COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12546

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

V.

NATHAN ENESTO LUGO,
Defendant-Appellant.

BRIEF OF SEVERAL DISTRICT ATTORNEYS AS AMICI CURIAE

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ISSUE UPON WHICH AMICUS IS OFFERED

Whether a mandatory life with parole sentence that does not allow for individualized sentencing of juveniles convicted of second-degree murder is constitutional under the Eighth Amendment and Article 26 of the Massachusetts Declaration of Rights in light of the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012) and the Massachusetts Supreme Judicial Court's subsequent decisions.

INTEREST OF THE AMICUS

The Suffolk County District Attorney is the Chief Law Enforcement Officer and prosecutor in the Suffolk District. *See* G.L. c. 12, §§ 12, 13, 27; G.L. c. 218, § 27A; *Burlington v. District Attorney for the Northern Dist.*, 381 Mass. 717, 718, 720 (1980); *District Attorney for the Suffolk Dist. v. Watson*, 381 Mass. 648, 660 (1980); *Attorney General v. Flynn*, 331 Mass. 413, 428 (1954). The District Attorney appears as amicus curiae ("amicus") in support of the District Attorney for Norfolk County.

In his district, the District Attorney is charged with enforcing public rights where the Commonwealth is a party or is interested. G.L. c. 12, § 27; *District Attorney for the Northern Dist. v. Magraw*, 34 Mass. App. Ct. 713, 715 (1993), *aff'd*, 417 Mass. 169 (1994); *Lodge v. District Attorney for the Suffolk Dist.*, 21 Mass. App. Ct. 277, 281-82 (1985), *rev. denied*, 396

Mass. 1106 (1986). "The district attorney is the people's elected advocate for a broad spectrum of societal interests – from ensuring that criminals are punished for wrongdoing, to allocating limited resources to maximize public protection." *Commonwealth v. Gordon*, 410 Mass. 498, 500 (1991). This office is responsible for prosecuting homicides in the Suffolk District, and this office has previously briefed or opposed motions regarding similar issues to those now before this Court. *See*, *e.g.*, *Commonwealth v. Cepeda*, 487 Mass. 1018 (2018). This office also has multiple cases still currently open in court that raise these specific issues. Additionally, the Suffolk County District Attorney was a named party in *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655, 669 (2013), which is among the applicable law under which the issue of this amicus is analyzed. This office believes that the direct experience it has with these cases, and the prior briefing of related issues, enable it to offer helpful analysis and argument to this Court.

STATEMENT OF THE CASE AND FACTS

The amicus relies on the statement of the case and statement of facts as set forth in the brief of the District Attorney for Norfolk County.

ARGUMENT

Under both the Eighth Amendment to the United States Constitution and Article 26 of the Massachusetts Declaration of Rights, the "'precept of justice [requires] that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655, 669 (2013) (*Diatchenko I*), quoting *Miller v. Alabama*, 567 U.S. 460, 469 (2012). "To reach the level of cruel [or] unusual, the punishment must be so disproportionate to the crime that it 'shocks the conscience and offends fundamental notions of human dignity.'" *Cepulonis v. Commonwealth*, 384 Mass. 495, 496 (1981) (quoting *Commonwealth v. Jackson*, 369 Mass. 904, 910 (1976)). This question turns on the "objective indicia of society's standards, as expressed in legislative enactments and state practice . . ." *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *see Diatchenko I*, 466 Mass. at 669 (quoting *Good v. Commissioner of Correction*, 417 Mass. 329, 335 (1994)) ("Analysis of disproportionality occurs 'in light of contemporary standards of decency which mark the progress of society.'").

I. THIS COURT MUST DEFER TO THE LEGISLATIVE JUDGMENT THAT LIFE WITH PAROLE ELIGIBILITY IS THE APPROPRIATE SENTENCE FOR THE CRIME OF MURDER IN THE SECOND DEGREE FOR A MURDERER WHO HAS NOT YET ATTAINED HIS EIGHTEENTH BIRTHDAY.

In this case the defendant seems to argue not that the sentence of life with the possibility of parole is unconstitutional, but that the lack of an individualized sentencing hearing at which some alternative date of parole eligibility, or perhaps even a term of years is an option, renders the sentencing statute unconstitutional. The defendant cites some unspecified advances in the scientific knowledge about human brain development, and a few discrete and distinguishable cases from other courts, in an effort to support his claim. The defendant's claim must be rejected, as there is no basis to find that the Legislatively enacted sentencing scheme violates the constitution. To the extent that the defendant seeks a term of years, he seeks a guarantee of freedom after having been convicted of murder. The constitution embraces no such guarantee. *Cf. Graham v. Florida*, 560 U.S. 48, 75 (2010) ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."). Likewise, while the constitution mandates the possibility of parole eligibility,

the defendant has made no showing that some time frame less than fifteen years of incarceration is constitutionally mandated.

As a general rule, "sentencing scheme[s] – not considering individual culpability would be clearly constitutional. Congress has the power to define criminal punishments without giving courts any sentencing discretion." *Chapman v. United States*, 500 U.S. 453, 467 (1991). "A sentencing scheme providing for 'individualized sentences rests not on constitutional commands, but on public policy enacted into statutes.'" *Id.* (emphasis added) (citation omitted). Thus, in approving the constitutionality of mandatory minimum sentencing, *Opinion of Justices to House of Representatives*, 378 Mass. 822, 832 (1979), this Court has recognized that "there is substantial support for the theory that certainty of punishment has a significant effect on the incidence of crime." *See, e.g.*, J. Q. Wilson, Thinking About Crime 174-175 (1975); Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968).

"The function of the legislature . . . is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety." *Commonwealth v. Guzman*, 446 Mass. 344, 348-349 (2006). "In matters of punishment . . . the

Legislature has primacy, and its action carries a presumption of validity." *Commonwealth v. Marcus*, 16 Mass. App. Ct. 698, 699 (1983) (noting also that "Courts act with great restraint when they review the exercise of [the legislative authority to impose severe punishments] in light of the Eighth Amendment" and Article 26)); *accord Weems v. United States*, 217 U.S. 349, 379 (1910); *Commonwealth v. Alvarez*, 413 Mass. 224, 233 (1992). Thus, courts "do not lightly second guess or upset the Legislature's independent determinations concerning particular conduct it wishes to criminalize and the sanctions it wishes to prescribe for that conduct to vindicate the community's legitimate interests in a secure, peaceable, and orderly society." *Commonwealth v. Dunn*, 43 Mass. App. Ct. 58, 62 (1997)(citing *Alvarez*, 413 Mass. at 233); *see also Carmona v. Ward*, 576 F.2d 405, 411 (2d Cir. 1978) ("In deciding [whether a punishment is cruel or unusual], we must bear in mind the legislature's obvious institutional advantage at determining the magnitude of the harm done to the societal interests and public weal."), *cert. denied*, 439 U.S. 1091 (1979).

This Court has appropriately deferred to the Legislature's determination that people are culpable for the crime of murder prior to their eighteenth birthday. "Where the Legislature has determined that a youth is capable of committing certain crimes, we have

noted that 'respect for the legislative process means that it is not the province of the court to sit and weigh conflicting evidence supporting or opposing a legislative enactment.'" *Commonwealth v. Okoro*, 471 Mass. at 65 (citation omitted). Further, "although children may not have the maturity fully to appreciate the consequence of wrongful actions," they do not necessarily "lack the ability to formulate the specific intent to commit particular wrongful acts." *Id.* The Legislature has clearly taken into account the constitutionally recognized differences between juvenile and adult homicide offenders through its sentencing laws, including the second-degree murder statute, which sentences adult offenders to life with parole eligibility up to 25 years versus parole eligibility after 15 years for juvenile offenders. *Id.* at 62; G.L. c. 279, § 24. And, as this Court has recognized, the Legislature has mandated that juvenile offenders not be "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 criminal convictions or the length of their sentences." *Id.*; G.L. c. 119, § 72B.

The defendant has not demonstrated that the Legislature acted irrationally in determining that the magnitude of the harm done to society when a murder is committed requires a mandatory life sentence with the

possibility of parole, nor is there an "evolving standard[] of decency" reflected in a national consensus that renders such a sentence unconstitutional, nor any well-established, reliable science on juvenile brain development to establish that "evolving standards of decency" have rendered such punishment a "shock to the conscience." Accordingly, the sentence is an appropriate matter of public policy on which the Court must defer to the Legislature.

II. A MANDATORY LIFE SENTENCE WITH PAROLE ELIGIBILITY AFTER FIFTEEN YEARS FOR A JUVENILE CONVICTED OF SECOND-DEGREE MURDER IS CONSTITUTIONAL BECAUSE *MILLER* HELD ONLY THAT THE *LACK* OF PAROLE ELIGIBILITY WAS A DISPROPORTIONAL PUNISHMENT FOR A JUVENILE DEFENDANT CONVICTED OF MURDER.

The defendant challenges the constitutionality of his mandatory life sentence with parole eligibility after fifteen years under G.L. c. 265, § 2, and G.L. c. 127, § 133A, because he argues that such a mandatory sentence for a conviction of murder in the second degree is disproportional in light of the decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), *Diatchenko I*, *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12 (2015) (*Diatchenko II*), and *Commonwealth v. Okoro*, 471 Mass. 51 (2015). The defendant bears the burden of proving this allegedly unconstitutional disproportionality. *See Commonwealth v. O'Neal*, 369 Mass. 242, 248 (1975) ("Where restraints

on liberty or fines are involved, a heavy burden is on the sentenced defendant to establish that the punishment is disproportionate to the offence for which he was convicted. If he fails to demonstrate such disproportion, the punishment will not be characterized as cruel in a constitutional sense."). The defendant has not met this burden, and his sentence is constitutional. The defendant does not challenge the constitutionality of parole eligibility after fifteen years, but rather of the Legislature's determination that a lesser term of years is not an appropriate sentence, such that an individual sentencing hearing is not necessary for every juvenile convicted of second degree murder to set such a sentence (D.Br. 21).[1] The Legislature has acted reasonably in determining that parole eligibility after fifteen years is the appropriate sentence for a person culpable for murder, and this Court must defer to that judgment, as it did in ruling prior to the imposition of this defendant's sentence that a mandatory life sentence with parole eligibility after fifteen years for a juvenile convicted of second-degree murder constitutional. *See Commonwealth v. Okoro*, 471 Mass. 51 (2015). The defendant has advanced no good or compelling reasons for this court to reconsider its recent determination that imposition of

[1] References to the defendant's brief will be cited as (D.Br. __).

a mandatory sentence of life with the possibility of parole after fifteen years to a juvenile convicted of second degree murder meets the requirements of the Eighth Amendment and art. 26, as well as other constitutional rights. *Id.* at 52.

Although the United States Supreme Court recognized in *Miller* that "children are constitutionally different from adults for purposes of sentencing," 567 U.S. at 471, it did so in the context of life *without* parole for juveniles convicted of first-degree murder, where "this ultimate penalty for juveniles [is] akin to the death penalty." *Miller*, 567 U.S. at 475. Applying *Miller* retroactively, this Court clearly articulated that life with the possibility of parole is a constitutionally permissible sentence for juveniles. *See Diatchenko I*, 466 Mass. at 671. This Court held that "[t]he unconstitutionality of [life imprisonment without the possibility of parole] arises not from the imposition of a sentence of life in prison, but from the absolute denial of any possibility of parole" because juveniles have a "diminished culpability and greater prospects for reform." *Id.* Thus, the thrust of this jurisprudence is not that a juvenile's neurological development excuses the juvenile from his or her criminal act, but rather that because the juvenile brain is still developing, the criminal act is less likely to be "evidence of irretrievable depravity" and

society "cannot say for sure that they are beyond reproach." *Id.* at 660. This Court has repeatedly reaffirmed that the science regarding the juvenile brain and the culpability of juvenile offenders is relevant to the appropriate punishment for juvenile offenders who commit murder, and may present a factual question for jury determination as to whether the juvenile formed, or possessed the requisite knowledge, or committed murder with extreme atrocity or cruelty, but that the juvenile's level of neurological development does not, as matter of law, render him incapable of forming the requisite criminal intent to commit murder. *See Commonwealth v. Brown*, 474 Mass. 576, 590 n.7 (2016); *Okoro*, 471 Mass. at 65. Although the defendant here committed murder in the second degree, which "does not include acts of deliberate premeditation or extreme atrocity or cruelty, [it] is an intentional crime involving the killing of another person; the severity of the offense, even when committed by a juvenile offender, goes without saying." *Okoro*, 471 Mass. at 58.

Indeed, as previously noted, in *Okoro* this Court recognized that neither *Miller* nor *Diatchenko I* lead to the conclusion that "a mandatory sentence, imposed on a juvenile offender who commits murder in the second degree, violates the *Eighth Amendment* or *art. 26*." *Okoro*, 471 Mass. at 58. Although, as the defendant

here correctly points out, this Court in *Okoro* left open "the question whether juvenile homicide offenders require individualized sentencing," *id.*, this Court did so because the science and law relating to juveniles and sentencing was insufficient and indeterminate as it was rapidly continuing to change. *Id.* at 59-61. This has not changed. The law and science are still just as unsettled as they were when *Okoro* was decided. Here, as in *Okoro*, given the unsettled and still evolving nature of the law in this area, it is unwise for the court to revisit its interpretation of Miller and the scope of its holding. *Id.* at 61. Nor does the juvenile's call for "individualized sentencing" that includes a full exposition of the juvenile's background and personal characteristics present a constitutional conflict with the Legislatively mandated life sentence for murder. There is nothing inherently inconsistent with an individualized sentencing hearing that memorializes at the time of sentencing personal characteristics of the juvenile that might later bear on the determination of the juvenile's amenability for parole. *See Diatchenko I*, *supra* at 674, (it is for the parole board to take into account "the unique characteristics" of such offenders that make them constitutionally distinct from adults appropriate for release based on demonstrated maturity and rehabilitation). Accordingly, even if a juvenile wishes to pre-

sent at the sentencing hearing information regarding his character, background, education and neurological development, in order to preserve or memorialize it for the parole board's future consideration, the court could permit it, while the sentence of life with parole eligibility at fifteen years would still be imposed and be constitutionally unassailable.

A. The Science And Law Around Juvenile Sentencing And Brain Development Are Still Ambiguous

The science relied on by this Court in *Diatchenko I* – and now by the defendant – regarding the psychosocial capacities of juveniles generally may only legitimately be used to formulate policy generally, and cannot be used in adjudicating individual cases, because the relatively nascent state of scientific knowledge does not lend itself to individualized application.

> [R]eliably assessing psychological maturity is easier said than done. There is a big difference between using neuroscience to guide the formulation of policy and using it to determine how individual cases are adjudicated. *Although it may be possible to say that, on average, people who are Johnny's age are typically less mature than adults, we cannot say whether Johnny himself is.*
>
> Science may someday have the tools to image an adolescent's brain and draw conclusions about that individual's neurobiological maturity relative to established age norms for various aspects of brain structure and function, but such norms do not yet exist, and the cost of doing individualized

> assessments of neurobiological maturity would be prohibitively expensive. Moreover, it is not clear that society would end up making better decisions using neurobiological assessments than those it makes on the basis of chronological age or than those it might make using behavioral or psychological measures. It makes far more sense to rely on a driving test than a brain scan to determine whether someone is ready to drive.

Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy*, 28 Issues in Sci. and Tech., no. 3, 67, 77-78 (Spring 2012) (emphasis added). "[O]ur knowledge of changes in brain structure and function during adolescence far exceeds our understanding of the actual links between these neurobiological changes and adolescent behavior, and . . . much of what is written about the neural underpinnings of adolescent behavior . . . is what we might characterize as '*reasonable speculation*.'" Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28(1) *Dev. Rev.* 78, 81 (2008) (emphasis added).[2] Furthermore, the news article the

[2] After devoting over 20 years of his life to researching adolescent brain development in decision making and risk taking and how they relate to criminal law, Laurence Steinberg, Ph.D., is a preeminent authority in this field. *WATCH – 'Should the Science of Adolescent Brain Development Inform Legal Policy?'*, Massachusetts General Hospital, Center for Law, Brain & Behavior (Oct. 21, 2015), http://clbb.mgh.harvard.edu/steinberg/. Robert Kinscherff, Ph.D., J.D., a "juvenile offender evaluation and juvenile justice policy expert[]," has consistently relied on Mr. Steinberg's work. *Juvenile Justice &*

defendant cites as new scientific developments on juvenile brain development is based on a study that the scientists themselves acknowledged as limited:

> The implications of our findings must be considered within the limitations of the study. First, behaviors were measured within a controlled research setting. Although the emotionally arousing conditions may be relevant to emotional arousal in the real world, they were limited to experimentally manipulated emotional conditions that did not capture the complex real-world situations in which individuals typically make decisions. Second, the sample, although community based and representative of the racial and ethnic distribution in Los Angeles and New York City, was relatively small, with 110 participants 12 to 25 years of age; replication of these findings is warranted.[3]

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the Adolescent Brain, Massachusetts General Hospital, Center for Law, Brain & Behavior, http://clbb.mgh.harvard.edu/juvenilejustice/ (last visited Aug. 17, 2018). Those who submitted briefs as amici curiae in support of petitioners for *Miller* also cited and relied on Mr. Steinberg's publications. *See, e.g.,* Brief for the American Psychological Association et al. as Amici Curiae in Support of Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646), 2012 U.S. S. Ct. Briefs LEXIS 215.

[3] According to the United States Census Bureau, the national population estimate of persons under 18 years old as of July 1, 2017 was 22.6%, which equaled 73,612,534 out of an estimated total population of 325,719,178. *QuickFacts: UNITED STATES*, United States Census Bureau, https://www.census.gov/quickfacts/fact/table/US/PST045217 (last visited Aug. 17, 2018). As this study only accounted for 110 individuals (some of which were not even under 18), which is approximately 0.000149% of juveniles, this study sample is in no way be a reliable representation of juveniles in the United States.

Alexandra O. Cohen et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27(4) Psychol. Sci. 549, 560 (2016). Such an unrepresentative and limited study cannot be deemed sufficiently settled for this Court to "revisit [its] interpretation of *Miller* and the scope of its holding." *Okoro*, 471 Mass. at 51.

Indeed, this Court is not the forum to adopt a bright line rule based on disputed and evolving psychological theories and research; rather, a trial court that conducts appropriate evidentiary hearings is a necessary predicate step to revisiting the current legislative scheme. Given the unsettled and changing landscape of the theories underlying brain development and maturity, it makes sense that the familiar *Daubert-Lanigan* procedure should be used to test expert assumptions and theories. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 585–595 (1993), and *Commonwealth v. Lanigan*, 419 Mass. 15, 24–26 (1994). As this court has aptly observed, no "particular theories or methods" are "grandfathered" for all time "especially in areas where knowledge is evolving and new understandings may be expected as more studies and tests are conducted." *Commonwealth v. Shanley*, 455 Mass. 752, 763 n.15 (2010) (court acknowledged it was prudent for trial judge to conduct an evidentiary hearing in connection with expert tes-

timony about dissociative amnesia because of "the evolving nature of scientific and clinical studies of the brain and memory"). The *Daubert-Lanigan* methodology, which includes five foundational requirements, is flexible while providing process, predictability, and a measure of rigor to testing what is presented to the court as science. *See* Mass. G. Evid. 702 & Notes.

The practice of drawing conclusions from reading untested, ambiguous, or contradictory studies or treatises on the appellate level should give way to the time-tested method of testing contradictory matter – the taking of evidence in a litigation setting with a fact finder to weigh and rule on the evidence. Especially in an area of uncertain and changing theories, there is no substitute for testimony. Testimony brings with it, among other things, the opportunity to call experts, subject them to cross-examination, and introduce exhibits.

B. A Review Of The Legal Developments In Other States Establishes There Have Not Emerged "Evolving Standards Of Decency" That Have Rendered The Punishment Of Mandatory Life In Prison With The Possibility to Parole For A Juvenile Convicted Of Second Degree Murder A "Shock To The Conscience."

Legal developments in other states also fail to show that there have been "evolving standards of decency that mark the progress of a maturing society" so as to render unconstitutional a mandatory life sen-

tence with parole eligibility after fifteen years for a juvenile convicted of second-degree murder. *Okoro* at 61. The examples the defendant provides do not demonstrate such an evolution of standards. The first case the defendant cites is *State v. Houston-Sconiers*, 391 P.3d 409 (Wash. 2017), from the Supreme Court of Washington, which overruled a state statutory scheme that barred a sentencing judge from considering "mitigating circumstances associated with the youth of any juvenile defendant." *Houston-Sconiers*, 391 P.3d at. 420. However, the statutory scheme involved mandatory sentencing enhancements that essentially "were the functional equivalent of the mandatory life without parole sentences that *Miller* rejected." *Id.* at 416. This increased judicial discretion for juveniles convicted in Washington was not due to mandatory sentencing schemes that resulted in a life sentence with the possibility of parole, but rather those that resulted in life sentences *without* parole. This legal development falls right in line with *Miller* and *Diatchenko I* and does not reveal any stark "evolving standards of decency." *Okoro*, 471 Mass. at 61.

The defendant's reliance on *Landrum v. State*, 192 So. 3d 459 (Fla. 2016), and *Horsley v. State*, 160 So. 3d 393 (Fla. 2015) from the Supreme Court of Florida and *State v. Jefferson*, 798 S.E.2d 121 (N.C. Ct. App. 2017), from the Court of Appeals of North Carolina as

evidence of "significant changes in the law since *Okoro* was decided" is misplaced (D.Br. 23). Analogous to this Court's reasoning in *Diatchenko I* and *Brown*,[4] *Landrum* held that whether a life sentence is mandatory or non-mandatory is irrelevant under a constitutional analysis subsequent to *Miller*. *Landrum*, 192 So. 3d at 466 ("The basis for the violation of the *Eighth Amendment* and the prohibition in article 1, section 17, of the Florida Constitution against 'Excessive Punishments,' does not emanate from the mandatory nature of the sentence imposed."). Rather, the *Landrum* court held that a trial court acting in accordance to a discretionary sentencing scheme for juveniles must take into account "how children are different" before imposing a life sentence *without* parole. *Id.* at 460. Similarly, *Horsley* only decided how to retroactively remedy the sentences that "now violate[d] the *Eighth Amendment* based on *Miller*," which are mandatory life sentences *without* the possibility of parole that ignored "children's diminished culpability and heightened capacity for change." *Horsley*, 160 So. 3d at. 394, 398. In *Jefferson*, the North Carolina court also

[4] As this court noted in *Diatchenko I* and *Brown*, the constitutional impediment to the imposition of a life sentence upon a juvenile convicted of murder—of whatever degree—arises not from the term of the sentence (life), but from the absolute denial of any possibility of parole.

confirmed the narrow reach of *Miller*, upholding the constitutionality of a statutory sentence for a juvenile defendant convicted for first-degree murder solely under the felony murder rule to a life sentence with parole eligibility after 25 years. *Jefferson*, 798 S.E.2d at 123 ("Because the Supreme Court has not indicated the individualized sentencing required in *Miller* extends to sentences beyond life without parole, we must presume the statute is constitutional, and defer to the legislature."). As all of these cases were simply applying *Miller* in determining the constitutionality of life sentences *without* parole eligibility for juveniles in their own states, none of these cases provide new legal developments or evolving standards that warrant this Court's revisiting of issues already decided in *Okoro*.

The only case provided by the defendant that suggests even an inkling of an "evolving standard" regarding juvenile offenders is *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014), from the Supreme Court of Iowa, interpreting the Iowa constitution's prohibition on cruel and unusual punishment as applied to juveniles. There, the Iowa court concluded that "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional" under the Iowa state constitution. *Lyle*, 854 N.W.2d at 400. Of great import the Court relied on the fact that: "Juveniles

over sixteen years of age or older who commit any form of forcible felony are now excluded under our law from the jurisdictional arm of juvenile courts and are prosecuted as adults. Iowa Code § 232.8(1)(c). Consequently, the mandatory minimum sentences applicable to adult offenders apply, with no exceptions, to juvenile offenders, including those who engage in inane juvenile schoolyard conduct." *Id.* at 401. The Court there also expressly rejected both rehabilitation and incapacitation as valid bases for such sentences. Nonetheless, that court recognized that "no other court in the nation has held that its constitution or the Federal Constitution prohibits a statutory schema that prescribes a mandatory minimum sentence for a juvenile offender. Further, most states permit or require some or all juvenile offenders to be given mandatory minimum sentences." *Id.* at 386. That one court out of the 50 states in our nation has opined that mandatory minimums for persons prosecuted as adults when they are sixteen years old is unconstitutional is insufficient to demonstrate "evolving standards of decency" that would "shock the conscience . . . of human dignity." *Okoro*, 471 Mass. at 61; *Cepulonis* 384 Mass. at 496.

Although the Lyle Court notes a few states that have statutorily limited mandatory minimum for juveniles, those states do not prohibit mandatory sentenc-

ing for the most serious of crimes committed by juvenile offenders, such as murder, and some of them also likely still transfer or otherwise prosecute some youthful offenders as adults and not juveniles, thus rendering any comparison inapposite.5 *Lyle*, 854 N.W.2d at 386 n.3. Colorado has a statute that limits the availability of mandatory minimum sentences for juveniles. Colo. Rev. Stat. § 19-2-908 (2017). Delaware has prohibited a mandatory minimum sentence for vehicular homicide for a juvenile offender. Del. Code. Ann. tit. 11, § 630A(c) (2018). New Mexico allows courts to sentence juvenile offenders to less than the mandatory minimum for a particular crime. N.M. Stat. Ann. § 31-18-13(B) (2018). Oregon prohibits its mandatory minimum sentences for juvenile offenders except in the cases of aggravated murder or felonies committed with a firearm. Or. Rev. Stat. § 161.620 (2018). Washington prohibits mandatory minimum sentences for juvenile offenders except in cases of aggravated first-degree murder. Wash. Rev. Code Ann. § 9.94A.540 (2018). As this amounts to only five out of fifty states, and as some or all of these states may otherwise permit the transfer of juveniles to the adult system, there is no national consensus on manda-

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[5] *See* Commonwealth brief in *Commonwealth v. Baez*, SJC-12394, pp. 35-47, citing numerous other jurisdictions that have juvenile transfer statutes.

tory minimum sentences and juvenile offenders. Moreover, as the elected voice of the people the Legislature is a more appropriate forum for the exposition of consensus as to the "evolving standards of decency" in this area.

C. Article 26 Of The Massachusetts Declaration Of Rights Relies On The Same "Evolving Standards Of Decency" As The Eighth Amendment Does, Thus, A Defendant Convicted Of Second-Degree Murder Does Not Have A Constitutional Right To Individualized Sentencing.

This Court held in *Okoro* that "following *Miller*, the Eighth Amendment does not require individualized, discretionary judicial sentencing of juvenile homicide offenders before these offenders may be sentenced to life in prison with eligibility for parole." *Okoro*, 471 Mass. at 63. This Court did note, however, that it has not yet concluded that Article 26 of the Massachusetts Declaration of Rights requires the same result. *Id.* at n.19. Because the defendant, who raised no objection at sentencing, raises unconstitutionality of his lack of individualized sentencing under both the Eighth Amendment and Article 26, this Court should hold that just as the "Eighth Amendment does not require individualized discretionary judicial sentencing of juvenile homicide offenders," neither does Article 26. This Court has acknowledged that "[a]lthough the rights guaranteed under *art. 26* may be broader than those guaranteed under the *Eighth Amendment*, *art. 26*

nevertheless 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,'" – in the same way the Eighth Amendment does – "such that developments in the area of juvenile justice in judicial opinions and legislative actions at the State, Federal, and international levels help to inform our understanding of what *art. 26* protects." *Id.* at 61 (citation omitted). As already established, there is still insufficient evidence of "evolving standards of decency" to warrant this Court to alter its understanding of what Article 26 protects.[6] To do so at this juncture would amount to no more than an *ipse dixit*.

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[6] This Court has established a tripartite test to determine whether a punishment is cruel or unusual under Article 26. The test for whether a punishment is cruel or unusual under Article 26 considers "(i) the nature of the offense and the offender in light of the degree of harm to society; (ii) a comparison of the challenged punishment with other punishments imposed within the State; and (iii) a comparison of the challenged punishment with punishments for the same or similar crimes in other jurisdictions." *Commonwealth v. Therriault*, 401 Mass. 237, 240 (1987) (citing *Jackson*, 369 Mass. at 910-913). Under the first prong, second-degree murder is indubitably one of the most severe crimes. As to the nature of the offender, a sentencing judge does not have the ability to determine a juvenile defendant's specific degree of harm to society and should defer to the legislature's primacy in a sentencing statute; such a determination is up to the parole board at the time of a parole hearing. *See infra*, 20-24. Thus, a mandatory life sentence with parole eligibility after 15 years is proportional under prong one. This punishment is also proportional under prong two as the only other crime more serious

No adult defendant is entitled to an individualized sentencing hearing that frustrates a legislatively enacted mandatory sentencing scheme. *See Commonwealth v. Jones*, 2018 Mass. LEXIS 89, *34-35 (2018) (mandatory life without parole sentence not unconstitutional for adult who has developmental disabilities). This Court has recognized that a person under the age of eighteen who engages in conduct that is against the criminal laws is committing crimes and is responsible and accountable for criminal conduct. *See supra*, 5-6. This is necessarily because the chronological age at which conduct is committed does not in and of itself determine that an individual is or is not culpable for such conduct.

Even persons under the age of eighteen have no constitutional right to a discretionary sentencing hearing for any crime or crimes unless the sentence may exceed fifteen years of mandatory incarceration before parole eligible. *See Commonwealth v. Perez*,

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than second-degree murder is first-degree murder; the mandatory life sentence before parole eligibility for a juvenile convicted of first-degree murder ranges from 20 years to 30 years versus 15 years to 25 years for a juvenile convicted of second-degree murder. The statute takes into account the lessened severity of a second-degree murder relative to a first-degree murder. Finally, as only one state out of fifty has made mandatory minimums for juvenile offenders unconstitutional, and most states allow or require mandatory minimum sentences for juvenile offenders, the defendant's sentence is proportional under prong three as well. *Supra* 8-10.

477 Mass. 677, 684-687 (2017)(court should consider Miller factors related to juvenile culpability when juvenile faces aggregate sentence causing parole eligibility to exceed fifteen years). *See also State v. Taylor G.*, 110 A.3d 338, 345-346 (Conn. 2015)(ten and five year mandatory minimum sentences for juvenile do not violate the eighth amendment prohibition against cruel and unusual punishment; "*Roper*, *Graham* and *Miller* cannot be read to mean that all mandatory deprivations of liberty are of potentially constitutional magnitude."). Furthermore, *Miller* emphasized individualized sentencing where juveniles were given mandatory sentences *without* the possibility of parole; this is qualitatively different from a mandatory sentence with the possibility of parole. *See id.* at 346 ("Life in prison without the possibility of parole is also final and irrevocable in the sense that it deprives the offender of all hope of future release and of living a normal life, even if he or she is successfully rehabilitated and capable of returning and making a positive contribution to society.").

Finally, the defendant claims his sentence is unconstitutional because it "disregards the possibility of rehabilitation even when the circumstances most suggest it" (D.Br. 22). This is misplaced because rehabilitation occurs over time, and the time spent while incarcerated may be rehabilitative. The eligi-

bility for parole itself does not disregard the possibility of rehabilitation, as the defendant claims, it is the embodiment of that possibility in law. An offender who is rehabilitated is paroled, and that the defendant may also be punished while awaiting parole does not render the fifteen year term cruel or unusual. This juvenile's life sentence provides him a "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,' and that accordingly, at the appropriate time, [he will] be considered for parole suitability." *Diatchenko II*, 471 Mass. at 18 (ultimately quoting *Graham v. Florida*, 560 U.S. 48, 76 (2010)). The sentencing judge cannot predict whether and when a juvenile will be rehabilitated, and the current state of neurological science provides no crystal ball to foretell that future; if and when the defendant is rehabilitated the parole board will provide for his conditional liberty.

The defendant also ignores the other purposes that imprisonment serves -- retribution, deterrence, and incapacitation. "The heart of the retribution rationale relates to an offender's blameworthiness," and although the Supreme Court in *Miller* recognized that "the case for retribution is not as strong with a minor as with an adult," such an analysis was in the context of a life sentence *without* parole and does not detract from the fact that juveniles can form the req-

uisite intent needed for a crime. *Miller*, 567 Mass. at 472. A juvenile needs to be punished for committing a crime even if his or her psychosocial abilities have not fully developed. Similarly, although the *Miller* court recognized that deterrence is less effective for juveniles than adults because the characteristics of juveniles "make them less likely to consider potential punishment," mandatory imprisonment for crimes as severe as second-degree murder would be an effective deterrence nonetheless. *Id.* As "different brain systems mature along different timetables, and different individuals mature at different ages and different rates," Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy*, *supra*, at 67, one cannot categorically say that juveniles are not likely to consider potential punishment. In fact, a study in which individuals were asked to play a video driving game found that when individuals were alone, there were no differences "in risk-taking between adolescents who averaged 14 and adults who averaged 34." Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, *supra*, at 99. The difference arose when the individuals were "in the presence of peers or under conditions of emotional arousal." *Id.* In the same vein, a mandatory life sentence with parole eligibility after 15 years can just as effectively serve incapacitation purposes.

Miller held that life without parole for juvenile offenders would not serve incapacitation purposes because it decides that a "juvenile offender forever will be a danger to society" and will "require 'mak[ing] a judgment that [he] is incorrigible.'" *Miller*, 567 U.S. at 472-473. That is not the case for those convicted of second-degree murder though because parole eligibility itself suggests corrigibility. Furthermore, as the developing science shows that personality and brain development during an adolescent's transition into adulthood leads to increased risk-taking because they are "more likely to engage in sensation seeking, less likely to control their impulses, or less likely to plan ahead," Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy*, *supra*, at 72, having a juvenile who committed second-degree murder serving a sentence during the years in which he or she would take the most risks and have a high chance of reoffending would certainly serve incapacitation purposes.

Additionally, the recognized constitutional differences between juvenile and adult offenders have already been incorporated into the parole process: "certain due process protections not available to adult offenders in their parole hearings must be made available to juvenile offenders" convicted of murder in the first degree and in the second degree. *Okoro*, 471

Mass. at 62-63. The discretion and individualization of juvenile offenders enter at this point of the legal process, which is ultimately left to the executive branch to decide through its parole board. This Court has held that such decisions pass constitutional muster because "neither the *Eighth Amendment* nor *art. 26* requires parole decisions to be vested in the judicial branch." *Id.* at 63. It is important to note that there are no studies that indicate the particular ages at which juveniles reach personality and brain maturation. In fact, there is no consensus among the various studies in this field on when a juvenile's personality is fully formed:

> The empirical literature on personality development is ambiguous. The prevailing view among psychologists is that during adulthood, personality becomes more stable over time, but no consensus exists when, if at all, personality ceases to change. Some studies have found that young adulthood is a time of considerable stability in personality; others have found that it is a time of instability, especially during the transition from adolescence to young adulthood; and yet another group has found variation among individuals. Moreover, some studies have also found variability *within individuals* in the stability of personality, in that some traits appear to be considerably more stable than others.

Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 649-650

(2016). Thus, to require a judge to determine when each juvenile offender's personality will be fully developed and ready for parole will be an absolutely unnecessary burden and violate the separation of powers by usurping the parole board's executive authority. Accordingly, a sentencing judge should not be constitutionally required to hold discretionary hearings for juveniles convicted of second-degree murder prior to giving them a mandatory life sentence with parole eligibility after 15 years.

CONCLUSION

For the foregoing reasons, the Suffolk County District Attorney respectfully submits that the answer to the Amicus question is "no."

Respectfully submitted
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ADDENDUM

Eighth Amendment to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article 26 of the Massachusetts Declaration of Rights

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

G.L. c. 12, § 12. District attorneys; qualifications; election; term; appearances

There shall be a district attorney for each district set forth in the following section, who shall be a resident therein and a member of the bar of the commonwealth and shall be elected as provided by section one hundred and fifty-four of chapter fifty-four. He shall serve for four years beginning with the first Wednesday of January after his election and until his successor is qualified.

The district attorney shall appear for a county constituting such district in all civil actions in which such county is a party under the provisions of chapter two hundred and fifty-eight.

G.L. c. 12, § 13. Districts for administration of criminal law or defense of civil actions

For the administration of the criminal law, or for the defense of civil actions brought pursuant to chapter two hundred and fifty-eight, Suffolk county shall constitute the Suffolk district; Middlesex county, the northern district; Essex county, the eastern district; Norfolk county, the Norfolk district; Plymouth county, the Plymouth district; Bristol county, the Bristol district; Barnstable, Nantucket and Dukes counties, the Cape and Islands district; Worcester county, excluding the town of Athol, the middle district; Berkshire county, the Berkshire district; Hampden county, the Hampden district; and Franklin county, including the town of

Athol, and Hampshire county, the northwestern district.

G.L. c. 12, § 27. District attorneys; duties; control of attorney general

District attorneys within their respective districts shall appear for the commonwealth in the superior court in all cases, criminal or civil, in which the commonwealth is a party or interested, and in the hearing, in the supreme judicial court, of all questions of law arising in the cases of which they respectively have charge, shall aid the attorney general in the duties required of him, and perform such of his duties as are not required of him personally; but the attorney general, when present, shall have the control of such cases. They may interchange official duties.

G.L. c. 119, § 72B. Persons between the ages of fourteen and eighteen convicted of murder; penalties

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.

[Fifth paragraph applicable as provided by 2014, 189, Sec. 9.]

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.

G.L. c. 127, § 133A. Eligibility for parole; notice and hearing; parole permits; revision of terms and conditions; revocation; arrest

[First paragraph applicable as provided by 2014, 189, Sec. 8.]

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.

G.L. c. 218, § 27A. Jury sessions

(a) Every division of the district court department is authorized to hold jury sessions for the purpose of conducting jury trials of cases commenced in the several courts of criminal offenses over which the district courts have original jurisdiction under the provisions of section twenty-six. The Boston municipal court department shall also be authorized for the purpose of conducting jury trials in cases commenced in said department and for the purpose of conducting jury trials of cases commenced in the divisions of the district court department in Suffolk county.

(b) The chief justice for the district court department shall designate at least one division in each county or an adjoining county for the purpose of conducting jury trials; provided, however, that jury trials in cases commenced in the courts within Suffolk county shall be held in the Boston municipal court department or district courts in Suffolk county or with the approval of the chief justice, may be held in such divisions of the district court department the judicial districts of which adjoin Suffolk county as are designated by said chief justice; and jury trials in cases commenced in the divisions for Dukes county and Nantucket county may be held in Barnstable county or Bristol county; and provided further that, with the approval of the chief justice for the superior court department, facilities of said superior court may be designated by the chief justice for administration and management of the trial court for jury trials in cases commenced in the district court department or in the Boston municipal court department. Jurors shall be drawn from the county in which trial is held.

The chief justice of the district court department may also designate one or more divisions in each county for the purpose of conducting jury-waived trials of cases commenced in any court of said county consistent with the requirements of the proper administration of justice.

(c) A defendant in any division of the district court who waives his right to jury trial as provided in section twenty-six A shall be provided a jury-waived trial in the same division.

A defendant in any division of the district court who does not waive his right to jury trial as provided in section twenty-six A shall be provided a jury trial in a jury session in the same division if such has been established in said division. If such session has not been so established, the defendant shall be provided a jury trial in a jury session as hereinbefore designated. In cases where the defendant declines to waive the right to jury trial, the clerk shall forthwith transfer the case for trial in the appropriate jury session. Such transfer shall be governed by procedures to be established by the chief justice for the district court department.

(d) The justice presiding over a jury session shall have and exercise all the powers and duties which a justice sitting in the superior court department has and may exercise in the trial and disposition of criminal cases including the power to report questions of law to the appeals court, but in no case may he impose a sentence to the state prison. No justice so sitting shall act in a case in which he has sat or held an inquest or otherwise taken part in any proceeding therein.

(e) Trials by juries of six persons shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all the defendants in the case entitled.

(f) For the jury sessions, jurors shall be provided by the office of the jury commissioner in accordance with the provisions of chapter two hundred and thirty-four A.

(g) The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in the trial of all cases in which the right to jury trial has not been waived and may appear in any other case. The chief justices for the district court department and the Boston municipal court department shall arrange for the sittings of the jury sessions of their respective depart-

ments and shall assign justices thereto, to the end that speedy trials may be provided. Review may be had directly by the appeals court, by appeals, report or otherwise in the same manner provided for trials of criminal cases in the superior court.

(h) The justice presiding at such jury session in the Boston municipal court department or district court department shall, upon the request of the defendant, appoint a stenographer; provided, however, that where the defendant claims indigency, such appointment is determined to be reasonably necessary in accordance with the provisions of chapter two hundred and sixty-one. Such stenographer shall be sworn, and shall take stenographic notes of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice for the department where the case is tried; and provided, further, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and services of stenographers appointed for sessions in his department and any other matter relative to stenographers. The compensation and expenses of a stenographer shall be paid by the commonwealth.

The request for the appointment of a stenographer to preserve the testimony at a trial shall be given to the clerk of the court by the defendant in writing no later than forty-eight hours prior to the proceeding for which the stenographer has been requested. In the Boston municipal court department or the district court department, the defendant shall file with such request an affidavit of indigency and request for payment by the commonwealth of the cost of the transcript and the court shall hold a hearing on such request prior to appointing a stenographer, in those cases where the defendant alleges that he will be unable to pay said cost. Said hearing shall be governed by the provisions of sections twenty-seven A to twenty-seven G, inclusive, of chapter two hundred and sixty-one, and the cost of such transcript shall be considered an extra cost as provided therein. If the court is una-

ble, for any reason, to provide a stenographer, the proceedings may be recorded by electronic means. The original recording of proceedings in the Boston municipal court department or the district court department made with a recording device under the exclusive control of the court shall be the official record of such proceedings. Said record or a copy of all or a part thereof, certified by the chief justices for the Boston municipal court department or the district court department, or his designee, to be an accurate electronic reproduction of said record or part thereof, or a typewritten transcript of all or a part of said record or copy thereof, certified to be accurate by the court or by the preparer of said transcript, or stipulated to by the parties, shall be admissible in any court as evidence of testimony given whenever proof of such testimony is otherwise competent. The defendant may request payment by the commonwealth of the cost of said transcript subject to the same provisions regarding a transcript of a stenographer as provided hereinbefore.

(i) In any case heard in a jury session where a defendant is found guilty and placed on probation, he shall thereafter be supervised by the probation officer of the court in which the case originated, unless the trial justice shall order otherwise and unless the regulations of the commissioner of probation provide otherwise.

G.L. c. 265, § 2. Punishment for murder; parole; executive clemency

[Text of section applicable as provided by 2014, 189, Sec. 8.]

(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. 279, § 24. Indeterminate sentence to state prison; determination of sentence for offender aged fourteen through seventeen

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.

[Second paragraph applicable as provided by 2014, 189, Sec. 8.]

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.

Colo. Rev. Stat. § 19-2-908: Sentencing - special offenders

(1) The court shall sentence a juvenile adjudicated as a special offender as follows:

(a) Mandatory sentence offender. The court shall place or commit any juvenile adjudicated as a mandatory sentence offender, as described in section 19-2-516(1) , out of the home for not less than one year, unless the court finds that an alternative sentence or a commitment of less than one year out of the home would be more appropriate; except that:

(I) If the person adjudicated as a mandatory sentence offender is eighteen years of age or older on the date of the sentencing hearing, the court may sentence that person to the county jail or to a community correctional facility or program for a period not to exceed two years, if such person has been adjudicated a mandatory sentence offender pursuant to this article for acts committed prior to such person's eighteenth birthday; or

(II) The juvenile or person may be released by the committing judge upon a showing of exemplary behavior.

(b) Repeat juvenile offender. The court shall sentence any juvenile adjudicated as a repeat juvenile offender, as described in section 19-2-516(2) , out of the home for not less than one year, unless the court finds that an alternative sentence or a commitment of

less than one year out of the home would be more appropriate; except that:

(I) If the person adjudicated as a repeat juvenile offender is eighteen years of age or older on the date of the sentencing hearing, the court may sentence that person to the county jail or to a community correctional facility or program for a period not to exceed two years, if such person has been adjudicated a repeat juvenile offender pursuant to this article for acts committed prior to such person's eighteenth birthday; or

(II) The juvenile or person may be released by the committing judge upon a showing of exemplary behavior.

(c) Violent juvenile offender. (I)(A) Upon adjudication as a violent juvenile offender, as described in section 19-2-516(3) , the juvenile shall be placed or committed out of the home for not less than one year; except that this sub-subparagraph (A) shall not apply to a juvenile who is ten years of age or older, but less than twelve years of age, when the court finds that an alternative sentence or a commitment of less than one year out of the home would be more appropriate.

(B) Upon adjudication as a violent juvenile offender, if the person is eighteen years of age or older on the date of the sentencing hearing, the court may sentence such person to the county jail or to a community correctional facility or program for a period not to exceed two years, if such person has been adjudicated a violent juvenile offender pursuant to this article for acts committed prior to such person's eighteenth birthday.

(II) The court may commit a violent juvenile offender to the department of human services. The court may impose a minimum sentence during which the juvenile shall not be released from a

residential program without prior written approval of the court that made the commitment.

(d) Aggravated juvenile offender. The court shall sentence an aggravated juvenile offender as provided in section 19-2-601 .

Del. Code. Ann. tit. 11, § 630A: Vehicular homicide in the first degree; class C felony; minimum sentence; juvenile offenders.

* * * *

(c) Every person charged under this section after having reached his or her sixteenth birthday, shall be treated for purposes of trial or other disposition of the charge, including but not limited to sentencing, as an adult, notwithstanding any contrary provisions of statutes governing the Family Court, or any other state law, except that the mandatory minimum sentencing provisions of subsection (b) of this section and § 630(b) of this title shall not apply to juveniles. Any such case involving a juvenile shall be subject to the transfer provisions of § 1011 of Title 10. Any period of incarceration imposed upon a juvenile by operation of this section shall be served in a juvenile correctional facility until the person attains his or her eighteenth birthday, at which time the person shall be transferred to the appropriate adult correctional institution or jail to serve any remaining portion of the sentence.

Iowa Code § 232.8: Jurisdiction

1.

* * * *

c. Violations by a child, aged sixteen or older, which subject the child to the provisions of section 124.401, subsection 1, paragraph “e” or “f”, or violations of section 723A.2 which involve a violation of chapter 724, or violation of chapter 724 which constitutes a felony, or violations which constitute a forcible felony are excluded from the jurisdiction of the juvenile court and shall be prosecuted as otherwise provided by law unless the district court

transfers jurisdiction of the child to the juvenile court upon motion and for good cause pursuant to section 803.6. Notwithstanding any other provision of the Code to the contrary, the district court may accept from a child in district court a plea of guilty, or may instruct the jury on a lesser included offense to the offense excluded from the jurisdiction of the juvenile court under this paragraph, in the same manner as regarding an adult. The judgment and sentence of a child in district court shall be as provided in section 901.5. However, the juvenile court shall have exclusive original jurisdiction in a proceeding concerning an offense of animal torture as provided in section 717B.3A alleged to have been committed by a child under the age of seventeen.

* * * *

N.M. Stat. Ann. § 31-18-13: Sentencing authority; all crimes.

* * * *

B. Whenever a defendant is convicted of a crime under the constitution of New Mexico, or a statute not contained in the Criminal Code [30-1-1 NMSA 1978], which specifies the penalty to be imposed on conviction, the court shall set as a definite term of imprisonment the minimum term prescribed by the statute or constitutional provision and may impose the fine prescribed by the statute or constitutional provision for the particular crime for which the person was convicted; provided, that a person sentenced as a serious youthful offender or as a youthful offender may be sentenced to less than the minimum term of imprisonment prescribed by the statute or the constitutional provision.

* * * *

Or. Rev. Stat. § 161.620: Sentences imposed upon waiver from juvenile court

Notwithstanding any other provision of law, a sentence imposed upon any person waived from the juvenile court under ORS 419C.349, 419C.352, 419C.364 or 419C.370 shall not include any sentence of death or

life imprisonment without the possibility of release or parole nor imposition of any mandatory minimum sentence except that a mandatory minimum sentence under:

(1) ORS 163.105 (1)(c) shall be imposed; and

(2) ORS 161.610 may be imposed. [1985 c.631 9; 1989 c.720 3; 1993 c.33 306; 1993 c.546 119; 1995 c.422 131y; 1999 c.951 2]

Wash. Rev. Code Ann. § 9.94A.540: Mandatory minimum terms.

(1) Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:

(a) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years.

(b) An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

(c) An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years.

(d) An offender convicted of the crime of sexually violent predator escape shall be sentenced to a minimum term of total confinement not less than sixty months.

(e) An offender convicted of the crime of aggravated first degree murder for a murder that was committed prior to the offender's eighteenth birthday shall be sentenced to a term of total confinement not less than twenty-five years.

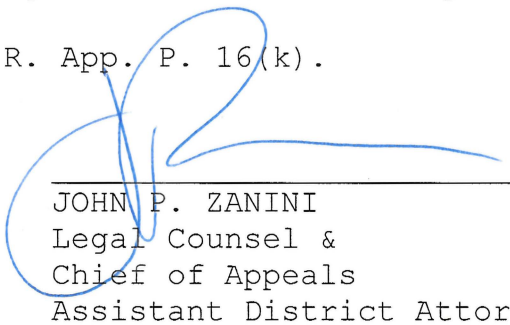
(2) During such minimum terms of total confinement, no offender subject to the provisions of this section is eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave of absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (a) In the case of an offender in need of emergency medical treatment; (b) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree; or (c) for an extraordinary medical placement when authorized under *RCW 9.94A.728(3).

(3)(a) Subsection (1)(a) through (d) of this section shall not be applied in sentencing of juveniles tried as adults pursuant to RCW 13.04.030(1)(e)(i).

(b) This subsection (3) applies only to crimes committed on or after July 24, 2005.

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k).



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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12546

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

V.

NATHAN ENESTO LUGO,
Defendant-Appellant.

BRIEF OF SEVERAL DISTRICT ATTORNEYS AS AMICI CURIAE

SUFFOLK COUNTY