COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT NO: SJC-12546

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COMMONWEALTH OF MASSACHUSETTS

v

NATHAN ENESTO LUGO

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ON APPEAL FROM A JUDGMENT OF THE
NORFOLK COUNTY SUPERIOR COURT

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# BRIEF OF JUVENILE LAW CENTER; CENTER FOR LAW, BRAIN AND BEHAVIOR; AND CENTER ON WRONGFUL CONVICTIONS OF YOUTH AS AMICI CURIAE IN SUPPORT OF DEFENDANT/APPELLANT

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## IDENTITY AND INTEREST OF AMICI CURIAE

**Juvenile Law Center** advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has participated in appeals to this Court addressing the protections that must be afforded to youth in the juvenile justice system, including as amicus curiae in *Commonwealth v. Brown*, No. SJC-11454; *Commonwealth v. Guthrie G.*, No. SJC-09805; and *Commonwealth v. Juvenile "LN" G.*, No. SJC-12351.

The **Center for Law, Brain and Behavior (CLBB)** of the Massachusetts General Hospital is a nonprofit organization whose goal is to provide responsible, ethical and scientifically sound translation of

neuroscience into law, finance and public policy. Research findings in neurology, psychiatry, psychology, cognitive neuroscience and neuroimaging are rapidly affecting our ability to understand the relationships between brain functioning, brain development and behavior. Those findings, in turn, have substantial implications for the law in general, and criminal law, in particular, affecting concepts of competency, culpability and punishment, along with evidentiary questions about memory, eyewitness identification and even credibility. The Center, located within the MGH Department of Psychiatry, seeks to inform the discussion of these issues by drawing upon the collaborative work of clinicians and researchers, as well as a board of advisors comprising representatives from finance, law, academia, politics, media and biotechnology. It does so through media outreach, educational programs for judges, students and practitioners, publications, a “Law and Neuroscience” course at the Harvard Law School, and amicus briefs. A particular focus of CLBB has been the question of what constitutes responsible and legal behavior in children and adolescence.

The **Center on Wrongful Convictions of Youth (CWCY)** operates under the auspices of the Bluhm Legal Clinic at

Northwestern University School of Law. A joint project of the Clinic's Center on Wrongful Convictions and Children and Family Justice Center, the CWCY was founded in 2009 with a unique mission: to uncover and remedy wrongful convictions of youth and promote public awareness and support for nationwide initiatives aimed at preventing wrongful convictions in the juvenile justice system. In recognition of the reality that juvenile's interactions with the criminal justice system increasingly begin with events at school, the CWCY urges courts to safeguard juvenile's constitutional rights within the schoolhouse. Since its founding, the CWCY has filed amicus briefs in jurisdictions across the country, ranging from state trial courts to the U.S. Supreme Court.

## SUMMARY OF THE ARGUMENT

Relying on both common-sense perceptions and a growing body of scientific evidence, this Court and the U.S. Supreme Court have ruled that age and its attendant characteristics are constitutionally relevant and must be taken into account when sentencing juvenile defendants. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016); *Miller v. Alabama*, 567 U.S. 460, 471 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261, 271-72 (2011);

*Graham v. Florida*, 560 U.S. 48, 76 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *see also Commonwealth v. Perez*, 480 Mass. 562, 628-29 (2018); *Diatchenko v. Dist. Att'y*, 466 Mass. 655, 669-70 (2013). Under this line of precedent, mandatory sentences that impose harsh adult penalties on juveniles without individualized consideration of age and other mitigating factors violate the Eighth Amendment. In *Miller v. Alabama*, the Supreme Court broadly condemned mandatory sentencing schemes that "prevent the sentencer from taking account of these central considerations." 567 U.S. at 474; *see also infra* Section I.A. Four years later, the Court underscored the need for individualized sentencing in *Montgomery v. Louisiana*, highlighting that children differ not just from adults, but also from each other. 136 S. Ct. at 734-35; *see also infra* Section I.B. In response to these decisions, states are moving away from mandatory sentencing schemes for juveniles, recognizing that these schemes risk disproportionality in their enforcement because they fail to account for individual mitigating circumstances. *See infra* Section I.C.

Harsh, mandatory sentences are particularly inappropriate when, as in this case, they are imposed for homicide offenses that include felony murder

theories of liability. The rationale for felony murder—that a person who engages in a dangerous felony should reasonably foresee the risk of death—is at odds with scientific research on adolescent development. *See infra* Section II.A. As this Court and the U.S. Supreme Court have recognized, adolescents process information differently than adults, are prone to sensation-seeking or risky behaviors, and may act impulsively, particularly in emotionally charged situations. *See infra* Section II.B. Imputing an intent to kill from a juvenile's mere participation in a felony therefore contradicts both the Supreme Court's juvenile jurisprudence and psychological and neuroscientific research.

In this case, a 17-year-old was convicted under Massachusetts' second-degree murder statute and thus automatically faced life in prison with a minimum term of imprisonment of 15 years. Because the trial court did not have any discretion to consider Mr. Lugo's age or other mitigating circumstances before imposing this harsh adult sentence, it is unconstitutional under *Miller*. Accordingly, *Amici* ask this Court to reverse Mr. Lugo's conviction and sentence and remand the case for an individualized resentencing.

## ARGUMENT

### I. THE EIGHTH AMENDMENT REQUIRES INDIVIDUALIZED CONSIDERATION OF AGE AND OTHER MITIGATING CIRCUMSTANCES BEFORE A JUVENILE CAN BE SENTENCED TO LIFE IN PRISON

It is beyond dispute that "children are constitutionally different from adults for purposes of sentencing." *Commonwealth v. Perez*, 480 Mass. 562 (2018) (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012)). In a series of decisions issued between 2005-2016, the U.S. Supreme Court has repeatedly reinforced that children are different. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *see also Miller*, 567 US. at 471; *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005). In *Miller* and *Montgomery*, the Court further recognized that children are also different from each other with respect to the constitutional boundaries of sentencing. *See Miller*, 567 U.S. at 477; *Montgomery*, 136 S. Ct. at 734. Relying on this settled principle, several state courts and legislatures have read *Miller* to require individualized approaches to the sentencing of juveniles, *see infra* section I.C. *Amici* encourage this Court to do the same, and hold that both the Eighth Amendment and art. 26 of the Massachusetts Declaration

of Rights require an individualized sentencing process that considers age and its attendant characteristics before a juvenile can be sentenced to life in prison with the possibility of parole.

### A. The U.S. Supreme Court's Decision In *Miller v. Alabama* Prohibits Sentencing Schemes That Impose Harsh Penalties On Juveniles Without Consideration Of The Mitigating Qualities Of Youth

In *Miller v. Alabama*, the U.S. Supreme Court held that a sentencing scheme that mandates life without parole for juvenile offenders violates the Eighth Amendment, as the sentencer must take into account the juvenile's age and individual characteristics before imposing this harshest available sentence. *Miller*, 567 U.S. at 465. This holding, the Court explained, "flows straightforwardly" from its prior juvenile sentencing cases, *id.* at 483, which describe three essential characteristics that distinguish youth from adults for culpability purposes:

> [a]s compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed."

*Graham*, 560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). *Miller* emphasized that "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.'" 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 68-69); *Roper*, 543 U.S. at 570.

In addition to relying on its prior decisions in *Roper* and *Graham*, the *Miller* Court also brought another line of precedent into its analysis: its prior individualized sentencing decisions involving challenges to mandatory death penalty statutes. *Miller*, 567 U.S. at 475. The Court previously rejected mandatory death penalty sentences because they "gave no significance to 'the character and record of the individual offender or the circumstances' of the offense, and 'exclud[ed] from consideration . . . the possibility of compassionate or mitigating factors,'" including the "mitigating qualities of youth." *Id.* at 475-76 (alterations in original) (first quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); then quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). The *Miller* Court for the first time applied these principles outside of a capital case, concluding that "*Graham*,

*Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 567 U.S. at 489.

In blending these two lines of precedent, *Miller* shifted the Court's juvenile Eighth Amendment analysis to focus not just on the offense and sentence, but also on the individual characteristics of the offender. The Court emphasized that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Miller*, 567 U.S. at 473. Rather, "[t]hose features are evident in the same way, and to the same degree" when the commission of a felony unexpectedly results in someone's death. *Id.* Highlighting that youth are different from adults as well as from each other, the Court declined to rule categorically that life without parole is never appropriate for a juvenile offender. Rather, the Court left open the possibility that it may be constitutional for the "rare juvenile offender." *Id.* at 479-80. Nevertheless, the Court explained that a mandatory sentencing scheme risked disproportionality because it equates all juvenile

offenders, regardless of their age, offense, or family history. *Id.* at 476-77.

Although *Miller*'s specific holding was limited to mandatory life without parole, the decision broadly condemns mandatory sentencing schemes generally and emphasizes the need for individualized consideration of age and other mitigating factors. "[M]andatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," the Court explained. *Miller*, 567 U.S. at 476. Failure to consider these factors risks disproportionate sentences, and thus the Eighth Amendment requires that "those meting out punishment" be able to consider "a juvenile's 'lessened culpability' and greater 'capacity for change,'" *id.* at 465 (quoting *Graham*, 560 U.S. at 68, 74), as well as other "mitigating qualities of youth." *Id.* at 476 (quoting *Johnson*, 509 U.S. at 367).

In the instant case, the sentencing court had no discretion to consider any of these factors before imposing a life sentence with a mandatory term of imprisonment on a 17-year-old. In fact, the court refused to hear mitigating evidence on Mr. Lugo's behalf, as it considered such evidence irrelevant to the

sentencing determination. (Def.'s Br. 15-16 (citing TR19 14-17, TR10, 15)). Such a sentencing scheme risks disproportionality, as it "precludes consideration" of relevant characteristics and fails to distinguish between "the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." *Miller*, 567 U.S. at 477. This mandatory sentence therefore cannot pass constitutional muster under *Miller*.

### B. *Montgomery v. Louisiana* Underscores The Supreme Court's Conclusion That Individualized Consideration Of Age And Its Attendant Characteristics Is Necessary When Juveniles Face Harsh Adult Sentences

When this Court last considered the constitutionality of a mandatory juvenile life sentence, the scope of *Miller*'s holding was unclear, and state courts still "disagreed as to whether *Miller*'s holding applies retroactively." *Commonwealth v. Okoro*, 471 Mass. 51, 60 (2015). Now, that question is settled. In *Montgomery v. Louisiana*, the U.S. Supreme Court held that *Miller*'s holding is a new substantive rule of constitutional law barring life without parole for "all but the rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility," and thus it is

retroactively applicable on collateral review. 136 S. Ct. at 734. As a result, across the country, juvenile offenders who have been serving life without parole sentences are now eligible to receive individualized hearings to assess whether that sentence is appropriate based on their particular characteristics and circumstances. *See id*. at 736-37; *see also* THE CAMPAIGN FOR FAIR SENTENCING OF YOUTH, *MONTGOMERY* MOMENTUM: TWO YEARS OF PROGRESS SINCE *MONTGOMERY v. LOUISIANA* 2 (2018), https://www.fairsentencingofyouth.org/wp-content/uploads/Montgomery-Anniversary-2018-Snapshot1.pdf (noting that "the number of individuals serving JWLOP has been cut in half" since *Montgomery*).

In finding *Miller* retroactive, the *Montgomery* Court emphasized the differences not just between adults and children, but among juvenile offenders. The Court noted that, "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 136 S. Ct. at 734. To separate these different types of offenders, "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary," the Court explained. *Id.* at 735 (quoting *Miller*, 567 U.S. at 465). Since

*Montgomery*, Justice Sotomayor has underscored this mandate, emphasizing the need for judges to make specific findings to determine "whether the petitioner was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring) (mem.) (quoting *Montgomery*, 136 S. Ct. at 734). Thus, it is now clear that *Miller* applies broadly, and stands for the general proposition that individualized consideration of age and related characteristics is necessary before a juvenile can face harsh adult sentences.

### C. States Around The Country Have Responded To *Miller* By Moving Away From One-size-fits-all Sentencing Schemes For Juveniles

#### 1. State supreme courts have struck down or limited mandatory minimum sentences for juveniles under *Miller*

Since the U.S. Supreme Court's holding in *Miller*, two state supreme courts have taken the Court's reasoning to its logical conclusion and ruled that *Miller* bars or significantly limits mandatory sentencing schemes for juveniles. In *State v. Houston-Sconiers*, the Washington Supreme Court struck down all mandatory minimum sentences for children, concluding that, "[i]n accordance with *Miller*, . . . sentencing courts must

have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant." 391 P.3d 409, 420 (Wash. 2017). In that case, two teenaged defendants stole candy and cell phones from trick-or-treaters on Halloween. Because at least one of the teens carried a gun, under the state's mandatory firearm enhancements, the sentencing court imposed mandatory sentences of 26 and 31 years on the two juveniles. *Id.* at 416. In striking down those sentences, the state supreme court explained that, "[b]ecause 'children are different' under the Eighth Amendment and hence 'criminal procedure laws' must take the defendants' youthfulness into account, sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable [mandatory minimums] when sentencing juveniles in adult court." *Id*. at 414.

Similarly, Iowa's highest court relied on *Miller*'s Eighth Amendment construction to bar trial courts from imposing mandatory minimum prison sentences on juveniles. *State v. Lyle*, 854 N.W.2d 378, 398, 404 (Iowa 2014). Although the court based its holding on the Iowa Constitution, it used the Supreme Court's reasoning, explaining that "*Miller* . . . requir[ed] the sentencing court to consider the offender's youth along with a

variety of other individual facts about the offender and the crime to determine whether the sentence is appropriate." *Id.* at 386. Noting that "juveniles have been viewed as constitutionally different from adults in this country for more than a century," and citing to national trends away from the tough-on-crime tendencies of the 1990s, the court identified a "growing understanding that mandatory sentences of imprisonment for crimes committed by children are undesirable in society."[1] *Id.* at 389-90. The court also cited the

[1] As has been well documented, during the 1990s, the inaccurate and racially charged prediction of a coming wave of juvenile "superpredators" led nearly every state to expand the laws allowing juveniles to be tried and sentenced as adults. *See, e.g.*, Equal Justice Initiative, *The Superpredator Myth, 20 Years Later* (April 7, 2014), https://eji.org/news/superpredator-myth-20-years-later; Clyde Haberman, *When Youth Violence Spurred "Superpredator' Fear*, N. Y. Times (April 6, 2014), https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html?smid=pl-share; John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U.L. REV. 535, 581-86 (2016). Recognizing that these statutes are both harmful and based on false information, some states have begun rolling back these provisions and reforming their "tough on crime" policies of the 1990s. *See* Nat'l Conf. of State Legis., *Comprehensive Juvenile Justice Policy Reform: State Resources* (June 11, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/comprehensive-juvenile-justice-policy-reform-state-resources.aspx; JAREE M. THOMAS, CAMPAIGN FOR YOUTH JUSTICE, RAISING THE BAR: STATE TRENDS IN KEEPING YOUTH OUT OF ADULT COURTS (2015-2017)(2017),

scientific research underpinning *Miller*, and explained that any attempt to sentence a juvenile without an "individualized analysis of the juvenile's categorically diminished culpability" was an "irrational exercise." *Id.* at 399. Thus, finding no reasonable rationale for imposing mandatory minimum sentences on juveniles, the court held that "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause" in the state constitution. *Id.* at 400; *see also Sate v. Zarate*, 908 N.W.2d 831, 841, 845-46, 855 (Iowa 2018) (affirming the court's ban on "all mandatory minimum prison sentences for juvenile offenders" and finding a sentencing statute mandating life but imposing no mandatory period of incarceration before parole eligibility constitutional because it gave sentencing courts discretion "to craft individualized sentences for each juvenile offender").[2]

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http://www.campaignforyouthjustice.org/images/StateTrends_Repot_FINAL.pdf.

[2] In *Zarate*, the Iowa Supreme Court held that the state's sentencing statute for first degree murder complied with *Miller*'s requirements. 908 N.W.2d at 846. The statute at issue gave courts three sentencing options for juveniles. *See id*. at 843 (citing Iowa Code § 902.1(2)(a). Although all of the options required the imposition of a life sentence, courts retained discretion to determine when a defendant could become

Other state supreme courts have also recognized that *Miller*'s principles extend beyond strict life without parole sentences. For example, many states have declared that lengthy sentences that amount to life without the possibility of parole, or *de facto* life without parole sentences, fall within *Miller*'s purview.[3]

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parole eligible and whether a minimum term of imprisonment was required. *Id.* at 845-46. The Massachusetts statute at issue here permits no judicial discretion, mandating fifteen years of imprisonment before a juvenile is eligible for parole. *See* M.G.L.A. c. 119, § 72B.

[3] State Supreme Courts in California, Connecticut, Illinois, Florida, Iowa, Louisiana, Missouri, Montana, Nevada, New Jersey, Oregon, Washington, and Wyoming have all recognized that a term of years sentence can be an unconstitutional *de facto* life sentence. *See People v. Caballero*, 282 P.3d 291, 297-98 (Cal. 2012); *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1047 (Conn. 2015); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016); *Johnson v. State*, 215 So. 3d 1237, 1242 (Fla. 2017); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013); *State ex rel. Morgan v. State*, 217 So. 3d 266, 273 (La. 2016); *State ex. rel Carr v. Wallace*, 527 S.W.3d 55, 60-61 (Mo. 2017) (en banc); *Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017), *cert. denied*, ––– U.S. ––––, 138 S. Ct. 1999 (2018); *State v. Boston*, 363 P.3d 453, 457 (Nev. 2015); *State v. Zuber*, 152 A.3d 197, 211 (N.J. 2017), *cert. denied*, ––– U.S. ––––, 138 S. Ct. 152 (2017); *State v. Moore*, 76 N.E.3d 1127, 1142-43 (Ohio 2016), *cert. denied*, ––– U.S. ––––, 138 S. Ct. 62 (2017); *Kinkel v. Persson*, 417 P.3d 401, 412 (Or. 2018), *petition for cert. filed*, No. 18-5634 (Aug. 8, 2018); *State v. Ramos*, 387 P.3d 650, 658 (Wash. 2017); *Bear Cloud v. State*, 294 P.3d 36, 45 (Wyo. 2013). Similarly, five federal courts have recognized *de facto* life sentences as unconstitutional while only one has declined to do so out of deference to state court sentences. *See generally*, *Kelly v. Brown*, 851 F.3d 686 (7th Cir. 2017); *United States v. Grant*, 887 F.3d 131 (3d Cir. 2018);

Others have turned to *Miller* for the general proposition that "individualized consideration is required so that a juvenile's sentence is proportionate to the offense and the offender." *See, e.g.*, *Horsley v. State*, 160 So.3d 393, 406 (Fla. 2015); *see also id.* at 399 ("Taken together, *Graham* and *Miller* establish that 'children are different'; that 'youth matters for purposes of meting out the law's more serious punishments'; and that 'a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.'" (quoting *Miller*, 567 U.S. at 481, 483, 489)).

**2. State legislatures have also interpreted *Miller* to limit mandatory sentencing for juveniles**

State legislative changes since *Miller* further demonstrate that sentencing schemes that preclude consideration of a juvenile defendant's age or other characteristics are now constitutionally suspect. In amending their statutes to comply with *Miller*'s categorical ban on mandatory life without parole, some

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*Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013); *Budder v. Addison*, 851 F.3d 1047 (10th Cir.), *cert. denied*, ––– U.S. ––––, 138 S. Ct. 475 (2017); *United States v. Mathurin*, 868 F.3d 921 (11th Cir. 2017), cert. denied, No. 17-7988, 2018 WL 1278155 (Oct. 1, 2018). *But see*, *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012).

states have moved away from mandatory sentencing schemes more generally. For example, South Dakota eliminated all mandatory minimum terms of imprisonment for juveniles convicted of homicide offenses, instead granting judges discretion to craft an appropriate sentence. *See* S.B. 140, 91st Leg. (S.D. 2016) (enacted). Similarly, Hawaii and Iowa no longer require a minimum term of imprisonment before parole eligibility for juvenile homicide offenders. H.B. 2116, 27th Leg. (Haw. 2014) (enacted); S.F. 448, 86th Gen. Assembly (Iowa 2015) (enacted). Other state statutes have been narrower in the scope of their substantive changes, amending only the mandatory life without parole provisions, but include language broadly interpreting *Miller* to require consideration of the characteristics of youth when sentencing juveniles charged with adult crimes. *See, e.g.*, S.B. 294, 91st Gen. Assembly (Ark. 2017) (enacted) ("The General Assembly acknowledges and recognizes that minors are constitutionally different from adults and that these differences must be taken into account when minors are sentenced for adult crimes."); S.B. 16-181, 70th Gen Assembly, 2nd Sess. (Colo. 2016) (enacted) (legislative declaration stating that *Miller* "held that children are

constitutionally different than adults in their level of culpability").

In short, since this Court's decision in *Okoro*, it has become increasingly clear that mandatory sentencing schemes like the one at issue here, which impose a life sentence and minimum term of imprisonment on every juvenile convicted of second-degree murder without any consideration of the juvenile's age or other mitigating characteristics, are unconstitutional under *Miller*.

## II. MANDATORY SENTENCING SCHEMES FOR JUVENILES ARE PARTICULARLY INAPPROPRIATE FOR FELONY MURDER OFFENSES

Mandatory sentencing schemes for juveniles pose a particularly high risk of disproportionality under the Eighth Amendment when they are imposed for offenses that include felony murder theories of liability. Massachusetts, like most states, "imposes criminal liability for homicide on all participants in a certain common criminal enterprise if a death occurred in the course of that enterprise," *Commonwealth v. Brown*, 477 Mass. 805, 822 (2017), on the theory that each participant consciously disregarded a reasonably foreseeable risk to human life. But what is "reasonably foreseeable" to an adult cannot be presumed to be what is "reasonably foreseeable" to a child. *See J.D.B.*, 564

U.S. at 274 (“Indeed, even where a ‘reasonable person’ standard otherwise applies, the common law has reflected the reality that children are not adults.”). *See also* Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts A Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can A More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 506 (2012) (“The qualities that characterize the reasonable person throughout the common law—attention, prudence, knowledge, intelligence, and judgment—are precisely those that society fails to ascribe to minors.”). Thus, presuming that a youth who agrees to engage in a dangerous felony, such as a robbery, also agrees to any action taken by their confederates, including murder, and imputing an intent to kill from their mere participation in the underlying felony ignores precedent and scientific findings underscored by both this Court and the U.S. Supreme Court.

### A. Convicting Juvenile Offenders Of Murder Under A Theory Of Transferred Or Imputed Intent Contravenes The Supreme Court's Juvenile Jurisprudence

Broadly defined, felony murder is the killing of another person during the commission of a felony. Emily Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11 CONN. PUB. INT. L.J. 297, 302 (2012). Felony murder liability is not dependent on an intent to kill: a person can be convicted of felony murder even if the killing was "accidental, unforeseeable, or committed by another participant in the felony." *Id.* at 302-03. Liability is justified by a theory of "transferred intent" because a reasonable person would know that death is a possible result of engaging in dangerous felonious activities, the intent to kill is inferred from an individual's intent to commit the underlying felony. *Id.* at 305. Massachusetts law reflects this classic understanding of felony murder, "constructively" applying the intent element of the underlying felony to the homicide. *See Commonwealth v. Watkins*, 375 Mass. 472, 486-87 (1978).

But, as the U.S. Supreme Court has recognized, this rationale fails when applied to juveniles. In *Graham*, the Supreme Court forbade the imposition of life without

parole sentences on juveniles "who do not kill, intend to kill, or foresee that life will be taken" because they "are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 560 U.S. at 69. "[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* The reasoning in *Graham* builds on the Supreme Court's felony murder jurisprudence in the death penalty context, which recognizes that the diminished culpability of non-principals precludes the application of the most extreme sentences to individuals who may have participated in, but did not commit, a murder. *Compare Tison v. Arizona*, 481 U.S. 137, 157-58 (1987) (upholding defendant's death sentence when he acted with "reckless disregard" and participation in the crime was "major") *with Enmund v. Florida*, 458 U.S. 782, 801 (1982) (reversing death sentence where defendant's culpability as an accomplice who did not kill or intend to kill was less than that of his accomplices who participated directly in the killing).

The *Miller* decision further reinforces that the rationale for felony murder liability conflicts with

what we know about adolescent development. As Justice Breyer explained in his concurring opinion:

> At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively.

567 U.S. 460, 492 (2012) (Breyer, J., concurring) (citation omitted). In short, the basic premise underpinning felony murder liability is inapplicable to juvenile defendants.

### B. Psychological And Neuroscientific Research Weigh Against Imposing Mandatory Harsh Sentences On Juveniles For Felony Murder

Both this Court and the U.S. Supreme Court have relied on an increasingly settled body of research finding that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68; *see also Perez*, 480 Mass. at 628-30; *Diatchenko v. Dist. Att'y*, 466 Mass. 655, 669-70 (2013). These scientific studies have helped to "explain salient features of adolescent

development, and point[] to the conclusion that children do not think and reason like adults because they cannot." Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 434-35 (2006).

Adolescents' risk assessment, decision-making capacities, and future orientation differ from those of adults in ways that are particularly relevant to felony murder cases. *See* Keller, *supra*, at 312-16. As the Supreme Court has observed, adolescents "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B.*, 564 U.S. at 272 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)). *See also* Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008). ("Considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices."). Although adolescents may possess the capacity to reason logically, they "are likely less capable than adults are in *using* these capacities in making real-world choices, partly because of lack of

experience and partly because teens are less efficient than adults at processing information." Scott & Steinberg, *supra*, at 20.

As adolescents attach different values to rewards than adults do, they often exhibit sensation-seeking characteristics that reflect their need to seek "varied, novel, [and] complex . . . experiences [as well as a] willingness to take physical, social, legal and financial risks for the sake of such experience." MARVIN ZUCKERMAN, BEHAVIORAL EXPRESSIONS AND BIOSOCIAL BASES OF SENSATION SEEKING 27 (1994). The need for this type of stimulation often leads adolescents to engage in risky behaviors, and as they have difficulty suppressing action toward emotional stimulus, they often display a lack of self-control. Scott & Steinberg, *supra*, at 20. The Supreme Court has recognized this, stating that adolescents "have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569). As a result, it is not surprising that "adolescents are overrepresented statistically in virtually every category of reckless behavior." *Roper*, 543 U.S. at 569 (quoting Jeffrey

Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 339 (1992)).

Adolescents are also vulnerable to peer pressure, and may agree to participate in a criminal act out of a misplaced concern about fitting in, even if they do not condone or want to participate in the criminal activity. Alison Burton, *A Commonsense Conclusion: Creating A Juvenile Carve Out to the Massachusetts Felony Murder Rule*, 52 Harv. C.R.-C.L. L. Rev. 169, 186-87 (2017) (citing DAVID MATZA, DELINQUENCY AND DRIFT 57 (1964)). This concern about 'fitting in' is one of the main reasons why juveniles are far more likely to participate in group crimes than adults are. *Id.* at 187 (citing FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 29 (1998)). Adolescents' willingness to act as accomplices in "inherently dangerous" felonies therefore more accurately reflects their impulsiveness, vulnerability to social pressure, failure to exercise good judgment, and inability to accurately assess risks—characteristics the Supreme Court has recognized are common to adolescents—than a reflection of a malicious intent to kill. *See Miller*, 567 U.S. at 471; *see also Roper*, 543 U.S. at 569. Holding an adolescent liable for murder because he or she should have been able to "reasonably

foresee" the same risks as an adult is nonsensical, and the theory of "imputed intent" is unjustifiable when juveniles are not found to have killed, intended to kill, or foreseen that life would be taken. *See Graham*, 560 U.S. at 69.

Although much of this research was well established when the Supreme Court decided *Miller*, recent studies on "hot cognition" further reinforce that juveniles are more likely than adults to take risks in emotionally charged or exciting situations. *See, e.g.*, Alexandra Cohen et al., *When Is An Adolescent An Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCHOL. SCI. 549, 555-59 (2016); Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk Taking in the Columbia Card Task*, 35 J. EXPERIMENTAL PSYCHOL. 709, 710 (2009).

> [I]n hot, high-arousal contexts, adolescents have difficulty relying on objective information to make rational decisions. . . . When emotionally aroused, adolescents discount the potential for negative consequences and weigh the potential for reward more heavily than adults do, impacting their decision-making abilities. Additionally, adolescents experience some situations as hot contexts that adults experience as cold contexts, such as the presence of peers. This means that adolescents may have even greater difficulty with decision

> making when peers are present than when they are not, as adolescent behavior in these subjectively hot situations tends to be driven more by the socioemotional parts of the brain than by the cognitive and executive controls.

Naomi E.S. Goldstein, Emily Haney-Caron, Marsha Levick & Danielle Whiteman, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 23-24 (2018). As adolescents are more likely to act based on impulses and emotions than rational thinking, they often fail to do a careful assessment of the risks to themselves or others. These deficiencies in risk appraisal are accentuated in the felony murder context, as participation in an arousing activity with peers has been shown to selectively exacerbate these cognitive immaturities.

In sum, scientific evidence shows that adolescents are more likely to take risks and react impulsively than adults, and these traits are context-specific. A theory of criminal liability that fails to take that context into account runs afoul of *Miller*. Individualized consideration of a juvenile's "distinctive (and transitory) mental traits and environmental vulnerabilities," *see Miller,* 567 U.S. at 473, such as peer pressure, social context, and stress, in general,

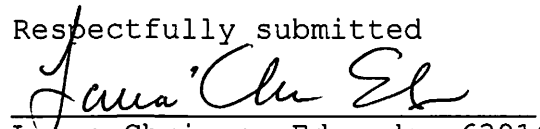
and the setting in which those deficits are exacerbated, is constitutionally required to ensure that a punishment fits both the offense and the offender.

In the instant case, Mr. Lugo was convicted of second-degree murder. The Massachusetts second-degree murder statute includes a wide array of possible homicide offenses, including felony murder. M.G.L.A. c. 265, § 1; *see also Brown*, 477 Mass. at 806 (reducing a homicide offense from first to second degree murder because the offense was based on a felony murder theory of liability). Although Mr. Lugo has been found to have been the principal, young people who play much more minor roles in homicide offenses—getaway drivers, friends tagging along during a robbery, accomplices who have no knowledge that another member of the group has a firearm—can also be convicted of second-degree murder under Massachusetts law. *See Brown*, 477 Mass. at 824. Because it imposes the same mandatory life sentence on all juveniles—even those who did not intend to kill or foresee that life will be taken—the sentencing scheme at issue is unconstitutional under *Miller.*

## CONCLUSION

For the foregoing reasons, *Amici Curiae* Juvenile Law Center; Center for Law, Brain, and Behavior at Masachusetts General Hospital; and The Center on Wrongful Convictions of Youth at Bluhm Legal Clinic of Northwestern University School of Law respectfully request that this Court reverse Mr. Lugo's conviction and sentence and remand the case for an individualized resentencing, with consideration of his age, its attendant characteristics, and other mitigating factors.

Respectfully submitted



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## STATUTORY ADDENDUM

**S.B. 140, 91st Leg. (S.D. 2016) (enacted).**

ENTITLED, An Act to eliminate life sentences for defendants under the age of eighteen at the time of the crime.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 22-6-1 be amended to read:

22-6-1. Except as otherwise provided by law, felonies are divided into the following nine classes which are distinguished from each other by the following maximum penalties which are authorized upon conviction:

(1) Class A felony: death or life imprisonment in the state penitentiary. A lesser sentence than death or life imprisonment may not be given for a Class A felony. In addition, a fine of fifty thousand dollars may be imposed;

(2) Class B felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class B felony. In addition, a fine of fifty thousand dollars may be imposed;

(3) Class C felony: life imprisonment in the state penitentiary. In addition, a fine of fifty thousand dollars may be imposed;

(4) Class 1 felony: fifty years imprisonment in the state penitentiary. In addition, a fine of fifty thousand dollars may be imposed;

(5) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of fifty thousand dollars may be imposed;

(6) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of thirty thousand dollars may be imposed;

(7) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of twenty thousand dollars may be imposed;

(8) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of ten
thousand dollars may be imposed; and

(9) Class 6 felony: two years imprisonment in the state penitentiary or a fine of four thousand dollars, or both.

If the defendant is under the age of eighteen years at the time of the offense and found guilty of a Class

A, B, or C felony, the maximum sentence may be a term of years in the state penitentiary, and a fine of fifty thousand dollars may be imposed.

The court, in imposing sentence on a defendant who has been found guilty of a felony, shall order in addition to the sentence that is imposed pursuant to the provisions of this section, that the defendant make restitution to any victim in accordance with the provisions of chapter 23A-28.

Nothing in this section limits increased sentences for habitual criminals under §§ 22-7-7, 22-7-8, and 22-7-8.1.

Section 2. That the code be amended by adding a NEW SECTION to read:

The penalty of life imprisonment may not be imposed upon any defendant for any offense committed when the defendant was less than eighteen years of age.

**H.B. 2116, 27th Leg. (Haw. 2014) (enacted).**

RELATING TO SENTENCING FOR JUVENILE OFFENDERS.

SECTION 1. The legislature acknowledges and recognizes that children are constitutionally different from adults and that these differences must be taken into account when children are sentenced for adult crimes. As stated by the United States Supreme Court in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior, and developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds, for example, in parts of the brain involved in behavior control." Children are more vulnerable to negative influences and outside pressures, including from family and peers, they have limited control over their own environment, and they may lack the ability to extricate themselves from horrific, crime-producing settings. The Supreme Court has emphasized through its decisions in *Roper v. Simmons*, 125 S. Ct. 1183 (2005), *Graham v. Florida*, 130 S. Ct. 2011 (2010), and *Miller v. Alabama* that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Youthfulness both lessens a juvenile's moral

culpability and enhances the prospect that, as the youth matures into an adult and neurological development occurs, the individual can become a contributing member of society.

The legislature further acknowledges that the United States is the only nation in the world that allows children to be sentenced to life imprisonment without parole, in violation of Article 37 of the United Nations Convention on the Rights of the Child, which categorically bars the imposition of "capital punishment [or] life imprisonment without the possibility of release . . . for offenses committed by persons below eighteen years of age."

Therefore, the purpose of this Act is to abolish life imprisonment without the possibility of parole as a sentencing option for those convicted for offenses committed while under the age of eighteen.

SECTION 2. Section 706-656, Hawaii Revised Statutes, is amended by amending subsection (1) to read as follows:

"(1) Persons eighteen years of age or over at the time of the offense who are convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without the possibility of parole.

As part of such sentence, the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

Persons under the age of eighteen years at the time of the offense who are convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment with the possibility of parole."

SECTION 3. Section 706-657, Hawaii Revised Statutes, is amended to read as follows:

**"§706-657 Enhanced sentence for second degree murder.** The court may sentence a person who was eighteen years of age or over at the time of the offense and who has been convicted of murder in the second degree to life imprisonment without the possibility of parole under section 706-656 if the court finds that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity or that the person was previously

convicted of the offense of murder in the first degree or murder in the second degree in this State or was previously convicted in another jurisdiction of an offense that would constitute murder in the first degree or murder in the second degree in this State. As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime which is unnecessarily torturous to a victim and "previously convicted" means a sentence imposed at the same time or a sentence previously imposed which has not been set aside, reversed, or vacated.

Hearings to determine the grounds for imposing an enhanced sentence for second degree murder may be initiated by the prosecutor or by the court on its own motion. The court shall not impose an enhanced term unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to the defendant of the ground proposed. Subject to the provision of section 706-604, the defendant shall have the right to hear and controvert the evidence against the defendant and to offer evidence upon the issue.

The provisions pertaining to commutation in section 706-656(2), shall apply to persons sentenced pursuant to this section."

SECTION 4. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect upon its approval, and shall apply to proceedings arising on or after its effective date and to proceedings that were begun but not concluded before its effective date.

**S.F. 448, 86th Gen. Assembly (Iowa 2015) (enacted).**

RELATING TO THE COMMISSION OF A CLASS “A” FELONY BY A PERSON UNDER EIGHTEEN YEARS OF AGE, PROVIDING PENALTIES, AND INCLUDING EFFECTIVE DATE AND APPLICABILITY PROVISIONS.

Section 1. Section 902.1, subsection 2, Code 2015, is amended by striking the subsection and inserting in lieu thereof the following:

2. *a.* Notwithstanding subsection 1, a defendant convicted of murder in the first degree in violation of section 707.2, and who was under the age of eighteen at the time the offense was committed shall receive one the following sentences:

(1) Commitment to the director of the department of corrections for the rest of the defendant's life with no possibility of parole unless the governor commutes the sentence to a term of years.

(2) Commitment to the custody of the director of the department of corrections for the rest of the defendant's life with the possibility of parole after serving a minimum term of confinement as determined by the court.

(3) Commitment to the custody of the director of the department of corrections for the rest of the defendant's life with the possibility of parole.

**S.B. 294, 91st Gen. Assembly (Ark. 2017) (enacted)**

AN ACT CONCERNING THE SENTENCING OF A PERSON UNDER EIGHTEEN YEARS OF AGE; ESTABLISHING THE FAIR SENTENCING OF MINORS ACT OF 2017; TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES.

SECTION 2. Legislative intent.

(a)(1) The General Assembly acknowledges and recognizes that minors are constitutionally different from adults and that these differences must be taken into account when minors are sentenced for adult crimes.

(2) As the United States Supreme Court quoted in Miller v. Alabama, 132 S.Ct. 2455 (2012), "only a relatively small proportion of adolescents" who engage in illegal activity "develop entrenched patterns of problem behavior," and "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including "parts of the brain involved in behavior control".

(3) Minors are more vulnerable to negative influences and outside pressures, including from their family and peers, and they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.

(4) The United States Supreme Court has emphasized through its cases in Miller, Roper v. Simmons, 543 U.S. 551 (2005), and Graham v. Florida, 560 U.S. 48 (2010), that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes".

(5) Youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society.

(b) In the wake of these United States Supreme Court decisions and the emerging juvenile brain and behavioral development science, several states, including Texas, Utah, South Dakota, Wyoming, Nevada, Iowa, Kansas, Kentucky, Montana, Alaska, West Virginia, Colorado, Hawaii, Delaware, Connecticut, Vermont, Massachusetts, and the District of Columbia, have eliminated the 20 sentence of life without parole for minors.

(c) It is the intent of the General Assembly to eliminate life without parole as a sentencing option for minors and to create more age-appropriate sentencing standards in compliance with the United States Constitution for minors who commit serious crimes.

**S.B. 16-181, 70th Gen Assembly, 2nd Sess. (Colo. 2016) (enacted)**

RESENTENCING HEARINGS FOR JUVENILE OFFENDERS SERVING LIFE SENTENCES

16-13-1001. Legislative declaration. (1) THE GENERAL ASSEMBLY FINDS THAT:

(a) (I) IN THE 2012 CASE OF *MILLER V. ALABAMA*, THE UNITED STATES SUPREME COURT HELD THAT IMPOSING A MANDATORY LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE ON A JUVENILE IS A CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION; AND

(II) THE COURT FURTHER HELD THAT CHILDREN ARE CONSTITUTIONALLY DIFFERENT THAN ADULTS FOR PURPOSES OF SENTENCING; AND

(b)(I)IN THE 2016 CASE OF *MONTGOMERY V. LOUISIANA*, THE COURT HELD THAT *MILLER V. ALABAMA* ANNOUNCED A

SUBSTANTIVE RULE OF CONSTITUTIONAL LAW THAT APPLIES RETROACTIVELY; AND

(II) IN LIGHT OF THE COURT'S HOLDING THAT CHILDREN ARE CONSTITUTIONALLY DIFFERENT THAN ADULTS IN THEIR LEVEL OF CULPABILITY, THE COURT FURTHER HELD THAT PRISONERS SERVING LIFE SENTENCES FOR CRIMES THAT THEY COMMITTED AS JUVENILES MUST BE GIVEN THE OPPORTUNITY TO SHOW THAT THEIR CRIMES DID NOT REFLECT IRREPARABLE CORRUPTION AND, IF THEY DID NOT, THEN THEIR HOPE FOR SOME YEARS OF LIFE OUTSIDE PRISON WALLS MUST BE RESTORED; AND

(III) THE COURT MADE IT CLEAR THAT A SENTENCE TO A LIFETIME IN PRISON IS AN UNCONSTITUTIONAL SENTENCE FOR ALL BUT THE RAREST OF CHILDREN.

(2) THE GENERAL ASSEMBLY FURTHER FINDS THAT:

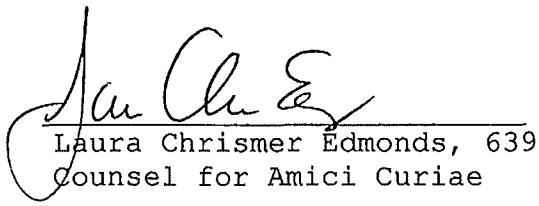
(a) A JUVENILE SENTENCED IN COLORADO FOR A CONVICTION OF A CLASS 1 FELONY AS A RESULT OF A DIRECT FILE OR TRANSFER OF AN OFFENSE COMMITTED ON OR AFTER JULY 1, 1990, AND BEFORE JULY 1, 2006, WAS SENTENCED TO A MANDATORY LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE; AND

(b) APPROXIMATELY FIFTY PERSONS IN COLORADO RECEIVED SUCH AN UNCONSTITUTIONAL SENTENCE.

(3) NOW, THEREFORE, THE GENERAL ASSEMBLY HEREBY DECLARES THAT THIS PART 10 IS NECESSARY TO PROVIDE PERSONS SERVING SUCH UNCONSTITUTIONAL SENTENCES THE OPPORTUNITY FOR RESENTENCING.

**CERTIFICATION OF COUNSEL PURSUANT TO MASS. R. APP. P. 16 (K)**

I hereby certify that the above document complies with the rules of this Court pertaining to the filing of briefs, including but not limited to: Mass. R. App. P. 16 (a) (6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16 (e) (reference to the record); Mass. R. App. 16 (f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16 (h) (length of briefs); Mass. R. App. P. 18 (appendix to briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).



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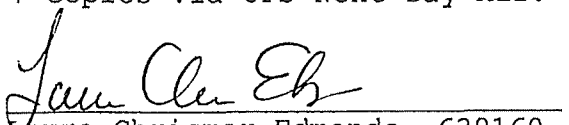
**CERTIFICATE OF SERVICE**

I, Laura Chrismer Edmonds, Esq., Attorney for Amici Curiae, in the above-captioned matter, hereby certify that on October 18, 2018, I served two copies of the herein appeal by postage prepaid, to Katherine C. Essington, 190 Broad Street, Suite 3W, Providence, RI 02903 and to Pamela Alford, District Attorney's Office, 45 Shamut Road, Canton, MA 02021. I further certify that on October 18, 2018, I filed the Brief of Amici Curiae with the Massachusetts Supreme Judicial Court by mailing an original and 7 copies via UPS Next Day Air.



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