EDITORIAL

If sentences vary too widely, courts should make corrections

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FILE/THE BOSTON GLOBE

Joseph Donovan in 2009.

JOSEPH DONOVAN has served 18 years in prison for his role in the 1992 stabbing murder of Yngve Raustein, an MIT student from Norway. Donovan has had time to evaluate, change, and come to terms with his actions. The question is whether the justice system is capable of similar reflection.

Donovan didn't kill Raustein. No one disputes that fact. The killer — Shon McHugh — stabbed Raustein in what can only be described as a thrill kill. But McHugh was a juvenile at the time, and the justice system saw fit to release him from prison in 2003 after he served just 11 years. Donovan, meanwhile, is serving a life sentence without the possibility of parole for having instigated the assault that led to the murder. The disparity of these sentences gnaws at many observers all the more because Donovan had turned 17 — the age of adulthood for criminal law purposes — just a few weeks before the crime. But for that handful of days, he would have been freed long ago.

Donovan, now 36, is not a victim of a wrongful conviction. Nor is his sentence an egregious miscarriage of justice. But he is an example of how a combination of bad luck, poor legal advice, and mandatory sentencing can bring about grossly disproportionate results. Governor Patrick could correct the imbalance by commuting Donovan's sentence. But many people would reserve commutation for more extreme cases.

A better option for Donovan and, potentially, for others caught in similar situations would be for prosecutors and judges of Middlesex County to review the case with an eye toward reducing the sentence, which would at least give Donovan a chance to apply for parole. There is a special rule of criminal procedure - 25 (b)(2) - that allows judges to substitute a reduced charge in place of the jury's verdict, even years later.

This rule hasn't been used frequently. But judges in Massachusetts can and should intervene if they believe that a punishment is disproportionate to the weight of the evidence. Far better for the courts themselves to review disproportionate sentences than to rely on the governor to commute sentences. Those who go to work in the legal system every day know which sentences are appropriate - and which are more accidents of fate.

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Donovan, McHugh, and another Cambridge youth, Alfredo Velez, were up to no good on Sept. 18, 1992. While walking along Memorial Drive in Cambridge, they encountered two Norwegian students. Donovan punched Raustein, who fell to the ground. And then, in the ensuing commotion, McHugh reached down and stabbed Raustein. There was conflicting testimony about who robbed the victims. But Velez pleaded guilty to manslaughter in exchange for his testimony that Donovan had participated in the robberies. Velez served less than the full 12 years of his sentence.

In Massachusetts, any murder that occurs during the commission of a crime that is punishable by life in prison - such as armed robbery - results in a first degree felony murder conviction. And in the eyes of the state's joint venture law, Donovan was indistinguishable from McHugh because he shared "the mental state required for the crime." When a jury convicted Donovan of first degree murder and armed robbery, he was automatically sentenced to life without parole.

On appeal, the Supreme Judicial Court found that if Middlesex Superior Court Judge Robert Barton had instructed the jury on the option of finding that Donovan had committed assault and battery rather than armed robbery, Donovan could have been found guilty of second degree felony murder, and thus eligible for parole. But a failure to instruct in this case, according to the high court, was not sufficient reason to overturn a jury verdict.

Judge Barton retired in 2000. But the case still nags at him. In 2009, he wrote to the state's Advisory Board of Pardons urging commutation of Donovan's sentence. Of the roughly 150 murder cases he tried over 22 years, wrote Barton, Donovan's punishment stood out as "unjust and excessive."

More than 1,500 people have signed petitions or sent letters of support on Donovan's behalf over the years. But none were more meaningful than the one from the mother and brother of the victim, Inghild and Dan-Jarle Raustein. They took the extraordinary step of supporting the commutation of Donovan's sentence.

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A reduction of Donovan's sentence would not imply forgiveness of his crime. It wouldn't even guarantee his release: He would merely have access to the parole system.

Still, the Middlesex DA's office has insisted that Donovan's prison record argues against leniency, including several prison fights between 1994 and 2000. And notably, according to the DA's office, Donovan was originally offered and rejected a deal to plead to second degree felony murder, which would have made him eligible for parole after 15 years. In the mind of the DA's office, Donovan made a bad choice and is thus responsible for his fate. But it's telling that the same DA's office that now opposes clemency was willing to give him a chance at parole eligibility 18 years ago.

In fact, Donovan's prison record is not unusual for a young man who has spent nearly his entire adult life in the threatening environment of a maximum security prison. And his efforts at self-improvement in prison - which include voluntary participation in workshops on nonviolence and conflict resolution - far outweigh his earlier transgressions, which generally involved self-defense.

Verdict reduction in Middlesex County wouldn't be unprecedented. In 2004, in a similar case, Judge Ralph Gants reduced the sentence of Sokphann Chhim from first degree murder to involuntary manslaughter. The judge reasoned that the Lynn man briefly participated in an assault but did not stab the victim or intend to murder him. The Middlesex DA's office issued a harsh rejoinder to the judge.

The Suffolk County District Attorney's office has looked more expansively on such cases. In 2006, prosecutors won a second degree murder conviction against Omar Delacruz of Chelsea in the fatal beating case of a 19-year-old Everett man. Of the five defendants, only Delacruz had rejected a manslaughter plea. But once convinced that Delacruz had paid the highest price for a lesser role in the crime, the Suffolk DA assented to a defense petition to reduce Delacruz's conviction to manslaughter. In 2008, a judge reduced the charge in the interest of justice.

These sentencing reductions are rare events, as they should be. The public doesn't want a judge, or governor, serving as a 13th juror. But the increase in mandatory-sentence rules, combined with the prosecutors' willingness to grant plea deals to co-defendants to testify

life sentences come about through bad luck and bad trial decisions rather than the judicious application of the law.

Fortunately, there is a corrective. After 18 years served for throwing a punch — albeit one that set off a horrible series of events — Donovan's imprisonment no longer resembles fair and equal justice. It's time to allow Donovan — the lifer — to reassemble the life he put on hold at 17.