COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC-12570

MIDDLESEX COUNTY

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COMMONWEALTH OF MASSACHUSETTS

v.

DANIEL LaPLANTE

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BRIEF AND APPENDIX FOR THE DEFENDANT

ON APPEAL OF THE ORDER OF THE
MIDDLESEX SUPERIOR COURT
AT THE DIRECTION OF THE SINGLE JUSTICE

Merritt Schnipper, Esq.
SCHNIPPER HENNESSY PC
25 Bank Row Suite 2S
Greenfield MA 01301
(413) 325-8541
mschnipper@schnipperhennessy.com
BBO #676543

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

I. ISSUES PRESENTED

1. When must a juvenile homicide offender's first parole hearing occur for that hearing to constitute the meaningful opportunity for release based on demonstrated rehabilitation necessary to conform his or her life sentence to art. 26?

2. To what possibilities for life outside prison must a juvenile homicide offender be given the opportunity for release if that opportunity is to be 'meaningful' under art. 26?

3. Does a sentence that requires a juvenile homicide offender to serve forty-five years in prison before first being considered for parole conform to art. 26 as explicated in *Diatchenko v. District Attorney for the Suffolk District*?

II. STATEMENT OF THE CASE

On January 12, 1988 Defendant Daniel LaPlante was indicted on three counts of murder, G.L. c.265 §1, in the deaths of Priscilla Gustafson and her children William and Abigail. RA:3, 25-27.[1] The Defendant was tried to a jury in the Middlesex Superior Court and convicted of first-degree murder on all three indictments. RA:29-31. He was sentenced to three consecutive terms of life without possibility of parole, RA:35-36, and this Court affirmed his convictions. See *Commonwealth v. LaPlante*, 416 Mass. 433 (1993).

[1] Citations to the Defendant's Addendum are identified as AD:Page; citations to the Defendant's Record Appendix are identified as RA:Page.

In 2015, following this Court's decision in *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655 (2013), the Defendant filed a motion to vacate his unlawful life without parole sentences pursuant to Mass. R. Crim. P. 30(a). RA:17. The Commonwealth assented to this motion, and the case proceeded to resentencing. RA:17-20. On March 23, 2017 the Middlesex Superior Court (Kazanjian, J.) sentenced the Defendant to three consecutive life terms, each with parole eligibility after fifteen years, for a cumulative sentence of forty-five years in prison before parole eligibility. AD:10; RA:20.

The Defendant noticed an appeal of his new sentence on April 10, 2017. RA:21. On January 10, 2018 the Defendant filed both a Gatekeeper Petition pursuant to G.L. c.278 §33E and a Motion for Direct Entry of Appeal or, in the Alternative, for Leave to File Late Gatekeeper Petition in the County Court. See RA:23. Following a May 30 hearing on the Petition and Motion, on July 10, 2018 a single justice of this Court (Lowy, J.) directed the appeal to the full bench. AD:12; RA:24. The case entered this Court on July 27, 2018.

III. STATEMENT OF FACTS

Pursuant to the single justice's order directing entry of this appeal, the parties have designated the Superior Court's Sentencing Memorandum, set forth in full at AD:1-10, as their statement of agreed facts. See SJC-12570, Paper #6. The facts set forth below are excerpted from the Superior Court's Sentencing Memorandum:

> The Court has considered the fact that Mr. LaPlante was 17½ years old at the time he committed the Gustafson murders. While at 17½ he was still a juvenile by virtue of his age, the evidence submitted at the hearing did not reflect that at the time of the murders he displayed the 'hallmark features' of a juvenile, that is, immaturity, impetuosity and failure to appreciate risks and consequences. This is notable in a variety of ways.
>
> Specifically, Mr. LaPlante's criminal history leading up to the Gustafson murders reflects deliberated and well calculated actions. He repeatedly broke into homes, terrorized families, and ultimately murdered Priscilla, Abigail, and William. His actions were goal driven and demonstrated a desire to exercise control over his victims.
>
> Mr. LaPlante's family and home environment was also relatively unremarkable. While his mother recounts having a difficult relationship with her first husband, she did not think that Mr. LaPlante witnessed any violence. Mr. LaPlante described his childhood as 'pretty good.' His mother worked hard. She remarried and her second husband served as a father figure to Mr. LaPlante. Mr. LaPlante struggled with learning disabilities and attention deficit disorder. However, he had

significant support systems in place at school and consistently tested above average intellectually.

The facts of these homicides are reflected in the trial transcripts and in Mr. LaPlante's description of the murders to Dr. Saleh.[2] Those facts clearly establish that Mr. LaPlante acted deliberately and intentionally on December 1, 1987, and that he did not act impulsively or out of a place of immaturity. He carefully planned his intrusions into the Gustafson's home; first breaking in on November 16, 1987, and stealing items. While he could have stopped there, he decided to return. He obtained a gun and lied to his brother's friend in order to get bullets. He practiced loading and unloading the gun. On December 1, 1987, Mr. LaPlante broke into the Gustafson's house for the second time, carrying the loaded weapon. When he heard Priscilla Gustafson and her 5 year-old son William entering the house, he said that his first thought was to jump out the window. But he decided not to. He confronted them with the gun, brought them to the bedroom, put William in the closet and tied Priscilla to the bed. Mr. LaPlante said that after he tied Priscilla to the bed, his plan was to leave. But once again he decided not to. Instead, he made the decision to rape her. After raping her, he acknowledged that he could have left. Instead, he decided he would kill her. After he killed Priscilla, Mr. LaPlante made the decision to take William into the bathroom and drown him. As he was leaving, he encountered Abigail. He lured her into the bathroom and made the decision to murder her as well. These facts reflect three distinct acts of murder, carried out deliberately and thoughtfully. Finally, Mr. LaPlante's conduct after the murders confirms that he acted with

[2] Dr. Fabian Saleh, a forensic psychiatrist, interviewed the Defendant and testified at resentencing on behalf of the Commonwealth.

deliberation. After fleeing the scene, he went home, ate and then attended his niece's birthday party as if nothing had happened.

Likewise, there is no evidence in the record that Mr. LaPlante demonstrated any youthful incompetencies that resulted in harsher charges or that his youthfulness affected his ability to work with his attorney. In fact, the Court has the benefit of multiple evaluations that were conducted around the time of these offenses, all of which concluded that Mr. LaPlante understood his circumstances and was capable of assisting his attorneys with his defense.

The last *Miller* factor is the possibility of rehabilitation. The records reflect that despite initial difficulties, Mr. LaPlante has shown signs of improved behavior, particularly in the last few years. He has positively engaged in many activities, earned his GED, tutored others and run a variety of programs and activities.

Mr. LaPlante did express remorse to Dr. Saleh, and in the courtroom yesterday. The Court hopes that those sentiments are genuine. However, Mr. LaPlante's recent description of the murders to Dr. Saleh reflects an extraordinary lack of empathy. The Court agrees with Dr. Saleh's opinion that Mr. LaPlante has not yet been rehabilitated and his prognosis for rehabilitation in the future is 'guarded.'

In sum, while the Court cannot say that Mr. LaPlante is incapable of rehabilitation, there is insufficient evidence for the Court to find that there is a likelihood that he will be able to rehabilitate.

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The Court found the testimony of Dr. Saleh credible. After a thorough evaluation, Dr. Saleh's opinion is that Mr. LaPlante currently suffers from Antisocial Personality Disorder, and that the Gustafson murders were a result of Conduct Disorder, Childhood onset Type, rather than any

adverse childhood experiences, learning disabilities or immaturity.

Mr. LaPlante's psychiatric history reflects that he has never suffered from psychotic illness, such as schizophrenia, or a mood disorder, such as bi-polar illness. Moreover, he has not suffered from anxiety disorder or an impulse control disorder. Mr. LaPlante has never been treated for any significant period of time with any psychiatric medication. Finally, Mr. LaPlante was not under the influence of alcohol or drugs at the time of the murders nor has he ever struggled with substance abuse.

The Court also reviewed the psychosocial evaluation of Kimberly Mortimer, M.S., L.M.C.H., submitted by the defense. Ms. Mortimer accurately points out that Mr. LaPlante has made progress during his time in prison. She also makes some important points generally about the current research regarding the development of the brains of juvenile offenders. However, the Court is not persuaded that Mr. LaPlante's conduct can be attributed to any of his childhood experiences or to immaturity, impetuousness or recklessness.

***

As the Court has noted, it is true that Mr. LaPlante appears to have made significant progress while in prison. His disciplinary infractions in the later part of his incarceration have been relatively minor and have not involved violent conduct. He has taken advantage of educational opportunities, receiving his GED and volunteering as a tutor. He was transferred to MCI Norfolk where he ultimately was elected to take on leadership roles involving a variety of activities. And most recently, he voluntarily entered the sexual treatment program at Bridgewater State Hospital. While the Court considers these facts as positives, they do not in the Court's judgment outweigh the other factors.

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Finally, the Court has carefully assessed the information before it in light of the recognized goals of criminal sentencing: punishment of the defendant that is fairly proportional to the culpability of his crime, general deterrence, specific deterrence, protection of the public and rehabilitation of the defendant, and considered whether there are mitigating circumstances that would warrant less than the maximum penalty in this case.

It is the responsibility of this Court to consult her conscience and exercise sound judicial discretion in order to punish the defendant justly. Judicial discretion does not permit the sentencing judge to act impulsively to satisfy any personal or public desire for vengeance. Judicial discretion does not permit the sentencing judge to punish the offender for conduct other than that which has resulted in a conviction. Ultimately the sentence imposed must be based on an individualized consideration of Mr. LaPlante's circumstances.

Based on the totality of the evidence submitted to the Court, the Court is persuaded that Mr. LaPlante's relative youth did not play a role in the Gustafson murders. This case does not involve a single act that resulted in three deaths. Mr. LaPlante committed three distinct and brutal murders. He killed a 33 year old pregnant mother and her 5 and 7 year old children. He left a family and a community devastated. The Court finds that the maximum penalty is warranted.

Accordingly, the Court will impose a life sentence for the murder of Priscilla Gustafson. The Court will impose a life sentence for the murder of William Gustafson to run consecutive to the previously imposed sentence. The Court will impose a life sentence for the murder of Abigail Gustafson to run consecutive to the two previously imposed sentences. Each sentence carries parole eligibility of fifteen years. Based

> on the Court's sentence of three consecutive life sentences, Mr. LaPlante is not eligible for parole until he has served 45 years.

AD:5-10.

IV. SUMMARY OF THE ARGUMENT

Massachusetts law requires that all juvenile homicide offenders, even those who commit the most heinous crimes and display few of the distinctive features of adolescence, be afforded a meaningful opportunity for release from prison based on demonstrated rehabilitation for their life sentences to be constitutional. This categorical prohibition on life without parole sentences flows from the fact no court can legitimately determine at the time of sentencing that a particular juvenile is incorrigible, and recognizes that because of juveniles' categorically lessened culpability, their sentences for even the worst crimes must hold out hope for some return to life outside prison. [10-18]. Retribution remains a legitimate purpose of juvenile sentencing, but the impulse to punish must ultimately yield to the constitutional requirement of a meaningful opportunity for release. [18-22].

Determining whether a sentence that requires a juvenile homicide offender to spend forty-five years

in prison before parole consideration provides a meaningful opportunity for release must begin with the recognition that persons serving life sentences imposed when they were teenagers are unlikely to live past their mid-sixties. [22-27]. Under *Graham v. Florida*, a meaningful opportunity for release must afford juvenile offenders a chance to rejoin and productively participate in society, not merely leave prison in time to die outside it. Legislative responses to *Graham* and *Miller v. Alabama*, including the Massachusetts Legislature's response to this Court's prohibition on juvenile life without parole, echo this understanding by requiring that juvenile offenders be considered for release between twenty-five and thirty years after sentencing. A sentence that requires a juvenile offender to serve forty-five years before parole consideration does not provide a chance to live outside prison walls. [27-35].

Under the art. 26 proportionality analysis established by this Court, the constitutionality of an integrated sentencing scheme imposed on a juvenile is determined by the aggregate length of time it requires him or her to spend in prison before first being considered for parole, not the parole eligibility date

of each discrete sentence imposed. Because the Defendant's sentence gives him no chance to leave prison in time to productively reenter and reengage with society, it is unconstitutional. [35-42].

V. ARGUMENT

Defendant Daniel LaPlante stands convicted of the premeditated murder of three people, including two young children.[3] As the Superior Court found, his crimes "left a family and a community devastated," and there can be no serious question a sentencing judge would be within his or her discretion to punish him as harshly as the law permits in light of his intentional actions and the grievous harms they caused. The Defendant is also a member of a class this Court has recognized as categorically less culpable than adult homicide offenders regardless of individual characteristics, and as to whom sentences of life in prison without possibility of parole are unconstitutional. For such offenders, the harshest penalty permitted by law must still allow for a meaningful opportunity for release based on

[3] Neither the verdict slips nor the jury's verdict rendered in open court indicate the theory or theories under which the Defendant was convicted. See RA:28-31, 41-42. The sentencing judge characterized his crimes as 'deliberate' and 'intentional.' AD:6.

demonstrated rehabilitation if it is to remain within the limits of art. 26.

The divergent and seemingly irreconcilable strands embodied in the Defendant's case—brutal homicidal criminal conduct justifying the maximum sanction on one hand and lessened offender culpability and greater potential for rehabilitation as a matter of law on the other—underlie both this Court's and the Supreme Court's categorical bans on particular punishments for juvenile offenders. However, they also raise unresolved questions of Massachusetts law regarding the measure of punishment that may be imposed on juvenile homicide offenders for purely retributive purposes, the time at which an opportunity for release from prison must arise in such cases for it to be constitutionally 'meaningful,' and the substantive possibilities for reentry to society that are, or are not, embodied in the concept of 'release' for juvenile homicide offenders.

The Superior Court structured the Defendant's sentence so that he would serve forty-five years in prison and would be sixty-two at the time he could first seek release on parole. As discussed *infra*, under this structure the Defendant's first opportunity

for release would arise roughly coincident with the expected age of death for persons who spend their entire adult lives in prison. Aside from any statistical or actuarial considerations, however, this structure means that first opportunity for release would arise close to the time many adults are nearing the end of their working lives and contemplating valedictory 'senior citizen' status. Even in a case where the crimes at issue justify maximum punishment, a sentence structure that requires a juvenile homicide offender to spend all of his or her working maturity in prison and first *be considered* for release—not actually be released—near the dawn of old age cannot be squared with the limitations on juvenile punishment erected by this Court's precedents and its acknowledgment of the impossibility of predicting, at the time of sentencing, a juvenile offender's rehabilitative trajectory. The Court should vacate the Superior Court's resentencing order and remand the case for entry of the only other available sentence—one with parole consideration after thirty years.

1. Art. 26's Prohibition on Juvenile Life Without Parole Derives Primarily Not from *Miller v. Alabama* But from the Categorical Rules of *Roper v. Simmons* and *Graham v. Florida*

When this Court held that art. 26 bars all life without parole sentences for juvenile homicide offenders, whether imposed mandatorily or as a matter of informed judicial discretion, it did so in the wake of the Supreme Court's decision in *Miller v. Alabama* acknowledging how the social and neurological particularities of adolescence undercut traditional rationales for criminal punishment. See *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655, 667-672 (2013) ("*Diatchenko I*") (citing 567 U.S. 460, 470-89 (2012)). *Diatchenko I* and case law following it show this Court has "fully accept[ed] the critical tenet of *Miller* that children are constitutionally different from adults for purposes of sentencing, with diminished culpability and greater prospects for reform." *Commonwealth v. Okoro*, 471 Mass. 51, 57 (2015); see also *Commonwealth v. Perez*, 477 Mass. 677, 683 (2017) ("*Perez I*") ("unique characteristics of juvenile offenders" inform art. 26 limitations on sentencing and weigh more heavily in proportionality calculus than under Eighth Amendment).

While *Miller* allowed juveniles to be sentenced to life without parole upon individualized consideration, notwithstanding their 'constitutional difference,' *Diatchenko I* categorically banned all such sentences, regardless of either the criminal acts for which they were imposed or the extent to which the 'unique characteristics of youth' were (or were not) present in a particular case. 466 Mass. at 670-71. As this departure illustrates, the principles articulated in *Diatchenko I* are most analogous not to those of *Miller*, but to two cases that underlay it: *Roper v. Simmons*, 543 U.S. 551 (2005), which categorically banned the death penalty for juvenile homicide offenders, and *Graham v. Florida*, 560 U.S. 48 (2010), which categorically banned life without parole sentences for juveniles who commit non-homicide crimes. In the course of formulating their categorical rules, both *Roper* and *Graham* emphasized the particular attributes of youth relevant to sentencing that animate *Miller* and which this Court embraced in *Diatchenko I*. But these cases also introduced distinct concepts essential to resolution of the issues raised by this appeal.

From *Roper* comes the concern, drawn from the Supreme Court's death penalty jurisprudence, "that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth" in the context of sentencing. 543 U.S. at 573. The "unacceptable likelihood" of such outcomes in cases of juveniles who commit the most serious crimes but who could nevertheless be rehabilitated with time is what drove *Roper's* categorical rule, *id.*, and its application to Mr. LaPlante's case is obvious. The facts of the Defendant's crimes are horrific and inexplicable, and the sentencing judge's finding he did not display the "hallmark features" of juvenile defendants strongly suggests a sentencing court would not give him, or a similarly situated defendant, the benefit of *Roper*, *Miller*, or *Diatchenko I* in the absence of a categorical prohibition on imposition of the most severe punishment the law permitted for adults. See AD:5-10; see also RA:35. *Diatchenko I* ensures this unacceptable likelihood will not occur.

From *Graham* comes the concept that juvenile offenders are constitutionally entitled to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," even when

they have "commit[ted] truly horrifying crimes." 560 U.S. at 75. The Eighth Amendment permits imposition of a sentence that precludes such a meaningful opportunity on only "the rarest of juvenile [homicide] offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016). But this Court has held without exception that "the meaningful opportunity for release through parole is necessary in order to conform the juvenile homicide offender's mandatory life sentence to the requirements of art. 26" and has required certain procedural protections at such offenders' parole hearings to ensure the opportunities they present are meaningful and not illusory. *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 18-19 (2015) ("*Diatchenko II*"). This uniform rule follows from the fact that, for art. 26 purposes, a showing that a particular juvenile is permanently incorrigible "can never be made, with integrity, by the Commonwealth" at the time of sentencing. *Diatchenko I*, 466 Mass. at 669-70.

To date, this Court has not addressed the related questions of when such an opportunity must first arise to be 'meaningful,' or to what possibilities outside

prison a juvenile homicide offender must be considered for release. The *Montgomery* court said only that the opportunity means "hope for some years of life outside prison walls must be restored." 136 S. Ct. at 736-37; see also *id.* (suggesting statute that makes juvenile homicide offenders parole eligible after twenty-five years provides meaningful opportunity for release). But *Graham* establishes that a meaningful opportunity for release should create an "incentive to become a responsible individual" by providing a "chance for fulfillment outside prison walls," "for reconciliation with society," and "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." 560 U.S. at 79. The order on appeal here is thus consistent with art. 26 only if a sentence that requires a juvenile homicide offender to spend forty-five years in prison before first being considered for parole at age sixty-two provides that offender with the opportunities and incentives identified in *Graham*, regardless of the particularities of the individual being sentenced or the facts of the crimes of conviction. See *Diatchenko I*, 466 Mass. at 670 (categorical bar on life without parole sentences applies to all juvenile homicide

offenders, "irrespective of the specific crimes they have committed").

2. Retribution Remains a Legitimate Sentencing Goal in Juvenile Cases, But the Wish to Impose the Maximum Penalty for Grievous Harms Caused Must Ultimately Yield to the Requirement that All Juvenile Offenders Receive a Meaningful Opportunity for Release

Diatchenko I's categorical rule is predicated on the fact that, at the time of sentencing, the Commonwealth cannot reliably show and a judge cannot reliably determine whether a particular juvenile homicide offender is beyond redemption. 466 Mass. at 669-71. As a practical matter, the same considerations that support this conclusion—juveniles' incomplete neurological and psychosocial development and increased capacity for change, and the imprecision of diagnostic and predictive tools—put the lie to the notion that the Commonwealth could show, and a judge could accurately determine at the time of sentencing, that forty-five (or thirty, for that matter) years of confinement is needed before parole consideration for either rehabilitation or incapacitation purposes. See, e.g., *State v. Zarate*, 908 N.W.2d 831, 860-61 (Iowa 2018) (Appel, J., concurring) (to the extent juvenile sentences serve rehabilitative or incapacitative

goals, "a meaningful opportunity to demonstrate maturation and release must occur no later than after the completion of character formation. Consideration for parole only when the juvenile offender reaches forty or fifty years of age is not timely"). Instead, the only rationale for making a juvenile offender wait until age sixty-two, or even forty-seven, for the first review to determine whether he or she is able to "live and remain at liberty without violating the law and that release is not incompatible with the welfare of society," G.L. c.127 §130, is punishment for his or her crimes and the harms they caused, regardless of any rehabilitative trajectory.

Notwithstanding their 'constitutional difference,' neither art. 26 nor the Eighth Amendment treat retribution as an impermissible consideration in juvenile sentencing. See, e.g., *Diatchenko I*, 466 Mass. at 674 ("The severity of this particular crime [of first-degree murder] cannot be minimized even if committed by a juvenile offender"); *Okoro*, 471 Mass. at 58 ("murder in the second degree 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"); *Graham*, 560

U.S. at 71 (acknowledging society's right to severely punish juvenile offenders "to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense"). As the Supreme Court of Iowa—a state that, like Massachusetts, has held juvenile life without parole violates its constitution in all cases—has observed, "[h]arm to a victim is not lessened because of the young age of an offender," and remedial post-*Miller* schemes should not "weigh this [sentencing] equation to only consider the age and culpability of the offender without [also addressing] the harm he or she caused." *State v. Propps*, 897 N.W.2d 91, 102 (Iowa 2017).

The Defendant's offense conduct and the harms it caused are the kind that justify retributive sentencing, and the resentencing judge determined in her discretion that "the maximum *penalty*"—not time to allow for maturation, or treatment—"[wa]s warranted." AD:10 (emphasis added). Mr. LaPlante does not contest the Superior Court's discretionary determination he should be subject to the maximum *constitutional* punishment. Still, "the time when a seventeen-year-old could seriously be considered to have adult-like culpability has passed," even when such a juvenile has

committed the most serious crimes and caused the greatest harms, and even when a judge finds the juvenile does not display hallmark features of youth. *State v. Lyle*, 854 N.W.2d 378, 398 (Iowa 2014). Indeed, "[a] constitutional framework that focused only on the harm the defendant caused would never have produced *Roper*, which involved a profoundly heinous crime." *Id.*

The crime at issue here was profoundly heinous. Meanwhile, the constitutional framework that produced *Diatchenko I* is more protective with respect to juvenile punishment than the one that produced *Roper*. The question for this Court is thus what longest period of retributive punishment may be imposed on a juvenile homicide offender within this more protective framework before it "could be seen as the functional equivalent of a life-without-parole sentence" that deprives him or her of the meaningful opportunity for release necessary to conform a life sentence to art. 26. *Commonwealth v. Brown*, 466 Mass. 676, 691 n.11 (2013). In a case where the crimes of conviction caused such grievous harms, the categorical rule established by *Diatchenko I* means the retributive impulse will be left to some extent unsatisfied by any

(E.D.N.Y. 2006) ("Life expectancy within federal prison is considerably shortened" as compared to that of general population). The United States Sentencing Commission treats "a sentence length of 470 months [thirty-nine years and two months] or longer" as one "in which a de facto life sentence had been imposed." United States Sentencing Commission, *Life Sentences in the Federal System* (February 2015) at 10 & n.52. This treatment is based on "the average life expectancy of federal criminal offenders," which is sixty-four for persons incarcerated at a median age at sentencing of twenty-five. *Id.*; American Civil Liberties Union of Michigan, *Note: Michigan Life Expectancy Data for Youth Serving Natural Life Sentences* (2013) ("ACLU Note") at 1. One study of over 400 inmates found that life expectancy for adults given life without parole sentences was just over fifty-eight, and for persons who began their sentences as juveniles that figure declined to just over fifty. ACLU Note at 2 & n.1.

These figures are not comprehensive, and it is impossible to say how the life span of a particular juvenile, including Mr. LaPlante, will measure against the probabilities they depict. Nevertheless, it appears beyond dispute that long-term prisoners live

significantly shorter lives than those of the general population, and persons who serve thirty or forty years beginning as teenagers live shorter still. Any analysis of whether a sentence that gives a juvenile incarcerated at seventeen a first review for release at sixty-two conforms to art. 26 must proceed mindful of the fact that such a person is not likely to live more than five years past his or her first parole hearing, and could easily die before it.

B. The Meaningful Opportunity Contemplated By *Graham* and *Diatchenko I* Requires Possible Release During Working Maturity and the Potential for Productive Participation in the Life of Society

Graham only briefly sketched what a meaningful opportunity for release entails: incentives to become a responsible person, the possibility of fulfillment outside prison and to reconcile with society, and "hope." See 560 U.S. at 79; see also Nick Straley, *Miller's Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 Wash. L. Rev. 963, 986 (2014) ("*Graham* viewed the concept of 'life' as broader than simply biological survival. It implicitly endorsed the notion that release from prison should be available at a time at which a defendant might 'live'

applying *Miller* to sentences setting parole eligibility at sixty and fifty-two-and-one-half years. *Brown*, 466 Mass. at 691 n.11 (citing, *inter alia*, *State v. Ragland*, 836 N.W.2d 107, 111, 121-122 (Iowa 2013) and *Null*, 836 N.W.2d at 45, 71). The Legislature heeded this admonishment by requiring that juveniles convicted of premeditated murder serve at least twenty-five years before being considered for parole and that juveniles convicted of murder committed with extreme atrocity or cruelty serve thirty. See G.L. c.279 §24,[6] as amended by St.2014 c.189 §8; see also *Commonwealth v. Perez*, 480 Mass. 562, 569 n.6 (2018) ("*Perez II*") ("In response to our decisions in [*Diatchenko I* and *Brown*], the Legislature established specific parole eligibility dates for juvenile offenders convicted of murder in the first degree"). These new minimum terms manifest a legislative balancing between the wish to severely punish

[6] General Laws c.279 §24 permits sentences with as little as twenty years to serve before parole eligibility where a juvenile is convicted of first degree murder that is neither premeditated nor committed with extreme atrocity or cruelty. However, in light of this Court's decision in *Commonwealth v. Brown*, 477 Mass. 805 (2017) prospectively abolishing felony-murder as an independent theory of liability, the minimum penalty for most juvenile homicide offenders is twenty-five years before parole eligibility as a practical matter.

juveniles who commit the most serious crime and the need to ensure such punishments conform to art. 26.

Other states have established similar parole eligibility horizons for juvenile homicide offenders in the wake of *Graham* and *Miller*, even when they have maintained life without parole as a possible sentence. See, e.g., 11 Del. Code Ann. §4209A (minimum of twenty-five years before parole eligibility); N.C. Gen. Stat. §15A-1340.19A (minimum of twenty-five years before parole eligibility); 18 Pa. Cons. Stat. Ann. §1102.1(a) (between twenty-five and thirty-five years before parole eligibility, depending on age of offender); Utah Code Ann. §76-3-207.7 (requiring "an indeterminate prison term of not less than 25 years and that may be for life"); Wyo. Stat. Ann. § 6-10-301(c) (juveniles given life sentences eligible for parole after twenty-five years); see also Cal. Penal Code §1170(d)(2) (juvenile given life without parole sentence may petition for resentencing based on demonstrated rehabilitation after fifteen years). These remedial provisions vary significantly according to each State's more general approach to sentencing. "However, one thing is clear: precluding eligibility for parole for 50 years is not part of the legislative

effort to comply with *Graham* and *Miller*." *Carter v. State*, 461 Md. 295, 355 (Maryland 2018). The reason such lengthy pre-parole eligibility periods are not part of these legislative compliance efforts is that they do not provide a meaningful opportunity for release and offer juvenile offenders only hope to die, rather than live, outside prison walls.

There is no reason to believe the Legislature independently wished to reduce the sentencing exposure for juveniles charged with first-degree murder. Until *Diatchenko I* declared the then-existing scheme unconstitutional, it required them to be tried as adults and subjected to mandatory life without parole sentences if convicted. In light of this manifested intent to punish such offenders as severely as possible, the Legislature's decision to make juveniles convicted of first-degree murder parole eligible after no more than thirty years in prison must be seen for what it is: a recognition that requiring more incarceration before parole eligibility risked substituting *de facto* life without parole sentences for the *de jure* sentences this Court held unconstitutional. See *Brown*, 466 Mass. at 691 n.11. This thirty-year mandatory term, which is the same one

Mr. LaPlante will be subject to if the Court finds his present sentence structure violates art. 26, ensures juvenile homicide offenders will have their rehabilitation assessed and be considered for parole in their late forties—past the midpoint of working maturity (understood as the period between legal majority and approximate retirement age) but still with enough time left that, even in the context of diminished life expectancy, productive participation in the life of society remains possible.

C. Judicial Discretion to Run Sentences Consecutively Must Yield, at Least as to Parole Eligibility, to the Constitutional Requirement of a Meaningful Opportunity for Release

It is well established that judges have discretion to run sentences either concurrently or consecutively, *Commonwealth v. Lykus*, 406 Mass. 135, 145 (1989), and "[w]henever a single criminal transaction gives rise to crimes of violence which are committed against several victims, then multiple indictments (and punishments) are appropriate." *Commonwealth v. Donovan*, 395 Mass. 20, 31 (1985) (parenthetical in original). Pursuant to these rules the resentencing judge acted within her discretion when she punished the three murders Mr. LaPlante

committed in the Gustafson home with three consecutive life sentences. Nevertheless, the youth-emphasizing proportionality analysis required by art. 26 precludes imposition of a forty-five year parole eligibility horizon on a juvenile homicide offender, regardless of the judge's discretion to structure the balance of the Defendant's sentence.

Though most courts to have considered the question have applied *Graham* and *Miller* to sentences expressed in terms of years, not only those denominated life without parole, some have blunted the import of this holding in consecutive sentence cases by analyzing each sentence separately rather than considering a defendant's parole eligibility under the aggregate sentencing scheme. See, e.g., *Commonwealth v. Foust*, 180 A.3d 416, 436-38 (Pa. Super. Ct. 2018) (holding that single sentence with parole eligibility after sixty years was a de facto life without parole sentence, but that two consecutive sentences with parole eligibility after thirty years in each was not); *Lucero v. People*, 394 P.3d 1128, 1133 (Colo. 2017) ("Life without parole is a specific sentence, imposed as punishment for a single crime, which remains distinct from aggregate term-of-years

sentences resulting from multiple convictions"). Others have recognized that "[a] court cannot impose a sentence that is barred because of the identity of the offender on the ground that the offender committed multiple crimes…The number of offenses cannot overshadow the fact that it is a child who has committed them." *Moore*, 149 Ohio St. 3d at 575; see also *Zuber*, 227 N.J. at 448 ("the force and logic of *Miller's* concerns apply broadly: to cases in which a defendant commits multiple offenses during a single criminal episode; to cases in which a defendant commits multiple offenses on different occasions; and to homicide and non-homicide cases").

The art. 26 analysis this Court has refined in *Diatchenko I* and its progeny "focus[es] on the parole eligibility date at the time of sentencing," not whether that date is the product of a single or several consecutive sentences. *Commonwealth v. Lutskov*, 480 Mass. 575, 584 n.7 (2018); see also *Perez I*, 477 Mass. at 681 (applying art. 26 proportionality analysis to cumulative parole eligibility date in case where defendant sentenced "to an aggregate term of thirty-two and one-half years imprisonment, resulting in parole eligibility after twenty-seven and one-half

years"). Moreover, while some courts have held that applying *Graham* and *Miller* principles to aggregate parole eligibility dates in consecutive sentence cases would interfere with judicial sentencing authority, see, e.g., *Foust*, 180 A.3d at 436-37, this Court has distinguished between the total length of sentence or sentences imposed and whether a defendant's parole eligibility date within a sentencing scheme conforms to art. 26. See *Lutskov*, 480 Mass. at 584-85 (affirming judge's discretion to impose "the twenty-year minimum sentence required by statute" but holding that "[n]onetheless, the defendant would be eligible for parole after fifteen years"); see also *Perez II*, 480 Mass. at 574 (leaving in place aggregate sentence for multiple convictions but modifying parole eligibility date to conform to art. 26).

While this analysis has developed largely in the context of aggregate sentence structures in non-homicide cases, its import for multiple homicide cases is determined by the fact "none of what [*Diatchenko I*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Miller*, 567 U.S. at 473 (citing *Graham*, 560 U.S. at 69) (parenthetical

in original). Under art. 26 judges therefore retain their traditional discretion to run sentences consecutively in cases with multiple crimes and multiple victims, but may not structure the parole eligibility component of those aggregate sentencing packages so as to deny juvenile homicide offenders the meaningful opportunity for release based on demonstrated rehabilitation to which they are constitutionally entitled.

4. The Sentence Imposed by the Superior Court Does Not Hold Out the Possibility the Defendant Could Leave Prison in Time to Participate Productively in the Life of Society, and Is Therefore Unconstitutional

The resentencing judge imposed three consecutive life sentences and ordered that "Mr. LaPlante is not eligible for parole until he has served 45 years," AD:10, and it is this requirement of forty-five years to serve before first consideration for release, not the fifteen-year horizon established by each discrete sentence or the possibility that the Defendant will never actually leave prison and return to society, that is relevant for art. 26 purposes. She also found that at the time of his crimes the Defendant lacked "the 'hallmark features' of a juvenile," that his "relative youth did not play a role in the Gustafson

murders," and "that the maximum penalty [possible for a juvenile homicide offender wa]s warranted" in his case. AD:5-10. The parole eligibility component of the Defendant's sentence is thus unconstitutional only if *no* juvenile homicide offender, regardless of his or her individual attributes, may be required to wait so long before first being considered for release.

For the reasons discussed *supra*, *Diatchenko I's* categorical requirement that every juvenile homicide offender have a meaningful opportunity for release prohibits a sentence with a forty-five year parole horizon even in a case justifying maximum retributive punishment. Under his present sentence Mr. LaPlante would not be eligible for parole until he was sixty-two—close to the likely age of death for persons like him who are incarcerated as teenagers and spend their twenties, thirties, forties, and fifties in prison. Such a late-arising first opportunity for release would not be 'meaningful' in the constitutional sense because it would not hold out the possibility—even if parole were granted—that the Defendant could productively reengage with the society from which had been separated for nearly a half-century. At an age when many citizens are beginning to contemplate the

end of their working years, the Defendant would be seeking his first job outside prison. At an age when many citizens are contemplating 'downsizing' out of the family home, the Defendant would be seeking a residence of his own for the first time. At an age when many citizens are surrounded by their grown children and are becoming grandparents, the Defendant would be realizing the chance for such life experiences had passed him by.

It is fair to point out both that these losses would be attributable to Mr. LaPlante's own criminal acts, and that those same acts deprived his victims of all future possibilities. This criticism is accurate to some extent in the case of every juvenile homicide offender, each of whose crime ended at least one life and the potential it embodied. *Diatchenko I* acknowledged the terrible harms caused by crimes like the Defendant's, but also recognized that even when a juvenile commits acts causing irrevocable losses he or she may not be subject to a complete forfeiture of the possibility of rehabilitation and social reentry consistent with art. 26. Though it holds out the possibility he might leave prison alive, a sentence structure with forty-five years to serve before parole

consideration does not hold out the possibility that Mr. LaPlante might live outside the prison walls within the meaning of *Graham* and *Diatchenko I*. It is therefore unconstitutional, and must be vacated.

VI. CONCLUSION

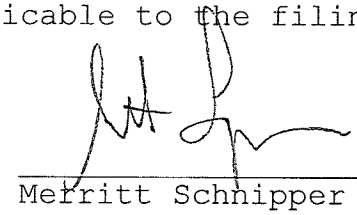
For the foregoing reasons, the Court should vacate the sentence imposed by the Middlesex Superior Court and remand the case for resentencing with parole eligibility after thirty years. The Court should further hold that an aggregate sentence structure that requires a juvenile homicide offender to serve forty-five years before consideration for parole does not provide a meaningful opportunity for release, and therefore violates art. 26.

DANIEL LaPLANTE
By His Attorney

Merritt Schnipper
SCHNIPPER HENNESSY PC
25 Bank Row Suite 2S
(413) 325-8541
mschnipper@schnipperhennessy.com
BBO #676543

CERTIFICATE OF COMPLIANCE

I certify pursuant to Massachusetts Rule of Appellate Procedure 16(k) that the foregoing complies with the rules applicable to the filing of briefs.



Merritt Schnipper