[REDACTED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

L.C.,
Petitioner-Appellant,

v.

[REDACTED], SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTE, AND [REDACTED],
Respondents-Appellees.

BRIEF OF APPELLANT

Appeal From The United States District Court
For The District Of Massachusetts
In Civil Action No. [REDACTED]

[REDACTED]

Attorneys for Petitioner-Appellant

August 18, 2011

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Fed. R. App. P. 34(a) and Local Rule 34.0(a), Appellant L.C. requests oral argument. This is a habeas case involving state convictions for two homicides that occurred 25 years ago. L.C. was a juvenile at the time the homicides occurred, but he was twice tried as an adult. The initial convictions of L.C. and his adult co-defendants were reversed by the Massachusetts Supreme Judicial Court ("SJC"), and one of L.C.'s co-defendants was ultimately acquitted. L.C.'s federal habeas petition was filed in 1999 and took the district court more than ten years to resolve. Simply put, this case is not a garden variety habeas case. It involves a lengthy and complicated factual and legal record. As the district court noted in issuing a certificate of appealability ("COA") of its decision denying L.C.'s petition, L.C.'s claims "are complex and the decisions are sufficiently debatable to warrant the issuance of a COA." Oral argument is merited because it will assist the Court to navigate through the complex factual record and the knotty legal issues presented.

STATEMENT OF JURISDICTION

This is an appeal of the Memorandum and Order (the "Order") of the United States District Court for the District of Massachusetts (Wolf, D.J.), dated December 2, 2010, denying L.C.'s petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. Judgment entered against L.C. on December 2, 2010, and he timely noticed this appeal on December 30, 2010. *See* Addendum at ADD-1; JRA at A1577-A1578.[1] This court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in applying a presumption of correctness, and not reviewing *de novo*, the state court's factual determination that the perjurious testimony of R.S. had been nothing more than a minor factor in the earlier state juvenile court decision that the then 16 year old L.C. was

[1] The Addendum to this Brief includes the Judgment and Order of the district court and copies of the statutes implicated by the Judgment, specifically: U.S. Const. amend. VI and XIV, 28 U.S.C. § 2254, and Mass. Gen. L. ch. 119, § 61 (1986). All citations to the factual record below are to the Joint Record Appendix ("JRA"), with the exception of materials included in the record below but not included in the JRA under Fed. R. App. P. 30(b)(1). Pursuant to Fed. R. App. P. 28(e) and Local Rule 30(a)(2), those materials are identified by their exhibit number in the District Court Appendix ("Dist. Ct. App.").

not amenable to rehabilitation within the juvenile justice system and, therefore, had to be transferred to adult court for trial (the "minor factor determination").[2]

2. Whether, upon appropriate *de novo* review, the Single Justice's minor factor determination was an "unreasonable determination" of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d).

3. Whether, even under the deferential standard of review of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") that was applied by the district court, the Single Justice's minor factor determination was unreasonable. Put differently, whether petitioner has rebutted the presumption of correctness, if applicable, under the AEDPA with the requisite clear and convincing evidence.

4. Whether, upon *de novo* review, there is a reasonable probability that L.C. would not have been tried and/or sentenced as an adult if prior counsel had sought reversal of the state juvenile court's non-amenability finding after learning of R.S.'s admitted perjury.

5. To the extent that *de novo* review of L.C.'s legal claims is not merited, whether the Single Justice's decision, such as it was, involved an

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[2] As discussed further below, the fact determination at issue was made by a Single Justice of the SJC acting in his "gatekeeper" capacity under Mass. Gen. L. ch. 278, § 33E. The SJC gatekeeper justice's decision – *see* JRA at A1424-A1426 – is the "last reasoned opinion" of a state court addressing the claims at issue and, therefore, must be the "focus" of this court's attention. *Phoenix v. Matesanz*, 189 F.3d 20, 25 (1st Cir. 1999).

"unreasonable application" of clearly established federal ineffective assistance of counsel law as determined by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny.

STATEMENT OF THE CASE

This is a habeas case in which the petitioner/appellant L.C. seeks reversal of his Massachusetts state court convictions on two counts of murder arising out of the February 19, 1986 shooting deaths of [REDACTED]. L.C. was a 16 year old juvenile at the time of the shootings. He was first charged as juvenile, but his case was transferred to adult court after the juvenile court found, among other things, that he was not amenable to rehabilitation within the juvenile justice system (the "non-amenability finding"). L.C. contends that the lynchpin of the non-amenability finding was the testimony of one R.S., who later admitted that his juvenile court testimony was almost entirely perjurious.

R.S. admitted his perjury both before and during L.C.'s second adult trial for murder, but L.C.'s trial counsel failed to seek remand to the juvenile court for reconsideration of the non-amenability finding. L.C. maintains that but for trial counsel's failure, there is a reasonable probability that a reasonable juvenile court judge would have reversed the non-amenability finding. The result of any such reversal would have been, at worst, a juvenile sentence rather than the

double life sentences L.C. received. The failure of L.C.'s trial counsel to seek reversal of the non-amenability finding after learning of R.S.'s perjury constituted ineffective assistance of counsel in violation of L.C.'s rights under the Sixth and Fourteenth Amendments to the United States Constitution. The principal basis for the petition below and the sole basis being advanced on appeal is this ineffective assistance provided by L.C.'s trial counsel, and the later ineffective assistance provided by direct appellate counsel who failed to raise trial counsel's ineffectiveness as a direct appellate issue.

The procedural history of the case that has now brought L.C. to this Court is as follows:

- February 23, 1986 – L.C. and two adults are arrested for the shooting deaths of [REDACTED].
- March 13, April 3 and 23, 1986 – The Massachusetts juvenile court holds a three day evidentiary hearing and determines to transfer L.C.'s case to the Massachusetts superior court for L.C. to be tried as an adult.
- December 5, 1986 – The superior court remands L.C.'s case to the juvenile court for clarification of that court's transfer findings. The juvenile court then issues expanded findings, *see* JRA at A0568-A0577, and transfers the case back to the superior court.

- March 23 – April 11, 1988 – L.C. and co-defendant F.D. are tried to a jury. Both are convicted on two counts each of first degree murder.
- December 28, 1992 – The SJC reverses L.C.'s and F.D.'s convictions. *See Commonwealth v. T.D.*, 414 Mass. 37, 50 (1992) ("*T.D. I*").
- January 13 – February 3, 1994 – L.C. and F.D. are tried for a second time. Both are once again convicted on two counts each of first degree murder, albeit on different theories.
- May 8, 1998 – The SJC affirms L.C.'s and F.D.'s convictions. *See Commonwealth v. T.D.*, 427 Mass. 414, 426 (1998) ("*T.D. II*").
- July 6, 1999 – L.C. files a motion for a new trial pursuant to Mass. R. Crim. P. 30 with the Massachusetts superior court raising for the first time his claim that trial and direct appellate counsel provided him with constitutionally ineffective assistance when they failed to seek reversal of the non-amenability finding.[3] The superior court denies

[3] The district court refers to these claims as L.C.'s "Strickland claims." *See* Addendum at ADD-15. In this brief, the two ineffective assistance claims will be referred to interchangeably as the "*Strickland* claims" and the "Non-amenability claims."

L.C.'s motion in a brief written opinion, dated December 28, 1999, without a hearing. JRA at A1341-A1343.

- January 14, 2000 – L.C. files a "gatekeeper" petition for review of the superior court's denial of his Rule 30 motion. The petition is filed pursuant to Mass. Gen. L. ch. 278, § 33E with the Single Justice of the SJC. After hearing, the gatekeeper petition is denied in a written opinion dated September 14, 2000. JRA at A1424-A1426.
- October 30, 2000 – L.C. files a petition for habeas relief with the district court pursuant to 28 U.S.C. § 2254. More than ten years later, following a Report and Recommendation from a magistrate judge, and several hearings, the district court denies L.C.'s petition in a Memorandum and Order dated December 2, 2010. This appeal followed.

STATEMENT OF FACTS

A. The Killing of [REDACTED, and the Arrest of the Juvenile L.C. and His Adult Co-Defendants

On February 19, 1986, [REDACTED] were killed in [REDACTED] in Boston's North End.[4] *See F.D. II*, 427 Mass. at 415. [REDACTED] was shot seven times, and [REDACTED] sixteen times. *Id.* at 415 n.2. On

[4] Dist. Ct. App. Ex. M-24 (Excerpt of Trial Transcript (Jan. 26, 1994)) at 7-12, 28.

February 23, 1986, L.C., F.D., and P.T. were arrested and charged with murder.[5] *Id.* at 417. F.D. and P.T., who were 19 and 21 years old respectively, were charged as adults.[6] L.C., who was a 16 year old high school sophomore with no criminal record, was charged as a juvenile.[7] *F.D. I*, 414 Mass. at 39.

B. R.S.'s Testimony at L.C.'s Juvenile Transfer Hearing

Within weeks of his arrest, L.C. had a transfer hearing in the juvenile court at which the Commonwealth was required to establish, among other things, that: (i) there was probable cause to believe L.C. had committed the offenses charged; (ii) L.C. was "dangerous"; and (iii) he was not amenable to rehabilitation within the

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5 Dist. Ct. App. Ex. M-24 at 138-139.

6 Dist. Ct. App. Ex. N-31 (Boston Police Dept. Arrest Booking Sheet (Feb. 23, 1986)).

7 Dist. Ct. App. Ex. M-24 at 150.

juvenile justice system. *See* Addendum at ADD-10, ADD-67 – ADD-75.[8] The testimony of three Commonwealth witnesses – two doctors and RS – bore on the issue of LC's amenability to rehabilitation. JRA at A0537-A0561.

RS, who was 17 years old at the time, was the only juvenile court witness who had been personally familiar with the victims and the defendants, including LC. JRA at A0275-A0279, A0285-A0286, A0297-A0298. He was also the only witness who claimed to have been in [REDACTED] on the evening of February 19, 1986, to have witnessed the shootings from start to finish, and to have spoken with LC and the other defendants in the hours and days after the shootings. *Id.* at A0298-A0299, A0302-A0332.

Before testifying in the juvenile court, RS was given immunity as to the murders. *F.D. II*, 427 Mass. at 416; JRA at A0083. But when he testified, he falsely stated that he had only received immunity with regard to a potential

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[8] LC's transfer proceeding was governed by Mass. Gen. L. ch. 119, § 61 (1985) ("Section 61"), which created a presumption that a juvenile charged with a crime would be retained within the juvenile system for rehabilitation. The presumption could be overcome only by "clear and convincing evidence" showing that the charged juvenile was both "dangerous" and "not amenable to rehabilitation." In 1996, ten years after LC's juvenile transfer hearing, and two years after L.C.'s second adult trial, Section 61 was repealed, and effectively replaced by Mass. Gen. L. ch. 119, §§ 54 & 58. LC's transfer was, however, indisputably governed by the statute that existed in 1986. *See, e.g.*, *Commonwealth v. Williams*, 427 Mass. 59, 60 n.1 (1998) (applying Section 61, in effect at the time original transfer decision was made, even though statute had since been repealed); *Commonwealth v. Harold*, 43 Mass. App. Ct. 320 & n.1 (1997) (same). A copy of the applicable Section 61 is included in the Addendum at ADD-67 – ADD-75.

charge of conspiracy to rob. JRA at A0271-A0275. R.S.'s false testimo ny regarding the scope of his immunity agreement was elicited by a prosecutor who knew the true details of the agreement. *Id.* at A0083, A0260-A0264, A0271-A0275, A0337. But the prosecutor did not correct the record or alert the juvenile court or defense counsel as to R.S.'s perjury. *Id.* at A0260-A0264, A0271- A0275, A0337. It would later become clear that R.S.'s perjury concerning his immunity agreement was the least of the lies he told the juvenile court. *Id.* at A0852-A0864, A0909-A0920.

R.S. provided the juvenile court with background information concerning the Slye Park shootings. JRA at A0279-A0302. He was a mutual friend of thc victims and F.D.. *Id.* at A0277-A0281, A0285. He testified that [REDACTED] had asked him to arrange a meeting with F.D. for the purported purpose of buying cocaine, while at the same time confiding in him that their real plan was to rob the cocaine from F.D.. *Id.* at A0280-A0290. R.S.'s testimony concerning [REDACTED]'s robbery plan was the only purported "motive" evidence presented to the juvenile court. *Id.* at 280; *see generally* JRA at A0102-A0302, A0386-A0475, A0481-A0536. R.S. would later admit that his testimony about the pre-shooting conversations he had with the victims and other pre-shooting conversations he later testified about having had

with F.D. were all "lies" and "pure fiction." JRA at A0909-A0920, A1152-A1163.

With respect to the homicides, and L.C.'s role in them, R.S. painted for the juvenile court a picture of L.C. as a bold and hardened killer. He told the juvenile court that L.C. was the first of the defendants to open fire, and that L.C. did so by shooting [REDACTED] six times at point blank range. JRA at A0308-A0310. R.S. further testified that after shooting [REDACTED], L.C. calmly turned on [REDACTED], shooting him twice, also at point blank range. *Id.* at A0310-A312.

According to R.S.'s juvenile court testimony, L.C. then stood his ground for a good 30 seconds, watching as F.D. and P.T. ran after the injured [REDACTED], firing guns again and again until [REDACTED] fell to the ground. JRA at A0311-A312. R.S. testified that L.C. then continued to watch as F.D. stood over the fallen [REDACTED], reloaded, and shot him again. *Id.* at A0315-A0317. After the shooting stopped, R.S. testified that L.C. caught R.S.'s eye, and fixed him with a hard, cold stare which caused R.S. to flee from the park. *Id.* at A0317. R.S. would later admit that every detail of this portrait of L.C. was false. *See infra.* at n.9.

R.S. further testified that almost immediately after he fled from [REDACTED] he received a call from F.D. instructing him to come to F.D.'s house. JRA at A0318-A0322. R.S. obeyed the summons and testified that

L.C. was still with F.D. when he arrived at F.D.'s house. *Id.* [REDACTED] testified that he was told "everything would be all right," and was offered cocaine. *Id.* at A0322-A0324. In addition he testified that there was a cover-up discussion at F.D.'s house, including talk of F.D. burning the jacket he had worn during the killings. *Id.* at A0325.

Two days later, according to R.S., he again met with L.C., F.D., and P.T. "to make up a story" about the events of February 19, 1986. JRA at A0328, A0330-A0332. R.S. testified that he was told to tell the police that he and the others had been "walking around," and that L.C. and F.D. had then gone to a friend's house, while R.S. went home. *Id.* R.S. would later admit that everything he told the juvenile court about the aftermath of the shootings was just one lie after another: There was no telephone summons to meet with L.C. and F.D., no meeting after the murders, and no cocaine offer or

cover-up, and L.C. played no role in any cover-up. *Id.* at A0766-A0769, A0878-A0882, A0899-A0903.[9]

C. Additional Evidence Bearing on Amenability to Rehabilitation Presented at the Juvenile Court Transfer Hearing

On the issue of L.C.'s amenability to rehabilitation, aside from R.S., the Commonwealth called two doctors – [REDACTED] – as witnesses. JRA at A0412-A0473. Their testimony was at best qualified and provisional. *Id.* at A0379 (noting a "provisional diagnosis"), A0092 (finding L.C. "*may* meet the criteria for DSM III 312.23"). Neither of the Commonwealth's

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[9] Although R.S. provided his testimony in the juvenile court just three weeks after the shooting deaths of [REDACTED], it was already his *third* entirely different account of the events in question. R.S.'s first version, provided to Boston Police detectives during an interview on February 22, 1986, was a complete denial that he had any knowledge of the shootings. JRA at A0332-A0333, A0823-A0824, A0832, A0838-A0840. In his second version, told just hours after his initial denial, R.S. acknowledged that he had observed the shootings, but claimed that he had been a mere innocent bystander. *Id.* at A004 1-A0056, A0824-A0832. In this second version, which was recorded, R.S. told the police that his friend, [REDACTED], had arranged for [REDACTED] to rob F.D. of drugs, and that [REDACTED]had then alerted F.D. to the plan. *Id.* at A0054-A0056, A1057- A1062. In this second statement, R.S., claiming to have seen the entirety of the murders, stated that he had seen L.C. shoot only [REDACTED], before fleeing. *Id.* at A0047-A0050. This version also included no mention of a post-murder cocaine offer or cover-up meeting with L.C. and F.D.. *Id.* at A0052- A0053. By the time L.C.'s juvenile transfer hearing commenced three weeks later, R.S. had changed and elaborated upon his tale, especially as it related to L.C.. He had
L.C. shooting [REDACTED] as well as [REDACTED] tari, *see* JRA at A031 0, and he had added the many other flourishes, including the hard, cold stare, discussed above. *Id.* at A0304-A0332. R.S. later admitted that all of the flourishes were lies. *Id.* at A0909-A0920, A1152-A1163.

physician witnesses testified that L.C. could not be rehabilitated or that he would not benefit from treatment in the juvenile justice system. *Id.* at A0412-A0473.

L.C. also called a physician witness – [REDACTED] – on the issue of his amenability to rehabilitation. JRA at A0483-A0533. In contrast to the tentative, and relatively benign, testimony offered by the Commonwealth's witnesses, L.C.'s witness could not have been clearer in his testimony that L.C. was a kid who would benefit greatly from being treated as a kid. *Id.* at A0479-A0480, A0512-A0523, A0525. In fact, Dr. [REDACTED], a board-certified psychiatrist, who had interviewed L.C. and his mother, testified unequivocally that L.C. was a better than average Department of Youth Services ("DYS") candidate and a fit subject for rehabilitation within the juvenile system. *Id.* at A0494-A0496, A0479-A0480.

D. The Juvenile Court's Findings

On March 14, 1986, the juvenile court found probable cause that L.C. had participated in the murders of [REDACTED]. JRA at A0538. Later the court issued written findings stating that it had further found that L.C. "pose[d] a significant danger to the public," and was "not amenable to rehabilitation within the juvenile justice system." *Id.* at A0560.

In reaching its non-amenability decision, the juvenile court cited R.S.'s testimony. JRA at A0539-A0541. Specifically, the court found that:

> defendant, L. C. , aimed his firearm at the weaponless [RED ACTED] and fired six to eight bullets into his body. The defendant then pointed his firearm at a defenseless [RED ACTED] and fired at least two bullets into his body. . . .

Id. at A0540. This "evidence" regarding the number of bullets L.C. had allegedly fired, and the number of victims L.C. had allegedly shot came only from RS.'s perjurious testimony. *Id.* at A0306-A0312; *see generally id.* at A0102-A0373, A0386-A0475, A0481-A536. In addition, the juvenile court based its non-amenability finding on the "facts" that L.C. had allegedly participated in a cocaine offer and cover-up meeting at F.D.'s apartment on the night of the shootings, *see id.* at A0541, as well as a later meeting to "concoct an alibi." *Id.* These "facts" were also based entirely on R S. , who later admitted that each was a lie. *Id.* at A0318-A0332; *see also id.* at A0909-A0920, A1152-A1163.

The juvenile court ignored the wealth of evidence establishing that L.C. was a perfect candidate for rehabilitation within the juvenile system. It disregarded Dr. [RED ACTED]'s unequivocal testimony that L.C. was a better than average candidate for rehabilitation within the juvenile system. JRA at A0479-A0480; A0494-A0496. In addition, the court ignored the fact that L.C. had *no* prior criminal record, and had had *no* disciplinary problems in school. *Id.* at A0036-A0040. And the court bypassed the uncontroverted evidence that L.C.'s school records included very good marks for effort, and indicated that he had been working hard to overcome learning difficulties. *Id.* at A0036-A0040, A0495-A0496. In

addition, the court ignored evidence that L.C. was active in sports, *see id.* at A0479, A0489, and had successfully held several part-time jobs, *id.* at A0478. The power of R.S.'s perjurious testimony was such that it simply overwhelmed the remainder of the juvenile record, virtually all of which cried out for L.C. being, if anything, highly amenable to rehabilitation within the juvenile system. *See generally id.* at A0012-A0026, A0036-A0040, A0084-A0577.

E. Remand to the Juvenile Court and the Submission of Additional Evidence that L.C. Was an Ideal Candidate for Rehabilitative Services

On December 5, 1986, nine months after the initial transfer of LC.'s case, the Superior Court allowed a defense motion to remand the case to the juvenile court for clarification of that court's non-amenability finding. JRA at A0566-A0567. Upon remand, L.C., who had been in the custody of DYS for all but two weeks since his arrest ten months earlier, submitted additional evidence of his amenability to rehabilitation within the juvenile system. *Id.* at A0562-A0565, A1261-1281. This evidence included DYS "attitude and behavior" reports of L.C. being "respectful, generally motivated, open-minded and agreeable," exhibiting "Superior Achievement and Excellence," and having "*an excellent attitude*." *Id.* at A1262-A1263, A1266-1281. DYS further reported that L.C. was "quite mature and very personable," *id.* at A0565, and had a desire to learn and a desire to be a positive influence in the classroom, *id.* at A0564-A0565. He was

viewed as a leader, who was a "stabilizing presence in [the] classrooms, setting an example for the rest of the residents." *Id.* at A0565. LC.'s official case worker summed it up by stating that L.C. "would benefit greatly from a Secure Treatment Program" within DYS. *Id.* at A0563. No countervailing additional evidence was submitted. The unanimous reports from LC.'s nearly ten months in DYS was not only that he was amenable to rehabilitation within the juvenile justice system, but that he was already well on the road to actual rehabilitation.

F. The Juvenile Court Ignores the Evidence from DYS and Issues Revised Non-Amenability Findings

Notwithstanding the unanimous new DYS evidence in LC.'s favor, the juvenile court once again issued a non-amenability finding, this time going so far as to say that L.C. was "outside the realm of possibility for rehabilitation within the juvenile justice system." JRA at A0576. The court's non-amenability ruling went on for eight pages, with the centerpiece, once again, being R.S.. Indeed, R.S.'s perjurious testimony infected the court's findings at every turn. *Id.* at A0304-A0332. Specifically, the court found that L.C. was not amenable to rehabilitation because:

> his fearless and deliberate action of pumping six bullets into one victim and two into the other, at close range, reflects his conscious disregard for the pain and suffering of another human being.

Id. at A0573. This was from R.S. and R.S. alone, and it apparently trumped all the positive evidence otherwise cutting in L.C.'s favor.

G. R.S.'s Disappearance, L.C.'s First Trial, and the Subsequent Vacating of L.C.'s Convictions

On March 23, 1988, L.C.'s and DiBenedetto's trial commenced in superior court.[10] Three weeks later, on April 11, 1988, the jury found each guilty on two counts of murder. JRA at A0580-A0583. Both were specifically found guilty of first degree murder on the grounds of deliberate premeditation *and* extreme atrocity or cruelty. *Id.* at A0580-A0583. P.T., in a separate trial, was also found guilty of two counts of murder in the first degree. *Commonwealth v. P.T.*, 411 Mass. 640 (1992).

Both trials were marked by the absence of the Commonwealth's key witness, R.S.. The Commonwealth argued that R.S. was "unavailable,"[11] and, in his place, the court allowed the introduction into evidence of his uncross-examined juvenile court testimony.[12]

On appeal, the SJC vacated the convictions of L.C. and his co-defendants, holding that the trial court had committed reversible error in admitting the uncross-

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[10] Dist. Ct. App. Ex. M-18 (Excerpt of the Trial Transcript (Mar. 23, 1988)).

[11] Dist. Ct. App. Ex. M-19 at 98-104 (Excerpt of the Trial Transcript (Apr. 4, 1988)).

[12] Dist. Ct. App. Ex. M-19 (Excerpt of the Trial Transcript (Apr. 4, 1988)).

examined testimony of R.S.. *P.T.*, 411 Mass. 640; *F.D. I*, 414 Mass. 37. The cases were remanded for new trials. *Id.*

H. L.C.'s Year on Bail

Following the SJC's reversal of his convictions and pending retrial, L.C. was admitted to bail, JRA at A1205, and remained out on bail from December 31, 1992 until his second jury commenced deliberations on February 2, 1994, *i.e.*, a total of 13 months.[13] *Id.* Throughout that period, L.C. was a model citizen, leading a productive life. *Id.* at A1282-A1284. He had no problems whatsoever with the law – not even a parking ticket. *Id.* at A1283. He briefly attended college on a PELL Grant, *id.*, before finding a job at [REDACTED] Apartments in Boston, *id.*, where he proved to be "an exemplary and diligent employee with a model attendance record." *Id.* at A1240.

I. R.S. Reappears, Confesses to the Murders, and Admits that His Juvenile Court Testimony Was Perjurious

As L.C., F.D., and P.T. were preparing for their new trials, the Commonwealth informed them that R.S. had reappeared and would testify at trial. The Commonwealth further informed them that it had entered into a written immunity agreement with R.S., pursuant to which R.S. had been given transactional immunity as to all events surrounding the [REDACTED] murders, including immunity as to the murders themselves. JRA at A0586-A0587.

13 Dist. Ct. App. Ex. M-27 (Excerpt of the Trial Transcript (Feb. 2, 1994)).

In addition, the defense learned that in October 1993, R.S. had *confessed*, in a recorded police interview, to having been one of the shooters in Slye Park. *Id.* at A0588-A0649. Specifically, R.S. had confessed to using his own .22 Magnum revolver and to shooting both [REDACTED], two and three times in the head, respectively. *Id.* at A0608-A0609, A0613, A0626-A0629.

R.S.'s confession was his *fourth* distinct version of the killings, and it included not only a confession, but admissions by R.S. that he had *repeatedly lied and perjured himself* in his testimony against L.C. at L.C.'s juvenile transfer hearing. JRA at A0644, A1078-A1079.

After learning of R.S.'s confession and his admissions of perjury before the juvenile court, L.C. moved to dismiss his indictments and to have his case remanded to the juvenile court for a new *probable cause* hearing.[14] JRA at A1241-A1243. The motion to dismiss/remand was denied, and L.C.'s re-trial was scheduled to commence on January 13, 1994. Trial counsel failed to request a new transfer hearing on the issue of amenability to rehabilitation. *Id.*

[14] Dist. Ct. App. Ex. N-41 (Def. L.C.'s Mot. to Remand to Juvenile Ct. for New Transfer Hrg. and to Dismiss Indictment (Nov. 17, 1993)); Dist. Ct. App. Ex. N-42 (Mem. in Supp. of Mot. to Remand to Juvenile Ct. for New Transfer Hrg. and to Dismiss Indictment ((Nov. 17, 1993)).

J. R.S. Changes His Story Once Again, Providing a *Fifth* Revised Account of the Murders

R.S.'s admission that he had participated in the murders was short-lived. Upon hearing the confession, the Commonwealth threatened to revoke R.S.'s grant of immunity and charge him with the murders, and the confession then quickly disappeared.[15] JRA at A1114-A1116. After hearing of the latest shift in R.S.'s "memory," defense counsel moved to dismiss the indictments or, in the alternative, to suppress R.S.'s testimony. *Id.* at 1243. The motion was denied on the eve of the re-trial. *Id.* at A1211, A1243. Counsel failed to move to remand to the juvenile court for reconsideration of the non-amenability finding. *Id.* at 1243.

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[15] Specifically, on January 7, 1994, just six days before L.C.'s second trial was scheduled to commence, the Commonwealth informed defense counsel that R.S. had again materially altered his version of what had occurred in Slye Park on the evening of February 19, 1986. Dist. Ct. App. Ex. N-43 (Ltr. regarding statement of Mr. R.S. (Jan. 7, 1994)). Apparently, after R.S. had confessed to the murders in October 1993, the Commonwealth had informed him that it still intended to subpoena him as a witness. JRA at A1112. R.S. then stated his intention to assert his privilege against self-incrimination. *Id.* at A1113-A1116. In turn, the Commonwealth threatened that if he stopped cooperating and breached his immunity agreement, it would indict him for murder and seek high bail. *Id.* at A1114-A1116. It was then that R.S. revised his story yet another time – this time denying that he had been a shooter. *Id.* at A0736-A0747. The defense received an outline of the fifth account of events immediately prior to trial, Dist. Ct. App. Ex. N-43, and it was this version, fleshed out with considerably more detail, to which R.S. testified at trial. *See infra* at 22-24.

When R.S. testified at trial, counsel again failed to seek review of the juvenile court's non-amenability finding. JRA at A0736-A0747. This failure came in the face of testimony that was markedly different from R.S.'s juvenile court testimony against L.C. in almost every material respect. Specifically, with respect to the particular nature of L.C.'s role in the murders and their aftermath, R.S.'s trial testimony was *qualitatively* and *quantitatively* distinct from his juvenile court testimony:

- Whereas in the juvenile court R.S. had testified to having seen L.C. "pump[]" six bullets into [REDACTED], JRA at A0306-A0312, A0573, at trial R.S. made clear that he saw L.C. shoot [REDACTED] only once. *Id.* at A0740.
- Whereas at the transfer hearing R.S. claimed to have seen L.C. shoot [REDACTED] twice at point blank range, JRA at A0306-A0312, A0573, at trial R.S. did not have L.C. shooting [REDACTED] at all. *Id.* at A0743.
- Whereas at the transfer hearing R.S. had testified that L.C. had opened the firing, JRA at A0306-A0312, A0540, at trial he testified that the first thing he saw in [REDACTED] was F.D. – not L.C. – open fire by shooting [REDACTED]. *Id.* at A0736.

- Whereas in the juvenile court R.S. portrayed L.C. as boldly remaining in the park after shooting his victims, and watching his cohorts fire numerous additional shots at point blank range, JRA at A0308-A0317, his trial testimony was that the 16 year old L.C. shot one bullet and immediately fled the scene. *Id.* at A0740, A0743.
- Whereas in the juvenile court R.S. testified that after the shooting stopped, he found L.C. fixing him with a stare so intimidating it caused R.S. to flee the park in fear, JRA at A0317, at trial R.S. testified that it was actually L.C. who fled the park soon after the shooting began. *Id.* at A0740, A0743.
- Whereas in the juvenile court R.S. testified the he had been summoned immediately after the shootings to a meeting with L.C. and F.D. at which he was offered cocaine and where a "cover-up" plan was hatched, JRA at A0318-A0325, his trial testimony contained *no* mention of any such summons, offer, or cover-up discussion. *Id.* at A0748, A0752.
- Whereas in the juvenile court R.S. testified to a meeting involving L.C. in which an alibi was "concocted," JRA at A0328-A0332, A0541, at trial he stated that L.C. played no role in the alleged discussion. *Id.* at A0766-A0769.

At bottom, whereas R. S. had portrayed L. C. to the juvenile court as a form of monster, who could never be rehabilitated, at trial he portrayed L. C. as the kid that he was. *Id.* at A0306-A332, A0540, A0573.

Not only was R. S. 's trial testimony 180 degrees contrary to his juvenile testimony on every issue bearing on the question of L. C. 's amenability to rehabilitation, R. S. readily admitted at trial that his prior testimony had been a tissue of lies. JRA at A0909-A0920, A1152-A1163. R. S. specifically acknowledged that his 1986 juvenile court testimony had been "lie upon lie upon lie." *Id.* at A1078-A1079. When confronted with his testimony about the drug robbery gone awry, R. S. admitted that numerous details he had provided to the juvenile court had been "pure fiction." *Id.* at A0910-A0920. R. S. 's admissions included the following:

> Q: . . . . the conversation of the arrangements you made at that time with Mr. F. D. ? . . . . Now, that was a lie?
>
> A: Yes, it was . . . .
>
> Q: That conversation never happened, isn't that right?
>
> A: Right.
>
> Q: And . . . any discussion as to . . . price or payments . . . . [t]hat was pure fiction, was it not?
>
> A: Yes, it was.
>
> Q: You made it up, isn't that correct?
>
> A: Yes . . . .

Q: And [regarding] arrangements made as to [the drug deal] . . . [t]hat was a lie, isn't that correct?

A: Yes.

Q: You made it up, isn't that right?

A: Yes.

Id. at A0910-A0912. R.S. also admitted that his testimony about the "cover-up" meeting and cocaine offer at F.D.'s house immediately after the murders was wholly perjurious. *Id.* at A0899-A0901; *see also id.* at A0907- A0908, A0912, A0918-A0921, A0925, A0927, A0928, A1078-A1079, A1112- A1162, A1160-A1167. Specifically, R.S. testified:

Q: And [you testified that] you received a call, telephone call from Mr. F.D. [shortly after the incident in [REDACTED] Park],

A: isn't that right?Yes.

Q: Now, that was a lie wasn't it?

A: Yes.

Q: And specifically you testified as to conversations that you had with Mr. F.D. during that phony telephone call you were testifying about?

A: Yes.

Q: And you lied about all of that?

A: Yes.

Q: And you lied when you said that Mr. F.D. said, come over to my house, is that correct? That was a lie?

A: Yes.

. . . .

Q: [W]hy didn't you come forward to this jury and tell them the story that you had told in October of 1993?

A: Because it wasn't true . . . .

Q: [W]hy didn't you tell this jury the story that you had told in 1986 [to the juvenile court and the grand jury]?

A: Because that wasn't true . . . .

Q: And, sir, why didn't you tell this jury the story that you told on February 22nd of 1986?

A: Because that wasn't true.

Id. at A0900-A0901, A1133.

K. The Verdict, the Direct Appeal, and L.C.'s Habeas Petition

At the conclusion of the second trial, both L. C. and F. D. were convicted. As in the first trial, the jury found F. D. guilty of murder by means of deliberate premeditation *and* extreme atrocity or cruelty. JRA at A1171- A1174. L. C. was found guilty on the first theory, but *not* on the theory of extreme atrocity or cruelty.[16] *Id.* P. T. was tried separately and acquitted of all

[16] The difference between the jury's F. D. and L. C. findings, and the difference between the findings of L. C. 's first and second juries, reflect the distinctions between R. S. 's 1986 and 1994 testimonies. The jury that heard R. S. 's transfer hearing rendition of L. C. 's particular role in the shootings found L. C. 's actions atrocious and cruel and at least implicitly found L. C. not amenable to rehabilitation. By contrast, the jury that heard R. S. 's later testimony as to L. C. 's actions found L. C. guilty but less culpable than F. D. , and less culpable than the first jury had found both men. It can be argued, at least implicitly, that the second jury seemed to find L. C. amenable to rehabilitation.

charges. *F.D. II*, 427 Mass. at 415 n.3. L.C. was sentenced, once again, to two life sentences without the possibility of parole. L.C.'s convictions for the murders, as well as his two consecutive life sentences, were affirmed by the SJC on May 8, 1998. *Id.* at 426.

On July 6, 1999, L.C., through current counsel, filed a Motion for Post-Conviction Relief pursuant to Mass. R. Crim. P. 30 ("Rule 30 Motion") in which he raised, for the first time, his *Strickland* claims based on the failure of prior counsel to have sought reconsideration from the juvenile court of its non-amenability finding in light of R.S.'s fourth and/or fifth versions of events.[17] The trial court summarily denied the Rule 30 Motion without a hearing on December 28, 1999, JRA at A1341-A1343, and on January 14, 2000 L.C. filed a petition for review of that decision pursuant to Mass. Gen. L. ch. 278, § 33E with the Single Justice of the SJC. *Id.* at A1344-A1371. L.C.'s Section 33E petition was also denied, *id.* at A1423-A1426, with the Single Justice finding that, "[o]n the question of [Costa's] amenability to rehabilitation, R.S.'s testimony played but a minor role." *Id.* at A1425. The Single Justice further noted – without distinguishing between the juvenile court's probable cause determination
(previously affirmed by the SJC) and the non-amenability determination (never considered by the SJC) – that the SJC had "previously determined that there was

[17] Dist. Ct. App. Exs. J-N, P.

no error in the decision to transfer the defendant to the Superior Court for trial as an adult." *Id.* At no point in the Section 33E decision did the Single Justice cite any federal case law, describe the standard for ineffective assistance of counsel, or make any findings regarding trial or appellate counsel's performance, or about the presence or absence of prejudice to L.C. resulting from trial and direct appellate counsel's failure to have raised the issue of amenability to rehabilitation after R.S. had rescinded every material component of his juvenile court non-amenability testimony. *Id.* at A1424-A1426.

On October 30, 2000, L.C. timely filed a habeas corpus petition with the district court pursuant to 28 U.S.C. § 2254.[18] Over ten years later, the district court issued its Order denying L.C.'s petition. Addendum at ADD-2 – ADD-46. This appeal timely followed.

SUMMARY OF ARGUMENT

The district court erred by affording undue deference under AEDPA to the SJC Single Justice's two-page opinion denying L.C.'s federal *Strickland* claims. Those claims were fairly and unambiguously presented to the Single Justice, who did not reject them on any adequate or independent state law ground, but at the same time failed to reach the federal merits. As a result, on federal habeas the claims must be reviewed *de novo*. The district court erred in not doing so.

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[18] District Court Dkt. No. 1 (Oct. 30, 2000).

With *de novo* review, it is clear that the Single Justice was mistaken in his central factual determination that the testimony of R.S. played no more than a "minor role" in the juvenile court's finding that the then 16 year old L.C. was not amenable to rehabilitation in the juvenile justice system. In fact, even without *de novo* review, L.C. has rebutted with clear and convincing evidence the presumption of correctness that would otherwise be afforded the Single Justice's fact finding. The record establishes that L.C.'s *Strickland* claims were rejected by the Single Justice based on an unreasonable and unsustainable determination of the facts regarding the role of R.S.'s testimony in the juvenile court's non-amenability decision. On this basis alone, the district court's affirmance of the Single Justice's decision must be reversed.

The Single Justice's unreasonable determination of the facts concerning R.S.'s role in the non-amenability decision, and the undue deference shown by the district court for that determination, resulted in the district court's erroneous conclusion that L.C. had failed to meet his burden of proving the requisite prejudice under *Strickland*. If R.S.'s testimony and its role in the juvenile court's non-amenability decision are properly evaluated, the merits of L.C.'s *Strickland* claims, including the prejudice to L.C. resulting from prior counsel's failures, become clear.

R.S.'s juvenile court testimony portrayed L.C. as a monster, who had fired numerous shots at point blank range into two separate victims. R.S. later admitted that his portrayal of L.C. to the juvenile court was pure fiction, and he changed his testimony to portray a frightened boy who at most fired one shot and then fled the scene. The original portrait was of a hardened criminal who could not be rehabilitated. The latter was of a child who could learn and grow and change. When prior counsel learned of the change in R.S.'s testimony, they failed to seek remand to the juvenile court to reconsider that court's non-amenability finding. Had they done so, there is at least a reasonable probability that the juvenile court would have changed course and tried and/or sentenced L.C. as a juvenile. Their failure to have done so constituted constitutional ineffective assistance of counsel.

STANDARD OF REVIEW

This court reviews *de novo* the district court's denial of habeas relief, including its determination of the appropriate standard of review of the state court proceeding. *Zuluaga v. Spencer*, 585 F.3d 27, 29 (1st Cir. 2009).

ARGUMENT

I. *De Novo* Review of L.C.'s Non-Amenability Claims Is Merited

The claims at issue on this appeal are L.C.'s two Non-amenability claims, *i.e.*, the claims labeled the "Strickland claims," by the district court. *See*

Addendum at ADD-15. The "gatekeeper" opinion of the Single Justice – *see* JRA at A1423-A1426 – was the "last reasoned opinion" of a state court to address those claims. It, therefore, was the proper "focus" of the district court's Order and must be the "focus" of this court's attention as well. *Phoenix*, 189 F.3d at 25.

In reviewing the Single Justice's opinion, the district court correctly observed that L.C. had fairly presented his federal *Strickland* claims, and that the Single Justice had not rejected those claims on any adequate or independent state ground. *See* Addendum at ADD-27 – ADD-30. The district court then went on, however, to conclude that the Single Justice had reached the merits of the *Strickland* claims, requiring the district court to apply AEDPA's "familiar" and deferential standard of review, including AEDPA's "presumption of correctness" with regard to the Single Justice's findings of fact. *Id.* at ADD-30 – ADD-31. This was error. The Single Justice did not reach the merits of L.C.'s fairly presented claims. Rather, he seems to have fundamentally misunderstood those claims. He left the actual claims unaddressed and unresolved. As a result, *de novo* review is appropriate. *See, e.g.*, *Lynch v. Ficco*, 438 F.3d 35, 44 (1st Cir. 2006) (*de novo* review appropriate where "the habeas petition presents a federal claim that was raised before the state court but was left unresolved").

Nowhere does the Single Justice mention *Strickland* or ineffective assistance of counsel or any federal case, and nowhere does he explain that L.C. has

somehow failed to prove that he was prejudiced by trial or direct appellate counsel's errors. The reader is left to guess as to the basis for the Single Justice's rejection of L.C.'s petition. Indeed, in straining to find that the Single Justice had somehow reached the merits of the actual claims presented, the district court did just that – it engaged in guesswork and speculation. In discussing the Single Justice's opinion, the district court talks of what the Single Justice "apparently" found, and states that the opinion "evidently rested" on a failure to prove actual prejudice, "[w]hile not explicitly stating" as much. Addendum at ADD-29. This is not the stuff of a true merits determination, and does not merit deferential AEDPA review. *See, e.g.*, *Brown v. Maloney*, 267 F.3d 36, 40 (1st Cir. 2001) ("In the absence of reasoning on a holding from the state court on the issue, we cannot say the claim was 'adjudicated on the merits' within the meaning of 28 U.S.C. § 2254(d)."") (citations omitted); *Fortini v. Murphy*, 257 F.3d 39, 47 (1st Cir. 2001) ("[W]e can hardly defer to the state court on an issue that the state court did not address."); *see also Teti v. Bender*, 507 F.3d 50, 56 (1st Cir. 2007) ("A matter is 'adjudicated on the merits' if there is a 'decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced . . .'"") (quoting *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001)).

The case of *Clements v. Clarke*, 592 F.3d 45 (1st Cir. 2010), is instructive. There, this court found that the Massachusetts Appeals Court had ruled on

"substantive" grounds, but that "determining precisely which substance proves a bit more elusive" as the state court had not identified the right that was at stake, but merely stated that no "impropriety" had occurred. *Id.* at 53. Still, the *Clements* panel was able to conclude that petitioner's claim had been adjudicated on the merits because the state court had specifically cited a case discussing the federal constitutional right at issue. *Id.* at 53-55. In contrast, here, the Single Justice failed to cite *Strickland* or any other state or federal case law citing *Strickland* or discussing "ineffective assistance of counsel." The substance of exactly what the Single Justice ruled on remains elusive. Simply put, the merits of the actual claims presented by L.C. were not reached, and *de novo* review is required. *See, e.g.*, *Perkins v. Russo*, 586 F.3d 115 (1st Cir. 2009) (*de novo* review appropriate where state court confuses standards applying to different claims, and fails to cite any state or federal cases mentioning the appropriate standards).

II. The Record Does Not Support the Single Justice's Factual Determination That R.S.'s Testimony Played Only a "Minor Role" in the Juvenile Court's Non-Amenability Decision

Although the Single Justice did not resolve, and certainly did not clearly and unambiguously resolve, the merits of L.C.'s fairly presented *Strickland* claims, it is clear that he made a factual determination that with respect to L.C.'s "amenability to rehabilitation, R.S.'s testimony played but a minor role, forming just one sentence in six pages of findings by the transfer judge." JRA at

A1425. In turn, the district court, finding that AEDPA deference should apply, afforded the Single Justice's "minor role" determination a "presumption of correctness," and concluded that L.C. had failed to rebut the finding with the requisite clear and convincing evidence. *See* Addendum at ADD-31. L.C. maintains that even if the presumption applies, he has rebutted it, and that surely under *de novo* review – which is appropriate here – the finding cannot stand. Regardless of standard, the record that was before the juvenile court establishes that R.S.'s testimony was crucial to the non-amenability decision. It played far more than a "minor role."

The Single Justice may have been correct in his observation that only one sentence of the juvenile court's non-amenability findings could be traced literally and directly to R.S.'s testimony. But that misses the point. R.S.'s testimony colored and influenced all the other findings. Without R.S.'s testimony that L.C. was a cold, calculating, remorseless killer, who had shot both victims multiple times, all the other evidence relied upon by the juvenile court

would have been insufficient to rebut the then applicable presumption of amenability to rehabilitation under Mass. Gen. L. ch. 119, § 61 (1985).[19]

Although the Single Justice was correct in stating that the juvenile transfer judge had considered the "appropriate factors" in making the non-amenability determination, a review of the record shows that these other factors, in and of themselves and without R.S.'s testimony, could not have supported the non-amenability finding. Specifically, as noted by the district court, the juvenile judge found that "a history of aggressive behavior, L.C.'s lack of remorse, his disrespect for authority, his lack of family support and his age" all supported the non-amenability finding. Addendum at ADD-35. But while each of these factors may have found some support in the juvenile record, and each was on its face independent of R.S., each was also dwarfed by countervailing evidence in the record. *See* JRA at A0278-A0336. R.S.'s testimony was the 800 pound gorilla that rendered evidence that would otherwise have been benign and/or drowned out by other evidence of record, into evidence of apparent concern.

For example, the evidence of L.C.'s "aggressive behavior," paled in comparison with the evidence that L.C. had no criminal record and a solid record

[19] The burden at the transfer hearing was not Costa's. There was a presumption of amenability to rehabilitation, and it was the Commonwealth's burden to prove by clear and convincing evidence that L.C. was not amenable to rehabilitation. *See, e.g.*, *A Juvenile v. Commonwealth*, 380 Mass. 552, 558-59 (1980) ("*Juvenile II*"); *Commonwealth v. A Juvenile*, 370 Mass. 272, 280-83 (1976) ("*Juvenile I*").

of good behavior in school. *See* JRA at A0036-A0040. The evidence of "lack of remorse" was innocent compared to the evidence, particularly the evidence gleaned from L.C.'s actual post-arrest DYS experience, that he was a good, caring young man, who provided support and positive encouragement to his peers. *See id.* at A0562-A0565, A1261-1281. The evidence of "disrespect for authority" was belied by the unanimous reports of the DYS authorities to whom he reported during the nearly ten months between his initial arrest and the juvenile court's issuance of its amended transfer findings. *See id.* at A0562-A0565. Indeed, the progress L.C. made during just those approximately ten months proved that within the juvenile justice system he could and would be rehabilitated, notwithstanding his purported "lack of family support and his age."[20]

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[20] Under then applicable law, L.C. could have been held in DYS until the age of 21 and beyond. *See* Mass. Gen. L. ch. 120, § 17 (1986) (DYS may petition court to extend a juvenile's commitment beyond the age of 18 if the Department believes that upon discharge the juvenile would be "physically dangerous to the public because of the person's mental or physical deficiency, disorder, or abnormality"); *see also Dept. of Youth Svcs. v. A Juvenile*, 398 Mass. 516, 519 n.1 (1986); *Dept. of Youth Svcs. v. A Juvenile*, 384 Mass. 784, 788-89 (1981). In addition, Mass. Gen. L. ch. 120, § 19 authorized DYS to seek further extensions of a juvenile's period of commitment under the provisions of § 17, "as often as in the opinion of the department [of youth services] may be necessary for the protection of the public." Mass. Gen. L. ch. 120, § 19 (1986). In fact, at the same time that Mr. L.C. turned 18, other juveniles who met the criteria set forth in Mass. Gen. L. ch. 120, §§ 17 and 19 were held beyond the age of 21. *See, e.g.*, *Commonwealth v. Rosenburg*, 410 Mass. 347, 359 (1991) (affirming extension of defendant's DYS commitment until age 23).

As the district court found, the non-R.S. "factors" relied upon by the juvenile judge for the non-amenability finding "were not based on R.S.'s allegedly perjured testimony," Addendum at ADD-35, but they were all influenced by the portrait R.S. painted of L.C.. Without that portrait, those other factors would not have been sufficient to outweigh either the ample affirmative evidence – *see, e.g.*, JRA at A0012-A0026, A0036-A0040, A0084-A0577 – of L.C.'s amenability to rehabilitation or the presumption of amenability required by then applicable law. *Juvenile II*, 380 Mass. at 558-59; *Juvenile I*, 370 Mass. at 280-83.

A *de novo* review of the entire juvenile court record – *see* JRA at A0020-A0565 – establishes that R.S.'s testimony played far more than a "minor role" in the non-amenability determination. Indeed, that same record, as discussed in detail above, stands as clear and convincing evidence that the Single Justice's "minor role" factual finding was incorrect. In this regard, even if AEDPA deference and the presumption of correctness applied, one would have to conclude that the Single Justice's decision rejecting L.C.'s petition "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). On this ground, the district court's decision to the contrary must be reversed. *Id.*; *DeBurgo v. St. Amand*, 587 F.3d 61, 67 (1st Cir. 2009); *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

III. But for the Constitutionally Ineffective Assistance Provided by Prior Counsel, There Is a Reasonable Probability That L.C. Would Have Been Tried and/or Sentenced as a Juvenile

"To succeed on a claim of ineffective assistance of counsel under the Sixth Amendment, [a movant] must show both deficient performance by counsel and resulting prejudice." *Peralta v. United States*, 597 F.3d 74, 79 (1st Cir. 2010) (citing *Strickland*, 446 U.S. at 687). Under *Strickland* and its progeny, a defendant is prejudiced by his trial counsel's deficient performance if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 446 U.S. at 694. A certainty that the outcome would be different is not required; rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*[21]

Here, L.C.'s precise ineffective assistance claim as to trial counsel is that either before or during L.C.'s second trial, when trial counsel learned of R.S.'s fourth and then fifth versions of events, and of R.S.'s admitted perjury, counsel should have sought remand to the juvenile court for reconsideration of that court's non-amenability finding. His failure to have done so was deficient, and that deficiency prejudiced L.C.. In the first instance, the practical prejudice was deprivation of the chance for L.C.'s case to be treated as a juvenile matter, with

[21] The test for ineffective assistance of appellate counsel is effectively the same. *See, e.g.*, *Jewett v. Brady*, 634 F.3d 67, 75 (1st Cir. 2011).

the attendant cap to LC.'s potential sentence. The legal prejudice was that, had remand been sought, there was, at a minimum, a reasonable probability that the juvenile court would have reversed its earlier non-amenability finding. In addition, there was a reasonable probability that had the juvenile court not reversed course, its failure to have done so would have been a violation of LC.'s federal due process rights.

The precise ineffective assistance claim as to direct appellate counsel is derivative of the *Strickland* claim concerning trial counsel. Direct appellate counsel's deficiency was in not having caught trial counsel's omission. The resulting prejudice to L.C. was that had the error been caught and pursued on appeal, there was a reasonable probability that LC.'s convictions would have been vacated, and his case remanded to the juvenile court for reconsideration of its non-amenability finding.

A. Trial and Direct Appellate Counsel's Deficient Performance

The district court did "not address or resolve the deficient performance component of the *Strickland* standard" because it found that "the Single Justice [had] reasonably concluded that L.C. did not prove the required prejudice." Addendum at ADD-38. This court may, of course, remand to the district court on the issue of deficient performance of counsel, *Rivera Alicea v. United States*, 404 F.3d 1, 4 (1st Cir. 2005), but it need not do so. The record here is such that the

court may resolve the issue of prior counsel's deficient performance without evidence or any additional supplementation. After all, prior counsel whose performance is being challenged have both submitted affidavits indicating that their failure to raise the non-amenability issue after learning of R.S.'s changing stories and admitted perjury was neither a tactical nor a strategic choice. JRA at A1241-A1259. Rather, for both counsel the omission was simply a mistake. *Id.* They admittedly missed the issue. *Id.*

That affidavit testimony from counsel is not likely to change. When the affidavits are combined with the obvious benefits to L.C. that potentially could have resulted – and, as discussed below, in all probability would have resulted – from raising the issue, it is clear that this Court may decide, without more, that counsel's performance met the *Strickland* deficiency standard. *United States v. McCoy*, 215 F.3d 102, 107-108 (D.C. Cir. 2000) (finding record of counsel's ineffective performance "'is so clear that remand is unnecessary,'" and "confidently resolv[ing] [petitioner's] claim in the first instance") (internal citation omitted).

It is telling that after learning of the dramatic changes in R.S.'s testimony, prior counsel raised concerns regarding the juvenile court's probable cause determination, but not its non-amenability determination. *See, e.g.*, JRA at A1241-A1256. That the probable cause issue was raised shows that counsel were

keenly aware of the importance of R.S.'s testimony. That they raised probable cause but not non-amenability shows that they were focused on exactly the wrong issue. After all, as the SJC later pointed out, through all of R.S.'s changing versions of events, one constant was that L.C. was a participant who fired one gun at least one time. *F.D. II*, 427 Mass. at 424. In other words, the issue of whether there was probable cause to believe L.C. should be charged at all was not implicated by R.S.'s shifting stories. In contrast, R.S.'s shift from portraying L.C. as a comfortable, confident, brazen shooter of multiple bullets at two different individuals at point blank range to a portrayal of L.C. as a frightened kid who fired one gun one time and then fled from the scene, goes directly to the issue of non-amenability. The former portrait was of a cold killer who was unlikely to be rehabilitated, the latter was of a child for whom there was very real hope. It was no mere coincidence that the jury that heard R.S.'s juvenile court testimony found L.C. guilty of first degree murder based on a theory of atrocity and cruelty, whereas the jury that heard R.S.'s later testimony did not. JRA at A0580-A0583, A1171-A1174. That prior counsel missed the issue, and failed to focus the court's attention on the import of R.S.'s testimony for the juvenile court's non-amenability finding was inexcusable. In that regard, prior counsel's performance "fell measurably below that which might be expected

from an ordinarily fallible lawyer."[22] *Lynch*, 438 F.3d at 48. And this court should so find.[23]

B. The Prejudice to L.C. Resulting from Prior Counsel's Deficient Performance

With respect to the prejudice component of *Strickland*, the district court correctly observed that:

> To show prejudice, L.C. must demonstrate that, had his counsel requested reconsideration of the decision that L.C. was not likely to be rehabilitated as a juvenile

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[22] It should be further noted that, as a general matter, reconsideration of probable cause is entirely different from reconsideration of a juvenile court determination of a child's amenability to rehabilitation in the juvenile justice system. Probable cause is an issue that can be effectively revisited and "cured" by an adult jury finding guilt beyond a reasonable doubt. *See, e.g.*, *United States v. Mangual-Corchado*, 139 F.3d 34, 42 (1st Cir. 1998) (finding of guilt beyond a reasonable doubt by petit jury demonstrates likelihood that grand jury would have found probable cause even absent errors in that proceeding). By contrast, a juvenile court finding of non-amenability to rehabilitation, no matter how wrong or misguided, is permanent unless reversed. Adult trial juries never reconsider, and thus can never cure, erroneous non-amenability findings. *See Juvenile II*, 380 Mass. at 557 n.5 (noting that under Massachusetts law a petit jury does not consider the evidence relevant to the decision to transfer).

[23] Alternatively, the Court could remand to the district court for further fact finding on the deficiency component of *Strickland*. L.C. asks the Court not to do so. L.C. waited more than ten years for the district court to issue its ruling on his petition. He wants, if possible, to avoid any additional, unnecessary delay. His petition is meritorious, and he hopes to be vindicated within the court system. But if that is not going to happen, he wants to know sooner than later. As the district court noted, he has made remarkable and admirable progress while in prison, and if need be he will be able to "present a compelling basis for the commutation of his life sentence." Addendum at ADD-8. The commutation route should not be necessary, but if it is, he hopes to learn that as soon as possible.

> following R S 's inconsistent and allegedly perjured testimony, it is reasonably probable that either (1) the Juvenile Court would have exercised its discretion to keep L C in the juvenile system; or (2) the Juvenile Court would have committed reversible error if it again decided that L C should be tried as an adult.

Addendum at ADD-38. The district court erred in its conclusion that L C had failed to meet his burden on either theory.

With respect to the first theory, based on appropriate *de novo* review – *see supra*, Argument § I – there can be little question that it would have been at least reasonably probable that a reasonable juvenile court judge,[24] presented with R S 's changed portrayal of L C , would have found L C amenable to rehabilitation and kept him in the juvenile system. For all the reasons detailed above, R S 's juvenile court testimony drove the original non-amenability determination. His testimony did not play a mere "minor role." The sea change in his portrayal of L C would have substantially altered the overall weight of the

[24] The test here is not subjective. The question is not what any particular juvenile court judge might have done. Rather, the test is an objective, reasonableness test. *Strickland*, 466 U.S. at 694-95 ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.").

evidence, and, therefore, created a reasonable probability of a different ruling on non-amenability.[25] *See, e.g.*, *Strickland*, 466 U.S. at 700.

The district judge reached a different conclusion, because he wrongly viewed himself as "bound to accept" the Single Justice's factual determination that RS.'s testimony had played only a "minor role" in the non-amenability finding. Addendum at ADD-39. Having accepted the Single Justice's fact finding, the district court could not have found the requisite reasonable probability that RS.'s changed testimony would alter the non-amenability finding. But, as discussed above, the district court was not bound to accept the Single Justice's erroneous fact finding; rather, *de novo* review of L.C.'s claim is appropriate. *See*

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[25] In light of the overall importance of RS.'s testimony to the initial non-amenability decision, there is a reasonable probability that the decision would have been different even if RS.'s changed testimony had been presented to the juvenile court on day one of the transfer hearing in 1986. Even more so given what had transpired between the initial hearing and the discovery of RS.'s changed testimony eight years later. During those eight years L.C. had demonstrated not only the potential for rehabilitation, but actual rehabilitation, within and outside of the juvenile justice system. *See supra* at 35-34; JRA at A0562-A0565, A1261-1281. In 1994, after the discovery of RS.'s lies, it would have been impossible, as both a practical and legal matter, for any juvenile judge to disregard the positive developments in L.C.'s life that had occurred over the prior eight years. *O'Brien v. Marshall*, 453 F.3d 13, 16 (1st Cir. 2006) (noting that, on remand, juvenile court considered defendant's conduct since original transfer hearing in determining defendant was not amenable to rehabilitation); *Commonwealth v. O'Brien*, 432 Mass. 578, 584-585 (2000) (noting that judge presiding over second transfer hearing considered that defendant "has neither voiced nor exhibited apparent motivation to change" and "has shown no motivation for . . . involvement in voluntary rehabilitation programs") (brackets removed).

supra, Argument § I. Furthermore, even without *de novo* review the record is replete with evidence sufficient to meet the clear and convincing standard required under AEDPA that the Single Justice's fact finding was unreasonable. *See supra,* Argument §§ I & II. In this regard, to the extent the Single Justice's decision can be viewed as a merits decision regarding L.C.'s Strickland claims, it involved an unreasonable application of clearly established federal law based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

On the second theory of prejudice articulated by the district judge – "that it would have been reversible error for the Juvenile Court to have decided to transfer L.C. after R.S.'s inconsistent and allegedly perjured testimony at the second trial," Addendum at ADD-40 – based on the totality of the information that would have been available to the juvenile court upon remand, including not only R.S.'s changed testimony but all the positive evidence of L.C.'s actual rehabilitation, there is a reasonable probability that a decision to transfer would have been a miscarriage of justice and a federal constitutional due process violation. *See, e.g.*, *United States v. Sealed Appellant I*, 591 F.3d 812, 819 (5th Cir. 2009) (error in juvenile transfer hearing "affects [defendant's] substantial rights" because "it subjects the defendant to the possibility of criminal conviction as an adult and the substantially more severe penalties that accrue to such conviction, while also increasing the risk that he will not be provided with

rehabilitative services in an appropriate juvenile facility"); *see also Kent v. United States*, 383 U.S. 541, 562 (1966) (a juvenile transfer hearing "must measure up to the essentials of due process and fair treatment"). The district court reached a contrary conclusion because it found that the Single Justice had reached the merits of L.C.'s *Strickland* claims and determined that "even in light of R.S.'s testimony at the second trial, the decision to transfer L.C. out of the juvenile system was not reversible error as a matter of state law." Addendum at ADD-40. Having determined that the Single Justice had decided the reasonableness of any transfer decision as a matter of state law, the district court concluded that it simply could not review the matter. *Id.* (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)).

There are several responses to the district court's finding. First, as discussed above, it is at best unclear whether the Single Justice reached the merits of L.C.'s actual *Strickland* claims. Second, to the extent the Single Justice suggested that any transfer decision would not have been reversible error, it was based on the decisions in *F.D. I* and *F.D. II*, neither of which addressed in any way, shape, or form the impact of R.S.'s changed testimony on the juvenile court's original non-amenability finding. Third, and most importantly, even if the Single Justice had found that as a matter of state law a decision to transfer L.C. out of the juvenile system could not constitute reversible error, a federal habeas

court would still have the ability, and indeed the obligation, to upset the finding to the extent it ran afoul of federal due process or any federal constitutional or statutory provision. *See, e.g.*, *Hamm v. Latessa*, 72 F.3d 947, 954 (1st Cir. 1995). Here, given (i) the entirety of the juvenile court record, (ii) L.C.'s positive experience within DYS over a nearly ten month period in 1986, (iii) L.C.'s maturation and development between 1986 and 1994, and (iv) the sea change in Storella's testimony with respect to L.C.'s role in the shootings, there is at least a reasonable probability that a decision by the state court on the basis of state law not to reverse a transfer decision would have run afoul of federal due process. *See, e.g.*, *Sealed Appellant I*, 591 F.3d at 819.

CONCLUSION

For all of the aforementioned reasons, this Court should reverse the portion of the District Court's Order that denied L.C.'s petition for a writ of habeas corpus based on the so called "*Strickland* claims," namely Claims A and B in L.C.'s petition, vacate the district court's Judgment against L.C., and order that L.C.'s petition for a writ of habeas corpus be granted.

Respectfully submitted,

L.C.

By his attorneys,

[REDACTED]

Dated: August 18, 2011

Certificate Of Compliance With Rule 32(a)

The undersigned, D.A., counsel for [REDACTED], hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as it contains 11,058 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and with the typeface requirements pursuant to Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in size 14 Times New Roman.

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Dated: August 18, 2011

Certificate Of Service

I, [REDACTED] hereby certify that on the 18th day of August, 2011, I electronically filed the foregoing Brief of Appellant and Addendum with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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I further certify that on the 17th day of August, 2011, I served by overnight mail, postage prepaid, a copy of the Joint Record Appendix on:

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