COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

[REDACTED]

COMMONWEALTH OF MASSACHUSETTS,

PETITIONER-APPELLEE,

v.

L.C.,

RESPONDENT-APPELLANT.

On Reservation and Report of Questions by a Single Justice of the Supreme Judicial Court

BRIEF OF RESPONDENT-APPELLANT L.C.

[REDACTED]

Dated: March 23, 2015

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STATEMENT OF ISSUES PRESENTED

The Single Justice (]REDACTED]) reported what she termed the following "important and novel question[s], not specifically addressed in *Diatchenko* and *Brown*" to the Full Court:

1. Whether "a trial court judge in imposing a sentence in accordance with and pursuant to *Diatchenko* and *Brown*, may amend that aspect of the original sentence that imposed consecutive life sentences to impose concurrent life sentences in order to provide the defendant with an opportunity for parole eligibility more consistent with the time frame set forth in G.L. c. 265, § 2, than if the sentences were to run consecutively"; and

2. "[I]f so, what shall be the nature of the proceeding required to make that determination."[1]

[1] Earlier today (3/23/15), after we had finalized and were preparing to file this Brief, this Court issued opinions in *Diatchenko v. District Attorney for the Suffolk District*, *Commonwealth v. Roberio*, and *Commonwealth v. Okoro*, SJC Nos. 11688, 11689, and 11659. Today's decisions, like this case, concern the rights of juvenile homicide offenders in the aftermath of *Diatchenko* and *Brown*. Undersigned counsel has not yet had an opportunity to study today's decisions, but at first blush they do not appear to require any material change to the arguments presented below. If upon further review counsel comes to believe that one or more aspects of today's opinions materially affect L.C.'s arguments, he will seek leave of Court to

STATEMENT OF THE CASE

The underlying case involves a double homicide that occurred in 1986. Appellant L.C. was 16 years old at the time. L.C. is one of the group of juvenile homicide offenders directly affected by the retroactive applicability of this Court's landmark decisions in *Diatchenko v. District Attorney for Suffolk District*, 466 Mass. 655 (2013), and *Commonwealth v. Brown*, 466 Mass. 676 (2013). This appeal, which was initiated by the Commonwealth through a petition for interlocutory relief to the Single Justice, but as to which L.C. has been designated the Appellant, concerns a sentencing issue arising out of but not specifically addressed in *Diatchenko* and *Brown*.

L.C. was initially charged as a juvenile, but his case was transferred to Superior Court in 1986, and he was later tried with one of his two adult co-defendants, F.D. (The second adult co-defendant, P.T., was tried separately.)

The current appeal is the fourth time L.C.'s case has come before this Court. The case first came

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submit a short supplemental brief, and/or he will present any and all pertinent arguments in his Reply to the Commonwealth's Appellee Brief.

before the Court following L.C.'s conviction in 1988. That first appeal was decided in 1992 and resulted in the vacating of the conviction and remand for a new trial. *See Commonwealth v. [REDACTED]*, 414 Mass. 37 (1992). L.C.'s second trial occurred in 1994, and he= was once again convicted. That conviction was affirmed by this Court in 1998. *See Commonwealth v. [REDACTED]*, 427 Mass. 414 (1998).

The case then came back to this Court on an appeal of a denial of a motion for a new trial based primarily on new DNA evidence. That third appeal resulted in the vacating of the denial of the new trial motion and a remand to the Superior Court for reconsideration. *See Commonwealth v. [REDACTED]*, 458 Mass. 657 (2011). Upon reconsideration, the trial judge again denied L.C.'s and co-defendant F.D.'s new= trial motions, and the Single Justice, acting as gatekeeper, affirmed the denials, rejecting L.C.'s and= F.D.'s separate petitions to send their cases to the= full bench.[2]

[2] The Single Justice also denied motions for reconsideration that were brought by both L.C. and F.D. separately. F.D. subsequently filed with this= Court a motion to reinstate his earlier appeal. *See Commonwealth v. [REDACTED]*, No. SJ-2012-0417. That motion was filed on October 1,

While L.C.'s motion for a new trial was on remand to the trial court, the Supreme Court decided *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Subsequently, this Court issued its decisions in *Diatchenko* and *Brown*, following which L.C.'s two consecutive life sentences without parole eligibility were converted by the trial court (Locke, J.) to two consecutive life sentences with parole eligibility after 15 years on each.

In conjunction with his being granted sentences with parole eligibility, L.C. moved pursuant to *Miller*, *Diatchenko*, and *Brown* that he be afforded an evidentiary resentencing hearing on, among other things, the issue of whether his consecutive sentences should run concurrently. *See* JA.006, JA.056.[3] Judge granted L.C.'s motion for a resentencing hearing limited to the issue of whether L.C.'s two life sentences should be consecutive or concurrent. Add.010-11. But before the limited resentencing

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2014, but has not been acted on by the Court. Although L.C. has not formally joined in F.D.'s current appeal, his case would be affected were the Court to act favorably on it.

[3] Citations to "JA.XXX" are to the parties' Joint Appendix filed herewith. Citations to "Add.XXX" are to the attached Addendum.

hearing could go forward, the Commonwealth brought an interlocutory appeal pursuant to G.L. c. 211, § 3 (Add.023), challenging the trial court's authority to hold the hearing. JA.093. Upon consideration, the Single Justice issued the Reservation and Report that has brought us here. *See* Add.001.

STATEMENT OF RELEVANT FACTS

1. L.C. Was Sixteen Years Old at the Time of the Underlying Double Homicide.

On February 19, 1986, F.C. and J.B. were killed in [REDACTED] in Boston's North End. *[REDACTED]*, 427 Mass. at 416. Four days later, L.C., F.D., and P.T. were arrested and charged with murder. [REDACTED]; F.D. and P.T., who were 19 and 21 years old respectively, were charged as adults. *Id.* L.C., who was a 16-year-old high school sophomore with no criminal record, was initially charged as a juvenile. [REDACTED]. L.C.'s case was later transferred to Superior Court. *Id.*

As evidenced by this photograph of L.C. that was taken just a month or two before the homicides, he was a very young 16-year-old:

[REDACTED]

2. L.C.'s Positive Adjustment and Performance While in DYS Custody (1986-88).

With the exception of a brief three and a half month period, L.C. was in DYS custody from his arrest on February 23, 1986 through April 11, 1988 when the jury returned a verdict of guilty at his first trial. [REDACTED] DYS educational reports from those two years describe L.C. as being respectful, with the "potential to achieve" and "desire to learn." JA.141-44. Furthermore, L.C.'s DYS case worker and/or other DYS personnel reported that L.C. was "quite mature and very personable." *Id.* They found that L.C. had a desire to learn and a desire to be a positive

influence in the classroom, in terms of both behavior and leadership, and that he was a "stabilizing presence in [the] classrooms, setting an example for the rest of the residents." *Id.*

3. L.C.'s Thirteen Months on Bail (12/92-2/94).

Following his conviction in April 1988, L.C. was transferred from DYS to State prison, where he remained until his conviction was overturned by this Court in December 1992. [REDACTED] L.C. was then admitted to bail, and remained free on bail from December 31, 1992 until his second jury commenced deliberations on February 2, 1994, *i.e.*, a total of thirteen months. [REDACTED] While on bail, L.C. was a model citizen, leading a productive life. He had no problems whatsoever with the law, not even a parking ticket. He briefly attended college on a PELL Grant, before finding a job at [REDACTED]in Boston, where he proved to be "an exemplary and diligent employee with a model attendance record."JA.158.

4. The Evidence at L.C.'s Trial Portrayed L.C. as a Follower, Who Was under the Influence of His Adult Co-Defendants.

L.C. was re-tried in early 1994 alongside one of his two adult co-defendants, F.D.[4] [REDACTED] The trial evidence against L.C. derived from two sources:

(i) J.S., a North End resident who observed the night-time shootings from his apartment several hundred yards away. *Id.* at 659-60. J.S. was unable to identify any of the shooters on the night of the crime, but one week later, and after much hesitation, he identified L.C. as one of the three shooters in a line-up. *See id.* After first viewing L.C.'s line-up, J.S. thought the shooter in the line-up may have been either of two individuals, but after taking some time to think, he landed on L.C. because L.C. had the "face of an angel," and one of the shooters had a face just like that.[5] JA.215-16.

[4] L.C.'s other adult co-defendant, P.T., was re-tried separately in 1994, and acquitted. [REDACTED]

[5] Notably, J.S. also separately and confidently identified P.T. as one of the three shooters, and testified at P.T.'s trial. P.T., as noted above, was acquitted.

(ii) R.S., an acquaintance of the defendants and the victims who at one point admitted to participating as a shooter in the killings himself. [REDACTED] R.S. admitted at trial to having told "lie upon lie upon lie," JA.213, and this Court has found that the reasons for finding his testimony "unreliable and incredible were legion." [REDACTED] Although much of R.S.'s testimony is open to question or otherwise incredible, there is no question he knew the defendants and the victims. For whatever his testimony was worth, R.S. made clear that in his view L.C.'s role in the shootings was minimal, and that L.C. was very much a follower. *See, e.g.*, JA.190-205. He testified that F.D. and P.T. had a motive and planned to kill the victims, and that the younger L.C. just followed along. JA.197, 203-04. He portrayed F.D. as the ringleader, who fired multiple shots at both victims. JA.204-07. In contrast, he testified that the juvenile L.C. fired one shot and then fled from the park where the shootings occurred. JA.206-09. Finally, he testified that he himself was purportedly threatened by F.D. following the shootings, and recruited to

participate in a cover-up story, but that L.C. played no part in either the alleged threats or the cover-up. [REDACTED]

The jury convicted both F.D. and L.C. of the murders, but it distinguished between the two defendants. It found F.D. guilty of two first degree murders on theories of both premeditation and atrocity and cruelty. [REDACTED] But it rejected the atrocity and cruelty theory as to L.C., finding him guilty as a joint venturer on the premeditation theory only. [REDACTED]

5. The Trial Court Did Not Take L.C.'s Age or Any Age-Related Mitigating Factors into Account at Sentencing.

L.C. and F.D. were both sentenced to consecutive life sentences immediately after the jury returned its verdict on February 3, 1994. JA.175. L.C.'s trial counsel very briefly argued that L.C. should be given concurrent terms "given his youth at the time these offenses took place," [REDACTED], but the sentencing judge failed to even pay lip-service to L.C.'s age in exercising his discretion to mete out consecutive life sentences. [REDACTED] Instead, immediately after L.C.'s counsel completed his argument, the trial judge, focusing exclusively on

photographs of the victims and the testimony of a ballistician regarding the number of rounds of ammunition recovered from the victims' bodies, and without distinguishing in the slightest between L.C. and his adult co-defendant, sentenced both defendants to "consecutive sentences." *Id*.

6. L.C.'s Record of Achievement in Prison

L.C. served two years in DYS custody prior to his first trial. *See supra* at 6-7. He was then incarcerated in state prison from April 1988 through December 1992, and he was returned to state prison following his February 1994 conviction. He has been in state prison ever since. *Supra* at 7. All told, he has now been incarcerated for the underlying offenses for nearly 28 years. *Supra* at 6-7. During this time, he has proven himself to be not just a model prisoner, but a model human being and citizen as well.

During his first year in prison he received four disciplinary tickets, at least one of which was related to an incident involving his father, who was also incarcerated. [REDACTED] But from July 1989 through his release in December 1992, and then again from his re-incarceration in February 1994 right up

until today, *i.e.*, a total of ***nearly 25 years, he has not received a single disciplinary ticket***. *See id.*

L.C. has not simply been well behaved. He has also used his time to better himself, and provide help, assistance, and insight to others. He has completed countless programs within prison and he has been gainfully employed on either [REDACTED's] kitchen or janitorial staff for decades. [REDACTED] But perhaps more significantly, he has obtained a college education. He was a high school sophomore when he was first taken into custody, but while in prison he earned a GED, and went on to ***earn a BA in History, graduating cum laude from [REDACTED] College in June 2010.*** [REDACTED] He was on the Dean's List every semester he attended college, and since graduating he has continued to take whatever college and post-graduate courses are made available within prison. [REDACTED] He has become a member of [REDACTED's] Education Committee, and he has gained the respect and admiration of both his college professors and Norfolk prison guards. [REDACTED] His professors describe him as "respectful," "diligent," "organized," and "disciplined", and guards describe him as an

“excellent” person and as someone who shows “respect.” *See, e.g.*, *id*. In fact, over the years, numerous MCI-Norfolk guards have told undersigned counsel in words or substance: “I hope you get him out. He deserves better. He’s just a great person. He’s done his time. Enough is enough.”

Over the past several years, following his college graduation, L.C. has used his education, drive, and charisma to ***found and develop the [REDACTED] Restorative Justice Program***. [REDACTED]. This is a program that strives to reduce recidivism and violence by enabling offenders to accept responsibility for their crimes, and empathize with their victims and their families. The Program brings together homicide offenders and victims’ families in a healing process and emphasizes “that those victimized must be central to any program and that accountability, responsibility and trying to right the wrongs as much as possible is essential to any restorative justice curriculum.” [REDACTED]

Notably, L.C.'s jailhouse achievements, including his obtaining his college degree and founding the Restorative Justice Program, occurred

prior to the Supreme Court's decision in *Miller*, and prior to this Court's decisions in *Diatchenko* and *Brown*. In other words, they occurred at a time when L.C. had no reason to believe he would ever be parole eligible. Following *Diatchenko* and *Brown*, L.C.'s two consecutive life without parole sentences were converted to two sentences of life with parole eligibility after 15 years on each. [REDACTED] In connection with his resentencing, L.C. moved for his consecutive sentences to be converted to concurrent life terms pursuant to the logic and reasoning of *Miller*, *Diatchenko* and *Brown*. The Superior Court (Locke, J.) ruled that consistent with the "principles" and "spirit of *Diatchenko* and *Brown*," he would hold an evidentiary hearing to determine whether L.C.'s consecutive sentences should be concurrent. Add.010-11. The Commonwealth challenged the Judge's authority to resentence L.C. to concurrent terms, and brought the interlocutory appeal that is now before this Court.

SUMMARY OF ARGUMENT

The narrow issue before the Court is whether the trial court has the authority to consider resentencing L.C. to concurrent, rather than consecutive, life

prison terms. As the Single Justice put it, the issue is "may" the trial court judge amend L.C.'s sentence and impose concurrent life sentences in place of L.C.'s current consecutive life sentences. The answer is an unqualified YES for at least five reasons:

First, there is no statute, rule, regulation, doctrine, or judicial precedent that would in any way preclude the trial court from converting L.C.'s consecutive life prison terms to concurrent life terms. *See infra* Argument § A.1.

Second, *Diatchenko* and *Brown* are consistent with and may even require granting the trial court authority to at least consider resentencing L.C. to concurrent terms. In the context of a double homicide, like the one for which L.C. was convicted, the harshest penalty is consecutive life terms. And as this Court explained in *Diatchenko*, when a juvenile, like L.C., is going to be "subjected to a State's harshest penalty ... a sentencer ***must*** have the ability to consider the mitigating qualities of youth" in determining whether that "harshest penalty" should be imposed. *Diatchenko*, 466 Mass. at 660-61 (emphasis added). *See infra* Argument § A.2.

Third, pursuant to *Diatchenko* and *Brown*, L.C.'s life sentences without parole eligibility have already been converted to life with parole eligibility after 15 years. To further amend L.C.'s original sentence so that his two life terms would run concurrently would be in keeping with a long line of precedent authorizing trial courts to resentence defendants on all interdependent sentences whenever any portion of the interdependent whole is vacated. *See infra* Argument § A.3.

Fourth, authorizing the trial court to consider changing L.C.'s consecutive sentences to concurrent ones would be consistent with the animating principle of *Diatchenko* and *Brown*, namely the principle that children are different from adults and have far greater potential to change, grow, mature, and be rehabilitated. Consistent with this principle, the trial court should be permitted to consider resentencing L.C. to a term that would make him parole eligible after 15 years, rather than 30 years (understanding, of course, that L.C. has already served nearly 28 years behind bars). *See infra* Argument § A.4.

Fifth, permitting L.C. to be potentially resentenced to concurrent terms would be consistent with the recognition that the scientific understanding of adolescent brain development has increased exponentially since L.C. was sentenced in 1994. Authorizing the trial court to hear evidence on the issue of whether L.C.'s sentence should run concurrent or consecutive would allow the trial court to view the evidence through the lens of this new science, which was unavailable to the sentencing judge in 1994. *See infra* Argument § A.5.

The proceeding at which the trial court would consider resentencing L.C. to concurrent life sentences should be an evidentiary hearing at which the trial court would take evidence regarding the role L.C.'s age and other age-related mitigating factors played in L.C.'s involvement in the crimes of conviction.[6] The hearing would be one at which the sentencing judge would consider: (i) the science of adolescent brain development; (ii) all the age-related mitigating factors set forth in *Miller - see infra*.

[6] For purposes of this appeal and any follow-on resentencing hearing, we assume, as we must, that L.C. is guilty of the crimes for which the February 1994 jury found him guilty.

n.8 – that would have been available to the trial court in 1994; and, consistent with long-standing precedent, (iii) L.C. post-1994 conduct, including his record of achievement in prison, as evidence of rehabilitation. *See infra* Argument § B.

In L.C.'s case, his 1994 sentencing judge could not have considered, and thus obviously did not consider, either the post-1994 developments in the scientific understanding of adolescent brain development or the substantial evidence of L.C. post-1994 record of maturation and rehabilitation. But L.C.'s 1994 sentencing judge also failed to consider L.C.'s age and other age-related mitigating information that was available as of February 1994. Applying *Diatchenko* and *Brown* retroactively, as required, it is clear that sentencing L.C. to consecutive terms without consideration of his age and the other *Miller* factors (*see infra* n.8), let alone the post-1994 scientific and L.C.-specific prison achievement evidence, constituted error (*e.g.*, an abuse of discretion and a constitutional due process violation) requiring resentencing. *See infra* Argument § C.

ARGUMENT

A. The Trial Court Has the Authority to Amend L.C.'s Two Consecutive Life Sentences to Two Concurrent Life Sentences.

Diatchenko and *Brown* made clear that juvenile homicide offenders like L.C. who had received life without parole sentences must be resentenced to sentences of life with parole eligibility after 15 years. But neither *Diatchenko* nor *Brown* addressed the issue of whether juveniles who received consecutive life sentences could be resentenced to concurrent terms. That issue, the issue of whether the trial court has the authority to convert consecutive life sentences to concurrent life sentences, is the exclusive issue before this Court on this appeal.

L.C. is asking the Court to make clear that the trial court, consistent with *Diatchenko* and *Brown*, has the authority to resentence him to concurrent life terms, and to explain the parameters of any hearing that would be held to determine whether his life sentences should be consecutive or concurrent. L.C. is not asking the Court to amend his sentences to run them concurrently. That will be up to the trial court on remand. Further, he is not asking that his sentences be reduced to a term of years. And he is not

arguing that consecutive life sentences with parole eligibility after 15 years on each, *i.e.*, an aggregate sentence of 30 years, is itself an unconstitutional sentence.[7] On this appeal, L.C.'s request is modest and narrow. He is simply and exclusively asking this Court to explicitly authorize the trial court to consider the question of consecutive versus concurrent life sentences. There are at least five reasons why

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[7] Any sentence that condemns a juvenile to die in prison is unconstitutional under *Diatchenko* and *Brown*. A life sentence without parole eligibility is unconstitutional. Likewise, any sentence that is the functional equivalent of a life sentence without parole eligibility would be unconstitutional. A 40, 45, or 50-year sentence for a juvenile before parole eligibility is almost certainly such a sentence. And even a 30-year sentence may be such a sentence. But .C. is not pursuing the argument on this appeal that 30 years without parole eligibility is the functional equivalent of life without parole eligibility. Judge [REDACTED] has rejected the argument, and the legislature has made clear that at least in its view a 30-year sentence for a juvenile homicide offender would be permissible. *See* St. 2014, c. 189, § 6. Here, L.C., who has already served nearly 28 years in prison, has reconciled himself to the possibility that he may have to serve 30 years before parole eligibility. For .C., the issue on this appeal will determine whether he may be parole eligible immediately as opposed to approximately two years from now. If this Court affirms Judge [REDACTED] decision and authorizes the trial court to resentence L.C., the trial judge may determine that .C. must serve consecutive terms, in which case he L.C. be parole eligible in about two years. In contrast, if L.C. receives concurrent terms, he will be parole eligible immediately. For L.C., this appeal concerns a little over two years of his life.

the answer to the question of whether the trial court has the requested authority is a resounding **YES**.

1. There Is No Legal Preclusion to the Authority of the Trial Court to Convert Consecutive Juvenile Life Sentences to Concurrent Life Sentences.

First and foremost there is no express legal prohibition, whether legislative or judicial, that would preclude a trial judge from converting consecutive juvenile life sentences to concurrent life sentences. The Commonwealth has not pointed to any such prohibition, nor could it. Its assertion before the Single Justice that permitting trial judges the authority to change consecutive juvenile life sentences to concurrent terms is somehow prohibited by the separation of powers doctrine, as it would purportedly usurp the authority of the Parole Board (*see* JA.104), is baseless.

The authority of the Parole Board is to determine parole. *Commonwealth v. Cole*, 468 Mass. 294, 302 (2014). It has no authority to determine a defendant's sentence or when a defendant becomes parole eligible. The sentencing function is a judicial one, appropriately left to the courts. *Id.* ("At the core of the judicial function is the power to impose a

sentence."); *Brown*, 466 Mass. at 690 (describing how sentencing judges apply discretionary parole eligibility ranges to juveniles). Here, the authority sought for the trial court is the authority to determine *when* L.C. would become parole eligible, *not whether* he will be paroled. There is no prohibition on the former as there would be on the latter. The former is nothing more nor less than the power to exercise lawful sentencing discretion. The latter determination, namely the actual parole decision, would still be made by the Parole Board. There would be no usurpation of the Parole Board's authority, and no violation of separation of powers.

2. The Authority of the Trial Court to Convert Prior Consecutive Juvenile Life Sentences to Concurrent Terms Is the Natural Extension of, if Not a Requirement Under, *Miller*, *Diatchenko*, and *Brown*.

There is no question that under *Miller*, *Diatchenko*, and *Brown*, if L.C. (or any other juvenile) were convicted today (*i.e.*, post-*Diatchenko* and *Brown*) of the exact same double homicide, the trial court would be authorized, indeed required, to hold a sentencing hearing to determine whether the defendant's two life sentences should be consecutive or concurrent. And there is no question that in

deciding the question of consecutive versus concurrent, the judge would be duty-bound to consider the juvenile's age and other age-related mitigating factors.[8] *See*, *e.g.*, *Miller*, 132 S. Ct. at 2469; *Diatchenko*, 466 Mass. at 669-70. Indeed, failure by a trial court to consider age and the other *Miller* factors today would unquestionably constitute an abuse of discretion. *Miller*, 132 S. Ct. at 2468-69, 2475. And, of course, under *Diatchenko*, what is true today with regard to juvenile homicide sentencing must be applied retroactively. *See Diatchenko*, 466 Mass. at 661.

In *Miller*, the Supreme Court abolished mandatory life without parole sentences for juveniles. *Miller*,

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[8] *Miller* sets forth a non-exhaustive list of five factors sentencing courts must consider in making the determination of whether a juvenile should receive the harshest potential sentence: (i) "age and its hallmark features——among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (ii) "family and home environment that surrounds [defendant]"; (iii) "the circumstances of the homicide[s], including the extent of [defendant's] participation in the conduct and the way familial and peer pressures may have affected him"; (iv) whether defendant "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth——for example, his inability to deal with police officers or prosecutors ... or his incapacity to assist his own attorneys"; and (v) "the possibility of rehabilitation" (collectively, the "*Miller* factors"). *Miller*, 132 S. Ct. at 2468.

132 S. Ct. at 2460. But it left open the possibility that in rare cases judges could, as a discretionary matter, sentence juvenile homicide offenders to life without parole. *Id.* at 2469. The Court held that before exercising this discretion, sentencing judges would have to hold a hearing and consider at least the five *Miller* factors. *See id.* at 2468-69.

In *Diatchenko* and *Brown*, this Court went beyond *Miller* and held that even discretionary life without parole sentences for juveniles are prohibited under the state constitution. *Diatchenko*, 466 Mass. at 671; *Brown*, 466 Mass. at 677-78. But this Court did not explicitly address how trial courts should proceed in the context of juvenile homicide cases where they would have sentencing discretion. A double-homicide case, like L.C.'s, provides a context where the trial court has and must exercise discretion. Specifically, in double-homicide cases, sentencing courts have discretion on the issue of whether the defendant's mandatory life sentences with parole eligibility should run consecutively or concurrently.

Under *Miller*, juvenile life without parole was the harshest penalty left open to a sentencing judge's discretion. With the abolition of such sentences in

Massachusetts, the possibility of consecutive as opposed to concurrent life terms remains open as the harshest penalty available to the sentencing judge's discretion in double-homicide juvenile cases. And although *Diatchenko* and *Brown* did not explicitly address this circumstance, *Diatchenko* made crystal clear that:

> a defendant who is going to be subjected to a State's harshest penalty ***must*** have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors.... In particular, a sentencer ***must*** have the ability to consider the mitigating qualities of youth.

Diatchenko, 466 Mass. at 660-61 (emphasis added). Under *Diatchenko*, sentencing judges not only may assess the mitigating qualities of youth before meting out the state's harshest punishment, they must do so. Put differently, in any double-homicide case, where as a matter of course consecutive life terms constitute the "harshest penalty," sentencing judges not only may have the authority to consider the issue of consecutive versus concurrent terms, they must have such authority.

3. The Authority of the Trial Court to Convert Consecutive Life Terms to Concurrent Terms Is Consistent with Well-Settled Resentencing Precedent.

There is no question and no dispute that *Diatchenko* and *Brown* mandate the resentencing of L.C., and all similarly situated juvenile homicide offenders, such that their sentences of life without parole eligibility are changed to life with parole eligibility after 15 years. *Brown*, 466 Mass. at 677-78. Indeed, L.C. has already been resentenced to two parole eligible terms of 15 years each. For the trial court now to be authorized to take the additional step of converting, or at least considering the conversion of, L.C.'s consecutive sentences to concurrent sentences, would be very much in keeping with long-standing precedent that permits the resentencing on all interdependent sentences whenever any portion of the interdependent whole is vacated. *See, e.g.*, *Commonwealth v. Parrillo*, 468 Mass. 318, 321 (2014)(where "part of an 'integrated package' of sentences on multiple convictions" is vacated "resentencing as to the entire sentencing scheme is appropriate"); *Commonwealth v. Scott*, 86 Mass. App. Ct. 812, 22 N.E.3d 171, 173 (2015)(whenever an illegal

sentence is vacated, the entire related sentencing scheme may be restructured); *Commonwealth v. Burden*, 48 Mass. App. Ct. 232, 236 (1999)("successful challenge to one sentence imposed at the same time as other sentences..., opens up all the interdependent, lawful sentences for reconsideration")(citing *Shabazz v. Commonwealth*, 387 Mass. 291, 295 (1982))(ellipsis in original).

4. The Authority of the Trial Court to Convert Consecutive Juvenile Life Sentences to Concurrent Sentences Is Consistent with the Animating Spirit of *Miller*, *Diatchenko*, and *Brown*.

The animating spirit of *Miller*, *Diatchenko*, and *Brown* is that children are different from adults. Children are more immature, more impetuous, and do not have the same appreciation as adults for risks and consequences. *See*, *e.g.*, *Miller*, 132 S. Ct. at 2465. Children change and mature, and are, therefore, as a general rule amenable to rehabilitation. They are deserving of a second chance. *See*, *e.g.*, *Graham v. Florida*, 560 U.S. 48, 73 (2010).

In *Miller*, the Supreme Court noted that the hallmark features of childhood mean that it will be the rare juvenile who would ever receive a discretionary life without parole sentence. *Miller*,

132 S. Ct. at 2469. This Court has gone one step further and held that no juvenile may ever, under any circumstance, be given a life without parole sentence. *Diatchenko*, 466 Mass. at 658-59. In other words, this Court has recognized the rehabilitation potential of all juveniles, no matter how hellacious their juvenile conduct.

The abolition of all life without parole sentences would seem to require, by extension, the abolition of any and all juvenile sentences that are the functional equivalent of life without parole. *See Brown*, 466 Mass. at 691, n.11. As noted above, here we are not arguing that a 30-year sentence (*i.e.*, two consecutive life sentences of 15 years each before parole eligibility) is necessarily or categorically the functional equivalent of a life without parole sentence.[9] Rather, we are simply saying that trial courts, in resentencing juvenile homicide offenders like L.C., who have been convicted of two homicides arising out of a single event, should have the discretion to consider whether the juvenile

[9] Of course, if this Court is prepared to hold that any 30-year sentence for a juvenile offender violates the state constitutional protection against "cruel or unusual punishment," we will not object.

defendant's sentence should be 15 or 30 years before parole eligibility, *i.e.*, whether the two required parole eligible life sentences should be concurrent or consecutive. We are asking for nothing more than that trial judges explicitly be given the ability to choose – based on hearing evidence from all interested parties, including the Commonwealth and victims' families – whether multiple juvenile life sentences should run concurrently or consecutively. Granting trial judges this choice would be very much consistent with the notion that children have the potential to mature and to be rehabilitated. In other words, the choice flows seamlessly from the very notion that animated *Miller*, *Diatchenko*, and *Brown*.

5. The Authority of the Trial Court to Convert Consecutive Juvenile Life Sentences to Concurrent Sentences Is Consistent with Scientific Advances in the Area of Adolescent Brain Development.

The notion that children are different from adults is not just the opinion of the justices sitting on this Court and the United States Supreme Court. It is a scientific fact. Indeed, advances in neuroscience and the science of adolescent brain development led directly to the Supreme Court's decisions in *Roper*, *Graham*, and *Miller*, and in turn to this Court's

decisions in *Diatchenko* and *Brown*. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham*, 560 U.S. at 68; *Miller*, 132 S. Ct. at 2464-65; *Diatchenko*, 466 Mass. at 663, 669-70; *Brown*, 466 Mass. at 687-88. Authorizing trial judges to consider the issue of consecutive versus concurrent sentences in resentencing L.C. would be consistent with an acknowledgment of these scientific advances. In fact, in ruling that L.C. is entitled to a resentencing hearing on the consecutive/concurrent issue, Judge Locke specifically noted that such a hearing was necessary to permit a sentencing judge today to consider the very scientific discoveries regarding adolescent brain development that were unavailable in 1994 when L.C. received his current consecutive sentences. *See* Add.010-11.

B. As a General Matter, Consideration of Whether Two Juvenile Life Sentences Should Be Consecutive or Concurrent Should Occur in an Evidentiary Hearing at Which All *Miller* Factors Are Fully Vetted.

In light of the above discussion, there should be no question that "a trial court judge in imposing a sentence in accordance with and pursuant to *Diatchenko* and *Brown may* amend that aspect of the original sentence that imposed consecutive life sentences to

impose concurrent life sentences." Add.002 (emphasis added). Thus, the question becomes "what shall be the nature of the proceeding required to make that happen." *Id.*

In our view, the proceeding should be exactly the same as the sentencing hearing contemplated by *Miller* to determine whether, as a matter of judicial discretion, a juvenile homicide offender should receive a life without parole sentence. Although in Massachusetts sentencing judges would not be considering life without parole as an option, in connection with all multiple homicide cases they would be considering the issue of consecutive versus concurrent sentences, and whether to impose the "harshest" available sentence. In other words, in all cases like Costa's, sentencing judges will have to address what is at core the exact issue as that faced by sentencing courts in states where life without parole for juveniles remains an option, namely, whether or not to sentence the juvenile offender to the "harshest" available sentence. *Miller*, 132 S. Ct. at 2468-69.

Any resentencing (and, prospectively, any original sentencing) hearing on the issue of whether

two first-degree murder sentences for a juvenile offender should run concurrently or consecutively, must start, as Judge [REDACTED] noted below, from the teachings of recent developments in adolescent brain research. Add.009-10. Using those teachings as the lens through which to consider the ultimate question of whether the juvenile offender should receive the harshest possible sentence, the trial court should then hear evidence from the Commonwealth, the victims' families, and the defense on each of the *Miller* factors.

In the context of a resentencing like Costa's, the *Miller* factor evidence should obviously include all age-related and other evidence that would have been available to the original sentencing judge. But, on the issue of potential for rehabilitation, it should also include evidence of the juvenile defendant's post-original sentencing conduct. After all, the best evidence of potential for rehabilitation is actual rehabilitation. As this Court and the Appeals Court have long recognized, it makes little sense in resentencing a defendant, whether a juvenile or an adult, to turn a blind eye to events, both good and bad, that have transpired in the years following

the defendant's original sentencing. *See, e.g.*, *Commonwealth v. Renderos*, 440 Mass. 422, 435 (2003) ("At resentencing, the judge may consider any information concerning the defendant's conduct, good and bad, during the intervening time."); *Commonwealth v. White*, 436 Mass. 340, 344 (2002)("in resentencing following the invalidation of a sentence (where the underlying conviction has not been vacated), the resentencing judge has authority to consider favorable information about the defendant's good conduct subsequent to his original sentencing"); *Commonwealth v. Wallace*, 85 Mass. App. Ct. 1109, 2014 WL 1235994, at *3 (Mar. 27, 2014)(Rule 1:28 Decision)("[i]t is, of course, up to the resentencing judge to decide what weight to give information concerning the defendant's conduct [good or bad] since the time of his original sentencing ..." (quoting *White*, 436 Mass. at 345)(bracketed language in original); *Commonwealth v. Leggett*, 82 Mass. App. Ct. 730, 736 (2012)("The vacation of a sentencing scheme creates a clean slate for resentencing.... The concept of the clean slate recognizes the discretionary freedom of the resentencing judge to impose a new structure upon the basis of information generated since the first

sentencing so that 'the punishment should fit the offender and not merely the crime.'") (quoting *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969); *Commonwealth v. Doucette*, 81 Mass. App. Ct. 740, 745 (2012)(in resentencing, "the judge may take into consideration intervening conduct to the extent that it sheds light on the permissible considerations of deterrence, protection of the public, and rehabilitation.... [I]nformation both favorable and unfavorable to the defendant that has become available since the initial disposition is admissible to show a 'defendant's character, behavior, and propensity for rehabilitation.'")(quoting *White*, 436 Mass. at 343).

C. L.C. Should Receive A Resentencing Hearing At Which Full Consideration is Given to the Science of Adolescent Brain Development, the *Miller* Factors, and L.C.'s 25 Year Record of Achievement.

In L.C.'s case, there is no dispute that his original sentencing judge failed to consider recent advances in the science of adolescent brain development, as those advances were not yet available. Likewise, the sentencing judge gave no consideration to L.C.'s age, let alone any of the other *Miller* factors, in meting out L.C.'s consecutive life sentences. JA.185. Although L.C.'s trial counsel

mentioned .C. age as a mitigating factor that should be considered by the trial judge in determining whether .C. two life sentences should run concurrently or consecutively, the transcript of the sentencing hearing makes clear that in sentencing L.C. the judge paid no attention to .C. age. *See id*. Instead, immediately after .C. trial counsel completed his very short sentencing argument, the trial judge, focusing exclusively on the crime, including the photographs of the victims and the testimony of the ballistician regarding the rounds of ammunition recovered from the victims' bodies, sentenced L.C. and his adult co-defendant to "consecutive sentences." *Id.*

Applying *Miller*, *Diatchenko*, and *Brown* retroactively, as we must, it was an abuse of discretion as well as a constitutional due process violation for the trial court to sentence the juvenile L.C. to the harshest possible punishment (*i.e.*, consecutive life sentences) without giving any consideration to the science of adolescent brain development or .C. age or any of the other age-related *Miller* factors. *See, e.g., Commonwealth v. Gresek*, 390 Mass. 823, 831-32 (1984) (vacating

sentence where trial judge failed to consider mitigating factors); *United States v. Morris*, 775 F.3d 882, 886-87 (7th Cir. 2015) (applying abuse of discretion standard and vacating sentence where it was not clear whether the sentencing judge had credited defendant's main mitigation arguments). The resentencing hearing ordered by Judge Locke, and that we are advocating for on this appeal, would remedy the original sentencing judge's errors.

At L.C.'s resentencing hearing, the trial court would have the opportunity to assess at least the following *Miller*-factor-related evidence, all of which was available at the time of L.C.'s 1994 sentencing and none of which was considered by L.C.'s original sentencing judge:

- The trial evidence, which made it clear that the homicides at issue were arranged by L.C.'s adult co-defendants, and that the juvenile L.C. participated as a follower based on peer pressure. *See, e.g.*, JA.190-205.
- The lesser role played by L.C. in the homicides as evidenced by the fact that the jury verdict found L.C.'s adult co-defendant guilty of first degree murder on the basis of "deliberate

premeditation" and "extreme atrocity and cruelty," while the jury verdict against L.C. found him ***not guilty*** as to the latter theory. *See* JA.179-80.

- L.C.'s youth. He was 16 years old and very much a child when the homicides at issue occurred, as evidenced by the photograph that is displayed above. *See supra* at 6. Notably, the sentencing judge at L.C.'s retrial, which occurred eight years after the crime, *i.e.*, when L.C. was already 24 years old, saw an adult in his courtroom, not the child who had committed the crime.
- L.C.'s record of achievement and rehabilitation while being held in DYS custody from 1986 to 1988 awaiting his first trial. *See, e.g.*, JA.139-46.
- L.C.'s overall positive disciplinary record while in adult prison from April 1988 through December 1992. *See, e.g.*, JA.145-46.
- L.C.'s record of maturity and law-abiding conduct while he was out on bail from December 1992 until February 2, 1994. *See, e.g.*, JA.158.

In addition to this pre-1994 information, L.C.'s resentencing judge would also receive evidence of the remarkable record of achievement and demonstrated rehabilitation that L.C. has accumulated over the 21 years that have transpired since he was last sentenced. This evidence would include:

- L.C.'s perfect disciplinary record. He has not received a single disciplinary ticket since his re-incarceration following his February 1994 conviction. In fact, he has ***not received a single disciplinary ticket since June 1989***. *See* JA.145-46.
- L.C.'s college degree. Prior to *Miller*, *Diatchenko*, and *Brown*, *i.e.*, at a time when L.C. had no reason to believe he would ever be parole eligible and have a chance at freedom, he ***earned a college degree with honors*** from [REDACTED College program. *See* JA.160.

- L.C.'s role in the Restorative Justice Program. L.C. is ***one of the founders and most active leaders of the Restorative Justice Program***, which brings together prisoners and their victims' families in an effort to achieve

understanding and, where possible, reconciliation. *See, e.g.*, JA.166-74; 217-222.

All of this evidence is directly relevant to L.C. rehabilitation, and to the penological interests in just punishment, deterrence and protection of the public. *See, e.g.*, *Doucette*, 81 Mass. App. Ct. at 745. The evidence would enable the resentencing judge to determine whether consecutive or concurrent terms better fits not just the crime but the offender. *See, e.g.*, *Leggett*, 82 Mass. App. Ct. at 736. The evidence of L.C. post-1994 achievements and rehabilitation, like the age-related evidence that was available but not considered by the sentencing judge in 1994, bears directly on one or more of the *Miller* factors.

We are confident that consideration of all of the *Miller*-factor-related evidence, together with consideration of the last two decades of advances in the science of adolescent brain development, will lead the resentencing judge to conclude that L.C. two life sentences should be concurrent and not consecutive. But the point here, on this appeal, is not whether L.C. will prevail at his resentencing hearing. The point is that the trial judge should be

given the chance to consider the evidence and make an informed decision as to whether L.C. should receive concurrent or consecutive life terms. Giving the trial court that chance is a natural and logical extension of *Diatchenko* and *Brown*, and, quite simply, the right thing to do.

CONCLUSION

For all of the foregoing reasons, Judge Locke's Order should be affirmed, and this case should be remanded to the Superior Court for a resentencing hearing at which evidence bearing on the *Miller* factors will be considered by the trial court judge on the issue of whether L.C.'s two life sentences should run concurrently or consecutively.

Respectfully

submitted,

L.R.

By his attorneys,

[REDACTED]

Dated: March 23, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that two copies of this brief and two copies of the joint appendix have been served by Federal Express on March 23, 2015 upon counsel for the Commonwealth, Assistant District Attorney [REDACTED].

/[REDACTED]

Addendum

TABLE OF CONTENTS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
[REDACTED]

COMMONWEALTH

vs.

[redacted].

RESERVATION AND REPORT

Before me is a petition of the Commonwealth pursuant to G. L. c. 211, § 3, seeking to vacate an order of a Superior Court judge allowing L.C.'s (defendant) motion for a resentencing hearing. Alternatively, the Commonwealth seeks to a report to the Full Court.

In 1994, the defendant was sentenced to two consecutive life terms without parole eligibility based on two convictions of murder in the first degree. On the date of the commission of these offenses, the defendant was sixteen years of age. He was transferred and tried as an adult.

Relying on this court's decisions in Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 666-671 (2013), and Commonwealth v. Brown, 466 Mass. 676, 678 (2013), a Superior Court judge (who was not the trial judge) converted the two life

sentences for murder in the first degree without the possibility of parole to the lesser punishment of mandatory life in prison under G. L. c. 265, § 2, which provides for parole eligibility after fifteen years on each of the life sentences. The judge also ordered, over the Commonwealth's objection, a hearing on whether the defendant is "entitled to resentencing to concurrent (rather than consecutive) life terms for the two murder convictions."

This case raises the important and novel question, not specifically addressed in Diatchenko or Brown, whether: (1) a trial court judge in imposing a sentence in accordance with and pursuant to Diatchenko and Brown, may amend that aspect of the original sentence that imposed consecutive life sentences to impose concurrent life sentences in order to provide the defendant with an opportunity for parole eligibility more consistent with time frame set forth in G. L. c. 265, § 2, than if the sentences were to run consecutively; and, (2) if so, what shall be the nature of the proceeding required to make that determination. Because the issue is one of significance with no controlling precedent that impacts the liberty interests of this defendant and may impact other defendants, I reserve and report the case without decision for determination by the Full Court on the following record:

1. The Commonwealth's petition for relief pursuant to G. L. c. 211, § 3, along with its attachments;

2. The defendant's opposition to the Commonwealth's petition, along with its attachments;

3. The docket sheet in SJ-2014-0493; and

4. This reservation and report.

In accordance with Mass. R. A. P. 5, as amended, 378 Mass. 930 (1979), the defendant is designated the appellant and the Commonwealth is designated the appellee. This matter shall proceed in all respects in conformance with the Massachusetts Rules of Appellate Procedure. The parties shall confer with the Clerk of the Supreme Judicial Court for the Commonwealth regarding the service and filing of briefs.

Geraldine S. Hines
Associate Justice

Entered: February 19, 2015

Pages: 17

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

COMMONWEALTH OF MASSACHUSETTS

v.

L.C.

* *

MOTION HEARING

BEFORE THE HONORABLE JEFFREY LOCKE
COURTROOM 906
BOSTON, MASSACHUSETTS
TUESDAY, NOVEMBER 25, 2013

APPEARANCES:

For the Commonwealth:
Suffolk County District Attorney's Office
By: [REDACTED]

For the Defendant:
By: [REDACTED]

Paula Pietrella
Official Court Reporter

PROCEEDINGS

(In court.)

(Defendant not present.)

THE CLERK: Calling number 2 and number 3 on today's list, Commonwealth versus L.C., on docket 1986-58969 and 58970. L.C. is not present in court; his presence has been waived. He's represented by Attorney D.A. Representing the Commonwealth is Assistant District Attorney J.Z.

THE COURT: Well, both have left the courtroom. Call a case that is present. Call a case that is present.

THE CLERK: Calling number 10 on today's list, Commonwealth versus -- returning to the matter of Commonwealth versus L.C. Would the parties please come forward.

THE COURT: Gentlemen, since last before me, I think we issued some revised documents, whether they were mittimus or whatever they were. Did the jail credit issue work out?

MR. D.A.L: It did work out, Your Honor. Thank you for that.

THE COURT: Did your client have his parole hearing?

D.A.: He has not had a parole hearing yet, but he's had a classification hearing.

THE COURT: Okay.

D.A.: And he's been reclassified to a minimum security.

THE COURT: All right. And then at the last hearing I dictated a ruling with regard to the defendant's motion for a resentencing hearing. After dictating that ruling, we had a snafu with our recording equipment, or hardware. The Commonwealth then filed a motion for written findings and rulings, and I have the motion before me, but I haven't drafted anything. Fortuitously, you're back on today's list, so my inclination is to attempt to dictate findings and rulings once again in the fondest hope that a transcript may be prepared.

All right. D.A., give me a 30-second encapsulation of your claim to a right for resentencing in light of *Miller*, *Diatchenko* and *Brown*.

D.A.: Cutting to the chase, I made various and sundry arguments, but the argument that seemed to persuade Your Honor, at least move Your Honor, is the argument that, on the narrow issue of whether or not Mr. L.C. sentences should be run consecutively or

concurrently, he's entitled, under *Diatchenko*, to a sentencing, specifically because in his case the judge did not fully or properly consider age and other age-mitigating factors at the time of sentencing. And under *Miller and Diatchenko*, as an exercise in the judge's discretion, the judge should have, and must, given the retroactive application of *Miller* and *Diatchenko*, the judge must consider those age-related factors, and therefore he's entitled to resentencing on that issue. Right now he's serving consecutive terms. The sole issue before the court on the evidentiary hearing would be whether or not the sentences will run concurrent.

THE COURT: J.Z., you give me asimilarly concise statement of your opposition.

J.Z.: Under *Diatchenko*, the sentences are lawful. The defendant is entitled only to a parole hearing, and will receive a parole hearing. The judge at the initial sentencing hearing did consider his age and said they were execution-style murders of two people, of two murders, and the sentence is lawful and appropriate, and the defendant is fully entitled to a parole hearing, which he will receive.

THE COURT: All right. Based on my review and understanding of the principles underlying most notably

the Supreme Court's triggering case of *Miller v. Alabama* -- and when I say "triggering," it triggered two cases by our State Supreme Court, *Diatchenko v. Commonwealth* and *Commonwealth v. Brown*, where the Supreme Judicial Court not only acknowledged the *Miller* principle, that the Eighth Amendment would preclude a mandatory life without parole sentence for someone under the age of eighteen at the time of the commission of an offense, and then expanding upon that under our state Declaration of Rights and all of those cases predicated upon what the courts were persuaded to find as emerging scientific evidence regarding cognitive development among adolescents in the adolescent brain, that does constitute evidence to be considered at the time that a judge determines a sentence and parole eligibility. That is what *Miller* tells us, and then in *Diatchenko* and *Brown*, to some extent, what the SJC similarly found and adopted.

The defendant has filed a motion. I don't know -- D.A., I believe it was in the context of a motion for a new trial, and, alternatively, motion for new sentencing. It is my view in this case, as it's been in a number of similar cases coming before the court in court for post-conviction relief where the

defendant was under the age of eighteen at the time of the offense, that the impact and import of *Diatchenko* and *Brown* is that, in essence, the court will convert a life sentence for a murder in the first degree to a life sentence as provided for under a second-degree conviction, that is, with parole consideration after fifteen years. And that, of course, would be the principle and the rule for those cases prosecuted before our recent statutory change affecting the date when parole is to be available.

So I find as it relates to L.C., that the sentences he received of life imprisonment would entitle him to parole consideration as would be calculated if the convictions were for second-degree murder, notwithstanding the fact that the jury returned a first-degree conviction in each case.

The defendant has made a second argument, which I do find persuasive; that is, that scientific evidence or social science evidence that is now found as significant by both our state Supreme Judicial Court and indeed by the U.S. Supreme Court regarding the impact of adolescent brain development or not fully developed brains among those under eighteen, presents significant evidence to be considered when a judge is determining

whether to sentence someone with or without parole, and, if a parole, at what point in time. I'm not familiar, under our new statute, where a judge is to determine a parole eligibility date for those convicted of a life felony other than first degree as to whether or not any of those cases have involved offenders under the age of eighteen and has led to any hearing regarding the mitigating effect, if that's what you would call it, or at least the adolescent brain development research.

Are you aware of any such case, D.A.?

D.A.: I'm not, Your Honor.

THE COURT: J.Z., are you aware of any such case?

J.Z.: No.

THE COURT: It is my view -- first, D.A., I do not accept the proposition that you advanced, which is that the trial judge in the second trial did not consider age. I don't know whether he did or didn't. But I do accept that, given the emerging social science research, the judge likely would not have considered the impact of adolescent brain development in formulating his sentencing structure, that is, in determining whether to impose concurrent sentences or consecutive life sentences for the crimes to which the defendant was

convicted, and accordingly, applying the principles in spirit of *Diatchenko* and *Brown*, and of *Miller* to some extent, I rule that the defendant is entitled to resentencing on the issue of whether the court will impose consecutive or concurrent life terms for the two murder convictions in this case, and I make that ruling based entirely on, as I indicated, the development of case law from *Miller* through *Diatchenko* through *Brown*. And accordingly, I will permit the defendant a hearing.

As I've indicated before, I frankly don't see the need to receive testimony regarding adolescent brain development or the scientific research. It seems to me that is established, at least in broad principle, and the parties may reference whatever accepted literature or studies there are on the issue. They've been referenced by the courts in their decisions.

To the extent there is some claim regarding L.C. himself, his level of cognition at the time of the commission of this crime, then I think that might be appropriate to consider. But unless there's that sort of evidence, I think we're largely dealing with argument by counsel based on the facts of the case and everything else known about the instant and about the defendant.

What say you to that?

D.A: We previously discussed -- we hadn't really discussed the details of an evidentiary hearing. I would agree with Your Honor that I don't think there's a need for testimony of a general nature on adolescent brain development. I think that it would be helpful to the court in fashioning the appropriate sentence to consider testimony from a psychologist specific to L.C., including testimony potentially from one or more of the psychologists who administered forensic tests to L.C. in connection with his juvenile transfer hearing right at the time of the incident.

THE COURT: Well, that may be.

D.A: And to also talk not just about tests that were performed then, but the limitations on those tests, tests that could be performed today, maybe tests that have been performed today, the differences between those tests, and what those same tests could reveal, with the added benefit of the developments in neuroscience and the like that have taken place over the years.

THE COURT: There was a transfer hearing in this case?

D.A.: THE There was a transfer hearing.

COURT: Did the psychologist testify?

D.A.: Yes.

THE COURT: Is it available to both sides?

D.A.:It is.

THE COURT:You have that, J.Z.?

D.A.: If he doesn't, I can provide it to him.

J.Z.: I've never seen a transcript or a record of the transfer hearing, Judge. if D.A. can provide it, I --

THE COURT: If it exists, I think you ought to provide that, D.A.. As well, if there's any other discovery related to those experts, produce that. I don't know that the Commonwealth have any expert at the transfer stage.

D.A.: I don't know. The Commonwealth had two experts and the defense had one expert. So there was one psychiatrist and two psychologists. I think two of the three submitted evaluations, including references to forensic testing that was done.

THE COURT: Do you have the evaluations?

D.A.: THE I do.

COURT: And do you have the underlying testing data?

D.A.: I don't believe I have the

underlying testing data, but one of the psychologists who was court appointed at the time has subsequently, quite recently actually, met with and evaluated L.C., and he is prepared to testify, and that's Robert Kinscherff.

THE COURT: Okay. I'm not ruling in any way on the relevance of any recent examinations or consultations with your client. He's now how old? In his forties?

D.A.: He's now in his mid-forties.

THE COURT: To the extent there were contemporaneous evaluations at or around the time of the crime, get those to J.Z. just so that everyone has the same record information.

Now, we haven't set a hearing date for this in part because you intend to take me up.

Paula, how long do you think it would take to transcribe the hearing that we've had now?

(Discussion held between the judge and the court reporter.)

THE COURT: I'm going to ask that a transcript of this hearing and the rulings that I've made, as inarticulate as they may be, be prepared and filed with the clerk, and copies then provided to counsel.

Should we set a hearing date or should we set a status date, understanding what you intend?

J.Z.: A status date.

THE COURT: Thirty days out? Is that good enough?

D.A.: That probably makes sense. I mean, I don't know what J.Z. -- I know that J,Z.'s intent is to file quicky, but it may help to --

THE COURT: Motivate him?

MR. D.A.: Motivate him or focus the mind if we have deadlines for a filing and even for a response.

J.Z.: I'm focused, Judge. I have a number of other cases that I'm also focused on that have deadlines, like December 5th, which is a murder case with [REDACTED]. There's a required filing on that case. There's other cases in the pipeline. So I certainly intend to file this as soon as I can. I have no reason to delay this case.

THE COURT: Well, how about the 23rd, or I can go the 30th, if you'd like.

D.A.: As a deadline for the Commonwealth to file its 2-11 --

THE COURT: Well, as a status date. And I want J.Z. to report on that date as to what he's

done.

J.Z.: I'll file it on the 23rd, Judge.

THE COURT: 23rd? All right. To the extent you can get something filed by the 23rd, I think that would be appropriate.

D.A.: My concern, as you know, Your Honor, is that L.C., his sentences have now been aggregating. If upon resentencing he's resentenced to concurrent time, he would be parole eligible immediately. If he is sentenced to consecutive time, it will be another three years, and my fear is that with the appeal process playing itself out, that even if the argument is meritorious, it would be rendered moot by the passage of time and the three years will be eaten up.

THE COURT: Mr. D.A.1, you would have no way of knowing the volume of post-conviction proceedings that take place in the Suffolk Superior Court. I have sympathy for J.Z., because everything that comes to him first comes to me, and the volume is, quite simply, staggering. I don't know, but we are dealing with three or four hundred different cases per year in post-conviction contexts, not to mention the hundreds of pending cases and pending appeals. So I can't treat Mr.

L.C. any differently than any other litigants seeking relief from the court. And every one of them in the post-conviction context can make a valid claim that, if successful, something good will happen: they'll be reclassified, they'll be released, they'll get additional credits. I can't view L.C. differently than anyone else. I'm comfortable that we are trying to keep this case moving forward, but I think December 23 is not an unreasonable period to prepare that request for interlocutory release.

D.A.: Assuming it's filed on or before December 23, will there be a need for us to be here on the 17th?

THE COURT: If the parties want to file a joint status report with the court and incorporated in that motion for further status date you all can agree on a date, I'd be happy to receive it in that form. Feel free to fax that, if you want, to Mr. Sheehan, but I want an agreement and I want a next proposed date agreeable to both. Okay?

D.A.: Okay. One last thing while we're here, Your Honor. In terms of the nature of an evidentiary hearing, assuming it does happen at some point, independent of psychiatric or psychologist

testimony with respect to testing that was done at the time and what may have been possible with respect to L.C. specifically, would the court also entertain evidence from others who knew the young man at the time, family members, lawyers, anyone?

THE COURT: I don't know. I don't know. And I think I'd want to hear what the proposed testimony would be, or scope of testimony.

D.A.: A proffer.

THE COURT: I'd like to hear what the opposition might be, and I want to consider to what extent ***Miller, Diatchenko*** and ***Brown*** focuses on the individual offender's brain at the time of the crime as opposed to the general science.

D.A.: I admit --

THE COURT: Let me see you folks at sidebar for a moment off the record.

(Off record discussion.)

THE CLERK: The matter is continued by agreement to December 23, 2014, in this session for status. The court orders the transcript be produced with respect to today's oral findings of the court and be placed in the file, along with copies given to counsel.

J.Z.: Thank you, Your Honor.

D.A.: Thank you, Your Honor. Have a great Thanksgiving.

THE COURT: You as well.

(Hearing ended.)

CERTIFICATION

I, [REDACTED], Official Court Reporter, do hereby certify that the foregoing is a true and accurate transcript from the record of the court proceedings in the above-entitled matter.

I, [REDACTED], further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive on Transcript Format.

I, [REDACTED], further certify that I neither am counsel for, related to, nor employed by any of the parties to this action in which this hearing was taken, and further certify that I am not financially nor otherwise interested in the outcome of the action.

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title I. Courts and Judicial Officers (Ch. 211-222)
Chapter 211. The Supreme Judicial Court (Refs & Annos)

M.G.L.A. 211 § 3

§ 3. Superintendence of inferior courts; power to issue writs and process

Effective: July 1, 2012
Currentness

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

Credits
Amended by St.1956, c. 707, § 1; St.1973, c. 1114, § 44; St.1992, c. 379, § 61; St.2011, c. 93, § 46, eff. July 1, 2012.

Notes of Decisions (803)

M.G.L.A. 211 § 3, MA ST 211 § 3
Current through Chapters 1 to 505 of the 2014 2nd Annual Session

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Massachusetts General Laws Annotated
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title I. Crimes and Punishments (Ch. 263-274)
Chapter 265. Crimes Against the Person (Refs & Annos)

M.G.L.A. 265 § 2

§ 2. Punishment for murder; parole; executive clemency

Effective: July 25, 2014
Currentness

<[Text of section effective until July 25, 2014. For text effective July 25, 2014, see below.]>

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

§ 2. Punishment for murder; parole; executive clemency

<[Text of section as amended by 2014, 189, Sec. 5 effective July 25, 2014 applicable as provided by 2014, 189, Sec. 8.]>

(a) Except as provided in subsection (b), any person who is found guilty of murder in the first degree shall be punished by imprisonment in the state prison for life and shall not be eligible for parole pursuant to section 133A of chapter 127.

(b) Any person who is found guilty of murder in the first degree who committed the offense on or after the person's fourteenth birthday and before the person's eighteenth birthday shall be punished by imprisonment in the state prison for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of chapter 279.

(c) Any person who is found guilty of murder in the second degree shall be punished by imprisonment in the state prison for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of chapter 279.

(d) Any person whose sentence for murder is commuted by the governor and council pursuant to section 152 of chapter 127 shall thereafter be subject to the laws governing parole.

Credits

Amended by St.1951, c. 203; St.1955, c. 770, § 78; St.1956, c. 731, § 12; St.1979, c. 488, § 2; St.1982, c. 554, § 3; St.2014, c. 189, § 5, eff. July 25, 2014.

Editors' Notes

VALIDITY

<The Massachusetts Supreme Judicial Court, in Com. v. Colon-Cruz, 470 N.E.2d 116, held the death penalty provisions of the punishment for murder law unconstitutional. The provisions of the law not related to the death penalty were held severable and valid. See Notes of Decisions, post.>

Notes of Decisions (31)

M.G.L.A. 265 § 2, MA ST 265 § 2
Current through Chapters 1 to 505 of the 2014 2nd Annual Session

End of Document

85 Mass.App.Ct. 1109
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

COMMONWEALTH
v.
John WALLACE.

No. 12–P–1703. | March 27, 2014.

By the Court (KATZMANN, GRAINGER & SIKORA, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** A Superior Court jury convicted the defendant, John Wallace, of raping a child twelve to fifteen years old on diverse dates between June, 1990, and June, 1994 (one count), G.L. c. 265, § 23, and of forcible rape of the same victim between the ages of sixteen and eighteen years (one count). See G.L. c. 265, § 22(*b*). The trial judge sentenced the defendant to a term of ten to twelve years at State prison and to a consecutive ten-year period of probation including, among other terms, GPS (global positioning system) monitoring. The defendant appealed from the judgments. In March, 2010, the Appeals Court upheld the convictions, but remanded the case to the trial judge for resentencing. See *Commonwealth v. Wallace,* 76 Mass.App.Ct. 411, 412, 419–420 (2010). That order resulted from an ambiguity in the judge's explanation of the use of a police report detailing uncharged conduct. *Id.* at 419.On remand, after consideration of memoranda from the defendant and the Commonwealth and after a hearing upon resentencing, the judge imposed the same sentence of incarceration and of probation. The central question of the defendant's current appeal is whether the resentencing constitutes an abuse of discretion. For the following reasons, we affirm.

Background. The facts material to the underlying criminal conduct appear in our previous decision. See *Commonwealth v. Wallace,* 76 Mass.App.Ct. at 412–414.During the original sentencing hearing, the judge referred to a police report describing, among other information, uncharged conduct related to instances of potential sexual abuse of minors other than the victim. The report contained an apparent acknowledgment by the defendant that at times he had hosted three other children in his bed. *Id.* at 419.He did not state, or admit, to the investigating police officer any further conduct with those three minors. The cause of the remand was this court's concern that the judge may have imposed the original sentence, in part, as punishment for the uncharged conduct. *Id.* at 419–420.

In preparation for the resentencing hearing in August, 2011, the defendant submitted a memorandum and numerous letters of support documenting his participation in sex offender therapy and educational programs, and submitted data concerning recidivism rates for sex offenders of the same age as the defendant. The defendant requested also that the court not impose a GPS monitoring requirement as a term for subsequent probation; he pointed out that, at the time of his criminal conduct, the imposition of such a sanction constituted a matter of discretion for a trial judge. See G.L. c. 265, § 47, inserted by St.2006, c. 303, § 8; *Commonwealth v. Cory,* 454 Mass. 559, 560, 570–573 (2009). The defendant proposed a resentence of five to eight years at State prison and a consecutive probationary term of five years without GPS monitoring.

In its resentencing memorandum, the Commonwealth requested the imposition of the same sentence imposed by the judge originally in 2008. It emphasized the nature of the defendant's crimes, the scope of suffering experienced by the victim, the impact of the conduct upon the victim's family, and the unlikelihood of rehabilitation of the defendant.

***2** At the resentencing hearing, the judge commented as follows.

> "In order for a judge to consider uncharged conduct in sentencing a defendant, it must be relevant and the report of it sufficiently reliable. I find that this report is relevant and sufficiently reliable, and I have considered it only as it bears on the defendant's character and his amenability to rehabilitation.
>
> "A judge cannot impose punishment for this conduct. I have not done so, nor did I do so at the first sentencing.
>
> "In resentencing, a judge may consider a defendant's postconviction behavior. I find that this behavior does not cause me to impose a lesser sentence."

The judge then reimposed the original sentence.[1] The defendant has appealed from the terms of the resentence. He meanwhile sought review of the resentence by the Appellate

Division of the Superior Court. See G.L. c. 278, §§ 28A–28C. The Appellate Division upheld the resentence.

Analysis. 1. *Uncharged conduct.*The defendant argues that the trial judge must have based the resentence at least in part upon the uncharged conduct described by the police report because she did not alter the terms of the original sentence. The record does not substantiate that claim.

Typically an appellate court reviews a sentence for error of law, and not for abuse of the trial judge's wide discretion. *Commonwealth v. McCravy,* 430 Mass. 758, 767 (2000).*Commonwealth v. Vega,* 54 Mass.App.Ct. 249, 250 (2002). The function of review of a sentence for abuse of discretion (typically excessive severity) belongs by statute to the Appellate Division of the Superior Court. G.L. c. 278, §§ 28A–28C.

The essence of the defendant's present argument is that the judge twice committed the same error of law: that she factored into his sentence uncharged conduct contained in the police report. A sentencing judge may not punish a defendant for uncharged conduct, but may consider any reliable information, including information related to uncharged conduct, concerning the defendant's character and amenability to rehabilitation. *Commonwealth v. Goodwin,* 414 Mass. 88, 92–95 (1993).*Commonwealth v. Stuckich,* 450 Mass. 449, 461–462 (2008). See *Commonwealth v. Henriquez,* 56 Mass.App.Ct. 775, 778–783 (2002), *S. C.,* 440 Mass. 1015 (2003). The reports of such conduct must be "sufficiently reliable" and related to the defendant's character and amenability to rehabilitation. *Commonwealth v. Goodwin, supra* at 94.

In her resentencing order, the judge stated explicitly her awareness of, and compliance with, the limitations on the use of reports of uncharged conduct, and her satisfaction with the relevance and reliability of the police report in question. We have no reason to doubt the genuineness of the judge's statements or her conclusions. The record indicates fully her alertness to the defendant's concerns about the report. She was also aware of the defendant's vehement argument in the 2008 sentencing hearing against reliance upon the information within the report.

***3** The sentencing judge found the report to be "sufficiently reliable," and the determination of the weight to give the report in assessing the defendant's amenability to rehabilitation lay within the sentencing judge's discretion. See *Commonwealth v. Stuckich,* 450 Mass. at 461–462.The record indicates that the judge considered the information in the report only in so far as it related to his character and capacity for rehabilitation. We have no reason to believe that the judge made such a representation falsely and that she improperly weighed the uncharged conduct or punished the defendant for it.

2. *Postconviction behavior.*The defendant's second contention is that the judge wrongly failed to consider mitigating postconviction conduct. Upon resentencing, a judge may consider such information. *Commonwealth v. Renderos,* 440 Mass. 422, 435 (2003). See *Commonwealth v. Doucette,* 81 Mass.App.Ct. 740, 744–745 (2012). The weight given to such conduct belongs to the broad discretion of the sentencing judge. *Commonwealth v. White,* 436 Mass. 340, 345 (2002) ("It is, of course, up to the resentencing judge to decide what weight to give information concerning the defendant's conduct [good or bad] since the time of his original sentencing ...").

The defendant emphasizes that, because he introduced evidence of positive steps undertaken since the time of original sentencing and because the judge has not altered the original sentence, she must have failed to consider his postconviction rehabilitative efforts. The record does not support that conclusion. Rather, the judge stated plainly that she had considered the behavior in question and had concluded against the imposition of a lighter sentence. A sentencing judge is "not bound to credit [a defendant's] expression of remorse at face value," and "[a]lthough a defendant may seek lenity in sentencing by way of mitigating factors, the judge must decide what weight to give to the proffered information."*Commonwealth v. Jones,* 71 Mass.App.Ct. 568, 574 (2008). The judge reported that she had considered the postconviction conduct. Nothing in the record causes us to conclude that her apparent rejection of its materiality rose to the level of an abuse of discretion or error of law.

3. *GPS monitoring.*The defendant's final contention is that the judge's imposition of the GPS monitoring term violated his constitutional rights. The imposition of just monitoring upon probationers like the defendant, whose criminal acts occurred prior to the enactment of St.2006, c. 303, § 8 (effective December 20, 2006), codified as G.L. c. 265, § 47 (mandating such supervision for particular sexual crimes), falls within the sentencing judge's discretion after an individualized assessment of the defendant's circumstances.

See *Commonwealth v. Cory*, 454 Mass. at 572.The holding of the court in *Cory* (that G.L. c. 265, § 47, mandating such monitoring does not apply retroactively) does not prohibit the imposition of GPS monitoring in such cases; it merely assigns it to the discretion of the sentencing judge. The defendant proposes that the judge mistakenly viewed this probationary term as mandated by the 2006 statutory insertion. The judge imposed the term in both the 2008 original sentence and the 2011 resentence as a consequence of conduct committed *before* the 2006 enactment. The *Cory* decision holds that mandatory imposition of the GPS term for conduct committed before enactment would violate the ex post facto prohibitions of both the United States and Massachusetts Constitutions. *Ibid.* The defendant argues that the judge imposed the term here as an imagined mandate of the statute.

***4** We find no indication of such a misunderstanding by the judge. A detailed explanation of the reason for the GPS term would naturally be desirable. However, she had the benefit of the defendant's argument. In addition, the imposition of this term has constituted a common element of a probationary scheme governing sexual offenders with a history of long running molestations. Most importantly, at resentencing, the defendant's counsel presented to the judge several reasons against her *discretionary* imposition of the monitoring term as a condition of probation. The judge reasonably could not have misunderstood the discretionary nature of the imposition of the GPS term. In the circumstances of a defendant's history of sexual offense, that term lay well within her wide range of discretion.

Judgments affirmed.

Parallel Citations

5 N.E.3d 968 (Table), 2014 WL 1235994 (Mass.App.Ct.)

Footnotes

1 The probationary terms required the defendant to register as a sex offender, to maintain employment, to refrain from unsupervised contact with children under sixteen years of age, to submit to sex offender evaluation and any treatment deemed necessary by the probation department, to refrain from direct or indirect contact with the victim and his family, and to wear a GPS bracelet monitored by the probation department.

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