COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO: SJC-12382

COMMONWEALTH OF MASSACHUSETTS

v

RAYMOND CONCEPCION

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF SUFFOLK COUNTY

BRIEF OF JUVENILE LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT RAYMOND CONCEPCION AND REVERSAL

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of *amicus* briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has participated in appeals to this Court addressing the protections that must be afforded to youth in the juvenile justice system, including as *amicus curiae* in *Commonwealth v. Brown*, No. SJC-11454; *Commonwealth v. Guthrie G.*, No. SJC-09805; *Commonwealth v. Juvenile "LN,"* No. SJC-12351; *Commonwealth v. Lugo*, No. SJC-12546; and *Commonwealth v. Evelyn*, No. SJC-12808.

DECLARATION PURSUANT TO MASS. R. APP. P. 17(C)(5)

No party or counsel for a party authored this brief in whole or in part or contributed money intended to fund its preparation or submission. No person or

[1] This brief is submitted pursuant to Mass. R. App. P. 17(a) allowing *amicus* briefs by leave of the appellate court or a single justice granted on motion.

entity, other than *Amicus*, their members, or their counsel, made a monetary contribution for the preparation or submission of this brief. Neither *amicus curiae* or its counsel has represented any of the parties to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

SUMMARY OF THE ARGUMENT

A mandatory transfer scheme that imposes a mandatory life sentence contravenes United States Supreme Court precedent and perpetuates the mass incarceration of historically marginalized communities. Massachusetts law permits the automatic transfer of youth charged with homicide to the adult criminal justice system without procedural protections. The statute deprives youth of the due process rights set forth in *Kent v. United States* and *Mathews v. Eldridge*. Under this unconstitutional scheme, youth are charged as adults without an individualized consideration of the attributes and characteristics of youth, their capacity for reform and rehabilitation, and the circumstances of the alleged crime. When placed in the adult criminal justice system, these youth are required to serve mandatory life sentences in contravention of the United States Supreme Court's holding in *Miller v. Alabama*. Furthermore, mandatory statutory schemes like the ones at issue here result in a disproportionate number of Black and Brown youth being transferred to adult court and sentenced to life in prison. Absent any individualized assessment at

transfer or at sentencing, youth like Raymond will remain in prison unless and until a parole board deems them eligible for release.

ARGUMENT

I. A MANDATORY STATUTORY SCHEME THAT PROVIDES NO OPPORTUNITY FOR INDIVIDUALIZED CONSIDERATION CONTRAVENES THE UNITED STATES SUPREME COURT'S JUVENILE JURISPRUDENCE

A. The United States Supreme Court Has Repeatedly Held That Children Are Different Than Adults In Constitutionally Relevant Ways

"[Y]outh is more than a chronological fact;" it is a "time and condition of life" marked by particular behaviors, perceptions, and vulnerabilities. *Eddings v. Oklahoma*, 455 U.S. 104, 115, (1982). These observations, which compel a distinctive application of the Constitution to youth, are supported by a significant body of developmental research and neuroscience demonstrating the significant psychological and neurological differences between youth and adults. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 68 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.").

Between 2005-2012, the U.S. Supreme Court issued four decisions that reinforce the primacy of this principle in decisions about the culpability of youth and the legal processes due to them. *See Miller v. Alabama*, 567 U.S. 460, 465 (2012) (holding that mandatory sentences of life without the possibility of parole for minors

convicted of homicide offenses violate the Eighth Amendment); *Graham*, 560 U.S. at 82 (ruling that the imposition of life without the possibility of parole for youth convicted of non-homicide crimes violates the Eighth Amendment); *J.D.B. v. North Carolina*, 564 U.S. 261, 271-72 (2011) (holding that age is a significant factor in determining whether a youth is "in custody" for *Miranda* purposes); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that the imposition of the death penalty on minors violates the Eighth Amendment).

In all these decisions, the Court relied on three categorical distinctions between youth and adults to explain why children must be treated differently—especially under our criminal laws. "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569). *Accord Graham*, 560 U.S. at 68. Research demonstrates that adolescents, as compared to adults, are less capable of making reasoned decisions, particularly in stressful situations. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008) ("Considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices."). Adolescent decision-making is characterized by sensation- and reward-seeking behavior. Laurence Steinberg, *A Dual Systems Model of*

Adolescent Risk-Taking, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010). Greater levels of impulsivity during adolescence may stem from adolescents' weak future orientation and their related failure to anticipate the consequences of decisions. Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD. DEV. 28, 29-30 (2009); *see also* REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH at 91, 97 (Richard J. Bonnie et al., eds. 2013).

Moreover, young people have a greater capacity for change than adults because adolescence is a transitional phase. "[A] child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Miller*, 567 U.S. at 471 (second and third alterations in original) (quoting *Roper*, 543 U.S. at 570). As a result, "a greater possibility exists that a minor's character deficiencies will be reformed." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570). These attributes are not limited solely to sentencing; youths' ability to reform shows that they are particularly amenable to the rehabilitative goals of the juvenile justice system. Each of these developmental characteristics leads to the diminished culpability of juvenile defendants; their "conduct is not as morally reprehensible as that of an adult." *Roper*, 543 U.S. at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)).

As a consequence of these unique developmental attributes, the Supreme Court held that the Constitution requires that youth receive procedural protections appropriate to their developmental status. *See, e.g.*, *Miller*, 567 U.S. at 473-76; *J.D.B.,* 564 U.S. at 272 (holding that age is relevant for the *Miranda* custody decision because "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go"). The distinctive traits of children and adolescents necessitate an *individualized assessment* of "an offender's age and the wealth of characteristics and circumstances attendant to it" before exposing youth to the punishments of the adult criminal justice system. *Miller*, 567 U.S. at 476.

B. United States Supreme Court Precedent Requires Consideration Of Individualized Characteristics Of Youth In The Criminal System

In *Miller*, the Court held that "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" *Miller*, 567 U.S. at 476 (striking mandatory life without parole sentences for juveniles). Failing to consider the youth's individual situation unconstitutionally

> precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense,

> including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.

Miller, 567 U.S. at 477. In *Miller*, the Court specifically noted six such characteristics that should be considered during sentencing in light of the differences between children and adults: (1) the youth's chronological age related to "immaturity, impetuosity, and failure to appreciate risks and consequences," (2) the juvenile's "family and home environment that surrounds him," (3) the circumstances of the offense, including extent of participation in the criminal conduct, (4) the impact of familial and peer pressures, (5) the effect of the offender's youth on his ability to navigate the criminal justice process, and (6) the possibility of rehabilitation. *Id*. at 477-78. The same requirement for individual consideration of youth characteristics must apply throughout a child's involvement in the criminal justice system. *See, e.g.*, *J.D.B.*, 564 U.S. at 272-74 (relying on earlier findings regarding the immaturity and vulnerability of children to hold that a child's age must be considered in determining whether they were in custody for purposes of the administration of *Miranda* warnings).

C. A Mandatory Statutory Scheme Runs Counter To The Procedural Fairness Emblematic Of The Juvenile Court System

The unique standards required for evaluating a statute's constitutionality as applied to youth exist not only because of the developmental status of youth, but also because of the unique rehabilitative purpose of the juvenile justice system, present

even before documented developmental neuroscience informed the Supreme Court's decisions. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 552 (1971) (White, J., concurring) ("Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties"); *see also In re Gault*, 387 U.S. 1, 26 (1967) ("[T]he appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be more impressive and more therapeutic attitude so far as the juvenile is concerned.").

The origins of the modern juvenile justice system are based on the ancient legal doctrine of *parens patriae*, meaning the "state as parent." *See In re Gault,* 387 U.S. at 16-17 (describing the power of the state to act in *loco parentis* for the purpose of protecting the property interests and the person of a child). *See also* Mass. Gen. Laws Ann. ch. 119 § 53 (2020) ("[A]s practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance."). The original juvenile court was designed to address youth who needed help based on their life circumstances or delinquent acts by providing rehabilitation and protective supervision. *See McKeiver*, 403 U.S. at 552 (White, J., concurring); *see also In re Gault*, 387 U.S. at 26. Judges could exercise broad discretion about how each individualized case should be handled, sometimes even informally. *See McKeiver*, 403 U.S. at 534, 544 n.5; *see also In re Gault*, 387 U.S. at 25-26.

The juvenile system then reformed in the 1960s, giving young people due process rights to ensure and bolster the original aims of the youth court. *See generally In re Gault*, 387 U.S. 1. Even before the Supreme Court held that due process protections applied to youth defendants in *Gault*, the Supreme Court had already acknowledged that a teenager, too young to exercise or even comprehend their rights, becomes an "easy victim of the law," *Haley v. Ohio*, 332 U.S. 596, 599 (1948), and that juvenile proceedings must satisfy "the basic requirements of due process and fairness." *Kent v. United States*, 383 U.S. 541, 553 (1966). *See also Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("Due process emphasizes fairness between the State and the individual.") (internal quotations omitted). With its ruling in *Gault*, the Court solidified procedural fairness as the cornerstone of the juvenile justice system; the Court emphasized that "[t]he absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures." *In re Gault*, 387 U.S. at 18.

In Massachusetts, the Juvenile Court's stated mission includes rehabilitating juveniles. Juvenile Court, https://www.mass.gov/orgs/juvenile-court (last visited Nov. 24, 2020). Since the origin of the juvenile court system in Massachusetts, the system has evolved to enable the reformation of young people, to enable what was then the Youth Service Board (now the Department of Youth Services) to best serve the needs of the child, to include effective clinical and diagnostic services in a

community-based system of care, and to close various facilities. BOSTON BAR ASSOCIATION'S TASK FORCE ON THE JUVENILE JUSTICE SYSTEM, THE MASSACHUSETTS JUVENILE JUSTICE SYSTEM OF THE 1900S: RE-THINKING A NATIONAL MODEL at 8-11, https://bostonbar.org/prs/reports/majuvenile94.pdf. It is now well understood that to meet the goals of the juvenile system and to appropriately provide for dispositions of youth, an individualized approach is needed. Mandatory transfer ignores now-documented neurological development and subverts the intent of the Commonwealth's juvenile justice system. This statutory scheme and its resulting mandatory sentencing scheme contravene the established procedural justice norms now emblematic of the juvenile justice system.

II. THE MASSACHUSETTS MANDATORY TRANSFER STATUTE FAILS TO ACCOUNT FOR THE UNIQUE CHARACTERISTICS OF YOUTH

The decision to prosecute a youth in the adult system is one of the most "critically important" steps that youth face in the justice system. *Kent*, 383 U.S. at 556. The distinct characteristics of youth that have driven the Supreme Court's sentencing decisions are no less relevant at the transfer stage; the automatic transfer statute, which eliminates any hearing on individual characteristics and forecloses any consideration of the youth's developmental attributes, contravenes the foundational principles of the Supreme Court's jurisprudence.

This distinction between the two systems is plainly apparent from the facts at issue here. Raymond did not receive a single procedural protection or consideration before he lost the protections of the juvenile court. Massachusetts law prevented the court from considering his background, immaturity, rehabilitative potential, or the circumstances around his alleged actions. Mass. Gen. Laws Ann. ch. 119 § 74 (2013); Mass. Gen. Laws Ann. ch. 119 § 72B (2014); Mass. Gen. Laws Ann. ch. 127 § 133A (2018). Raymond was prosecuted in the adult criminal justice system solely because of his age and alleged offense. Such a scheme does not satisfy the concerns underlying the Court's requirement of basic due process and fairness under *Kent*.

A. The Massachusetts Automatic Transfer Statute Conflicts With The United States Supreme Court's Holding In *Kent v. U.S.*

"[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Due process is a flexible concept, and the particular process required varies with the situation; generally speaking, the greater the interest at stake, and the higher the risk of an erroneous deprivation of that interest, the more stringent the procedural protections required. *Zinermon v. Burch*, 494 U.S. 113, 127-28 (1990) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); *see also Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970) ("The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to

suffer grievous loss.'" (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring))). As the United States Supreme Court held fifty years ago in *Kent*, 383 U.S. at 553-54, the liberty interests at stake in the transfer of a youth from juvenile to adult criminal court are "critically important," and they call for heightened procedural protections not provided under the automatic transfer statute in Massachusetts.

In the *Kent* decision, the Supreme Court held that the transfer of a youth from juvenile court to adult criminal court imposes a significant deprivation of liberty and therefore warrants substantial due process protection. *Kent*, 383 U.S. at 554. The Court noted the "special rights and immunities" offered by the juvenile court that a youth loses upon transfer to the adult system. *Id.* at 556. The Court also emphasized that the transfer determination might mean the difference between a few years' confinement until the youth reaches age twenty-one, and the harshest sentences imposed upon adults. *Id.* at 556-57. In light of those circumstances, the Court found it "clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile," and thus it must "satisfy the basic requirements of due process and fairness," including an individualized assessment of the youth's amenability to juvenile court jurisdiction. *Id.* at 553, 556. The Supreme Court referenced in its Appendix to the *Kent* decision several factors that must be considered including: (1) the seriousness of the offense

and whether the protection of the community requires waiver, (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner, (3) whether the offense was against persons or property, (4) the prosecutive merit of the complaint, (5) the desirability of trial and disposition in one court if there are adult associates of the crime (6) the sophistication and maturity of the juvenile as determined by his home, environmental situation, emotional attitude, and pattern of living, (7) the record and previous history of the juvenile, and (8) the prospects of adequate protection of the public and likelihood of reasonable rehabilitation. 383 U.S. at 566-67. The automatic transfer statute Raymond was prosecuted under does not allow consideration of any of these factors.

B. The Automatic Transfer Statute Fails The *Mathews v. Eldridge* Analysis For Sufficient Due Process

Because of the vital importance of the liberty interests at stake in a transfer determination, due process requires a proceeding that allows the court to conduct an individualized assessment of the youth's amenability to juvenile court jurisdiction. As the *Kent* Court explained, "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Kent*, 383 U.S. at 554.

The total lack of process here is also problematic under the test established in *Mathews v. Eldridge,* which requires that courts review the "fairness and reliability"

of the existing procedures in place to determine whether additional safeguards are necessary. 424 U.S. 319, 343 (1976). Under *Eldridge*, to determine whether the procedural protections in place are sufficient, the court must review (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

1. Children have a significant interest in remaining in the juvenile justice system

Raymond has an interest in both the rehabilitative resources of the juvenile justice system and protection from the harsh consequences associated with adult criminal court prosecution. Removal of juvenile court jurisdiction results in Raymond suffering the "grievous loss" of both these interests, which triggers due process protections. *See Kelly*, 397 U.S. at 263.

The adult criminal justice system is not designed or suited to serve the unique developmental characteristics or needs of youth. By removing young people from the juvenile justice system, Mass. Gen. Laws Ann. ch. 119 § 74 trounces their interest in remaining in a developmentally appropriate justice system. Young people like Raymond have a significant interest in remaining in the juvenile justice system

because their unique developmental needs are better served in the rehabilitative atmosphere of juvenile courts and facilities.

Furthermore, maintaining jurisdiction in the juvenile court system protects young people from the harsh realities of adult prosecution. When young people are prosecuted in the adult court system, numerous negative consequences attach. Not only are young people subject to longer sentences in adult court, adult criminal records can only be expunged in very limited circumstances. Trying youth in the adult system also increases the risk of reoffending, thus jeopardizing public safety. Youth transferred to the adult system "reoffend more quickly and are more likely to engage in violent crimes after release than youths processed in the juvenile justice system." Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 PSYCHIATRIC SERVICES 965, 972 (2008). This increase in recidivism may result from a lack of age-appropriate treatment, programming and education in adult facilities, as adult corrections personnel do not have specialized training to meet the educational and mental health needs of young people, and adult facilities fail to address their rehabilitative potential. CAMPAIGN FOR YOUTH JUSTICE, THE CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 7 (2007), http://www.campaignforyouthjustice.org/images/nationalreports/consequencesaren

tminor/CFYJNR_ConsequencesMinor.pdf. Youth incarcerated in adult jails and prisons are also extraordinarily vulnerable to victimization. *See* Marty Beyer et al., *Experts for Juveniles at Risk of Adult Sentences, in* MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT, COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE 18-20 (P. Puritz, A. Capozello & W. Shang eds., 2002). One study showed that youth in adult facilities were five times more likely to be sexually assaulted while incarcerated and two times more likely to be assaulted with a weapon than were youth in the juvenile justice system. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. (Off. Juv. Just. Delinq. Prevention, Washington, D.C.), June 2010, at 7, https://permanent.fdlp.gov/gpo24956/220595.pdf. For Raymond, in addition to the physical and emotional harm likely to befall him while incarcerated, Raymond has been sentenced much more harshly than he would have had he been prosecuted in juvenile court. As such, unless granted parole, Raymond will die in prison for an offense committed when he was a child.

Moreover, the Massachusetts juvenile justice system is better equipped to handle the unique needs of youth than the adult criminal justice system. In juvenile court, Raymond would have access to broad discretion from a juvenile court judge to ensure that a rehabilitative aim is realized, *Commonwealth v. Samuel* S., 69 N.E.3d 573, 581 (Mass. 2017), and receive a determination regarding delinquency

rather than criminal guilt. *Metcalf v. Commonwealth*, 156 N.E.2d 649, 651 (Mass. 1959). The express goals of the Massachusetts juvenile court system include treating young people as children in need of aid, encouragement and guidance instead of as criminals, serving the best interests of the child, and fulfilling rehabilitative goals. Mass. Gen. Laws Ann. ch. 119, § 53. *See also Commonwealth v. Humberto H.*, 998 N.E.2d 1003, 1014 (Mass. 2013); *Commonwealth v. Magnus M.*, 961 N.E.2d 581, 587-88 (Mass. 2012).

2. Automatic transfer erroneously deprives youth of their interest in remaining in the juvenile justice system without providing them any procedural protections before subjecting them to adult prosecution

The procedural protections set forth in *Kent* ensure young people are only transferred to the adult justice system if they cannot be served by the juvenile justice system. By denying young people any procedural protections under Massachusetts law, *see* Mass. Gen. Laws Ann. ch. 119 § 74, the risk of erroneously removing a child to the adult criminal justice system is manifest.

Indeed, "the root requirement" of the Due Process Clause is "that an individual be given an opportunity for a hearing" before he is deprived of a significant liberty or property interest. *Loudermill*, 470 U.S. at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)); *see also Board of Regents v. Roth*, 408 U.S. 564, 569-71 (1972) ("When protected interests are implicated, the right to some kind of prior hearing is paramount."). Pre-deprivation hearings are constitutionally

required in numerous contexts where there is no liberty interest at stake at all, such as when "an employee who has a constitutionally protected property interest in his employment" is terminated, *see Loudermill*, 470 U.S. at 542, or when certain governmental benefits may be discontinued, *see Kelly*, 397 U.S. at 263-64.

It is readily apparent that not only are existing procedures neither fair nor reliable, they are nonexistent. An essential procedure required before deprivation of a significant interest is "notice and opportunity for hearing appropriate to the nature of the case." *Loudermill*, 470 U.S. at 542 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

3. No government interests are unduly burdened in providing a hearing before removing juvenile jurisdiction

Eldridge requires the court to consider what government and public interests are implicated by the additional procedures, including the burdens and costs associated with more hearings. 424 U.S. at 347. Providing individualized hearings prior to removal of juvenile jurisdiction not only improves public safety by reducing recidivism, *see* Section IIB1, *supra*, but also places minimal burden on the Commonwealth.

Massachusetts law already provides for hearings in some cases where juvenile jurisdiction is removed. If an individual commits an offense or violation prior to their eighteen birthday and is not apprehended until after their nineteenth birthday, the Juvenile Court will determine at a hearing separate from a trial on the merits whether

there is probable cause to believe that the person committed the offense charged, and determine if the interests of the public require that the individual be tried in criminal court. Mass. Gen. Law ch. 119 § 72A (2013). The delinquency complaint must be issued first and then the individual is entitled to a two-part transfer hearing. *Commonwealth v. Nanny*, 971 N.E.2d 762, 763 (Mass. 2012).

Providing similar hearings to *all* youth subject to adult court jurisdiction imposes a limited additional burden on the Commonwealth. Universal transfer hearings ensure that before children are subject to the lingering or life-long consequences of the adult justice system, there has been sufficient consideration of whether adult prosecution is necessary and advances the interests of the child and the community.

C. The Automatic Transfer Statute Violates Due Process By Putting In Place An Unconstitutional Irrebuttable Presumption

By categorically determining that all youth of a certain age charged with certain offenses must be tried in adult criminal court, where they are automatically subject to the same mandatory minimum sentences as adults upon conviction, Massachusetts' statutory scheme creates a "non-rebuttable presumption that the juvenile who committed the crime is equally morally culpable as an adult who committed the same act." Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 491 (2012). This presumption conflicts with recent Supreme Court cases emphasizing the

diminished culpability of juveniles, *see, e.g.*, *Graham*, 560 U.S. at 68, as well as long-standing due process jurisprudence striking down statutes that create irrebuttable presumptions regarding material facts. *See, e.g.*, *Vlandis v. Kline*, 412 U.S. 441, 445-46 (1973). Despite the Supreme Court's repeated statement that "children cannot be viewed simply as miniature adults," *J.D.B.*, 564 U.S. at 274 (citing *Eddings* , 455 U.S. at 115-16), the statute at issue does just that, by presuming Raymond to be deserving of the same treatment as adults, with no opportunity to rebut that presumption, in violation of basic due process protections.

The United States Supreme Court has struck down several statutes creating such irrebuttable presumptions, noting that they "have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis*, 412 U.S. at 446. *See also Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (striking law that authorized the removal of children from the custody of their unwed fathers without requiring any showing of the father's unfitness); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (overturning a Texas statute that presumed that all service people stationed there were not residents and therefore could not vote). The Court has found that when a presumption "created is . . . definitely conclusive—incapable of being overcome by proof of the most positive character," it cannot be upheld. *Id.* (alteration in original) (quoting *Heiner v. Donnan*, 285 U.S. 312, 324 (1932)); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644 (1974) (a school board maternity leave policy

that required pregnant teachers to terminate employment "amount[ed] to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing."); *Vlandis*, 412 U.S. at 452 (due process forbids a state to deny an individual the resident tuition rate at a state university "on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true").

The statute here follows the same unlawful path as the challenged statutes above—it creates an irrebuttable presumption that all youth of a certain age charged with a certain offense are identical to their adult counterparts with respect to culpability and their lack of capacity to change or reform, thus warranting their prosecution and sentencing as adults without further inquiry. The statute presumes unfitness to be rehabilitated in the juvenile justice system, ignoring the key attributes of youth that must inform all criminal laws: that youth individually possess different levels of maturity, decision-making ability, culpability, and capacity for change and growth. *See Graham*, 560 U.S. at 76. "[T]he presumption here created"—that the youth is as culpable as an adult and is not amenable to rehabilitation "is . . . definitely conclusive—incapable of being overcome by proof of the most positive character," *Carrington,* 380 U.S. at 96 (alteration in original) (quoting *Heiner*, 285 U.S. at 324), "even when the . . . evidence . . . might be wholly to the contrary." *LaFleur,* 414 U.S. at 644. That "presumption is not necessarily or universally true . . . and . . . the

State has reasonable alternative means of making the crucial determination." *Vlandis,* 412 U.S. at 452.

Raymond was denied a hearing where he could have introduced evidence to rebut the presumption and offer evidence to the contrary. *Stanley,* 405 U.S. at 649. By forbidding Raymond "ever to controvert the presumption," *see Carrington*, 380 U.S. at 96, of an adult level of culpability, the State "unjustifiably effected a substantial deprivation." *Stanley*, 405 U.S. at 655. It viewed Raymond "one-dimensionally" as an adult, *id.*, rather than granting him the individualized determination due process requires.

III. MANDATORY LIFE WITH PAROLE SENTENCES MUST ADHERE TO THE PROCEDURAL GUARANTEES OF *MILLER V. ALABAMA*

Following the Supreme Court holding in *Miller* that "[a] sentencer misses too much if he treats every child as an adult", states not only began applying *Miller* to cases involving life without parole sentences for youth, but also in mandatory sentences of life *with* parole and term of years sentences. 567 U.S. at 477.

The Iowa Supreme Court was the first court in the nation to consider the propriety of mandatory minimum sentences for youth irrespective of their offense. *State v. Lyle*, 854 N.W.2d 378, 380 (Iowa 2014). In holding Lyle's mandatory seven-year sentence unconstitutional, the Court reasoned that youths' diminished culpability established in the juvenile death penalty and life without parole cases "also applies, perhaps more so, in the context of lesser penalties as well." *Id.* at 396

(quoting *State v. Pearson*, 836 N.W.2d 88, 98 (Iowa 2013) (Cady, C.J., concurring specially)). Noting that the *Miller*'s analysis was not "crime-specific," the *Lyle* Court concluded "the natural concomitant that what . . . [the court] said is not punishment-specific either." *Id.* at 399.

As in *Miller*, imposing adult sentencing schemes is beyond the state's power to impose on young people without individualized considerations of youth, rejecting the notion that a mandatory sentence is presumptively appropriate. *See State v. Houston-Sconiers*, 391 P.3d 409, 426 (Wash. 2017) ("[I]n sentencing juveniles in the adult criminal justice system, a trial court must be vested with full discretion to depart from . . . sentencing guidelines and any otherwise mandatory sentence . . . and to take the particular circumstances surrounding a defendant's youth into account."). The U.S. Supreme Court's holdings established that the Eighth Amendment requires courts to address the differences between children and adults via discretion for mitigating factors "whether the youth is sentenced in juvenile or adult court and whether the transfer to adult court is discretionary or mandatory." *Id*. at 418-19 (first citing *Miller*, 567 U.S. at 466-68 (both appellants had the benefit of discretionary transfer hearings), then citing *Graham*, 560 U.S. at 53 ("Graham was charged as an adult, at prosecutor's discretion")).

Any sentence imposed on children without due consideration of the mitigating features of youth cannot stand. This Court has held that a juvenile offender must

receive a hearing on the factors articulated in *Miller* to determine whether the circumstances of the young person's actions warranted harsh sentencing for a nonmurder juvenile offender. *Commonwealth v. Perez*, 80 N.E.3d 967, 975-976 (Mass. 2017) (holding that, without a *Miller* hearing, the Eighth Amendment proscription against cruel and unusual punishment precludes a juvenile offender from being sentenced more harshly for parole purposes than a juvenile offender convicted of murder). Beyond *Miller*, the Court focused on whether the sentence was disproportionate under the Massachusetts Constitution, analyzing (1) whether the punishment for the offense is so disproportionate that the punishment shocks the conscience and offends fundamental notions of human dignity, (2) how the sentence aligned with the punishments prescribed for more serious crimes, and (3) a comparison of the punishment with the punishment for the same offense in other jurisdictions. *Id.* at 974 (quoting *Cepulonis v. Commonwealth*, 427 N.E.2d 17, 20 (Mass. 1981)). As in other states, Massachusetts has already recognized the need, both practically and legally, to apply the *Miller* factors to determine the appropriate procedure in an individual young person's case; youth like Raymond must not be denied this necessary individualized examination.

The analyses under *Miller* are no less relevant when adult sentencing schemes are deemed presumptively applicable with respect to either minimum sentencing guidelines or certain mandatory sentencing enhancements. Retribution in light of a

juvenile's diminished culpability is an "irrational exercise." *Lyle*, 854 N.W.2d at 399; *Thompson,* 487 U.S. at 836-37. The deterrence rationale is "even less applicable when the crime (and concordantly the punishment) is lesser." *Lyle*, 854 N.W.2d at 399. Similarly, "the rehabilitative objective can be inhibited by mandatory minimum sentences" and delaying the release of a juvenile once he or she matures and reforms is "nothing more than the purposeless and needless imposition of pain and suffering." *Id.* at 400 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)); *Thompson,* 487 U.S. at 838 (quoting *Coker*, 433 U.S. at 592). This disconnect between presumptive or mandatory minimum sentences and penological objectives renders these sentences unconstitutional under the Eighth Amendment. *Lyle*, 854 N.W.2d at 398.

The *Lyle* Court emphasized that its decision was "not about excusing juvenile behavior, but imposing punishment in a way that is consistent with our understanding of humanity today." *Id.* at 398. The *Lyle* Court concluded that "*[m]andatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults*. This rationale applies to all crimes, and no principled basis exists to cabin the protection only for the most serious crimes." *Id.* at 402 (emphasis added).

The *Lyle* Court relied on a traditional Eighth Amendment analysis to find the mandatory sentencing scheme unconstitutional: the "punishment for crime should

be graduated and proportioned to [the] offense," *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (alterations in original) (quoting *Weems v. U.S.*, 217 U.S. 349, 367 (1910)) considering, in part, "the evolving standards of decency that mark the progress of a maturing society." *Miller*, 567 U.S. at 469-70 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). This latter analysis includes consideration of the "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether a national consensus against a sentencing practice exists. *Roper*, 543 U.S. at 563. "It is not so much the number of … States [enacting reform] that is significant, but the consistency of the direction of change." *Atkins,* 536 U.S. at 315.

The court also "must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Graham*, 560 U.S. at 61 (citing *Roper*, 543 U.S. at 572). This judgement considers the culpability of the individual in light of the offense and whether "the challenged sentencing practice serves legitimate penological goals." *Graham*, 560 U.S. at 67, 71.

The *Lyle* court concluded that mandatory sentences can never be proportional punishment for youth in light of their diminished culpability and noted in particular recent legislative efforts to expand judicial discretion in juvenile sentencing, finding

that they "illustrate a building consensus in this state to treat juveniles in our courts differently than adults." *Lyle*, 854 N.W.2d at 388. The Court continued:

> [S]ociety is now beginning to recognize a growing understanding that mandatory sentences of imprisonment for crimes committed by children are undesirable in society. If there is not yet a consensus against mandatory minimum sentencing for juveniles, a consensus is certainly building… in the direction of eliminating mandatory minimum sentencing.

Id. at 389.

This "growing understanding" is reflected in state legislation requiring the consideration of the *Miller* factors at sentencing for all children in adult court and authorizing judges to depart from the standard sentencing range for adults. *See, e.g.*, W. Va. Code §§ 61-11-23, 62-12-13b (requiring an individualized *Miller* sentencing hearing for every child sentenced as an adult); Nev. Rev. Stat. § 176.017 (requiring courts to consider the "diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth" and authorizing judges to "reduce any mandatory minimum period of incarceration"); District of Columbia Comprehensive Youth Justice Amendment Act, D.C. Code § 24-403.01(c)(2)(A) (eliminating all mandatory minimum sentences for youth prosecuted in the adult criminal system).

Furthermore, in 2019 alone, bills were introduced in two states, and in Congress, requiring the *Miller* factors to be considered at sentencing and authorizing judges to depart from mandatory minimums. *See* H.R. 1949, 116th Cong. (2019) (requiring consideration of youth and giving judges greater discretion when

sentencing children in the federal system); S.607, 92nd Gen. Assemb., Reg. Sess. § 1(e) (Ark. 2019) ("The General Assembly . . . finds that there is a recent *trend in the United States of giving greater discretion to judges when sentencing children, including departing from mandatory minimums in appropriate cases*." (emphasis added)); H.R. 218, 30th Leg., Reg. Sess. (Haw. 2019) (requiring consideration of the *Miller* factors at sentencing and allowing judges to depart from mandatory minimum sentences).

IV. A MANDATORY TRANSFER SCHEME THAT IMPOSES A MANDATORY SENTENCE INTRODUCES THE RISK OF A DISPARATE EFFECT ON YOUTH OF COLOR

Miller and *Montgomery* made clear that the harshest punishments for youth should be reserved for the "rare," "uncommon" and irreparably corrupt child. However, instead, the harshest punishments—those mandatorily applied in the adult criminal justice system—are levied disproportionately against youth of color. Nationally, 47.3 percent of youth who are transferred to adult court are Black despite Black youth making up only 14 percent of the total youth population. *See* NAT'L ASS'N OF SOCIAL WORKERS, THE COLOR OF YOUTH TRANSFERRED TO THE ADULT CRIMINAL JUSTICE SYSTEM: POLICY & PRACTICE RECOMMENDATIONS 1 (2017), http://cfyj.org/images/pdf/Social_Justice_Brief_Youth_Transfers.Revised_copy_09-18-2018.pdf. Demographic data is not available in Massachusetts regarding

children transferred into the adult system, however Black and Latinx/Hispanic[2] youth are disproportionately represented in the number of young people arrested, arraigned, and detained, leading to disproportionate representation in children receiving these automatic and harsh punishments. Massachusetts Office of the Child Advocate, *Massachusetts Juvenile Justice System: Data and Outcomes for Youth* (Nov. 2, 2020), https://www.mass.gov/resource/massachusetts-juvenile-justice-system-data-and-outcomes-for-youth. While Black and Latinx/Hispanic youth make up only 27 percent of the youth population of Massachusetts, 60 percent of youth arraigned and 72 percent of youth detained are Black or Latinx/Hispanic. *Id*. This data exposes a failure to apply justice equally across levels of the criminal justice system and illuminates that the national trend of racially disproportionate transfer is all-too-likely placed upon Black and brown youth in Massachusetts.

[2] The variation in terminology around ethnic identity in this brief reflects the variation in terminology used in the applicable data or sources. We recognize that the terms "Latino," "Latinx" and "Hispanic" may have different meanings, and that language around ethnic identity varies widely. *See* Mark Hugo Lopez, Jens Manuel Krogstad &Jeffrey S. Passel, *Who is Hispanic?*, PEW RESEARCH CTR. (Sept. 15, 2020), https://www.pewresearch.org/fact-tank/2019/11/11/who-is-hispanic/; *see also* Daniel Hernandez, *Pew Poll Finds Most Latinos Haven't Heard of 'Latinx.' Only 3% Use the Term*, L.A. TIMES (Aug. 11, 2020, 12:21 PM) (citing Luis Noe Bustamante, Lauren Mora & Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, PEW RESEARCH CTR. (Aug. 11, 2020), https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/).

This Court has recognized that Black individuals in Massachusetts are targeted disproportionately for stops, frisks, and searches, noting a "pattern of racial profiling." *Commonwealth v. Evelyn*, 152 N.E.3d 108, 125 (Mass. 2020) (quoting *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016) (citing *Boston Police Commissioner Announces Field Interrogation and Observation Study Results*, BPD NEWS (Oct. 8, 2014), http://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results))). This disproportionate targeting is the entry point for individuals from communities that have been historically and continuously marginalized. Over-policing of Black and Brown communities and racially motivated targeting is one of the greatest drivers of the racial disparity in our mass incarceration system. These increased interactions with police result in those same community members being subject to harsh punishments without evaluating the impacts of racial profiling. In *Evelyn*, this Court reasoned that "even if [the] blight [of patterned racial profiling] were eradicated today, a long history of race-based policing will likely remain imprinted on the group and individual consciousness" of people of color in Massachusetts. *Id*.

While mandatory sentencing and transfer schemes seemingly eliminate the possibility of individual bias creeping into decision-making by removing discretion and individualized decision making, racial disparities in sentencing still persist. "Race neutral" sentencing policies have significant disparate racial effects,

particularly in the cases of habitual offender laws and many drug policies, mandatory minimum sentencing laws, and school zone drug enhancements. JENNIFER TURNER & JAMIL DAKWAR, WRITTEN SUBMISSION OF THE AMERICAN CIVIL LIBERTIES UNION ON RACIAL DISPARITIES IN SENTENCING: HEARING ON REPORTS OF RACISM IN THE JUSTICE SYSTEM OF THE UNITED STATES 2 (October 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf (citing Matthew S. Crow & Kathrine A. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing*, 19 CRIM. JUST. POL'Y REV. 63 (2008)). Likewise, absent individualized consideration, mandatory transfer and sentencing laws perpetuate the mass incarceration of Black and Brown individuals imbedded in our structurally racist institutions.

The racial disparity present here casts a long shadow over this nation's commitment to equal justice. The U.S. Supreme Court has expressed concern about the role of race in our criminal justice system, noting the "imperative to purge racial prejudice from the administration of justice." *See, e.g.*, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) ("It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of

justice.")). The Massachusetts Supreme Court has also identified the need for meaningful action regarding racial injustice in the criminal justice system through a rare letter to the Massachusetts state judiciary and bar emphasizing the "need to reexamine why, too often, our criminal justice system fails to treat African-Americans the same as white Americans, and recommit ourselves to the systemic change needed to make equality under the law an enduring reality for all." *Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar* (June 3, 2020), https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and. *See also* ELIZABETH TSAI BISHOP ET AL., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM 53 (2020), https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf (showing disproportionate mandatory sentences for non-white defendants). Remedying the current transfer laws that disproportionately subject Black and Brown children automatically to the harshest punishments upon entry to the criminal justice system provides an opportunity to address—and substantially diminish—the destructive treatment of young people from historically harmed communities.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Juvenile Law Center respectfully

requests that this Court grant the relief requested by Appellant, Raymond Concepcion, to vacate his conviction and order a new trial or, in the alternative, to reduce the degree of guilt and remand his case for a resentencing hearing.

Respectfully submitted

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STATUTORY ADDENDUM

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Mass. Gen. Laws Ann. ch. 119 § 53 (2020)

Delinquent children; liberal construction; nature of proceedings

Sections fifty-two to sixty-three, inclusive, shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings.

Mass. Gen. Laws Ann. ch. 119 § 72A (2013)

Proceedings upon apprehension after nineteenth birthday

If a person commits an offense or violation prior to his eighteenth birthday, and is not apprehended until after his nineteenth birthday, the court, after a hearing, shall determine whether there is probable cause to believe that said person committed the offense charged, and shall, in its discretion, either order that the person be discharged, if satisfied that such discharge is consistent with the protection of the public; or, if the court is of the opinion that the interests of the public require that such person be tried for such offense or violation instead of being discharged, the court shall dismiss the delinquency complaint and cause a criminal complaint to be issued. The case shall thereafter proceed according to the usual course of criminal proceedings and in accordance with the provisions of section thirty of chapter two hundred and eighteen and section eighteen of chapter two hundred and seventy-eight. Said hearing shall be held prior to, and separate from, any trial on the merits of the charges alleged.

Mass. Gen. Laws Ann. ch. 119 § 72B (2014)

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.

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.

Mass. Gen. Laws Ann. ch. 119 § 74 (2013)

Limitations on criminal proceedings against children

Except as hereinafter provided and as provided in sections fifty-two to eighty-four, inclusive, no criminal proceeding shall be begun against any person who prior to his eighteenth birthday commits an offense against the laws of the commonwealth or who violates any city ordinance or town by-law, provided, however, that a criminal complaint alleging violation of any city ordinance or town by-law regulating the operation of motor vehicles, which is not capable of being judicially heard and determined as a civil motor vehicle infraction pursuant to the provisions of chapter ninety C may issue against a child between sixteen and 18 years of age without first proceeding against him as a delinquent child.

The juvenile court shall not have jurisdiction over a person who had at the time of the offense attained the age of fourteen but not yet attained the age of 18 who is charged with committing murder in the first or second degree. Complaints and indictments brought against persons for such offenses, and for other criminal offenses properly joined under Massachusetts Rules of Criminal Procedure 9 (a) (1), shall be brought in accordance with the usual course and manner of criminal proceedings.

Mass. Gen. Laws Ann. ch. 127 § 133A (2018)

Eligibility for parole; notice and hearing; parole permits; revision of terms and conditions; revocation; arrest; right to counsel and funds for expert

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.

CERTIFICATION PURSUANT TO MASS. R. APP. P. 17(c)(9)

I hereby certify that the foregoing brief complies with the rules of this Court pertaining to the filing of briefs, including but not limited to: Mass. R. App. P. 17 and 20. The brief uses Times New Roman 14-point font and was composed in Microsoft Word 2016. This brief contains 7,355 non-excluded words as calculated by Microsoft Word's word count function.

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CERTIFICATE OF SERVICE

I, Katherine E. Burdick, Esq., Attorney for *Amicus Curiae*, in the above-captioned matter, hereby certify that on November 25, 2020, I served the parties via the Court's electronic filing system or by mailing two copies of the herein appeal by postage prepaid, to Elizabeth A. Billowitz, P.O. Box 470413, Brookline, MA 02445, elizabeth@billowitzlaw.com and to Cailin M. Campbell, District Attorney's Office, One Bulfinch Place, 3rd Floor, Boston, MA 02114, cailin.campbell@state.ma.us. I further certify that on November 25, 2020, I electronically filed the Brief of *Amicus Curiae* with the Massachusetts Supreme Judicial Court and arranged to have Litigation Document Productions, Inc. hand deliver 7 paper copies to the court.

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