COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-12382

COMMONWEALTH

Plaintiff-Appellee,
v.
RAYMOND CONCEPCION
Defendant-Appellant.

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

BRIEF OF CITIZENS FOR JUVENILE JUSTICE AND COMMITTEE FOR PUBLIC COUNSEL SERVICES, YOUTH ADVOCACY DIVISION AS AMICI CURIAE IN SUPPORT OF RAYMOND CONCEPCION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF IDENTITY AND INTEREST OF THE AMICI CURIAE

Citizens for Juvenile Justice ("CfJJ") is the only statewide, independent, non-profit organization working exclusively to improve the juvenile justice system in Massachusetts. CfJJ's mission is to advocate statewide systemic reform to achieve equitable youth justice. This includes promoting smart policies that advance the healthy development of children and youth so they can grow up to live as responsible and productive adults in our communities. CfJJ believes that both children in the system and public safety are best served by a fair and effective system that recognizes the ways children are different from adults and that focuses primarily on rehabilitation rather than an overreliance on punitive approaches.

The Committee for Public Counsel Services ("CPCS") was created by the Legislature in 1983 "to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services" to indigent parties in the commonwealth. St. 1983, c. 673, codified in G. L. c. 211D, § 1. Aside from the appointment of counsel for the indigent youth, CPCS has no financial interest in the case.

The Youth Advocacy Division ("YAD") is the juvenile justice division of CPCS. YAD contracts with more than four hundred private attorneys who represent youth in a wide variety of proceedings, including delinquency and youthful offender proceedings, juvenile homicide trials and appeals, and juvenile parole hearings. Because YAD attorneys provide legal counsel to youth charged

with murder and tried in Superior Court, the Court's decision in this case will affect the interests of YAD's present and future clients.

RULE 17(c)(5) DECLARATIONS

No party or counsel for a party authored the brief in whole or in part. No party, counsel for a party contributed money that was intended to fund preparing or submitting the brief. No person or entity – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief. Neither the amicus nor its counsel represents or has represented one of the parties the present in 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 young, high-school aged boy is faced with an impossible choice: do what the adult gang members are ordering him to do so that he can leave the gang and be safe, or refuse, and put his life, and the lives of his loved ones, in grave danger. He is just a boy. An immigrant. He has an IQ of 66, and his brain has only developed to the maturity of an eight- or nine-year-old. His diminished cognitive function means that he is particularly susceptible to peer pressure. He seems to do whatever he is told to do. He does not even seem to fully understand that he is being asked to kill somebody—that shooting into the car will end another person's life. He had

previously witnessed at least four other people get shot, some multiple times, and still survive. He does not understand the risk, the morality, or the consequences, and he does not understand that he has any choice.

Massachusetts does not consider any of these circumstances before automatically trying this boy as though he is an adult.[1] Nor does Massachusetts consider any of these circumstances before automatically condemning him to a life sentence.[2] Any and every child aged fourteen to seventeen who is charged with murder is tried as an adult, and, if convicted, is sentenced to life in prison, regardless of any mitigating circumstances.

The mind of a child is not fully developed, and the circumstances of youth change the application of the Commonwealth's penological goals. Is an intellectually impaired child morally culpable for his actions? Is he likely to reform? Is he unlikely to reoffend as he grows older? Is a teenager, whose mind has not developed the ability to accurately assess risk and consequences, expected to respond to deterrents like an adult? As the Supreme Court held in *Miller v. Alabama*, "children are constitutionally different from adults for purposes of sentencing" due to their "diminished culpability and greater prospects for reform."[3]

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[1] G.L. c. 119, § 74 (mandating that the juvenile court shall not have jurisdiction over a child aged fourteen to seventeen who is accused of committing murder in the first or second degree).
[2] G.L. c. 265, § 2.
[3] *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

Neurological differences between adults and children "diminish the penological justifications" for imposing harsh sentences.[4] Accordingly, the Supreme Court in *Miller* held that individualized consideration of mitigating circumstances, such as youth and brain development, is required in order to determine the constitutionally proportionate sentence for a child.[5]

The mandatory exclusion from juvenile court of a child as young as 14 based only on the crime committed and without any opportunity for the exercise of judicial discretion, is unconstitutional. And the mandatory imposition of one of the state's harshest penalties on such a child without considering his youth and other mitigating circumstances is doubly constitutionally cruel and unusual.[6]

Courts across the country, before and after *Miller*, have recognized the fundamental differences between children and adults that must be considered in determining the appropriate court in which to prosecute a juvenile, and the constitutional requirement that these differences be considered in sentencing.

[4] *Id.* at 472.
[5] *Id.* at 477–78.
[6] *Id.*

ARGUMENT

I. Both the Mandatory Exclusion of Fourteen to Seventeen Year Olds from Juvenile Court, and the Mandatory Sentencing Scheme, Which Sentences Those Children to Life Imprisonment Without Considering Their Youth and Intellectual Disabilities, Violate the Constitution.

The Commonwealth disregards youth and intellectual impairments of juvenile offenders aged fourteen to seventeen at two pivotal stages of prosecution: exclusion from juvenile court jurisdiction, and sentencing. The mandatory exclusion from juvenile court of children aged fourteen to seventeen who are accused of murder from juvenile court, without consideration of mitigating factors before trying these children as though they are adult offenders, violates the Constitution. And the mandatory imposition of a life sentence on such children found guilty of murder, again without considering the mitigating factors of youth or intellectual impairment, constitutes cruel and unusual punishment. Although the mandatory exclusion and sentencing statutes are each unconstitutional even in isolation, the fact that Massachusetts prohibits the exercise of judicial discretion at either stage is doubly so. Massachusetts should thus join the growing consensus of states in recognizing that, following *Miller*, individualized assessment of the circumstances, maturity, and intellectual capacity of child offenders is required so as to protect children from mandatory punishments that are cruel and unusual.

A. G.L. c. 119, § 74 is an Outlier in the Growing Trend of States Maintaining Juvenile Court Jurisdiction and Providing Discretionary Transfer to Adult Court.

Since the 1996 repeal of G.L. c. 119, § 61, children aged fourteen to seventeen accused of murder are mandatorily tried in adult court as opposed to juvenile court.[7] In adult court, all children aged fourteen to seventeen who are convicted of murder are automatically sentenced to life imprisonment. As Justice Lenk noted in *Commonwealth v. Walczak*, indicting juveniles for murder under § 74 "evokes many of the same concerns" as *Miller*, *Roper v. Simmons* and *Graham v. Florida*.[8] Massachusetts need only look to her sister states to see that the wave of juvenile justice reform following *Miller* demands that the exclusion of child offenders from juvenile court—even those charged with murder—occur only following the informed exercise of discretion.

In 27 states, youth under 16 years of age are not automatically excluded from juvenile court when they are charged with murder. Instead, the juvenile court judge has discretion to transfer the juvenile, usually after a hearing considering a number of factors, such as the youth's sophistication and maturity.[9] Indeed, in

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[7] G.L. c. 119, § 74.

[8] *Commonwealth v. Walczak*, 463 Mass. 808, 831 (2012) (Lenk, J., concurring); *see Miller*, 567 U.S. 460; *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

[9] *See* Addendum, Table A.

California, no child under age 16 can be transferred to adult court, regardless of the charge.[10]

California's current statute regarding juvenile court jurisdiction comes after years of amendments. In 2016, California voters passed Prop 57, which requires a juvenile court hearing before a youth charged with any crime can be transferred to adult court.[11] The probation officer must submit a report on the minor's behavioral patterns and social history, and the prosecutor and minor's counsel may submit additional relevant information. The prosecutor bears the burden of showing that a minor is unfit for juvenile court by a preponderance of the evidence. The juvenile court is required to consider: "(1) [t]he degree of criminal sophistication exhibited by the minor[;] (2) [w]hether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction[;] (3) [t]he minor's previous delinquent history[;] (4) [s]uccess of previous attempts by the juvenile court to rehabilitate the minor[; and] (5) [t]he circumstances and gravity of the offense alleged in the petition to have been committed by the minor."[12]

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[10] SB-1391, § 707(a)(2).
[11] California Quick Guide to Propositions, *Proposition 57: Criminal Sentences. Parole. Juvenile Criminal Proceedings and Sentencing. Initiative Constitutional Amendment and Statute*, http://quickguidetoprops.sos.ca.gov/propositions/2016-11-08/57 (2016).
[12] SB-1391, *Senate Analyses 8/30/18*, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1391# (Aug. 30, 2018).

In 2018, the California legislature passed Senate Bill 1391, which raised the floor for judicial transfer to age 16 such that the transfer to adult court of any child under age 16 is absolutely prohibited.[13] As the bill's sponsors recognized, "cognitive science has proven that children and youth who commit crimes are very capable of change." "We know that sending youth to adult prison does not help our youth and it does not make our communities safer."[14]

In light of these amendments, the California Court of Appeals recently held in *Kevin P. v. Superior Court* that "the allegation that a minor committed a serious offense, including murder, does not 'automatically require a finding of unfitness [of juvenile court jurisdiction].'"[15] In determining whether transfer to adult court is warranted, "a juvenile court may rely on evidence that, 'while not justifying or excusing the crime, tends to lessen its magnitude', 'including, but not limited to, the actual behavior of the person, the mental state of the person, the person's degree of involvement in the crime, the level of harm actually caused by the person, and the person's mental and emotional development.'"[16] The Court specifically acknowledged that "the gang involvement of a minor with poor

[13] SB-1391, Section 707(a)(2).
[14] SB-1391, *Assembly Floor Analysis 8/21/18*, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1391# (Aug. 21, 2018).
[15] *Kevin P. v. Super. Ct. of Contra Costa Cty.*, No. A159680, 2020 WL 6535948, at *7 (Cal. Ct. App. Nov. 6, 2020) (citation omitted).
[16] *Id.* (citation omitted).

cognitive functioning might demonstrate a lesser degree of criminal sophistication than the gang involvement of a minor with normal cognitive functioning."[17]

The defendant in *Kevin P.* was a 17 year old juvenile who stabbed a woman 38 times, killing her. The Court held that despite the appalling circumstances of the killing, the prosecution did not provide substantial evidence that the rehabilitation criterion of California law governing transfer favored the juvenile's transfer to criminal court. "[W]ithout expert testimony . . . a court cannot reasonably infer that a minor has an amorphous 'dark side' hindering rehabilitation."[18] Accordingly, the Court vacated the juvenile court's transfer to adult court and ordered the juvenile court to reevaluate whether the child could be rehabilitated before the expiration of the juvenile court's jurisdiction.[19]

Other state courts have similarly recognized the significance of judicial review of the decision to prosecute a juvenile in adult court. In Texas, for instance, the juvenile court judge has discretion, after a full investigation and hearing, to transfer a juvenile at least 14 years of age who is alleged to have committed murder.[20] In *Moon v. State*, the juvenile court waived its jurisdiction over a 16 year old youth alleged to have committed an intentional or knowing murder,

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[17] *Id.* at *10.
[18] *Id.* at *15.
[19] *Id.*
[20] Tex. Fam. Code § 54.02.

finding that the youth was sophisticated and mature enough to be tried as an adult. However, the Court of Criminal Appeals held that the juvenile court's waiver constituted an abuse of discretion because the juvenile court's sole reason for waiving jurisdiction was the seriousness of the offense.[21] The Court rejected the argument that a charge of murder alone could justify the transfer of jurisdiction from juvenile to adult court.[22]

In Oregon, before exercising its discretion to transfer a youth charged with murder, the juvenile court must also hold a hearing considering, among other factors, the youth's emotional and mental health. In *Matter of J.C.N.-V.*, a juvenile court waived its jurisdiction over a 13 year old boy who allegedly committed aggravated murder. The Supreme Court of Oregon held that to waive jurisdiction, however, "a juvenile court must find that the youth possesses sufficient adult-like intellectual, social and emotional capabilities to have an adult-like understanding of the significance of his or her conduct, including its wrongfulness and its consequences for the youth, the victim, and others."[23] *Id.* at 597. Such a finding may be based on the balancing of competing evidence relating to a youth's capabilities because a youth may be relatively mature in some ways and not in others. "They may be intellectually mature but socially immature; they may have

[21] *Moon v. State*, 451 S.W.3d 28, 50 (Tex. Crim. App. 2014).
[22] *Id.* at 51.
[23] *In re J.C.N.-V.*, 380 P.3d 248, 597 (Or. 2016).

mature decision-making capacities in terms of abilities to consider and weigh options, yet be morally immature in the ways in which they apply those abilities."[24]

Consequently, the Court remanded the case to juvenile court. The juvenile court's transfer was based on the fact that the youth understood and acknowledged his role in the murder and knew that murder is a crime that carries criminal consequences. However, those findings did not demonstrate "whether the youth had the adult-like capacities that would allow him to appreciate the significance and wrongfulness of his conduct and its consequences in both an intellectual and an emotional sense."[25]

As these state court decisions demonstrate, the charge of murder alone does not obviate the need to consider a defendant's youth and related circumstances when determining whether to waive juvenile court jurisdiction. Section 74's automatic exclusion of juveniles from juvenile court without regard to a defendant's youth and intellectual capacity is thus out of step with the growing nationwide consensus that these factors must be considered in deciding whether to waive juvenile court jurisdiction in favor of adult court.

[24] *Id*. at 599 (citation omitted).
[25] *Id*. at 599-600.

B. Massachusetts' Mandatory Sentencing Scheme Exacerbates the Constitutional Infirmity of Its Treatment of Juveniles Charged with Criminal Offenses.

Massachusetts is also swimming against the tide of juvenile justice reform in sentencing juvenile offenders who have been waived from juvenile jurisdiction. Massachusetts provides a mandatory life sentence for children between the ages of fourteen and seventeen who are convicted of murder in the first degree.[26] Children sentenced to life imprisonment are not eligible for parole for at least 20 years. And after such lengthy incarceration, eligibility for parole is far from a guarantee of release.[27] In 2019, only 48% of juveniles sentenced to life imprisonment were granted parole—and of those, only two, one of whom had served 45 years before his hearing because he had originally been sentenced to life without parole, were granted parole at their first parole hearing.[28]

Incarceration for decades in a prison is not a setting in which even developmentally typical children can reasonably be expected to develop, grow, and mature. For an intellectually disabled child like Concepcion, the opportunity for parole is especially bleak—his presentation at a parole hearing, his expression of remorse and understanding of his crime, his ability to participate in rehabilitative

[26] G.L. c. 265, § 2.
[27] G.L. c. 279, § 24.
[28] Massachusetts Parole Board, *Life Sentence Decisions*, https://www.mass.gov/lists/life-sentence-decisions#2019- (2019).

programs while in prison, and his gained maturity are all central for release. These are daunting obstacles for a developmentally impaired inmate who entered prison at such a young age. Without the help of counselors and tutors, Concepcion, and other young children like him, face very long odds at making the meaningful developmental gains that are required for a grant of parole.

And of course, parole is not freedom. Under Massachusetts law, juvenile offenders found guilty of murder in the first degree are subject to a lifetime of restrictions on their liberty, and the consequence of violating those restrictions is a return to prison, under the terms of their original life sentence.[29] But Massachusetts does not allow for any consideration of a child's circumstances and youth before condemning them to that fate.

The Supreme Court has, on multiple occasions, "insisted […] that a sentence have the ability to consider the mitigating factors of youth."[30] "[M]andatory schemes," like the one exercised in Massachusetts, are "flawed because [they] g[i]ve no significance to the character and record of the individual offender or the circumstances of the offense, and exclud[e] from consideration the possibility of compassionate or mitigating factors."[31] "[M]andatory penalties, by their nature,

[29] G.L. c. 127, § 149.
[30] *Miller v. Alabama*, 567 U.S. 460, 476 (2012) (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).
[31] *Id*. at 475 (internal citations omitted).

preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[32] Thus, although *Miller* considered a sentence of life *without* parole, it was the *mandatory nature* of the sentence, not the substantive sentence itself, which violated the Eighth Amendment. Pursuant to *Miller*, it is cruel and unusual that under the Commonwealth's mandatory sentencing scheme, "every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one."[33]

In a sharp contrast to Massachusetts' mandatory minimum life sentence for children who are found guilty of murder, twenty-six states,[34] and counting, allow for discretionary sentencing to a term of years.[35] Every one of those twenty-six states permits a judge, in his or her discretion, to consider both the youth of the offender, his mental impairment, ability to comprehend the wrongness of his actions, his background, and any other factor which is reasonable in considering the appropriate sentence for a child tried as an adult.[36] These discretionary sentencing schemes allow judges to consider the brain development of each

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[32] *Id*. at 476.
[33] *Id*. at 477.
[34] Washington, D.C., is included in this number.
[35] *See* Addendum, Table B.
[36] *Id*.

individual offender to craft an appropriate sentence that meets the basic penological goals of deterrence and rehabilitation.

The draconian nature of Massachusetts' mandatory sentencing scheme is even more apparent when one considers the material differences in the approaches to juvenile justice of the jurisdictions that are seemingly *peers* in the mandatory sentencing of juveniles to a term of life imprisonment. Of the twenty-four states that impose mandatory life sentences, seventeen allow for discretion in determining whether to waive juvenile court jurisdiction over juveniles who are first time offenders, younger than 16 years of age and charged with murder.[37] In contrast, at neither the prosecution nor sentencing stage does Massachusetts consider "developments in psychology and brain science [that] show fundamental differences between juvenile and adult minds" including "parts of the brain involved in behavior control."[38] Nor does a judge have discretion to consider the "transient rashness, proclivity for risk, and inability to assess consequences" resulting from the lack of brain development that the *Miller* court determined both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "deficiencies will be reformed."[39] Massachusetts is joined by a minority of *only seven other states* in failing to

[37] *See* Addendum, Table A.
[38] *Miller*, 567 U.S. at 471–72, citing *Graham v. Florida*, 560 U.S. 48, 68 (2010).
[39] *Miller*, 567 U.S. at 472 (citation omitted).

consider the underdeveloped brain of a child and its impact on moral culpability and opportunity for rehabilitation—much less developmental disabilities and low IQ—at *either* stage of prosecuting children like Concepcion before sentencing them to life imprisonment.

Indeed, some states have acknowledged that *any* mandatory minimum is unconstitutional in the context of sentencing children. For example, the Iowa Supreme Court in *State v. Lyle* held that "juvenile offenders cannot be mandatorily sentenced under a mandatory minimum sentencing scheme."[40] The Court noted that "constitutional protection for the rights of juveniles in sentencing for the most serious crimes is rapidly evolving in the face of widespread sentencing statutes and practices to the contrary."[41] "[I]t is becoming clear that society is now beginning to recognize a growing understanding that mandatory sentences of imprisonment for crimes committed by children are undesirable in society."[42]

The Court concluded that "the sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability" as described in *Miller*.[43] Indeed, the "constitutional infirmity with the punishment

[40] *State v. Lyle*, 854 N.W.2d 378, 381 (Iowa 2014), *as amended* (Sept. 30, 2014).
[41] *Id*. at 387 (citation omitted).
[42] *Id*. at 389.
[43] *Id*. at 398.

imposed in *Miller* was its mandatory imposition, not the length of the sentence"—"the mandatory nature of the punishment establishes the constitutional violation."[44] "Simply put, attempting to mete out a given punishment to a juvenile for retributive purposes irrespective of an individualized analysis of the juvenile's categorically diminished culpability is an irrational exercise."[45] "A statute that sends all juvenile offenders to prison for a minimum period of time under all circumstances simply cannot satisfy the standards of decency and fairness embedded in" the constitutional prohibition against cruel and unusual punishment.[46] Massachusetts' mandatory sentencing scheme is thus irreconcilable with *Miller*, and is unconstitutional.[47]

The fact that children in Massachusetts are afforded the opportunity of parole at some point does not fulfill *Miller's* requirement of discretionary consideration at the time of sentencing. As sister courts have noted, "the possibility of a murder review hearing by the parole board […] years in the future

[44] *Id*. at 401.
[45] *Id*. at 399.
[46] *Id*. at 403.
[47] *See also State v. Houston-Sconiers*, 188 Wash. 2d 1, 21 (2017) (eliminating mandatory sentencing for juveniles, holding that "courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant[…] and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements").

is not a constitutionally adequate substitute for that consideration."[48] The Oregon Court of Appeal in *State v. Link* considered an identical circumstance to that considered by this Court: mandatory transfer followed by a mandatory life sentence.[49] As in *Lyle*, the Court noted that the issue was not the potential length of the sentence itself, but "the procedural imposition of the sentence."[50] Oregon's juvenile aggravated murder scheme, like Massachusetts', removed the opportunity of a waiver hearing for some juveniles, then mandated a sentence of life once convicted.[51] "By that scheme, it creates a subcategory of juvenile defendants for whom no sentencer will ever meaningfully consider the transient qualities of youth."[52] Such a sentencing scheme, which "dictates such a severe sentence be applied to a juvenile defendant, without regard for the qualities of youth, runs afoul of *Miller*."[53] The elusive opportunity of a parole hearing decades in the future is not a constitutionally adequate substitute for consideration of a defendant's youth in sentencing.[54]

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[48] *State v. Link*, 297 Or. App. 126, 158, *review allowed*, 365 Or. 556, 451 P.3d 1000 (2019).
[49] *Id*.
[50] *Id*. at 156.
[51] *Id*. at 157.
[52] *Id*.
[53] *Id*.
[54] *Id*. at 158.

As in *Link*, the several statutes that comprise the Massachusetts scheme for imposition on a juvenile of a single, severe sentencing option for murder fail to meet the constitutional obligation to assess the role of youth at the time of sentencing. By removing discretion both at the prosecution and at sentencing, no sentencer ever considered Concepcion's youth, impressionability, lack of culpability, and capacity for reform before condemning him to a life sentence. This mandatory sentencing scheme thus clearly runs afoul of *Miller* and of the Eighth Amendment, and renders Massachusetts as an outlier in failing to consider science in its approach to juvenile justice.

II. Massachusetts' Statutory Exclusion Scheme Serves No Legitimate Penological Goal.

As violent crime rates rose in the 1980s, lawmakers nationwide began to erode the barrier between the adult and juvenile justice systems. In the 1990s, lawmakers were fueled by public and political pressure to ensure harsh punishment for these crimes. States were concerned that the juvenile system was ill-equipped to respond appropriately to young criminal offenders, particularly youth of color who were characterized in the media as "super predators."[55] A variety of rationales were offered for statutory exclusion from juvenile courts, including

[55] Justice Policy Institute and Campaign for Youth Justice, *The Child Not the Charge: Transfer Laws Are Not Advancing Public Safety*, *supra*, at 3 (2020).

deterrence, retribution and community protection.[56] However, mounting research refutes these rationales, making plain that, rather than promoting these goals, mandatory exclusion undermines them.

First, statutory exclusion does not promote deterrence. Studies indicate that statutory exclusion from juvenile court is ineffective as a general deterrent (i.e., one that dissuades would-be juvenile offenders from committing offenses) and is not only ineffective, but *counterproductive* as a specific deterrent (i.e., one that decreases the likelihood that a juvenile offender will reoffend).[57] The data on general deterrence is clear: statutory exclusion has not resulted in a lower crime rate.[58] The U.S. Department of Justice has noted that the lack of a deterrent effect may be explained by the fact that juveniles ignore transfer laws, have a tendency to discount or ignore risks in decision making, and lack impulse control,[59] many of

[56] John H. Lemmon, et al., *The Effect of Legal and Extralegal Factors on Statutory Exclusion of Juvenile Offenders*, 3 Youth Violence and Juv. Just. 214 (2005).
[57] Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, U.S. Dep't of Just., Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin 7 (2010).
[58] Jeree Thomas, et al., *Raising the Floor: Increasing the Minimum Age of Prosecution of Youth as Adults*, Campaign for Youth Just. 12 (2019).
[59] Patrick Griffin, Sean Addie, Benjamin Adams, and Kathy Firestine, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Offenders and Victims: National Report Series 26 (2011).

the same scientifically-supported factors that led the Supreme Court to hold that children are different in *Miller v. Alabama*.[60]

Nor do mandatory exclusion statutes specifically deter juvenile offenders from reoffending. On the contrary, studies have found greater overall recidivism rates among juveniles prosecuted as adults than among those retained in juvenile court. More specifically, criminally prosecuted youth have been found to recidivate sooner and more frequently than those retained in juvenile court.[61] The higher general rate of recidivism among youth tried as adults reflects the harsh realities of America's prison system. "[P]rison and jail environments present challenges to one's sense of self and identity that even hardened criminals find disorienting, upsetting, and traumatic."[62] Vulnerable adolescents mandatorily tried in adult court and convicted thus spend their youth, a pivotal period of their development, "in an environment that does not promote physical or emotional health and that may harm their progress as well."[63] Reports show that juveniles

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[60] 567 U.S. at 480.
[61] *Id*.
[62] Edward P. Mulvey and Carol A. Schubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Working for Youth Justice and Safety: Juvenile Justice Bulletin 5 (2012).
[63] *Id*.

transferred to adult court experience higher rates of suicide and violent victimization while in prison than in juvenile facilities.[64]

Second, mandatory exclusion does not serve a legitimate retributive interest. "[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[65] "Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult."[66] As the Supreme Court emphasized repeatedly in its most recent juvenile justice jurisprudence, juvenile offenders have many characteristics that reduce their culpability from the outset. Juveniles are more impulsive and less able to appreciate risks and consequences; they are more vulnerable to environmental pressures, but less able to extricate themselves from dysfunctional peer and family dynamics; and they often lack a developed sense of responsibility and self.[67] Indeed, these considerations are significant enough to spill outside of the sentencing context into other areas of constitutional import,

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[64] Richard E. Redding, *supra*, at 7; Neelum Arya, *Getting to Zero: A 50-State Study of Strategies to Remove Youth from Adult Jails*, UCLA School of Law (2018), https://drive.google.com/file/d/1LLSF8uBlrcqDaFW3ZKo_k3xpk_DTmItV/view.
[65] *Graham*, 560 U.S. at 71 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).
[66] *Roper*, 543 U.S. at 571.
[67] *See Montgomery v. Louisiana*, 136 S. Ct. 718, 732–34 (2016); *Miller*, 567 U.S. at 476–78; *Graham*, 560 U.S. at 71–72; *Roper*, 543 U.S. at 568–71.

such as the determination of custody under *Miranda* and the intent element for criminal offenses generally.[68]

While the Supreme Court's recent observations are in line with common sense and shared experience, they are also corroborated by an ever-growing corpus of scientific evidence. "A significant body of behavioral research as well as neuroscientific studies of brain development provides a solid basis for establishing youths' greater tendency, as a class, to risk-taking and impulsive reactions."[69] Developmental literature has also consistently found a "correlation between adolescents' risk-taking behaviors (e.g., delinquency, substance use, risky sex) and those of their peers," with peer reference groups becoming increasingly influential in adolescence, and most risk-taking behaviors occurring in the context of such groups.[70] There are also well-documented connections between early childhood and adolescent trauma and juvenile delinquency.[71] And finally, a plethora of studies indicate that the diminished capacity of youth undermines their ability to

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[68] *See, e.g.*, *J.D.B. v. N. Carolina*, 564 U.S. 261, 272–76 (2011) (discussing age relevance to *Miranda* analysis); Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 28 Crim. Just. 9, 12 (2013) (discussing role of developmental factors in juvenile justice system policies); *see also Miller*, 567 U.S. at 489–93 (Breyer, J., concurring) (discussing age relevance to felony murder rule).
[69] Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on* Miller v. Alabama, 22 Psychol. Pub. Pol'y & L. 235, 241 (2016) (collecting studies).
[70] Shelly S. McCoy et al., *Adolescent Susceptibility to Deviant Peer Pressure: Does Gender Matter?*, 4 Adolescent Res. Rev. 59, 59 (2017) (collecting studies).
[71] *Prospects for Developmental Evidence*, at 242 (collecting studies).

participate meaningfully in legal proceedings, including police interrogations, attorney collaboration, trial decision-making, and pleading.[72] This last group of factors can impair the accuracy of the legal process, undermining not only potential retributive aims but *all* legitimate penological objectives.

The Supreme Court's recognition of these differences, supported by a wealth of empirical evidence, undermines any claim that statutory exclusion advances legitimate retributive interests. By its very nature, statutory exclusion strikes at the heart of the retributive inquiry—assessing individual culpability—by applying a one-size-fits-all approach to offenders. The retributive concerns are further exacerbated by the practice's specific targeting of juveniles, a uniquely vulnerable population with categorically diminished culpability. And this is especially the case in Massachusetts, where mandatory exclusion combines with a mandatory life sentence for the same offense, giving rise to a complete abdication of the court's role in evaluating individual culpability for the individuals who need it the most.

Finally, statutory exclusion also detracts from community protection, incapacitating a group of juveniles who generally pose *less* danger to the community than adults and eliminating rehabilitative opportunities in the process. A case study best illustrates the point. In the aftermath of *Miller* and *Montgomery*, Pennsylvania launched the process of resentencing juveniles serving mandatory

[72] *Id.* at 245 (collecting studies).

life sentences without parole ("LWOP"). This was no small undertaking; Philadelphia alone had approximately 325 juveniles serving mandatory LWOP sentences, the most of any city in the country.[73] All juveniles serving mandatory LWOP sentences in Philadelphia were doing so in connection with either a first or second degree murder conviction.[74] To achieve resentencing, Philadelphia established the Lifer Resentencing Committee, an 8 member committee comprised of lawyers from the District Attorney's Office who made resentencing decisions using "information on the facts of the original case, demographic information on the victim and offender, mitigating information, the offender's prison adjustment (e.g., misconducts, rehabilitative programming), information on acceptance of responsibility and remorse, the victim's family's perspective on release, and reentry plans."[75]

As of December 31, 2019, Philadelphia had re-sentenced 269 of these juveniles, and had released 174.[76] Remarkably, over an average period of 21 months following release, only six of these individuals were rearrested, yielding a rearrest rate of 3.45%.[77] "In comparison, among persons convicted of homicide

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[73] Tarika Daftary-Kapur, Ph. D. and Tina M. Zottoli, Ph. D., *Resentencing of Juvenile Lifers: The Philadelphia Experience,* Montclaire State University 1 (2020).
[74] *Id.* at 6.
[75] *Id.* at 4.
[76] *Id.* at 2.
[77] *Id.* at 10.

offenses nationally, an estimated 30% are rearrested within two years of release, a rate that is 8.72 times higher than that of juvenile lifers released in Philadelphia."[78]

The Philadelphia case study demonstrates, at least, that juveniles convicted of serious offenses show significant promise for rehabilitation, and that as a sub-class, they pose less of a risk to the community than adults convicted of similar offenses. Research corroborates this conclusion, finding that children's personality traits are still in transition during their teenage years, and that few people who engage in criminal activity as children maintain patterns of criminality in adulthood.[79] Indeed, "professionals who work with juvenile offenders attest to their 'remarkable resilience,' and report notable success in rehabilitating these offenders."[80]

Of course, for the Philadelphia offenders in the case study, individualized attention to their mitigating circumstances was necessary to ameliorate the prior harmful effects of the generalized sentencing regime that meted out their uniform life sentences. And, in light of these offenders' heightened potential for rehabilitation as a class, this population would have benefited immeasurably from

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[78] *Id.* at 10. Researches also estimated that resentencing would yield an approximate correctional cost savings of $9.5 million over the subsequent decade. *Id.* at 11.

[79] Anna K. Christensen, *Note: Rehabilitating Juvenile Life Without Parole: An Analysis of Miller v. Alabama*, 4 Cal. L. Rev. Cir. 132, 138 (2013) (collecting sources).

[80] *Id.* at 139 (citations omitted).

being tried as juveniles and retained in the juvenile justice system, with its increased focus on rehabilitation. Together, these conclusions undermine any claim that a non-individualized approach to juvenile jurisdiction and sentencing based on offense alone—in other words, the kind contemplated by mandatory exclusion statutes like the Commonwealth's—serves any community protection interest in either incapacitation or rehabilitation. Instead, mandatory exclusion erodes community cohesion by pursuing unnecessary incapacitation and squandering meaningful rehabilitation opportunities.

In sum, statutory exclusion—especially as it operates in Massachusetts, where sentencing discretion is all but completely removed by mandatory life sentencing—is an ineffective deterrent of juvenile crime, an inadequate and counterproductive means of addressing moral culpability, and a measure that works *against* rehabilitation among the group of offenders who perhaps show the greatest hope of reform.

While these defects are critical on their own, they also have a constitutional dimension. As the Supreme Court observed in *Graham*, "a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[81] As *Graham* reasoned, "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile

[81] *Graham*, 560 U.S. at 71.

offenders, even when they commit terrible crimes."[82] Two year after *Graham*, following the same line of reasoning, the Court made the following observation in *Miller*:

> [T]he mandatory penalty schemes at issue here [imposing mandatory LWOP sentences for juvenile who committed homicide offenses] prevent the sentence from taking account of the central considerations [of the characteristics of youth]. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.[83]

Miller's reasoning applies with equal force here. By eliminating discretion, Massachusetts' statutory exclusion regime deprives Commonwealth courts of the necessary tools to examine punishment proportionality in the cases that require the closest scrutiny—those dealing with juvenile offenders. Massachusetts should shed its outlier status as one of the last states to maintain the practice of mandatory exclusion and life sentencing for offenders like Raymond Concepcion. In light of the lack of penological justification for statutory exclusion, and its violation of *Miller*'s mandate that states should not impose their "most severe penalties on juvenile offenders" without considering their status as juveniles,[84] this Court

[82] *Miller*, 567 U.S. at 472.
[83] *Id.* at 474.
[84] *Id.*

should hold that the Commonwealth's statutory exclusion scheme is unconstitutional.

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CONCLUSION

For the foregoing reasons, the amicus curiae requests that this Court determine that G. L. c. 119, § 74 is unconstitutional, reverse Concepcion's conviction and remand to the trial court for further proceedings.

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ADDENDUM

Table A. State Statutes Providing Judicial Discretion to Waive Juvenile Court Jurisdiction over Juveniles who are First Time Offenders, Younger than 16 Years of Age and Charged with Murder

#	Jurisdiction	Citation	Description of Statute
1	Alabama	Ala. Code §§ 12-15-203 and 12-15-204	The juvenile court judge may transfer a juvenile at least 14 years of age but younger than 16 years of age after a hearing considering, among other factors, the extent and nature of the physical and mental maturity of the child.
2	Alaska	Alaska Stat. § 47.12.100	The juvenile court judge may transfer a juvenile younger than 16 years of age if the minor is unamenable to treatment.
3	Arkansas	Ark. Code Ann. § 9-27-318	The juvenile court judge has discretion to transfer a fourteen or fifteen year old juvenile after a hearing considering, among other factors, the sophistication or maturity of the juvenile and written reports relating to the juvenile's mental, physical, educational and social history.
4	Colorado	Colo. Rev. Stat. § 19-2-518	The juvenile court judge has discretion to transfer a juvenile at least 12 years of age but under 16 years of age after an investigation and a hearing considering, among other factors, the juvenile's maturity.
5	Florida	Fla. Stat. § 985.556	The juvenile court judge has discretion to transfer a juvenile at least 14 years of age after a hearing considering, among other factors, the sophistication and maturity of the child, and a study and report relevant to such factors.

6	Hawaii	Haw. Rev. Stat. § 571-22(d)	The juvenile court judge has discretion to waive jurisdiction after a full investigation and hearing considering, among other factors, the juvenile's sophistication and maturity.
7	Idaho	Idaho Code § 20-508	The juvenile court judge has discretion to waive jurisdiction after a hearing considering, among other factors, the juvenile's maturity.
8	Illinois	705 Ill. Comp. Stat. 405/5-805	The juvenile court judge has discretion to transfer a juvenile at least 13 years of age after a hearing considering, among other factors, the minor's mental health, physical, or educational history.
9	Iowa	Iowa Code § 232.45	The juvenile court judge has discretion to transfer a juvenile at least 12 years of age after a hearing.
10	Kansas	Kan. Stat. Ann. § 38-2347(b)(2)	The juvenile court judge has discretion to transfer a juvenile at least 14 years of age after a hearing considering, among other factors, the sophistication or maturity of the juvenile.
11	Maine	Me. Rev. Stat. Ann. tit. 15 § 3101	The juvenile court judge has discretion to transfer a juvenile after a full hearing detailing the characteristics of the juvenile.
12	Maryland	Md. Code Ann. § 3-8A-06	After a hearing, the juvenile court judge has discretion to transfer a juvenile who is 15 years of age or younger than 15 but is charged with committing an act, which if committed by an adult, would be punishable by life imprisonment. The judge must consider, among other factors, the child's mental condition. The judge may not waive its jurisdiction

			unless it determines, from a preponderance of the evidence, that the child is unfit for juvenile rehabilitative measures.
13	Michigan	M.C.L.A. 712A.4	The juvenile court judge has discretion to transfer a juvenile at least 13 years of age and younger than 16 years of age after a hearing considering, among other factors, the minor's culpability.
14	Minnesota	Minn. Stat. § 260B.125	The juvenile court judge has discretion to transfer a juvenile at least 14 years of age and younger than 16 years of age after a hearing. The prosecutor must show by clear and convincing evidence that the public safety would not be served by retaining the proceeding in juvenile court. In determining whether public safety is served by certifying the matter for adult court, the court must consider, among other factors, the child's culpability.
15	Missouri	Mo. Rev. Stat. §§ 211.071(1) and 211.071(6)	The juvenile court judge has discretion to transfer a juvenile after a hearing and written report has been prepared detailing, among other items, the child's sophistication and maturity, whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court and racial disparity in certification.
16	Nevada	Nev. Rev. Stat. § 62B.390	The juvenile court judge has discretion to transfer a juvenile at least 13 years of age and younger than 16 years of age.

17	Ohio	Ohio Rev. Code §§ 2152.10 and 2152.12(B)	The juvenile court judge has discretion to transfer a juvenile under 16 years of age after a full hearing and consideration of "the child's social history, education, family situation, and any other factor bearing on whether the child is amenable to juvenile rehabilitation, including a mental examination of the child by a public or private agency or a person qualified to make the examination."
18	Oregon	Or. Rev. Stat. §§ 419C.349 and 419C.352	The juvenile court has discretion to transfer a juvenile after a hearing considering, among other factors, the youth's emotional and mental health.
19	Rhode Island	HB 7503, Gen. Assemb., Reg Sess. (R.I. 2018); R.I. Gen. Laws § 14-1-7	The juvenile court has discretion to transfer a juvenile after a hearing.
20	South Carolina	S.C. Code Ann. § 63-19-1210	The juvenile court judge has discretion to transfer a juvenile fourteen or fifteen years of age.
21	South Dakota	S.D. Codified Laws §§ 26-11-3.1 and 26-11-4	The juvenile division of the circuit court has discretion to transfer the case to the criminal division after a hearing. The juvenile division may consider written reports and other materials relating to the child's mental, physical, and social history if the person who prepared the material appears and is subject to both direct and cross-examination.
22	Tennessee	Tenn. Code § 37-1-134	The juvenile court judge has discretion to transfer a juvenile younger than 16 years of age after a hearing.

23	Texas	Tex. Fam. Code § 54.02	The juvenile court judge has discretion to transfer a juvenile at least 14 years of age after a full investigation and hearing in which it considers, among other factors, the child's sophistication, maturity and likelihood of rehabilitation.
24	Utah	Utah Code §§ 78A-6-703.3 and 78A-6-703.5	The juvenile court judge may transfer a juvenile at least 14 years of age but younger than 16 years of age after a hearing considering, among other factors, the juvenile's mental, physical, educational, trauma, and social history.
25	Virginia	Va. Code Ann. § 16.1-269.1	The juvenile court judge may transfer a juvenile at least 14 years of age but younger than 16 years of age after a hearing considering, among other factors, the juvenile's mental and emotional maturity.
26	Washington	Wash. Rev. Code § 13.40.110	The juvenile court judge may transfer a juvenile after a hearing.
27	Wyoming	Wyo. Stat. Ann. § 14-6-237	The juvenile court judge may transfer a juvenile after a hearing considering, among other factors, the sophistication and maturity of the juvenile.

Table B. State Statutes Providing Judicial Discretion in Sentencing Juvenile Offenders Convicted with Murder Who Were Charged as Adults

#	Jurisdiction	Description
1	Alaska	First Degree Murder is punishable by a term of years – at least 30 but not more than 99 years. Alaska Stat. Ann. § 12.55.125. In sentencing, the court is to consider the past criminal history of the defendant, the likelihood of rehabilitation, the circumstances of the offense, and the deterrent effect of the sentence. Alaska Stat. Ann. § 12.55.005. The judge has discretion in determining the appropriate sentence, and may consider the mitigating factors enumerated in § 12.55.155 by analogy, which includes whether the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but that significantly affected the defendant's conduct; whether the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant; and whether the conduct of an youthful defendant was substantially a product of physical or mental infirmities resulting from the defendant's age. *State v. Korkow*, 314 P.3d 560, 563 (Alaska 2013) (approving consideration of § 12.55.155 by analogy in first degree murder cases).
2	California	When the defendant is between 16-18 years of age, and a special circumstance (which includes intellectual disability under § 190.4) is found to be true, the court has the discretion to sentence the offender to as little as 25 years. Cal. Penal Code § 190.5. Juveniles under 16 cannot be tried as adults, or face adult life sentences. *See* Addendum, Table A. The judge can consider any mitigating factors that reasonably relate to the defendant, including his mental condition. Cal. Rules of Court 4.423.
3	Connecticut	A juvenile guilty of murder may be sentenced to as little as 25 years, or a maximum of life. Conn. Gen. Stat. Ann. § 53a-35a; Conn. Gen. Stat. Ann. § 53a-54a(c). The Connecticut Sentencing Commission approved recommendations on December 20, 2012 that the *Miller* factors must be

		considered at sentencing in all cases involving crimes committed by individuals under the age of eighteen who are sentenced in adult court. https://criminal.findlaw.com/criminal-procedure/factors-considered-in-determining-sentences.html
4	Delaware	Any person who is convicted of first-degree murder for an offense that was committed before the person had reached the person's eighteenth birthday shall be sentenced to term of incarceration not less than 25 years up to a term of imprisonment for the remainder of the person's natural life without benefit of probation or parole or any other reduction. Del. Code Ann. tit. 11, § 4209A. Per the Delaware Sentencing Accountability Commission Benchbook, the presumptive sentence is 25% of the maximum, and mitigating factors include mental retardation (IQ of 70 or less), inducement by others, duress, and physical/mental impairment. SENTAC Benchbook 2020, https://cjc.delaware.gov/wp-content/uploads/sites/61/2020/02/Benchbook-2020F.pdf at 110-114. For juvenile offenders tried as adults, sentencing judges should consider the offender's chronological age, immaturity, impetuosity, failure to appreciate risks and consequences, family and home environment, peer pressure, medical history, learning capacity, and other factors – these factors may provide for a departure from the standard sentencing range. *Id*. at 119.
5	District of Columbia	The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment; no person who was less than 18 years of age at the time the murder was committed shall be sentenced to life imprisonment without release. D.C. Code Ann. § 22-2104. Mitigating factors in determining the length of sentence include the defendant's capacity to appreciate the wrongfulness of his or her conduct. District of Columbia Sentencing Commission, Voluntary Sentencing Guidelines Manual August 12, 2020 at 34. https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publicatio

		n/attachments/2020_SCDC_Guidelines_Manual_Complete_August31.pdf
6	Florida	Juveniles who commit murder are to be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in accordance with *Miller*, the court finds that life imprisonment is an appropriate sentence. If the court finds that life imprisonment is not an appropriate sentence, such person shall be punished by a term of imprisonment of at least 40 years. Fla. Stat. Ann. § 775.082. In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court considers multiple factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to: (a) The nature and circumstances of the offense committed by the defendant. (b) The effect of the crime on the victim's family and on the community. (c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense. (d) The defendant's background, including his or her family, home, and community environment. (e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense. (f) The extent of the defendant's participation in the offense. (g) The effect, if any, of familial pressure or peer pressure on the defendant's actions. (h) The nature and extent of the defendant's prior criminal history.

		(i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment. (j) The possibility of rehabilitating the defendant. Fla. Stat. Ann. § 921.1401.
7	Illinois	When a person commits an offense and the person is under 18 years of age at the time of the commission of the offense, the court, at the sentencing hearing, shall consider the following additional factors in mitigation in determining the appropriate sentence: (1) the person's age, impetuosity, and level of maturity at the time of the offense, including the ability to consider risks and consequences of behavior, and the presence of cognitive or developmental disability, or both, if any; (2) whether the person was subjected to outside pressure, including peer pressure, familial pressure, or negative influences; (3) the person's family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma; (4) the person's potential for rehabilitation or evidence of rehabilitation, or both; (5) the circumstances of the offense; (6) the person's degree of participation and specific role in the offense, including the level of planning by the defendant before the offense; (7) whether the person was able to meaningfully participate in his or her defense; (8) the person's prior juvenile or criminal history; and (9) any other information the court finds relevant and reliable, including an expression of remorse, if appropriate. However, if the person, on advice of counsel chooses not to

		make a statement, the court shall not consider a lack of an expression of remorse as an aggravating factor. 730 Ill. Comp. Stat. Ann. 5/5-4.5-105. For the crime of murder in the first degree, the court shall impose a sentence of not less than 40 years of imprisonment. *Id*.
8	Indiana	A person, including juveniles, who commits murder shall be imprisoned for a fixed term of between 45 and 65 years, with the advisory sentence being 55 years. Only a juvenile between the ages of 16-18 years old may be sentenced to life imprisonment without parole, pursuant to a *Miller* hearing, but an individual with an intellectual disability cannot be so sentenced. Ind. Code Ann. § 35-50-2-3.
9	Kentucky	When a person is convicted of a capital offense, he shall have his punishment fixed […] at a term of imprisonment for life without benefit of probation or parole until he has served a minimum of twenty-five (25) years of his sentence, or to a sentence of life, or to a term of not less than twenty (20) years nor more than fifty (50) years. Ky. Rev. Stat. Ann. § 532.030(1). Ky. Rev. Stat. Ann. § 640.040 prohibits life without parole for juvenile offenders.
10	Maine	A person convicted of the crime of murder may be sentenced to as little as 25 years as prison, with a maximum sentence of life. Me. Rev. Stat. tit. 17-A, § 1603. Mitigating factors are to be considered in sentencing. Me. Rev. Stat. tit. 17-A, § 1602.
11	Michigan	If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. Mich. Comp. Laws Ann. § 769.25. Michigan's intricate sentencing guidelines allow for the

		consideration of youth and other mitigating factors. Mich. Comp. Laws Ann. § 777.
12	Missouri	A person found guilty of murder in the first degree who was under the age of eighteen at the time of the commission of the offense shall be sentenced to a term of life without eligibility for probation or parole as provided in section 565.034, life imprisonment with eligibility for parole, or not less than thirty years and not to exceed forty years imprisonment. When assessing punishment in all first degree murder cases in which the defendant was under the age of eighteen at the time of the commission of the offense or offenses, the judge in a jury-waived trial shall consider, or the judge shall include in instructions to the jury for it to consider, the following factors: (1) The nature and circumstances of the offense committed by the defendant; (2) The degree of the defendant's culpability in light of his or her age and role in the offense; (3) The defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense; (4) The defendant's background, including his or her family, home, and community environment; (5) The likelihood for rehabilitation of the defendant; (6) The extent of the defendant's participation in the offense; (7) The effect of familial pressure or peer pressure on the defendant's actions; (8) The nature and extent of the defendant's prior criminal history, including whether the offense was committed by a person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions;

		(9) The effect of characteristics attributable to the defendant's youth on the defendant's judgment; and (10) A statement by the victim or the victim's family member as provided by section 557.041 until December 31, 2016, and beginning January 1, 2017, section 595.229. Mo. Ann. Stat. § 565.033.
13	Montana	A juvenile convicted of murder may be sentenced to life imprisonment, or imprisonment in the state prison for a term of not less than 10 years or more than 100 years. Mont. Code Ann. § 45-5-102. Mandatory minimum sentences prescribed by law, including mandatory life sentences, do not apply if the offender was under 18 at the time of committing the offense, or if the offender's mental capacity was significantly impaired. Mont. Code Ann. § 46-18-222. And other mitigating factors are also considered. Mont. Code Ann. § 46-18-222.
14	Nebraska	A juvenile convicted of murder may be sentenced to a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment. In determining the sentence for a juvenile offender, the court shall consider mitigating factors which led to the commission of the offense. The convicted person may submit mitigating factors to the court, including, but not limited to: (a) The convicted person's age at the time of the offense; (b) The impetuosity of the convicted person; (c) The convicted person's family and community environment; (d) The convicted person's ability to appreciate the risks and consequences of the conduct; (e) The convicted person's intellectual capacity; and (f) The outcome of a comprehensive mental health evaluation of the convicted person conducted by an

		adolescent mental health professional licensed in this state. The evaluation shall include, but not be limited to, interviews with the convicted person's family in order to learn about the convicted person's prenatal history, developmental history, medical history, substance abuse treatment history, if any, social history, and psychological history. Neb. Rev. Stat. Ann. § 28-105.02.
15	Nevada	The court may sentence a juvenile convicted of murder to a term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served, or to life with a possibility of parole after 20 years, at the sentencer's discretion. Nev. Rev. Stat. Ann. § 200.030.
16	New Jersey	Juveniles convicted of murder may be sentenced a term of 30 years, during which the person shall not be eligible for parole, or to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole. N.J. Stat. Ann. § 2C:11-3. Mitigating circumstances in determining which sentence is proportionate include youth. NJ LEGIS 110 (2020), 2020 NJ Sess. Law Serv. Ch. 110 (ASSEMBLY 4373).
17	New Mexico	A person sentenced as a serious youthful offender or as a youthful offender may be sentenced to less than the basic or mandatory sentence prescribed by statute for adult offenders. N.M. Stat. Ann. § 31-18-13. When an alleged serious youthful offender is found guilty of first degree murder, the court may sentence the offender to less than, but not exceeding, the mandatory term for an adult. N.M. Stat. Ann. § 31-18-15.3.
18	New York	All juvenile homicide offenders age 13 or older may be sentenced to a maximum indeterminate sentence of life. The lower end of this maximum sentence is 15 years for 16- and 17-year-olds, 7.5 years for 14- and 15-year-olds, and 5 years for 13-year-olds. N.Y. Penal Law § 70.05

19	North Dakota	Notwithstanding any other provision of law, a court may reduce a term of imprisonment imposed upon a defendant convicted as an adult for an offense committed and completed before the defendant was eighteen years of age if: a. The defendant has served at least twenty years in custody for the offense; b. The defendant filed a motion for reduction in sentence; and c. The court has considered the factors provided in this section and determined the defendant is not a danger to the safety of any other individual, and the interests of justice warrant a sentence modification. N.D. Cent. Code Ann. § 12.1-32-13.1.
20	Oregon	A mandatory sentencing scheme which does not consider mitigating circumstances either at transfer from juvenile court or in sentencing is unconstitutional. *State v. Link*, 297 Or. App. 126, 158, *review allowed*, 365 Or. 556, 451 P.3d 1000 (2019).
21	Pennsylvania	A person who at the time of the commission of the offense of first degree murder was 15 years of age or older shall be sentenced to a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 35 years to life. 18 Pa. Stat. and Cons. Stat. Ann. § 1102.1. Mitigating circumstances are considered. 204 Pa. Code § 303.13.
22	South Carolina	A juvenile guilty of murder may be sentenced to a mandatory minimum term of imprisonment for thirty years to life. The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence. These factors include the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially

		impaired, the age or mentality of the defendant at the time of the crime, and whether the defendant was below the age of eighteen at the time of the crime. S.C. Code Ann. § 16-3-20.
23	South Dakota	If the defendant is under the age of eighteen years at the time of the offense, the maximum sentence may be a term of years in the state penitentiary. S.D. Codified Laws § 22-6-1. The penalty of life imprisonment may not be imposed upon any defendant for any offense committed when the defendant was less than eighteen years of age. S.D. Codified Laws § 22-6-1.3. The *Miller* factors (1) the chronological age of the juvenile, (2) the juvenile's immaturity, impetuosity, irresponsibility, and recklessness, (3) family and home environment, (4) incompetency in dealing with law enforcement and the adult criminal justice system, (5) the circumstances of the crime, and, most importantly, (6) the possibility for rehabilitation, are to be considered. *State v. Quevedo*, 947 N.W.2d 402 (2020).
24	Utah	A juvenile convicted of murder may be sentenced to an indeterminate prison term of not less than 25 years and that may be for life. Utah Code Ann. § 76-3-207.7. Notwithstanding any provision of law, a person may not be sentenced to life without parole if convicted of a crime punishable by life without parole if, at the time of the commission of the crime, the person was younger than 18 years of age. The maximum punishment that may be imposed on a person described in this section is an indeterminate prison term of not less than 25 years and that may be for life. Utah Code Ann. § 76-3-209. Utah's sentencing guidelines include mental health.
25	Vermont	The punishment for murder in the first degree shall be imprisonment for life and for a minimum term of 35 years unless a jury finds that there are aggravating or mitigating factors which justify a different minimum term. If the jury finds that the mitigating factors outweigh any aggravating factors, the court may set a minimum term at less than 35 years but not less than 15 years. Vt. Stat. Ann. tit. 13, § 2303(b). Mitigating factors shall include the following:

		(1) The defendant had no significant history of prior criminal activity before sentencing. (2) The defendant was suffering from a mental or physical disability or condition that significantly reduced his or her culpability for the murder. (3) The defendant was an accomplice in the murder committed by another person and his or her participation was relatively minor. (4) The defendant, because of youth or old age, lacked substantial judgment in committing the murder. (5) The defendant acted under duress, coercion, threat, or compulsion insufficient to constitute a defense but which significantly affected his or her conduct. (6) The victim was a participant in the defendant's conduct or consented to it. (7) Any other factor that the defendant offers in support of a lesser minimum sentence. *Id*.
26	Washington	The court may sentence a juvenile offender guilty of first degree murder to a term of twenty-five years to life. Wash. Rev. Code Ann. § 9.94A.510. Murder in the first degree: 23 years and 4 months to 40 years. *Id*. The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences: the defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct, the defendant, with no apparent predisposition to do so, was induced by others to participate in the crime, or the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Wash. Rev. Code Ann. § 9.94A.535.

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. A. P. 16(k), I hereby certify that to the best of my knowledge the foregoing brief complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to Mass. R. A. P. 17, the pertinent portions of Mass. R. A. P. 16, Mass. R. App. P. 18, and Mass. R. A. P. 20; and

This brief complies with the type-volume limitation of Mass. R. App. P. 20(a)(3)(E) because it was prepared in Microsoft Word and the parts of the brief required by Rule 16(a)(5)-(11) that are subject to page limits or a word count contain less than 7,500 words (6,247 words) in a proportionally spaced font in 14-point or greater (Times New Roman 14-point).

/s/ J. Leon Smith, Jr.
J. Leon Smith, Jr.

CERTIFICATE OF SERVICE

NO. SJC-12382

I certify that this brief was served upon the attorney of record for each party by complying with this Court's directives on electronic filing through the Tyler efile system, with electronic service to:

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