

**COMMONWEALTH OF MASSACHUSETTS**

**BERKSHIRE, ss.**

**SUPREME JUDICIAL COURT  
NO. SJC-13495**

**COMMONWEALTH OF MASSACHUSETTS**

**V.**

**QUASIM HASTINGS**

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**AMENDED BRIEF AND ADDENDUM FOR THE DEFENDANT  
ON APPEAL FROM JUDGMENTS OF THE BERKSHIRE  
SUPERIOR COURT**

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## **ISSUES PRESENTED**

- I. Whether Mr. Hastings who is indigent and has been appointed counsel for his parole hearing based on his recognized disability caused by a serious mental illness has a right to public funds in pursuant to G.L. c. 261, §27C, in order to obtain the reasonably necessary services of a social service advocate in order to accommodate his disability as required by law where there are no other available means to obtain such funding.
- II. Whether a mentally impaired defendant must be provided with the expert funds in order to protect his rights guaranteed by Article 114 of the Amendments to the Massachusetts Constitution and cognate statutory law not to be “excluded from participation in, denied the benefits of, or subject to discrimination under any program or activity within the Commonwealth” on account of his mental impairment.

## **STATEMENT OF THE CASE**

On March 12, 2004, Mr. Hastings pled guilty to second-degree murder in Berkshire Superior Court, in accordance with G.L. c. 265, §2, and was sentenced to a mandatory prison term of life with the possibility of parole after 15 years by Judge Curley, J., presiding. (R. 5).<sup>1</sup>

Mr. Hastings is statutorily eligible to be considered for release on parole under his sentence. See G.L. c. 127, §133A, as amended

<sup>1</sup> The Record Appendix is cited as “(R. )”. Impounded Record Appendix is cited as “(R.II).”



through St. 1996, c.43. Mr. Hastings has been diagnosed by the Department of Corrections (DOC) with Major Depressive Disorder with psychotic features, Antisocial Personality Disorder, Other Specified Trauma and Stressor-related Disorder, and Alcohol and Cannabis Disorders. (R.II 10).

On March 6, 2018, the Parole Board requested an appointment of counsel from the Committee for Public Counsel Services (CPCS) based on Hastings' mental health disability. Counsel was appointed on March 19, 2018. (R. 14-15).

On August 12, 2022, Mr. Hastings filed an ex parte motion for funds to obtain the services of a social services advocate in order to assist with his upcoming parole hearing. On September 22, 2022, Honorable Judge Wilkins, J., denied the motion after requesting and receiving a memorandum addressing the court's legal authority under G.L. c. 261, §27B. (R. 24-28).

On October 24, 2022, Mr. Hastings filed a motion for reconsideration and requested a hearing. On November 15, 2022, the court denied this motion after a hearing on November 4, 2022, but reported its denial to this Court under Mass. R. Civ. P. 64(a) and Mass. R. Crim. P. 34. (R. 29, 64).

On December 14, 2022, Mr. Hastings filed a motion to assent and joined the lower court's reporting of the legal issue in this case. (R. 71). Mr. Hastings' appeal was entered on the docket of the Appeals Court on February 2, 2023. On June 23, 2023, Mr. Hastings filed an Application for Direct Appellate Review which was supported by a letter from the Office of the Attorney General who intervened on behalf of the Parole Board. On September 20, 2023, Mr. Hastings' Application for Direct Appellate Review was allowed. Mr. Hastings' appeal was entered on the docket of this Court on September 21, 2023.

### **STATEMENT OF FACTS**

Mr. Hastings adopts the facts as set forth by the motion judge:

Mr. Hastings is indigent. He is eligible for parole consideration. He has received appointment of counsel in the parole proceeding because he requires the assistance of counsel due to mental illness or self-injurious behavior affecting his ability to communicate or participate in his parole proceedings. He is mentally disabled and has requested funds to ensure that he is not denied the opportunity for parole because of his disabilities. To support his request for parole he needs a comprehensive parole release plan that addresses his specific needs, including the need for intra-agency referrals, completion of psychosocial assessments and coordination of specialized residential care. A Social Services expert is necessary to prepare such a plan. Otherwise, the Parole Board may well lack the information needed to make a decision about his readiness to be in the community in light of his mental disability and psychological status, as well as to conclude that he has

presented a post-release plan that minimizes the probability of reoffense and shows a reasonable probability that he will live without violating the law. A person with sufficient funds would spend his or her own money for such a purpose when seeking release on parole.

The parole Board has no funding for expert evaluations. It lacks the administrative structure to pay a third-party vendor for such evaluations.

## **INTRODUCTION**

Mr. Hastings has a constitutional right to a parole hearing by having received a sentence that includes the right to a parole hearing. That right cannot be taken away without violating the constitutional prohibition on double jeopardy and ex post facto laws. Since Mr. Hastings is indigent and mentally disabled and this Court has already held that the Parole Board must accommodate parole petitioners' disabilities in the parole process by ensuring that disabled petitioners seeking parole have the assistance of experts needed; Crowell v. Mass. Parole Bd., 477 Mass. 106 (2017); and as in Diatchenko v. District Attorney for the Suffolk District, (Diatchenko II), 471 Mass. 12 (2015), the only mechanism for obtaining funds for the needed expert services is through G.L. c. 261 §§ 27B-27C; this Court should therefore hold that disabled people can obtain reasonable expert funds under §27C to assist them in relation to their parole hearings. Any other result would deprive Mr. Hastings and all other similarly situated people of their right to have their disabilities accommodated in the parole process.

## ARGUMENT

**I. WHETHER MR. HASTINGS WHO IS INDIGENT AND HAS BEEN APPOINTED COUNSEL FOR HIS PAROLE HEARING BASED ON HIS RECOGNIZED DISABILITY CAUSED BY A SERIOUS MENTAL ILLNESS HAS A RIGHT TO PUBLIC FUNDS IN PURSUANT TO G.L. C. 261, §27C, IN ORDER TO OBTAIN THE REASONABLY NECESSARY SERVICES OF A SOCIAL SERVICE ADVOCATE IN ORDER TO ACCOMMODATE HIS DISABILITY AS REQUIRED BY LAW WHERE THERE ARE NO OTHER AVAILABLE MEANS TO OBTAIN SUCH FUNDING.**

A. Standard Of Review.

When an appeal presents a pure issue of law, a de novo review is warranted. See Commonwealth v. Soto, 476 Mass. 436, 438 (2017). Where the motion judge took no evidence and decided what process was due to Mr. Hastings on a documentary record, this Court is "in as good a position as the judge below" to evaluate that record. See Barry v. Commonwealth, 390 Mass. 285, 289 (1983).

B. Contrary To The Assertion Of The Superior Court, Mr. Hastings Has A Constitutional Right To A Meaningful Access To A Parole Hearing.

Article I, §10, of the United States Constitution provides: "No state shall ... pass any ... ex post facto law." Article 24 of the Massachusetts Declaration of Rights states: "Laws made to punish for actions done before the existence of such laws, and which have not

been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.” This Court has interpreted the meaning and scope of the ex post facto clauses of the Federal and State Constitutions identically. See In re Dutil, 437 Mass. 9, 19 n. 8 (2002); Commonwealth v. Bruno, 432 Mass. 489, 492 n. 4 (2000). The 5<sup>th</sup> Amendment to the U.S. Constitution protects a defendant’s expectation of finality in his sentence under the prohibition against double jeopardy. See Aldoupolis v. Commonwealth, 386 Mass. 260, 274 (1982)(sentence is final judgment in a criminal case). In the case at bar, the prohibition on double jeopardy and ex post facto laws gives Mr. Hastings a constitutional right to a parole hearing.

In Diatchenko II, 471 Mass. at 28, this Court construed the indigency funds act (G. L. c. 261, §§ 27A-27G) to give Superior Court judges the authority “to allow for the payment of fees to an expert witness to assist” a person serving a life sentence for a juvenile offense in relation to parole proceedings where those funds are “reasonably necessary to protect the juvenile homicide offender’s meaningful opportunity for release.” In its decision and report in this case, the Superior Court distinguished Mr. Hastings’ case from

Diatchenko II on the grounds that people serving juvenile life sentences have a constitutional “right to a parole hearing,” while Mr. Hastings’ right to parole consideration merely “arises by statute.” (R. 67). According to the motion judge, the courts have no role in allocating necessary funds to disabled parole applicants because the Parole Board’s duty to accommodate disabilities “has nothing to do with the court’s sentence or constitutional constraints upon sentencing” but rather are part of the Board’s “purely executive function of considering whether to grant parole.” Id.

This attempt to distinguish the cases is entirely unavailing. While it is true that Mr. Hastings’ right to parole consideration arises by statute, it is not true that Mr. Hastings’ right to parole consideration arises only by statute. Once a sentence has been imposed in accordance with the statute mandating parole consideration, Mr. Hastings, and others like him, have a Federal and State constitutional right to parole consideration which cannot be taken away. Prohibition on double jeopardy will not allow it. See Fender v. Thompson, 883 F.2d 303, 305 (4th Cir.1989) (“parole eligibility is part of the law annexed to the crime at the time of a person's offense” [citation omitted]; Stewart v. Chairman of the Mass. Parole Bd., 35 Mass. App.

Ct. 843, 845 (1994). In fact, most recently, this Court upheld an illegal sentence based on double jeopardy grounds prohibiting the State from increasing a defendant's sentence once the defendant's reasonable expectation of finality in the imposed sentence has "crystallized." See Commonwealth v. Selavka, 469 Mass. 502, 513 (2014); Martin v. Commonwealth, 209 N.E. 3d 488, 492-493 (2023)("even an illegal sentence will, with the passage of time, acquire a finality that bars further punitive changes detrimental to the defendant," and that the Commonwealth will no longer be free to "shatter" the defendant's legitimate interest in repose).

Even if the Massachusetts Legislature decides to take away a defendant's right to parole consideration under the statute, G.L. c. 127, §133A, it cannot amend the statute retroactively because it would be in violation of ex post facto laws. The Supreme Court has deemed unconstitutional the retroactive application of parole laws where the increase in punishment is certain and demonstrable. See Lynce v. Mathis, 519 U.S. 433, 446-447 (1997). The United States Constitution and the Massachusetts Declaration of Rights provide protection from the operation of ex post facto laws. See Commonwealth v. Kelley, 411 Mass. 212, 214 (1991). See also Police

Dep't of Salem v. Sullivan, 460 Mass. 637, 644 n. 11 (2011) (“We interpret the ex post facto clause of the State Constitution to be coextensive with that of the Federal Constitution”). The ex post facto clause is intended to prohibit laws that “retroactively alter the definition of crimes or increase the punishment for criminal acts.” See Collins v. Youngblood, 497 U.S. 37, 43 (1990).

This Court has stated that “the controlling inquiry as to whether the retroactive application of a law affecting parole constitutes an ex post facto violation is whether such application ‘creates a significant risk of prolonging [an individual's] incarceration.’” See Clay v. Massachusetts Parole Bd., 475 Mass. 133, 136-137 (2016), quoting Garner v. Jones, 529 U.S. 244, 251 (2000). Also see art. I, §§ 9, 10, of the United States Constitution; art. 24 of the Massachusetts Declaration of Rights.

Therefore, the Superior Court was wrong about whether Mr. Hastings has a constitutional right to a parole hearing. Additionally, as explained in the next argument, Mr. Hastings is entitled to have a hearing before the Board that accommodates his uncontested mental disability which would include allowance of payment of fees to an



expert witness to assist in his parole proceeding just like his juvenile offender counterparts.

C. This Court Has Previously Construed G.L. C. 261, §§27A-27G To Authorize A Superior Court Judge To Allow Payment Of Fees To An Expert To Assist An Offender In Connection With His Or Her Parole Proceedings.

In Diatchenko II, 471 Mass. at 15, the single justice reported a question that, in pertinent part, asked whether in order to ensure a meaningful opportunity to obtain release, a juvenile homicide offender had the right to public funds in order to secure reasonably necessary expert assistance at their parole hearings. The Court answered in the affirmative, and construed G.L. c. 261, §§ 27A- 27G, to authorize Superior Court judges to allow payment of expert fees whenever such expenditures are necessary to guarantee meaningful access to “postconviction procedures.” See Diatchenko II, 471 Mass. at 26-27; Commonwealth v. Conceicao, 388 Mass. 255, 261-262 (1983).

While, this Court’s holding in Diatchenko II about access to expert funds did not apply to any other class of offenders beyond people serving life sentences for juvenile offenses, there is no good reason that the holding should not also apply to disabled parole applicants who need expert assistance to ensure that they are not excluded from the benefits of parole “by reason of [their] disability.”

See Crowell, 477 Mass. at 112. In Crowell, the Court held that under both the parole statute, G. L. c. 127, §130 and the American with Disabilities Act (“ADA”), the Parole Board must take reasonable measures to accommodate prisoners with disabilities. The Court specifically noted that when “the board is aware that a mental disability may affect a prisoner’s ability to prepare an appropriate release plan in advance of a parole hearing” the Board must accommodate that disability “by providing an expert or other assistance to help the prisoner identify appropriate postrelease programming.” Id.

This Court has a simple way to solve the problem of how to ensure that disabled people have the experts they need to accommodate their disabilities during the parole process. Since the Court has already construed that statutory scheme to permit the authorization of expert funds for juvenile homicide offenders serving life sentences is in pursuant to G.L. c. 261, §27C. And as argued supra, Mr. Hastings’ constitutional right to parole consideration is no different than his juvenile offender counterpart. Thus, all this Court needs to do is extend its holding in Diatchenko II to permit disabled people to seek needed funds under G.L. c. 261, §§ 27A- 27G.

Especially, where the holding in Diatchenko II, did not only rest on juvenile lifers' protected status but also on the "premise" that judges have the discretion to authorize the payment of expert fees under G.L. c. 261, §§27A-G, whenever such expenditures are necessary to guarantee meaningful access to "postconviction procedures." 471 Mass. at 26-27 & n. 27.

In the case at bar, Mr. Hastings who was two months past his 18<sup>th</sup> birthday at the time of his offense was determined by the Parole Board to be mentally disabled. The Board attempted to fulfil its obligation under the mandate of Crowell and ADA by requesting that the Committee for Public Counsel Services assign counsel to assist Mr. Hastings with his upcoming parole proceedings. (R. 14). This accommodation, however, will be meaningless if Mr. Hastings' counsel is not able to seek the expert assistance needed to prepare a proper parole release plan that accommodates Mr. Hastings' disability. See Commonwealth v. Patton, 458 Mass. 119, 128 (2010).

**II. A MENTALLY IMPAIRED DEFENDANT MUST BE PROVIDED WITH THE EXPERT FUNDS IN ORDER TO PROTECT HIS RIGHTS GUARANTEED BY ARTICLE 114 OF THE AMENDMENTS TO THE MASSACHUSETTS CONSTITUTION AND COGNATE STATUTORY LAW NOT TO BE “EXCLUDED FROM PARTICIPATION IN, DENIED THE BENEFITS OF, OR SUBJECT TO DISCRIMINATION UNDER ANY PROGRAM OR ACTIVITY WITHIN THE COMMONWEALTH” ON ACCOUNT OF HIS MENTAL IMPAIRMENT.**

A. Standard Of Review.

As stated previously, where the motion judge took no evidence and decided what process was due to Mr. Hastings on a documentary record, this Court is "in as good a position as the judge below" to evaluate that record. See Barry v. Commonwealth, *supra*. An erroneous denial of the "minimum requirements of due process" is reviewed for harmlessness beyond a reasonable doubt. See Commonwealth v. Kelsey, 464 Mass. 315, 319 (2013).

B. Mr. Hastings Is Protected Against Disability-Based Discrimination And Entitled To Proper Accommodation For His Disability In The Parole Process.

This Court has held that Article 114 of the Amendments to the Massachusetts Constitution, G.L. c. 93, §103, and the Americans with Disabilities Act, 42 U.S.C. §§12101 et seq. (ADA), each “prohibit the same conduct: disabled persons may not be excluded from

participation in or be denied the benefits of services, programs, or activities [of a public entity], and they may not be subjected to discrimination.” See Crowell, 477 Mass. at 112(both the ADA and the parole statute require the Parole Board to “take some measures to accommodate prisoners with disabilities”).

This Court made clear that these required accommodations can include providing expert services to help the disabled person develop a viable parole plan: “Where the board is aware that a mental disability may affect a prisoner’s ability to prepare an appropriate release plan in advance of a parole hearing, the board should make reasonable modifications to its policy, for example, by providing an expert or other assistance to help the prisoner identify appropriate postrelease programming.” Id.

Here, the Superior Court found that Mr. Hastings is disabled,<sup>2</sup> and that this exact kind of expert services were necessary to accommodate his disability. (R. 65). Mr. Hastings has been diagnosed by the DOC as suffering from a major depressive

<sup>2</sup> A “disability” for these purposes is “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” See Shedlock v. Department of Correction, 442 Mass. 844, 849 (2004), quoting 42 U.S.C. § 12102(2).

disorder with psychotic features along with other disorders that meet the “regulatory criteria” of a “mental illness.” He has been moved by the DOC to the unit within Old Colony Correction Center designated for the treatment of mentally ill prisoners. The Parole Board has concluded that, as a result of his “mental illness,” Mr. Hastings requires the assistance of counsel at his parole proceedings. Thus, Mr. Hastings has, or has been regarded as having an established record of having a qualifying mental impairment and is entitled to a parole hearing that affords him the protections of Article 114, G.L. c. 93, §106, and the ADA. See Crowell, 477 Mass. at 111 & n.10 (State entities that determine whether to grant or revoke parole must “[e]nsure that people with mental health disabilities . . . have an equal opportunity to participate in and benefit from the entities’ programs, services, and activities”) (citation omitted).

The Parole Board, as the Superior Court acknowledges, “has no funding for expert evaluations.” (R. 67). In contrast to, say, the Sex Offender Registry Board’s statute, the Parole Board’s statute has no provision permitting it to authorize funds to a prospective parolee. And the Parole Board does not have the staff or funds to provide the services itself. (R. 56). The Parole Board recognizing its obligation

under the mandate of Crowell to ensure that prisoners with disability are not denied parole due to their disability, began referring such cases to CPCS for assignment of parole counsel, so counsel could procure the expert assistance needed to accommodate the prisoner's disability because such requests are the only practical way for the Board to fulfill its time-sensitive responsibility under art. 114 to accommodate the prisoner's disability. It is clear that in the wake of Crowell, the Parole Board and CPCS have worked collaboratively to put together a system that can protect the constitutional rights of disabled prisoners seeking parole and provide the Board with expert evaluations, reports, and testimony necessary for it to make reliable suitability determinations. (R. 14-15). The Parole Board considers the reports, evaluations, risk assessments, reentry plans, and testimony of experts so hired in deciding whether a disabled prisoner is suitable for parole. The expert information presented on behalf of disabled prisoners improve the Board's decision-making process, and that a mentally disabled lifer such as Mr. Hastings who does not present the Board with a current evaluation by a qualified mental health expert and a detailed reentry plan has no meaningful chance of receiving a positive parole vote.

Thus, the Superior Court erroneous conclusion that it lacked authority to grant the funds pursuant to G.L. c. 261, §§27B-27C created a legal conundrum where the Court recognized that the funds were necessary to accommodate Mr. Hastings' disability but left him with no vehicle to obtain the needed expert services. The system that has allowed for such reasonable accommodations by providing the appropriate expert funding should be endorsed by this Court by construing G.L. c. 261, §§ 27A-G to allow for expert funds for such disabled prisoners for whom the Parole Board, has an affirmative obligation to ensure compliance with their rights under art. 114, and art. 12 of Mass. Decl. of Rights.

C. The Requested Funds Are Necessary To Ensure That Mr. Hastings' Parole Hearing Comports With Due Process.

A hearing implicating an individual's liberty interests must be conducted in a manner that "comports with the requirements of due process." See Matter of Minor, 484 Mass. 295, 306 (2020). See also Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 535 (2014); Doe v. Massachusetts Parole Bd., 82 Mass. App. Ct. 851, 855 (2012). Sections 130 and 136 of Chapter 127 require that Mr. Hastings be provided with a hearing that "carefully and thoroughly" considers whether, if he is released on parole with appropriate conditions and



supervision, he “will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society.” However, in the absence of a comprehensive release plan addressing Mr. Hastings’ mental impairments and related mental health needs, the hearing to which Mr. Hastings is entitled cannot “carefully and thoroughly” assess whether he is suitable for parole.

The affidavits submitted in support of Mr. Hastings’ motion for funds establish that disabled lifers like Mr. Hastings regularly seek funds for expert assistance, that such motions until recently have almost always been allowed, (in fact Mr. Hastings two previous motions for funds for an expert psychologist had been allowed)(R. 16), that the Parole Board does not have the infrastructure to provide such funding, that the Parole Board considers the evaluations and testimony of experts so hired; including mental health professionals and social workers; in determining whether a prisoner is suitable for parole. (R. 56-57). No reasonable person in Mr. Hastings’ position who had the means would proceed without the expert assistance sought here, as held by the motion judge. (R. 65). Accordingly, basic principles of due process and equal protection, as guaranteed by the Fourteenth

Amendment to the United States Constitution and arts. 1, 10, and 12 of the Massachusetts Declaration of rights, require that the motions for funds be allowed under the statutory scheme currently set in place.

D. The Requested Funds Are Necessary To Ensure That Mr. Hastings Receives An Effective Assistance Of Counsel.

The Parole Board requested that CPCS assign counsel for Mr. Hastings based on its recognition that he has been diagnosed with mental disabilities affecting his capacity to communicate or participate meaningfully in his parole proceedings. (R. 14). Ensuring that Mr. Hastings is provided with the assistance of counsel under these circumstances is in accord with the Parole Board's own regulations, and is necessary to ensure "fundamental fairness." See 120 Code Mass. Regs, §300.08(2)(b)(permitting legal representation where prisoner may not understand the process or adequately communicate "because of a mental, psychiatric, medical, physical condition or language barrier"); compare Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)(due process requires assistance of counsel where board is aware that parolee may not be capable "of speaking effectively for himself" at parole proceeding). See also Diatchenko II, 471 Mass. at 23-24(assistance of counsel at parole proceedings

necessary where parole eligible prisoner “likely lack[s] the skills and resources to gather, analyze, and present” evidence demonstrating suitability for parole). Counsel as a conduit will need to procure necessary funds in order to take the Parole Board’s obligation to ensure a meaningful access by a disabled individual to parole proceeding to the finish line.

Equally as important is counsel’s duty to provide her client with effective assistance of counsel. Indeed, whenever there is a right to the assistance of counsel, “from whatever source,” that assistance must be “effective.” Commonwealth v. Patton, 458 Mass. 128. Given that Mr. Hastings has been diagnosed with suffering from mental illnesses, counsel must rely on the expertise of a forensic psychologist to not only assess and explain his mental illnesses, but also to be able to learn how to communicate with him in order to obtain necessary information from him to make effective representation to the Board explaining his institutional adjustment, benefits of programming, and the crime itself amongst other related matters. Counsel also needs the assistance of a social worker in order to identify Mr. Hastings’ needs upon release, available assistance in the community, and to devise an appropriate release plan in

accordance to his mental illness needs upon release. In Mr. Hastings' case, due to his complex needs, a viable release plan will require navigation of complicated intra-agency referrals, completion of appropriate application for services, and coordination of specialized residential care which is most appropriately handled by a qualified social worker. The assistance of counsel without the aid of needed experts will not only render assistance of counsel ineffective but also render the Parole Board's referral to CPCS for assignment of counsel meaningless and the proceedings before the Parole Board will violate the requirements of the Massachusetts parole statute, the ADA, and this Court's holding in Crowell because the Board would have no way to "carefully and thoroughly" determine whether there's a reasonable probability that if released on parole with appropriate conditions and supervision, Mr. Hastings "will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society."

### **CONCLUSION**

This Court should construe G.L. c. 261, §§27A-G to allow disabled incarcerated people to obtain expert funds that are reasonably

necessary to accommodate their disabilities in the parole process.

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\*\*\* IMPOUNDED PER G.L. c. 261, §§ 27A-27G \*\*\*

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT  
CRIMINAL NO. 0376CR00106

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COMMONWEALTH

V.

QUASIM HASTINGS

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**MEMORANDUM OF DECISION AND REPORT TO THE APPEALS COURT  
ON DEFENDANT’S MOTION FOR RECONSIDERATION  
OF THE DENIAL OF THE DEFENDANT’S MOTION FOR FUNDS**

The defendant, Quasim Hastings (“Hastings”) pled guilty to second degree Murder on March 12, 2004. He was sentenced to life in the state prison. G.L. c. 127, § 133A. On August 12, 2022, Hastings filed an ex parte motion for funds for an expert in his upcoming parole hearing. After requesting and receiving a memorandum addressing the court’s legal authority under G.L. c. 261, § 27B to grant funds for a parole hearing, the court endorsed that motion on September 22, 2022:

Endorsement on Memorandum of Law in Support of Quasim Hastings' Ex Parte Motion, (#39.0): Other action taken After review, denied. The Court's authority under G.L. c. 261, sec. 27B is limited to "any civil, criminal or juvenile proceeding or . . . appeal in any court." A parole hearing is not "in any court." While the defendant may have a constitutional right to funds, the obligation to provide those funds resides in the Parole Board or the executive agency or with the legislature. (Wilkins, J.)

On October 24, 2022, Hastings’ counsel filed “Defendant’s Ex-Parte Motion for Reconsideration of the Denial of the Defendant’s Motion for Funds,” (“Motion”) requesting a hearing. The court held an ex parte hearing by zoom on November 4, 2022. After hearing, the Motion is DENIED. Because the legal issue recurs frequently and requires appellate resolution, the court REPORTS

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ITS DENIAL TO THE APPEALS COURT UNDER MASS. R. CIV. P. and also, if the defendant consents, under Mass. R. Crim. P. 35.

### **FINDINGS OF FACT**

Mr. Hastings is indigent. He is eligible for parole consideration. He has received appointment of counsel in the parole proceeding because he requires the assistance of counsel due to mental illness or self-injurious behavior affecting his ability to communicate or participate in his parole proceedings. He is mentally disabled and has requested funds to ensure that he is not denied the opportunity for parole because of his disabilities. To support his request for parole he needs a comprehensive parole release plan that addresses his specific needs, including the need for intra-agency referrals, completion of psychosocial assessments and coordination of specialized residential care. A Social Services expert is necessary to prepare such a plan. Otherwise, the Parole Board may well lack the information needed to make a decision about his readiness to be in the community in light of his mental disability and psychological status, as well as to conclude that he has presented a post-release plan that minimizes the probability of reoffense and shows a reasonable probability that he will live without violating the law. A person with sufficient funds would spend his or her own money for such a purpose when seeking release on parole.

The Parole Board has no funding for expert evaluations. It lacks the administrative structure to pay a third-party vendor for such evaluations.

### **DISCUSSION**

Section 27B of G.L. c. 261 provides in relevant part:

Upon or after commencing or answering to any civil, criminal or juvenile proceeding or appeal **in any court**, including but not limited to civil actions, proceedings for divorce or separate support, summary and supplementary processes, and proceedings upon petitions to vacate, for review or, upon appeal in a criminal case, any party may file with the clerk



an affidavit of indigency and request for waiver, substitution or payment by the commonwealth of fees and costs upon a form prescribed by the chief justice of the supreme judicial court and in accordance with the standards set forth in sections twenty-seven C to twenty-seven F, inclusive, and sworn to under oath by the affiant. [Emphasis added].

The phrase “in any court” limits the authority to authorize payment by the Commonwealth. The Supreme Judicial Court “has held that G. L. c. 261, § 27C (4), provides ‘extra fees and costs,’ including funds for expert witnesses, [Note Omitted] only in the context of a ‘prosecution, defense or appeal.’” Diatchenko v. District Attorney for the Suffolk District, 471 Mass. 12, 26 (2015), citing Commonwealth v. Davis, 410 Mass. 680, 684 (1991). See also Commonwealth v. Arriaga, 438 Mass. 556, 569 (2003). In another administrative proceeding governed by due process requirements and addressing post-conviction consequences, the Supreme Judicial Court has also stated that G.L. c. 261, § 27A “refers solely to fees and costs connected to court proceedings.” Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 778-780 (2008). As the court noted in Diatchenko, 471 Mass. at 27, “these cases have generally addressed the availability of costs for indigent defendants pursuing nonconstitutionally mandated procedures.” The Defendant cites no general constitutional right to parole for adult offenders sentenced to life imprisonment, and the right to seek parole is statutory. G.L. c. 127, § 133A. Whatever the wisdom of the policy advocated by the Defendant in this case, this court is bound by the clear statutory language of G.L. c. 261, § 27B, as interpreted authoritatively by the Supreme Judicial Court.

The Supreme Judicial Court has recognized a constitutionally-based exception to this rule:

**Because the postconviction proceeding at issue here, a parole hearing for a juvenile homicide offender, is required in order to ensure that an offender's life sentence conforms to the proportionality requirements of art. 26, the proceeding is not available solely at the discretion of the State. Rather, it is constitutionally mandated, and**

as such, it requires certain protections not guaranteed in all postconviction procedures. It is appropriate, therefore, to construe G. L. c. 261, §§ 27A-27G, to authorize a Superior Court judge, upon motion of a parole-eligible, indigent juvenile homicide offender, to allow for the payment of fees to an expert witness to assist the offender in connection with his or her initial parole proceeding in certain limited contexts -- specifically, where it is shown that the juvenile offender requires an expert's assistance in order effectively to explain the effects of the individual's neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual's present capacity and future risk of reoffending. The judge may exercise discretion to do so when the judge concludes that the assistance of the expert is reasonably necessary to protect the juvenile homicide offender's meaningful opportunity for release.

Diatchenko, 471 Mass. at 27. The key rationale underlying this exception is the juvenile's right to a parole hearing arising out of a constitutional limitation on the court's authority to order a life sentence.

That is not the case here (assuming that the Supreme Judicial Court does not extend Diatchenko to defendants who just barely qualified as adults). In this case, the court imposed a life sentence for murder in the second degree. The defendant's right to parole consideration therefore arises by statute. G.L. c. 127, § 133A. That statute specifically delegates the authority over that parole proceeding and subsequent decision to "[t]he parole board." As the entity conducting the parole hearing, the Parole Board has the duty to accommodate the Defendant's disability. Crowell, 477 Mass. at 113 ("once the board became aware that the plaintiff's disability could potentially affect his ability to qualify for parole, it had the responsibility to determine whether reasonable modifications could enable the plaintiff to qualify, without changing the fundamental nature of parole."). This duty has nothing to do with the court's sentence or constitutional constraints upon sentencing. It affects the Parole Board at the time of exercising the purely executive function of considering whether to grant parole.

The fact that the Legislature and Parole Board had provided no statutory avenue for relief against the Executive does not require disregarding the plain language of G.L. s. 261, § 27B or

the controlling authority under that statute. Even if there is no statutory means of redress for violation of his state constitutional rights under Art. Amend. 114, Defendant may still have rights against the Parole Board and the Executive branch to access the funds he needs. See Layne v. Superintendent, Massachusetts Correctional Institution, Cedar Junction, 406 Mass. 156, 159-160 (1989). The court, however, has no authority to misread § 27B to accomplish that result.

Solely as a matter of statutory constraint, therefore, the court denies the request for funds under G.L. c. 261, § 27A-H. Without that statutory limitation, it would grant the Motion.

### **REPORT TO THE APPEALS COURT**

Mass. R. Civ. P. 64(a) appears to govern a report of the court's ruling on the Motion in this case. This conclusion is not entirely clear, however.

Though captioned as a motion in a criminal case, the Motion does not address any proceeding in, or relief available, from the criminal court. The leading authority, Diatchenko, arose in a civil action commenced in the Supreme Judicial Court for Suffolk County. See also Crowell v. Mass. Parole Board, 477 Mass. 106, 112 (2017). That case followed a long line of cases holding that the grant of parole "lies exclusively within the province of the executive branch" and that denial of parole is reviewable in a civil action in the nature of certiorari. Id., 471 Mass. at 28-30. If parole were denied improperly, due to the failure to accommodate the Defendant's disabilities, review would be by certiorari. See Crowell, 477 Mass. at 112.

Accordingly, the court reports the Denial of the Motion pursuant to Mass. R. Civ. P. 64(a) based upon the above findings of fact and, in the alternative finds that the order on the Motion so affects the merits of the controversy that the matter ought to be determined by the appeals court before any proceedings in this court.

Of course, the defendant could also consent to the report, in the event that Mass. R. Crim. P. 34 governs, or could appeal the denial pursuant to G.L. c. 261 § 27D. In either case, the question of the criminal or civil nature of the court's ruling would become moot.

The court believes that appellate resolution of this court's authority to authorize fees for experts in parole proceedings for adult defendants is highly desirable. It appears from Exhibit B to the Memorandum of Law in Support of the Defendant's Ex Parte Motion for Reconsideration (at ¶ 16) that at least 37 similar motions have been allowed, including an earlier motion in this very case. The Motion does not set forth the number of motions that have been denied, but, to the best of the court's recollection, the undersigned has denied one such motion in Middlesex County, which does not appear in the affidavit.<sup>1</sup> It is not surprising that there is no report of denials, because only allowances would result in paper trails of payments to experts.

#### **REQUEST FOR RELIEF PENDING APPEAL**

If the Defendant files a motion for relief pending appeal (Mass. R. App. 6(a), (b); G.L. c. 261, § 27D), the Court would seriously entertain a request to authorize the requested funds to be expended during the pendency of appeal. The Defendant's efforts for release on parole are highly time-sensitive, the loss of time in pursuit of parole is irreparable, and there is little burden on the Commonwealth, because the Treasury would almost certainly incur no net impact, where some agency of the Commonwealth likely has a duty to expend funds to accommodate the Defendant's disability during pursuit of his parole application.

#### **CONCLUSION**

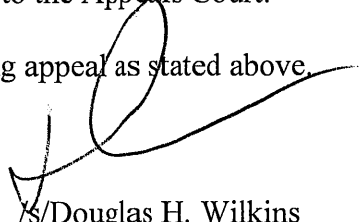
For the above reasons:

1. The court **DENIES** Defendant's Ex-Parte Motion for Reconsideration of the Denial of the Defendant's Motion for Funds.

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<sup>1</sup> It is not clear whether a different judge subsequently granted that motion in Middlesex.

2. The Court **REPORTS** the correctness of its ruling to the Appeals Court.
3. The Court will entertain a motion for relief pending appeal as stated above.



/s/Douglas H. Wilkins  
Douglas H. Wilkins,  
Justice of the Superior Court

Dated: November 15, 2022

**ENTERED**  
THE COMMONWEALTH OF MASSACHUSETTS  
BERKSHIRE S.S. SUPERIOR COURT  
**NOV 15 2022**  
*General Stanger*

## **UNITED STATES CONSTITUTION**

### **Fifth Amendment:**

No person shall \* \* \* be subject for the same offence to be twice put in jeopardy of life or limb; \* \* \*

### **Article I, Section 10**

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

## **MASSACHUSETTS DECLARATION OF RIGHTS**

### **Article Twenty-Four:**

Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

### **Article One-Hundred-Fourteen**

No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth.

## UNITED STATES CODE

### Title 42, Section 12101

#### (a) Findings

The Congress finds that—

- (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;
- (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
- (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
- (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
- (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
- (6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;
- (7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.



## STATUTORY PROVISIONS

### Chapter 93, Section 103

Any person within the commonwealth, regardless of handicap or age as defined in chapter one hundred and fifty-one B, shall, with reasonable accommodation, have the same rights as other persons to make and enforce contracts, inherit, purchase, lease, sell, hold and convey real and personal property, sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, including, but not limited to, the rights secured under Article CXIV of the Amendments to the Constitution.

### Chapter 127, Section 133A

Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth, except prisoners confined to the hospital at the Massachusetts Correctional Institution, Bridgewater, except prisoners serving a life sentence for murder in the first degree who had attained the age of 18 years at the time of the murder and except prisoners serving more than 1 life sentence arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, shall be eligible for parole at the expiration of the minimum term fixed by the court under section 24 of chapter 279.

### Chapter 261, Section 27C

(4) If the court makes a finding of indigency, it shall not deny any request with respect to normal fees and costs, and it shall not deny any request with respect to extra fees and costs if it finds the document, service or object is reasonably necessary to assure the applicant as effective a prosecution, defense or appeal as he would have if he were financially able to pay. The court shall not deny any request without first holding a hearing thereon; and if there is an appeal pursuant to section twenty-seven D following a denial, the court shall, within three days, set forth its written findings and reasons justifying such denial, which document shall be part of the record on appeal.

### Chapter 265, Section 2

€ 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.

## **MASSACHUSETTS RULES OF CIVIL PROCEDURE**

### **Rule 64**

- (a) Courts Other Than District Court. The court, after verdict or after a finding of facts under Rule 52, may report the case for determination by the appeals court. If the trial court is of opinion that an interlocutory finding or order made by it so affects the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in the trial court, it may report such matter, and may stay all further proceedings except such as are necessary to preserve the rights of the parties. The court, upon request of the parties, in any case where the parties agree in writing as to all the material facts, may report the case to the appeals court for determination without making any decision thereon. In an action commenced before a single justice of the supreme judicial court, the court may report the case in the circumstances above described to either the appeals court or the full supreme judicial court; provided further that a single justice of the supreme judicial court may at any time reserve any question of law for consideration by the full court, and shall report so much of the case as is necessary for understanding the question reserved.

## **MASSACHUSETTS RULES OF CRIMINAL PROCEDURE**

### **Rule 34**

If, prior to trial, or, with the consent of the defendant, after conviction of the defendant, a question of law arises which the trial judge determines is so important or doubtful as to require the decision of the Appeals Court, the judge may report the case so far as necessary to present the question of law arising therein. If the case is reported prior to trial, the case shall be continued for trial to await the decision of the Appeals Court.

## **COUNSEL'S CERTIFICATE OF COMPLIANCE**

I, Sharon Dehmand, do hereby certify that this brief complies with all rules of the 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 the brief, appendices, and other documents) by using proportionally spaced Times New Roman font size of 14, containing 4,376 non-excluded words utilizing Microsoft Office Word 2016.

/s/ Sharon Dehmand  
Attorney for Defendant

**COMMONWEALTH OF MASSACHUSETTS**

**BERKSHIRE, ss.**

**SUPREME JUDICIAL COURT  
NO. SJC-13495**

**COMMONWEALTH OF MASSACHUSETTS**

**V.**

**QUASIM HASTINGS**

**CERTIFICATE OF SERVICE**

I, Sharon Dehmand, counsel of record for the above- named appellant, depose and say as follows:

1. On October 11, 2023, I served a copy of the defendant's brief and record appendix electronically by e-service on Assistant Attorney General, Andre A. Janiszewski, at: [andre.a.janiszewski@mass.gov](mailto:andre.a.janiszewski@mass.gov)

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY  
THIS 11<sup>th</sup> DAY OF October 2023.

/s/ Sharon Dehmand

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