

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SALEM SUPERIOR COURT
DOCKET NO. ESCR 15-318

COMMONWEALTH)
)
v.)
)
HXXXXX RXXXXX,)
Defendant)

DEFENDANT’S SUPPLEMENTAL REQUEST FOR CHANGE OF PLEA HEARING
AND REQUEST FOR SENTENCING NOTWITHSTANDING
OTHERWISE APPLICABLE MANDATORY-MINIMUM
OR IN THE ALTERNATIVE, MOTION TO DISMISS

On October 14, 2016, the Supreme Judicial Court (“SJC”) issued its rescript in Commonwealth v. Laltaprasad, 475 Mass. 692 (2016). The Court ruled that G.L. c. 211E §3(e) did not authorize a sentencing judge to depart from statutory mandatory sentences for drug offenses. Id. at 693. The Court did not reach Laltaprasad’s constitutional claims, which he raised for the first time on appeal. Id.

On July 26, 2016 the instant Defendant submitted a request for a hearing on a change of plea - notwithstanding the otherwise applicable mandatory-minimum - pursuant to G.L. c. 211E §3(e).

As a result of the SJC’s ruling, the Defendant submits the instant supplemental brief, in which he asks this Honorable Court to consider the constitutional claims, which the SJC left unresolved in Laltaprasad.

The Defendant submits that this Court must dismiss the instant indictment against the Defendant or - at a minimum - impose sentence irrespective of any applicable minimum mandatory.

Herein, the Defendant contends that the mandatory minimum contained in G.L. c. 94C, § 32E(c) is unconstitutional in every case because 1) it has repeatedly and consistently resulted in disproportionate punishment of minorities, which effect

evidences a discriminatory purpose in violation of the equal protection right guaranteed by art. 1 of the Massachusetts Declaration of Rights; 2) it vests charging and sentencing discretion in the prosecution, thus intruding on the judiciary's inherent power to sentence and the legislature's inherent power to define crime and punishment, contrary to art. 30 of the Declaration of Rights; and 3) it creates disproportionate punishment for non-violent, low level offenders such as the instant defendant, amounting to cruel or unusual punishment in violation of art. 26 of the Declaration of Rights.

Moreover, the Defendant submits that the three and one-half year mandatory 4) as applied to him, violates his right to equal protection under art. 1 of the Declaration of Rights and constitutes cruel and unusual punishment in light of his lack of criminal record, lack of sophistication, dire economic circumstances, and the non-violent nature of his offense.

1. THE COMMONWEALTH'S MINIMUM MANDATORY TRAFFICKING LAWS VIOLATE THE EQUAL PROTECTION CLAUSE OF ART. 1 OF THE MASSACHUSETTS CONSTITUTION.

The first right set forth in the Massachusetts Constitution provides:

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Art. 1, as amended by art. 106 of the Amendments to the Massachusetts Constitution.

Notwithstanding the primacy of this principle in Massachusetts constitutional law, mandatory minimum drug laws in this Commonwealth have disproportionately affected minorities. In fact, mandatory minimum drug laws have disproportionately affected minorities repeatedly, unrelentingly, and at an astonishing rate.

According to census data, non-hispanic white persons comprise Seventy-three and one-half percent of the Massachusetts population. Twenty-six and one-half percent of Massachusetts residents are minorities, and 11.2% are Hispanic.¹
²

However, notwithstanding the modest number of minorities in the state, over the past twelve years minorities have made up on average seventy-five and one-half percent of all persons sentenced for mandatory drug offenses. Indeed, despite only accounting for 11.2% of the population, Hispanic persons received on average forty-one percent of all mandatory drug sentences. The actual numbers are set forth below in Table 1:

TABLE 1:

SUMMARY OF 2002 THROUGH 2013 MA SENTENCING COMMISSION DATA

YEAR	% MANDATORY DRUG SENTENCES BY RACE			% ALL DRUG CONVICTIONS	
	% WHITE SENTENCED TO MANDATORY	% NON-WHITE SENTENCED TO MANDATORY	% HISPANIC SENTENCED TO MANDATORY	WHITE	NON-WHITE
2002	19.8	80.2	55.4	47.4	50.6
2003	19.4	80.6	47.9	47.6	50.7
2004	23.1	76.9	45.6	46.7	52.1
2005	23.5	76.5	41.3	45.3	53.5
2006	25.4	74.6	44.2	45.0	54.0
2007	21.4	77.7	40.1	45.6	52.9
2008	23.6	76.4	37.9	47.4	51.5
2009	28.5	71.2	36.0	49.4	49.5
2010	29.0	71.0	33.4	48.2	50.6
2011	27.6	72.4	37.1	50.2	48.8
2012	25.8	74.2	34.5	53.8	45.4
2013	25.3	74.7	38.9	55.3	43.7

¹ Data available at quickfacts.census.gov/qfd/states/250001k.html. Attached as Exhibit A.

² Non-Hispanic black individuals make up 8.4% of Massachusetts residents. The Defendant is both black and Hispanic.

Average 22.4 75.5 41.0 48.5 50.3³

G.L. c. 94C, § 32E(c) does not explicitly direct police and prosecutors to pursue mandatory prison terms for non-white offenders. Thus, the statute is facially neutral.

However, laws that are facially neutral must be struck down if those laws are revealed to have a discriminatory impact and purpose. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886) ("Though the law itself be fair on its face and impartial in appearance" it must yet be struck down "if it is applied and administered by public authority with an evil eye and an unequal hand[.]")

The law has long recognized that statistics and patterns have an uncanny tendency to illuminate purpose and intention. See, e.g., Commonwealth v. Lora, 451 Mass. 425, 440 (2008) (statistical evidence may be offered to shift burden to Commonwealth to demonstrate race-neutral justification for government action); Commonwealth v. Sneed, 413 Mass. 387, 396-397 (1992) (prior pattern of violence negated the probability of an accident as the cause of an infant's injuries).

Regarding the statistics and patterns set forth in this case, the following questions arise:

If whites and non-whites use and sell drugs at comparable rates⁴, precisely what inference can be drawn about the law's intent from the fact that non-whites make up 26% of the state's

³ Mass. Sentencing Comm'n, Survey of Sentencing Practices, FY2002 to FY2013, available at mass.gov/courts/court-info/trial-court/sent-commission/survey-of-sentencing-practices-generic.html. Attached as Exhibit B1 - B12.

⁴ Mass. Dep't of Pub. Health, Alcohol Use, Illegal Drug Use, & Gambling in Mass., 2002, at 35-42 (July 2005) (Attached as Exhibit C); Jonathan Rothwell, How the War on Drugs Damages Black Social Mobility, Brookings Institute (Sept. 30, 2014).

population, but receive over 75% of the mandatory minimum drug sentences?

When race based disparities of this magnitude are not rare or aberrant, but instead continue on an unrelenting march, year after year, what inference can be drawn as to the law's intent?

When over a decade of race based disparities are published annually in the Commonwealth's own records (see Table 1, supra), yet the disparities persist year over year, what inference can be drawn as to the law's intent?

That these questions must even be asked at this late hour constitutes a stain on the Commonwealth's legacy as the pioneer of civil liberties. Year after year, "facially neutral" mandatory minimum drug laws are used to systematically incarcerate a shamefully disproportionate number of minorities for non-violent offenses. That our courts and practitioners have quietly acquiesced to this pattern year after year does intolerable violence to the intent of the framers of the Massachusetts Constitution, who chose to place equal protection first among all of the rights governing the Commonwealth.

Where as here the statistics demonstrate a pattern of discriminatory impact, the Defendant has satisfied his obligation to "raise a reasonable inference of impermissible discrimination." Lora, supra at 442. As a result, the Commonwealth must now rebut the inference of racial discrimination which this evidence suggests "or suffer dismissal of the underlying [indictment]." Commonwealth v. Lafaso, 49 Mass. App. Ct. 179, 182 (2000).

2. THE MINIMUM MANDATORY DRUG LAWS IMPERMISSIBLY INFRINGE ON THE CONSTITUTIONAL DIRECTIVE OF A SEPARATION OF POWERS.

Application of minimum mandatory drug laws implicate another constitutional protection: that of the separation of powers. Like the right of equal protection, the Commonwealth of Massachusetts enjoys the distinction of standing among only a few states which have explicitly codified this protection in its constitution. Commonwealth v. Cole, 468 Mass. 294, 301 (2014). Thus, the framing language of the Massachusetts

Constitution does not simply evidence this Commonwealth's early recognition that a clear separation of powers "is fundamental to our form of government." Opinion of the Justices, 365 Mass. 639, 640 (1974). Rather, the "explicit" language of article 30 again reveals Massachusetts as the standard bearer of critical constitutional protections.

"The mandate of art. 30 is clear: it forbids the legislative and executive branches from exercising powers that are entrusted to the judicial branch if that exercise restrict[s] or abolish[es] a court's inherent powers." Cole, supra at 301 (internal citations and quotations omitted).

But mandatory minimum drug laws erode that mandate by transferring to the Prosecutor the Judge's power to sentence and the Legislature's power to define crimes and punishments.

A. The Executive Now Exercises the Legislature's Inherent Function of Defining Crimes and Fixing Penalties

It is an essential duty of the Legislature to codify criminal laws and set a range of penalties for violation of those laws. Cole, supra at 302.

However, experience teaches that the practical effect of minimum mandatory drug laws is to delegate this core legislative function to the prosecutor.

Examining the numerous statutory provisions which may be employed to prosecute drug trafficking offenses makes the extent of unconstitutional delegation plain to see. For example, distribution of heroin over 36 grams may be prosecuted in any of the manners described in Table 2:

Table 2: Charging Options for Trafficking Over 36 Heroin

<u>G.L. c. 94C, § 32E(c) (2)</u>
Trafficking Heroin over 36 Grams
Penalty: Not less than five not more than thirty years

G.L. c. 94C, § 32E(c)(1)

Trafficking Heroin over 18 Grams

Penalty: Not less than three and one-half
nor more than thirty years

Chapter 94C, § 40

Conspiracy to Violate Drug Laws

Penalty: Up to thirty years

G.L. c. 94C, § 32

Possession of Heroin with Intent

Penalty: Up to ten years in State Prison or
two and one-half years in the House
of Correction

G.L. c. 94C, § 34

Possession of Heroin

Penalty: Up to two years in the House of
Correction

G.L. c. 94C, § 35

Unlawful presence at a place where heroin
is kept

Penalty: Up to one year in the house of
correction

Thus, where evidence exists to support a trafficking charge, the Commonwealth has at its disposal a vast array of sentencing options, which it may or may not choose to pursue. The point is, a consequence of the mandatory drug laws is that the decision as to how to define the crime and the penalty which follows is delegated and committed to the near limitless discretion of the Executive.

If the purpose of the mandatory drug laws was to limit discretion and ensure uniformity in sentencing, the mission is an unmitigated failure. Instead of limiting discretion, the minimum mandatory drug laws transfer all discretion to the prosecuting attorney. With that discretion, the prosecuting attorney is granted discretion to essentially weaponize

mandatory drug laws into instruments, by which it may extract guilty pleas and obtain agreement to prison sentences. The crimes charged and penalties obtained are limited only by policies and practices which vary county by county, or worse, by the discretion of the prosecutor handling a given case.

Because the mandatory minimum drug laws bestow on the prosecutor the power to define the crime and the penalty, such laws violate the separation of powers set forth in article 30 of the Massachusetts Declaration of Rights.

B. Ensuring Just Sentencing is a Core Judicial Function

It is a "quintessential judicial power to sentence" in criminal cases. Commonwealth v. Rodriguez, 461 Mass. 256, 264 (2012); see also Cole, supra at 302 ("power to impose a sentence" is "at the core" of the judicial function). Moreover, the Court's core powers must be "broad enough to enable a judge to ensure the fair administration of justice." Wong v. Luu, 472 Mass. 208, 217 (2015).

It is thus a component of that quintessential judicial power which must allow a judge to decline to impose sentences which are "more severe than justice permits." Rodriguez, supra. Moreover, another integral part of this quintessential judicial power is the "considerable latitude to fashion an appropriate individualized sentence." Stated more simply, ensuring just and fair punishment is at the heart of a judge's power.

But under the plain language of the trafficking statute, what power does a judge retain to decline to impose a sentence which it considers too harsh? And if the Court's inherent power to impose only just sentences is stripped away and vested in the prosecutor, have we not tolerated an impermissible "restrict[ion] or aboli[tion of] a court's inherent powers[?]" Cole, supra at 301.

In mandatory drug cases such as this, the reality is that the judge retains the power to sentence only in the most technical sense. In reality, it is the prosecutor who decides the penalty. In all but the most unusual case, the Judge's vestigial sentencing function is relegated to simply imposing the sentence

which the prosecutor dictates. As the Honorable Chief Justice Ralph D. Gants observed, "minimum mandatory sentences are only mandatory for the judge and the defendant, not for the prosecutor, who retains the discretion to charge a crime with a minimum mandatory or not." Hon. Ralph D. Gants, Remarks at University of Massachusetts - Boston, at 8 (March 16, 2015).⁵

This reality constitutes an impermissible "restrict[ion] or aboli[tion of] a court's inherent powers." Cole, supra at 301; See also United States v. Sidhom, 144 F. Supp. 2d 41 (D. Mass. 2001), ("[i]n the long tradition of the common law, it was the judge, the neutral arbiter, who possessed the authority to impose sentences which he deemed just within broad perimeters established by the legislature." A Sentencing scheme which shifts the power to sentence to the executive "which, as the prosecuting authority, is an interested party to the case ... constitutes an erosion of judicial power and a breach in the wall of the doctrine of the separation of powers.")

It is true that the Supreme Judicial Court has rejected prior Article 30 challenges to mandatory sentencing regimes. See, e.g., Commonwealth v. Jackson, 369 Mass. 904, 920-925 (1976) (carrying a firearm without a license); Commonwealth v. Therriault, 401 Mass. 237, 242 (1987) (motor vehicle homicide while intoxicated). However, while the law must be durable, it must not be immovable. Rather, it must exist as an organic, evolving, and - hopefully - improving instrument designed to reflect a contemporary understanding of justice. History has taught that, on occasion, it is proper to reflect on the wisdom of our past judgments, and correct them as the conceptualization of justice refines with experience. Compare Dred Scott v. Sanford, 60 U.S. 393 (1857) ("a negro, whose ancestors were imported into [the U.S.], and sold as slaves" could not be an American citizen and had no standing to sue for his freedom); Plessy v. Ferguson, 163 U.S. 537 (1896) ("separate but equal" public facilities did not offend equal protection clause).

⁵ Available at <http://www.mass.gov/courts/docs/sjc/docs/speeches/sjc-chief-justice-gants-remarks-umass-boston-031615.pdf>

The Defendant in the instant case respectfully suggests that the time to reflect on the wisdom of minimum mandatory drug offenses has arrived.⁶

National trends indicate that heroin overdoses increased 45% nationwide between 2006 and 2010.⁷ This is an undeniable tragedy. However, also tragic is that since the 1980's to 2010, the number of non-violent drug offenders has increased twenty-fold in state prisons, and 8 fold in county jails.⁸ The percentage of non-violent drug offenders serving mandatory prison terms in Massachusetts has remained at 70% since 2009.⁹ Thus, it is difficult to argue that incarceration is an effective solution to, or is even rationally related to the opioid crisis. Yet the opioid crisis and the scourge of drug abuse are the most oft-cited rationale for prison sentences in drug cases.

⁶ Judge Gants underscores the need for this reflection. In his 2015 speech (supra at p. 11), the Chief Justice observed that "the reasons to end [drug mandatories] are so compelling, and the reasons to keep them are so flawed, that the time has come to ... abolish minimum mandatory sentences in drug cases in Massachusetts, so that judges may be allowed to set individualized, evidence-based sentences[.]"

⁷ Richard Valdmanis, Massachusetts declares heroin emergency, looks to anti-overdose drug, REUTERS, Mar. 27, 2014, available at <http://www.reuters.com/article/2014/03/27/usa-heroin-massachusetts-idUSL5N0M05BE20140327>.

⁸ Jeff Bernstein, Incarceration Trends in Massachusetts: Long Term Increases, Recent Progress, (Jan. 26, 2016) available at <http://www.massbudget.org/reports/pdf/Incarceration%20Trends%20in%20Massachusetts%20Long-term%20Increases,%20Recent%20Progress%201-26-2016.pdf>. attached as Exhibit D.

⁹ MA Dep't. of Correction, Prison Population Trends 2009, at 22 (2010); MA Dep't. of Correction, Prison Population Trends 2015, at 23 (2016). Attached as Exhibits E1 - E2.

Prosecutors wield mandatory drug laws to leverage prison sentences, but they do so based on the false premise that we can incarcerate ourselves out of the opiate epidemic.¹⁰ See Hon. J. Gants, *supra*, at 7-8. Worse, the mass incarceration for non-violent drug offenses affects minorities at an astonishingly disproportionate rate. See p. 2-5, *supra*. Where any law purports to strip the judiciary of the power to correct injustice of this magnitude, it erodes the separation of powers, which article 30 of the Massachusetts Constitution guarantees.

3. MANDATORY DRUG LAWS CREATE DISPROPORTIONATE PUNISHMENT FOR NON-VIOLENT, LOW LEVEL OFFENDERS SUCH AS THE INSTANT DEFENDANT, AMOUNTING TO CRUEL OR UNUSUAL PUNISHMENT IN VIOLATION OF ART. 26 OF THE DECLARATION OF RIGHTS.

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

Mass. Dec. Rights. Art. 26.¹¹

At the heart of Article 26 is the concept of proportionality, which arises from "the fundamental precept of justice" that punishment must be calibrated "to both the offender and the offense." Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 669 (2013) (internal quotations omitted).

¹⁰ "In short, as we have learned, we cannot incarcerate our way out of the drug problem." Hon. J. Gants, *supra*, at p. 3. "The fact of the matter is that minimum mandatory sentences in drug cases have failed to substantially affect the price or availability of dangerous narcotics. Narcotics are cheaper, more easily available, and more deadly than they have ever been in our lifetime." Id. at p. 11.

¹¹ Article 26 was subsequently amended by article 116 of the Amendments to the Massachusetts Constitution to include two sentences relative to the death penalty.

But where prosecutors wield the minimum mandatory drug law as a "one size fits all" blunt instrument¹², the core principle of individualized justice is defeated. That is, if a prosecutor forbids a judge from considering the personal circumstances of the offender, any hope of Article 26 proportionality is gone.

The injury which minimum mandatory drug laws inflict upon Article 26 principles is only deepened when examined against the evolving standards under which Article 26 concerns must be measured. Article 26 "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Commonwealth v. Okoro, 471 Mass. 51, 61 (2015) (internal citations omitted).

These "[e]volving standards of decency" are manifest within a national groundswell - reaching the level of outcry - against the failed objectives of minimum mandatory drug laws.

Dissent surrounding draconian mandatory sentences for non-violent drug offenses is not a fringe or aberrant phenomenon.

In fact, a review of the docket in the Laltaprasad matter reveals that 43 entities joined Laltaprasad as amici in opposition to the Commonwealth's appeal of his below-mandatory prison sentence. These entities included the NAACP, the National Association of Social Workers, the National Lawyer's Guild, Massachusetts Chapter, Families Against Mandatory Minimums, Black and Pink (LGBTQ advocacy organization) the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, the Greater Boston Interfaith Organization, the Jewish Alliance for Law and Social Action, and many, many others.

¹² Judge Gants observes that minimum mandatory drug laws "treat the drug courier the same as the kingpin, because the length of the minimum mandatory sentence depends solely on the amount of drugs, not on the defendant's role in committing the offense." The instant case illustrates of Judge Gants' concern. Hon. J. Gants, *supra*, at 6.

In contrast, no organization filed a brief in support of the Commonwealth's appeal.

Officials at the highest levels of the judiciary and the executive have also joined in the chorus which has called for rejection of minimum mandatory drug laws.

In 2013, former Attorney General Eric Holder and the Obama administration prioritized sentencing reform, resolving to "recalibrate" America's criminal justice system with measures eliminating "draconian" sentences for low-level, non-violent drug offenders.¹³ Chief Justice Gants of the Massachusetts Supreme Judicial Court has recommended elimination of mandatory minimum sentences for drug offenses. See Hon. J. Gants, *supra*. The Chairperson of the United States Sentencing Commission, the Honorable Judge Patti B. Saris, has also advocated for an overhaul of federal mandatory minimum sentences.¹⁴

Thus, this mainstream, contemporary rejection of mandatory minimum drug laws for non-violent offenders reveals an "[e]volving standard[] of decency" incompatible with draconian drug laws. This evolution seeded in the conscience of a maturing society demonstrates the need to reexamine the vitality of mandatory drug laws in light of Article 26's command against cruel or unusual punishment.

A quartet of outdated cases¹⁵, decided before our "matur[ed] society" recognized the fallacy of minimum mandatory drug laws,

¹³ Eric Holder, Attorney General, Remarks at the Annual Meeting of the American Bar Association's House of Delegates, (Aug. 12, 2013), available at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-association>

¹⁴ Hon. Patti Saris, Sentencing Reform, Boston B.J. Vol. 59 #3 (2015), available at <http://bostonbarjournal.com/2015/07/08/sentencing-reform/>

¹⁵ Commonwealth v. Alvarez, 412 Mass. 224 (1992); Commonwealth v. Silva, 21 Mass. App. Ct. 536 (1988); Commonwealth v. Marcus, 16 Mass. App. Ct. 698 (1983); Opinion of the Justices, 378 Mass. 822 (1979).

cannot serve to constrain the dynamic nature of Article 26 anymore than the cocoon can confine the butterfly. The most recent of these cases was decided almost a quarter of a century ago, at a time when the world was reeling from, and terrified by a crack epidemic. In that time period, politicians and lawmakers fearmongered, warned of "super predators," and passed ultra-severe mandatory drug laws designed to cage drug dealers who had "no conscience, no empathy" and would spill unchecked into innocent, suburban communities.¹⁶ Thus, the most recent precedent upholding drug mandates against Article 26 challenge was published at the height of the war on drugs, where an understanding of the carnage caused by such sentences had not yet entered its infancy. As a result, these cases have no bearing on an Article 26 analysis set against contemporary standards and learning.

Silva represents the most relevant Article 26 challenge to mandatory drug laws "as applied" to offenders with no record. Silva, supra, at 544-545. Again, the foundation of the Silva decision is mired in myth and misinformation as to the causes of addiction and the efficacy of prison as a salve. As discussed above, the opioid epidemic in America has reached supernova, despite the fact that the spike in mass incarceration occurred on pace with the spike in opioid drug abuse. Thus, the theory that incarceration "remove[s] traffickers from society and [] deter[s] others from similar criminal activity[,] "id., is pure fantasy. Experience has shown that one has nothing to do with the other. If "[t]he Legislature may also have reasoned that achieving these goals could, in turn, help curb the rising incidence of [drug] use," id., the rise in the opioid epidemic is proof positive that that reasoning is meritless.

Moreover, no appellate opinion has addressed the particularly draconian consequences, which mandatory drug laws inflict on racial and ethnic minority offenders such as the instant defendant, who at the time of their offense had no

¹⁶ Available at <http://www.politifact.com/truth-o-meter/statements/2016/aug/28/reince-priebus/did-hillary-clinton-c-all-african-american-youth-su/>

convictions, and who as a result of their conviction face the additional consequence of mandatory deportation and exile from the United States for life, following completion of their sentence of incarceration.

It is cruel and unusual that a young man, ignorant and unsophisticated as the instant Defendant, should be preyed upon by sophisticated drug dealers who thrust him into the front lines to do their dirty work, then be subject to year upon year of imprisonment for his first, low-level, non-violent offense.

Stated bluntly, it is cruel, but sadly not unusual that a racial and ethnic minority such as the instant Hispanic, black Defendant is facing mandatory imprisonment for his first, non-violent offense.

It is cruel and unusual that in addition to the term of imprisonment which is explicitly included in the statute, the instant defendant faces - for his first offense - the certainty of being ripped from his newborn child, and from his young wife, to live the remainder of his days in exile from the ones he loves.

Stated simply, Article 26's mandate of individualized sentencing is irreconcilable with rigid mandatory drug laws which are blind to an offenders' individual character and circumstances. Diatchenko, supra at 669.

Article 26's directive to tether itself to contemporary, evolving notions of justice, is incompatible with a series of laws which arose in an acrid soil of fear, myth and misinformation, and which have become wholly unmoored from contemporary standards of decency and justice.

As a result, this Honorable Court should dismiss the instant indictments as offensive to Article 26's prohibition against cruel and unusual punishment.

4. AS APPLIED TO MR. RXXXXX, G.L. C. 94C, §32E(C) IS UNCONSTITUTIONAL.

If the Court is not prepared to hold that the mandatory minimum contained in G.L. c. 94C §32E(c) is unconstitutional in every

case, the Court should bar its application to the instant matter because, as applied to Mr. RXXXXX, the statute is unconstitutional.

As described above, the minimum mandatory drug laws have year after year affected minorities in this Commonwealth at a staggeringly disproportionate rate. Here, the Defendant is a black, Hispanic male. As a result, he belongs to not one, but two protected classes. Both protected classes have, year after year, been locked away at a rate disproportionate to their population. As a result, the minimum mandatory drug law offends the art. 1 constitutional guarantee of equal protection as applied to Mr. RXXXXX.

Moreover, application of G.L. c. 94C §32E(c) violates art. 26's "fundamental imperative" that sentencing must be "proportionate to the offender and the offense." Diatchenko, 466 Mass. at 671. As stated more fully in his motion, at the time of his offense, Mr. RXXXXX was twenty-eight years old and had no record. Having grown up in the Dominican Republic, he had little understanding of heroin and the harm it causes to American communities. The Defendant's offense was non-violent in nature. Dire economic circumstances led to the Defendant's incredibly stupid decision to commit the instant offense. Yet as a mere courier, the Defendant played only a minor but highly fungible role in the hierarchy of drug trafficking.

A state prison sentence for Mr. RXXXXX is unduly harsh.

But the statute in question carries an additional, even more catastrophic consequence for Mr. RXXXXX than the mere prospect of imprisonment. That is, following Mr. RXXXXX' incarceration, he will almost certainly be placed in an expedited removal hearing, the effect of which will serve to exile him for the remainder of his life from his wife and child.

It is true that §32E(c) does not delineate deportation as a penalty for heroin trafficking. However, the causal relationship is immediate; one inevitably flows from the other. In these circumstances, it is difficult to perceive of any principled separation from the two other than in the most artificial and technical sense.

The particular circumstances of HXXXXX RXXXXX' case describe a vastly disproportionate outcome for what was in fact the Defendant's very first transgression.

Application of the minimum mandatory in the particular circumstances of this case results in an outcome that "shocks the conscience and offends fundamental notions of human dignity." Commonwealth v. Cepulonis, 384 Mass. 495, 497 (1981).

5. CONCLUSION

As a result of the foregoing, and for the reasons articulated in the Defendant's July 26, 2016 motion, the Defendant respectfully requests that this Court dismiss the instant indictment or, in the alternative, allow him to change his plea notwithstanding the mandatory minimum contained in G.L. c. 94C, §32E(c).

Respectfully submitted
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By his Attorney,

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