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## From Homicidal Youths to Reformed Adults: Parole Hearing Procedures for Juvenile Homicide Offenders in *Diatchenko v. District Attorney for the Suffolk District*

Paula Trahos  
*Boston College Law School*, paula.trahos@bc.edu

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**FROM HOMICIDAL YOUTHS TO  
REFORMED ADULTS: PAROLE HEARING  
PROCEDURES FOR JUVENILE  
HOMICIDE OFFENDERS IN *DIATCHENKO*  
v. *DISTRICT ATTORNEY FOR THE  
SUFFOLK DISTRICT***

PAULA TRAHOS\*

**Abstract:** In 2013, the Supreme Judicial Court of Massachusetts, following a United States Supreme Court case, *Miller v. Alabama*, held that all juvenile homicide offenders would have an opportunity for parole after serving fifteen years in prison. Subsequently, the Supreme Judicial Court of Massachusetts, in *Diatchenko v. District Attorney for the Suffolk District*, held that juvenile homicide offenders are entitled to representation by counsel at parole hearings, funds for expert witnesses, and can be granted judicial review of parole board decisions. The majority afforded these additional procedures with the intention of providing juvenile homicide offenders with a meaningful opportunity for release. The dissent argued that the majority overstepped their judicial boundaries and entered the executive realm by combining criminal sentencing with parole hearing procedures. This Comment argues that the majority appropriately granted juvenile homicide offenders parole hearing procedural protections.

INTRODUCTION

On May 9, 1981, seventeen-year-old Gregory Diatchenko stabbed Thomas Wharf to death near Kenmore Square in Boston.<sup>1</sup> A jury convicted Diatchenko of murder in the first degree and sentenced him to a mandatory term of life imprisonment without the possibility of parole.<sup>2</sup> Five years later, on July 29, 1986, Jeffrey Roberio, also seventeen, beat and strangled seventy-nine year old Lewis Jennings to death.<sup>3</sup> As with Diatchenko, a jury found Roberio guilty of murder in the first degree and sentenced him to life in prison without the possibility of parole.<sup>4</sup>

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\* Staff Writer, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE, 2015–2016.

<sup>1</sup> *Diatchenko v. Dist. Attorney for the Suffolk Dist. (Diatchenko II)*, 1 N.E.3d 270, 274 (Mass. 2013).

<sup>2</sup> *Id.*

<sup>3</sup> *See Commonwealth v. Roberio*, 700 N.E.2d 830, 831 (Mass. 1998).

<sup>4</sup> MASS. GEN. LAWS ch. 265, § 2(a) (2014) (requiring that a person found guilty of murder in the first degree shall be imprisoned for life and is not eligible for parole); *see Roberio*, 700 N.E.2d at 830.

Nearly thirty years after Diatchenko's and Roberio's convictions, the United States Supreme Court decided *Miller v. Alabama*, holding that sentencing a juvenile to life without parole is a violation of the Eighth Amendment's "prohibition on 'cruel and unusual punishments.'"<sup>5</sup> Consequently, Diatchenko filed a petition for post-conviction relief, seeking retroactive application of *Miller*; with the Supreme Judicial Court of Massachusetts ("*Diatchenko II*").<sup>6</sup> The court held that *Miller* had retroactive application for cases on collateral review and that sentencing juvenile homicide offenders to life without parole was an unconstitutionally disproportionate punishment in violation of article XXVI, part 1 of the Massachusetts Constitution's prohibition on "cruel or unusual punishments."<sup>7</sup>

The holding in *Diatchenko II* acknowledged that giving life without parole was a disproportionate punishment considering that the offense was committed by a juvenile, yet it left open the issue concerning how a juvenile homicide offender's opportunity for release on parole would be protected.<sup>8</sup> To ensure that their opportunity for release through parole would be meaningful, Diatchenko and Roberio filed petitions with the Supreme Judicial Court of Massachusetts ("*Diatchenko III*") arguing that access to counsel, funds for expert witnesses, and an opportunity for judicial review of the decision on their parole applications were necessary.<sup>9</sup> In *Diatchenko III*, the court's majority agreed and held that, given the significance of a mandatory life sentence to juvenile homicide offenders, the parole process takes on a constitutional liberty interest.<sup>10</sup> Thus, juvenile homicide offenders should have access to counsel, fees for expert witnesses, and judicial review of parole board decisions.<sup>11</sup> The dissent argued that, by imposing additional procedural protections on the parole process, the court usurped the executive power's regulation of parole hearings, incorporating it into the sentencing process.<sup>12</sup>

Part I of this Comment briefly summarizes the factual and procedural history of *Diatchenko III*. Part II discusses the reasoning of the majority in holding that parole hearings for juvenile homicide offenders require due

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<sup>5</sup> U.S. CONST. amend. VIII; see *Diatchenko II*, 1 N.E.3d at 275 (citing *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012)).

<sup>6</sup> See *Diatchenko II*, 1 N.E.3d at 275.

<sup>7</sup> MASS. CONST. art. XXVI; *Diatchenko v. Dist. Attorney for the Suffolk Dist. (Diatchenko III)*, 27 N.E.3d 349, 353 n.3 (Mass. 2015) (citing *Miller*, 132 S. Ct. at 2455) (explaining that the term "juvenile homicide offender" refers to a person who has been convicted of murder in the first degree and was under the age of eighteen at the time the murder was committed); see *Diatchenko II*, 1 N.E.3d at 280, 281.

<sup>8</sup> See *Diatchenko III*, 27 N.E.3d at 353; *Diatchenko II*, 1 N.E.3d at 284.

<sup>9</sup> See *Diatchenko III*, 27 N.E.3d at 353.

<sup>10</sup> See *id.* at 357.

<sup>11</sup> See *id.* at 353.

<sup>12</sup> See *id.* at 370 (Spina, J., dissenting).

process procedural protections in contrast to the dissent's opinion, which argued that parole is an executive action separate and distinct from a judicial sentence. Finally, Part III argues that the approach taken by the majority was appropriate given the inherent differences between juveniles and adults.

### I. JUVENILE HOMICIDE OFFENDERS AND THE PATH TO PAROLE

On the evening of May 9, 1981, Boston police officer Peter Jerome responded to a radio call at approximately 9:45 p.m. directing him to Kenmore Square.<sup>13</sup> Upon arriving, the officer found Thomas Wharf “unconscious and bleeding in the driver’s seat of a red Cadillac automobile.”<sup>14</sup> At trial the paramedic on the scene “described Wharf’s body as ‘filleted open’ . . . and when the paramedics opened the driver’s-side door, more blood poured from [the victim’s] chest onto the ground.”<sup>15</sup> At 10:40 p.m. Thomas Wharf was declared dead.<sup>16</sup> An autopsy showed that Wharf had “nine stab wounds, including one penetrating [his] left lung . . . and another piercing [his] heart.”<sup>17</sup> Three witnesses to the crime—Ronald Gray, Lori Pearlman and James Ryan—testified at trial.<sup>18</sup> At around 10:15 p.m. that night, while waiting at a public transportation stop, James Ryan saw a young light-haired man with a brown leather jacket walking away from the scene of the murder.<sup>19</sup> Mr. Ryan noticed that the boy had blood on his hand and, when he inquired about the blood, the boy responded by stating that “he had been in a fight and had stabbed someone approximately twenty times.”<sup>20</sup> Upon reading about the murder in the paper the next day, Mr. Ryan called the police and the police later obtained an arrest warrant.<sup>21</sup>

The jury found Diatchenko guilty of murder in the first degree, citing “deliberate premeditation and malice aforethought, extreme atrocity and

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<sup>13</sup> Commonwealth v. Diatchenko (*Diatchenko I*), 443 N.E.2d 397, 399 (Mass. 1982).

<sup>14</sup> *Id.*

<sup>15</sup> Beth Schwartzapfel, *Would You Let This Man Go Free?*, BOSTON MAG. (July 2014), <http://www.bostonmagazine.com/news/article/2014/07/22/let-free-greg-diatchenko/> [<https://perma.cc/K7F7-GMYR>].

<sup>16</sup> *Diatchenko I*, 443 N.E.2d at 399.

<sup>17</sup> *See id.* In addition, “[t]he right rear pocket of the victim’s pants had been ripped open.” *See id.*

<sup>18</sup> *See id.* “Ronald Gray testified that he saw [Diatchenko] alone on Hadassah Way near Park Square in Boston” at around 8:00 p.m. the night of the stabbing. *See id.* Lori Pearlman, whose living room “table was located next to an open window overlooking the alley where the stabbing occurred,” testified that she heard an individual yell a number of times: “Give me your money, you m\_\_ f\_\_.” *See id.* While on the phone with the police, Ms. Pearlman heard a car horn sound for five seconds and then saw a person with light hair and a brown leather jacket run away. *See id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

cruelty, and felony-murder.”<sup>22</sup> The judge imposed life imprisonment without the possibility of parole, a punishment required under Massachusetts Law.<sup>23</sup>

On July 29, 1986 Michael Eagles and seventeen-year-old Jeffrey Roberio visited the trailer home of seventy-nine year old Lewis Jennings.<sup>24</sup> The following day, Jennings body was found beaten with a blunt force object and strangled to death with his pillowcase.<sup>25</sup> An autopsy revealed that Jennings was alive when his “spine, several ribs, and bones in his neck were fractured.”<sup>26</sup> Personal property was stolen from the victim’s home, including money and a shotgun.<sup>27</sup> A jury found Roberio guilty of both murder in the first degree and armed robbery and, like Diatchenko, sentenced him to life in prison without the possibility of parole.<sup>28</sup>

Thirty years later, in 2012, the United States Supreme Court decided *Miller v. Alabama*, which held that the Eighth Amendment of the U.S. Constitution prohibits mandatory life in prison without the possibility of parole sentences for juvenile homicide offenders.<sup>29</sup> Following this decision, Diatchenko sought “retroactive application of [*Miller*’s] prohibition against mandatory life without parole sentences for juvenile offenders” by filing a petition for post-conviction relief with the Supreme Judicial Court of Massachusetts.<sup>30</sup> Diatchenko also “filed a petition in the county court . . . challenging the constitutionality of the sentencing scheme for murder in the first degree set forth in [the Massachusetts statute], as it applied to [his case].”<sup>31</sup> In addition, Diatchenko “sought a declaration that art[icle] 26 [of the Massachusetts Constitution] categorically bar[red] the imposition of a sentence of life without parole on offenders who were under the age of eighteen when they committed murder in the first degree.”<sup>32</sup>

The Supreme Judicial Court of Massachusetts in *Diatchenko II* granted Diatchenko’s petition for post-conviction relief, finding that a mandatory sentence of life in prison without parole for juvenile homicide offenders, set forth by chapter 265, section 2 of Massachusetts General Laws, violated article XXVI of the Massachusetts Constitution, which prohibits “cruel or

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<sup>22</sup> *Id.* at 400 (finding felony-murder because the perpetrators committed armed robbery in addition to the murder).

<sup>23</sup> See *Diatchenko I*, 443 N.E.2d at 400.

<sup>24</sup> See *Roberio*, 700 N.E.2d at 831.

<sup>25</sup> *Id.*

<sup>26</sup> See *id.* In addition, there were “numerous lacerations on [Jennings’s] right hand indicative of defensive wounds.” *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See *Roberio*, 700 N.E.2d at 831; *Diatchenko I*, 443 N.E.2d at 400.

<sup>29</sup> *Miller*, 132 S. Ct. at 2469.

<sup>30</sup> *Diatchenko II*, 1 N.E.3d at 270 (citing *Miller*, 132 S. Ct. at 2455); *Roberio*, 700 N.E.2d at 831.

<sup>31</sup> *Diatchenko II*, 1 N.E.3d at 275.

<sup>32</sup> MASS. CONST. art. XXVI; *Diatchenko II*, 1 N.E.3d at 275.

unusual punishments.”<sup>33</sup> Thus, the court created a fifteen-year parole eligibility exception applicable to juvenile homicide offenders.<sup>34</sup> The court based its finding on developmental psychology and neuroscience research that demonstrated fundamental differences between juvenile and adult brains, as well as the heightened capacity of juveniles for positive change and rehabilitation.<sup>35</sup>

As part of the decision in *Diatchenko II*, the Supreme Judicial Court remanded the case to the county court for further proceedings.<sup>36</sup> Diatchenko filed a motion to the single justice of the county board requesting funds to retain an expert for his parole board hearing.<sup>37</sup> Given Diatchenko’s county motion, the single judge reported multiple questions to the Supreme Judicial Court of Massachusetts asking whether access to counsel, funds for expert witnesses, and an opportunity for judicial review of the decision on Diatchenko and Roberio’s parole applications were crucial to ensure that their opportunity for release on parole would be protected and meaningful.<sup>38</sup> The Supreme Judicial Court of Massachusetts determined that, because a juvenile homicide offender’s meaningful opportunity to be released on parole is necessary for conforming to Eighth Amendment proportionality requirements, the parole process itself thus takes on a constitutional liberty interest

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<sup>33</sup> MASS. CONST. art. XXVI; MASS. GEN. LAWS ch. 265, § 2(a); see *Diatchenko II*, 1 N.E.3d at 276.

<sup>34</sup> See *Diatchenko III*, 27 N.E.3d at 354 (citing *Diatchenko II*, 1 N.E.3d at 270).

<sup>35</sup> See *Diatchenko II*, 1 N.E.3d at 282 (citing *Miller*, 132 S. Ct. at 2464–65, 2469, 2475).

<sup>36</sup> *Diatchenko III*, 27 N.E.3d at 354. The court in *Diatchenko II* remanded to the county court “with the direction to enter judgment consistent with the court’s opinion in the case and to ‘take such further action as is necessary and appropriate.’” *Id.*

<sup>37</sup> *Id.* (“On February 27, 2014, Diatchenko filed a motion for entry of a judgment that would include a number of orders of specific relief, and also filed a motion for funds to retain an expert in connection with his hearing before the board.”). The district attorney, chair of the board, and commissioner filed oppositions. See *id.*

<sup>38</sup> See *id.* at 354–55. After a hearing, the single justice reserved and reported two questions regarding Diatchenko’s case to the SJC. *Id.* at 354. Roberio was permitted to intervene in the Diatchenko case. *Id.* at 355. The single justice asked:

1. Whether, in order to ensure that the petitioner and other similarly situated juvenile homicide offenders receive the ‘meaningful opportunity to obtain release’ that is required by the court’s opinion [in *Diatchenko II*], they must be afforded:
  - (a) the right to assistance of counsel at their parole hearings, including the right to have counsel appointed if they are indigent; and
  - (b) the right to public funds, if they are indigent, in order to secure reasonably necessary expert assistance at the hearings.
2. Whether, in order to ensure that the petitioner and other similarly situated juvenile homicide offenders receive the ‘meaningful opportunity to obtain release’ that is required by the court’s opinion, there must be an opportunity for the petitioner or a similarly situated individual who is denied parole to obtain judicial review of the parole board’s decision, and if so, what form the judicial review will take.

*Id.* at 355.

in the form of access to counsel, funds for expert witnesses, and judicial review of parole decisions.<sup>39</sup>

## II. THE COURT'S DECISION TO ENSURE A MEANINGFUL PAROLE PROCESS FOR JUVENILE HOMICIDE OFFENDERS

The Supreme Judicial Court of Massachusetts (SJC) agreed in substance with Diatchenko and Roberio, finding that the petitioners and similarly situated juvenile homicide offenders should have access to counsel, access to funds for expert witnesses, and an opportunity for judicial review on parole decisions.<sup>40</sup> In evaluating the petitioners' claims, the court kept in mind constitutional proportionality and the importance of a juvenile homicide offender's access to a meaningful opportunity for release on parole.<sup>41</sup>

### A. Access to Counsel

The SJC held that, given the challenges involved for a juvenile homicide offender serving a mandatory life sentence, the opportunity for parole would not be meaningful without access to counsel.<sup>42</sup> The majority performed a two-step analysis.<sup>43</sup> First, the court considered the constitutionality of the parole process for juvenile homicide offenders.<sup>44</sup> Second, the court discussed the inability of juvenile homicide offenders to effectively advocate for themselves in parole hearings.<sup>45</sup>

The majority looked to precedent in the U.S. Supreme Court case *Graham v. Florida*, which held that a juvenile can never receive a sentence of life in prison without the possibility of parole for a non-homicide crime.<sup>46</sup> The Supreme Court also cited *Miller*, which observed that, under the Eighth Amendment, children are constitutionally different from adults because sentencing a juvenile homicide offender to life in prison without the possibility of parole is disproportionate to the crime given the neurological differences

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<sup>39</sup> *Id.* at 353, 357.

<sup>40</sup> Diatchenko v. Dist. Attorney for the Suffolk Dist., (*Diatchenko III*), 27 N.E.3d 349, 353 (Mass. 2015). The court in *Diatchenko III* "remanded [the case] to the county court, where the single justice will enter a judgment consistent with [*Diatchenko III*]." *Id.* at 368.

<sup>41</sup> *See id.* at 353. The court noted that constitutional proportionality means that the punishment of the offender should be proportional to the crime committed in accordance with the Eighth Amendment and article XXVI of the Massachusetts Constitution. *Id.* at 356 (citing *Diatchenko v. Dist. Attorney for the Suffolk Dist. (Diatchenko II)*, 1 N.E.3d 270, 270 (Mass. 2013)); *see* MASS. CONST. art. XXVI.

<sup>42</sup> *See Diatchenko III*, 27 N.E.3d at 361.

<sup>43</sup> *See id.* at 356–58, 360–61.

<sup>44</sup> *See id.* at 356–58.

<sup>45</sup> *See id.* at 360–61.

<sup>46</sup> *See id.* at 356, n.10; *Graham v. Florida*, 560 U.S. 48, 75 (2010).

between children and adults.<sup>47</sup> The court further noted the importance of the precedent in *Diatchenko II*'s holding that Diatchenko and similarly situated juvenile homicide offenders deserved a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."<sup>48</sup>

The majority reasoned that, "where the meaningful opportunity for release through parole is necessary in order to conform the juvenile homicide offender's mandatory life sentence to the requirements of [article XXVI of the Massachusetts Constitution], the parole process takes on a constitutional dimension [i.e. a liberty interest] that does not exist for other offenders whose sentences include parole eligibility."<sup>49</sup> Thus, given the protected liberty interest in juvenile homicide offender parole hearings, the court found that juvenile homicide offenders are entitled to procedural protections such as access to counsel.<sup>50</sup>

The court noted that, for any offender, the question facing the parole board is whether the inmate is "likely to reoffend."<sup>51</sup> The court acknowledged that a parole hearing for a juvenile homicide offender "involves complex and multifaceted issues that require the potential marshalling, presentation, and rebuttal of information derived from many sources."<sup>52</sup> Additionally, victims' families, which parole boards are particularly sympathetic to, and public officials, who are often stronger advocates than the juvenile offender, often contest parole hearings.<sup>53</sup> The court noted that juvenile homicide offenders generally "lack the skills and resources to gather, analyze, and present this evidence adequately" in their favor, thus their opportunity for release would only be meaningful if they had access to counsel.<sup>54</sup>

#### *B. Access to Funds for Expert Witnesses*

In addition to access to counsel, Diatchenko and Roberio argued that, in order to secure a meaningful opportunity for release as juvenile homicide offenders, they needed expert witnesses to provide opinions "concerning the

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<sup>47</sup> *Diatchenko III*, 27 N.E.3d at 356; see *Miller*, 132 S. Ct. at 2469; *Diatchenko II*, 1 N.E.3d at 282 (citing *Miller*, 132 S. Ct. at 2464–65, 2469, 2475).

<sup>48</sup> *Diatchenko III*, 27 N.E.3d at 356 (quoting *Diatchenko II*, 1 N.E.3d at 270).

<sup>49</sup> MASS. CONST. art. XXVI; *Diatchenko III*, 27 N.E.3d at 357. The court acknowledged that there is no constitutionally protected liberty interest in parole, but followed Supreme Court precedent that acknowledged that "a liberty interest in parole requiring at least some minimal due process rights may derive from language in a State's parole statute." *Diatchenko III*, 27 N.E.3d at 357 (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 7, 11–12 (1979)).

<sup>50</sup> See *Diatchenko III*, 27 N.E.3d at 358 (citing *Dep't of Pub. Welfare v. J.K.B.*, 393 N.E.2d 406, 408 (Mass. 1979)).

<sup>51</sup> *Id.* at 360.

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* at 360–61.

<sup>54</sup> *Id.*



relationship between neurobiological immaturity and culpability in general, as well as factors relating to each of their individual and family circumstances that may help both to explain past conduct and assess future risk of reoffending.”<sup>55</sup> The court agreed.<sup>56</sup> The majority opinion referenced the scientific research on adolescent brain development cited in *Diatchenko II* as support for the pivotal role an expert witness could play in regards to a juvenile homicide offender’s meaningful opportunity for release on parole.<sup>57</sup>

The majority noted that, given the liberty interest in post conviction proceedings of a juvenile homicide offender, due process procedures are necessary to ensure a meaningful opportunity for release on parole.<sup>58</sup> Thus, the court held that a Superior Court judge may grant the compensation of fees for expert witnesses to aid the offender in restricted contexts.<sup>59</sup> The judge may use his or her discretion to conclude that the “assistance of the expert is reasonably necessary to protect the juvenile homicide offender’s meaningful opportunity for release.”<sup>60</sup>

### C. Availability of Judicial Review

Judicial review of parole decisions for juvenile homicide offenders also became available as a result of the court’s decision in *Diatchenko III*.<sup>61</sup> The majority held that a parole decision may be brought under certiorari review in order to determine whether the parole board abused its discretion by failing to take into account attributes relevant to the juvenile homicide offender.<sup>62</sup> The court reasoned that judicial review of a parole decision is appropriate because it protects the juvenile homicide offender’s meaningful opportunity for release and provides a safeguard for constitutional proportionality between the juvenile homicide offender and the sentence.<sup>63</sup> Thus,

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<sup>55</sup> See *id.* at 361–62.

<sup>56</sup> See *id.* at 362.

<sup>57</sup> See *id.* “[S]cientific research on adolescent brain development has revealed ‘myriad significant ways that this development impacts a juvenile’s personality and behavior,’ some of which suggest decreased moral culpability for certain juvenile homicide offenders or indicate a greater potential for them to mature to a point where they no longer engage in the behaviors that led to their crimes.” See *id.* (quoting *Diatchenko I*, 1 N.E.3d at 284).

<sup>58</sup> See *Diatchenko III*, 27 N.E.3d at 363.

<sup>59</sup> See *id.* “Limited contexts” include situations where the “juvenile offender requires an expert’s assistance in order to effectively 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.” *Id.*

<sup>60</sup> *Id.* at 363–64.

<sup>61</sup> See *id.* at 365.

<sup>62</sup> See *id.* at 366 (“[I]f the judge concludes that the board’s consideration of the juvenile offender’s status as a juvenile and the distinctive attributes of his or her youth did constitute an abuse of discretion—was arbitrary and capricious—a remand to the board for rehearing would be appropriate.”).

<sup>63</sup> See *id.* at 365.

judicial review is available “solely to ensure that the board exercise[d]” its discretion in a constitutional manner.<sup>64</sup>

#### D. The Dissenting Opinion of Justice Spina

Justice Francis Spina criticized the majority for making *Diatchenko II* about a new liberty interest, as opposed to limiting *Diatchenko II* to the parole eligibility of juvenile homicide offenders.<sup>65</sup> He argued that *Diatchenko II* “respected juveniles’ constitutional distinctiveness from adults” by creating an exception in the sentence so as to not make it cruel or unusual, but that *Diatchenko III* overreached the judicial responsibility of sentencing and entered the executive duty to carry out the sentence by imposing additional procedural protections to the parole hearing process.<sup>66</sup> In support, Justice Spina noted that the majority cited to Supreme Court authority that “children are constitutionally different from adults for purposes of sentencing.”<sup>67</sup> Justice Spina explained that parole and sentencing are distinct.<sup>68</sup> He argued that the majority should not have created additional procedures in the parole process because children and adults should be treated differently solely for sentencing, not parole.<sup>69</sup>

### III. IMPLEMENTATION OF DUE PROCESS PROCEDURES FOR JUVENILE HOMICIDE OFFENDERS

In *Diatchenko II*, the court correctly interpreted *Miller* and held that juvenile homicide offenders must have an opportunity to be released on parole after fifteen years of incarceration.<sup>70</sup> In order for the decision in *Di-*

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<sup>64</sup> See *id.* “The question for the reviewing judge will be whether the board abused its discretion in the manner in which it considered and dealt with ‘the distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders,’ as they relate to the particular circumstances of the juvenile homicide offender seeking parole.” *Id.* at 366.

<sup>65</sup> See *id.* at 371 (Spina, J., dissenting).

<sup>66</sup> See *id.* at 369. Dissenting in accordance with Justice Spina, Justice Cordy noted that the majority intruded on what is a function of the executive branch—regulating the conduct of a parole hearing. See *id.* at 379. (Cordy, J., dissenting).

<sup>67</sup> See *id.* at 370 (Spina, J., dissenting) (quoting *Diatchenko II*, 1 N.E.3d at 286 (quoting *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012))).

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, (*Diatchenko III*), 27 N.E.3d 349, 354 (Mass. 2015) (citing *Diatchenko v. Dist. Attorney for the Suffolk Dist.* (*Diatchenko II*), 1 N.E.3d 270, 286–87. (Mass. 2013)). *Miller* held that, because children are constitutionally different from adults for purposes of sentencing, “juveniles convicted of murder in the first degree could no longer receive life sentences without the possibility of parole unless a court determined they were incorrigible.” See *Diatchenko III*, 27 N.E.3d at 368 (Spina, J., dissenting) (citing *Miller*, 132 S. Ct. at 2464).

*atchenko II* to be meaningful, the majority in *Diatchenko III* justly imposed additional procedures for juvenile parole hearings.<sup>71</sup> In contrast to the dissent's concerns about judicial activism, given the constitutional dimension of the parole process for juvenile homicide offenders, the court did not overstep the role of the executive branch in executing punishments, but instead the majority made a judicial ruling on what the procedural liberty interest in the parole process should entail.<sup>72</sup> In so doing, the court provided juvenile homicide offenders with additional procedures in the parole process, a natural extension of the sentencing determined by a judge.<sup>73</sup>

Adopting these additional due process procedures is critical to ensuring that a juvenile homicide offender's maturity and rehabilitation is properly demonstrated to a parole board.<sup>74</sup> As the majority emphasized, juvenile homicide offenders are particularly in need of such procedures because they are an at-risk population and are constitutionally different from adults.<sup>75</sup>

First, juvenile homicide offenders are an at risk population in need of the assistance of counsel during parole hearings because they are typically an indigent, powerless group that lack the knowledge and resources to collect and present the evidence necessary to contest the statements of victim's families and public officials that often oppose their parole application.<sup>76</sup> Thus, in order to ensure a meaningful chance of release on parole, juvenile homicide offenders need access to counsel to assist them in providing the evidence necessary to demonstrate their rehabilitation and ability to be a productive member of society.<sup>77</sup>

Second, advances in neurological science and common sense suggest that juvenile homicide offenders are distinct from adults and thus the Eighth Amendment's proportionality requirement should be applied to juveniles differently.<sup>78</sup> Juveniles lack the maturity to evaluate their responsibility to others and are more easily manipulated to conform to negative pressures in their community.<sup>79</sup> Thus, juvenile homicide offenders may have diminished culpability and are more likely to reform in comparison to adults because juvenile temperaments are fluid and their harmful actions are less likely to be "evidence of irremediabl[e] deprav[ity]."<sup>80</sup> Therefore, providing juvenile homicide offenders with funding for expert witnesses is crucial to their opportunity for

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<sup>71</sup> See *id.* at 353 (majority opinion).

<sup>72</sup> See *id.* at 357 n.12.

<sup>73</sup> See *id.*

<sup>74</sup> *Id.* at 358.

<sup>75</sup> See *id.* at 356.

<sup>76</sup> *Id.* at 360.

<sup>77</sup> See *id.* at 361.

<sup>78</sup> See *Diatchenko II*, 1 N.E.3d at 277 (citing *Miller*, 132 S. Ct. at 2465).

<sup>79</sup> See *id.*

<sup>80</sup> See *id.* (citing *Miller*, 132 S. Ct. at 2458).

meaningful release because expert witnesses have the knowledge and capacity to explain the neurobiological differences between juvenile and adult offenders, the future risk of reoffending, and how the circumstances of their environments may have contributed to their criminal conduct at the time.<sup>81</sup>

Lastly, an abuse of discretion judicial review standard provides a safeguard to ensure that the parole board considered “the distinctive attributes of youth that diminish the penological justifications for imposing [life sentences] on juvenile offenders.”<sup>82</sup> Implementation of judicial review makes certain that proportionality between the juvenile offender and the crime committed is properly evaluated to ensure a meaningful opportunity for release on parole.<sup>83</sup> Accordingly, the majority properly instituted access to counsel, access to funds for expert witnesses, and an opportunity for judicial review in parole decisions made on behalf of juvenile homicide offenders.<sup>84</sup>

### CONCLUSION

The Supreme Judicial Court of Massachusetts in *Diatchenko III* held that juvenile homicide offenders are entitled to (1) representation by counsel at parole hearings, (2) access to funds for expert witnesses in certain situations, and (3) an opportunity for judicial review on parole decisions. The majority’s decision in *Diatchenko III* correctly applied the judicial power to protect the liberty interest of juvenile homicide offenders by providing these additional procedural protections during the parole process.

Providing due process procedures for juvenile homicide offenders is a crucial step forward because members of this voiceless group now have a meaningful opportunity to prove their rehabilitation and reenter society. However, these procedural rights should also be extended to some adult offenders. By distinguishing juveniles from adults as the basis for finding a liberty interest in the parole process of juvenile homicide offenders, the court implies that such rights would not be extended to non-juvenile offenders if such a case were to be tried in front of the court. Nevertheless, *Diatchenko III* is a positive revelation that could lead to the court also consid-

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<sup>81</sup> See *Diatchenko III*, 27 N.E.3d at 361–62. In particular, the court acknowledged that access to expert opinion would be crucial to Roberio’s opportunity for release because, when Roberio was forty-four years old, a neuropsychologist conducted a physiological evaluation and found “that many of the neurobiological and behavioral challenges Roberio experienced in his teenage years had resolved,” thus an expert witness could “[explain] the path of [Roberio’s] apparent growth in cognitive and emotional maturity and its relationship to the question of whether he would be likely to reoffend if released on parole.” *Id.* at 362 n.23.

<sup>82</sup> *Id.* at 366 (citing *Miller*, 132 S. Ct. at 2465).

<sup>83</sup> See *id.* at 367.

<sup>84</sup> *Id.* at 353.

ering the liberty interests and rights for certain adult offenders sentenced to life with the possibility of parole.

*Diatchenko III* held that, for juvenile homicide offenders, the standard parole proceedings were not meaningful because of the challenges juvenile homicide offenders encounter when they attempt to advocate on their own behalf. However, the challenges discussed are not limited to juvenile homicide offenders; many adult offenders will “lack the [necessary] skills and resources” to navigate “complex and multifaceted issues” inherent to parole proceedings.<sup>85</sup> Although article XXVI of the Massachusetts Constitution and chapter 265, section 2 of the Massachusetts General Laws do not mandate parole availability for adult homicide offenders, it is unlikely that the Supreme Judicial Court of Massachusetts would agree that parole-eligible adults are not entitled to a meaningful parole hearing. Thus, the parole board should be required to offer additional procedures to offenders that can assist them in demonstrating any mitigating circumstances similar to those attributed to juvenile homicide offenders.

The court properly decided the case given the issue in front of them. Nevertheless, if the court is presented with a case of a non-juvenile offender that possesses mitigating circumstances similar to those of juveniles, it should hold that they too have a liberty interest in the parole process so that justifications for their release are properly presented to a parole board through additional procedural protections.

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<sup>85</sup> See *id.* at 360.