No. SJC-11693

Supreme Judicial Court

for the Commonwealth of Massachusetts

Commonwealth

v.

Sheldon Mattis

On Appeal from the Suffolk Superior Court

Reply Brief for Defendant Sheldon Mattis

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Argument

I. The Commonwealth erroneously claims that the record shows sentencing judges can reliably determine which late adolescents are irretrievably depraved.

The Commonwealth concedes that "*mandatory* imposition of a life without the possibility of parole sentence for those 18-21 years old violates art. 26 of the Massachusetts Declaration of Rights." C. Br. 27 (emphasis added). This concession is compelled by the clear record and Judge Ullmann's findings that late adolescents are less culpable and more capable of change than adults in the very same ways as younger adolescents that led the Supreme Court in *Miller v. Alabama*, 567 U.S. 460 (2012) and this Court in *Diatchenko v. District Attorney*, 466 Mass. 655 (2013) to find mandatory LWOP unconstitutional for juveniles.

But the Commonwealth is wrong that, in contrast to this Court's holding for juveniles in *Diatchenko*, the *discretionary* imposition of LWOP on late adolescents is permissible under art. 26. C.Br. 27. This position flies in the face of the record and Judge Ullmann's findings. Faithfully applying this Court's rationale for a categorical bar on LWOP for juveniles in *Diatchenko* to this case can lead to only one

conclusion—that even discretionary imposition of LWOP sentences on late adolescents does not square with art. 26.

In addressing the constitutionality of discretionary LWOP for late adolescents, the Commonwealth begins by correctly articulating the relevant question under *Diatchenko*: "whether . . . a [sentencing] judge could, with integrity, make a finding 'that a particular offender [between eighteen and twenty-one], at that point in time, is irretrievably depraved.'" C. Br. 35 (quoting *Diatchenko*, 466 Mass. at 670). In *Diatchenko*, this Court interchangeably framed the question as whether sentencing judges can identify irretrievable depravity at that young age "with integrity," "with confidence," or "with any reasonable degree of certainty." *Diatchenko*, 466 Mass. at 669-670. In short, can a sentencing judge make that long-term prediction with a tolerable degree of reliability?

The Commonwealth claims that "[t]he answer to this question based on the record is yes." C.Br. 27. In fact, the record supplies the precise opposite answer: There is no way for a judge tasked with sentencing a late adolescent to reliably predict whether that particular person is "irretrievably depraved."

The only testimony that was directly responsive to this question came from Dr. Robert Kinscherff, a forensic psychologist with expertise in adolescent development and recidivism risk analysis. Dr. Kinscherff first discussed the data showing that the large majority of people who commit even serious crimes will desist from criminality once they reach their early to mid-twenties (RK 29), a point with which all four experts agreed (LS 35-36, 67, 107; AG 112; SM 107), and which the Commonwealth acknowledges "is widely accepted, is universal and demonstrates that criminal behavior peaks for individuals somewhere around 17-22 and then substantially moderates and drops off." C. Br. at 38. Dr. Kinscherff then explained that one cannot predict "in any kind of reliable way" that an individual adolescent offender is going to be a rare "life-course persistent offender" (RK 46). "I would not try to look at somebody at 18 and say this is a person who's still going to be offending in prison when they're 30, 40 or 50. We simply don't have the scientific ability to do that on anything like a reliable basis" (RK 47). And he is not alone in this belief: Among forensic psychologists who are "most immersed in the research literature" and are "leaders and teachers in

this field," there is a consensus that "one should not do long-term risk prediction for late adolescent homicide offenders" (RK 48).

Based on this record evidence, Judge Ullmann found that "forensic psychologists have reduced their preparation of and reliance on long-term risk assessments of criminal defendants who commit violent crimes in their late teens and early 20s because of the reduced utility of such studies" (Add. 91). "Reduced utility" is perhaps an understated way of characterizing Dr. Kinscherff's uncontroverted testimony that this long-term risk prediction cannot be made "in any kind of reliable way" at this early stage of a person's life. But the point is the same: In the language of *Diatchenko*, it cannot be done "with integrity," "with confidence," or "with any reasonable degree of certainty."

In claiming that the record somehow supports its position that sentencing judges can reliably predict irretrievable depravity, the Commonwealth ignores Dr. Kinscherff's testimony, the supporting scientific research, and Judge Ullmann's finding regarding risk prediction. Nowhere in its discussion of the controlling question of whether judges can reliably predict irretrievable depravity does the

Commonwealth even mention Dr. Kinscherff's clear, undisputed testimony or Judge Ullmann's findings about risk prediction.

This Court should not similarly ignore this critical evidence and finding. Instead, as the retired judges who filed an amicus brief have "implore[d]," this Court should reject the Commonwealth's proposal to "burden sentencing judges with the impossible task of determining permanent incorrigibility for offenders who are, neurologically, the equivalent of juveniles." Brief of Amici Curiae Retired Massachusetts Judges, the Boston Bar Association, and the Massachusetts Bar Association in Support of Appellants at 21.

II. The Commonwealth erroneously focuses on the irrelevant phenomena of variability in brain development among late adolescents and brain functioning in different emotional contexts.

Rather than reckoning with the actual evidence and findings on the question of sentencing judges' ability to reliably predict irretrievable depravity, the Commonwealth focuses instead on evidence that is irrelevant to answering this question. Specifically, the Commonwealth rests its argument on the evidence that "brain maturation of those 18-21 is highly varied," both "amongst individuals" and "based on the emotional state of the individual." C.Br. 40. While these two phenomena

are true, they in no way answer the question of whether sentencing judges are more capable of reliably determining irretrievable depravity for late adolescents than they are for juveniles.

No one contests that brain maturation varies from one late adolescent to another. But as Dr. Galván explained, this variability "is in no way unique to late adolescents" (AG 251). "Individuals differences exist at every age, every age group" (AG 250). "Those individual differences exist for adolescents under the age of 18," as well as those over the age of eighteen (AG 250). Indeed, the Supreme Court recognized developmental variability among juveniles in *Roper v. Simmons*, 543 U.S. 551 (2005): "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, *some* under 18 have already attained a level of maturity some adults will never reach." *Id.* at 574 (emphasis added). The Commonwealth itself included this very quote in its brief, C.Br. 40, but rather than accepting the uncontroverted testimony that the individual variability between older adolescents is no different than that between younger adolescents, it instead tried to suggest the opposite: that individual variability in brain development provides a basis to

distinguish late adolescents from the younger cohort for whom LWOP is categorically barred. This claim is belied by the record.

Moreover, just as with younger adolescents, brain scan technology does not allow scientists to determine for older adolescents "precisely how developed [an] individual adolescent's brain is" (AG 56). No neuroscientist, let alone sentencing judge, could make a reliable determination that a particular late adolescent has reached a level of brain maturation that renders him more adult than youth.

Nor does the earlier development of "cold cognition" change this analysis. While the evidence did show, and Judge Ullmann correctly found, that late adolescent brains function more like adults under circumstances of "cold cognition," this is also true for sixteen- and seventeen-year-olds, who comprise the vast majority of juveniles for whom LWOP was categorically barred in *Diatchenko*. As Dr. Steinberg testified and Judge Ullmann found, "the consensus" is that "cold cognition is mature by the age of 16," meaning that just like 18-, 19-, and 20-year-olds, "under conditions of cold cognition individuals who are 16 don't seem to show any more deficiencies in their logical

reasoning and information processing than adults do" (LS 155, 113; Add. 91).

In short, the Commonwealth is wrong when it claims that variation in brain development among late adolescents and variation in brain functioning during different emotional states "is in direct contrast to the characteristics of youth considered by the Supreme Court in *Miller* and the Supreme Judicial Court in *Diatchenko*." C.Br. 40. Because these same variations also exist for the *Diatchenko* cohort, they provide no principled basis to fashion a different remedy for late adolescents than for juveniles.

III. Whether a murder is committed with deliberate premeditation or under circumstances of hot cognition should not dictate whether a young person is sentenced to life with or without parole.

The Commonwealth suggests that a sentence of LWOP would be constitutional if the late adolescent "commit[ted] a premeditated murder in cold cognition and that his or her brain would have been functioning the same as an adult." C.Br. at 42. This Court should resist the invitation to adopt such a rule for several reasons.

First, a murder committed with deliberate premeditation and one committed under cold cognition are not coextensive. Under

Massachusetts law, "[d]eliberate premeditation does not require any particular length of time of reflection" and "may be formed over . . . even a few seconds," in contrast to the type of calm, calculated planning that could be indicative of cold cognition. Model Jury Instructions on Homicide at 46. Moreover, even if a person does engage in the type of contemplation or planning associated with cold cognition, the person might only go forward with the killing because he or she entered a state of emotional arousal, which Dr. Steinberg testified can occur in a matter of seconds (LS 155-156). Dr. Steinberg also explained that a host of factors can trigger hot cognition for late adolescents, including time pressure, various emotional circumstances, or simply being in the presence of peers (LS 157-159). It is surely the case that almost all premeditated murders committed by late adolescents occur in circumstances of hot cognition, whereas instances of cold cognition murders that meet the premeditation standard are vanishingly small. A rule that LWOP is permissible after a finding of deliberate premeditation would therefore sweep in many cases where the killing actually occurred under conditions of hot cognition.

Second, it is often impossible to accurately determine whether a killing occurred under conditions of hot or cold cognition. As Dr. Steinberg explained, a person can go into a state of hot cognition in a matter of seconds, a person can go in and out of hot cognition as circumstances change, and many factors can trigger hot cognition, including time pressure, emotional stimuli, and the presence of peers (LS 156-159). While it is possible to control these factors when conducting research in a laboratory setting, things are far messier outside the laboratory (LS 157). In many cases, it would be impossible for a sentencing judge to accurately determine whether the killing occurred during hot or cold cognition.

Third, this focus on culpability at the time of the crime is detached from the reason this Court found LWOP constitutionally intolerable for juveniles–the inability to determine at sentencing whether a young person may be capable of reform at some point before death or is permanently beyond redemption. In *Diatchenko*, this Court did not suggest that a person who commits murder in a particular way is more or less likely to remain incorrigible for life. In fact, in discussing why LWOP was categorically barred for juveniles, the Court stated that

"'children are constitutionally different from adults for purposes of sentencing,' *irrespective of the specific crimes that they have committed*." 466 Mass. at 670 (emphasis added) (quoting *Miller*, 567 U.S. at 461). Nor is there any basis in the record to conclude that the manner in which a crime is committed is predictive of long-term prospects for reform. This Court should not abandon its approach in *Diatchenko* by now finding that a judge can constitutionally sentence a young person to die in prison based on that judge's assessment of whether that youth committed murder with cold or hot cognition.

Finally, if sentencing a young person to LWOP depends on whether that person committed murder during circumstances of hot cognition, the Sixth Amendment would require that a jury make that finding beyond a reasonable doubt. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the U.S. Supreme Court held that "facts that increase the prescribed range of penalties to which a defendant is exposed" are elements of the crime such that the Sixth Amendment demands those facts be proven to a jury beyond a reasonable doubt. *Id.* at 490, 484. In *Alleyne v. United States*, 570 U.S. 99 (2013), the Court found that this principle applies to "a fact triggering a mandatory minimum" or one

that establishes "the floor of a sentencing range." *Id.* at 112. The Commonwealth's proposed approach would render imposition of life without parole (a sentence with no floor that mandates serving one's entire life in prison), as opposed to life with parole eligibility (a sentence with a specific floor), dependent on a factual finding about how the crime was committed. See *Jones v. Mississippi*, 141 S. Ct. 1307, 1316 n. 3 (2021) (recognizing that a rule establishing "a factual prerequisite to a life-without-parole sentence . . . might require that a jury, not a judge, make such a finding" under its Sixth Amendment precedent). This Court should avoid that constitutional morass by adhering to the wise approach it took in *Diatchenko*.

IV. Under *Diatchenko*, the Court's analysis must focus on the proportionality between the penalty and the offender.

In his amicus brief, the Eastern District Attorney (EDA) urges this Court to strictly apply the tripartite analysis set forth in *Cepulonis v. Commonwealth*, 384 Mass. 495, 497 (1981), an analysis that places emphasis on proportionality between the offense and the penalty imposed (EDA Amicus Br. at 15-17). In making this argument, the EDA fails to account for the reasoning of *Diatchenko*, the controlling precedent in this case. Under *Diatchenko*, the relevant measure is

proportionality between the *offender* and the punishment, not between the *offense* and the punishment.

On direct appeal in 1982, Gregory Diatchenko first challenged the constitutionality of his LWOP sentence, arguing that it "contravene[d] modern standards of decency." *Commonwealth v. Diatchenko*, 387 Mass. 718, 722 (1982). This Court applied the three-part *Cepulonis* test and rejected his challenge. The Court emphasized the severity of Diatchenko's crime, noting that he "was convicted of the most severe crime possible" and holding that his youth "alone does not justify invalidating the Legislature's choice of punishment for murder in the first degree." *Id.* at 725. The Court again relied on the severity of the crime when applying "the second prong of the disproportionality test," finding that this prong could not "even be applied in this case because there are no crimes more serious than that committed by the defendant." *Id.* at 726.

Thirty-one years later, the Court rejected its earlier mode of analysis when it found that Diatchenko's LWOP sentence, like those of all other juvenile offenders, violated art. 26. The Court recognized that he had been convicted of the most serious offense possible but, in

contrast to its 1982 decision, found that his LWOP sentence was disproportionate based on his age at the time of the offense. The Court explained that LWOP "for the commission of murder in the first degree by a juvenile under the age of eighteen is disproportionate not with respect to the offense itself, *but with regard to the particular offender*." *Diatchenko*, 466 Mass. at 669 (emphasis added). This decision was rooted in a line of cases, decided after *Cepulonis*, barring the imposition of the most severe sentences on certain classes of defendants, despite their commission of the most serious of offenses. See, e.g., *Roper*, 543 U.S. at 578 (prohibiting imposition of capital punishment against defendants who were younger than eighteen at time they committed murder); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (prohibiting death penalty for intellectually disabled people who commit murder).

Consistent with *Diatchenko*, this Court's analysis of the constitutionality of LWOP for late-adolescent offenders must focus on the proportionality between young people and their offenses. As the Supreme Court explained in *Roper*, it is imperative that "the brutality or cold-blooded nature of any particular crime [does not] overpower mitigating arguments based on youth." *Roper*, 543 U.S. at 573.

V. Accepting Mr. Mattis's position will not create instability in the law.

The EDA's amicus brief claims that "[w]hile the line sought now is 21, if the Court accepts the argument, that line promises to be a shifting one" (EDA Amicus Br. at 23). The EDA argues that this risk can be avoided by following the Supreme Court's approach in *Roper*, looking not solely to scientific research but also to "society's collective judgment about when the rights and responsibilities of adulthood should accrue." *Id.* at 21 (citation and internal quotation marks omitted). The EDA then contends that because "'[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,'" this Court should adhere to that constitutional cutoff for the imposition of LWOP in order to avoid an "ever shifting line" that threatens "the stability of the law." *Id.* at 20-21, 25 (quoting *Roper*, 543 U.S. at 574).

This is a straw-man argument, based on a mischaracterization of Mr. Mattis's position. Mr. Mattis does not claim that science alone should dictate this Court's constitutional analysis. Rather, consistent with *Diatchenko*, he merely asserts that the Court's analysis must be conducted "with current scientific evidence in mind." *Diatchenko*, 466 Mass. at 671. In decisions after *Diatchenko*, this Court recognized that

"[s]cientific and social science research on adolescent brain development and related issues continues" and that this on-going research should "inform [the Court's] understanding of constitutional sentencing as applied to youth." *Commonwealth v. Okoro*, 471 Mass. 51, 59-60 (2015). Indeed, the reason the Court remanded this case to the Superior Court was for "development of the record with regard to research on brain development after the age of seventeen" that would allow the Court "to come to an informed decision as to the constitutionality of sentencing young adults to life without the possibility of parole." *Commonwealth v. Watt*, 484 Mass. 742, 756 (2020). There can be no question that this Court's analysis of the constitutionality of LWOP imposed on late adolescents must be informed by science.

But Mr. Mattis does not contend that science alone is determinative. He agrees that the Court must also look to society's current and traditional line drawing between childhood and adulthood. Indeed, Mr. Mattis spent an entire section of his opening brief discussing the many areas where Massachusetts sets twenty-one, rather than eighteen, as the age when rights and responsibilities of adulthood accrue (Mattis Br. at 47-56). This is far from a new

phenomenon. Under the English common law, the age of majority was "twenty-one years," and "till that time [a person was considered] an infant, and so stiled in law." Blackstone, 1 *Commentaries on the Laws of England* 463 (St. George Tucker ed. 1803). Likewise, at the time of our nation's founding, the "term 'minor' or 'infant'—as those terms were historically understood—applied to persons under the age of 21, not only to persons under the age of 18." *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 201 (5th Cir. 2012), abrogated on other grounds by *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022). That tradition continued into the twentieth century, *id.*, and, as discussed in Mr. Mattis's opening brief, persists today for many purposes.

Thus, the question for this Court is whether the scientific record and judicial findings in this case support a constitutional cutoff for the imposition of LWOP at age eighteen, the line society draws between childhood and adulthood for some purposes, or twenty-one, both the common-law age of majority and the age when many other rights and responsibilities of adulthood now accrue. Mr. Mattis is not asking this Court to draw a random or arbitrary line. Rather, he asks this Court to

conduct the same kind of principled analysis the *Roper* Court conducted when it raised the constitutional cutoff for the imposition of the death penalty from age sixteen to age eighteen.

A ruling in Mr. Mattis's favor will not result in an ever-shifting line for the constitutional imposition of LWOP. Any future defendant seeking to push the cutoff beyond age twenty-one will face the challenge of pointing to that older age as a line society draws to demarcate adulthood. Perhaps one day, likely informed by science, society will establish twenty-two or twenty-five or some other age as the point when people acquire certain rights and responsibilities of adulthood. At that time, a defendant's claim to move the constitutional line for the permissible imposition of LWOP might be ripe. But we are not there and may never be. Instead, the sound scientific evidence presented here makes clear that the constitutional cutoff for when LWOP is permissible should be age twenty-one, the law's traditional age of majority and the age society presently recognizes as the cutoff for adulthood for many relevant purposes.

Conclusion

The Commonwealth's request that this Court ban mandatory LWOP but permit discretionary LWOP is untethered from the controlling constitutional precedent of *Diatchenko* and is in the teeth of the record and findings in this case. A faithful application of that precedent to the record and findings leads to the inescapable conclusion that even discretionary LWOP offends art. 26. Sentencing judges are not forensic soothsayers who can peer into the future and predict with reliability which late adolescents are "irretrievably depraved" and therefore deserving of death in prison. Any remedy that compels judges to conduct that kind of impossible fortune-telling is unconstitutional. This Court should hold that both mandatory and discretionary LWOP violate art. 26 when imposed on people who were eighteen, nineteen, or twenty years old at the time of their offenses.

Respectfully submitted,

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Certificate of Compliance

I, Ryan M. Schiff, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). I further certify that this brief was prepared using 14-point Century font using Microsoft Word and, according to Microsoft's wordcount tool, contains 3,648 words.

/s/ Ryan M. Schiff
Ryan M. Schiff

Certificate of Service

I, Ryan M. Schiff, hereby certify that I will cause the above brief to be served on all counsel of record in this case through the Massachusetts e-filing system.

/s/ Ryan M. Schiff
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