Hearing for Sentence Imposition.	
02/27/2017		21

Docket Date	Docket Text	File Ref Nbr.
	Defendant 's EX PARTE Motion for Supplemental Funds. DUOLICATE COPY WAS FILED IN CLERK'S OFFICE, COPY WAS PLACED IN 430'S BOX ATTENTION JUDGE PIERCE, RAJ.	
02/27/2017	Endorsement on Motion for funds Supplemental, (#21.0): ALLOWED	
03/08/2017	Habeas Corpus for defendant issued to Bridgewater State Hospital returnable for 03/22/2017 09:00 AM Hearing for Sentence Imposition.	
03/15/2017	Commonwealth's Memorandum Sentencing Memorandum PLACED IN 730'S BOX FOR JUDGE KAZANJIAN	22
03/15/2017	Commonwealth's Memorandum Rebuttal to the Report of Kimberly Mortimer.	30
03/16/2017	Commonwealth 's Supplemental for Exhibit to the Commonwealth Rebuttal to the Report of Kimberly Mortimer PLACED IN 730'S BOX ATTENTION JUDGE KAZANJIAN	23
03/20/2017	Offense Disposition:: Charge #1 MURDER c265 §1 On: 10/25/1988 Judge: Robert Barton By: Jury Trial Guilty Verdict	
03/20/2017	Defendant 's Motion to Permit Defendant to Change into Court Attire PLACED IN 730'S BOX, ATTENTION JUDGE KAZANJIAN	24
03/20/2017	Daniel J LaPlante's Memorandum Sentencing memorandum PLACED IN 730'S BOX, ATTENTION JUDGE KAZANJIAN	25
03/22/2017	Event Result: The following event: Hearing for Sentence Imposition scheduled for 03/22/2017 09:00 AM has been resulted as follows: Result: Held as scheduled Day 1 of re-sentencing hearing. C/R: Cindy Hart	
03/22/2017	Habeas Corpus for defendant issued to Massachusetts Treatment Center - Bridgewater returnable for 03/23/2017 09:00 AM Hearing for Sentence Imposition. DEFENDANT NEEDED FOR 9:00AM HEARING.	
03/23/2017	Daniel J LaPlante's Memorandum Supplemental Exhibit in Support of Sentencing Memorandum. Applies To: Schiff, Esq., Ryan (Attorney) on behalf of LaPlante, Daniel J (Defendant)	26
03/23/2017	List of exhibits 1 through 10 introduced by the parties at resentencing hearing. C/R: Cindy Hart (EXHIBITS IN ROOM 207A) *CORRECTION EXHIBITS IN ROOM 207 1 ENVELOPE*	27
03/23/2017	Event Result: The following event: Hearing for Sentence Imposition scheduled for 03/23/2017 09:00 AM has been resulted as follows: Result: Held as scheduled C/R: Cindy Hart	
03/23/2017	MEMORANDUM & ORDER: Sentencing Memorandum. The Court will impose a life sentence for the murder of Priscilla Gustafson. The Court will impose a life sentence for the murder of William Gustafson to run consecutive to the previously imposed sentence. The Court will impose a life sentence for the murder of Abigail Gustafson	28

Docket Date	Docket Text	File Ref Nbr.
	to run consecutive to the two previously imposed sentences. Each sentence carries parole eligibility of fifteen years. Based on the Court's sentence of three consecutive life sentences, Mr. LaPlante is not eligible for parole until he has served 45 years.	
03/23/2017	Defendant sentenced:: Sentence Date: 03/23/2017 Judge: Hon. Helene Kazanjian Charge #: 1 MURDER c265 §1 Life with Parole Not Less Than: 15 Years, 0 Months, 0 Days Committed to MCI - Cedar Junction (at Walpole) Credits 328 Days Further Orders of the Court: Sentence originally imposed 10/25/88 revised 3/23/17. Defendant to be credited with any time previously served on said sentence. Jail credit from date of arrest, 12/3/87 through original sentence date of 10/25/88. SEE ALSO DOCKET NO. 8881CR00020 AND NO. 8881CR00021 FOR ADDITIONAL SENTENCES.	
03/23/2017	Issued on this date: Mitt For Sentence (First 6 charges) Sent On: 03/23/2017 14:58:23	29
04/10/2017	Notice of appeal filed. Applies To: LaPlante, Daniel J (Defendant)	31
06/19/2017	Attorney appearance On this date Ryan Schiff, Esq. dismissed/withdrawn for Defendant Daniel J LaPlante	
06/22/2017	Attorney appearance On this date Merritt Spencer Schnipper, Esq. added for Defendant Daniel J LaPlante	
08/31/2017	Court Reporter Cindy Hart is hereby notified to prepare one copy of the transcript of the evidence of 03/22/2017 09:00 AM Hearing for Sentence Imposition, 03/23/2017 09:00 AM Hearing for Sentence Imposition	32
08/31/2017	Defendant 's Motion for Copy of File.	33
08/31/2017	Endorsement on Motion for Copy of File, (#33.0): ALLOWED	
12/19/2017	CD of Transcript of 03/22/2017 09:00 AM Hearing for Sentence Imposition, 03/23/2017 09:00 AM Hearing for Sentence Imposition received from Cindy Hart.	34

Case Disposition

Disposition	Date	Case Judge
Disposed	10/25/1988	Barton, Robert

Appendix C

Commonwealth of Massachusetts

Middlesex, ss. Superior Court No. 88-0019-22

Commonwealth

v.

Daniel J. LaPlante

DEFENDANT'S MOTION TO VACATE ILLEGAL SENTENCE

Defendant Daniel J. LaPlante moves this Honorable Court, under Massachusetts Rule of Criminal Procedure 30(a), for an order vacating his sentences and granting him a new sentencing hearing.

In support of this motion, the Defendant states as follows and submits a supporting memorandum of law:

(1) On October 25, 1988, the Defendant was convicted of three counts of first-degree murder and sentenced to three consecutive life sentences without the possibility of parole. He was seventeen years old when he committed the murders.

(2) In Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 669 (2013), the Supreme Judicial Court held that sentences of life imprisonment without the possibility of parole imposed on juveniles under the age of eighteen who have been convicted of first-degree murder violate art. 26's prohibition on cruel or unusual punishment.

(3) In light of the SJC's decision in Diatchenko,

the Defendant's sentence was restructured, without judicial involvement, to make him first eligible for parole after forty-five years of imprisonment, when he will be sixty-two years old. This sentence is the product of "'aggregating the parole ineligibility periods [i.e., fifteen years] attendant to each [of the Defendant's] consecutive sentence.'" Hamm v. Commissioner of Correction, 29 Mass. App. Ct. 1011, 1013 (1991), citing Parole Eligibility Policies Annotated § 203.6 (1988).

(4) The Defendant's restructured sentence is unlawful for three reasons.

(5) First, a life sentence that does not permit parole consideration until the defendant has been incarcerated for forty-five years is a de facto life-without-parole sentence and therefore violates the holding of Diatchenko when imposed on a juvenile offender.

(6) Second, the Defendant's sentence violated his right to be free from cruel and/or unusual punishment under the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights, as well as his right to due process under the Fourteenth Amendment and arts. 1, 10, and 12, because it was imposed without any consideration of the distinctive attributes of youth

and the ways they undermine the justifications for imposing the harshest sentences on children.

(7) Third, the Defendant should be given a new sentencing hearing because evidence relating to new developments in psychology and neurobiology was unavailable at the time of the Defendant's sentencing hearing and undermines the justification for requiring the Defendant's life sentences to run concurrently, rather than consecutively.

For these reasons as well as those set forth in the supporting memorandum of law, the Defendant's sentence should be vacated and he should be granted a new sentencing hearing.

Respectfully submitted,

Daniel J. LaPlante
By his attorney,

Ryan M. Schiff
BBO No. 658852
Committee for Public Counsel Services
Special Litigation Unit
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Dated: June 10, 2015

Commonwealth of Massachusetts

Middlesex, ss. Superior Court No. 88-0019-22

Commonwealth

v.

Daniel J. LaPlante

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO VACATE ILLEGAL SENTENCE

INTRODUCTION

On October 25, 1988, Daniel J. LaPlante ("LaPlante" or "Defendant") was convicted of three counts of first-degree murder and sentenced to three consecutive life sentences without the possibility of parole. He was seventeen years old at the time he committed the crimes.

The Supreme Judicial Court recently held that "a sentence of life in prison without the possibility of parole for the commission of murder in the first degree by a juvenile under the age of eighteen" violates art. 26's prohibition on cruel or unusual punishments. Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 669 (2013). In light of this decision, the Defendant's sentence was restructured to make him first eligible for parole consideration after forty-five years of incarceration.

The Defendant's restructured sentence is unlawful for three reasons. First, the imposition of three

indeterminate consecutive life sentences--which would result in the Defendant's not being eligible for parole consideration until he has spent four and a half decades in prison--does not provide for a meaningful opportunity to obtain release and therefore results in an unconstitutional de facto life sentence. See Commonwealth v. Brown, 466 Mass. 676, 691 n. 11 (2013) ("a constitutional sentencing scheme for juvenile homicide defendants must . . . avoid imposing on juvenile defendants any term so lengthy that it could be seen as the functional equivalent of a life-without-parole sentence"). Second, the Defendant's sentence is unconstitutional because the sentencing court did not consider the "distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders," Miller, 132 S. Ct. at 2465, when it sentenced the Defendant to three consecutive, rather than concurrent, life terms. Third, the Defendant should be granted a new sentencing hearing because evidence relating to new developments in psychology and neurobiology was unavailable at the time of the Defendant's sentencing hearing and provides strong support for his argument that his sentences should run concurrently, rather than consecutively.

RELEVANT BACKGROUND

In January 1988, a Middlesex grand jury returned

indictments charging the Defendant with three counts of murder (App.1-3). The murders were committed on December 1, 1987, when the Defendant was seventeen years old (Id.; Schiff Aff. ¶ 2).

The Defendant was tried before a jury in October of 1988 (App.14-15). The Commonwealth presented evidence that the Defendant killed Priscilla Gustafson and her five- and seven-year-old children in their home. See Commonwealth v. LaPlante, 416 Mass. 433, 434-436 (1993). The evidence demonstrated that Ms. Gustafson "died as a result of two shots at close range with a .22 caliber firearm." Id. at 434. "The cause of death of both children was drowning. Additionally, [the older child] suffered blunt trauma to the head and compression of the neck." Id. The jury found the Defendant guilty of all three counts. Id.

At sentencing, the Commonwealth urged the Court to impose three consecutive life sentences because he "will be a danger to the public to the day he dies" and therefore "must die in prison" (Tr. 17:11).[1] Defense counsel made little sentencing argument and instead told the Court that because the Defendant faced a mandatory sentence of life imprisonment without the possibility of parole, "it really in effect does not

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[1]A copy of the sentencing transcript is attached as Exhibit A to the Affidavit of Ryan M. Schiff.

matter whether you make them concurrent or consecutive" (Tr. 17:13). Defense counsel's entire sentencing argument, which takes up less than one line in the transcript, was that "[g]iven the Defendant's age, I would ask that you make them concurrent" (Id.).

The Court (Barton, J.) imposed a sentence designed to ensure that the Defendant spends "the rest of [his] natural life behind bars with no parole. That is three consecutive life sentences" (Id.). The Court gave no indication that it considered the Defendant's "youth and attendant characteristics" (Miller, 132 S.Ct. at 2471) when imposing this sentence (See id.).

On November 16, 1993, the Supreme Judicial Court affirmed the Defendant's convictions. Id. at 444. After the Supreme Judicial Court decided Diatchenko, the Defendant's sentence was restructured, without any judicial action, to three consecutive life sentences with parole eligibility after fifteen years. Because the Defendant committed his crimes before January 1, 1988, he has "a single parole eligibility date [determined] 'by aggregating the parole ineligibility periods attendant to each consecutive sentence.'" Hamm v. Commissioner of Correction, 29 Mass. App. Ct. 1011, 1013 (1991), citing Parole Eligibility Policies Annotated § 203.6 (1988). This results in an effective sentence of life imprisonment with parole eligibility

after forty-five years.

ARGUMENT

I.

THE DEFENDANT'S INDETERMINATE LIFE SENTENCE WITH PAROLE ELIGIBILITY AFTER FORTY-FIVE YEARS OF INCARCERATION IS A DE FACTO LIFE SENTENCE AND THEREFORE VIOLATES ART. 26'S PROHIBITION ON CRUEL OR UNUSUAL PUNISHMENT.

A. Introduction.

In Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. at 671, the Supreme Judicial Court held that the "imposition of a sentence of life in prison without the possibility of parole on juveniles who are under the age of eighteen when they commit murder in the first degree violates the prohibition against 'cruel or unusual punishment[]' in art. 26." In a separate case decided the same day, the Court made clear that this prohibition applies not just to literal life-without-parole sentences but also to "any term so lengthy that it could be seen as the functional equivalent of a life-without-parole sentence." Commonwealth v. Brown, 466 Mass. 676, 691 n. 11 (2013). In support of this holding, the Court cited a decision of the Supreme Court of Iowa finding that a seventy-five-year sentence with parole eligibility after 52.5 years imposed on a sixteen-year-old defendant was an unconstitutional de facto life sentence. Id., citing State v. Null, 836 N.W.2d 107, 111, 121-22 (Iowa 2013). The Iowa Supreme Court has applied the same logic to

invalidate a sentence of thirty-five years without the possibility of parole imposed on a defendant who was seventeen years old at the time of his crimes. State v. Pearons, 836 N.W.2d 88, 96 (Iowa 2013).

In this case, the Defendant was sentenced to three consecutive life sentences without the possibility of parole. This sentence was plainly unlawful under Diatchenko and has now been restructured to result in a life sentence with the possibility of parole after forty-five years. But the restructured sentence is also unlawful because it is the "functional equivalent of a life-without-parole sentence." Brown, 466 Mass. at 691 n. 11. This sentence does not even permit the possibility of parole until the Defendant is sixty-two years old and has spent four and a half decades in prison. "The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society[.]" Null, 836 N.W.2d at 71.

B. Art. 26 Prohibits the Imposition of Sentences That Are the Functional Equivalent of Life Without Parole for Crimes Committed When the Defendant Was Younger than Eighteen.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." Likewise, art. 26 of the Massachusetts Declaration of Rights forbids the

"inflict[ion] cruel or unusual punishments" (emphasis added). The Eighth Amendment and art. 26 both include a proportionality principle, requiring that "punishment for crime should be graduated and proportioned to both the offender and the offense." Miller, 132 S. Ct. at 2458 (citation and internal quotation marks omitted); Diatchenko, 466 Mass. at 671 ("the fundamental imperative of art. 26 [is] that criminal punishment be proportionate to the offender and the offense").

In recent years, the courts have applied the proportionality test to forbid the imposition of certain sentences on children that would be constitutional if applied to adults. In Roper v. Simmons, 543 U.S. 551, 579 (2005), for example, the Supreme Court held that the Eighth Amendment forbids the "imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." In Graham v. Florida, 560 U.S. 48, 82 (2010), the Court extended its holding in Roper by concluding that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." Two years later, the Court held that "the Eighth Amendment forbids [any] sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Miller, 132 S.Ct. at 2469. Under this rule,

a sentencing scheme "requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes" violates "the Eighth Amendment's ban on cruel and unusual punishment." Id. at 2475.

Because the Massachusetts murder statute mandated life sentences without the possibility of parole for certain juveniles, it was plainly unconstitutional under Miller as applied to those children. In Diatchenko, the SJC considered three issues: (1) "whether Miller is retroactive"; (2) the impact of Miller on the Massachusetts murder statute; and (3) the appropriate remedy for individuals "serving mandatory life sentences without the possibility of parole" for murders committed when they were under the age of eighteen. 466 Mass. at 658. The Court concluded that "Miller has retroactive application to cases on collateral review." Id. The Court went on to explain that the Massachusetts murder statute was unconstitutional under Miller and under art. 26 of the Massachusetts Declaration of Rights because "[b]y its clear and plain terms, the statute impose[d] life in prison without the possibility of parole on individuals who are under the age of eighteen when they commit the crime of murder in the first degree." Id. at 667. But

the Court also went beyond the Supreme Court's holding in Miller by concluding that even "the discretionary imposition of a sentence of life in prison without the possibility of parole on juveniles who are under the age of eighteen when they commit murder in the first degree violates the prohibition against 'cruel or unusual punishment[]' in art. 26." Id. at 284-85 (emphasis added). Finally, the Court concluded that the proper remedy for a person serving an unconstitutional life-without-parole sentence was to leave the life sentence in place but to recognize that "the statutory exception to parole eligibility no longer applies[.]" Id. at 673.

In Commonwealth v. Brown, which was decided on the same day as Diatchenko, the Court clarified this remedy. A juvenile convicted of first-degree murder, the Court explained, must be given a "sentence of life in prison with the possibility of parole in no fewer than fifteen years[.]" Brown, 466 Mass. at 682. The Court recognized that there was a potential problem in future cases because juveniles convicted of first- and second-degree murder would face the same mandatory punishment--life imprisonment with the possibility of parole after between fifteen and twenty-five years. Id.

at 689-690.[2] The Court left "to the sound discretion of the Legislature the specific contours of a new sentencing scheme for juveniles convicted of homicide crimes, including the length of any mandatory prison term or the minimum and maximum term of any discretionary sentencing or parole-eligibility ranges." Id. at 691 n. 11.

But the Court made clear "that a constitutional sentencing scheme for juvenile homicide defendants must take account of the spirit of our holdings today here and in Diatchenko, and avoid imposing on juvenile defendants any term so lengthy that it could be seen as the functional equivalent of a life-without parole sentence." Id. at 691 n. 11 (emphasis added). In support of this recognition, the Court cited decisions from the California and Iowa supreme courts invalidating life sentences imposed on juveniles where those sentences only permitted parole consideration after decades of incarceration. Id., citing People v. Caballero, 55 Cal. 4th 262, 145 Cal. Reptr. 3d 286, 282

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[2]Before Diatchenko was decided, the Legislature amended the parole-eligibility statute to permit judges to "set parole eligibility between fifteen and twenty-five years for an offender convicted of a mandatory life-sentence crime committed on or after August 2, 2012." Brown, 466 Mass. at 690, citing G.L. c. 127, § 133A, as amended through St. 2012, c. 192, §§ 37-39; G.L. c. 279, § 24, as amended through St. 2012, c. 192, § 46. The statute has since been amended again. See St. 2014, c. 189, § 6.

P.3d 291, 295 (Cal. 2012); State v. Ragland, 836 N.W.2d 107, 111, 121-122 (Iowa 2013); State v. Null, 836 N.W.2d 41, 45, 71 (Iowa 2013). In the California case, the court held that a life sentence with "a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." Caballero, 55 Cal. 4th at 268. The court did not discuss whether a sentence that only permits parole consideration after decades of incarceration but within the juvenile's life expectancy also runs afoul of the constitutional prohibition on cruel and unusual punishment.

The Iowa Supreme Court, however, did decide this issue in Ragland and Null. In Ragland, the defendant, who was seventeen when he committed murder, challenged his sentence of life imprisonment with the possibility of parole after sixty years. Ragland, 836 N.W.2d at 119. (A concurring justice noted that with good-time credit, this sentence "allowed for the possibility of Ragland's release after forty-two and one-half years[.]" Id. at 126 (Zager, J., concurring).) This sentence permitted the defendant to "becom[e] eligible for parole during his natural lifetime[.]" Id. at 120. The court nonetheless found that it was unconstitutional under Miller. The court explained that

"the spirit of the law [must] not be lost in the application of the law." Id. at 121. Miller, the court observed, mandated that the sentencing process "be tailored to account in a meaningful way for the attributes of juveniles that are distinct from adult conduct." Id. The court held that "a government system that resolves dispute could hardly call itself a system of justice with a rule that demands individualized sentencing considerations common to all youths apply only to those youths facing a life without parole and not to those youths facing a sentence of life with no parole until" the final years of their life expectancy. Id.

In Null, the Iowa Supreme Court extended this rule beyond sentences that only permit parole consideration at the very end of the juvenile's life expectancy. Null was sentenced to a term of between fifty-two and one-half and seventy-five years for crimes he committed when he was sixteen years old. Under this sentence, Null would be eligible for parole when he was sixty-eight years old. The evidence submitted in the case did "not clearly establish that [the] prison term [was] beyond [Null's] life expectancy." Id. at 71. But the court rejected the notion that "the determination of whether the principles of Miller or Graham apply in a given case should turn on the niceties of epidemiology,

genetic analysis, or actuarial sciences in determining precise mortality dates." Id. Instead, the court held that a "juvenile's potential future release in his or her late sixties after a half century of incarceration [is not] sufficient to escape the rationales of Graham or Miller. The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by Graham." Id. (citation omitted).

In other cases, courts have applied the same reasoning to invalidate sentences that permitted parole consideration sooner than in this case. In State v. Pearson, 836 N.W.2d 99, 96 (Iowa 2013), for example, the Supreme Court of Iowa held that a thirty-five-year sentence without the possibility of parole imposed on a seventeen-year-old defendant "violate[d] the core teachings of Miller" and the requirements of the Iowa State Constitution. This sentence, which would have resulted in the defendant's being released when he was fifty-two years old, was unlawful because it "deprived [him] of any chance of an earlier release and the possibility of leading a normal adult life." Id.

In Bear Cloud v. State, 334 P.3d 132, 141-42 (Wyoming 2014), the Supreme Court of Wyoming considered

the legality of an aggregate sentence of life with the possibility of parole after forty-five years (thirty-five years with good-time credit) imposed on a sixteen-year old defendant for first-degree murder, aggravated burglary, and conspiracy to commit aggravated burglary. The court declined to "make any predictions of Mr. Bear Cloud's life expectancy" and instead held that "[a]s a practical matter, a juvenile offender sentenced to a lengthy term-of-years sentence will not have a 'meaningful opportunity for release.'" Id. at 142. The court, therefore, concluded that the defendant's sentence was unconstitutional under Miller because it was imposed without "consider[ation of] the practical result of lengthy consecutive sentences, in light of the mitigating factors of youth[.]" Id. at 142-43.[3]

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[3]Other courts have arrived at contrary conclusions. The decisions of those courts, however, are in conflict with the SJC's warning in Brown about de facto life sentences and its approving citation of the Null decision. See, e.g., State v. Brown, 118 So. 3d 332, 341 (Louisiana 2013) ("In our view, Graham does not prohibit consecutive term of year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant's lifetime"); Bunch v. Smith, 685 F.3d 546, 551 (6th Cir. 2012) (denying habeas relief because Graham did not create clearly established Federal law barring consecutive, term sentences in excess of offender's life expectancy); State v. Kasic, 265 P.3d 410, 415 (Ariz. Ct. App. 2011) (holding that consecutive sentences imposed on juvenile were not unconstitutional under Graham even though they exceeded "normal life expectancy").

C. The Defendant's Sentence Is the Functional Equivalent of a Life-without-Parole Sentence.

The Defendant's sentence of life imprisonment without any possibility of parole until he has spent four and a half decades in prison can "be seen as the functional equivalent of a life-without-parole sentence" and is therefore unconstitutional under Brown and Diatchenko. Brown, 466 Mass. at 691 n. 11. As the Iowa Supreme Court recognized in Null and the Wyoming Supreme Court recognized in Bear Cloud, the proper mode of analysis for determining whether this is a de facto life-without-parole sentence is not simply to compare the Defendant's age at the time he is first eligible for parole with his life expectancy. That method is improper for several reasons.

First, life expectancy tables are based on estimates for the general population and fail to account for the various ways imprisonment significantly reduces a person's actual life expectancy. It is well accepted that the stressors, violence, and disease associated with imprisonment significantly shorten one's life expectancy. See, e.g., People v. Solis, 224 Cal. App. 4th 727, 734 (Cal. App. 4th Dist. 2014), further review granted, 326 P.3d 253 (Cal. 2014). (recognizing that in light of "the health hazards associated with prison life," number offered by life-expectancy table "may actually be optimistic"); United

States v. Taveras, 436 F. Supp. 2d 493, 500 (E.D.N.Y. 2006) (recognizing that prisoners' life expectancies are "considerably shortened"); Nick Straley, "Miller's Promise: Re-Evaluating Extreme Criminal Sentences for Children," 89 Wash. L. Rev. 963, 986 (Oct. 2014) ("The unpleasant realities of prison life reduce the life expectancies of many prisoners incarcerated as children"). One study of inmates in New York State found that each year a person spent in prison resulted in a two-year decline in life expectancy. Patterson, Evelyn J., "The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003," American Journal of Public Health 103(3): 523-528 (2013). Plainly, general life-expectancy numbers cannot be used to accurately calculate how long a person will live after spending decades in prison.

Second, life-expectancy tables by their nature are based on averages for entire populations and therefore fail to take into consideration individual characteristics that are known to reduce life expectancy, including socioeconomic status, education level, family background, and access to quality medical care. United States v. Nelson, 491 F.3d 344, 350 (7th Cir. 2007) (noting that general life-expectancy tables offer an "imperfect measure[] of life expectancy" because they fail "to consider a defendant's individual

characteristics"). Indeed, even as life expectancies have increased in the United States in recent years, "government research has found 'large and growing' disparities in life expectancy for richer and poorer Americans[.]" Pear, Robert, "Gap in Life Expectancy Widens for the Nation," New York Times (March 23, 2008). "Many of the people who received lengthy sentences as juveniles and whose cases are being reviewed because of Graham's [and Miller's] requirement that they have a meaningful opportunity for release, are exactly the people whose estimated life expectancy was already diminished by race, poverty, and lack of opportunity by the time they were sentenced." Cummings, Adele & Colling, Stacie N., "There is No Meaningful Opportunity in Meaningless Data: Why it is Unconstitutional to Use Life Expectancy Tables in Post Graham Sentences," 18 UC Davis J. Juv. L. & Pol'y 267, 272 (2014).

Third, because life expectancy varies significantly based on race and gender, it cannot be used as the standard for determining whether a sentence is constitutional without raising substantial equal-protection problems. The life expectancy for non-Hispanic black men in the United States is ten years less than for Hispanic women. Nat'l Vital Statistics Reports, Vol. 63, No. 7 (Nov. 6, 2014) at 3. Thus, if

the most accurate life-expectancy figures were used as the standard for determining whether a sentence is constitutional under Diatchenko, a female Hispanic juvenile could be forced to spend a decade longer in prison before being eligible for parole than her African-American male counterpart convicted of the same crime. This cannot be squared with requirements of equal protection. On the other hand, if the courts were to use general life expectancy figures that do not account for racial and gender disparities, African-American juveniles could be forced to remain in prison without parole consideration beyond their actual life expectancies. See Nat'l Vital Statistics Reports, Vol. 63, No. 7 (Nov. 6, 2014) at 3 (reporting life expectancy for non-Hispanic black men as 7.3 years less than the life expectancy for all races and genders combined). This cannot be squared with the requirements of Diatchenko and Miller.

Finally, using life-expectancy figures as the touchstone for determining whether a sentence is an unconstitutional de facto life-without-parole sentence fails to "take account of the spirit of [the SJC's] holdings [in Brown] and in Diatchenko[.]" Brown, 466 Mass. at 691 n. 11. In Diatchenko, the SJC explained that "because 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." 466 Mass. at 670. Accordingly, juvenile homicide offenders sentenced to life imprisonment must be granted a parole hearing where "they should be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 674. It follows that this "meaningful opportunity to obtain release" must mean more than the possibility of geriatric release after decades of imprisonment--essentially a chance to die on the street. It must include an opportunity for the juvenile to demonstrate that he has obtained sufficient maturity and rehabilitation to justify granting him "the possibility of leading a normal adult life" outside the prison walls. Pearson, 836 N.W.2d at 96.

The Defendant's sentence requires him to remain in prison for forty-five years before he even has a chance of being paroled. By that point he will have spent the last portion of his teens, all of his twenties, his thirties, his forties, his fifties, and the first part of his sixties in a prison cell, isolated from society. He will never have held an adult job, he will have no experience obtaining housing, he will never have gone grocery shopping for himself, and he will be financially destitute. See Schiff Aff. ¶ 18. Under

those circumstances, LaPlante--if he is even granted parole--will have no real possibility of leading a normal adult life. His sentence is therefore the functional equivalent of a life-without-parole sentence and is unlawful under Brown and Diatchenko.

II.

THE DEFENDANT MUST BE GRANTED A NEW SENTENCING HEARING BECAUSE THE SENTENCING COURT VIOLATED HIS RIGHT TO DUE PROCESS AND TO BE FREE FROM CRUEL AND/OR UNUSUAL PUNISHMENT WHEN IT IMPOSED THREE CONSECUTIVE, RATHER THAN CONCURRENT, LIFE SENTENCES WITHOUT CONSIDERING THE MITIGATING EFFECT OF YOUTH.

At sentencing, the Commonwealth "urge[d] the court to sentence [the Defendant] to the maximum sentence" of three consecutive life terms (Tr. 17:10). This sentence, the Commonwealth explained, would send "a signal to whomever has to deal with him in the future that he must never be released from prison. He must die in prison" (Id. at 12). Defense counsel made little argument in rebuttal, explaining that "[i]t really in effect does not matter whether you make [the life-without-parole sentences] concurrent or consecutive" (Id. at 13). Counsel's only statement about the appropriate sentence was that "[g]iven the Defendant's age, I would ask you to make them concurrent" (Id.).

In response, the judge made clear that his intention was to impose what we now know is an unconstitutional sentence: "[T]he sentence to be

imposed is one that intends that you spend the rest of your natural life behind bars with no parole, no commutation and no furlooughs. That is three consecutive life sentences" (Id.). The judge gave no indication that he considered the Defendant's age to be a mitigating sentencing factor in any way. Instead, he appeared to base the sentence entirely on the nature of the crime, explaining that "[t]here are some who would say, Mr. LaPlante, that you should receive the same sentence you imposed the Gustafson family, that is death by ligature or hanging" (Id.). He did not impose this sentence because "we have no death penalty in Massachusetts" (Id.).

Sentencing the Defendant to three consecutive life sentences without any consideration of the many ways the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders," Miller, 132 S. Ct. at 2465, violated the Defendant's right to be free from cruel and/or unusual punishment under the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights, as well as his right to due process under the Fourteenth Amendment and arts. 1, 10, and 12.

In Miller, the Supreme Court held that juvenile homicide offenders cannot, consistent with the

requirements of the Eighth Amendment, be given the harshest available sentence without first being afforded a hearing where the sentencing judge must consider certain youth-related mitigating factors. The Court identified five relevant--though not exclusive--mitigating factors: (1) "age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "family and home environment that surrounds [the defendant]"; (3) "the circumstances of the homicide, including the extent of [the defendant's] participation in the conduct and the way familial and peer pressure may have affected him"; (4) whether the defendant "might have been convicted of a lesser offense if not for the incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors . . . or his incapacity to assist his own attorneys"; and (5) "the possibility of rehabilitation." Miller, 132 S.Ct. at 2468.

While the circumstances of the crime are undoubtedly a relevant factor that the sentencing court should consider, the court must also ensure that the horrific nature of the specific crime does not obscure or overpower the mitigating effect of the juvenile's youth, immaturity, and stage of brain development. As the Supreme Court explained when it rejected the death

penalty for juveniles: "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." Roper v. Simmons, 543 U.S. 551, 573 (2005). And in Miller, the Court made clear that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Miller, 132 S. Ct. at 2465 (emphasis added). See also People v. Gutierrez, 58 Cal. 4th 1354, 1381 (Cal. 2014) (recognizing that "the mitigating features of youth can be dispositively relevant, whether the crime is a nonhomicide offense or a heinous murder punishable by death if committed by an adult").

Here, the sentencing judge gave no indication that he considered the mitigating effect of youth or any other aspect of the Defendant's character and circumstances when imposing the three consecutive life sentences. Rather, he gave every indication that he was basing the sentence purely on the nature of the Defendant's crimes and suggested that he would have preferred to have imposed the death penalty in order to

give the Defendant the "the same sentence you imposed on the Gustafson family" (Tr. 17:13).[4]

The Court, moreover, was not presented with any evidence relating to the mitigating factors identified by the Supreme Court in Miller. The Defendant's counsel told the Court (accurately under the law in existence at that time) that "[i]t really in effect does not matter whether you make them concurrent or consecutive" since "[t]hey are life sentences without parole" (Tr. 17:13). The prosecutor urged the Court to make the sentences consecutive "because of not only what he has done . . . but because of my belief that this Defendant will be a danger to the public until the day he dies" (Tr. 17:10-11). The prosecutor also argued that the Defendant "must pay for" the fact that he "has never demonstrated the slightest bit of remorse or caring for the lives of the totally innocent people" he killed (Tr. 17:12).

The aggravating factors identified by the prosecutor have been criticized as reasons for imposing the harshest of penalties on juveniles. The Supreme Court has repeatedly recognized "the great difficulty .

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[4]Years later, the sentencing judge said in an interview that he thought LaPlante deserved the death penalty and that he, "personally, could pull the switch." Lisa Redmond, "Judge: 'I Could Pull the Switch,'" Lowell Sun (Dec. 1, 2007) (available at http://www.lowellsun.com/front/ci_7610222).

. . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" Miller, 132 S.Ct. at 2469, quoting Roper, 543 U.S. at 573. The courts have also noted that "[w]hile it is true that juveniles lack the maturity to fully understand the consequences of their actions, . . . this too is a mitigating factor" under Miller. Pearson, 836 N.W.2d at 97, citing Miller, 132 S.Ct. at 2468-69. Thus, the prosecutor did not simply fail to address the mitigating factors identified in Miller but also made affirmative arguments that we now know are questionable in relation to juvenile offenders.

The sentencing court's failure to consider the Defendant's age and the other age-related mitigating factors identified by the Miller Court before imposing three consecutive life sentences violated his right to be free from cruel and/or unusual punishment under the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights, as well as his right to due process under the Fourteenth Amendment and arts. 1, 10, and 12. He should therefore be granted a new sentencing hearing where the Court can consider these factors in relation to, among other things, the following evidence, which was not presented

at the Defendant's 1988 sentencing hearing:

- As a young child, LaPlante was subjected to extreme psychological abuse by his father (Schiff Aff. ¶ 7; Moore Aff. ¶¶ 3-8).
- As a result of this psychological abuse, LaPlante did not speak to anyone other than his siblings until he was five years old (Schiff Aff. ¶ 8).
- LaPlante struggled in school, was diagnosed with dyslexia and hyperactivity disorder, and was labeled a "special-needs" student (Schiff Aff. ¶ 10; Moore Aff. ¶ 11).
- In second grade, LaPlante was sent to a psychiatrist as a result of his difficulties at school. The psychiatrist repeatedly sexually abused him (Schiff Aff. ¶ 11).
- Since being sent to prison, LaPlante has proven that, contrary to the speculation of the prosecutor in 1988, he is capable of rehabilitation. He has voluntarily taken on leadership positions within the prison that have required him to work constructively with other inmates and the prison authorities; he has participated in significant programming over the past decade; and he has gone from being a marginally literate teenager when he

entered the prison to being a well-educated man who has successfully completed numerous college-level courses and has earned seventy credits through Boston University's prison education program with a cumulative GPA of 3.34 (Schiff Aff. at ¶ 16, Exhibits B & C).

- Assuming the Court grants funds pursuant to G.L. c. 261, § 27C, LaPlante would also present the testimony of Frank C. DiCataldo, Ph.D., an assistant professor of psychology at Roger Williams University and a well-qualified expert on adolescent cognitive development.[5]

LaPlante's current sentence is more an accident of legal history than the product of a judge's careful consideration of him "as an individual" and the case "as a unique study in the human failings" that may "mitigate" or may "magnify[] the crime and punishment to ensue." Pepper v. United States, 462 U.S. 476, 131 S.Ct. 1229, 1239-1240 (2011) (citation and internal quotation marks omitted). This Court should therefore conduct a new sentencing hearing to ensure full

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[5]See Commonwealth v. Okoro, 471 Mass. 51, 66 (2015) (recognizing that judge correctly permitted expert at juvenile's murder trial "to testify regarding the development of adolescent brains and how this could inform an understanding of this particular juvenile's capacity for impulse control and reasoned decision-making" at the time of the crime).

consideration of the Miller factors and that the "punishment . . . fit[s] the offender and not merely the crime." Id. at 1240 (citation and internal quotation marks omitted). See also Commonwealth v. Hall, 369 Mass. 715, 735 (1976) (Where defendant was unconstitutionally sentenced to death on two murders and lawfully sentenced to consecutive life term on armed robbery, Court "remand[ed] to Superior Court" for imposition of three life sentences, while "leav[ing] for decision by the judge of the Superior Court the question whether any or all of the three life sentences . . . shall be ordered served concurrently or consecutively."); Commonwealth v. Renderos, 440 Mass. 422, 435 (2003) ("The sentences imposed constituted an integrated package, each piece dependent on the other, which cannot be separated. Because the judge misunderstood the bounds of his statutory authority, the defendant must be sentenced again.").

III.

THE DEFENDANT SHOULD BE GRANTED A NEW SENTENCING HEARING BECAUSE EVIDENCE RELATING TO NEW DEVELOPMENTS IN PSYCHOLOGY AND NEUROBIOLOGY WAS UNAVAILABLE AT THE TIME OF HIS SENTENCING HEARING AND PROVIDES STRONG SUPPORT FOR HIS ARGUMENT THAT HIS SENTENCES SHOULD RUN CONCURRENTLY, RATHER THAN CONSECUTIVELY.

To prevail on a motion under Rule 30 of the Massachusetts Rules of Criminal Procedure based on a claim of newly discovered evidence, a defendant must establish two things: (1) that "the evidence was

unknown to the defendant or trial counsel and not reasonably discoverable at the time of trial"; and (2) that "the evidence casts real doubt on the justice of the conviction" or sentence. Commonwealth v. Cowels, 470 Mass. 607, 616 (2015) (citations and internal quotation marks omitted). LaPlante can readily satisfy both of these elements.

A. The Newly Discovered Evidence Was Not Reasonably Discoverable at the Time of the Defendant's 1988 Sentencing Hearing.

The Defendant's claim is not based on new case-specific factual information but on new developments in psychology and neurobiology that have radically altered the way we view adolescent criminality. When a defendant presents a claim of newly discovered evidence based on new scientific developments, it is not enough to show "the broadening of research" on the topic at issue. Commonwealth v. Shuman, 445 Mass. 268, 275 (2005). The newly discovered evidence here is not merely "new research results supporting claims the defendant made or could have made at [sentencing]." Commonwealth v. LeFave, 430 Mass. 169, 181 (1999). Rather, this new evidence is based on groundbreaking research over the past two decades that has caused a sea change in the way experts, the judicial system, and society in general view adolescent brain development and criminality.

LaPlante was sentenced in an era when prominent academics were warning that the nation would, in the words of Princeton professor John DiIulio, Jr., soon be overrun by "tens of thousands of severely morally impoverished juvenile super-predators" and that, according to Northeastern University criminologist James Alan Fox, "'unless we act today, . . . we will have a bloodbath when these kids grow up.'" John J. Dilulio, Jr., "The Coming of the Super-Predators," Weekly Standard (Nov. 27, 1995); Robert Lee Hotz, "Experts Warn of New Generation of Killers," Los Angeles Times (Feb. 18, 1995). This "image of remorseless teenage criminals as a major threat to society . . . was invoked repeatedly in the media and in the political arena" to justify tough treatment of juvenile offenders. Elizabeth S. Scott & Laurence Steinberg, "Adolescent Development and Regulation of Youth Crime," The Future of Children, Vol. 18, No. 2 at 17 (Fall 2008). Under this view of children, an offender's youth became an aggravating, rather than a mitigating, factor. See Atkins v. Virginia, 536 U.S. 304, 321 (2002) (recognizing that "reliance on mental retardation as a mitigating factor [during penalty phase of death-penalty trial] can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the

jury" (citation omitted)).

This way of understanding adolescent criminality led to harsh new legislative measures that "resulted in the wholesale transfer of youths into the adult criminal system--more than 250,000 a year by most estimates." Elizabeth S. Scott & Laurence Steinberg, "Adolescent Development and Regulation of Youth Crime," supra at 17. By 2005, there were at least 2,225 people--including LaPlante--serving life-without-parole sentences in the United States for crimes they committed as juveniles. See Amnesty International & Human Rights Watch, The Rest of Their Lives: Life without Parole for Child Offenders in the United States (2005) at 35 (available at http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf).

Since the late 1990s, "scientists have been using new [imaging] technologies to study the human brain, and have discovered that adolescent brains are further from full adult development than previously believed." Mark Soler, Dana Shoenberg, & Marc Schindler, "Juvenile Justice: Lessons for a New Era," 16 Georgetown J. Poverty Law & Policy 483, 493 (2009). See also Br. for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amicus Curiae, Miller v. Alabama, 567 U.S. ---, 132 S.Ct. 2455 (2012) (Nos. 10-9646, 10-9647) ("Modern brain research

technologies have developed a body of data from the late 1990s to the present that provides a compelling picture of the inner workings of the adolescent brain"). "These imaging techniques 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." Id. at 15-16.

These studies have uncovered two extremely important things for understanding adolescent criminality. First, the portions of the brain that "support the control of behavior, including the prefrontal cortex (which comprises roughly the front third of the human brain), continue to mature even through late adolescence." Id. at 17. Second, when adolescents make behavioral decisions, they rely "more heavily than adults on systems and areas of the brain that promote risk-taking and sensation-seeking behavior." Id. "Thus, the immature judgment of teens may to some extent be a function of hard wiring," rather than impoverished morality. Scott & Steinberg, "Adolescent Development and the Regulation of Youth Crime," supra at 23. One researcher has described the

adolescent brain as a "'natural tinderbox' because gonadal hormones are actively stimulating affective and appetitive behaviors, such as sexual drive, increased emotional intensity, and risk taking, yet the brain systems that regulate and moderate these emotional and appetitive urges are not yet mature." LD Selemon, "A Role for Syntaptic Plasticity in the Adolescent Development of Executive Function," Translational Psychiatry (2013) 3. Perhaps most importantly, "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." Null, 836 N.W.2d at 55, citing Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 53 (2008).

By 2012, John DiIulio, Jr. (who coined the phrase "juvenile super-predators") and James Alan Fox (who warned of the coming "bloodbath") had both disavowed their earlier statements and signed onto an amicus brief in Miller explaining that empirical data has proven that "proponents of the juvenile superpredator myth . . . were wrong." Br. of Jeffery Fagan et al. as Amici Curiae, Miller v. Alabama, 567 U.S. ---, 132 S.Ct. 2455 (2012) (Nos. 10-9646, 10-9647). The judiciary's view of juvenile offenders also changed

significantly during the same period. One year after LaPlante was sentenced, the United States Supreme Court held that "the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age" did not "constitute[] cruel and unusual punishment under the Eighth Amendment." Stanford v. Kentucky, 492 U.S. 361, 364-365 (1989). Sixteen years later, the Court reconsidered the issue and held that "the death penalty is [an unconstitutional] disproportionate punishment for offenders under 18." Roper, 543 U.S. at 575. In part, the Court based this holding on the consensus among psychological experts that "the character of a juvenile is not as well formed as that of an adult" and that [t]he personality traits of juveniles are more transitory, less fixed." Id. at 570. Five years later in Graham, the Court noted that "[n]o recent data provide reason to reconsider the Court's observations in Roper about the nature of juveniles"; rather, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." Graham, 560 U.S. at 68. Three years after that, the SJC was able to declare in no uncertain terms that the "current scientific research on adolescent brain development" demonstrates that "the brain of a juvenile is not fully developed, either structurally or functionally, by eighteen," and,

accordingly, "a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved." Diatchenko, 466 Mass. at 669-70.

LaPlante's trial counsel did not present this evidence about adolescent brain development because it simply did not exist at the time of LaPlante's sentencing. See Sheketoff Aff. ¶¶ 5-6. As outlined above, this evidence was based on research that was first conducted in the late 1990s, some ten years after the Defendant was sentenced. Indeed, the American Medical Association's amicus brief in Miller cited ninety-nine scientific authorities relating to adolescent brain development, and not one of those studies had been published at the time of LaPlante's sentencing in 1988. See Br. For the American Medical Association, supra at IV-XXI. Evidence regarding recent scientific breakthroughs about adolescent brain development was thus neither known to nor reasonably discoverable by the Defendant at the time of sentencing.

B. The Newly Discovered Evidence Casts Real Doubt on the Justice of LaPlante's Sentence.

The sentencing judge's decision to impose three consecutive life sentences was based on his determination that LaPlante was irretrievably depraved and therefore must spend "the rest of [his] natural

life behind bars with no parole" (Tr. 17:13). This is precisely the determination that the SJC has said cannot be made for juvenile offenders "with any reasonable degree of certainty" in light of the past two decades of scientific findings about adolescent brain development. Diatchenko, 466 Mass. at 670.

These newly discovered scientific developments would have permitted the Defendant to present two types of evidence. First, the Defendant could have submitted recent peer-reviewed scientific articles relating to the discoveries about adolescent brain development described above. A core group of these articles is attached to the affidavit of the Defendant's present counsel. See Schiff Aff., Exh. D. Second, the Defendant could have presented the testimony of an expert on adolescent neurological and psychological development to explain the significance of the recent scientific discoveries and to offer an opinion about the Defendant's neurological development at the time of his crimes and about his capacity for rehabilitation.

As the SJC recognized in Diatchenko and the Supreme Court recognized in Miller, this evidence could have powerfully undermined all of the rationales for imposing the harshest of sentences on LaPlante. "The penological justifications for imposing life in prison without the possibility of parole--incapacitation,

retribution, and deterrence--reflect the ideas that certain offenders should be imprisoned permanently because they have committed the most serious crimes, and they pose an ongoing and lasting danger to society." Diatchenko, 466 Mass. at 670-71. But the current scientific understanding of the "distinctive attributes of juvenile offenders renders such justifications suspect." Id. at 671. Incapacitation is not a defensible justification because it "would require mak[ing] a judgment that [the juvenile] is incorrigible," and such a judgment about a juvenile's "value and place in society" is "at odds with a child's capacity for change." Miller, 132 S.Ct. at 2465 (citations and internal quotation marks omitted). Retribution also cannot justify imposing the harshest of sentences on juveniles because "[t]he heart of the retribution rationale relates to an offender's blameworthiness," and children's crimes--even the most brutal and cold-blooded of those crimes--are at least in part the product of an underdeveloped brain, rather than an irredeemably depraved character. Id. Finally, deterrence is not a supportable justification in this context because "the same characteristics that render juveniles less culpable than adults--their immaturity, recklessness, and impetuosity--make them less likely to consider potential punishment." Id.

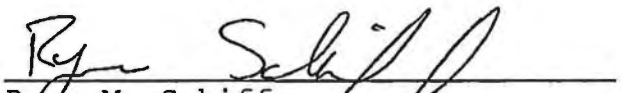
In Diatchenko, the SJC made clear that its decision about the constitutionality of juvenile life-without-parole sentences was made "[w]ith current scientific evidence in mind." Diatchenko, 466 Mass. at 671. The determination about whether LaPlante's sentences ought to run concurrently or consecutively should also be made with this highly relevant evidence in mind. Accordingly, the Defendant's sentence should be vacated, and a new sentencing hearing should be held.

CONCLUSION

For these reasons, the Defendants' sentence must be vacated and he must be granted a new sentencing hearing.

Respectfully submitted,

Daniel J. LaPlante
By his attorney,



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Dated: June 10, 2015

Appendix D

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT DEPARTMENT
DOCKET NO. MICR-88-0019-22

COMMONWEALTH

V.

DANIEL LAPLANTE

COMMONWEALTH'S RESPONSE TO
DEFENDANT'S MOTION TO VACATE ILLEGAL SENTENCE

Now comes the Commonwealth and respectfully requests that this Honorable Court resentence the defendant in the above-captioned case to three consecutive life sentences pursuant to Commonwealth v. Costa, 472 Mass. 139, 33 N.E.3d 412, 421 (2015). In Costa, which issued after the defendant filed his motion to vacate his illegal sentence, the SJC explained that unlike juvenile offenders serving one or concurrent life sentences which were automatically converted to be parole eligible at fifteen years pursuant to Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 674 (2013), resentencing of juvenile offenders sentenced to consecutive life sentences was appropriate because "[w]e cannot know that the judge would have imposed consecutive sentences had he known [that such sentences would be invalidated and result in doubling the amount of time a defendant must serve before he becomes eligible for parole], or had he known about the constitutional differences that separate juvenile offenders from adults." Id. at 417-418.

In considering whether there is sufficient mitigation to amend such a defendant's consecutive sentences to concurrent sentences, the SJC held that "a judge may consider a variety of factors including the defendant's behavior, family life, employment history, and civic contributions, as well as societal goals of punishment, deterrence, protection of the public, and

rehabilitation." Id. at 419. Additionally, a judge is to consider the five factors identified in Miller v. Alabama, __ U.S., 132 S.Ct. 2455, 2468 (2012):

(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 or peer pressures may have affected him;

(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 own attorneys; and

(5) the possibility of rehabilitation;

as well as "the defendant's then-extant psychological characteristics in the process of assessing the Miller factors," and "information concerning the defendant's postsentencing conduct, whether favorable or unfavorable." Costa, 33 N.E.3d at 420-421.

It is the Commonwealth's position that the circumstances of the offense demonstrate that this was not a crime resulting from immaturity, impetuosity and failure to appreciate risks and consequences, that the defendant's participation was not the result of familial or peer pressure, and that the defendant's youth did not disadvantage him in the criminal proceedings (i.e., the defendant made no inculpatory statements and did not miss an opportunity to negotiate a more favorable disposition). The circumstances of this crime, the defendant's criminal history as well as the nolle prossed offenses[1] demonstrate the unlikelihood of rehabilitation. See Commonwealth v. Goodwin, 414 Mass. 88, 92 (1993) (reliable evidence of prior misconduct is relevant to the sentencing goals of protection of the public and rehabilitation).

[1] Twenty three indictments (alleging offenses on different dates, at a number of different locations, involving multiple victims) were nolle prossed on the basis that the defendant had been sentenced to three consecutive life without parole sentences. Attachment A.

In affirming the defendant's convictions, the SJC set forth the following facts:

At approximately 5 P.M. on December 1, 1987, Andrew Gustafson discovered the body of his wife, Priscilla Gustafson, on the bed in the master bedroom of the family's home in Townsend. She died as a result of two shots at close range with a .22 caliber firearm. The shots were fired through a pillow which lay on top of the victim's head. Gustafson telephoned the police immediately, who, on arrival, discovered the bodies of Gustafson's two children, William, five years old, and Abigail, almost eight years old. The police found William's body face down in the tub in the upstairs bathroom. The police discovered Abigail's body face down in the tub in the downstairs bathroom. The cause of death of both children was drowning. Additionally, Abigail suffered blunt trauma to the head and compression of the neck.

Karolyn LeClaire, a chemist with the Department of Public Safety, found semen and sperm cells near one corner of the bedspread, and a portion of a condom on the floor beside the bed. In the bedroom closet, LeClaire found a knotted brown sock dampened with saliva, consistent with having been used as a gag. She also found seven "ligatures"-a necktie, a sock, stockings, and pantyhose which had been knotted and cut. In the bedroom, police found a nearly full bottle of beer, that apparently had been taken from the Gustafson refrigerator. In the kitchen wastebasket, police found several pieces of paper which were torn from the pages of a pornographic magazine.

The defendant lived with his family in October, 1987. The evidence showed that the defendant engaged in a series of daytime burglaries in the neighborhood, including a burglary of the Gustafson home in November, 1987. On October 14, 1987, between 12 P.M. and 2:15 P.M., someone broke into 38 Elm Street, the home of Raymond Pindell and his family.[1] Two Ruger .22 caliber guns and their holsters were stolen, as was a sizable amount of cash. Approximately three weeks later, the defendant's stepfather discovered one of Pindell's stolen guns and its holster in the defendant's laundry basket. When confronted by his parents, the defendant claimed he had obtained the gun a year earlier from Westminster. The second of the two firearms stolen from the Pindell house later proved to be the weapon used to kill Priscilla Gustafson. During this same time period, the defendant's brother, Stephen LaPlante, and Michael Polowski both saw the defendant with a few hundred dollars in cash, although the defendant was unemployed at the time.

> fn. 1 The Pindell home was located less than one-quarter mile from the defendant's home. The backyards of the two houses are connected by a trail.

On November 16, 1987, between 11:30 A.M. and 3:30 P.M., someone broke into the Gustafson home. Among other things, the thief[2] took a cordless telephone, two cable television boxes, a cable television remote control device, and some

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[2] The defendant was charged with the theft of these items in a separate indictment which was nolle prossesd. See note 1.

coins from a Liberty silver dollar collection. The defendant placed the Gustafsons' cordless telephone and a cable box in his brother's tool cabinet. The defendant told his brother that he was putting them there to prevent his parents from seeing them. At that time, the defendant's brother also saw the defendant with some silver coins similar to those reported missing from the Gustafson home, including a Statue of Liberty coin in a box.

During this period, the defendant asked both his brother and Polowski for bullets. The defendant told them he wanted to make a large bullet and sell it. Toward the end of November, Polowski gave the defendant a number of .22 caliber bullets from a carton he owned. Polowski gave the remaining bullets to a coworker. Subsequent ballistics tests and laboratory analysis of the remaining bullets revealed that they were the same brand, caliber class, and casing composition of the ones used in the murder of Priscilla Gustafson.

The Commonwealth also linked the defendant to the murders through physical evidence. Laboratory analysis of the defendant's blood revealed that he is a "Type A secretor"-the same status of the semen stain discovered on the bedspread where Priscilla Gustafson's body was found. Laboratory analysis also revealed that fibers, bearing the same microscopic and optical characteristics as a fiber sample taken from a shirt located in the woods were found (1) on the clothing worn by the defendant on the day of the murders; (2) on the socks found in his bedroom; (3) on the belt found with the murder weapon; and (4) in three places at the murder scene. In addition, fiber samples taken from the sock believed to be used to gag Priscilla Gustafson matched samples found on the gray shirt worn by the defendant on the day of the murders.

The Commonwealth offered evidence of consciousness of guilt. The defendant left his home on the evening of December 2, 1987, after State police arrived and asked to speak with him. The next afternoon, the defendant unlawfully entered two homes in Pepperell, stole a .32 caliber revolver, and unsuccessfully tried to gain admittance into a third home. At the home of Pamela Makela in Pepperell, the defendant ordered Makela at gunpoint to drive him in her van to Fitchburg. Makela jumped out of the van, and the defendant continued on in her van. The defendant was arrested in an Ayer industrial park dumpster. At police barracks, while searching the defendant, police found a loaded .32 caliber revolver hidden in the defendant's underwear, and a .32 caliber bullet inside his right sneaker.

. . .

During a search of the woods between the Gustafson and LaPlante homes, [police] found a blue and white flannel shirt. The Gustfafsons' nameplate and a pair of soaking wet work gloves were wrapped inside the shirt. Chemical tests later indicated the presence of gunshot residue on the gloves

Commonwealth v. LaPlante, 416 Mass. 433, 434-437 (1993).

Where the Court is to consider whether there is sufficient mitigation of the defendant's culpability due to attributes of youth which are no longer present,[3] the Commonwealth requests that the Court order a presentencing examination pursuant to G.L. c. 123, § 15. The Commonwealth will also seek to have its own expert on the issue of the relevance of the defendant's youth to his culpability for the crimes. Commonwealth v. Ostrander, 441 Mass. 344, 351-355 (2004) (Court entitled to hear from Commonwealth's expert where considering defendant's mental condition at the penalty phase in support of a claim of mitigating circumstances).[4] The Commonwealth also seeks orders from this Court for (1) school records of the defendant, (2) records from Bridgewater State Hospital, (3) records from the Department of Youth Services, and (4) the defendant's juvenile probation records.

The Commonwealth proposes that a status hearing be scheduled to identify the defendant's intended experts and exhibits, and to address the Commonwealth's discovery requests, as well as for further scheduling.

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[3] Because the defendant is now an adult, there is no constitutional impediment to reimposing consecutive sentences resulting in parole eligibility after 45 years even if such a sentence was determined to be the functional equivalent of life without parole. Diatchenko, 466 Mass. at 669-670 (holding discretionary imposition of life without parole unconstitutional under art. 26 of Massachusetts Declaration of Rights because "a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved").

[4] The defendant filed a motion for funds for an expert in support of his motion to vacate the sentences, setting forth the anticipated testimony as relating to juvenile development generally and not this specific defendant. Where the object of his motion was to establish that he was entitled to a resentencing hearing, not what he would present at a resentencing hearing, it is not clear that he would seek to utilize an expert for these general principles. To the extent he would, as the SJC noted in Costa, because the basic insights regarding scientific research into adolescent cognition and brain development are already well established in the case law, this Court should deny the defendant's request for funds to retain an expert on the subjects outlined in his motion as the only relevant inquiry is the development and psychological condition of this defendant. See Costa, 33 N.E.3d at 416.

Respectfully Submitted,

For the Commonwealth,

MARIAN T. RYAN
DISTRICT ATTORNEY

Bethany Stevens by approval

Bethany Stevens
Assistant District Attorney
Office of the Middlesex District Attorney
15 Commonwealth Avenue
Woburn, MA 01801
(781) 897-6848
BBO No. 655366

Date: September 23, 2015

CERTIFICATE OF SERVICE

I, Bethany Stevens, hereby certify that I have served a copy of the foregoing Commonwealth's Response to the Defendant's Motion to Vacate Illegal Sentence on Ryan M. Schiff, counsel for the defendant, on September 23, 2015, via first class mail.

Signed under the pains and penalties of perjury.

Bethany Stevens by approval

Bethany Stevens
Assistant District Attorney

ATTACHMENT A

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT DEPARTMENT
NOS. 88-23 through 88-46

COMMONWEALTH

v.

DANIEL J. LAPLANTE

NOLLE PROSEQUI

Now comes the Commonwealth in the above-captioned matter and respectfully states that it will not prosecute Indictment Nos. 88-23 through 88-46 any further.

As grounds therefor, the Commonwealth states that the defendant is presently serving three (3) consecutive life sentences for convictions on Indictment Nos. 88-19 through 88-22, which convictions have been affirmed on appeal by the Supreme Judicial Court. Commonwealth v. LaPlante, 416 Mass. 433 (1993).

2/4/94 Judge signature

Respectfully Submitted
For the Commonwealth,

THOMAS F. REILLY
DISTRICT ATTORNEY

by: David E. Meier
DAVID E. MEIER
Assistant District Attorney
Lowell Regional Office
44 Church Street
Lowell, MA 01852
(508)458-4440

Dated: February 4, 1994
0068G/lt

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and eighty -eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That Daniel J. LaPlante

on the Third day of December in the year of our Lord one thousand nine hundred and eighty -seven at Pepperell, in the County of Middlesex aforesaid,

being armed with a dangerous weapon, to wit: a gun, did enter a dwelling house, the property of Pamela Makela, and while therein did assault Pamela Makela with intent to commit a felony.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

Dan E. Kelly
Asst.
District Attorney.

88-0023

AD : 86

D.A.-001

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden

at the CITY OF CAMBRIDGE, within and for the County of Middlesex,

on the First Monday of January in the year of our

Lord one thousand nine hundred and eighty -eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Third day of December

in the year of our Lord one thousand nine hundred and eighty -seven

at Pepperell, in the County of Middlesex aforesaid,

did assault Johnathan Lang by means of a dangerous weapon, to wit: a gun.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

Thomas F. Reilly
First Assistant *District Attorney.*

88-0024

D.A.-001

AD : 87

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden

at the CITY OF CAMBRIDGE, within and for the County of Middlesex,

on the First Monday of January in the year of our

Lord one thousand nine hundred and eighty -seven

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Third day of December

in the year of our Lord one thousand nine hundred and eighty -seven

at Ayer , in the County of Middlesex aforesaid,

did assault Edward Gallant by means of a dangerous weapon, to wit: a gun.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury

Daniel F. Conley
District Attorney.

88-0025

D.A.-001

AD : 88

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and eighty -eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Third day of December in the year of our Lord one thousand nine hundred and eighty -seven at Pepperell, in the County of Middlesex aforesaid,

without lawful authority, did forcibly or secretly confine or imprison Pamela Makela within this Commonwealth against her will.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

Ralph C. Martin, II
District Attorney.

89-0026

D.A.-001

AD : 89

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and Eighty-eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Third day of December in the year of our Lord one thousand nine hundred and Eighty-seven at Pepperell, in the County of Middlesex aforesaid, in the ~~night~~ DAY time did break and enter ~~the~~ a building of Paul and Lynne McGovern situated in said Pepperell with intent therein to commit larceny, and did steal

a felony

~~of the property of~~

~~XXXXXXXXXXXXXXX~~

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided

88-002

A true bill.

Foreman of the Grand Jury.

District Attorney.

AD. 90

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and eighty -eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Third day of December in the year of our Lord one thousand nine hundred and eighty-seven at Pepperell, in the County of Middlesex aforesaid,

did steal a jacket, a cartridge belt, and ammunition, the property of Paul McGovern, the value of such property not exceeding one hundred dollars.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Farley
Foreman of the Grand Jury.

Theft Assault

District Attorney.

88-0026

AD : 91

D.A.-001

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and eighty-eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Third day of December in the year of our Lord one thousand nine hundred and eighty-seven at Pepperell, in the County of Middlesex aforesaid,

did steal a firearm, the property of Paul McGovern

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Flaherty
Foreman of the Grand Jury.

Thomas F. Conroy
First Assistant

District Attorney.

88-0029

AD : 92

D.A.-001

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and eighty -eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Third day of December in the year of our Lord one thousand nine hundred and eighty -seven at Pepperell and Ayer, in the County of Middlesex aforesaid,

did carry on his person or under his control in a vehicle a firearm without complying with the requirements of the firearms laws.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

Thomas F. Reilly
First Assistant *District Attorney.*

AD : 93

89-0030

D.A.-001

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and eighty-eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Third day of December in the year of our Lord one thousand nine hundred and eighty-seven at Pepperell, in the County of Middlesex aforesaid,

did steal a motor vehicle, the property of Gilbert Levesque.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Lakey
Foreman of the Grand Jury.

Asst. [illegible]
District Attorney.

AD : 94

88-0031

D.A.-001

Commonwealth of Massachusetts

MIDDLESEX, s.s.

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, for the transaction of Criminal Business on the first Monday of January in the year of our Lord one thousand nine hundred and Eighty-eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present,

That Daniel J. LaPlante

Diverse dates in October, November and December in the year of our Lord one thousand nine hundred and Eighty-seven

~~on the~~ XXXXXX ~~day of~~ XXXXX

~~in the year of our Lord one thousand nine hundred and~~ XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

at Townsend, in the County of Middlesex aforesaid, did buy, receive or aid in the concealment of stolen property, to wit: a firearm

of the value of more than one hundred dollars the property of one Raymond Pindell then lately before stolen, the said Daniel J. LaPlante well knowing the said property to have been stolen as aforesaid.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

Thomas ... Reilly
First Assistant District Attorney.

88-0032

Commonwealth of Massachusetts

MIDDLESEX, s.s.

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, for the transaction of Criminal Business on the first Monday of January in the year of our Lord one thousand nine hundred and Eighty-eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That Daniel J. LaPlante Diverse dates in October, November and December in the year of our Lord one thousand nine hundred and Eighty-seven on the XXXXX XXXXX in the year of our Lord one thousand nine hundred and XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX at Townsend, in the County of Middlesex aforesaid, did buy, receive or aid in the concealment of stolen property to wit: certain German daggers of the value of more than one hundred dollars the property of one David Brown then lately before stolen, the said Daniel J. LaPlante well knowing the said property to have been stolen as aforesaid.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

[illegible]
District Attorney.

AD : 96

89-0028

Commonwealth of Massachusetts

MIDDLESEX, S.S.

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, for the transaction of Criminal Business on the first Monday of January in the year of our Lord one thousand nine hundred and Eighty-eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That Daniel J. LaPlante

Diverse dates in November and December in the year of our Lord one thousand nine hundred and Eighty-seven

~~on the~~ XXXXX day of XXXXX

~~in the year of our Lord one thousand nine hundred and~~ XXXXX

at Townsend, in the County of Middlesex aforesaid, did buy, receive or aid in the concealment of stolen property, to wit: a cordless Tandy telephone, two television cable boxes, and coins

of the value of more than one hundred dollars the property of one Andrew Gustafson

then lately before stolen,

the said Daniel J. LaPlante

well knowing the said property to have been stolen as aforesaid.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

[illegible]
First Assistant *District Attorney.*

88-0034

AD : 97

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and Eighty-eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That Daniel J. LaPlante

on the Sixteenth day of November in the year of our Lord one thousand nine hundred and Eighty-seven at Townsend, in the County of Middlesex aforesaid, in the ~~NXXX~~ DAY time did break and enter the Building of Andrew Gustafson situated in said Townsend with intent therein to commit ~~XXXXXX~~ a felony and did steal various items of personal property including but not limited to a cordless Tandy telephone, 2 television cable boxes, and coins,

of the property of Andrew Gustafson in said Building, the value of said property exceeding one hundred dollars.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided

88-0035

A true bill.

Thomas F. Reilly
District Attorney

Virginia M. Fahey
Foreman of the Grand Jury.

AD. 1988

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of Janudry. in the year of our Lord one thousand nine hundred and Eighty-eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That Daniel J. LaPlante

on the Fourteenth day of October in the year of our Lord one thousand nine hundred and Eighty-seven at Townsend, in the County of Middlesex aforesaid, in the ~~XXXX~~ DAY time did break and enter the building of Raymond Pindell situated in said Townsend with intent therein to commit a felony ~~XXXXXX~~ and did steal

two Ruger .22 caliber handguns and money

of the property of Raymond Pindell in said Building, the value of such property exceeding one hundred dollars.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided

88-0036

A true bill.

Thomas F. Quinn / Virginia M. Fahey

District Attorney / Foreman of the Grand Jury.

AD 19

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden

at the CITY OF CAMBRIDGE, within and for the County of Middlesex,

on the First Monday of January in the year of our

Lord one thousand nine hundred and eighty -eight :

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Eighth day of December

in the year of our Lord one thousand nine hundred and eighty -six

at Pepperell , in the County of Middlesex aforesaid,

did break and enter in the night time the dwelling house of Francis Bowen with the intent to commit a felony or after having entered with such intent did break said dwelling house and did arm himself and assault Francis Bowen, a person lawfully therein.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

District Attorney.

88-0037

D.A.-001

AD :100

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden

at the CITY OF CAMBRIDGE, within and for the County of Middlesex,

on the First Monday of January in the year of our

Lord one thousand nine hundred and eighty -eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Eighth day of December

in the year of our Lord one thousand nine hundred and eighty -six

at Pepperell, in the County of Middlesex aforesaid,

did enter without breaking in the night time a building with the intent to commit a felony, the owner Francis Bowen and other persons lawfully therein being put in fear.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

Thomas F. Reilly
District Attorney.

D.A.-001

AD :101

88-0033

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, for the transaction of Criminal Business on the first Monday of January in the year of our Lord one thousand nine hundred and Eighty-eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That Daniel J. LaPlante

on the Eighth day of December in the year of our Lord one thousand nine hundred and Eighty-six at Pepperell, in the County of Middlesex, aforesaid,

did by means of a dangerous weapon, to wit: a hatchet, did assault Francis Bowen.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

AD :102

89-0039

Count 2

AND THE JURORS aforesaid for the COMMONWEALTH OF MASSACHUSETTS on their oath aforesaid, do further present

That Daniel J. LaPlante

on the Eighth day of December

in the year of our Lord one thousand nine hundred and Eighty-six

at, Pepperell in the County of Middlesex aforesaid,

did by means of a dangerous weapon, to wit: a hatchet, did assault Tina Bowen.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

Count 3

AND THE JURORS aforesaid for the COMMONWEALTH OF MASSACHUSETTS on their oath aforesaid, do further present

That Daniel J. LaPlante

on the Eighth day of December

in the year of our Lord one thousand nine hundred and Eighty-six

at, Pepperell in the County of Middlesex aforesaid,

did by means of a dangerous weapon, to wit: a hatchet, did assault Karen Bowen.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

COUNT 4

AND THE JURORS aforesaid for the COMMONWEALTH OF MASSACHUSETTS on their oath aforesaid, do further present

That Daniel J. LaPlante

on the Eighth day of December
in the year of our Lord one thousand nine hundred and Eighty-six
at Pepperell, in the County of Middlesex aforesaid,

did by means of a dangerous weapon, to wit: a hatchet, did assault Kathy Knapp.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

Asst. District Attorney.

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and eighty -eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Eighth day of December in the year of our Lord one thousand nine hundred and eighty -six at Pepperell, in the County of Middlesex aforesaid,

did without lawful authority, forcibly or secretly confine or imprison Francis Bowen within this Commonwealth against his will.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

Ross - Paul
Fred Cowden
District Attorney.

D.A.-001

AD :106

88-0040

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and eighty -eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Eighth day of December in the year of our Lord one thousand nine hundred and eighty -six at Pepperell, in the County of Middlesex aforesaid,

did without lawful authority, forcibly or secretly confine or imprison Karen Bowen within this Commonwealth against her will.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

District Attorney.

D.A.-001

AD :107

88-004

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden

at the CITY OF CAMBRIDGE, within and for the County of Middlesex,

on the First Monday of January in the year of our

Lord one thousand nine hundred and eighty -eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Eighth day of December

in the year of our Lord one thousand nine hundred and eighty -six

at Pepperell, in the County of Middlesex aforesaid,

did without lawful authority, forcibly or secretly confine or imprison Tina Bowen within this Commonwealth against her will.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

[illegible]
District Attorney.

D.A.-001

AD :108

88-0042

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and eighty -eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Eighth day of December in the year of our Lord one thousand nine hundred and eighty -six at Pepperell, in the County of Middlesex aforesaid,

did without lawful authority, forcibly or secretly confine or imprison Kathy Knapp within this Commonwealth against her will.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

Ross E. Zolla
Ford Aspinwall
District Attorney.

88-0043

AD :109

D.A.-001

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and eighty-eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That

Daniel J. LaPlante

on the Eighth day of December in the year of our Lord one thousand nine hundred and eighty-six at Pepperell, in the County of Middlesex aforesaid,

did steal one coat valued at over one hundred dollars, the property of Francis Bowen in a certain building of said Francis Bowen.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

Ford Cronin
District Attorney.

88-004

AD :110

D.A.-001

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and Eighty-eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That Daniel J. LaPlante

on the or about Tenth day of December in the year of our Lord one thousand nine hundred and Eighty-six at Pepperell, in the County of Middlesex aforesaid, in the night time did break and enter the building of Francis Bowen situated in said Pepperell with intent therein to commit ~~larceny and a~~ a felony

~~of the~~ in said

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided

A true bill.

Thomas F. Reilly
District Attorney

Virginia M. Fahey
Foreman of the Grand Jury.

88-0045

AD. 1988

Commonwealth of Massachusetts

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the First Monday of January in the year of our Lord one thousand nine hundred and eighty -eight

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That Daniel J. LaPlante on or about the Tenth day of December in the year of our Lord one thousand nine hundred and eighty -six at Pepperell, in the County of Middlesex aforesaid,

did wilfully and maliciously destroy or injure the personal property, dwelling house or building of Francis Bowen, the value of said property destroyed or injured exceeding one hundred dollars.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Virginia M. Fahey
Foreman of the Grand Jury.

District Attorney.

88-0046

D.A.-001

AD :112

CERTIFICATE OF COMPLIANCE
Mass. R.A.P. 16 (k)

Re: Commonwealth v. Daniel LaPlante,
No. SJC-12570

I, Crystal L. Lyons, hereby certify that the brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6)(pertinent findings or memorandum of decision); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

By: \s\ CRYSTAL L. LYONS
CRYSTAL L. LYONS
ASSISTANT DISTRICT ATTORNEY
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Woburn, MA 01801
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Tel: (781) 897-6825
crystal.lyons@state.ma.us

Dated: February 8, 2019

CERTIFICATE OF SERVICE

Re: Commonwealth v. Daniel LaPlante,
No. SJC-12570

I, Crystal L. Lyons, hereby certify that on this day I served the Commonwealth's brief, record appendix and supplemental record appendix on the defendant by causing PDF copies of all three documents to be sent via Tylerhost to his attorney:

Merritt Schnipper, Esq.
25 Bank Row, Suite 2S
Greenfield, MA 01301
mschnipper@schnipperhennessy.com

Signed under the pains and
penalties of perjury,

By: \s\ CRYSTAL L. LYONS
CRYSTAL L. LYONS
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crystal.lyons@state.ma.us

Dated: February 8, 2019

No. SJC-12570

Commonwealth of Massachusetts

v.

Daniel LaPlante

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

BRIEF FOR THE COMMONWEALTH

Suffolk County
2019 Sitting
