No. 11-1025

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.

REPLY BRIEF OF APPELLANT

Appeal From The United States District Court
For The District Of Massachusetts
In Civil Action [REDACTED]

[REDACTED]

Attorneys for Petitioner-Appellant

January 23, 2012

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 4

1. The Commonwealth Waived Its Procedural Default Argument, Particularly as to L.C.'s Claim for Ineffective Assistance of Appellate Counsel. 4

2. As the District Court Found, L.C. Did Not Procedurally Default His *Strickland* Claims, and There Was No Finding of Procedural Default by the Single Justice. 6

3. *Harris v. Reed* Requires Consideration of L.C.'s *Strickland* Claims on the Merits. 8

4. The Commonwealth Overreaches in Its Reading of *Mendes*. 9

5. Assuming Arguendo Procedural Default Were Established, There Is Cause and Prejudice Sufficient for This Court to Reach the Merits of L.C.'s *Strickland* Claims. 11

   a. L.C. Has Demonstrated "Cause." 12

   b. L.C. Has Demonstrated "Prejudice." 15

CONCLUSION 25

TABLE OF AUTHORITIES

CASES **Page(s)**

A Juvenile v. Commonwealth,
380 Mass. 552, 405 N.E.2d 143 (1980) 22, 24

Clauson v. Smith,
823 F.2d 660 (1st Cir. 1987) 6

Commonwealth v. A Juvenile,
370 Mass. 272, 347 N.E.2d 677 (1976) 23, 24

Commonwealth v. F.D.,
414 Mass. 37, 605 N.E.2d 811 (1992) 13, 14, 16, 17

Commonwealth v. F.D.,
427 Mass. 414, 693 N.E.2d 1007 (1998) 16, 17

Dugas v. Coplan,
428 F.3d 317 (1st Cir. 2005) 14

Estelle v. McGuire,
502 U.S. 62 (1991) 23

Gaskins v. Duval,
640 F.3d 443 (1st Cir. 2011) 10

Harris v. Reed,
489 U.S. 255 (1989) 7, 8, 10

Jewett v. Brady,
634 F.3d 67 (1st Cir. 2011) 10

Lynch v. Ficco,
438 F.3d 35 (1st Cir. 2006) 3, 15

Mendes v. Brady,
656 F.3d 126 (1st Cir. 2011) ..... passim

Michigan v. Eliason,
No. 2010-015309-FC (Mich. App. Ct. Oct. 25, 2011) 22

Munoz-Monsalve v. Mukasey,
551 F.3d 1 (1st Cir. 2008) 13

Murray v. Carrier,
477 U.S. 478 (1986) 11, 12

Phoenix v. Matesanz,
189 F.3d 20 (1st Cir. 1999) 8, 10

Strickland v. Washington,
466 U.S. 668 (1984) 3, 15

Tevlin v. Spencer,
621 F.3d 59 (1st Cir. 2010) 10

United States v. Slade,
980 F.2d 27 (1st Cir. 1992) 6

Yeboah-Sefah v. Ficco,
556 F.3d 53 (1st Cir. 2009) 10

STATUTES

Fed. R. App. P. 30 2

Mass. Gen. L. ch. 278, § 33E ..... passim

OTHER AUTHORITIES

Martha Duncan, *So Young and So Untender: Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1473 (2002) 22

Rachel Aviv, *No Remorse*, NEW YORKER, Jan. 2, 2012 22

INTRODUCTION

The Commonwealth's primary argument on appeal is procedural default. Relying on this Court's recent decision in *Mendes v. Brady*, 656 F.3d 126 (1st Cir. 2011), the Commonwealth argues that L.C. waived his *Strickland* claims[1] by not raising them on direct appeal, and that the Single Justice of the Supreme Judicial Court ("SJC"), acting in his "gatekeeper" capacity under Mass. Gen. L. ch. 278, § 33E, found just that. According to the Commonwealth, the Single Justice's opinion that L.C. had failed to raise a "new and substantial" claim was the equivalent of a finding of waiver, and that finding constitutes an independent and adequate state ground barring federal habeas review. The Commonwealth further argues that this Court should not reach the merits of L.C.'s *Strickland* claims because L.C. has failed to establish "cause and prejudice" for his purported default.

The Commonwealth also maintains that regardless of procedural default, L.C. has failed to establish that either L.C.'s trial counsel or direct appellate counsel rendered constitutionally ineffective assistance. And as for L.C.'s

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[1] All references in this Reply Brief to L.C.'s "*Strickland* claims" are to the ineffective assistance of counsel claims defined and discussed in L.C.'s primary brief. As in the primary brief, the terms "*Strickland* claims" and "Non-amenability claims" are used interchangeably.

specific argument that the Single Justice's "minor factor determination"[2] was unreasonable, the Commonwealth asserts that L.C. waived the argument by not raising it below. This last assertion, presented on the final four pages of the Commonwealth's brief, is makeweight, and is, in any event, belied by the record. Not only did L.C. not waive his argument regarding the unreasonableness of the gatekeeper's minor factor determination, that argument was a centerpiece of his briefs and argument below. *See, e.g.*, Dist. Ct. Dkt. No. 18 at 19-33; Dist. Ct. Dkt. No. 24 at 1-11, 14-16; Dist. Ct. Dkt. No. 44 at 9-23, 25-28; JRA at A1514; Dist. Ct. Dkt. No. 61 at 11-13; Dist. Ct. Dkt. No. 63 at 4-5; JRA at A1545-A1546, A1548, A1556; Dist Ct. Dkt. No. 70 at 4-6; Dist. Ct. Dkt. No. 77 at 1-4 and n.2.[3]

For the reasons presented in L.C.'s primary brief, the gatekeeper was wrong to conclude that [REDACTED]'s juvenile court testimony played only a minor role in the juvenile court's non-amenability finding, and the district court erred in its minor factor determination. *See, e.g.*, L.C. Br. at 33-37.[4] The Commonwealth has not presented anything on appeal to rebut L.C.'s minor role argument. Thus,

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2 The "minor factor determination" is defined on pages 2-3 of L.C.'s primary brief and discussed throughout that brief.

3 Pursuant to Fed. R. App. P. 30(a)(2), the Court may rely on parts of the record not included in the Joint Record Appendix.

there is no reason to revisit that argument in this Reply. Likewise, the Commonwealth has presented nothing on appeal that challenges the merits of L.C.'s *Strickland* claims, and L.C. will not repeat here the ineffective assistance of counsel arguments he has already made. Instead, L.C. addresses all substantive points raised by the Commonwealth regarding ineffective assistance of counsel in his discussion of "cause and prejudice."[5] *See infra* at Argument § 5. This Reply is otherwise devoted to addressing the Commonwealth's principal argument of procedural default.

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[4] Citations herein to L.C.'s primary appellate brief are in the form "L.C. Br. at __." Citations to the Commonwealth's brief are in the form "Com. Br. at __." Citations to the addendum to L.C.'s primary brief are in the form "ADD-__," and citations to the addendum to L.C.'s reply brief are in the form "R. ADD-__."

[5] Because L.C. argues that ineffective assistance of counsel was the "cause" for any procedural default, his demonstration of "cause and prejudice" to overcome default overlaps with his demonstration of "deficient performance" and prejudice for his underlying *Strickland* claims. *See, e.g.*, *Lynch v. Ficco*, 438 F.3d 35, 48 (1st Cir. 2006) ("A habeas petitioner complaining of ineffective assistance of counsel as a basis to show cause for procedural default must show (1) 'that counsel's representation fell below an objective standard of reasonableness,' and (2) that 'any deficiencies in counsel's performance [were] prejudicial to the defense,' in that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'") (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 692, 694 (1984)) (internal citations omitted).

ARGUMENT

1. The Commonwealth Waived Its Procedural Default Argument, Particularly as to L.C.'s Claim for Ineffective Assistance of Appellate Counsel.

The Commonwealth takes L.C. to task for not having addressed the issue of "procedural default" in his primary brief. *See, e.g.*, Com. Br. at 29. But there was no reason for L.C. to address the issue. The district court (Wolf, D.J.) found that the Single Justice had addressed the merits of L.C.'s *Strickland* claims, and that those claims had not been procedurally defaulted. ADD-30. Rather, the district court, exercising a deferential standard of review under AEDPA, agreed with the Single Justice's merits determination regarding L.C.' *Strickland* claims. ADD-30 – ADD-43. L.C. appealed the standard of review exercised by the district court as well as the district court's substantive finding. *See* L.C. Br. at 2-3. The Commonwealth filed no cross appeal. Thus, there was no procedural default finding for L.C. to appeal.

The Commonwealth's failure to appeal from the district court's finding that there had been no procedural default in the state court is arguably a basis for this Court to decline to reach the issue. But even if this Court chooses to consider the Commonwealth's argument of procedural default as to L.C.'s claim regarding the ineffectiveness of trial counsel, there can be no dispute that the Commonwealth

waived its procedural default argument as to L.C.'s claim regarding the ineffectiveness of direct appellate counsel.

In a footnote in its appellate brief, the Commonwealth misleadingly states that it did not "clearly argue" below that L.C. had procedurally defaulted his ineffective assistance of appellate counsel. *See* Com. Br. at 27 n.12. In fact, in the district court, the Commonwealth clearly and explicitly waived any such argument, first in writing and then in oral argument. In a memorandum, the Commonwealth argued that L.C.'s Claim A (his *Strickland* claim concerning trial counsel) had been procedurally defaulted, but acknowledged that L.C.'s "Claim B" (his ineffective assistance of appellate counsel claim) would have to be decided by the court on the merits. Dist. Ct. Dkt. No. 60 at 1-2; *see also id.* at 9 (arguing procedural default only as to Claim A). Later in hearing, the district court had the following colloquy with counsel:

> THE COURT: ... you're in agreement that Claim B, whether appellate counsel Mr. [REDACTED] was ineffective in failing to argue that [REDACTED]'S perjury required reconsideration by the juvenile court of whether Mr. L.C. should have been tried as an adult, is properly before me. There's no claim of procedural default on that issue?
>
> MR. D.A. [for L.C.]: That's my understanding, your Honor.
>
> MS. [REDACTED] [for the Commonwealth]: I believe that's correct, your Honor.

See JRA at A1536. Having explicitly waived its procedural default argument as to L.C.'s *Strickland* claim regarding direct appellate counsel below, the

Commonwealth should not be permitted to raise that argument for the first time on appeal. *See United States v. Slade*, 980 F.2d 27, 30 (1st Cir. 1992) ("It is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals"); *Clauson v. Smith*, 823 F.2d 660, 666 (1st Cir. 1987) ("we abjure consideration of Clauson's newfound theories of the case – theories which, we note, the defendant had no opportunity to meet at trial and the district judge . . . had no cause to examine").

2. As the District Court Found, L.C. Did Not Procedurally Default His *Strickland* Claims, and There Was No Finding of Procedural Default by the Single Justice.

Regardless of whether this court considers the Commonwealth's procedural default argument, that argument should be rejected just as it was rejected by the district court. ADD-30. Relying on *Mendes*, the Commonwealth argues that the Single Justice found that L.C. waived his *Strickland* claims by not raising them on direct appeal. *See, e.g.*, Com. Br. at 27. If the Single Justice had made any such finding, *Mendes* would control and the Commonwealth's argument would necessarily prevail. *See Mendes*, 656 F.3d at 128, 131 (affirming district court's denial of habeas petition on the basis that "the gatekeeper's finding of failure to raise the claim on direct appeal" was an independent and adequate state law basis precluding habeas review). But the Single Justice made no such finding. *See* JRA at A1424-A1426 (making no finding of lack of novelty); *see also* ADD-28 (district

court observing that "[t]he Single Justice did not state that the § 33E petition was being denied because the ineffectiveness of trial counsel issue had been waived and, therefore, was not new, and his analysis is not consistent with such a theory.").

While the state superior court found "waiver," the Single Justice did not adopt that finding. Instead, the Single Justice discussed what at least appeared to be the merits of L C. 's *Strickland* claim regarding trial counsel, and simply disregarded the *Strickland* claim concerning direct appellate counsel.[6] *See* JRA at A1424-A1426. There is no finding by the Single Justice that L. C. procedurally defaulted his ineffective assistance of counsel claims, and at least as to the direct appellate counsel claim there could not have been any such finding. The district court found that the Single Justice made no finding of procedural default. ADD-30. At a minimum, the Single Justice's opinion does not provide a sufficiently clear basis for overturning the district court's finding. *See Harris v. Reed*, 489 U.S. 255, 263 (1989).

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[6] Although the Single Justice decided the gatekeeper petition on the merits of the claim rather than finding procedural waiver, he did not address the merits of the federal claims sufficiently to trigger the AEDPA standard of review. *See* L. C. Br. at 31-33.

3. *Harris v. Reed* Requires Consideration of L.C.'s *Strickland* Claims on the Merits.

It is well settled habeas law that where, as here, a habeas petitioner clearly and unambiguously presents a federal claim for consideration by the state courts, and the last state court to consider the issue reaches (and rejects) the merits, subsequent habeas review is required unless there is an independent and adequate state ground for the state court's decision. *See, e.g.*, *Phoenix v. Matesanz*, 189 F.3d 20, 24 (1st Cir. 1999). Procedural default under state law is, of course, a wholly independent and adequate state ground. *Id.* at 25. But under *Harris v. Reed*, if federal habeas review is going to be barred on the basis of procedural default, "the last state court rendering a judgment in the case [must] 'clearly and expressly' state[] that its judgment rests on a state procedural bar." 489 U.S. at 263.

Here, the Single Justice was the highest state court that considered L.C.'s *Strickland* claims. And there can be no question that it, as the district court found, failed to "clearly and expressly" rest its judgment on procedural default. ADD-27 – ADD-28. Rather, the Single Justice reached the merits of L.C.'s *Strickland* claim regarding trial counsel. In this regard, L.C.'s case is markedly different from *Mendes*, where the Single Justice had expressly referenced procedural default as a basis for his decision. *Mendes*, 656 F.3d at 131.

In *Mendes,* this court found that to the extent the gatekeeper had discussed the merits of Mendes's claim, he was simply illustrating that petitioner stood no real chance of success, and that his claim was not "substantial." *Id.* This court found that the gatekeeper's discussion of the merits was effectively gratuitous as the Single Justice had already expressly found a procedural default, barring federal habeas review. *Id.* In contrast, here, the Single Justice's discussion of the merits was a real discussion of the substance of L.C.'s claims, as there had been no prior (or subsequent) finding of procedural default in his decision. JRA at A1424-A1426. The district court rejected the Commonwealth's protestations regarding procedural default (*see, e.g.*, ADD-28), and this Court should as well.

4. <u>The Commonwealth Overreaches in Its Reading of *Mendes*.</u>

The Commonwealth appears to argue that *Mendes* breaks new ground and announces a categorical rule that in any "gatekeeper" case, like this, in which Section 33E review has been afforded defendant/petitioner's claims on direct appellate review, a finding of no "new and substantial" ground for appeal constitutes, without more, an adequate and independent state bar to federal collateral relief. Per the Commonwealth's reading of *Mendes*, a gatekeeper can never reach the merits under Section 33E, and, thus, any negative application of the new-and-substantial rule in a Section 33E case must necessarily serve as a bar

to federal habeas review. *See, e.g.*, Com. Br. at 20-21. But, at least as far as L.C. is able to determine, *Mendes* does not reach that far.

Mendes does not, as the Commonwealth would have it, impliedly overrule the passel of decisions in which this Court has reached the merits of Section 33E gatekeeper decisions after the gatekeeper denied full panel review. *See, e.g.*, *Gaskins v. Duval*, 640 F.3d 443 (1st Cir. 2011); *Tevlin v. Spencer*, 621 F.3d 59 (1st Cir. 2010). Nor does *Mendes* run counter to Supreme Court precedent such as *Harris v. Reed*, which requires a plain and unambiguous statement of procedural default in the state courts before federal habeas review will be precluded. *Mendes*, 656 F.3d at 131. Rather, it appears as if *Mendes* merely extends this Court's holding in *Yeboah-Sefah v. Ficco*, 556 F.3d 53 (1st Cir. 2009), to Massachusetts Section 33E "gatekeeper" cases in which ineffective assistance of counsel claims could have been but were not raised on direct appellate review, and where the gatekeeper has plainly and expressly found a waiver. *See Mendes*, 656 F.3d at 128-131.[7]

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[7] The *Mendes* decision addresses only the adequacy of the gatekeeper bar where the petition is denied on the basis of waiver (*i.e.*, the claim is "not new"), and not the independence of the gatekeeper bar where the petition is denied on the basis that the claim presented is "not substantial." *Mendes* does not disrupt a long line of cases holding that when the Single Justice denies a gatekeeper petition on the ground that the federal claim presented is new but "not substantial," that decision is not independent of the federal merits and therefore is not a bar to federal habeas review. *See, e.g.*, *Jewett v. Brady*, 634 F.3d 67, 76 (1st Cir. 2011); *Yeboah-Sefah*, 556 F.3d at 75; *Phoenix*, 189 F.3d at 26.

Here, unlike *Mendes*, one of petitioner L. C. 's ineffective assistance of counsel claims – his claim concerning the ineffectiveness of direct appellate counsel – could not have been raised on direct appeal. *Contrast Mendes*, 656 F.3d at 130 ("Mendes . . . could have raised his [only ineffective assistance] claim and made his record while the direct appeal was pending"). In addition, as noted above, the gatekeeper here, unlike the gatekeeper in *Mendes*, failed to plainly or expressly find procedural default on either claim. Thus, notwithstanding *Mendes*, the district court was correct in its determination that L. C. 's *Strickland* claims were not procedurally defaulted.

5. Assuming Arguendo Procedural Default Were Established, There Is Cause and Prejudice Sufficient for This Court to Reach the Merits of L.C.'s *Strickland* Claims.

A habeas petitioner who can demonstrate "cause and prejudice" may obtain federal review of the merits of his claims despite a procedural default. *Murray v. Carrier*, 477 U.S. 478, 485-86 (1986).[8] The record here amply establishes that, if the Court were to find procedural default (which it should not), "cause and prejudice" exist such that the court should still address the merits of L. C. 's *Strickland* claims.

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[8] Although the Commonwealth chastises L. C. for not having "made any effort" to show "cause and prejudice" in his primary brief, *see* Com. Br. at 32, the reality is that the district court held that there was no procedural default, and the Commonwealth did not file a notice of appeal on this issue. L. C. thus had no reason to address the point.

a. L.C. Has Demonstrated "Cause."

The "cause" for any procedural default of L. C. 's claim of ineffective assistance of trial counsel was the ineffectiveness of L. C. 's direct appellate counsel in failing to pursue L. C. 's Non-amenability claim on direct appeal under Section 33E.[9] "Ineffective assistance of counsel . . . is cause for a procedural default." *Murray*, 477 U.S. at 488. The Commonwealth has not suggested otherwise. *See, e.g.*, Com. Br. at 30.

Instead, the Commonwealth argues that direct appellate counsel was not ineffective, and that the "cause" for counsel's failure to raise L. C. 's Non-amenability claim was counsel's purported knowledge that any such claim would have been futile. *See, e.g.*, Com. Br. at 31. But there is no evidence of this alleged knowledge. In fact, the record evidence, in the form of an affidavit from prior counsel, is that counsel failed to develop the Non-amenability claim on direct appeal because he simply missed it. JRA at A1257-A1259. He did not consciously make either a strategic or tactical decision not to raise the issue. *Id.* ¶ 4. And he did not think in the slightest about whether the claim would have been successful or unsuccessful; he just missed the issue. *Id.*

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[9] There can be no argument that L. C. ever waived his claim of ineffective assistance of appellate counsel. There is no scenario under which L. C. would need to demonstrate "cause and prejudice" as to that claim.

The Commonwealth on appeal pooh-poohs prior counsel's affidavit as an example of counsel supposedly "falling on his sword" for his former client. *See* Com. Br. at 31 n.16. But this is pure speculative argument, without any basis in the record. Had the Commonwealth wanted to challenge prior counsel's affidavit with something other than sarcasm and speculation, it could have below. Indeed, the district court invited the Commonwealth to subpoena prior counsel to court for cross-examination, but the Commonwealth declined the invitation. Dist. Ct. Dkt. No. 60 at 15 ("At a hearing on this matter on October 16, 2006, this Court inquired whether the respondents would seek an evidentiary hearing in connection with the claims advanced in [L. C. 's *Strickland* claims]. The respondents do not seek to inquire of petitioner's state trial or appellate counsel about the reasons neither sought a new amenability hearing."). The Commonwealth's current conclusory and argumentative assertions are no substitute for the evidence the Commonwealth failed to seek, let alone obtain. *See, e.g.*, *Munoz-Monsalve v. Mukasey*, 551 F.3d 1, 7 (1st Cir. 2008) ("An attorney's conclusory statements . . . are not a substitute for proof.").

The Commonwealth also maintains that prior counsel's failure to raise or pursue the Non-amenability claim was not ineffective because any such claim would have been futile in light of the SJC having previously held, in F. D. and L. C. 's first direct appeal, *see Commonwealth v. F.D.*, 414 Mass. 37,

48-49, 605 N.E.2d 811, 818-19 (1992) ("*F.D. I*"), that the Juvenile Court's transfer decision had been appropriate. *See* Com. Br. at 31. But the SJC's prior decision regarding L.C.'s transfer had approved that court's probable cause finding. *F.D. I*, 414 Mass. at 47-49, 605 N.E.2d at 818-19. The Non-amenability claim had never been presented to the SJC. *See, e.g.*, L.C. Br. at 40- 41. The Commonwealth's conflating of probable cause and non-amenability is disingenuous at best. The conflation focuses on only the single common denominator in [REDACTED]'s various renditions of events and ignores the dramatic and dispositive differences in those renditions regarding L.C.'s conduct during the brutal killings of [REDACTED]. *See* L.C. Br. at 41.

The Commonwealth further supports its contention that prior counsel was not ineffective by pointing to the SJC's praise for the work done by direct appellate counsel. Com. Br. at 44. But, of course, the fact that L.C.'s prior counsel may be a good or even a great lawyer, and that he may have done a very good job on the issues he raised on appeal, does not excuse his having missed the single issue that could and likely would have removed L.C.'s case from Superior Court and put it back in Juvenile Court where it always belonged. *Dugas v. Coplan*, 428 F.3d 317, 324, 328-29 (1st Cir. 2005) (expressing no doubt that attorney was experienced and noting the numerous instances of attorney presenting correct defenses, but nevertheless finding attorney's performance ineffective for failing to present "non-

arson" defense). Here, that issue was the Non-amenability claim. *See* L.C. Br. at 41-42.

b. L.C. Has Demonstrated "Prejudice."

The "prejudice" L.C. needs to show for "cause and prejudice" purposes is the same as the prejudice he must demonstrate to prevail under *Strickland*. *See, e.g.*, *Lynch*, 438 F.3d at 48. Here, the prejudice he needs to demonstrate, and that he has demonstrated, is that if prior counsel had raised the non-amenability argument, there is a reasonable probability that his case would have been remanded to Juvenile Court for trial and/or sentencing. *See* L.C. Br. at 42-47.

In attempting to show that L.C.'s prior counsel's error in not raising the Non-amenability claim did not "prejudice" L.C., the Commonwealth advances four arguments, none of which have merit.

First, the Commonwealth argues that the particular Juvenile Court judge who transferred L.C. would not have been swayed to alter his transfer decision by [REDACTED]'s changed testimony. *See, e.g.*, Com. Br. at 33-41. In particularizing its argument to the specific Juvenile Court judge who ordered L.C.'s transfer, the Commonwealth applies an incorrect, subjective standard to the prejudice inquiry. The test here is not what that particular judge might have done when confronted with new information, but rather what an objective, reasonable judge would have done. *See, e.g.*, *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."). Since the standard is not subjective, the Commonwealth's reliance on the proclivities of the particular Juvenile Court Judge who presided over the 1986 transfer hearing – and, for example, his demonstrated reluctance to reevaluate his findings, Com. Br. at 34 – is misplaced.

Second, the Commonwealth argues it was improbable that prior counsel's raising of the non-amenability argument would have made any difference as the SJC had already twice, in both *F.D. I* and *Commonwealth v. F.D.*, 427 Mass. 414, 693 N.E.2d 1007 (1998) ("*F.D. II*"), "rejected [L.C.'s] claim that he was entitled to a new transfer hearing in the juvenile court." Com. Br. at 34; *see also* Com. Br. at 44 n.23. While it is true that the SJC had previously held that a new transfer hearing was not required based on the arguments then before it, the issue of L.C.'s amenability to rehabilitation was not presented to or addressed by the SJC in either *F.D. I* or *F.D. II*. The issue could not have been raised in *F.D. I* as [REDACTED] had not as yet changed his description of the role L.C. played in the shootings, and in *F.D. II* the issue simply was not raised. On appeal, counsel raised the purported impropriety

of the Juvenile Court's probable cause determination, but not its non-amenability finding. In rejecting L. C. 's argument that transfer had been improper, the SJC ruled only on probable cause, not amenability to rehabilitation. *See F.D. I*,414 Mass. at 4 8-50, 605 N.E.2d at 818-19; *F.D. II*, 427 Mass. at 424; 693 N.E.2d at 1014. As the district court correctly observed: "*F.D. II* addressed only whether Storella's inconsistent or 'perjured' testimony required a new Juvenile Court determination of probable cause . . . . The SJC was not, in *F.D. II*, presented with the question of whether Storella's testimony required a reconsideration of the amenability issue." ADD-16 n.5. The SJC's prior rejections of L. C. 's request for a new transfer hearing based solely on arguments concerning probable cause do not signal how that court would have ruled on the Non-amenability claim had it been properly presented as part of L. C. 's Section 33E appeal, nor do the SJC opinions provide any guidance as to whether a reasonable juvenile court judge would have found L. C. amenable to rehabilitation and kept him in the juvenile system.

Third, the Commonwealth maintains that prior counsel could not have prejudiced L. C. by failing to raise an issue concerning [REDACTED]'s credibility, because the SJC had already indicated that it would not set aside the Juvenile Court's probable cause determination notwithstanding Storella's obvious credibility deficiencies. *See, e.g.*, Com. Br. at 34-35. But this argument

misunderstands L.C.'s Non-amenability claim. The key point of the claim is not that the Superior Court would have remanded or that the Juvenile Court would have reconsidered the transfer decision because [REDACTED] lacked credibility. Rather, the key point is that the version of events [REDACTED] disclosed for the first time just before and then during L.C.'s second trial (*see* L.C. Br. at 19-26), if believed, would in all probability have resulted in a reversal of the original transfer decision. The Non-amenability claim turns on the truth of [REDACTED]'s trial testimony, not on [REDACTED]'s credibility. It turns on [REDACTED] being believed, not on his being disbelieved. Here, L.C. is asking the Court to consider [REDACTED]'s trial testimony – that L.C. fired one shot and fled, JRA at A0737, A0740, A0743 – and, assuming [REDACTED] told the truth at trial, to find that had that testimony replaced [REDACTED]'s testimony before the Juvenile Court, there would have been insufficient evidence before the Juvenile Court to overcome the presumption of amenability to rehabilitation.

Fourth, the Commonwealth argues that failure to raise the Non-amenability claim could not have prejudiced L.C. because [REDACTED]'s Juvenile Court testimony played only a minor role in that court's non-amenability finding. *See, e.g.*, Com. Br. at 35-41. In support of its argument, the Commonwealth highlights pieces of evidence that were before the Juvenile Court and which it claims support the non-amenability finding, notwithstanding [REDACTED]'s changed description of L.C.'s role

in the offense. The specific items of evidence upon which the Commonwealth focuses are:

- *Ballistics and autopsy evidence* – This evidence shows that three different guns were used in the offense, and that both victims were shot by all three guns. But this evidence says nothing about L.C.'s role in the offense. If viewed through the lens of [REDACTED]'s original Juvenile Court testimony, the evidence would tend to support [REDACTED]'s portrait of L.C. as a monster, incapable of rehabilitation within the juvenile justice system. On the other hand, the evidence does not contradict [REDACTED]'s changed testimony regarding L.C.'s dramatically reduced role in the shootings. The evidence simply suggests that [REDACTED] may have been mistaken in testifying that L.C. fired one shot rather than two. Alternatively, it suggests, consistent with [REDACTED]'s testimony, that L.C. fired one shot and fled, while one of the alleged adult cohorts picked up L.C.'s discarded gun and used it to continue shooting.
- *Chasing after a wounded victim* – The Commonwealth argues that "[REDACTED] told the jury that he saw L.C. chase the second victim." Com. Br. at 38. This assertion is simply false. [REDACTED] did not testify that

  L.C. chased either victim. Rather, he testified that he "seen

take a shot," and then he "seen L. C. start to flee to where [REDACTED] was" – that is, toward the park exit. JRA at A0736- A0737 ("Q. And what did you see happen to F. D. as F. D. took that shot? A. He started to flee. Q. Which way did he run? A. Towards the entrance [of the park] . . . . Q. What did you see when you looked over in the direction of L. C. and ? A. I seen take a shot . . . . Q. What did you see happen? A. I seen L. C. start to *flee* to where [REDACTED] was.") (emphasis added). [REDACTED] did not use the word "chase" or any synonym, but described L. C. as fleeing from the scene, toward the park exit, which also happened to be where [REDACTED] had fallen.

- *Concocting an alibi* – The Commonwealth asserts that [REDACTED] testified at trial that after the shootings, "L. C. and his cohorts met to concoct an alibi." Com. Br. at 38. This too is a distortion of the record. While Storella noted in testimony that L. C. was present at a gathering at which F. D. proposed putting "a plan" together, [REDACTED] testified only as to F. D. 's, [REDACTED]'s, and his own active participation at the meeting. He did not testify to any contribution made by L. C. or any involvement of L. C. in the meeting. JRA at A0768-A0769.

- *Confession* – The Commonwealth maintains that [REDACTED] testified at trial that L.C. confessed to shooting both victims. JRA at A0772- A0773. While this was [REDACTED]'s testimony, it is inconsistent with [REDACTED]'s testimony regarding his own first-hand observation of the shootings, namely his testimony, given the very same day as the "confession" testimony, that L.C. fired one shot and fled. JRA at A0736-A0737. In the context [REDACTED]'s trial testimony as a whole, there is no reason to believe the "confession" testimony at the expense of his "one shot and fled" testimony. And, in any event, the "confession" testimony does not alter the very different picture of L.C. painted by [REDACTED]'s trial testimony as opposed to his Juvenile Court testimony.
- *Lack of remorse* – The Commonwealth points to the Juvenile Court's finding that L.C. lacked remorse as independent evidence supporting the non-amenability finding. Com. Br. at 41. But there can be little question that the Juvenile Court judge's subjective impression of L.C. was influenced by [REDACTED]'s grossly false and inflated Juvenile Court testimony. In addition, the Juvenile Court judge's view was belied by

L.C.'s post-arrest DYS experience in which L.C. demonstrated he could be rehabilitated, and made great strides

towards rehabilitation. *See, e.g.*, JRA at A0562-A0565, A1261-A1281. Furthermore, it should be noted that a juvenile's failure to display adult-like remorse says little or nothing about whether the juvenile is remorseful. As a growing body of scientific evidence demonstrates, when it comes to remorse, as with so much else, kids are simply different from adults. *See, e.g.*, Martha Duncan, *So Young and So Untender: Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1473 (2002) [R. ADD-1 – R. ADD-52] (noting that, due to their developmental stage, adolescents "may show less grief than the system demands"); *Michigan v. Eliason*, No. 2010-015309-FC (Mich. App. Ct. Oct. 25, 2011) [R. ADD-53] (remanding for an evidentiary hearing on whether the defendant received constitutionally ineffective representation where trial counsel failed to present an expert witness regarding how children exhibit remorse differently than adults); Rachel Aviv, *No Remorse*, NEW YORKER, Jan. 2, 2012, at 53 [R. ADD-54 – R. ADD-65]. Here, the Juvenile Court judge's perception that L.C. lacked remorse is insufficient to overcome the then-applicable presumption of amenability to rehabilitation. *See, e.g.*, *A Juvenile v. Commonwealth*, 380 Mass. 552, 558-59, 405 N.E.2d 143, 147-48 (1980) ("*Juvenile I*");

Commonwealth v. A Juvenile, 370 Mass. 272, 280-83, 347 N.E.2d 677, 684-85 (1976) ("*Juvenile II*").

- *Length of juvenile eligibility* – Citing the Juvenile Court's transfer decision, the Commonwealth maintains that LC.'s age (16 years old) supported the non-amenability finding, and supports the Commonwealth's view that it is unlikely there would have been a different non-amenability decision had LC.'s case been remanded for reconsideration in light of [REDACTED]'s changed testimony. Com. Br. at 40 n.20, 21. According to the Commonwealth, the "fact" that the juvenile system would only have been able to retain jurisdiction over L. C. for "eight to eighteen months" supported the Juvenile Court judge's finding that L.C. could not be rehabilitated within that system. But, as set forth in LC.'s primary brief, the Juvenile Court's, and the Commonwealth's, assertion that L.C. could not be kept in the juvenile system for more than 18 months post-arrest, was false.[10] L.C. Br. at 36 n.20. Furthermore, even if it had been true, the juvenile record in this case, particularly the record of LC.'s

[10] The Commonwealth argues that *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) precludes this court from reviewing the Juvenile Court's erroneous legal conclusion that it could not retain jurisdiction over L.C. for more than eight to eighteen months. Com. Br. at 40 n.20. But there is no such preclusion in *Estelle*.

accomplishments within DYS during the first eight months he was in custody (*see, e.g.*, JRA at A0562-A0565) makes clear that L.C. was amenable to rehabilitation within the juvenile system, despite his

At [REDACTED]'s testimony, the evidence before the Juvenile Court would have been utterly insufficient to outweigh the substantial affirmative evidence of LC.'s amenability to rehabilitation, *see, e.g.*, JRA at A0012-A0026, A0036-A0040, A0084-A0577, or to overcome the presumption of amenability required by then-applicable law. *Juvenile II*, 380 Mass. at 558-59, 405 N.E.2d at 147-48; *Juvenile I*, 370 Mass. at 280-83, 347 N.E.2d at 684-85. Viewing the evidence that was before the Juvenile Court as a whole, it is more than probable that if [REDACTED]'s transformed testimony regarding L.C. had replaced his earlier testimony, any objective, reasonable Juvenile Court judge would have found that L.C. could be rehabilitated within the juvenile system. That the Juvenile Court was not given the opportunity to reassess after [REDACTED] changed his portrait of L.C. from that of a vicious killer to that of a kid, prejudiced L.C. in the extreme. That LC.'s direct appellate counsel failed to rectify the ineffectiveness of trial counsel, rendered permanent the prejudice L.C. had already suffered. If direct appellate counsel had challenged trial counsel's ineffectiveness, L.C. would likely have been treated as a juvenile, and he would never have received double life

sentences. That L.C. has now served more than 25 years in prison and has a sentence that will keep him incarcerated for the remained of his life is the starkest illustration of the prejudice caused by prior counsels' ineffectiveness.

CONCLUSION

For all of the aforementioned reasons and those in L.C.'s primary brief, 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 his "*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 on Claims A and B be granted.

Respectfully

submitted, L.C.

By his attorneys,

[REDACTED]
[REDACTED]

Dated: January 23, 2012

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

The undersigned, [REDACTED], counsel for L.C., hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as it contains 5,772 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.

_____

[REDACTED]

Dated: January 23, 2012

CERTIFICATE OF SERVICE

I, [REDACTED], hereby certify that on the 23rd day of January, 2012, I electronically filed the foregoing Reply Brief of Appellant 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:

[REDACTED]

[REDACTED]