

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

HAMPDEN, ss.

SJC-12411

COMMONWEALTH OF MASSACHUSETTS

v.

MAKSIM LUTSKOV

**ON DIRECT APPELLATE REVIEW OF
AN ORDER OF THE HAMPDEN JUVENILE COURT**

**BRIEF OF *AMICUS CURIAE*,
THE BOSTON BAR ASSOCIATION**

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**CORPORATE DISCLOSURE STATEMENT OF
THE BOSTON BAR ASSOCIATION**

Pursuant to Supreme Judicial Court Rule 1:21(b)(i), the Boston Bar Association ("BBA") is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. The BBA is a bar association established almost 250 years ago and currently has nearly 13,000 members. There is no parent corporation or publicly-held corporation or publicly-held corporation that owns 10% or more of the BBA's stock.

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I. INTEREST OF AMICUS CURIAE

The Boston Bar Association ("BBA") was founded in 1761 by John Adams and other prominent Boston lawyers. It is the nation's oldest bar association. The BBA's mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. From its early beginnings, the BBA has served as a resource for the judicial, legislative, and executive branches of government. The BBA's diverse, member-driven leadership draws attorneys from all areas of the legal profession, including both prosecutors and criminal defense attorneys.

The BBA respectfully submits this brief pursuant to Mass. R. App. P. 17 and the Court's solicitation of amicus briefs to address the following issue:

Where the defendant was convicted, as a youthful offender, of armed home invasion and other offenses, whether his sentence of twenty years in the State prison (the mandatory minimum for armed home invasion) violates article 26 of the Declaration of Rights. See Diatchenko v. District Attorney for the Suffolk District, 466 Mass. 655 (2013), and Commonwealth v. Perez, 477 Mass. 677 (2017).

Commonwealth v. Maksim Lutskov, No. SJC-12411, Amicus Announcement (November 2017).

The BBA has been actively involved in sentencing reform since as early as 1991, when it assembled a joint Task Force with the Crime and Justice Foundation to examine the effects of mandatory minimum sentencing in the Commonwealth. See Boston Bar Association, The Crisis in Corrections and Sentencing on Massachusetts, Final Report (February 1991), available at <http://bit.ly/2BMbxhP>. The Task Force determined that mandatory minimum sentences threatened public safety, reduced fairness and proportionality in sentencing, and greatly contributed to overcrowding in the prison system. Id. at 27-29. The Task Force recommended repealing mandatory minimum sentences.¹

Since the 1991 Task Force report, the BBA has continued to advocate for the repeal of mandatory minimum sentences.² See Testimony of the Boston Bar Association Before the Joint Committee on the Judiciary in

¹ The Task Force did not at that time recommend abolishing mandatory minimum sentencing for first-degree murder. Id. at 28.

² See e.g., Boston Bar Association publications: "Myths of Mandatory Sentencing," June 23, 2011, available at <http://bit.ly/2sfNSCt>; "As We've Been Saying, Corrections Reform is Long Overdue," April 4, 2013, available at <http://bit.ly/2EaQQty>; "A Little Sanity in the Mandatory Minimum Sentencing Debate," August 15, 2013, available at <http://bit.ly/2nSsNbK>; "13 for '13," December 19, 2013, available at <http://bit.ly/2C3LwGh>.

Opposition to Mandatory Minimum Sentencing (June 9, 2015), available at <http://bit.ly/2Ebnk6P>.

The BBA also has a longstanding commitment to juvenile justice. In 1994, the BBA convened a Task Force to analyze the impact of major legislative changes intended to facilitate the transfer of juvenile cases to adult court. See Boston Bar Association, The Massachusetts Juvenile Justice System of the 1990s: Rethinking a National Model (1994), available at <http://bit.ly/2nMOjPT>.

In its report, the Task Force discussed the importance of treating children in the criminal justice system differently from adults. Id. at 2-4. Specifically, the Task Force determined that the legislative removal of discretion in certain transfer hearings, and the application of mandatory minimum sentences to juveniles, was antithetical to the concept of specialized rehabilitation for juveniles and weakened the integrity of the juvenile justice system:

The different treatment accorded youths in the juvenile justice system is justified in large part by the belief that children have far greater capacity to reform than adults. . . . The mandatory minimum sentencing provisions, however, gainsay the efficacy of treatment and the possibility of reform. They remove a juvenile's incentive to participate in the treatment process, and

make it far more likely that the positive effects of treatment the juvenile receives in the juvenile system will be subsequently undone in the state prison environment. Moreover, these sentencing provisions operate even though a court has made the determination, by retaining the youth in the juvenile justice system, that the youth, despite the offense he or she has committed, is amenable to treatment and should be treated.

Id. at 34-36.

More recently, in 2013, the BBA unanimously approved a set of juvenile justice principles, including that there be individualized, evidentiary sentencing hearings for all juveniles convicted of first-degree murder. See Boston Bar Association, "Juvenile Life Without Parole, Memo and Final Report," December 17, 2013, available at <http://bit.ly/2BKT3ht>. See also Boston Bar Association, "Juvenile Justice Through the Possibility of Parole," January 9, 2014, available at <http://bit.ly/2EcnDOS>.

As set forth more fully below, and consistent with its sustained involvement with issues of criminal justice and juvenile justice reform, the BBA urges this Court to find that the imposition of an adult mandatory minimum prison sentence on a juvenile adjudicated as a youthful offender, without first holding an individualized sentencing hearing, violates article

26 of the Massachusetts Declaration of Rights ("art. 26") because it does not allow for consideration of, among other factors, the special circumstances of the case, the youthful offender's diminished capacity, and his greater prospects for reform.³

II. STATEMENT OF THE CASE AND THE FACTS

The BBA adopts the statement of the case and statement of facts set forth in the brief filed by Defendant/Appellant Lutskov ("Lutskov Brief") to the limited extent the facts relate to the sole question raised by the amicus request and addressed in this brief and to the extent they detail the procedural history of this matter. However, the BBA takes no position as to any other factual issues raised in the Lutskov Brief.

III. SUMMARY OF THE ARGUMENT

Both federal and Massachusetts frameworks support the finding that art. 26 of the Massachusetts Declaration of Rights prohibits the application of adult mandatory minimum prison sentences on juveniles adjudicated

³ The BBA does not seek to be heard on the merits of Mr. Lutskov's waiver claim regarding the sufficiency of the evidence, on which the BBA takes no position.

cated as youthful offenders. See infra, pp. 6-10.

Where the Supreme Judicial Court has previously held that juveniles are constitutionally different from adults and require individual consideration at sentencing, art. 26's ban on cruel and unusual punishment prohibits the application of adult mandatory minimum prison sentences to juveniles without first conducting an individualized sentencing hearing to determine whether such a sentence is appropriate and proportional. See infra, pp. 10-13.

IV. ARGUMENT

- A. Under Both Federal And State Constitutional Frameworks, The Application Of Adult Mandatory Minimum Sentences To Juveniles Violates Article 26's Ban On Cruel And Unusual Punishment. To Guarantee That All Adult Sentences Applied To Juveniles Are Proportional, Juvenile Judges Must Conduct Individualized Sentencing Hearings, Taking Into Consideration The Factors Established In Miller v. Alabama, 567 U.S. 460 (2012), And Must Be Able To Exercise Discretion In Sentencing Based On Such Consideration.**

Applying recent federal and state constitutional precedents, and based on the facts and circumstances of this case, this Court should here find that discretion is required in all instances of juvenile sentencing and that the non-discretionary imposition of an adult mandatory minimum sentence on juvenile offenders

violates art. 26.

In a progression of cases, the United States Supreme Court has recognized that, “. . . children are constitutionally different from adults for purposes of sentencing.” Miller v. Alabama, 567 U.S. 460, 471 (2012). In Roper v. Simmons, 543 U.S. 551 (2005), the Court found that imposition of the death penalty on juveniles under the age of eighteen violated the Eighth Amendment’s prohibition against cruel and unusual punishment. In Graham v. Florida, 560 U.S. 348 (2010), the Court found that sentencing a juvenile offender to life without parole for a non-homicide crime violated the Eighth Amendment. In Miller, the Court found that the mandatory sentencing of a juvenile convicted of murder to life in prison without parole violated the Eighth Amendment. 567 U.S. at 479.

The SJC has described the impact of Miller on its own jurisprudence and analysis under art. 26. In Ditatchenko v. District for the Suffolk Dist., 466 Mass. 655 (2013), this Court held that the mandatory imposition of life without parole, on individuals under eighteen who had committed murder, violated art. 26’s prohibition against cruel and unusual punishment, and that even the discretionary imposition of such sen-

tence was unconstitutionally disproportionate when viewed in the context of the unique characteristics of juveniles.⁴ Summarizing the "Miller analysis of the Eighth Amendment landscape," which drew heavily from Roper, the Diatchenko court stated:

Relying on science, social science, and common sense, the Supreme Court in Miller pointed to three significant characteristics differentiating juveniles from adult offenders for the purposes of Eighth Amendment analysis. First, children demonstrate a "lack of maturity and an underdeveloped sense of responsibility' leading to recklessness, impulsivity, and heedless risk-taking." Second children "are more vulnerable . . . to negative influences and outside pressures, 'including from their family and peers; they have limited control over their own environment' [;] and [they] lack the ability to extricate themselves from horrific, crime-producing settings.'" In essence, these distinctive characteristics of youth which do not vary based on the nature of the crime committed, "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Miller, supra at 2465.

* * *

⁴ The SJC further held that, because Miller announced a "new rule" that did not clearly exist in precedent before Miller, Diatchenko and other similarly-situated juveniles serving life without parole were entitled to retroactive application of Miller's holding. 466 Mass. at 663-664. Similarly, should this Court conclude that its holding in this case establishes a "new rule" that did not clearly exist under prior case law, its holding should apply retroactively to Mr. Lutskov and other similarly-situated juveniles.

[T]he [Miller] Court said that, given the “diminished culpability” of juveniles and their “heightened capacity for change,” those occasions when juveniles will be sentenced to the “harshest possible penalty will be uncommon.” In any event, an individualized hearing must be held prior to the imposition of such a sentence so that a judge or jury can have the opportunity to consider mitigating evidence that would counsel against a sentence of life in prison without the possibility of parole.

Diatchenko, 466 Mass. at 660-661 (some internal citations omitted). Simply put, the Diatchenko court concluded, “It was not until Miller was decided that the sentencing of juvenile offenders fundamentally changed in a way that had not been dictated by then-existing precedent.” Id. at 664. Accord State v. Lyle, 854 N.W.2d 378, 398 (Iowa 2014) (“[T]he sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child’s categorically diminished culpability”).

This Court’s understanding of the “unique circumstances” of youth and its impact on juvenile sentencing has continued to evolve. In Commonwealth v. Brown, 466 Mass, 676 (2013), as in Commonwealth v. Okoro, 471 Mass. 51 (2015), this Court left “open for future consideration the broader question whether discretion is

constitutionally required in all instances of juvenile sentencing.'" 471 Mass. at 58, citing 466 Mass. at 688. While not answering that question directly, the Court in Commonwealth v. Perez found that,

[W]here a juvenile is sentenced for a non-murder offense or offenses and the aggregate time to be served prior to parole eligibility exceeds that applicable to a juvenile convicted of murder, the sentence cannot be reconciled with art. 26 unless, after a hearing on the factors articulated in [Miller, 567 U.S. at 477-478] (Miller hearing), the judge makes a finding that the circumstances warrant treating the juvenile more harshly for parole purposes than a juvenile convicted of murder.

477 Mass. 677, 679 (2017).

Returning to the case at bar and applying this constitutional framework, the BBA urges this Court to find that art. 26 prohibits the non-discretionary imposition of adult mandatory minimum sentences on juveniles adjudicated as youthful offenders without the trial court first holding an individualized Miller sentencing hearing.⁵

⁵ The BBA does not here argue that a juvenile court could never sentence a youthful offender to a term of prison equivalent to an adult mandatory minimum sentence. However, because the term "mandatory" implies a lack of discretion, the BBA urges this court to hold that a meaningful, individualized sentencing hearing is first required to ensure that the sentence imposed is proportional to the juvenile and the particular circumstances of the case. In other words, juvenile

This case presents an additional opportunity for the Court to set forth, with clarity, what is expected when judges when conduct a Miller-type sentencing hearing. This Court previously stated in Perez that such a hearing includes meaningful consideration and weighing of the following factors:

- (1) The particular attributes of the juvenile, including immaturity, impetuosity, and failure to appreciate risks and consequences;
- (2) The family and home environment that surrounds [the juvenile] from which he cannot usually extricate himself; and
- (3) The circumstances of the ... offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him.

Perez, 477 Mass. at 686 (internal quotation marks omitted). Most importantly, the record should clearly reflect, either orally or with written findings, that the sentencing judge considered these factors of youth as **mitigating** factors. Id. at 686-687.⁶ See also Mil-

courts must have discretion in every case to depart from the statutory mandatory minimum sentence, be it a downward or upward departure.

⁶ "[T]he judge expressly declined to consider the juvenile defendant's age as a mitigating factor, which, as we have said, is required in the circumstances of this case. [Perez's] counsel went to great lengths in emphasizing the juvenile's age, his family circumstanc-

ler, 567 U.S. at 472 (“Roper and Graham emphasized that the distinctive attributes of youth **diminish** the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes”) (emphasis added).

This procedure would ensure that the sentencing judge takes into account the youth of the juvenile and “the wealth of characteristics and circumstances attendant to it,” Id. 476, in order to craft proportional sentences that do not offend art. 26.⁷ See Perez, 477 Mass. at 683 (“The touchstone of art. 26's proscription against cruel or unusual punishment, however, remains proportionality”). By requiring such sen-

es, and the uncle's role in encouraging the juvenile's involvement in the offenses, factors that take on greater significance when, as here, a sentencing decision must be informed by a Miller hearing.” Id.

⁷ As demonstrated by the trial courts' own records, the imposition of this requirement for juveniles adjudicated as youthful offenders would not unduly burden the juvenile trial court system as youthful offenders comprise among the smallest classes of juvenile cases. According to statistics provided by the juvenile court, available at <http://bit.ly/2nVfebX>, the court reported only 151 youthful offender cases versus 8,648 delinquency cases in the 2017 fiscal year. Add. 1. The 2016 fiscal year saw 218 youthful offender cases versus 9,658 delinquency cases. Add. 2. The 2015 fiscal year saw 216 youthful offender cases versus 10,293 delinquency cases. Add. 3. The actual number of youthful offenders who are subject to adult sentences is estimated to be even lower than the overall number of youthful offenders.

tencing procedure under art. 26, this Court will further guarantee and ensure that our juvenile justice system reflects "contemporary standards of decency which mark the progress of society." Lyle, 466 Mass at 669 (citations omitted).

CONCLUSION

In the absence of meaningful consideration of the characteristics of youth derived from an individualized Miller-type sentencing hearing, and the ability to exercise judicial discretion based on that consideration, the imposition of adult mandatory minimum prison sentences on juveniles adjudicated as youthful offenders violates art. 26's prohibition against cruel and unusual punishment because it fails to ensure that such sentences are proportional.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I, Meredith Shih, hereby certify pursuant to Mass. R. App. P. 16(k) that this brief complies with the rules of court that pertain to the filing of briefs, including those required by Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 17, 18, & 20.

Meredith Shih

ADDENDUM

Massachusetts Trial Court Case Statistics,
Fiscal Year 2017..... Add. 1

Massachusetts Trial Court Case Statistics
Fiscal Year 2016..... Add. 2

Massachusetts Trial Court Case Statistics
Fiscal Year 2015..... Add. 3

Juvenile Court Department, Fiscal Year 2017 Filings by Case Type and Division

CASE TYPE	BARNSTABLE / TOWN OF PLYMOUTH										FRANKLIN / HAMPSHIRE										TOTAL
	BERKSHIRE	BRISTOL	ESSEX	HAMPDEN	MIDDLESEX	NORFOLK	PLYMOUTH	SUFFOLK	WORCESTER	BERKSHIRE	BRISTOL	ESSEX	HAMPDEN	MIDDLESEX	NORFOLK	PLYMOUTH	SUFFOLK	WORCESTER			
Adoption	36	37	101	84	52	49	48	26	34	67	130	664									
Adult Criminal	1	0	2	0	0	1	0	0	0	0	0	0	0	0	0	0	0	2			
Application for Complaint	669	368	1,649	1,709	393	1,410	1,982	812	706	1,649	1,828	13,175									
Care & Protection	168	123	388	349	182	530	374	128	165	434	621	3,462									
Child Requiring Assistance	218	191	606	862	78	350	812	272	242	1,031	726	5,388									
Contempt - Civil	0	1	0	1	0	5	0	0	2	2	2	13									
Contempt - Criminal	0	0	0	0	0	0	0	0	0	0	0	0									
Contributing to Delinquency	2	0	0	3	3	1	6	0	0	1	3	19									
Delinquency	442	262	1,025	1,547	238	1,012	1,233	447	418	963	1,061	8,648									
Equity	1	8	7	1	0	6	6	0	0	7	6	42									
Failure to Gause	0	10	76	11	5	48	43	6	4	129	68	400									
Guardianship	35	42	103	95	39	209	89	42	25	92	243	1,014									
Harassment	22	15	41	59	23	73	95	27	12	32	63	462									
Interstate Compact	0	0	2	2	1	1	1	1	1	2	2	13									
Mentally Ill Person	2	0	7	1	2	1	3	1	1	1	4	23									
Name Change	0	3	0	3	0	3	4	3	0	1	2	19									
Paternity/Support	19	13	57	34	13	57	30	23	24	40	71	381									
Substance Abuse	10	2	19	11	8	7	50	6	12	7	5	137									
Support	0	0	0	0	0	1	0	1	0	0	0	2									
Temporary Support	0	0	0	0	0	0	0	0	0	0	1	1									
Young Adult Permanency Hearings	18	29	23	85	19	47	73	25	22	81	41	463									
Youthful Offender	2	4	10	43	0	13	7	16	5	38	13	151									
Grand Total	1,645	1,108	4,116	4,900	1,056	3,824	4,856	1,836	1,673	4,577	4,892	34,483									

Juvenile Court Department, Fiscal Year 2016 Filings by Case Type and Division

CASE TYPE	BARNSTABLE / TOWN OF				FRANKLIN /										TOTAL
	PLYMOUTH	BERKSHIRE	BRISTOL	ESSEX	HAMP/SHIRE	HAMPDEN	MIDDLESEX	NORFOLK	PLYMOUTH	SUFFOLK	WORCESTER				
Adoption	27	40	117	69	37	70	62	34	39	51	135	681			
Adult Criminal	0	0	0	1	0	1	1	0	5	0	1	9			
Application for Complaint	723	417	1,600	2,124	348	1,600	1,929	869	727	2,034	2,048	14,419			
Care & Protection	196	153	443	411	159	552	389	150	189	518	695	3,855			
Child Requiring Assistance	212	205	632	962	68	356	837	224	266	1,210	740	5,712			
Contempt - Civil	0	4	2	2	0	2	1	0	0	0	5	16			
Contempt - Criminal	1	0	0	0	0	0	0	0	0	0	0	1			
Contributing to Delinquency	2	1	8	7	3	4	8	6	0	1	2	42			
Delinquency	453	303	997	1,913	221	1,174	1,234	508	462	1,198	1,195	9,658			
Equity	0	8	8	5	2	3	8	0	5	4	8	51			
Failure to Cause	0	5	57	12	1	32	51	4	5	110	91	368			
Guardianship	33	43	78	67	42	137	93	38	36	55	160	782			
Harassment	37	8	39	69	15	87	106	23	21	42	84	531			
Interstate Compact	0	1	1	2	0	3	0	0	0	4	1	12			
Mentally Ill Person	1	0	1	0	0	0	2	2	0	0	4	10			
Name Change	0	2	2	2	0	7	2	0	0	0	0	15			
Paternity/Support	10	18	76	37	10	44	31	15	21	43	55	360			
Substance Abuse	13	0	8	15	5	8	36	13	13	12	2	125			
Support	0	0	0	0	0	0	0	0	0	0	1	1			
Temporary Support	0	0	0	0	0	0	0	0	0	4	0	4			
Young Adult Permanency Hearings	31	10	29	79	12	47	64	18	11	50	50	401			
Youthful Offender	4	3	14	70	6	24	17	9	5	53	13	218			
Grand Total	1,743	1,221	4,112	5,847	929	4,151	4,871	1,913	1,805	5,389	5,290	37,271			

Add. 3

CaseType	Barnstable /Town of Plymouth	Berkshire	Bristol	Essex	Franklin / Hampshire	Hampden	Middlesex	Norfolk	Plymouth	Suffolk	Worcester	Grand Total
Adoption	27	39	92	52	27	70	62	25	45	63	104	606
Adult Criminal	2	0	2	3	0	0	0	0	1	0	5	13
Application for Complaint	727	412	1,726	2,040	385	1,627	1,927	886	847	2,303	2,162	15,042
Care & Protection	169	122	426	338	151	476	340	138	175	435	613	3,383
Child Requiring Assistance	247	201	596	981	81	376	929	258	311	1,243	913	6,136
Contempt - Civil	0	2	1	0	2	3	0	1	0	0	2	11
Contributing to Delinquency of Child	1	3	2	3	2	3	2	9	1	1	4	31
Delinquency	471	280	1,061	1,787	245	1,299	1,308	507	519	1,448	1,368	10,293
Equity	0	14	8	2	2	9	1	3	3	7	13	62
Failure to Cause	2	7	73	5	4	39	55	10	8	132	82	417
Guardianship	43	41	75	54	33	124	89	36	34	57	149	735
Harassment	24	18	33	52	18	78	83	13	8	51	65	443
Interstate Compact	1	1	2	3	0	1	3	0	2	1	2	16
Mentally Ill Person	3	0	2	2	0	0	2	1	2	1	1	14
Name Change	0	1	2	2	0	0	1	2	0	0	0	8
Paternity/Support	13	20	50	38	20	48	41	24	26	60	47	387
Substance Abuse	5	1	3	3	7	11	37	9	9	2	6	93
Support	0	0	0	0	0	0	0	4	0	0	0	4
Young Adult Permanency Hearings	23	25	96	90	30	62	149	42	27	104	138	786
Youthful Offender	3	7	31	49	8	28	18	11	8	39	14	216
Temporary Support	0	0	0	0	0	0	3	0	1	0	0	4
Grand Total	1,761	1,194	4,281	5,504	1,015	4,254	5,050	1,979	2,027	5,947	5,688	38,700