COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NORFOLK COUNTY NO. 12546

COMMONWEALTH

v.

NATHAN ERNESTO LUGO

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ON APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT

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# BRIEF OF COMMITTEE FOR PUBLIC COUNSEL SERVICES, YOUTH ADVOCACY DIVISION, CHILDREN'S LAW CENTER OF MASSACHUSETTS, THE HONORABLE GAIL GARINGER (RETIRED) AND ROBERT KINSCHERFF, PhD. AS AMICI CURIAE IN SUPPORT OF DEFENDANT/APPELLANT

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OCTOBER 2018

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## STATEMENT OF INTEREST AND IDENTITY OF THE AMICI CURIAE

The **Committee for Public Counsel Services** (CPCS) was created by the Legislature in 1983 "to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services" to indigent parties in the commonwealth. St. 1983, c. 673, codified in G. L. c. 211D, § 1. Aside from the appointment of counsel for the indigent juvenile, CPCS has no financial interest in the case. The **Youth Advocacy Division** (YAD) is the juvenile justice division of CPCS. Because YAD attorneys represent juveniles in a wide variety of proceedings, including homicide trials and appeals and at parole eligibility hearings under *Diatchenko*, the Court's decision in this case will affect the interests of YAD's present and future clients.

Founded in 1977, the **Children's Law Center of Massachusetts** ("CLCM") is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in juvenile justice, child welfare, and education matters. The CLCM provides technical assistance and training to attorneys and other professionals who provide services and advocacy for children and

families. CLCM attorneys regularly participate as faculty at the MCLE and other continuing legal education seminars and have led amicus curiae briefs in juvenile justice and child welfare cases in the past. CLCM's mission is to promote and secure equal justice and to maximize opportunity for low-income children and youth. In seeking to realize its mission, CLCM is committed to ensuring that children facing incarceration receive individualized sentencing consideration recognizing fundamental characteristics of their youth and other relevant developmental factors.

**Hon. Gail Garinger (ret.)** is the former Child Advocate for the Commonwealth of Massachusetts. The Child Advocate is charged with investigating reports of "critical incidents" and child abuse and neglect involving children receiving services from state agencies, advising the public and government officials on ways to improve services to children and families, and advocating for the humane and dignified treatment of children placed in the care or under the supervision of the Commonwealth, including those serving life sentences. Before Governor Patrick appointed her as Child Advocate in 2008, Judge

Garinger served as a juvenile court judge in Massachusetts for thirteen years, the last eight years as First Justice of the Middlesex County Division of the Juvenile Court Department. A Harvard Law School graduate, she has also served as General Counsel at Children's Hospital Boston and has significant private practice experience in children's health and welfare.

**Robert Kinscherff, PhD**, is a clinical/forensic psychologist and attorney. Dr. Kinscherff is Faculty in the Doctoral Program in Clinical Psychology (forensic psychology, concentration in Children and Families of Adversity and Resilience) and Associate Vice President for Community Engagement at William James College. He was also the 2015-2017 Senior Fellow in Law & Applied Neuroscience at the Center for Law, Brain and Behavior at MGH and the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School. He is also Senior Associate at the National Center for Mental Health and Juvenile Justice. Dr. Kinscherff has held various government, teaching, professional service, and policy advisory/development positions, reflecting interests in clinical and forensic practice with juvenile and adult offenders, risk assessment and management,

ideologically-motivated violence, and the developmental impact of childhood exposures to adversity and trauma.

## ISSUES PRESENTED

The Court has solicited amicus briefs on two questions:

1. Where the defendant was convicted of murder in the second degree for a homicide he committed as a juvenile, whether imposing a mandatory sentence of life with the possibility of parole violated the Eighth Amendment of the United States Constitution or article 26 of the Massachusetts Declaration of Rights?

The amici submit that the answer to this question is yes, because section 2 of G. L. c. 265, as applied to second degree juvenile homicide offenders, provides only mandatory sentencing to a sentence of life with the possibility for parole after fifteen years and such sentencing precludes judicial consideration of youth and its attendant characteristics and contravenes evolved standards of decency of a maturing society regarding treatment of children, thereby violating the Eighth Amendment and article 26.

2. Whether a juvenile defendant convicted of murder in the second degree is entitled to an

individualized sentencing hearing?

The amici submit that the answer to this question is yes, because an individualized sentencing hearing to consider second degree juvenile homicide offenders' youthful characteristics, social and family circumstances and diminished culpability is required to comport with constitutional principles established in *Miller v. Alabama* (*Miller),* 132 S. Ct. 2455 (2012), provide second degree homicide offenders with a meaningful opportunity for parole when they reach parole eligibility and afford them protections equal to juveniles convicted of first degree murder.

## STATEMENT OF THE CASE

The amici agree with the parties' statements of the case.

## SUMMARY OF THE ARGUMENT

This Court should overrule the holding in *Commonwealth v. Okoro* and determine that mandatorily sentencing second degree juvenile homicide offenders to life with the possibility of parole eligibility after fifteen years violates the federal and state constitutions and that individualized sentencing is required in every case in which a juvenile is convicted of murder. The reasons in *Okoro* for

postponing a decision to require individualized sentencing for second degree juvenile homicide offenders no longer have force. The law and science are firmly established. No guidance on juvenile sentencing requirements is expected from the Supreme Court (pp. 7-12).

Simply put, the constitutional distinction, as established in *Miller,* between children and adults for sentencing purposes requires this result. *Miller*'s principles are not limited to one specific homicide offense, but created a set of rights for juveniles based on the age of the offender, as opposed to rights based on the offense. The constitutional directive for individualized, rather than automatic, sentencing for juveniles is clear. Such one-size-fits-all sentencing violates the Eighth Amendment and cannot continue. (pp. 24-31).

Criminal defendants are often afforded greater protections under the Massachusetts Declaration of Rights than are available under corresponding provisions of the Federal Constitution. So too here. Mandatory sentencing of second degree juvenile homicide offenders without consideration of juvenile status is disproportionate with regard to the

offender, is cruel punishment in light of contemporary standards of decency and is barred under article 26 of the Massachusetts Declaration of Rights (pp. 32-40).

Individualized sentencing must be extended to second degree juvenile homicide offenders so they are afforded the same due process rights as juveniles convicted of the greater crime of first degree murder, who now receive individualized sentencing (pp. 23-24; 40-44). Without restriction by the crime or sentence, second degree juvenile homicide offenders receive due process rights in the parole system comparable to juveniles convicted of first degree murder, including the assistance of counsel and an expert. Second degree juvenile homicide offenders must receive an individualized sentencing hearing to give them a meaningful opportunity for release on parole. Accordingly, this Court should remand Mr. Lugo's case for an individualized sentencing hearing (pp. 44-47).

## ARGUMENT

- *Introduction*

This case presents the opportunity to revisit and overrule the holding in *Commonwealth v. Okoro (Okoro)*, 471 Mass. 51 (2015) that mandatorily sentencing second degree juvenile homicide offenders to life with the

possibility of parole after fifteen years did not offend the federal or state constitutions and that limited individualized sentencing, as required by *Miller*, to juveniles convicted of first degree murder sentenced to life without the possibility of parole ("LWOP").[1] The time has come to end mandatory sentencing for second degree juvenile homicide offenders, like Mr. Lugo, and extend individualized sentencing to that cohort because of the constitutional distinction between children and adults for sentencing purposes and because second degree juvenile homicide offenders are entitled to protections equal to those provided to first degree juvenile homicide offenders.

*Okoro*'s rationale for limiting *Graham v. Florida*, 560 U.S. 48 (2010), *Miller* and *Diatchenko (I) v. District Attorney for the Suffolk Dist.*, 466 Mass. 655 (2013) to a sentence of juvenile LWOP now has little

[1] The *Okoro* Court anticipated revisiting these issues. *Id.* at 62 ("at present" mandatory life sentence with parole eligibility after fifteen years imposed on second degree juvenile homicide offenders not unconstitutional under federal or state constitutions) & 58 (leaving "for a later day" whether individualized sentencing in every case in which juvenile homicide offender receives life sentence is constitutionally required). See *Commonwealth v. Brown*, 466 Mass. 676, 688 (2013) (leaving open question whether discretion is constitutionally required in all instances of juvenile sentencing).

force. The legal landscape regarding juvenile sentencing has changed, prompting courts and legislatures to reconsider the manner in which criminal laws apply to children. Crime rates have been relatively low since the mid 1990s,[2] calming anxiety about public safety and facilitating a less punitive, more pragmatic approach to juvenile crime regulation.[3] And, the reasons cited for postponing a decision regarding individualized sentencing for second degree juvenile homicide offenders no longer apply.

The language, logic and science of *Miller* demand a broader reading than prior narrow interpretations. See *Okoro, supra* at 57 (labeling *Miller's* holding as "narrow" and limited to whether juvenile homicide offender can be subjected to mandatory sentence of LWOP). Three years later, with a nuanced analysis of

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[2] In 2012, less than one-fifth of 1% of all juveniles ages 10 to 17 living in the country were arrested for a violent crime. This is less than half of what it was in the mid-1990s, when fears of "super-predators" dominated the discussion of juvenile law. Office of Juvenile Justice & Delinquency Prevention, Statistical Briefing Book, www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05201. (last accessed 9/28/18).

[3] Scott, E., Grisso, T., Levick, M., & Steinberg, L. (2016), *The Supreme Court and the transformation of juvenile sentencing,* 30. John D. and Catherine T. MacArthur Foundation, citing E. Scott (2013) *Miller v. Alabama and the Past and Future of Juvenile Crime Regulation,* Mn. J. L. & Inequality, 31, 535-558.

*Miller, Okoro's* conclusion that a mandatory sentence for a juvenile homicide offender is prohibited only where a State seeks to impose LWOP on a juvenile cannot withstand scrutiny.

*Miller's* central principle that children are constitutionally different from adults for sentencing purposes is no longer new. See *Okoro, supra* at 58-60. The principle is accepted by most courts and legislatures and utilized in the sentencing process.[4]

Some of the reluctance to extend individualized juvenile sentencing beyond LWOP was based on the prospect of new scientific discoveries. *Okoro*, *supra* at 59-60, n.14 ("...At this point, we cannot predict what the ultimate results of [continued] research [on adolescent brain development and related issues] will be or, more importantly, how it will inform our understanding of constitutional sentencing as applied to youth."). The *Okoro* Court cited "the age range at which most individuals reach adult neurobiological

[4] See MA Best Practices for Sentencing Using Social Science Data & Research http://www.gov/files/documents/2016/08/wk/best-practices-in-sentencing-using-social-science.pdf.6 (citing *Miller*). See also http://www.mass.gov/courts/docs/sentencing-commission/dc-bmc-sentencing-best-practices.pdf. (encouraging adult and juvenile court judges to consider social science data and research pertaining to juveniles, their culpability and brain development in sentencing decisions) (last accessed 9/19/18).

maturity" and "ways that environmental factors, such as chronic or extreme stress, trauma, or neglect, can impact brain development and adolescent behavior" as "new knowledge [that]...may have important implications for...decisions that affect juvenile sentencing." *Id.* However, such new knowledge would not change the fundamental tenet on which *Miller* rests, that children's brains are physically different from adults in ways that bear on culpability. Nor has the science weakened since *Okoro.*[5] Then, as now, the science on adolescent brain development as it relates to culpability is sufficiently settled[6] to support

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[5] See *Miller*, 132 S. Ct. at 2464-65, n.5 (quoting Brief for American Psychological Association, American Psychiatric Association & National Association of Social Workers as Amici Curiae in Support of Petitioners at 3 ("The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger). See also L. Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions About Adolescents' Criminal Culpability,* 14 NATURE REVS. NEUROSCIENCE 513 (2013).

[6] The juvenile brain science in *Miller* is not new. Since 1999, scientists have used new technologies to study the human brain and to discover that adolescent brains are further from full adult development than was previously believed. Mark Soler, D. Shoenberg & M. Schindler, *Juvenile Justice: Lessons for a New Era,* 16 Georgetown J. Poverty Law & Policy 483, 493 (2009). By 2000, adolescents' behavior, once attributed solely to hormonal changes, was found to be affected more by physical changes in the brain, so, given their brains' differences, it would be "astonishing indeed if

ending mandatory sentences and requiring individualized sentencing for second degree juvenile homicide offenders.

In waiting to revisit the issue, *Okoro* held out hope for guidance on constitutional requirements for juvenile sentencing.[7] There has been none, and there are no juvenile sentencing cases on the Supreme Court docket.

The constitutional directive for individualized, rather than automatic, sentencing for juveniles is clear so state sentencing schemes that fail to take account of age at any stage of the process are unconstitutional in light of *Miller.* Jennifer S. Breen & John R. Mills, *Mandating Discretion: Juvenile Sentencing Schemes After Miller v. Alabama,* American Criminal Law Review 52 (2) 292, 306, 318 (2015). This Court has been in the forefront of juvenile sentencing

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adolescents did not differ from adults in various aspects of their motivated behavior". L. P. Spear, *Neurobehavioral Changes in Adolescence*, 9 Current Directions Psychol. Sci. 111, 113 (2000).

[7] See *Okoro at* 60-61, n.15 & 16 ("[*Montgomery*]... indicates a reasonable possibility that the Court may shed additional light on *Miller*'s full implications and on the constitutional requirements for juvenile sentencing...before too long."). *Montgomery v. Louisiana,* 136 S. Ct. 718, 736-737 (2016), reinforced that "children are constitutionally different from adults in their level of culpability" but shed no light on requirements of juvenile sentencing.

by applying *Miller* retroactively, even before *Montgomery* dictated, see *Diatchenko I*, 466 Mass. at 666,[8] and requiring individualized sentencing for certain juveniles convicted of non-homicide offenses, see *Commonwealth v. Lutskov*, 480 Mass. 575, 582 (2018) and *Commonwealth v. Perez II*, 480 Mass. 562, 569 (2018) and would continue by ending mandatory sentences and requiring individualized sentencing for second degree juvenile homicide offenders. For reasons that follow, this Court should remand Mr. Lugo's case for an individualized resentencing.

To start, an overview of treatment of juveniles and sentencing schemes for juvenile homicide offenders under Massachusetts law provides a useful context in which to fit abolishing mandatory sentencing and requiring individualized sentencing.

- *The Trajectory of Juvenile Justice in Massachusetts*

In the 1990's Massachusetts followed a national trend in sentencing children as adults, but in the last decade has moved toward sentencing children in a

[8] Massachusetts was among fourteen states that found *Miller* retroactive. Josh Rovner, THE SENTENCING PROJECT, Juvenile Life Without Parole: An Overview 3 (2017). http://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf(last accessed 10/3/18).

manner that recognizes and takes into account their constitutional differences.

Massachusetts historically has been a leader and pioneer in juvenile justice, creating the nation's first juvenile correctional system around 1846 and leading the first reforms by shutting down Dickensian "training schools." C. Peak, "The Impressive Top-to-Bottom Makeover of the Massachusetts Juvenile Justice System" 2/8/17, http://nationswell.com/ massachusetts-juvenile-criminal-justice-makeover/. (last accessed 10/8/18). The primary goal of the juvenile justice system was rehabilitative, even for juveniles charged with the most serious offenses. *A Juvenile v. Commonwealth*, 370 Mass. 272, 282-283 (1976).

The system was premised on treating juvenile offenders as children needing direction and guidance, rather than as criminals. *A Juvenile*, *supra* at 281 (citation omitted) (statutes dealing with delinquent children construed liberally so children, as far as practicable, shall be treated "not as criminals, but as children in need of aid, encouragement and guidance").[9] See *Commonwealth v. A Juvenile*, 363 Mass.

[9] "Our own juvenile justice system is premised on similar considerations [as *Roper v, Simmons,* 543 U.S. 551 (2005), *Graham* and *Miller*]." See R.L. Ireland,

640, 641 (1961) ("proper administration of criminal justice" requires defendant be afforded an opportunity to establish he should be treated as a child rather than as an adult). Juveniles, including those charged with murder, could only be transferred to the Superior Court for prosecution and sentencing as adults after a Juvenile Court judge conducted a two-part transfer hearing.[10] See G. L. c. 119, § 61, as amended through St. 1993, c. 12, § 3; St. 1992, c. 398, § 3. *Walczak*, 463 Mass. at 825-26. The statutory mechanism for transfer was only warranted in "exceptional circumstances". *Id.* (citation omitted). With enactment of the 1996 Juvenile Justice Reform Act, this changed.

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Juvenile Law § 1.3, at 18 (2d ed. 2006) ("The rationale of [the dual system for adult and juvenile offenders] is diminished culpability: deviant behavior of children may be regarded as generally less culpable than similar adult behavior for the reason that a child's capacity to be culpable...is not as fixed or as absolute as that of an adult"). *Commonwealth v. Walczak*, 463 Mass. 808, 831 (2012) (Lenk, J., concurring).

[10] Consideration of a child's prior record, his family and school history, psychological and emotional development, and the nature of any past rehabilitative efforts, much like the *Miller* factors, went into evaluating a minor's treatment as a juvenile. See *A Juvenile*, 370 Mass. at 282, n.14.

Massachusetts, following a national trend,[11] moved toward treating and sentencing children as adults. The 1996 act eliminated transfer procedure and drastically altered the treatment of juveniles. *Clint C.*, *supra* at 222. As called for by the act, the criminal justice system treats juveniles in one of three ways: as a delinquent, a youthful offender, or an adult. But if a juvenile is charged with murder, delinquent and youthful offender status are both off the table. The act limited the Juvenile Court's jurisdiction and required a juvenile indicted for murder be tried "in accordance with the usual course and manner of criminal proceedings" applicable to adult defendants in the Superior Court and be treated as an adult in all respects. *Walczak, supra* at 827. Juveniles charged with murder were thus not entitled to the benefit of a juvenile justice system that is "primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders, and geared toward the correction and redemption to society of delinquent children." *Commonwealth* v. *Hanson H.*, 464

[11] Coinciding with the "super-predator" panic of the 1990's, the act was enacted in response to societal concerns about violent crimes committed by juveniles. *Commonwealth v. Clint C.*, 430 Mass. 219, 222 (1999) (citation omitted).

Mass. 807, 814 (2013) (internal quotations and citations omitted).

Until *Diatchenko I* and *Brown,* juveniles convicted of murder in any degree, unlike all other crimes, were treated as adults in all respects. See *Walczak, supra* at 827. Currently, for juveniles convicted of first degree murder, a sentencing judge must consider their juvenile status and related circumstances before imposing a sentence and parole eligibility date range from 20 to 30 years. Not so for second degree juvenile homicide offenders, who are subject to "one-size fits all" sentencing. For them, there is no exercise of judicial discretion, no sentencing process in which juvenile status is taken into account and, even if their juvenile status and circumstances were to warrant, no chance to receive a sentence other than the mandatory life sentence with parole eligibility after fifteen years.

- *Evolution of Massachusetts Sentencing Schemes for Juvenile Homicide Offenders*

Before 1996, a judge had considerable discretion within the statutory framework to determine whether a child charged with murder should be treated as an adult or tried and sentenced in juvenile court. *Commonwealth v. Matthews*, 406 Mass. 380, 383 (1990).

In *Matthews*, a fifteen-year old was tried and sentenced as an adult for second degree murder, but only after a judge considered all relevant factors, made supportive findings, and determined transfer to adult court was legitimately warranted. *Id.* at 384. If tried and sentenced in the juvenile court at that time, a second degree juvenile homicide offender could receive less than fifteen years. After the 1996 act, this judicial discretion was eliminated.[12]

Today, in sentencing juvenile homicide offenders, a web of statutes is involved: G. L. c. 265, § 2 sets the punishments for convictions of first and second degree murder; G. L. c. 279, § 24 specifies the term

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[12] When the juvenile committed the offense, "the sentence to be imposed on a finding of delinquency by reason of murder in the second degree was a minimum of ten and a maximum of fifteen years' confinement. The penalty on an adjudication of delinquency by reason of murder in the first degree was a minimum of fifteen and a maximum of twenty years' confinement. See G. L. c. 119, § 72, as amended through St. 1992, c. 398, §§ 4, 5. The statutory provisions for these penalties were removed in 1996 by St. 1996, c. 200, §§ 13, 39. G. L. c. 119, § 72B, was enacted at the same time, St. 1996, c. 200, § 14, and provides that, where a person is found guilty of murder in the first or second degree after his fourteenth birthday, the Superior Court shall impose the penalty 'provided by law.' In the case of murder in the first degree, that sentence would be life imprisonment without possibility of parole. See G. L. c. 265, § 2. As to murder in the second degree, § 72B provides that the juvenile would be eligible for parole after fifteen years." *Commonwealth v. Doane*, 428 Mass. 631, 634, n.1 (1999).

of years fixed by the court that must be served before parole eligibility; G. L. c. 127, § 133A governs availability of parole eligibility for life sentences; and G. L. c. 119, § 72B specifies procedures for juvenile homicide offenders. The statutes underwent several changes, but the mandatory life sentence with parole eligibility after fifteen years for second degree juvenile homicide offenders has not changed.

The version of G. L. c. 265, § 2, in place before *Diatchenko I* and *Brown,* stated:

> Any other person who is guilty of murder in the first degree shall be punished by imprisonment in the state prison for life. Whoever is guilty of murder in the second degree shall be punished by imprisonment in state prison for life. No person shall be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven while he is serving a life sentence for murder in the first degree. St. 1982, 554, § 3.

For juvenile homicide offenders, the version of G. L. c. 119, § 72B, then in place, inserted by G. L. St. 1996, c. 200, § 14, provided:

> If a person is found guilty of murder in the first degree committed on or after his fourteenth birthday and before his seventeenth birthday.... the superior court shall commit the person to such punishment as is provided by law for the offense [LWOP] [and] a person found guilty of murder in the second degree committed on or after his fourteenth birthday and before his seventeenth birthday...the superior court shall commit the person to such punishment as is provided by law. Said person shall be eligible

> for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven when such person has served fifteen years of said confinement.

In 2012, the Legislature amended the punishment for adults convicted of second degree murder. General Laws c. 127, § 133A, was amended through St. 2012, c. 192, §§ 37-39, to provide that minimum parole term is set according to G. L. c. 279, § 24, and G. L. c. 279, § 24, as amended through St. 2012, c. 192, § 46, set the sentence for adults convicted of second degree murder as a mandatory life sentence with parole eligibility to begin no earlier than after fifteen years and no later than after twenty-five years. The statutes were again amended in 2014, but the sentence for an adult convicted of second degree murder stayed the same. G. L. c. 265, § 2, amended through St. 2014, c. 189, § 5; G. L. c. 279, § 24, amended through St. 2014, c. 189, § 6.

In 2013, the temporary fix for sentencing first degree juvenile homicide offenders within the confines of *Miller* was to sever unconstitutional applications of G. L. c. 265, § 2 (2012), "resulting in the functional equivalent of sentencing a [juvenile] defendant convicted of murder in the first degree to the punishment commonly imposed for murder in the

second degree. What remain[ed] of G. L. c. 265, § 2...then was a mandatory sentence of life in prison with the possibility of parole." *Brown,* 466 Mass. at 688-689 & n.10. Neither *Diatchenko I* nor *Brown* addressed mandatory sentencing of second degree juvenile homicide offenders.

In response to *Diatchenko I* and *Brown*, the Legislature, in 2014, established specific parole eligibility dates for juvenile offenders convicted of murder in the first degree. G. L. c. 265, § 2, as amended by 2014, 189, § 5. G. L. c. 119, § 72B, as amended by 2014, 189, § 2. G. L. c. 279, § 24, as amended by 2014, 189, § 6. G. L. c. 127, § 133A, as amended by 2014, 189, § 3. These statutes changed the parole eligibility dates for first degree juvenile homicide offender from fifteen years to a range of 20 to 30 years.[13]

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[13] After the July 25, 2014 amendments, G. L. c. 265, § 2 (b) provides: Any person who is found guilty of murder in the first degree who committed the offense on or after the person's fourteenth birthday and before the person's eighteenth birthday shall be punished by imprisonment in the state prison for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of chapter 279, which states: In the case of a sentence of life imprisonment for murder in the first degree committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not

Despite changing the parole eligibility dates for first degree juvenile homicide offenders, the Legislature has left alone the mandatory sentence for second degree juvenile homicide offenders. See G. L. c. 119, § 72B, as amended by St. 2013, c. 84, §§ 24, 24A; G. L. c. 119, § 72B, as amended by St. 2014, c. 189, § 2. On this point *Okoro* is correct and *Brown* got it wrong.[14] *Okoro, supra* at 55, n.4 ("... with respect

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

[14] Statutory amendments, including of c. 119, § 72B, show the analysis in *Brown, supra* at 689-690, is wrong. See *id.* ("As a result [of *Brown* and *Diatchenko*], juvenile defendants convicted of homicide crimes committed after August 2, 2012, both murder in the first degree and murder in the second degree are mandatory life-sentence crimes with parole eligibility to be set between fifteen and twenty-five years."). The 2012 amendments applied only to adult second degree homicide offenders. See St. 2012, 192, §§ 45, 46. *Brown*'s concern of sentencing disparities between first degree and second degree juvenile homicide offenders is also misplaced. *Id.* ("...as a result of applying the same discretionary parole-eligibility range to these two defendants, a juvenile convicted of the lesser crime of murder in the second degree could

to defendants between fourteen and eighteen who are convicted of murder in the second degree and are subject to sentencing under G. L. c. 119, § 72B, although § 72B was amended in 2013 and in 2014, the Legislature did not change the fifteen-year parole eligibility date for this cohort. See G. L. c. 119, § 72B, as amended by St. 2013, c. 84, §§ 24, 24A; G. L. c. 119, § 72B, as amended by St. 2014, c. 189, § 2").[15]

While *Brown's* sentencing disparities concern was misplaced, n.14, *infra,* there is legitimate concern that juveniles convicted of second degree murder, as compared to juveniles convicted of first degree murder, are treated unfairly since juveniles convicted of first degree murder are afforded due process rights. Unlike first degree juvenile homicide offenders, the cohort of second degree murder juveniles has no opportunity for exercise of judicial discretion and individualized sentencing. To determine what parole eligibility date to impose—from twenty to thirty years—in the case of a juvenile convicted of

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be sentenced to a lengthier minimum term than the juvenile convicted of the more severe crime of murder in the first degree.").

[15] The 2013 amendments expanded persons covered by § 72B to include seventeen-year old defendants. St. 2013, c. 84, §§ 24, 24A. *Okoro, id.*

first degree murder committed after July 25, 2014, an individualized sentencing hearing must be held so the sentencing judge can exercise discretion under c. 265, § 2 and c. 279, § 24. But, for second degree juvenile homicide offenders, there is no discretionary parole-eligibility range to apply, only a mandatory sentence with parole eligibility after fifteen years[16] imposed in every case, regardless of a juvenile's youthful characteristics, family or social circumstances or other mitigating factors. That second degree juvenile homicide offenders receive fewer rights than juveniles convicted of the greater crime of first degree murder renders the mandatory sentence disproportionate with respect to the offender.

**I.** Section 2 of G. L. c. 265, as applied to second degree juvenile homicide offenders, violates the Eighth Amendment to the US Constitution and article 26 of the Massachusetts Declaration of Rights because mandatory sentencing precludes judicial consideration of youth and its attendant characteristics and is contrary to evolved standards of decency regarding treatment of children under criminal law.

- *Sentencing second degree juvenile homicide offenders to a mandatory life sentence violates the Eighth Amendment, as explained by Miller.*

[16] *Sharris v. Commonwealth*, 480 Mass. 586, 592, n.3 (2018), which noted the murder statute was revised so defendants convicted of second degree murder are eligible for parole after 15-25 years, is inapposite because Sharris was not a juvenile.

This Court should determine mandatory sentencing of second degree juvenile homicide offenders does not pass constitutional muster. *Miller* made clear that in order to appreciate the context in which the juvenile has committed a homicide crime (or at least been convicted of one), states must employ a process that allows the defendant to explain his life context. Cara Drinan, *The Miller Revolution,* 101 Iowa L. Rev. 1787, 1802 (2016).“[M]andatory penalty schemes....prevent the sentencer from taking account of these central considerations.” *Miller,* 132 S. Ct. at 2466.

*Miller* is not confined to a sentence of mandatory life in prison without parole. Its principles are equally applicable to second degree juvenile homicide offenders. A state sentencing statute that requires, regardless of the defendant's age, that a certain sentence be imposed based on the conviction violates a juvenile's substantive right to be sentenced based on the juvenile's culpability. When the only inquiry made by the sentencing court is to consult the legislature's mandatory punishment for the crime, without any further inquiry into whether the punishment is appropriate for the juvenile, for no other reason than it is appropriate for an adult, the

Constitution requires more." Martin Guggenheim, *Graham v. Florida & A Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L.L. REV. 457, 490-91 (2012), citing *Graham*, 560 U.S. at 88 (Roberts, C.J., concurring) ("[J]uvenile offenders are generally—though not necessarily in every case—less morally culpable than adults who commit the same crimes."). See Breen & Mills, *supra* at 292, 294 & n.5 ("The automatic imposition of a mandatory sentence on a juvenile without considering the unique attributes of his youth conflicts with constitutional principles."). A sentencing judge must have the discretion to craft a sentence that accounts for the age of the juvenile, level of involvement in the offense, the circumstances of the offense, and individual level of culpability in light of development. *Miller, supra* at 2467-2468 ("....mandatory 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.").

Nor are *Miller*'s principles limited to one specific homicide offense. *Miller* created a set of rights for juveniles based on the young age of the offender, as opposed to rights based on the offense.

The key category in sentencing is age, not the offense or the sentence. Breen & Mills, *supra* at 307. "Even though much of *Miller*'s language focuses on the LWOP sentence, the decision states, 'None of what it said about children is crime-specific.' The Chief Justice's dissent quotes that sentence and then explains: 'The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. See *ante,* at 2467-2469. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive...' *Miller,* at 2482 (Roberts, C.J., dissenting)...." *Id.* at 315, n.126.

Professors Breen and Mills, *id.* at 307-308, note:

> ...the Court banned the imposition of the sentence without considering the unique characteristics of the juvenile. In simultaneously adding this key requirement while refraining from banning the sentence outright, the Court reoriented sentencing procedures for juveniles toward mandating individualized consideration of the unique vulnerabilities of youth. This shift in focus, away from the sentence imposed and the type of crime committed and towards the procedure used by courts to sentence children, marks a fundamental change in the Court's juvenile jurisprudence. It marked a change from a focus on a particular sentence—[LWOP]—to the person being sentenced. It represents a shift from "life without parole for children is different" to "children are different."

"The *Miller* decision...recognizes that process matters when sentencing children. The Court's position that 'none of what *Graham* said about children ...is crime-specific' is really no different from the position that none of what *Roper*, *Graham*, and *Miller* said about children is sentence-specific. The sentencing process and discretion called for by the *Miller* Court are simply incompatible with a mandatory sentencing scheme—whether it is a mandatory sentence of life without parole or a mandatory sentence of 35 years." Drinan, *supra* at 1820.

It is thus not the sentence for the juvenile that is at issue, but rather how it is imposed. Alex Dutton, *The Next Frontier of Juvenile Sentencing Reform: Enforcing Miller's Individualized Sentencing Requirement Beyond the JLWOP Context,* 23 Temp. Pol. & Civ. Rts. L. Rev. 173, 196 & n.218 (2013-14) (citation omitted) (*Miller* "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty"). "While *Roper, Graham,* and *Miller* all focus on the most severe punishments available to courts, mandatory...sentences offend the same principles the courts sought to protect. The key

term...is mandatory: these types of sentences do not allow courts to consider the characteristics of youth, a consideration deemed crucial by the Court. As concluded in *Graham* and reiterated in *Miller,* juvenile sentences should be shaped by demonstrated maturity and rehabilitation of the defendant...mandatory... sentences do not allow for this type of consideration." Lindsey Krause, *One Size Does Not Fit All: The Need for a Complete Abolition of Mandatory Minimum Sentences for Juveniles In Response to Roper, Graham & Miller,* 33 Law and Inequity 481, 503 (2015).

The *Okoro* Court, *supra* at 61-62, said, "although both juvenile and adult homicide offenders remain subject to a mandatory life sentence," there are a number of "ways that the constitutional differences between juvenile and adult homicide offenders currently are reflected in our sentencing laws": a juvenile convicted of second degree murder is guaranteed to become eligible for parole at some point in his life; juvenile offenders become eligible for parole after fifteen years, not twenty-five years for adult offenders; incarcerated youthful offenders are not restricted in their ability to take part in educational and treatment programs, or to be placed in

a minimum security facility, solely because of the nature of their crimes or length of their sentences, unlike adult offenders, and juvenile homicide offenders, including those convicted of second degree murder, have access to due process rights at parole hearings. But such "constitutional differences" only come into play after a mandatory sentence is imposed. None offers an opportunity for consideration of youth and its attributes before the imposition of a sentence, which is the constitutional directive.

Mandatory sentences force courts to apply a standardized sentence to juveniles based on the crime, not on their culpability or other outside factors[17] that have a disproportionate effect on juveniles. Krause, *supra* at 502. Even within the juvenile system, mandatory minimum sentences do not take into account the vast differences between each offender in the criminal system, as *Miller* recognized:

> Under these schemes, every juvenile will receive the same sentence as every other — the 17-year-

[17] The "prevalence of juveniles in the adult criminal system is a serious problem" and "mandatory sentences place juveniles in a potentially precarious situation without fully examining the mitigating factors of youth. These sentences attempt to fit juveniles into adult boxes, sending them off to a dangerous environment without allowing for the considerations mandated by the Court." Krause, *supra* at 503.

> 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...

Krause, *id.* at 502, quoting *Miller*, 132 S. Ct. at 2467-2468.

Mandatory sentencing of juveniles convicted of second degree murder ignores that all children convicted of homicide are constitutionally different for sentencing purposes, not just children convicted of a particular homicide offense or those receiving a particular sentence. Mandatory sentencing treats that cohort as though they are adults at every stage of the process, contrary to principles in *Roper, Graham, Miller, Diatchenko I,* and reinforced in *Montgomery*. See *Graham, supra* at 76 ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."). This one-size-fits-all sentencing violates the Eighth Amendment. *Miller* mandates individualized sentencing for juveniles. Mandatory sentencing is the opposite of individualized sentencing and cannot continue. [18]

[18] See *Commonwealth v. Baez*, 480 Mass. 328, 333 (2018) (Gants, C. J., concurring, with whom Lenk and Budd, JJ., joined) (inviting examination of wisdom and fairness of mandatory minimum sentences, especially where predicate crimes committed as juveniles).

- *In light of evolved standards of decency, mandatory sentencing of second degree juvenile homicide offenders without judicial consideration of their youth status violates article 26.*

Article 26 bars punishments found to be cruel or unusual in light of contemporary standards of decency, which mark the progress of society. *Libby v. Comm'r of Correction,* 385 Mass. 421, 435 (1982). In divining contemporary standards of decency, this Court looks to State statutes and regulations, which reflect the public attitude as to those standards. *Good v. Comm'r of Correction*, 417 Mass. 329, 335 (1993). Courts also "determine in the exercise of [their] own independent judgment whether the punishment in question violates contemporary moral standards to the extent that it is a constitutional violation". *Commonwealth v. Jones*, 479 Mass. 1, 17 (2018), citing *Graham*, *supra* at 61. See *Diatchenko I*, 466 Mass. at 669 (citation omitted) (disproportionality occurs "in light of contemporary standards of decency which mark the progress of society"). "[T]he framers of our Constitution, like those who drafted the Bill of Rights, anticipated that interpretation of the cruel or unusual punishments clause would not be static but that the clause would be applied consistently with the standards of the age in which the questioned punishment was sought to be

inflicted." *District Attorney for Suffolk Dist. v. Watson*, 381 Mass. 648, 661 (1980) (internal quotations and citation omitted).[19]

Criminal defendants are often afforded greater protections under the Massachusetts Declaration of Rights than are available under corresponding provisions of the Federal Constitution. *Diatchenko I*, *supra* at 668, citing *Watson*, *supra* at 650, 665 (death penalty contravened prohibition against cruel or unusual punishment under art. 26, notwithstanding its constitutionality under Eighth Amendment). So too here. In light of contemporary standards of decency, evinced by legislative enactments, changing public attitudes toward juvenile sentencing and harm suffered by juveniles incarcerated as adults, mandatory sentencing of second degree juvenile homicide offenders, regardless of its constitutionality under the Eighth Amendment, is cruel punishment barred under art. 26. See *Libby*, 385 Mass. at 435.

"[T]he clearest and most reliable objective evidence of contemporary values is the legislation

[19] *Id.* at 676 (Liacos, J., concurring) ("cruel or unusual" as used in art. 26 has meaning distinct from the phrase "cruel and unusual" in Eighth Amendment to U.S. Constitution and, under art. 26, a punishment may not be inflicted if it be either cruel or unusual").

enacted by the country's legislatures." *Jones*, 479 Mass. at 17 (quotations and citations omitted). Massachusetts has enacted many statutes that protect juveniles from engaging in risky behavior because of their reduced capacity for decision-making.[20] These statutes are indicative of public attitudes and of societal standards of decency regarding treatment of children under the criminal law.

Massachusetts ended mandatory sentences for juveniles convicted of first degree murder. That juveniles convicted of second degree murder, a lesser crime, should be sentenced with the same due process protections and the same constitutional recognition of their juvenile status is indeed a short step. Cf. *Jones*, *supra* at 17 (no court yet disallowed mandatory LWOP for people with intellectual or developmental disabilities). Numerous courts and legislatures have ended or limited mandatory minimum sentencing for all juvenile offenders, suggesting a change in public

[20] See, e.g., G. L. c. 149, § 56-105 (minors under 18 cannot work in certain places or during particular hours); G. L. c. 138 § 34A (minor may not purchase, attempt to purchase or have someone else to purchase alcohol); St. 2018 c. 157 (raises smoking purchase age to 21); G. L. c. 94G, § 7 (only adults 21 years or older can possess marijuana); G. L. c. 207, §7 (person under 18 cannot marry without parental consent); G. L. c. 128A, §§ 9,10 (no one under 18 can place bets in pari-mutual betting or even attend).

attitudes.[21] See, e.g., *State v. Houston-Sconiers*, 391 P.3d 409 (Wash. 2017) (struck down statutory scheme that did not allow sentencing judge to exercise discretion for juvenile offenders); *State v. Smiley,* 478 SW 3d 411, 417 (Mo. 2016); *Horsley v. State*, 160 So.3d 393, 408 (Florida 2015) (struck down sentencing scheme that precluded individualized sentencing for juvenile homicide offenders); *State v. Lyl*e, 854 NW 2d 378, 401 (Ia 2014) (mandatory minimum adult sentences unconstitutional for juveniles).

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[21] Since *Miller*, many jurisdictions have adopted sentencing reforms for juveniles sentenced to a mandatory sentence. E. Scott, et al, *The Supreme Court and Transformation of Juvenile Sentencing*, 12,16 (Florida statute requires inquiry into psychological immaturity and impact on involvement in offense for youth facing life sentence with possibility of parole for homicide). West Virginia and Nevada not only ban JLWOP, but also permit periodic review for youth serving lengthy terms and requires sentencing judges to consider mitigating aspects of youth. http://www.fairsentencingofyouth.org/wp-content/uploads/Righting-Wrongs-.pdf.,8,9 (accessed 10/9/18). In 2005, Washington HB 1187 eliminated mandatory minimum sentences for juveniles tried as adults. http://www.campaignforyouthjustice.org/images/nationalreports/statetrendslegislativevictories.pdf (*id.*). Recent WA legislation removes some crimes from list of offenses in which the juvenile system automatically declines jurisdiction over a minor and the case is filed in adult court and also extends juvenile jurisdiction for those specific crimes to age 25. http://www.seattletimes.com/seattle-news/crime/seimic-shift-new-law-will-reduce-number-of-juveniles-sent-to-adult-court-in-washington (accessed 10/3/18). See E Monahan, *Children are Constitutionally Different: Neuroscience Developments Bring Smart Changes,* 24 Pub. Law. 7, 8-9 (2016) (discussing sentencing reforms since *Miller*).

In deciding whether a punishment is cruel or unusual, courts look to "'objective indicia of society's standards'...to determine whether there is a national consensus against the sentencing practice at issue." *Jones,* 479 Mass. at 17 (citations omitted). While perhaps not at a consensus, public attitudes are changing.[22] The public favors protecting even children charged with serious crimes and supports taking youth into account in sentencing.[23] A recent study on stereotypes about youthful offenders [on transfer decisions and sentencing to LWOP] showed most

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[22] Ready for Reform? Public Opinion on Criminal Justice in Massachusetts, MASSACHUSETTS INSTITUTE FOR A NEW COMMONWELTH POLLING GROUP (2/20/14) http://www.massincpolling.com/?p=1334 (poll of 1,207 Massachusetts residents revealed nearly 2/3 of residents think the criminal justice system should prioritize rehabilitation or prevention over punishment or enforcement). Both 2014 and 2017 MassINC polls found few voters favor continuing the practice of mandatory minimums with 8% of voters preferring mandatory minimums and the majority split between having judges refer to sentencing guidelines (46%) or giving judges complete discretion in sentencing (41%). https://massinc.org/wp-content/uploads/2017/06/Public-Opinion-on-Criminal-Justice-Reform-in-Massachusetts.pdf (last accessed 10/10/18).

[23] A national survey of voters indicates that people strongly support improvement of the juvenile system, with 65% believing that juveniles should be treated differently than adults. PEW Charitable Trusts, Public Opinion on Juvenile Justice in America 1 (Nov. 2014), *available at www.pewtrusts.org/~/media/assets/2015/08/pspp_juvenile_poll_web.pdf?la=en.* (last accessed 10/3/18).

respondents dismissed the concept of juvenile super-predators. E. Greene, L. Duke & W.D. Woody (2017): "Stereotypes influence beliefs about transfer and sentencing of juvenile offenders", *Psychology, Crime & Law,* 23:9, DOI:10.1080/1068316X.2017.1332194, 12. In rating LWOP appropriateness, participants were more punitive toward an adult offender rather a juvenile across crime types and deemed LWOP less appropriate for juveniles. These findings indicate laypeople's awareness of younger offenders' impulsiveness, limited maturity, and increased potential for rehabilitation, and their preference to opt to treat them in a less punitive manner than adults in terms of jurisdiction and length of incarceration. *Id.* at 13 (citations omitted).[24] The researchers suggest scientific findings on adolescent brain development have resonated with courts, media, legislators and laypeople. *Id.* at 15 (citation omitted).

Sentencing and incarcerating children as adults

[24] For states limiting the pathways of transfer of juveniles to the adult system or creating ways for youth to return to juvenile court, including 25 states with reverse waiver provisions to allow youth to be placed back in juvenile system, see Thomas, J.M. (2017). *Raising the Bar: State Trends in Keeping Youth Out of Adult Courts (2015-2017)*, Wash. DC: Campaign for Youth Justice, 28-34. http://cfyj.org/images/StateTrends_ Report_FINAL.pdf. (accessed 9/28/18).

places them at risk for devastating consequences and must be considered in assessing disproportionality:

- decline in life expectancy for prisoners incarcerated as children, Nick Straley, "*Miller's Promise: Re-evaluating Extreme Criminal Sentences for Children*," 89 Wash. L. Rev. 963, 986, n.142 (Oct. 2014);

- youths in adult prison 36 times more likely to commit suicide, Jessica Lahey, *The Steep Cost of Keeping Juveniles in Adult Prisons*, The Atlantic, Jan. 8. 2016 http://www.the atlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/ (last accessed 9/28/18);

- youths less likely to receive age-appropriate mental health treatment and education, Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform* 7 (2007);

- youths in adult prisons lack opportunity to participate in rehabilitative programming and spend much of their time learning new criminal techniques from more skilled and experienced offenders, Donna Bishop & Charles Frazier, *Consequences of Transfer, in The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court,* 227, 256-257 (2000 ed.);

- youths in adult facilities five times more likely to be sexually assaulted by guards and other inmates and two times more likely to be assaulted with weapon, Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* June 2010, 7, Juvenile Justice Bulletin, Wash., D.C. Office of Juvenile Justice and Delinquency Prevention;

- sexual abuse increases tendencies toward criminal behavior and substance abuse in juveniles, Nat'l Prison Rape Elimination

Comm'n, Report 69 (2009), available at http://nprec.us/files/pdfs/NPREC_FinalReport.PDF. (last accessed 10/3/18);

- when released from prison, victims of prison rape more likely to become homeless or require government assistance due to impacts of rape, *Id.* at 153.

- incarceration in adolescence and early adulthood associated with worse physical and mental health outcomes in adulthood, Barnert ES, Dudovitz R, *et al.*, *How Does Incarcerating Young People Affect Their Adult Health Outcomes?* Pediatrics.2017;

- transferred youths re-offend more quickly and more likely to engage in violent crimes after release than youths in juvenile system, Jason Washburn, *et al.*, *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, Psychiatr. Serv. 2008 September; 59(9): 965–973, 972.[25] [26]

These findings underscore the disproportionate impact of adult incarceration on juveniles. Imposing a mandatory sentence on second degree juvenile homicide offenders is unacceptable under contemporary moral standards and a growing national and international

[25] See Andrea Wood, "Cruel and Unusual Punishment: Confining Juveniles with Adults after Graham and Miller", Emory Law Journal: Atlanta, Vol. 61, Iss. 6 (2012): 1445-1491, 1450-1458.

[26] Of note, housing juveniles for a life sentence requires decades of public expenditures. Nationally, costs are about $34,135 per year (citation omitted). http://www.sentencingproject.org/publications/juvenile-life-without-parole/(last accessed 10/10/18).

consensus[27] supporting a juvenile justice system that recognizes children's differences. Mandatory incarceration without consideration of juvenile status is "disproportionate not with respect to the offense itself, but with regard to the particular offender," *Diatchenko I*, 466 Mass. at 669, violating art. 26.

**II.** Regardless of the constitutionality of mandatory sentencing under G. L. c. 265, § 2, as applied to second degree juvenile homicide offenders, an individualized sentencing hearing to consider a juvenile's youthful attributes, circumstances and diminished culpability is constitutionally required for juveniles convicted of murder.

- *An individualized hearing is constitutionally required for all juvenile homicide offenders.*

Simply put, *Miller*, 132 S. Ct. at 2467-68, mandates individualized sentencing for all juvenile homicide offenders. This Court recently extended individualized sentencing hearings to certain juveniles convicted of non-homicide offenses. In *Lutskov*, 480 Mass. at 583-584, this Court said where the mandatory minimum sentence imposed by statute exceeds *the parole eligibility* for murder, the sentencing judge is not afforded an opportunity to

[27] "As John Adams recognized over 215 years ago, we belong to an international community that tinkers toward a more perfect government by learning from the successes and failures of our own structures and those of other nations. See J. Adams, Preface, A Defence of the Constitutions of Government of the United States of America (1797)." *Diatchenko I*, *supra* at 671, n.16.

consider the *Miller* factors as they relate to imposing a sentence below the mandatory minimum and ruled the sentencer must be given that opportunity to impose a sentence below the mandatory minimum or if the sentencer finds extraordinary circumstances, to impose a sentence greater than a parole eligibility date after fifteen years. See *Commonwealth v. Perez I*, 477 Mass. 677, 686 (2017) (juveniles convicted of nonhomicide offenses require individualized consideration of characteristics attendant to youth before imposing integrated sentence with parole eligibility date in excess of that applicable for murder) and *Perez II*, 480 Mass. at 569. The Court said, "[b]ecause the defendant's sentence was imposed without "a finding that the circumstances warrant treating the [defendant] more harshly for parole purposes than a juvenile convicted of murder," it is presumptively disproportionate under art. 26." *Lutskov, id.* at 584, quoting *Perez I*, *id.* at 679.

Central to holdings in *Perez I* and *II* and *Lutskov* is that a juvenile convicted of nonhomicide offenses must not, absent extraordinary circumstances, be treated more harshly than a juvenile convicted of murder. *Perez I, supra* at 685. To determine whether

such extraordinary circumstances exist so that the juvenile's personal characteristics make it necessary to delay parole eligibility for a time exceeding that available to juveniles convicted of murder or whether based on the juvenile's personal characteristics, (the *Miller* factors) a sentence below the mandatory minimum should be imposed, an individualized sentencing hearing must be held. *Lutskov*, *supra* at 582-583.

Likewise, an individualized sentencing process must be extended to second degree juvenile homicide offenders so they are not treated with less consideration and afforded fewer rights than first degree juvenile homicide offenders. Juveniles convicted of the greater offense of first degree murder are already afforded an individualized sentencing process so the sentencer can determine what parole eligibility range to apply after considering circumstances of the offense and the child's personal characteristics and circumstances. But, unlike that cohort and the *Perez* and *Lutskov* cohorts, juveniles convicted of second degree murder have no opportunity for an individualized sentencing process to present mitigating evidence of their personal characteristics and circumstances (the *Miller* factors) and no chance

for the sentencing judge to determine whether to impose any sentence other than the mandatory sentence of life with parole after fifteen years. The disparity in protections afforded to second degree juvenile homicide offenders is constitutionally impermissible.

It cannot be said that an individualized sentencing process is unavailable to juveniles convicted of second degree murder because of their homicide crime or the availability of parole after fifteen years. This focus is incorrect. The key category under *Miller* is age, not the offense or the sentence. Breen & Mills, *supra* at 307.

It is not the sentence for the juvenile at issue, but rather how it is imposed. Dutton, *supra* at 196. "*Miller...*marked a change from a focus on a particular sentence—life without parole—to the person being sentenced". Breen & Mills, *supra* at 301-308. It is the sentencing mechanism to reach the penalty, that is, imposing a mandatory sentence without individualized sentencing of the child, that is antithetical to *Miller's* principles. *Miller* "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty". *Miller* at 2471.

The individualized sentencing mandate of *Miller* requires a system that takes into account the specific story of each juvenile, regardless of the offense. Krause, *supra* at 500. In contravention of *Miller*'s principles, juveniles convicted of second degree murder cannot show how youth matters in their case and cannot receive a sentence other than the mandatory minimum sentence. Second degree juvenile homicide offenders, regardless of their crime, sentence or the availability of parole, are constitutionally entitled to an individualized sentencing process that takes into account unique circumstances and characteristics and narrative of the child being sentenced.

- *An individualized sentencing hearing is required to provide second degree juvenile homicide offenders with a meaningful opportunity for release on parole.*

Another vital reason for an individualized hearing, to be held contemporaneous with sentencing, for all juvenile homicide offenders is to afford them with "a meaningful opportunity to be considered for parole suitability" when the juvenile reaches his or her parole eligibility date. See *Diatchenko I,* 466 Mass. at 674. "Where decisions regarding parole suitability are not informed by an attention to "the distinctive attributes of youth [that] diminish the

penological justifications for imposing the harshest sentences on juvenile offenders," "considerations that would seem no less germane to determinations of parole suitability, the meaningful nature of the opportunity for release may be compromised." *Id.* at 675 (Lenk, J., concurring). To provide a meaningful opportunity for parole release, an individualized hearing must be held, at the time of sentencing, to produce an accurate baseline picture of the juvenile—when he is a juvenile or close to it--against which to measure his rehabilitation and maturity when he reaches parole eligibility.

In the case of a juvenile homicide offender — at least at the initial parole hearing — the task is far more complex than it is in the case of an adult offender because of "the unique characteristics" of juvenile offenders. *Diatchenko II v. DA*, 471 Mass. 12, 23 (2015) (citations omitted). And, retrospective evaluations of juveniles present many difficulties, such as availability of sources of information in cases that occurred many years ago, its questionable reliability and susceptibility to interest-based bias in interpretation. T. Grisso & A. Kavanaugh, "Prospects for Developmental Evidence in Juvenile

Sentencing Based on *Miller* v. *Alabama"*, 22 Psychol. Pub. Pol'y & L. 235, 246 (2016). The assessments need to be made when the juvenile is a juvenile or at least close to being a juvenile. See K. Larson, F. DiCataldo & R. Kinscherff, *Miller v. Alabama: Implications for the Forensic Mental Health Assessment at the Intersection for Social Science and the Law*, 39 New Eng. J. on Crim. & Civ. Confinement 319, 335 (2013). In a *post-Miller* hearing occurring after a potentially lengthy initial term of incarceration, a forensic evaluator at the time of re-sentencing will not have information about the functioning of the juvenile during the previous period of initial incarceration. Even when there are periods of a year or more between arrest and sentencing, the youth being sentenced is likely still in adolescence or very early adulthood where significant developmental and maturational processes are underway. *Id.* When a baseline of a juvenile's developmental status and characteristics is obtained, a juvenile's maturation and rehabilitation can be effectively measured when he or she reaches parole eligibility. *Id.* at 335.

The same due process protections in the parole system that are available to juveniles convicted of

first degree murder, i.e., assistance of counsel and an expert, are provided to juveniles convicted of second degree murder to assure them with a meaningful opportunity for release on parole. *Diatchenko II*, 471 Mass. at 39; *Okoro, supra* at 62-63. Those protections are not restricted by the juvenile's crime or sentence. *Okoro, id.* at 61-62. Thus, juveniles convicted of second degree murder, like those convicted of first degree murder, must be provided with an individualized hearing at the time of sentencing to assess their present juvenile characteristics. See *Deal I v. Comm'r of Correction*, 475 Mass. 307, 323 (2016) (language and purpose of c. 119, § 72B requires individualized consideration of juvenile inmate's suitability for minimum security classification). Juveniles convicted of second degree murder are entitled to equal, not less, due process protection as compared to juveniles convicted of a greater offense, and thus are entitled to an individualized sentencing hearing.

## CONCLUSION

For the foregoing reasons, the amici submit that mandatory sentencing of second degree juvenile homicide offenders violates the Eighth Amendment of

the US Constitution and article 26 of the Massachusetts Declaration of Rights, contravenes the principles in *Miller* and *Diatchenko I* and cannot continue. The amici therefore respectfully request that Mr. Lugo's case be remanded for an individualized sentencing hearing to consider his age, its attributes and other mitigating circumstances.

Respectfully submitted
For the Amici Curiae,

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Dated:

**BRIEF CERTIFICATION**

I hereby certify that this brief complies with the rules of court governing the filing of briefs, including but not limited to: R.A.P. 16 (a) (6); Mass. R.A.P. 16 (e (f) and (h); Mass. R.A.P. 18 and Mass. R.A.P. 20.

_____
Elizabeth Doherty

Dated:

**ADDENDUM**

**G.L. c. 265, § 2**

***§ 2. Murder — Penalty.***

(a) Except as provided in subsection (b), any person who is found guilty of murder in the first degree shall be punished by imprisonment in the state prison for life and shall not be eligible for parole pursuant to section 133A of chapter 127.
(b) Any person who is found guilty of murder in the first degree who committed the offense on or after the person's fourteenth birthday and before the person's eighteenth birthday shall be punished by imprisonment in the state prison for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of chapter 279.
(c) Any person who is found guilty of murder in the second degree shall be punished by imprisonment in the state prison for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of chapter 279.
(d) Any person whose sentence for murder is commuted by the governor and council pursuant to section 152 of chapter 127 shall thereafter be subject to the laws governing parole.

**Amendment to G. L. c. 265,** § 2
2014 Mass. ALS 189, 2014 Mass. Ch. 189, 2013 Mass. H.B. 4307

SECTION 5.

- Chapter 265 of the General Laws is hereby amended by striking out section 2, as so appearing, and inserting in place thereof the following section:-
  - Section 2.
    - (a) Except as provided in subsection (b), any person who is found guilty of murder in the first degree shall be punished by imprisonment in the state prison for life and shall not be eligible for parole pursuant to section 133A of chapter 127.
    - (b) Any person who is found guilty of murder in the first degree who committed the offense on or after the

person's fourteenth birthday and before the person's eighteenth birthday shall be punished by imprisonment in the state prison for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of chapter 279.

- (c) Any person who is found guilty of murder in the second degree shall be punished by imprisonment in the state prison for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of chapter 279.
- (d) Any person whose sentence for murder is commuted by the governor and council pursuant to section 152 of chapter 127 shall thereafter be subject to the laws governing parole.

**G. L. c. 127, § 133A**

***§ 133A. Eligibility for Parole; Permits; Violations.***

Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth, except prisoners confined to the hospital at the Massachusetts Correctional Institution, Bridgewater, except prisoners serving a life sentence for murder in the first degree who had attained the age of 18 years at the time of the murder and except prisoners serving more than 1 life sentence arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, shall be eligible for parole at the expiration of the minimum term fixed by the court under section 24 of chapter 279. The parole board shall, within 60 days before the expiration of such minimum term, conduct a public hearing before the full membership unless a member of the board is determined to be unavailable as provided in this section. Notwithstanding the previous sentence, the board may postpone a hearing until 30 days before the expiration of such minimum term, if the interests of justice so require and upon publishing written findings of the necessity for such postponement. For the purposes of this section, the term unavailable shall mean that a board member has a conflict of interest to the extent

that he cannot render a fair and impartial decision or that the appearance of a board member would be unduly burdensome because of illness, incapacitation, or other circumstance. Whether a member is unavailable for the purposes of this section shall be determined by the chair. Board members shall appear unless said chair determines them to be unavailable. Under no circumstances shall a parole hearing proceed pursuant to this section unless a majority of the board is present at the public hearing. Unless a board member is unavailable due to a conflict of interest, any board member who was not present at the public hearing shall review the record of the public hearing and shall vote in the matter.

Said board shall at least thirty days before such hearing notify in writing the attorney general, the district attorney in whose district sentence was imposed, the chief of police or head of the organized police department of the municipality in which the crime was committed and the victims of the crime for which sentence was imposed, and said officials and victims may appear in person or be represented or make written recommendations to the board, but failure of any or all of said officials to appear or make recommendations shall not delay the paroling procedure; provided, however, that no hearing shall take place until the parole board has certified in writing that it has complied with the notification requirements of this paragraph, a copy of which shall be included in the record of such proceeding; and provided further, that this paragraph shall also apply to any parole hearing for an applicant who was convicted of a crime listed in clause (i) of subsection (b) of section 25 of chapter 279 and sentenced and committed to prison for 5 or more years for such crime and does not show that a pardon has been issued for the crime.

After such hearing the parole board may, by a vote of two-thirds of its members, grant to such prisoner a parole permit to be at liberty upon such terms and conditions as it may prescribe for the unexpired term of his sentence. If such permit is not granted, the parole board shall, at least once in each ensuing five year period, consider carefully and thoroughly the merits of each such case on the question of releasing such prisoner on parole, and may, by a vote of two-thirds of its members, grant such parole permit.

Such terms and conditions may be revised, altered and amended, and may be revoked, by the parole board at any time. The violation by the holder of such permit or any of its terms or conditions, or of any law of the commonwealth, may render such permit void, and thereupon, or if such permit has been revoked, the parole board may order his arrest and his return to prison, in accordance with the provisions of section one hundred and forty—nine.
If a prisoner is indigent and is serving a life sentence for an offense that was committed before the prisoner reached 18 years of age, the prisoner shall have the right to have appointed counsel at the parole hearing and shall have the right to funds for experts pursuant to chapter 261.

**Amendments to G. L. c. 127, § 133A**

2012 Mass. ALS 192, 2012 Mass. Ch. 192, 2011 Mass. H.B. 3818
SECTION 37.

- Section 133A of said chapter 127, as so appearing, is hereby amended by striking out the first sentence and inserting in place thereof the following 3 sentences:- Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth, except prisoners confined to the hospital at the Massachusetts Correctional Institution, Bridgewater, except prisoners serving a life sentence for murder in the first degree and except prisoners serving more than 1 life sentence arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, shall be eligible for parole at the expiration of the minimum term fixed by the court under section 24 of chapter 279. The parole board shall, within 60 days before the expiration of such minimum term, conduct a public hearing before the full membership unless a member of the board is determined to be unavailable as provided in this section. Notwithstanding the previous sentence, the board may postpone a hearing until 30 days before the expiration of such minimum term, if the interests of justice so require and upon

publishing written findings of the necessity for such postponement.

2014 Mass. ALS 189, 2014 Mass. Ch. 189, 2013 Mass. H.B. 4307
SECTION 3.

- Section 133A of chapter 127 of the General Laws, as appearing in the 2012 Official Edition, is hereby amended by inserting after the word "degree", in line 5, the following words:- who had attained the age of 18 years at the time of the murder.

**G. L. c. 279, § 24**

***§ 24. Sentence — Indeterminate.***

If a convict is sentenced to the state prison, except as an habitual criminal, the court shall not fix the term of imprisonment, but shall fix a maximum and a minimum term for which he may be imprisoned. The maximum term shall not be longer than the longest term fixed by law for the punishment of the crime of which he has be convicted, and the minimum term shall be a term set by the court, except that, where an alternative sentence to a house of correction is permitted for the offense, a minimum state prison term may not be less than one year. In the case of a sentence to life imprisonment, except in the case of a sentence for murder in the first degree, and in the case of multiple life sentences arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, the court shall fix a minimum term which shall be not less than 15 years nor more than 25 years.

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

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

**Amendments to G. L.c. 279, § 24**

2012 Mass. ALS 192, 2012 Mass. Ch. 192, 2011 Mass. H.B. 3818

SECTION 46.

Said section 24 of said chapter 279, as so appearing, is hereby further amended by adding the following sentence:- In the case of a sentence to life imprisonment, except in the case of a sentence for murder in the first degree, and in the case of multiple life sentences arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, the court shall fix a minimum term which shall be not less than 15 years nor more than 25 years.

SECTION 45.

- Section 24 of chapter 279 of the General Laws, as so appearing, is hereby amended by striking out, in lines 1 and 2, the words 'for life or'.

2014 Mass. ALS 189, 2014 Mass. Ch. 189, 2013 Mass. H.B. 4307

SECTION 6.

- Section 24 of chapter 279 of the General Laws, as so appearing, is hereby amended by adding the following paragraph:-
    - In the case of a sentence of life imprisonment for murder in the first degree committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 20

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

**G. L. c. 119, § 72B**

***§ 72B. Delinquency — Procedure Where Youth Commits Murder Between Ages Fourteen and Eighteen.***

If a person is found guilty of murder in the first degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty—five, the superior court shall commit the person to such punishment as is provided by law for the offense.

If a person is found guilty of murder in the second degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty—five, the superior court shall commit the person to such punishment as is provided by law. Said person shall be eligible for parole under section one hundred and thirty—three A of chapter one hundred and twenty—seven when such person has served fifteen years of said confinement. Thereafter said person shall be subject to the provisions of law governing the granting of parole permits by the parole board.

The superior court shall not suspend the commitment of a person found guilty of murder in the first or second degree, nor shall the provisions of section one hundred and twenty—nine C or one hundred and twenty—nine D of chapter one hundred and twenty—seven apply to such commitment. In all cases where a person is alleged to have violated section one of chapter two

hundred and sixty—five, the person shall have the right to an indictment proceeding under section four of chapter two hundred and sixty—three.
A person who is found guilty of murder and is sentenced to a state prison but who has not yet reached his eighteenth birthday shall be held in a youthful offender unit separate from the general population of adult prisoners; provided, however, that such person shall be classified at a facility other than the reception and diagnostic center at the Massachusetts Correctional Institution, Concord, and shall not be held at the Massachusetts Correctional Institution, Cedar Junction, prior to his eighteenth birthday.
The department of correction shall not limit access to programming and treatment including, but not limited to, education, substance abuse, anger management and vocational training for youthful offenders, as defined in section 52, solely because of their crimes or the duration of their incarcerations. If the youthful offender qualifies for placement in a minimum security correctional facility based on objective measures determined by the department, the placement shall not be categorically barred based on a life sentence.
If a defendant is not found guilty of murder in the first or second degree, but is found guilty of a lesser included offense or a criminal offense properly joined under Massachusetts Rules of Criminal Procedure 9(a)(1), then the superior court shall make its disposition in accordance with section fifty—eight.

**Amendments to G. L. c. 119, § 72B**

1996 Mass. ALS 200, 1996 Mass. Ch. 200, 1995 Mass. H.B. 5876

SECTION 14. Said chapter 119 is hereby further amended by inserting after section 72A the following section:-
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Section 72B. If a person is found guilty of murder in the first degree committed on or after his fourteenth birthday and before his seventeenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law for the offense.

If a person is found guilty of murder in the second degree committed on or after his fourteenth birthday and before his seventeenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law. Said person shall be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven when such person has served fifteen years of said confinement. Thereafter said person shall be subject to the provisions of law governing the granting of parole permits by the parole board.

The superior court shall not suspend the commitment of a person found guilty of murder in the first or second degree, nor shall the provisions of section one hundred and twenty-nine C or one hundred and twenty-nine D of chapter one hundred and twenty-seven apply to such commitment. In all cases where a person is alleged to have violated section one of chapter two hundred and sixty-five, the person shall have the right to an indictment proceeding under section four of chapter two hundred and sixty- three.

A person who is found guilty of murder and is sentenced to a state prison but who has not yet reached his seventeenth birthday shall be held in a youthful offender unit separate from the general population of adult prisoners; provided, however, that such person shall be classified at a facility other than the reception and diagnostic center at the Massachusetts Correctional Institution, Concord, and shall not be held at the Massachusetts Correctional Institution, Cedar Junction, prior to his seventeenth birthday.

If a defendant is not found guilty of murder in the first or second degree, but is found guilty of a lesser included offense or a criminal offense properly joined under Massachusetts Rules of Criminal Procedure 9 (a) (1), then the superior court shall make its disposition in accordance with section fifty-eight.

2013 Mass. ALS 84, 2013 Mass. Ch. 84, 2013 Mass. H.B. 1432

SECTION 24. Section 72B of said chapter 119, as so appearing, is hereby amended by striking out, in lines

2, 7 and 24, the word “seventeenth” and inserting in place thereof the following word:- eighteenth.
SECTION 24A.

- Said section 72B of said chapter 119, as so appearing, is hereby further amended by striking out, in lines 29 and 30, the word “seventeenth” and inserting in place thereof the following word:- eighteenth.

2014 Mass. ALS 189, 2014 Mass. Ch. 189, 2013 Mass. H.B. 4307

SECTION 2.

- Section 72B of chapter 119 of the General Laws, as amended by section 24A of chapter 84 of the acts of 2013, is hereby further amended by inserting after the fourth paragraph the following paragraph:-
  - The department of correction shall not limit access to programming and treatment including, but not limited to, education, substance abuse, anger management and vocational training for youthful offenders, as defined in section 52, solely because of their crimes or the duration of their incarcerations. If the youthful offender qualifies for placement in a minimum security correctional facility based on objective measures determined by the department, the placement shall not be categorically barred based on a life sentence.

**Prior versions of G. L. c. 119, § 72B**

**2012 GL c. 119, § 72B**

***§ 72B. Commitment of Violent Juvenile Offenders.***

If a person is found guilty of murder in the first degree committed on or after his fourteenth birthday and before his seventeenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law for the offense.

If a person is found guilty of murder in the second degree committed on or after his fourteenth birthday and before his seventeenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law. Said person shall be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven when such person has served fifteen years of said confinement. Thereafter said person shall be subject to the provisions of law governing the granting of parole permits by the parole board.

The superior court shall not suspend the commitment of a person found guilty of murder in the first or second degree, nor shall the provisions of section one hundred and twenty-nine C or one hundred and twenty-nine D of chapter one hundred and twenty-seven apply to such commitment. In all cases where a person is alleged to have violated section one of chapter two hundred and sixty-five, the person shall have the right to an indictment proceeding under section four of chapter two hundred and sixty-three.

A person who is found guilty of murder and is sentenced to a state prison but who has not yet reached his seventeenth birthday shall be held in a youthful offender unit separate from the general population of adult prisoners; provided, however, that such person shall be classified at a facility other than the reception and diagnostic center at the Massachusetts Correctional Institution, Concord, and shall not be held at the Massachusetts Correctional Institution, Cedar Junction, prior to his seventeenth birthday.

If a defendant is not found guilty of murder in the first or second degree, but is found guilty of a lesser included offense or a criminal offense properly joined under Massachusetts Rules of Criminal Procedure 9(a)(1), then the superior court shall make its disposition in accordance with section fifty-eight.

**2013 G. L. c. 119, § 72B**

***§ 72B. Procedure Where Youth Commits Murder Between Ages Fourteen and Eighteen.***

If a person is found guilty of murder in the first degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law for the offense.

If a person is found guilty of murder in the second degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law. Said person shall be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven when such person has served fifteen years of said confinement. Thereafter said person shall be subject to the provisions of law governing the granting of parole permits by the parole board.

The superior court shall not suspend the commitment of a person found guilty of murder in the first or second degree, nor shall the provisions of section one hundred and twenty-nine C or one hundred and twenty-nine D of chapter one hundred and twenty-seven apply to such commitment. In all cases where a person is alleged to have violated section one of chapter two hundred and sixty-five, the person shall have the right to an indictment proceeding under section four of chapter two hundred and sixty-three.

A person who is found guilty of murder and is sentenced to a state prison but who has not yet reached his eighteenth birthday shall be held in a youthful offender unit separate from the general population of adult prisoners; provided, however, that such person shall be classified at a facility other than the reception and diagnostic center at the Massachusetts Correctional Institution, Concord, and shall not be held at the Massachusetts Correctional Institution, Cedar Junction, prior to his eighteenth birthday.

If a defendant is not found guilty of murder in the first or second degree, but is found guilty of a lesser included offense or a criminal offense properly joined under Massachusetts Rules of Criminal Procedure 9(a)(1), then the superior court shall make its disposition in accordance with section fifty-eight.

**2014 G. L. c. 119, § 72B**

***§ 72B. Procedure Where Youth Commits Murder Between Ages Fourteen and Eighteen.***

If a person is found guilty of murder in the first degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law for the offense.

If a person is found guilty of murder in the second degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty-five; , the superior court shall commit the person to such punishment as is provided by law. Said person shall be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven when such person has served fifteen years of said confinement. Thereafter said person shall be subject to the provisions of law governing the granting of parole permits by the parole board.

The superior court shall not suspend the commitment of a person found guilty of murder in the first or second degree, nor shall the provisions of section one hundred and twenty-nine C or one hundred and twenty-nine D of chapter one hundred and twenty-seven apply to such commitment. In all cases where a person is alleged to have violated section one of chapter two hundred and sixty-five, the person shall have the right to an indictment proceeding under section four of chapter two hundred and sixty-three.

A person who is found guilty of murder and is sentenced to a state prison but who has not yet reached his eighteenth birthday shall be held in a

youthful offender unit separate from the general population of adult prisoners; provided, however, that such person shall be classified at a facility other than the reception and diagnostic center at the Massachusetts Correctional Institution, Concord, and shall not be held at the Massachusetts Correctional Institution, Cedar Junction, prior to his eighteenth birthday.

The department of correction shall not limit access to programming and treatment including, but not limited to, education, substance abuse, anger management and vocational training for youthful offenders, as defined in section 52, solely because of their crimes or the duration of their incarcerations. If the youthful offender qualifies for placement in a minimum security correctional facility based on objective measures determined by the department, the placement shall not be categorically barred based on a life sentence.

If a defendant is not found guilty of murder in the first or second degree, but is found guilty of a lesser included offense or a criminal offense properly joined under Massachusetts Rules of Criminal Procedure 9(a)(1), then the superior court shall make its disposition in accordance with section fifty-eight.

**2015 G. L. c. 119, § 72B**

***§ 72B. Delinquency -- Procedure Where Youth Commits Murder Between Ages Fourteen and Eighteen.***

If a person is found guilty of murder in the first degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law for the offense.

If a person is found guilty of murder in the second degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law. Said person shall be eligible for parole under section one hundred

and thirty-three A of chapter one hundred and twenty-seven when such person has served fifteen years of said confinement. Thereafter said person shall be subject to the provisions of law governing the granting of parole permits by the parole board.

The superior court shall not suspend the commitment of a person found guilty of murder in the first or second degree, nor shall the provisions of section one hundred and twenty-nine C or one hundred and twenty-nine D of chapter one hundred and twenty-seven apply to such commitment. In all cases where a person is alleged to have violated section one of chapter two hundred and sixty-five, the person shall have the right to an indictment proceeding under section four of chapter two hundred and sixty-three.

A person who is found guilty of murder and is sentenced to a state prison but who has not yet reached his eighteenth birthday shall be held in a youthful offender unit separate from the general population of adult prisoners; provided, however, that such person shall be classified at a facility other than the reception and diagnostic center at the Massachusetts Correctional Institution, Concord, and shall not be held at the Massachusetts Correctional Institution, Cedar Junction, prior to his eighteenth birthday.

The department of correction shall not limit access to programming and treatment including, but not limited to, education, substance abuse, anger management and vocational training for youthful offenders, as defined in section 52, solely because of their crimes or the duration of their incarcerations. If the youthful offender qualifies for placement in a minimum security correctional facility based on objective measures determined by the department, the placement shall not be categorically barred based on a life sentence.

If a defendant is not found guilty of murder in the first or second degree, but is found guilty of a lesser included offense or a criminal offense properly joined under Massachusetts Rules of Criminal Procedure 9(a)(1), then the superior court shall make its disposition in accordance with section fifty-eight.

**2016 G. L. c. 119, § 72**B

***§ 72B. Delinquency -- Procedure Where Youth Commits Murder Between Ages Fourteen and Eighteen.***

If a person is found guilty of murder in the first degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law for the offense.

If a person is found guilty of murder in the second degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law. Said person shall be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven when such person has served fifteen years of said confinement. Thereafter said person shall be subject to the provisions of law governing the granting of parole permits by the parole board.

The superior court shall not suspend the commitment of a person found guilty of murder in the first or second degree, nor shall the provisions of section one hundred and twenty-nine C or one hundred and twenty-nine D of chapter one hundred and twenty-seven apply to such commitment. In all cases where a person is alleged to have violated section one of chapter two hundred and sixty-five, the person shall have the right to an indictment proceeding under section four of chapter two hundred and sixty-three.

A person who is found guilty of murder and is sentenced to a state prison but who has not yet reached his eighteenth birthday shall be held in a youthful offender unit separate from the general population of adult prisoners; provided, however, that such person shall be classified at a facility other than the reception and diagnostic center at the Massachusetts Correctional Institution, Concord, and shall not be held at the Massachusetts Correctional Institution, Cedar Junction, prior to his eighteenth birthday.

The department of correction shall not limit access to programming and treatment including, but not limited to, education, substance abuse, anger management and vocational training for youthful offenders, as defined in section 52, solely because of their crimes or the duration of their incarcerations. If the youthful offender qualifies for placement in a minimum security correctional facility based on objective measures determined by the department, the placement shall not be categorically barred based on a life sentence.

If a defendant is not found guilty of murder in the first or second degree, but is found guilty of a lesser included offense or a criminal offense properly joined under Massachusetts Rules of Criminal Procedure 9(a)(1), then the superior court shall make its disposition in accordance with section fifty-eight.

**1996 Mass. ALS 200, 1996 Mass. Ch. 200, 1995 Mass. H.B. 5876 The Juvenile Justice Act**

SECTION 7. Section sixty-one of said chapter one hundred and nineteen is hereby repealed.

SECTION 5. Said chapter 119 is hereby further amended by striking out section 58, as amended by section 1 of chapter 278 of the acts of 1995, and inserting in place thereof the following section:--

Section 58. At the hearing of a complaint against a child the court shall hear the testimony of any witnesses who appear and take such evidence relative to the case as shall be produced. If the allegations against a child are proved beyond a reasonable doubt, he may be adjudged a delinquent child, or in lieu thereof, the court may continue the case without a finding and, with the consent of the child and at least one of the child's parents or guardians, place said child on probation; provided, however, that any such probation may be imposed until such child reaches age eighteen or age nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday. Said probation may include a requirement, subject to agreement by the child and at least one of the child's parents or guardians, that the child do work or participate in activities of a

type and for a period of time deemed appropriate by the court.

If a child is adjudicated a delinquent child on a complaint, the court may place the case on file or may place the child in the care of a probation officer for such time and on such conditions as it deems appropriate or may commit him to the custody of the department of youth services, but the probationary or commitment period shall not be for a period longer than until such child attains the age of eighteen, or nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday.

If a child is adjudicated a youthful offender on an indictment, the court may sentence him to such punishment as is provided by law for the offense. The court shall make a written finding, stating its reasons therefor, that the present and long-term public safety would be best protected by:

(a) a sentence provided by law;; provided, however, that in no event shall the aggregate sentence imposed on the combination sentence exceed the maximum adult sentence provided by law; or

(c) a commitment to the department of youth services until he reaches the age of twenty-one.

In making such determination the court shall conduct a sentencing recommendation hearing to determine the sentence by which the present and long-term public safety would be best protected. At such hearing, the court shall consider, but not be limited to, the following factors: the nature, circumstances and seriousness of the offense;; a report by a probation officer concerning the history of the youthful offender;; the success or lack of success of any past treatment or delinquency dispositions regarding the youthful offender;; the youthful offender's age and maturity;; provided, however, that such youthful offender shall be classified at a facility other than the reception and diagnostic center at the Massachusetts Correctional Institution, Concord, and shall not be held at the Massachusetts Correctional Institution, Cedar Junction, prior to his seventeenth birthday.

If it is alleged in the complaint upon which the child is so adjudged that a penal law of the commonwealth, a city ordinance or a town by-law has been violated, the court may commit such child to the custody of the commissioner of youth services and authorize him to place such child in the charge of any person, and, if at any time thereafter the child proves unmanageable, to transfer such child to that facility which in the opinion of said commissioner, after study, will best serve the needs of the child. The department of youth services shall provide for the maintenance, in whole or part, of any child so placed in the charge of any person.

Notwithstanding any other provisions of this chapter, a person adjudicated a delinquent child by reason of a violation of paragraph (a), (c) or (d) of section ten or section ten E of chapter two hundred and sixty-nine, shall be committed to the custody of the commissioner of youth services who shall place such child in the custody of a facility supported by the commonwealth for the care, custody and training of such delinquent children for a period of at least one hundred and eighty days or until such child attains his eighteenth birthday, whichever first occurs, provided, however, that said period of time shall not be reduced or suspended.

Upon the second or subsequent violation of said paragraph (a), (c) or (d) of said section ten or ten E of said chapter two hundred and sixty- nine, the commissioner of youth services shall place such child in the custody of a facility supported by the commonwealth for the care, custody and training of such delinquent child for not less than one year;; provided, however, that no order for the payment of money shall be entered until the person by whom payments are to be made shall have been summoned before the court and given an opportunity to be heard. The court may from time to time, upon petition by, or notice to the person ordered to pay such sums of money, revise or alter such order or make a new order, as the circumstances may require.

The court may commit such delinquent child to the department of youth services, but it shall not commit such child to any institution supported by the

commonwealth for the custody, care and training of delinquent children or juvenile offenders.

Except in cases in which the child has attained the age of majority, whenever a court of competent jurisdiction adjudicates a child as delinquent and commits the child to the department of youth services, the court, in order to comply with the requirements contained in the federal Adoption Assistance and Child Welfare Act of 1980 and any amendments thereto, shall receive evidence in order to determine whether continuation of the child in his home is contrary to his best interest, and whether reasonable efforts were made prior to the commitment of the child to the department, to prevent or eliminate the need for removal from his home; or whether an emergency situation existed making such efforts impossible. No such determination shall be made unless the parent or guardian of the delinquent shall have been summoned before the court and, if present, given an opportunity to be heard. The court, in its discretion, may make its determinations concerning said best interest and reasonable efforts in written form, but in the absence of a written determination to the contrary, it shall be presumed that the court did find that continuation of the child in his home was contrary to his best interest and that reasonable efforts to prevent or eliminate the need for removal of the child from his home did occur. Nothing in this section shall diminish the department's responsibility to prevent delinquent acts and to protect the public safety.