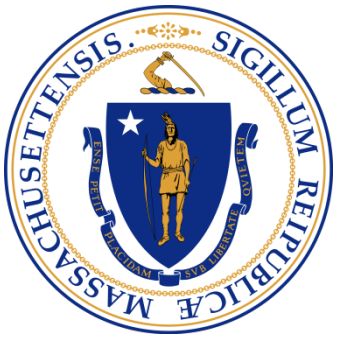
Report of the
Juvenile Life Sentence Commission



Presented to:
Clerks of the House and Senate; the House and Senate Committees on Ways and Means;
and the Joint Committee on the Judiciary

June 15, 2016

1. Introduction

In 2014, the Legislature created a commission "to study and determine the usefulness and practicality of creating a developmental evaluation process for all cases of first degree murder committed by a juvenile.[1] […] The evaluation process shall determine the developmental progress and abilities of the juvenile offender at the time of sentencing and at the time of parole eligibility and the Parole Board shall utilize the evaluation process to inform release decisions. In making recommendations, the commission shall establish factors to analyze in determining the developmental progress of a juvenile offender. […] The commission shall submit its report and findings, along with any drafts of legislation, to the house and senate committees on Ways and Means, the Joint Committee on the Judiciary and the Clerks of the Senate and the House of Representatives by December 31, 2014."[2]

To fulfill that Legislative mandate, Commission members hereby submit the following report that includes a brief history of Massachusetts' law and proceedings against juveniles charged with murder, the changing legal landscape arising out of recent Supreme Court and Supreme Judicial Court decisions, a review of current evaluative tools used by the Department of Correction and the Parole Board, and the Board's current criteria for parole release decisions when the offender was a juvenile at the time of the crime.

Based on the review contained herein, the Commission believes that current practice and procedures are sufficient such that the creation of a specialized evaluation process for all cases of murder committed by juveniles is not necessary

2. Membership

Secretary of Public Safety and Security Designee	Jennifer Queally *Undersecretary of Law Enforcement*
Executive Director of the MA Office of Victim Assistance Designee	Patrice Provitola *Deputy Director*
Commissioner of the Department of Mental Health Designee	Dr. Virginia Merritt *Department of Mental Health*
Chief Justice of the Trial Court Designee	Georgia Critsley* *Senior Manager of Intergovernmental Relations*

[1] Pursuant to G.L.c. 119, § 74, a juvenile between the ages of ages 14 and 18 who is charged with murder is proceeded against in the adult criminal court and subject to the adult penalties allowed by law.

[2] St. 2014, c. 189, § 7, An Act Expanding Juvenile Jurisdiction.

Chief Justice of the Juvenile Court Designee	Dr. Robert Kinscherff* *William James College*
Chief Counsel for the Committee for Public Counsel Services Designee	Barbara Kaban *Director of Juvenile Appeals*
MA District Attorneys Association Designee	Tara Maguire *Executive Director*
Senate President Designee	Senator Will Brownsberger
Senate Minority Leader	Senator Bruce Tarr
Speaker of the House Designee	Representative Chris Markey
House Minority Leader Designee	Representative Sheila Harrington
At least 2 people who specialize in child psychology and mental development, who shall be appointed by the Governor	Vacant

*In accordance with CJE Opinion No. 2014-4, "Serving on Statutory Commissions" (December 10, 2014), the designees from the Trial Court and Juvenile Court served the Commission in a limited, consulting role and did not take a position on the Commission's overall recommendations.

3. Juveniles Charged With Murder in Massachusetts - An historical perspective

Since 1996, a juvenile over the age of fourteen who is charged with murder is proceeded against as if he were an adult. Prior to the Supreme Court and Supreme Judicial Court decisions in *Miller* and *Diatchenko I,*[3] if the juvenile was convicted of murder in the first degree, the only sentence allowed by law was life imprisonment without the possibility of parole. If a juvenile was convicted of murder in the second degree, the mandatory sentence was life in prison, with the possibility of parole after fifteen years.[4]

Prior to 1996, before an adolescent could be subject to adult criminal proceedings, a judge sitting in a juvenile session had to relinquish jurisdiction of the case pursuant to the requirements of G.L. c. 119, §61 (transferring jurisdiction only after a judicial determination that the juvenile was dangerous and not amenable to rehabilitation in the juvenile justice system).[5]

[3] *Miller v. Alabama*, 132 S.Ct. 2455 (2012); *Diatchenko v. District Attorney for the Suffolk Dist.,* 466 Mass. 655 (2013) (hereinafter *Diatchenko I*).

[4] G.L.c. 265, § 2.

[5] Repealed, St.1996, c.200, § 7.

Counsel for juvenile offenders charged with murder typically provided detailed information to the juvenile court regarding the mitigating qualities of a particular youth as they advocated for retention in the juvenile justice system. Often both the prosecution and the defense presented expert testimony focusing on the juvenile's social history, cognitive functioning, mental health and other relevant factors as they argued for or against transfer. Consequently, this information became part of the court record. Once transfer was eliminated, such information no longer played a role in the court proceedings except in rare instances where issues of competency or criminal responsibility were raised.

From 1975 to 1991, if a juvenile court judge retained jurisdiction of the juvenile's case, the maximum penalty allowed by law was commitment to the Department of Youth Services until age 18.[6] If jurisdiction was transferred to the Superior Court, the mandatory penalty for murder in the first degree was a life sentence without the possibility of parole ("LWOP"). This system forced judges to make a sometimes difficult decision: retain jurisdiction, but have too brief a period of confinement to ensure rehabilitation, or transfer jurisdiction to the adult criminal court where the possibility of rehabilitation for the juvenile was no longer an issue for consideration.

In 1991, the Legislature amended the statutory scheme to address the disparity in sentencing options for juveniles convicted of murder.[7] A juvenile retained in the juvenile system and adjudicated delinquent by reason of murder in the first degree would face a maximum penalty of 20 years. If adjudicated delinquent for murder in the second degree, the juvenile would face a maximum penalty of fifteen years.[8] Juveniles prosecuted as adults continued to be subject to the mandatory LWOP sentence for murder in the first degree.

In 1996, the Legislature created a new category of juvenile offender, the youthful offender, eliminated transfer proceedings, and granted the Superior Court exclusive jurisdiction over juveniles fourteen or older who were charged with murder.[9] Accordingly, if convicted, juvenile offenders fourteen or older were subject to the mandatory adult penalties. This statutory scheme remained in effect until the recent court decisions in *Miller* and *Diatchenko*.

4. The Changing Legal Landscape

On June 25, 2012, in the case *of Miller v. Alabama*, the Supreme Court of the United States ruled that "mandatory life without parole for those under eighteen at the time of their crimes

[6] G.L.c. 120, §§ 16-18 allowed the Department of Youth Services to petition the court to extend the juvenile's commitment to age 21 based on a showing that the youth was dangerous to the public..

[7] St. 1991, c. 488, § 7.

[8] G.L.c. 119, § 72 (1992).

[9] St. 1996, c. 200.

violates the Eighth Amendment prohibition on cruel and unusual punishment."[10] On December 24, 2013, in *Diatchenko I*, the Supreme Judicial Court held that the *Miller* decision applies retroactively and imposed a categorical bar on the imposition of life without parole sentences for juveniles convicted of murder.[11]

Thus, *Miller* and *Diatchenko I* made substantive changes in our understanding of what constitutes unconstitutionally cruel and/or unusual punishment for juvenile offenders. Relying on research in adolescent brain development, cognitive functioning, social development, risk perception, impulse control, and the common course of criminal desistance for even high-risk juvenile offenders, the Court concluded that "children are different" from adult offenders and their developmental differences make children "constitutionally different from adults for purposes of sentencing."[12] The Supreme Court referenced scientific studies that documented the parts of the brain involved in behavior control that do not reach full maturity until age twenty-five[13] and concluded, "those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed."[14]

The Supreme Court concluded that before a life without parole sentence could be imposed on a juvenile offender, there must first be a hearing where the "judge or jury" considers the juvenile's "diminished culpability" by virtue of his immature, developmental status and imposes a proportionate punishment consonant with justice in light of the juvenile's potentially reduced blameworthiness and his "greater prospects for reform."[15] Further, the focus of any subsequent parole release hearing should be the individual's documented history while incarcerated in order to assess the prisoner's growth, maturity and rehabilitation as he transitioned from adolescence to adulthood behind prison walls.[16]

5. The *Miller* Factors

Acknowledging the expanding body of research in developmental psychology and neuroscience as well as juveniles' heightened capacity for rehabilitation, the Supreme Court concluded that

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[10] *Miller* v. *Alabama,* 132 S. Ct 2455 (2012).

[11] *Diatchenko*, supra 661-671; see also *Commonwealth v. Brown*, 466 Mass. 676 (2013).

[12] *Miller*, supra at 2464, 2469.

[13] *Miller*, supra at 2464, citing Brief for the American Psychological Association as Amici Curiae, 22-27 in *Graham* v. *Florida*, 560 U.S. 48, 68 (2010)

[14] *Id.* at 2464-2465 (internal quotations omitted).

[15] *Id*. at 2465, 2475..

[16] *Diatchenko*, supra at 674; *Graham*, supra at 75.

before a court could impose a life-without-parole sentence on a juvenile, the judge or jury must have the ability to consider the mitigating qualities of youth.[17] Therefore, the Court required the sentencing authority to consider, at a minimum, the following factors:[18]

- The juvenile's age at the time of the offense and its hallmark features - "immaturity, impetuosity and failure to appreciate risks and consequences";
- The juvenile's "family and home environment that surrounds [him] and from which he cannot usually extricate himself – no matter how brutal or dysfunctional";
- The "circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him";
- The possibility that the child may have been "charged and convicted of a lesser offense if not for the incompetencies associated with youth" – for example, the inability to deal with police officers or prosecutors (including on a plea agreement) or [the] incapacity to assist his own attorney which placed the juvenile at a significant disadvantage in criminal proceedings; and
- The possibility of rehabilitation - a child's sentence may not be imposed in a manner that "disregards the possibility of rehabilitation even when circumstances most suggest it."

These factors are consistent with statutory requirements that must be considered at the time of sentencing when a juvenile is adjudicated as a youthful offender.[19] In youthful offender proceedings, the Court has a wide range of sentencing options including: (i) commitment to the Department of Youth Services to age 21; (ii) commitment to the DYS to age 21 with an adult suspended sentence; or (iii) any adult sentence allowed by law.[20] To assist in the sentencing decision, the Legislature required the probation department to prepare a pre-sentencing report that addressed factors similar to the *Miller* factors outlined above, including: "the offender's age and maturity;" the juvenile's "history;" the juvenile's prior record and history of prior treatment; the circumstances of the offense; and "the likelihood of avoiding future criminal conduct."[21]

6. The Current Statutory Scheme

[17] *Miller,* supra at 2466.

[18] *Id*. at 2468.

[19] G.L.c. 119, § 58.

[20] G.L. c. 119, § 58.

[21] G.L. c. 119, § 58(c).

In 2014, the Massachusetts Legislature amended the statutory scheme as applied to juveniles charged with murder in the first degree:[22]

> In the case of a sentence of life imprisonment for murder in the first degree committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 20 years nor more than 30 years; provided, however, that in the case of a sentence of life imprisonment for murder in the first degree with extreme atrocity or cruelty committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of 30 years; and provided further, that in the case of a sentence of life imprisonment for murder in the first degree with deliberately premeditated malice aforethought committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 25 years nor more than 30 years.

The maximum sentence for murder in the second degree is life, but "the court shall fix a minimum term which shall be not less than 15 years nor more than 25 years."[23]

The 2014 amendments left in place the "direct-file provision," where a juvenile (fourteen or older) charged with murder is automatically proceeded against as if he or she is an adult in Superior Court. However, the current statutory scheme does provide for judicial discretion at sentencing when establishing the minimum term of years before parole eligibility. Thus, juveniles convicted of murder now have an opportunity to provide to the Court, at the time of sentencing, mitigating evidence about their psycho-social history, the nature of their involvement in the crime, and their capacity for change, in support of an argument for a lesser minimum sentence. Therefore, important developmental information about the juvenile will once again become part of the record.

In 2014, the Legislature also amended G.L. c. 119, § 72B, formally ending policies and practices that limited juvenile homicide offenders' access to educational or rehabilitative programs "solely because of the nature of their criminal convictions or the length of their sentences."[24] However, DOC had previously taken action to update the programming tracks of juvenile offenders after they were granted a parole eligibility date by way of *Diatchenko I*. Prior to the SJC decision,

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[22] G.L.c. 279, § 24.

[23] G.L.c. 279, § 24.

[24] *Commonwealth v. Okoro*, 471 Mass. 51, 62 (2015) citing G.L. c. 119, § 72B, as amended by St. 2014, c. 189, § 2 ("The department of correction shall not limit access to programming and treatment, including, but not limited to , education, substance abuse, anger management and vocational training for youthful offenders, as defined in section 52, solely because of their crimes or the duration of their incarcerations. If the youthful offender qualifies for placement in a minimum security correctional facility based on objective measures determined by the department, the placement shall not be categorically barred based on a life sentence.")

juvenile murderers were assessed and provided the same programming track as adult offenders serving LWOP–the "Low Track"–since DOC prioritizes programming by release date.

7. Parole Practices in Massachusetts

In 2013, the Supreme Judicial Court held that, under Article 26 parole eligibility was an essential component of a constitutional sentence for a juvenile homicide offender.[25] Article 26 does not guarantee eventual release, but does create an entitlement to a meaningful opportunity for such release based on demonstrated maturity and rehabilitation.[26] In *Diatchenko II,* the Court addressed the substantive procedural questions concerning how best to protect the entitlement to a meaningful opportunity for such release. The Court acknowledged that the parole process for juvenile homicide offenders "takes on a constitutional dimension that does not exist for other offenders whose sentences include parole eligibility"[27] and held that procedural protections, specifically the right to representation by counsel, the opportunity to obtain expert assistance, and limited judicial review, are essential to protect juveniles' constitutionally required meaningful opportunity for parole release.[28] The Court reiterated that juveniles are constitutionally different from adults, with "diminished culpability and greater prospects for reform" and enumerated the "Miller" factors in which the board has the responsibility to take into account in making its decision.

By statute, the board is required to determine an individual's suitability for parole based on whether there is a "reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society."[29] In its published *Guidelines for Life Sentence Decisions*, the Parole Board states, "an inmate who committed the offense as a juvenile will be evaluated with recognition of the distinctive attributes of youth, including immaturity, impetuosity, and a failure to appreciate risks and consequences." In reaching its decision, the Board is entitled to obtain significant amounts of information, including prior criminal history, nature and circumstances of the offense, information about the prisoner's physical, medical and psychiatric status; disciplinary reports; classification reports; work evaluations; records of educational achievements and program participation. As noted by the Court, such a parole hearing "involves complex and multifaceted issues that require the potential marshalling,

[25] *Diatchenko* I, supra at 671; *Diatchenko II*, supra at 29.

[26] *Diatchenko II*, supra at 30.

[27] *Diatchenko v. Dist. Att. for the Suffolk Dist*., 471 Mass.12. 19 (2015) (hereinafter *Diatchenko II*).

[28] *Id.* at 24-27.

[29] G.L. c.127, §130.

presentation, and rebuttal of information derived from many sources."[30] Accordingly, counsel for the juvenile offender may provide a detailed report, documenting the juvenile offender's social and cognitive history, as well as his progress while incarcerated. In addition, counsel may provide a re-entry plan, outlining possible living and work options for the offender. Finally, the Parole Board is required by statute to conduct a risk/needs assessment in the service of its release decision-making.[31]

8. Risk/Needs Assessment Tools

There is growing reliance on risk/needs assessment tools at multiple steps in the criminal justice system. The goal is to better inform decision-making about appropriate levels of intervention based on the offender's risk of re-offense and appropriate services to apply based on criminogenic needs. Historically, risk assessment techniques were divided into three categories: (1) unstructured clinical assessments; (2) actuarial assessments; and (3) structured professional judgment.[32] Research has shown that actuarial risk assessment and structured professional judgment are superior and less arbitrary than individual clinical assessment.[33]

Risk/needs assessment tools tabulate data derived from a variety of static and dynamic factors to arrive at an overall risk and needs assessment. Static factors are aspects of the offender's past that cannot be changed and, therefore, are not amenable to intervention (e.g. seriousness of the crime; age at time of crime; criminal history). Dynamic factors, by contrast, change over time (e.g. cognitive, social and neurological abilities). Researchers agree that an appropriate tool should not be heavily weighted toward static factors when used for placement or release decisions.[34] Further, when risk/needs assessment tools are used to assess an individual's likelihood of re-offense, it is important to understand the way in which the tool defines "recidivism," e.g., re-arrest for any type of offense; re-arrest for violent offenses; or any report of anti-social behavior or conduct problems.

Tools also vary in their predictive validity (i.e., does it actually measure what it purports to assess) and reliability (i.e., consistency of the measure). Both the Department of Correction and the Parole Board now employ commercially available assessment tools. The DOC administers COMPAS; the Parole Board administers LS/CMI. Both are widely used tools with reasonable reliability and general predictive validity about re-offense.

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[30] Diatchenko II , supra at 23.

[31] G.L.c. 127, §130.

[32] Christopher Slobogin, Risk Assessment, in the Oxford Handbook of Sentencing and Corrections (2012) at 196.

[33] *Id*. at 200.

[34] P.Gendreau, et. al., *A Meta-Analysis of the Predictors of Adult Offenders Recidivism: What Works*, 34 Criminology 575,575 (1996).

(a) LS/CMI

The Level of Service/Case Management Inventory (LS/CMI) is a widely used, well validated, and highly generalizable assessment tool that measures the risk and need factors of late adolescent and adult offenders. It is currently being used by the Massachusetts Parole Board in its parole suitability determinations, as well as in the application of evidence-based supervision practices. The LS/CMI requires the examiner to collect data from a variety of sources, including an offender interview, but also suggests reviewing legal and social records and collateral sources of information. The semi-structured interview provides the assessor with necessary information for scoring. The results yield a total score that correlates with a risk of general recidivism: 0-4 = very low risk; 5-10 = low risk; 11-19 = medium risk; 20-29 = high risk; 30+ = very high risk. In addition, there is an override section which provides an opportunity for the assessor to increase or decrease the risk level based on additional information. The Parole Board has collected and analyzed data for 1,579 offenders who had a parole hearing in 2013. The 2013 data reveals a 71% paroling rate for those who scored low risk; a 73% release rate for those who scored medium risk; 56% release rate for those who scored high risk; and a 35% release rate for those who scored very high risk.[35] This data does not include hearing outcomes based on risk scores for life sentence cases due to the small sample size available at the time of the analysis.

(b) COMPAS

Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) is a "commercially available, computerized tool designed to assess offenders' needs and risk of recidivism" based on twenty-four risk/need scales.[36] It is currently being used by the DOC at the time of commitment. Prior to an inmate's release, the DOC relies on a comprehensive discharge planning process and case management strategy as an alternative to the COMPAS Reentry Assessment used prior to 2013.

Data is gathered through self-report, scripted interview, or guided discussion. In addition, data from official records is required. The responses result in a scaled score that indicates high, medium, or low risk of recidivism and/or high, medium or low need for services or treatment in areas such as substance abuse, criminal thinking, or vocational training. Data on static factors are carried forward from one administration of the tool to the next assessment. According to its publisher, a "COMPAS assessment can take anywhere from 10 minutes to an hour depending on the scale content and administration data collection style." COMPAS also provides for

[35] Correspondence received from Parole Board Research and Planning Specialist, Shawna Andersen, dated May 5, 2014.

[36] J. Skeem, et.al., *Assessment of Evidence on the Quality of the Correctional Offender Management Profiling for Alternative Sanctions* (COMPAS), University of California, Davis Center for Public Policy Research (December 2007).

"overrides" that allow the screener to introduce their own judgment about the inmate's risk of recidivism. According to the publisher, "due to either aggravating or mitigating circumstances not detected by COMPAS, one may expect override rates from 8% to 15%."

In a 2010 report, prepared for the California Department of Corrections by UCLA's Semel Institute for Neuroscience and Human Behavior,[37] data from 91,334 parolees was analyzed. The focus of the study was the predictive validity of the COMPAS, that is, its ability to predict future recidivism among California parolees. Two major outcome measures were examined: subsequent arrest and subsequent arrest for a violent offense. The general recidivism risk scale achieved the statistical threshold for predictive validity, but the violent recidivism scale did not meet acceptable statistical standards for predictive validity.

The Massachusetts DOC conducted a study of 887 males released from DOC facilities from January 1, 2011 through July 31, 2011.[38] The study defined "recidivism" as conviction for a new offense within one year of release from prison and did not consider those offenders who recidivated after that point. Typical recidivism studies follow up at a minimum of three years post release. Of those who scored low on the COMPAS, 4.4% "recidivated"; of those who scored medium, 9.9% "recidivated"; of those who scored high, 21.6% "recidivated".

9. COMMISSION RECOMMENDATION:

Based on the above review, the Commission believes that current practice and procedures are sufficient such that the creation of a specialized evaluation process for all cases of murder committed by juveniles is not necessary.

[37] Farabe, R. et al, *COMPAS Validation Study: Final Report,* University of California, Los Angeles Semel Institute for Neuroscience and Human Behavior (August , 2010).

[38] H. Matthews, et. al., *Massachusetts Department of Correction Two-Year Recidivism Study: A Descriptive Analysis of the January-July 2011 Releases and Correctional Recovery Academy Participation*, Massachusetts Department of Correction (January 2014).