SUPREME JUDICIAL COURT

OF THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-09265	and	No. SJC-11693
COMMONWEALTH, Appellee		COMMONWEALTH, Appellee
v.		v.
JASON ROBINSON, Appellant		SHELDON MATTIS, Appellant

On Appeal from an Order of the Suffolk Superior Court

BRIEF OF AMICI CURIAE RETIRED MASSACHUSETTS JUDGES, THE BOSTON BAR ASSOCIATION, AND THE MASSACHUSETTS BAR ASSOCIATION IN SUPPORT OF APPELLANTS

Counsel for Amici Curiae

Kenneth J. Parsigian (BBO # 550770)
Avery E. Borreliz (BBO # 705153)
Erin M. Haley (BBO # 711035)
LATHAM & WATKINS LLP
200 Clarendon Street
Boston, Massachusetts 02116
(617) 880-4500
kenneth.parsigian@lw.com
avery.borreliz@lw.com
erin.haley@lw.com

Massachusetts Bar Association

By its General Counsel
and Chief Operating Officer
Martin W. Healy
BBO No. 553080
20 West St.
Boston, MA 02111
(617) 338-0500
mhealy@massbar.org

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RULE 17 DECLARATION BY ALL AMICI CURIAE AND COUNSEL

This brief is submitted pursuant to Mass. R. A. P. 17(a), 489 Mass. 1601 (2022) (allowing the filing of amicus briefs when solicited by an appellate court) and this Court's August 24, 2022 amicus announcement. No party or party's counsel authored any part of this brief, and no party, person, or entity other than amici, their members, or their counsel made any monetary contribution intended to fund preparation or submission of this brief. *See* Mass. R. A. P. 17(c)(5), 489 Mass. 1601 (2022). Neither amici nor their counsel represents or represented any of the parties in the present appeal in another proceeding involving similar issues, and neither amici nor their counsel was a party or represented a party in a proceeding or legal transaction at issue in the present appeal. *See id.*

IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are a group of former Massachusetts judges, the Boston Bar Association, and the Massachusetts Bar Association. Amici submit this brief in support of appellants to aid the Court as it "revisit[s] the boundary between defendants who are seventeen years old and thus shielded from the most severe sentence of life without the possibility of parole, and those who are eighteen years old and therefore exposed to it." *See Commonwealth* v. *Watt*, 484 Mass. 742, 755–756 (2020). Accordingly, amici set forth that sentencing young offenders who are between the ages of eighteen and twenty ("late adolescents") to life without parole constitutes cruel and unusual punishment.

Individual amici are as follows:

- **Judge Carol S. Ball (ret.)** served as an Associate Justice of the Massachusetts Superior Court for Suffolk County between 1996 and 2015.
- **Judge Jay D. Blitzman (ret.)** served as an Associate Justice and First Justice of the Middlesex Juvenile Court in Massachusetts from 1996 until 2020. Prior to his judicial appointment, he founded and co-founded various youth-orientated organizations, including the Roxbury Youth

Advocacy Project, Citizens for Juvenile Justice, and the Massachusetts Bar Association Juvenile and Child Welfare Section. Judge Blitzman holds numerous academic and leadership positions that involve promoting justice for juveniles and late adolescents, including serving as a faculty member for the Center for Law, Brain & Behavior, and is a lecturer at Harvard, Northeastern, and Boston College law schools.

- **Judge Isaac Borenstein (ret.)** served as an Associate Justice of the Commonwealth's Lawrence District Court between 1986 and 1992 and of the Massachusetts Superior Court between 1992 and 2008. Judge Borenstein now serves as a visiting lecturer in law at Boston University School of Law.
- **Judge Robert Cordy (ret.)** served as an Associate Justice of the Massachusetts Supreme Judicial Court from 2001 until 2016. Prior to his service on the Court, Judge Cordy worked as a public defender, a state and federal prosecutor, a private practitioner, and Chief Legal Counsel to Governor Weld.
- **Judge Terry Craven (ret.)** served as an Associate Justice and First Justice of the Suffolk Juvenile Court in

Massachusetts between 2001 and 2020. In addition to her time on the bench, Judge Craven gained experience working with adolescents and late adolescents in her roles as a probation officer, teacher in the Boston school system, and director of the Herrick Center for Girls in Boston.

- **Judge Leslie Donahue (ret.)** served as an Associate Justice of the Essex and Middlesex Divisions of the Massachusetts Juvenile Court.
- **Judge Kenneth Fishman (ret.)** served as an Associate Justice of the Massachusetts Superior Court for Middlesex County from 2002 to 2020.
- **Judge Patricia A. Flynn (ret.)** served as an Associate Justice of the Middlesex Juvenile Court in Massachusetts from 2003 to 2018. Prior to becoming an attorney, Judge Flynn garnered eight years of experience working with juvenile probationers as a probation officer.
- **Judge Gail Garinger (ret.)** served as an Associate Justice and First Justice of the Middlesex Juvenile Court in Massachusetts between 1995 and 2008. Judge Garinger has

served as the Massachusetts Child Advocate and as Director of the Commonwealth's Child and Youth Protection Unit.

- **Judge Nancy Gertner (ret.)** served as a United States District Court Judge for the District of Massachusetts from 1994 to 2011. Judge Gertner has written and spoken extensively on various juvenile justice and criminal justice issues, including sentencing theories and addressing pervasive discrimination. She now serves as managing director of the Center for Law, Brain & Behavior and is a Senior Lecturer on Law at Harvard Law School.
- **Judge Martha Grace (ret.)** served as a Justice of the Massachusetts Juvenile Court from 1990 to 1998. Between 1998 and 2009, Judge Grace presided as Chief Justice of the Juvenile Court.
- **Judge Sydney Hanlon (ret.)** began her career as a prosecutor, serving at the county, state, and federal levels between 1975 and 1990. In 1990, she was appointed an Associate Justice and later the First Justice of the Dorchester District Court (now the Dorchester Division of the Boston Municipal Court), and served in that court until 2009. Judge

Hanlon then served as an Associate Justice of the Massachusetts Appeals Court until 2021, including one additional year at the Appeals Court on recall.

- **Judge Leslie Harris (ret.)** served as an Associate Justice of the Suffolk Juvenile Court in Massachusetts between 1994 and 2014. During his twenty years on the Juvenile Court, Judge Harris presided over thousands of cases involving juvenile defendants. Before his judgeship, Judge Harris worked as a probation officer, as a public defender with Roxbury Defenders, and with juvenile offenders as Chief of the Suffolk County District Attorney's Juvenile Division.
- **Judge Geraldine Hines (ret.)** served as an Associate Justice of the Massachusetts Supreme Judicial Court from 2014 to 2017. Prior to her tenure on the Supreme Judicial Court, Judge Hines had served as an Associate Justice of the Massachusetts Superior Court and Associate Justice of the Massachusetts Appeals Court.
- **Judge Bertha Josephson (ret.)** served as an Associate Justice of the Massachusetts Chicopee District Court from 1992 to 1994 and the Massachusetts Superior Court from

1994 to 2016. Following her time on the bench, Judge Josephson was appointed to serve as a hearing officer with the Community Police Hearing Board for the City of Springfield.

- **Judge Stephen Limon (ret.)** served as an Associate Justice of the Suffolk Juvenile Court in Massachusetts between 1994 and 2016. He subsequently served as a Statutory Recall Judge in the Suffolk and Essex County Juvenile Courts until his retirement in 2020 and as trustee emeritus of the Flaschner Judicial Institute. Judge Limon has worked as an attorney for the Massachusetts Defenders Committee, court specialist for the Committee on Criminal Justice, executive director of the Judicial Conduct Commission, Assistant Attorney General, district court supervisor, legal counsel to Attorney General Harshbarger, and adjunct professor of law.
- **Judge John Lu (ret.)** served as an Associate Justice of the Superior Court from 2006 to 2021 and an Associate Justice of the Boston Municipal Court from 2001 to 2006. He chaired the Sentencing Commission from 2014 to 2018 when the Commission accomplished its first overhaul of the Advisory Sentencing Guidelines in twenty-one years. He participates in

various local and national sentencing initiatives and is an adjunct faculty member at the University of Massachusetts Lowell School of Criminology and Justice Studies.

- **Judge James McHugh (ret.)** served as an Associate Justice on the Massachusetts Superior Court from 1985 to 2001. Judge McHugh subsequently served as an Associate Justice on the Massachusetts Appeals Court from 2001 to 2012.
- **Judge Christopher Muse (ret.)** served as an Associate Justice of the Massachusetts Superior Court from 2001 to 2018. Before his tenure on the bench, Judge Muse taught in the Boston public school system. He began his legal practice at the Middlesex County Indigent Defender program, where juveniles and young offenders comprised the majority of his cases.
- **Judge Tina Page (ret.)** served as an Associate Justice of the Massachusetts Superior Court from 1998 to 2018. While on the bench, she served as Chair of the Superior Court Bail Committee. Additionally, Judge Page has taught at Western New England University School of Law.

- **Judge Mary-Lou Rup (ret.)** served as an Associate Justice of the Massachusetts Superior Court from 1992 to 2018. During her tenure, Judge Rup served on the Civil, Criminal, Education, and Law Clerks Committees. She currently serves as senior counsel at Bulkley, Richardson and Gelinas, LLP.
- **Judge Francis Spina (ret.)** served as a Justice on the Massachusetts Supreme Judicial Court from 1999 to 2016. Prior to his tenure on the Supreme Judicial Court, Judge Spina served six years as an Associate Justice on the Massachusetts Superior Court and Massachusetts Appeals Court.
- **Judge Kathe M. Tuttman (ret.)** served as an Associate Justice of the Massachusetts Superior Court between 2006 and 2021.

Individual amici are joined by the Boston Bar Association ("BBA") and Massachusetts Bar Association ("MBA"):

The **Boston Bar Association** traces its origins to meetings convened by John Adams, who provided pro bono representation to the British soldiers prosecuted for the Boston Massacre and went on to become the nation's second president. The BBA's mission is to advance

the highest standards of excellence for the legal profession, to serve the community at large, and to advocate for access to justice.

In keeping with that mission, the BBA has long expressed concern about the use of mandatory minimum criminal sentences, the treatment of young people in the justice system, and the pernicious and persistent racial and ethnic disparities implicated in sentencing throughout that system. In 2018, the BBA filed amicus briefs in *Commonwealth v. Lugo*, 482 Mass. 94 (2019), and *Commonwealth v. Lutskov*, 480 Mass. 575 (2018), arguing for individualized sentencing and urging the Court to build on its own jurisprudence in this area by following scientific advances in brain development.

The **Massachusetts Bar Association** is a nonprofit organization founded in 1910 that serves the legal profession and the public by promoting legal education, professional excellence, diversity and unity in the profession, and by publicly advocating for the sound administration of justice and respect for the law. It is the largest bar association in Massachusetts.

The MBA's House of Delegates is comprised of its officers, eighteen regional delegates, seven at-large delegates, chairs of nineteen section councils, and others; it also has representative seats for every

county bar association, many other statewide legal associations focused on specific practice areas, and all major diversity bar associations in the Commonwealth.

With the assistance of the MBA's President, Chief Legal Counsel, and Amicus Committee, the House of Delegates determines whether to file any amicus curiae on behalf of the MBA. Concluding that the issues raised in the cases at bar affect the administration of justice and the constitutional protections provided to young people in the Commonwealth of Massachusetts, the House of Delegates authorized the MBA to join in the filing of this amicus brief.

The MBA had joined in an amicus brief in *Diatchenko* v. *District Attorney for the Suffolk Dist.*, 466 Mass. 655 (2013), urging the court to decide the case as it did. In light of modern scientific information about the similarity in the brains of adolescents and their capacity for rehabilitation, and in view of emerging standards of decency in this Commonwealth, the MBA supports extending the state constitutional protections established by the Court's decision in *Diatchenko* to include individuals who were eighteen, nineteen, or twenty years old at the time of their crime.

SUMMARY OF ARGUMENT

This Court asks whether it should extend its holding in *Diatchenko* v. *District Attorney for the Suffolk Dist.*, 466 Mass. 655 (2013) and hold that the imposition of a mandatory sentence of life without parole for those convicted of first degree murder, who were eighteen through twenty years old at the time of the crime, violates art. 26 of the Massachusetts Declaration of Rights. Though the Court asks whether a mandatory sentence of life without parole violates art. 26, *Diatchenko* held that ***any*** imposition of life without parole—mandatory or not—constitutes cruel or unusual punishment for juvenile offenders.

Amici set forth two arguments based on their collective experience interacting with late adolescent offenders on the bench and in practice as to why this Court's holding in *Diatchenko* should be ***fully extended*** and eliminate ***all*** life without parole sentences for late adolescents. First, in the decade since *Diatchenko* was decided, developments in neuroscience have shown that the scientific groundwork on which *Diatchenko* relied applies equally to late adolescents aged eighteen to twenty. As the growing body of scientific research shows, and as Superior Court Judge Ullmann found on remand, late adolescents do not magically transform in the two or three

years after turning eighteen. *See* 23–25, *infra*. On the contrary, late adolescent offenders share the same attributes as juvenile offenders for which this Court held life without parole categorically inappropriate: late adolescents' brain development renders them less culpable for their offenses and much more able to rehabilitate and desist from crime than adult offenders. *See* 23–28, *infra*.

Second, amici argue this Court should extend *Diatchenko* in order to avoid sentencing schemes that would promote inconsistent and discrepant sentences for late adolescents. *Diatchenko* properly rejected a system that would call on sentencing judges to conduct sentencing hearings—like those required under *Miller* v. *Alabama*, 567 U.S. 460 (2012)—to determine whether life without parole is appropriate for any late adolescents convicted of first degree murder. Such hearings invite inconsistencies, are influenced by unconscious bias, and ask judges to make impossible predictions about whether young offenders are "permanently incorrigible." Respectfully, amici implore this Court not to burden sentencing judges with the impossible task of determining permanent incorrigibility for offenders who are, neurologically, the equivalent to juvenile offenders. *See* 29–40, *infra*. Amici's cumulative experience both on the bench and in practice confirms that the

determination as to whether a late adolescent offender can be rehabilitated is appropriately made by the parole board ***after*** the opportunity for rehabilitation. *See* 40–45, *infra*. For the reasons advanced below, amici respectfully request this Court extend its own reasoning from *Diatchenko* and hold that ***any*** life without parole sentence for late adolescents—not just mandatory sentences—violates art. 26.

ARGUMENT

I. Any Imposition of Life Without Parole is Unconstitutional as Applied to Late Adolescents.

In 2013, this Court drew a line and determined that, based on the scientific evidence available, ***any*** sentence of life without parole for offenders under eighteen violated the Commonwealth's prohibition on cruel and unusual punishment. *See Diatchenko*, 466 Mass. at 658–659. It is time to advance that line. The Court's opinion in *Diatchenko* reflects what amici know based on their shared involvement in the Massachusetts court system: the circumstances attendant to youth make late adolescent offenders less culpable for their offenses and better disposed for rehabilitation. Amici urge the Court to hold—just as it did in *Diatchenko* based on the same scientific principles, same penological

justification, and same human reasoning—that life without parole sentences are categorically unconstitutional for late adolescents.

A. Late Adolescents Share More Cognitive Similarities with Juveniles than with Adults and Should be Treated as Such.

In amici's experience, on the bench and in practice, late adolescents are emotionally, physically, cognitively, and behaviorally indistinguishable from juveniles. Given this inability to meaningfully distinguish between late adolescent and juvenile offenders, late adolescents warrant the same protection against a sentence of life without parole as their under-eighteen counterparts. As Judge Ullmann recognized, clear and growing scientific evidence demonstrates that late adolescents ages eighteen to twenty, like juveniles, are still developing neurologically. Ex. A, *Commonwealth* v. *Robinson*, Mass. Super. Ct., No. 0084CR10975, at 15–17 (Suffolk County July 20, 2022) (finding late adolescents more similar to juveniles than adults twenty-one and over in terms of lowered self-regulation, proclivity for sensation seeking, susceptibility to peer influence, and capacity to change); *see* Ex. B, *United States* v. *Rosario*, U.S. Dist. Ct., No. 12-CV-3432 (ARR), slip op. at 12 (E.D.N.Y. Aug. 9, 2018) ("[N]o magic transformation occurs when a juvenile reaches the age of 18.").

Indeed, the "penological justifications for imposing life in prison without the possibility of parole[:] incapacitation, retribution, and deterrence[,]" that are rendered "suspect" by the "distinctive attributes of juvenile offenders" do not dissipate the moment a person turns eighteen. *See Diatchenko*, 466 Mass. at 670–671, citing *Graham* v. *Florida*, 560 U.S. 48, 71–73 (2010); *Miller*, 567 U.S. at 471–473. Rather, "recent scientific research establish[es] that these same 'signature qualities of youth' extend into the period of late adolescence . . . ." Insel, Tabashneck, Shen, Edersheim & Kinscherff, Center for Law, Brain & Behavior, White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers 7 (2022), https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/ (reviewed by amici Hon. Jay D. Blitzman and Hon. Nancy Gertner). Over the last decade, neuroscience has firmly established that the brains of eighteen to twenty year old adolescents "are not as fully developed as the brains of older individuals in terms of their capacity to avoid conduct that is seriously harmful to themselves and others." Ex. A, at 20. And thus late adolescents, like juveniles, are less criminally culpable for their conduct. *Id.* As with those under eighteen, this "mismatch" between culpability and the

severity of life without parole renders any such sentence inappropriate for late adolescents. *Id.*; *see Diatchenko*, 466 Mass. at 658–659 (explaining even "the discretionary imposition of [life without parole] . . . violates art. 26" because "the unique characteristics of juvenile offenders" render the punishment "unconstitutionally disproportionate").

Moreover, extending *Diatchenko* would align not only with the science that late adolescent offenders are similar to juvenile offenders, but with other initiatives in the Commonwealth. A recent legislative task force recommended the creation of a "young adult offender" category within the Commonwealth's Juvenile Court system, and an expansion of Department of Youth Services programming to all facilities serving late adolescents. *See* Commonwealth of Mass. Task Force on Emerging Adults in the Criminal Justice Sys., Emerging Adults in the Massachusetts Criminal Justice System: Report of the Criminal Justice Task Force on Juvenile Age, 2020 Senate Report No. 2840, at 9, 26. In support of such efforts, former Suffolk County District Attorney Rachael Rollins stated, "[b]y pushing [late adolescents], who research tells us are still developing, into the adult justice system, we are willfully ignoring decades of data and developmental science and

failing to protect the health and safety of communities as public servants are sworn to do." Press Release, Fair & Just Prosecution, Prosecutors Urge Policymakers to Raise the Age of the Juvenile Justice System to 21 (June 27, 2019), https://fairandjustprosecution.org/wp-content/uploads/2019/06/MA-RTA-Release-FINAL.pdf. Accordingly, as the Commonwealth acknowledges, scientific developments plainly support that late adolescents in Massachusetts, as with individuals under eighteen, should not be considered among the most criminally culpable.

B. Like Juvenile Offenders, Late Adolescent Offenders Have Great Propensity for Rehabilitation, Rendering Life Without Parole Inappropriate.

Though there are myriad reasons why life without parole is inappropriate for late adolescent offenders, amici believe the most significant is late adolescent offenders' propensity for rehabilitation. Amici cannot overstate that a sentence of life without parole eliminates any hope of release and denies late adolescents the potential for rehabilitation. Yet throughout their service across Massachusetts's courts and its legal system, amici have been repeatedly struck by the ability of young offenders, including those convicted of homicide, to turn their lives around and change and reform as they grew older.

Certainly, not every offender will be successfully rehabilitated, but amici adamantly believe both that many are capable of such reform if they are given the opportunity and that, as this Court recognized in *Diatchenko* and as discussed in detail below, it is impossible to identify with confidence which offenders are permanently incorrigible at the time of sentencing.

Amici's experience watching late adolescent offenders transform their lives is borne out by the scientific literature: youth is strongly correlated with criminal behavior, and high rates of desistance from antisocial conduct occur as youth mature into young adulthood. *See, e.g.*, Ulmer & Steffensmeier, The Age and Crime Relationship: Social Variation, Social Explanations, *in* The Nurture Versus Biosocial Debate in Criminology 377, 378 (Beaver, Barnes, & Boutwell eds., 2015) ("It is now a truism that [young] age is one of the strongest factors associated with criminal behavior."). Known as the "age-crime curve," there is a clear pattern of juvenile offending increasing through adolescence and dropping off in an offender's twenties. *See* Steinberg, The Influence of Neuroscience on US Supreme Court Decisions About Adolescents' Criminal Culpability, 14 Nature Revs. Neuroscience 513,

515 & fig.1 (2013). That trend is evident across the criminal justice system:

> Criminologists know that individuals 'age out' of crime. Any parent of a teenager understands that misbehavior, often serious, is all too common at this stage. FBI arrest data show that the rate of arrest for teenage boys rises sharply from the mid-teen years through the early 20s but then declines significantly. Arrests for robbery, for example, peak at age 19 but decline by more than half by age 30 and by three-quarters by age 40. The same is true for other violent crimes. The reason is clear. As teenage boys enter their 20s, they lose their impulsivity, get jobs, find life partners, form families, and generally take on adult roles. Violent behavior becomes less attractive.

Gertner & Mauer, Taking a Second Look at Life Imprisonment, Bos. Globe (Nov. 7, 2019) [hereinafter Gertner & Mauer]. Indeed, most offenders desist entirely from crime by their mid-twenties and the rates of all kinds of crime plunge with age. As a result, the likelihood of a late adolescent offender becoming a chronic adult offender is small: late adolescents are simply naturally more susceptible to rehabilitation than adult offenders. "[E]ach of us is more than the worst things we have done. This is especially so for children and adolescents." Blitzman, Shutting Down the School-to-Prison Pipeline, A.B.A. Hum. Rts. Mag. (Oct. 12, 2021). By extending *Diatchenko*, this Court will afford all late adolescent offenders the *potential* for a reformed life.

II. This Court Should Extend *Diatchenko* to Late Adolescent Defendants.

As explained above, amici believe that no late adolescent offender should be sentenced to life without parole, mandatory or otherwise. A categorical ban on life without parole sentences for late adolescents is warranted because any alternative, such as *Miller* hearings, would lead to inconsistent sentencing, invite error, and compel judges to make unknowable predictions about future behavior. The risk that any one late adolescent offender is wrongly sentenced to life without parole based on unconscious bias or judges' inability to predict behavior decades in the future is too great to allow discretionary imposition of life without parole sentences under a *Miller*-like framework. Because *Diatchenko*'s absolute bar on life without parole would apply equally to all late adolescents, the more equitable and prudent path forward is for this Court to extend its own precedent and eliminate life without parole sentences for all late adolescent offenders.

A. *Miller* Hearings Would Lead to Inconsistent Sentencing.

A core principle of our legal system is that just sentencing requires that like cases be treated alike; discretion, like that employed in *Miller* hearings, stands to threaten that core principle. *See* Hart, The

Concept of Law 159 (3d ed. 2012); Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 624 (1958) ("[O]ne essential element of the concept of justice is the principle of treating like cases alike."). Amici strongly believe that, if life without parole sentences are not categorically banned and judges retain the discretion to impose life without parole on late adolescents, it will lead to disparate and arbitrary sentencing.

Amici's belief is evinced in jurisdictions that conduct *Miller* hearings. *Miller* provides five factors for determining if a life without parole sentence is warranted: (1) age, "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "family and home environment"; (3) "circumstances of the [] offense", including extent of participation and peer influence; (4) understanding of legal proceedings; and (5) potential for rehabilitation. *Miller*, 567 U.S. at 477–478. Yet *Miller* does not provide judges with any guidance on how to properly weigh or interpret each factor. Absent guidance, sentencing judges diverge in when, whether, and how they apply the *Miller* factors. *See, e.g.*, *State* v. *Roby*, 897 N.W.2d 127, 148 (Iowa 2017) (highlighting "obvious" difficulty in applying *Miller* factors); *State* v. *Sweet*, 879 N.W.2d 811, 838 (Iowa 2016) (labeling *Miller* factors "fraught with

risks" of inconsistent interpretations); *People* v. *Hyatt*, 316 Mich. App. 368, 437, 441–442 (2016) (Beckering, J., concurring) (characterizing *Miller* hearings as "difficult" and "problematic"); *State* v. *Bassett*, 198 Wash. App. 714, 743 (2017), aff'd, 192 Wash. 2d 67 (2018) (noting *Miller* factors "provide little guidance" for sentencing judges); *see also* Amicus Curiae of Juvenile Justice Clinic for Robert Taylor at 1–2, *People* v. *Taylor*, Mich. Sup. Ct., No. 154994 (Feb. 21, 2022) (contending "disparate interpretations" of *Miller* factors produced arbitrary sentencing of Michigan juveniles).

Indeed, even the Supreme Court has acknowledged *Miller* hearings are inherently disparate. *See Jones* v. *Mississippi*, 141 S. Ct. 1307, 1319 (2021) ("It is true that one sentencer may weigh the defendant's youth differently than another . . . . Some sentencers may decide that a defendant's youth supports a sentence less than life without parole. Other sentencers presented with the same facts might decide that life without parole remains appropriate despite the defendant's youth."). What amici find particularly problematic about *Miller* hearings as applied to late adolescents is that sentencing judges diverge in how they weigh age in sentencing. *Compare, e.g.*, *Roby*, 897 N.W.2d at 145 ("[A]ge is not a sliding scale that necessarily weighs

against mitigation the closer the offender is to turning eighteen years old at the time of the crime." (citations omitted)), *with People v. Palafox*, 179 Cal. Rptr. 3d 789, 795 (Ct. App. 2014) (finding lower court properly discounted significance of age where defendants were "older" and "more mature"). These difficulties will inevitably persist in the context of late adolescents.

Further, though amici are well-aware that judges strive to sentence accurately and fairly, amici collectively acknowledge that unconscious biases may exacerbate the already inconsistent and arbitrary sentencing seen under *Miller*. Of particular concern is that unconscious bias can introduce racial distortions in sentencing. Research has shown that young Black men are often perceived to be older than they are, and that such perceptions may wrongfully lead judges to believe that young Black men are more culpable for their actions than their same-age white counterparts. *See* Goff, Jackson, Di Leone, Culotta & DiTomasso, The Essence of Innocence: Consequences of Dehumanizing Black Children, 106 J. Personality & Soc. Psych. 526, 532 (2014). If judges implicitly (and incorrectly) perceive Black late adolescents as older, and if judges have the discretion to impose life without parole sentences on late adolescents,

they may be more likely to do so for Black late adolescent offenders than for white.

In fact, research confirms that decision-makers often rely on subconscious stereotypes that Black youth are more prone to criminal behavior and therefore punish them more harshly. *See* Nowacki, An Intersectional Approach to Race/Ethnicity, Sex, and Age Disparity in Federal Sentencing Outcomes: An Examination of Policy Across Time Periods, 17 Criminology & Crim. Just. 97, 109 (2017) [hereinafter Nowacki] (finding young Black men were sentenced more punitively than both young white men and young Hispanic men). For example, one analysis found that Black youth comprise 65.8 percent of juvenile life without parole sentences. *See* Mills, Dorn & Hritz, Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway, 65 Am. U. L. Rev. 535, 576 (2016). Similarly, research has shown that young Black men are more likely to be adjudged as hardened criminals than their same-age white counterparts. *See* Nowacki at 107 (finding that young Black men were sentenced more punitively than both young white men and young Hispanic men). And, since *Miller*—which suggested that the "appropriate occasions for sentencing juveniles to [life without parole] [would] be uncommon"—

the racial disparity has worsened. *See Miller*, 567 U.S. at 487. From 2012 to 2018, about 72 percent of children sentenced to life without parole were Black. Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children, Campaign for Fair Sentencing of Youth (Dec. 3, 2018), https://cfsy.org/wp-content/uploads/Tipping-Point.pdf.

Although the Commonwealth does not currently conduct *Miller* hearings, patterns of divergent sentencing have arisen in other contexts and the application of *Miller*-like hearings to late adolescents would further exacerbate this problem. Young adults aged eighteen to twenty-four constitute only 10 percent of Massachusetts's population, but they make up 23 percent of those behind bars in the Commonwealth. *See* Perker & Chester, Emerging Adults: A Distinct Population that Calls for an Age-Appropriate Approach by the Justice System, Harv. Kennedy School, Emerging Adult Just. in Mass. 3 (June 2017). Further, while Black and Latinos represent only 25 percent of Massachusetts residents, they comprise 70 percent of incarcerated late adolescents. *Id.* at 3–4. And, as amici have written, in 2019 Massachusetts ranked first nationally in life without parole sentencing disparities between Latinx and white offenders, and among the highest between Black and white

offenders. *See* Gertner, DA Rollins is on the Right Path in Criminal Justice Reform, Bos. Globe (Apr. 8, 2019). Such disparity is particularly troubling in the context of life without parole sentences, where unconscious biases may dictate the remainder of an offender's life.

Application of criminal punishment that is "pregnant with discrimination" is "not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *See Furman* v. *Georgia*, 408 U.S. 238, 256–257 (1972) (Douglas, J., concurring); *see also* Gants, Lenk, Gaziano, Lowy, Budd, Cypher & Kafker, Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar (June 3, 2020), https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and-the-bar-june-3-2020 ("As judges, we must look afresh at what we are doing, or failing to do, to root out any conscious and unconscious bias in our courtrooms . . . to create in our courtrooms, our corner of the world, a place where all are truly equal."). No judge wants to be the one "whose release decision, however well-grounded, leads to a violent crime," Gertner, Reimagining Judging, Harv. L. Sch., Executive Session of the

Future of Justice Policy (Square One Project) 16 (Jan. 2021), but amici advance the answer to such fears is not to allow judges to sentence late adolescents to die in prison when such decisions are fraught with inconsistency and bias.

B. *Diatchenko* Properly Held that Judges Cannot Accurately Predict "Permanent Incorrigibility" at Sentencing.

Permitting discretionary life without parole sentences under a *Miller*-like framework risks not only inconsistent and disparate practices, but this Court, sister courts, and the Supreme Court have recognized that sentencing judges cannot accurately predict whether a young offender is "permanently incorrigible." In *Diatchenko*, this Court explained that "[g]iven current scientific research on adolescent brain development . . . a conclusive showing of traits such as an irretrievably depraved character, *can never be made, with integrity*, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender." *Diatchenko*, 466 Mass. at 669–670 (emphasis added; internal quotations and citations omitted).

Amici agree with this Court: because a juvenile's brain "is not fully developed . . . by the age of eighteen, a judge cannot find with

confidence that a particular offender, at that point in time, is irretrievably depraved. Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted." *Id.* at 670 (internal citations omitted). Late adolescent offenders' brains are equally undeveloped. Ex. A, at 15–17. Under *Miller*, judges would thus face an impossible charge to predict at the time of sentencing which late adolescents are incapable of reform. *See Miller*, 567 U.S. at 479, quoting *Roper* v. *Simmons*, 543 U.S. 551, 573 (2005); *Graham*, 560 U.S. at 68 (recognizing "great difficulty [the Court] noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption'").

In amici's experience, permanent incorrigibility is unknowable. That opinion is not novel: in 2012, a group of former juvenile court judges advocated to the *Miller* Court that sentencing judges cannot anticipate the person a juvenile offender may grow to become. *See* Brief of Former Juvenile Court Judges as Amici Curiae in Support of

Petitioners at 1, *Miller* v. *Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646 & 10-9647). And other judges have explained:

> [A] district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is 'irretrievably corrupt' at a time when even trained professionals with years of clinical experience would not attempt to make such a determination.

Sweet, 879 N.W.2d at 837. Indeed, a Washington State court noted that "the sentencing court is placed in the impossible position of predicting . . . which juveniles will prove to be irretrievably corrupt. The sentencing court must separate the irretrievably corrupt juveniles from those whose crime reflect transient immaturity – a task even expert psychologists cannot complete with certainty." *Bassett*, 198 Wash. App. at 742; *see Graham*, 560 U.S. at 68, quoting *Roper*, 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.").

Scientific research confirms that it is impossible to accurately predict incorrigibility, *see* Berry, Ending Death by Dangerousness: A

Path to the De Facto Abolition of the Death Penalty, 52 Ariz. L. Rev. 889, 907–908 (2010) ("[I]ncontrovertible scientific evidence demonstrates that future dangerousness determinations are, at best, wildly speculative."), and even more troubling, predictions about future behavior can result in a "false positive problem." *See* Laub & Sampson, Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70, at 289–290 (2003) (explaining limitations of using juvenile risk factors to attempt to predict future criminal behavior). In other words, sentencing judges may be more likely to think a late adolescent offender is incorrigible than to think he or she has the potential for reform. Sampson & Laub, Crime in the Making: Pathways and Turning Points Through Life at 15 (1993) ("Known as the false positive problem, prediction scales often result in the substantial overprediction of future criminality."). This is no small risk: in one study predicting juvenile criminal behavior, the false positive rate was 87 percent. *See* Loeber, Menting, Lynman, Moffitt, Stouthamer-Loeber, Stallings, Farrington & Pardini, Findings from the Pittsburgh Youth Study: Cognitive Impulsivity and Intelligence as Predictors of the Age-Crime Curve, 51 J. Am. Acad. of Child & Adolescent Psychiatry 1136, 1146 (2012) (noting study's inability to predict who would reoffend into adulthood).

Those odds represent what should be plainly viewed as an unacceptable risk when considering the seriousness of life without parole sentences. Extending *Miller* would ask judges to take on an impossible assessment and risk sentencing a late adolescent who could be reformed to life without parole. Absent any ability to reliably predict future criminality, amici submit that no late adolescent offender should be denied the possibility for reform and change.

C. Because Judges Cannot Accurately Determine Incorrigibility While the Defendant is Still Young, There Must be a Meaningful Opportunity to Reassess Incarceration.

Based on their years of experience both on the bench and in practice, amici believe that judges simply do not have sufficient information at sentencing to determine whether a late adolescent offender—someone who is only in the first twenty years of their life—will remain a danger to society after a near-equal amount of time in prison. *See* Gertner & Mauer ("[T]here's no way of knowing on the date of sentencing what a person will be like two decades hence. Many individuals . . . undergo personal transformations while imprisoned."). Accordingly, as the *Diatchenko* Court held for juvenile offenders, amici assert that the parole board is better suited to determine whether and

when a late adolescent offender is afforded the opportunity to re-enter society:

> At the appropriate time, it is the purview of the Massachusetts parole board to evaluate the circumstances surrounding the commission of the crime, including the age of the offender, together with all relevant information pertaining to the offender's character and actions during the intervening years since conviction. By this process, a juvenile homicide offender will be afforded a meaningful opportunity . . . for parole suitability.

Diatchenko, 466 Mass. at 674; *see State* v. *Williams-Bey*, 167 Conn. App. 744, 780 (2016) ("Whether the defendant has sufficiently rehabilitated himself to safely rejoin society . . . is precisely the determination that the parole board is statutorily designated to make."); *Hyatt*, 316 Mich. App. at 440 (Beckering J., concurring) (finding parole board best equipped to determine parole eligibility where board benefits from passage of time, incarceration records, and juvenile's further cognitive development). Amici see no reason why the parole board cannot do the same for late adolescent offenders.

Between an initial sentencing and a parole board hearing, the totality of evidence grows exponentially. Sentencing judges are limited to assessing the nature of the crime, the offender's age at the time of the crime, and the circumstances of the offender's young life to date. By

contrast, the parole board weighs myriad evidence unavailable at the time of initial sentencing: success of institutional adjustment; length of positive adjustment; disciplinary records while incarcerated; time spent in lower security; participation in educational, vocational, treatment, and rehabilitation programs while incarcerated; work evaluations; acceptance or denial of responsibility; desire and motivation to rehabilitate; presence of a support network upon release; and employment prospects upon release. *See generally*, *e.g.*, Ex. C, *In re Andrews*, Mass. Parole Bd., No. W60418 (July 5, 2022) (finding offender who was under eighteen at time he committed first degree murder was suitable for parole where offender completed two years in lower security without incident and awaited support network of family, counseling services, and employment upon release); Ex. D, *In re Hamilton*, Mass. Parole Bd., No. W53919 (July 5, 2022) (granting parole in accordance with *Diatchenko* where offender benefited from programming and treatment, accepted responsibility, and appeared remorseful); Ex. E, *In re Laporte*, Mass. Parole Bd., No. W96050 (Oct. 12, 2022) (weighing former juvenile offender's completion of GED, engagement in Vet Dog Program, and participation in Alternatives to Violence, Cognitive Skills, and AVP programming in favor of release);

Ex. F, *In re MacNeil*, Mass. Parole Bd., No. W39496 (June 15, 2022) (noting former juvenile offender's compliance with medication and mental health treatment and programming); Ex. G, *In re Shea*, Mass. Parole Bd., No. W93447 (Sept. 15, 2022) (denying parole to offender who was under eighteen when he committed first degree murder where offender lacked motivation to rehabilitate and demonstrated continued disciplinary and conflict resolution problems). In fact, regulations specifically instruct the parole board to consider information beyond that available at the time of sentencing: "the parole hearing panel shall consider a risk and needs assessment, whether the inmate has participated in available work opportunities and education or treatment programs, and has demonstrated good behavior." 120 Code Mass. Regs. § 300.5(1) (2017). This accumulation of evidence enables the parole board to properly evaluate which offenders have sufficiently rehabilitated such that release "is not incompatible with the welfare of society." G. L. c. 127, § 130.

The parole hearings held in Massachusetts in the wake of *Diatchenko* illustrate this truth. As a result of that decision, sixty-three incarcerated adults became eligible for early release after serving at least fifteen years, and the Massachusetts parole board has proven

capable of assessing whether parole is appropriate for those adults. *See* Trounstine, What Happens at a Juvenile Lifer Hearing?, Bos. Daily (Feb. 20, 2015), https://web.archive.org/web/20160417031820/www.bostonmagazine.com/news/blog/2015/02/20/happens-juvenile-lifer-hearing/. And in the last two years alone, the Massachusetts parole board rendered release determinations for nineteen individuals convicted of first degree murder committed as a juvenile. *See generally* Life Sentence Record of Decisions (RODs), Mass. Parole Board, https://www.mass.gov/lists/life-sentence-record-of-decisions-rods= (last visited Jan. 12, 2023). Of the nineteen, thirteen were granted parole. *See id.* This record demonstrates the parole board's ability to distinguish "the juvenile offender whose crime reflects unfortunate yet transient immaturity, [from] the rare juvenile offender whose crime reflects irreparable corruption." *See Miller*, 567 U.S. at 479–480, quoting *Roper*, 453 U.S. at 573; *Graham*, 560 U.S. at 68; *see also, e.g.*, Ex. H, *In re Francis*, Mass. Parole Bd., No. W89571 (Aug. 10, 2022) (granting parole to offender convicted of second degree murder committed at eighteen years old based, in part, on "factors related to his *young age* at the time of the offense" (emphasis added)).

Though judges carefully weigh mitigating and aggravating factors at sentencing, that is no substitute for the information available to the parole board. "A parole board assessment of a person's prison record, completion of skills training, and engagement in rehabilitative programming can identify those for whom further imprisonment would be a poor use of resources." *See* Gertner & Mauer. Such evidence is especially relevant to late adolescents who, like juveniles, possess great capacity to reform and rehabilitate. Sentencing judges cannot peer into the future to observe which late adolescent offenders realize this potential. The parole board, however, can reach a reasoned determination aided by years' or even decades' worth of additional evidence. Amici urge this Court to find that because late adolescents are as capable of change as juvenile offenders, late adolescent offenders should be afforded the same opportunity for release as juveniles under *Diatchenko*: a meaningful opportunity for release, assessed by the parole board, on the basis of years of data evincing—more accurately than can ever be known at the time of sentencing—whether the offender has been sufficiently reformed.

CONCLUSION

For the reasons stated above, amici respectfully urge this Court to extend *Diatchenko* in full and eliminate life without parole sentences for late adolescents.

Dated: January 17, 2023

Respectfully submitted,

Kenneth J. Parsigian (BBO # 550770)
Avery E. Borreliz (BBO # 705153)
Erin M. Haley (BBO # 711035)
LATHAM & WATKINS LLP
200 Clarendon Street
Boston, Massachusetts 02116
(617) 880-4500
kenneth.parsigian@lw.com
avery.borreliz@lw.com
erin.haley@lw.com

Counsel for Amici Curiae

Massachusetts Bar Association
Amicus Curiae
By its Chief Legal Counsel
and Chief Operating Officer

Martin W. Healy
BBO No. 553080
20 West St.
Boston, MA 02111
(617) 338-0500
mhealy@massbar.org

ADDENDUM

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EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 0084CR10975
SJC-09265
No. 1184CR11291
SJC-11693

COMMONWEALTH
vs.

JASON ROBINSON

COMMONWEALTH
vs.

SHELDON MATTIS

FINDINGS OF FACT ON BRAIN DEVELOPMENT AND SOCIAL BEHAVIOR AND RULING OF LAW ON WHETHER MANDATORY LIFE-WITHOUT-PAROLE SENTENCES FOR DEFENDANTS AGE 18 THROUGH 20 AT THE TIME OF THEIR CRIMES VIOLATES THE MASSACHUSETTS DECLARATION OF RIGHTS

I. INTRODUCTION

Pursuant to G.L. c. 265, § 2(a), the Massachusetts statute that governs the penalties for murder, the defendant in Suffolk Co. Case No. 0084CR10975, Jason Robinson ("Robinson"), and the defendant in Suffolk Co. Case No. 1184CR11291, Sheldon Mattis ("Mattis"), are serving mandatory sentences of life in prison without the possibility of parole based on their convictions for first-degree murder in separate crimes committed when they were respectively 19 and 18 years old.

As of December 2021, both cases were pending before the Supreme Judicial Court ("SJC") following evidentiary hearings in the Superior Court before two different judges on

issues related to the brain development and social behavior of 18 through 20-year-olds, in some instances including 21-year-olds.

On December 24, 2021, the SJC issued an order remanding both cases to the Superior Court and assigning the cases to this Court (the undersigned judge) for factual findings and to "consider and address whether the imposition of a mandatory sentence of life without the possibility of parole for . . . those convicted of murder in the first degree who were eighteen to twenty-one at the time of the crime violates article 26 of the Massachusetts Declaration of Rights."

Article 26 of the Massachusetts Declaration of Rights ("article 26") includes the Commonwealth's constitutional ban on "cruel or unusual punishments." After limited additional proceedings described below, the Court now issues Findings of Fact and a Ruling of Law on the article 26 issue.

With regard to the constitutional question that the SJC asked this Court to address, the Court holds that mandatory sentences of life in prison without the possibility of parole ("mandatory life without parole") for defendants who were 18 through 20 years old at the time of their crimes -- *i.e.*, sentences that preclude a judge from granting parole eligibility -- violate article 26 of the Massachusetts Declaration of Rights. Robinson and Mattis are therefore entitled to a new sentencing hearing.

II. PROCEDURAL HISTORY

A. Commonwealth v. Jason Robinson

Robinson is pursuing a direct appeal of his 2002 convictions on charges of first-degree murder and related offenses based on a robbery and fatal shooting committed on March 27, 2000. When the crimes were committed, Robinson was 19 years old. The evidence at trial

established that Robinson and his co-defendant Tanzerius Anderson ("Anderson") agreed to rob the victim, who was known to carry a significant amount of cash, and that during the robbery, Anderson fatally shot the victim.[1] Anderson's conviction was affirmed by the SJC in 2005. See *Commonwealth* v. *Anderson*, 445 Mass. 195, 196 (2005). Robinson filed a timely notice of appeal, but the appeal was stayed in 2007 so that Robinson could move for a new trial.

Eight years later, in 2015, Robinson filed his new trial motion, seeking a new trial on six grounds, including that closure of the courtroom violated his right to a fair trial and that his mandatory life-without-parole sentence constituted cruel or unusual punishment based on his age at the time of the crime. (Paper # 37.2)

A Superior Court judge allowed Robinson's new trial motion after finding that the public was unlawfully barred from the courtroom throughout jury selection. The SJC reversed, holding that Robinson procedurally waived his claim that the courtroom closure constituted structural error by not objecting to the closure at the time it happened. *Commonwealth* v. *Robinson*, 480 Mass. 146, 147 (2018). In addition to reversing the grant of Robinson's motion for a new trial, the SJC remanded the case "for the motion judge to determine whether the improper courtroom closure created a substantial risk of a miscarriage of justice." *Id.* at 155. On remand, in September 2018, the Superior Court found that Robinson had not met his burden of showing that he had suffered any substantial prejudice as a result of courtroom closure. In October 2018, the case was re-assigned to this Court for resolution of the other issues raised by Robinson in his new trial motion.

In a Memorandum of Decision and Order dated November 7, 2018 (Paper # 67), this Court denied the remainder of Robinson's motion for a new trial, except that the Court deferred

[1] Anderson was convicted of first-degree murder on theories of felony murder and extreme atrocity or cruelty. Robinson was convicted of first-degree murder only on a theory of felony murder. See 445 Mass. at 196 and n.1.

to the SJC the issue of whether the evidence was sufficient to convict Robinson of felony murder. The Court deferred this issue primarily because the law of felony murder had changed since the time of Robinson's offense in 2000, and it was unclear to this Court which if any of those changes should be applied to Robinson's case.[2]

On November 19, 2018, Robinson filed a motion to reconsider this Court's November 7, 2018, decision so that he could create a factual record through expert testimony to support his claim that *Miller* v. *Alabama,* 567 U.S. 460, 470 (2012), and *Diatchenko* v. *District Attorney for the Suffolk Dist. ("Diatchenko I"),* 466 Mass. 655, 667-671 (2013), should be applied to defendants who were 19 years old at the time of their crimes, as was Robinson (Paper # 68). *Miller* held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " 567 U.S. at 465. *Diatchenko I* held that "mandatory imposition of a sentence of life in prison without the possibility of parole on individuals who were under the age of eighteen when they committed the crime of murder in the first degree violates the prohibition against 'cruel or unusual punishments' in art. 26 of the Massachusetts Declaration of Rights, and that the discretionary imposition of such a sentence on juvenile homicide offenders also violates art. 26 because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders." 466 Mass. at 658–659 (footnote omitted).

[2] This Court notes that the SJC has declined to apply *Commonwealth* v. *Brown,* 477 Mass. 805, cert. denied,139 S. Ct. 54 (2018), retroactively, see *Commonwealth* v. *Sun,* 490 Mass. 196, No. SJC-12870, 2022 WL 2517173, at *16 (Mass. July 7, 2022) (slip op. at 50), and the SJC did not ask this Court to address that issue in its December 24, 2021 remand order.

Additional delay resulted from several factors, including consideration of creating a factual record without the need for an evidentiary hearing, which prudently was abandoned, followed by the creation of a factual record through hearings and the COVID-19 pandemic.[3]

On October 30, 2020, this Court held an evidentiary hearing via Zoom, at which Professor Laurence Steinberg ("Dr. Steinberg"), a developmental psychologist, testified on behalf of Robinson, and a binder of articles on adolescent brain development authored or co-authored by Dr. Steinberg (Exhibit 1) was admitted in evidence.[4] The Court set a schedule for the submission of post-hearing briefs.

On April 12, 2021, Robinson filed his post-hearing brief, arguing that the holding in *Diatchenko I* should be extended to defendants who, like him, were 19 years old at the time of their crimes, and that the evidence at trial was insufficient to convict him of felony murder. (Paper # 109) On April 14, 2021, the Commonwealth filed its response. (Paper # 110) In it, the Commonwealth changed the position on the constitutional question that it had held throughout Robinson's appeal and agreed with Robinson's position to the extent that, absent an individualized sentencing hearing, a sentence of life without parole for a defendant who was 19 years old at the time of his crime was unconstitutional. In effect, the Suffolk County District Attorney took the position that *Miller,* but not *Diatchenko I,* should be extended to defendants who were 18 through 20 years old at the time of their crimes.

On May 7, 2021, this Court ordered the record to be transmitted to the Clerk for the Commonwealth. (Paper # 111) The Court's primary reason for transmitting the case was its opinion that the issue of mandatory life-without-parole sentences for individuals who were 19

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[3] See *Committee for Pub. Counsel Servs.* v. *Chief Justice of the Trial Court*, 484 Mass. 431, 433-434 (2020) (explaining generally disruption of pandemic).

[4] Dr. Steinberg's credentials are set forth below.

years old at the time of their crimes should be decided on a broader factual record than the testimony of Dr. Steinberg and articles authored by him.

The subsequent procedural history of this case and the *Mattis* case is set forth in Section C below.

B. Commonwealth v. Sheldon Mattis

Mattis is seeking a reduction in his sentence for his 2013 convictions on charges of first-degree murder and related offenses based on a fatal shooting committed in September 2011. Mattis and his co-defendant Nyasani Watt ("Watt") were tried together and convicted in November 2013 of first-degree murder and related offenses. When the crimes were committed, Mattis was 18 years old. The Commonwealth's theory of the case was that Watt followed the two young pedestrian victims on a bicycle and shot them in the back as they ran away from him. Mattis was tried as Watt's joint venturer.[5]

In 2014, in conjunction with an appeal of his conviction, Mattis filed an omnibus motion in the SJC ("First Motion"). Upon consideration of the First Motion, the SJC stayed the case and remanded the First Motion to the Superior Court for disposition. In a portion of the First Motion, Mattis sought a hearing pursuant to *Commonwealth* v. *Fidler*, 377 Mass. 192 (1977), as to alleged extraneous influence on a deliberating juror. A Superior Court judge (Roach, J.) denied the First Motion in a Memorandum and Order dated March 27, 2015. (Paper # 118)

Following the SJC's ruling in *Commonwealth* v. *Moore*, 474 Mass. 541 (2016), which addressed issues of post-verdict contact with jurors, Mattis and Watt renewed their request for juror contact to pursue their *Fidler* motion. Judge Roach conducted individual voir dire of two

[5] Because Mattis turned 18 years old eight months before the murder, he is serving a life sentence without the possibility of parole. Watt turned 18 years old ten days after the murder, and therefore is now eligible for parole no sooner than fifteen years from sentencing, pursuant to the SJC's ruling in *Diatchenko I*. See *Commonwealth* v. *Watt*, 484 Mass. 742, 753-754 (2020), citing *Diatchenko I*, 466 Mass. at 672-673.

jurors and issued Preliminary Findings of Fact Following Juror Inquiry in March 2017. (Paper # 139)

Mattis subsequently sought further inquiry of all jurors on the questions of "racial animus in the jury room and black gangs," and a court order. (Paper # 141) Mattis also filed Defendant's Memorandum in Support of Motion for New Trial, Reduction in Verdict, and/or Resentencing (Paper # 147), and the Commonwealth filed an opposition. (Paper # 148) Mattis' co-defendant, Watt, sought relief, as well. On October 31, 2017, Judge Roach issued Memorandum of Decision and Order on Defendants' Renewed Motion for New Trial in both cases, denying the new trial motions and declining to grant other relief. (Paper # 150)

Both defendants then appealed their convictions and the denial of their motions for a new trial. In June 2020, the SJC affirmed the defendants' convictions and declined to grant either defendant extraordinary relief pursuant to G.L. c. 278, § 33E. However, the Court stated:

> it likely is time for us to revisit the boundary between defendants who are seventeen years old and thus shielded from the most severe sentence of life without the possibility of parole, and those who are eighteen years old and therefore exposed to it. We can only do so, however, on an updated record reflecting the latest advances in scientific research on adolescent brain development and its impact on behavior. See *Diatchenko I*, 466 Mass. at 669-670.

Commonwealth v. *Watt*, 484 Mass. 742, 755-756 (2020). The SJC remanded Mattis' case to the Superior Court "for development of the record with regard to research on brain development after the age of seventeen." *Id.* at 756.

Between January 14, 2021 and March 1, 2021, Judge Roach conducted an evidentiary hearing via Zoom, at which two volumes of exhibits were admitted and Professor Adriana Galvan ("Dr. Galvan"), a developmental cognitive neuroscientist, and Professor Robert Kinscherff ("Dr. Kinscherff"), an attorney and forensic psychologist, testified for Mattis, and Professor Stephen Morse ("Dr. Morse"), an attorney and forensic psychologist, testified for the

Commonwealth.[6] Thereafter, Judge Roach ordered the record to be transmitted to the Clerk of the Commonwealth (Paper # 187), as this Court had done in the *Robinson* case.

C. Procedural History of Cases Following December 2021 Remand Order

On December 24, 2021, the SJC issued an order remanding the *Robinson* case and the *Mattis* case to the Superior Court and assigning the cases to the undersigned for factual findings on brain development after the age of 17, and to "consider and address whether the imposition of a mandatory sentence of life without the possibility of parole for . . . those convicted of murder in the first degree who were eighteen to twenty-one at the time of the crime violates article 26 of the Massachusetts Declaration of Rights." See 12/24/21 Order in SJC-09265 and SJC-11693 ("December 2021 Remand Order").

This Court gave the parties in both cases an opportunity to supplement the record, which the parties declined. On April 8, 2022, the Court, on its own initiative, heard limited additional testimony, and the defendants offered one additional exhibit in evidence, after which the Court heard oral argument.

III. POSITION OF THE PARTIES

The Commonwealth takes the position, consistent with *Miller*, that *mandatory* life-without-parole sentences for defendants who were under age 21 at the time of their crimes, *i.e.*, sentences that preclude a judge from granting parole eligibility, violate article 26 of the Massachusetts Declaration of Rights. Put another way, in the Commonwealth's view, life-without-parole sentences for defendants convicted of first-degree murder who were 18 through

[6] The credentials of Dr. Galvan, Dr. Kinscherff, and Dr. Morse are set forth below.

20 years old at the time of their crimes comply with article 26, "as long as there is an individualized sentencing hearing." (Paper # 194 at 9)[7]

At the April 8, 2022 hearing, Robinson and Mattis took the position that *any* sentence of life without parole for a defendant who was under age 21 at the time of the crime violates article 26 of the Massachusetts Declaration of Rights.

Because the SJC has asked this Court only to address the constitutionality of *mandatory* life-without-parole sentences for defendants who were under age 21 at the time of their crimes, this Court does not decide the issue of whether *any* sentence of life without parole for a defendant convicted of first-degree murder who was under age 21 at the time of the crime violates articles 26. However, the Court briefly addresses this issue near the end of Part V of this decision.

IV. FINDINGS OF FACT

1. The Court has made two types of findings of fact in this opinion. First, the Court has made Preliminary Findings on the expertise and credibility of the witnesses and the reliability of other evidence that provide support for the Court's findings about age and brain development. Second, the Court has made Core Findings about age and brain development.

Preliminary Analysis and Findings

2. At its core, the issue in this case is whether the science of brain development in 18 through 20-year-olds has progressed to the point that it provides a reliable basis to answer the SJC's question, and if it has, how the Court should rule on the question. The Court begins by looking at the principles that govern admissibility of expert testimony.

[7] The Suffolk District Attorney's Office speaks on behalf of the Commonwealth in these cases. The Court recognizes that the positions of other offices representing the Commonwealth, including the other District Attorney's Offices and the Attorney General's Office, may not necessarily be in accordance with the view of the Suffolk District Attorney.

3. To be admissible, expert witness testimony must satisfy five foundational requirements. See *Commonwealth* v. *Barbosa*, 457 Mass. 773, 783 (2010), *cert. denied*, 563 U.S. 990 (2011); Mass. Guide Evid. § 702 (2022). First, the expert witness testimony must assist the trier of fact. Second, the expert witness must be qualified as an expert in the relevant area of inquiry. Third, the facts or data in the record must be sufficient to enable the expert witness to give an opinion that is not merely speculation. Fourth, the expert opinion must be based on a body of knowledge, a principle, or a method that is reliable. Fifth, the expert's opinion must reflect a reliable application of the body of knowledge, the principle, or the method to the particular facts of the case. The overarching issues are the expertise of the witness and the scientific validity of the principles that underlie the proffered evidence. See *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-595 (1993); *Commonwealth* v. *Lanigan*, 419 Mass. 15, 24-25 (1994). As discussed below, the requirements for admission of the expert evidence relied upon by the Court have been met.

4. The four experts who testified in *Robinson* and *Mattis* can provide the opinions that support the findings below to a reasonable degree of scientific certainty based on their qualifications and experience, extensive study results and clinical observations supported by peer-reviewed publications, and evolving but recognized principles that have been subjected to rigorous testing.

5. The core findings of fact in this decision about age and brain development are based on (1) the October 30, 2020 testimony and Supplemental Affidavit (Paper # 79) of Dr. Steinberg in *Robinson* (see *infra* ¶ 6); (2) the January 14, 2021 testimony in *Mattis* and brief April 8, 2022 testimony in both cases of Dr. Galvan (see *infra* ¶ 7); (3) the February 19, 2021 testimony in *Mattis* of Dr. Kinscherff (see *infra* ¶ 8); (4) the March 1, 2021 testimony in *Mattis* of Dr. Morse

(see *infra* ¶ 9); and (5) seven scholarly journal articles, the first six of which were co-authored by Dr. Steinberg and/or Dr. Galvan.[8]

6. Dr. Steinberg, a PhD in human development and family studies and tenured professor at Temple University, is a renowned leader in the field of developmental psychology and adolescence. For over 40 years, he has been the sole author, lead author, or co-author of scores of studies published in peer-reviewed journals, including top journals in his field. See 10/30/20 Hearing, Ex. 1. Dr. Steinberg is the lead author of "Around the World," a peer-reviewed article that addressed a far-reaching international study on youth and brain maturation. (10/30/20 Hearing, Ex. 1, Tab U) He has received numerous honors and awards. Steinberg at 15-16.[9] He has been qualified as an expert in the field of developmental psychology approximately 30 times. *Id.* at 16. His research was cited in two of the leading Supreme Court cases on the Eighth Amendment ban on cruel and unusual punishment as applied to juveniles, including *Miller*. See

[8] The seven articles are: (a) Steinberg, et al., "Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation," *Developmental Science* (March 2018) (*Robinson* Exhibit No. 1, Tab U), cited herein as Steinberg, et al., "Around the World"; (b) Icenogle, Steinberg, et al., "Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a 'Maturity Gap' in a Multinational, Cross-Sectional Sample," *Law and Human Behavior*, Vol 43, No. 1 at 69-85 (2019) (*Mattis* Exhibits, Vol. 1, Ex. 2; Bates 000036-000070), cited herein as Icenogle, et al., "Adolescents' Cognitive Capacity"; (c) Rudolph, et al. (including Steinberg and Galvan), "At risk of being risky: The relationship between 'brain age' under emotional states and risk preference," *Developmental Cognitive Neuroscience*, Vol 24 (April 2017) at 93-106 (*Mattis* Exhibits, Vol. 1, Ex. 7; Bates 000192-000208), cited herein as Rudolph, et al., "At risk of being risky"; (d) Cohen, et al., "When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts," 27 *Psych. Sci.* 549 (2016) (*Robinson* Exhibit 1, tab O), cited herein as Cohen, et al., "When Is an Adolescent an Adult?"; (e) Steinberg, "A Social Neuroscience Perspective on Adolescent Risk-taking," *Devel. Rev.* Vol 28(1): 78-106 (*Mattis* Exhibits, Vol. 2, Ex. 19; Bates 000854-000880), cited herein as Steinberg, "A Social Neuroscience Perspective"; (f) Galvan, "Adolescent Brain Development and Contextual Influences: A Decade in Review," Journal of Research on Adolescence, Vol. 31(4): 843-869 (2021), Exhibit 3 to Commonwealth's Supplemental Response to Defendants' Motion for New Trial ("Comm. Supp. Resp.") (Paper # 120 in *Robinson;* Paper # 184 in *Mattis*), cited herein as Galvan, "Adolescent Brain Development: Decade in Review"; and (g) Casey, et al., "Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders," *Annual Rev. of Criminol.* (2022) 5:321-343, Exhibit 1 to Comm. Supp. Resp., cited herein as Casey, et al., "Making the Sentencing Case."

[9] Cites to transcripts of the expert testimony in this case refer to the expert's name and the pages in the transcript, *e.g.*, Steinberg at 15-16.

Roper v. *Simmons*, 543 U.S. 551, 572-575, 578 (2005) (death penalty for those under 18 at time of crime violates Eighth Amendment); *Miller*, 567 U.S. at 489.

7. Dr. Galvan, a PhD in neuroscience, is a tenured Professor of Psychology and Director of the Developmental Neuroscience Lab at U.C.L.A. Dr. Galvan is a recognized leader in the field of developmental cognitive neuroscience, and a co-author of over 100 book chapters and studies published in peer-reviewed journals, including top journals in her field. Galvan at 25-26. She has received numerous honors and awards, including the Presidential Early Career Award for Scientists and Engineers, bestowed by the White House, and the Troland Award from the National Academy of Sciences. *Id.* at 26-27.

8. Dr. Kinscherff is a law school graduate and PhD in clinical psychology. Kinscherff at 10, 16. He is a professor in the doctoral psychology program at William James College. *Id.* at 6-7. Dr. Kinscherff has testified as an expert in the field of psychology dozens of times. *Id.* at 12. He is a former Assistant Commissioner for Forensic Mental Health of the Massachusetts Department of Mental Health. *Id.* at 15.

9. Dr. Morse is an attorney and PhD in psychology and social relations. Morse at 8-9, 16. He is a tenured professor of law and professor of psychology and law at the University of Pennsylvania. *Id.* at 13. He has testified as an expert in at least 20 cases since 1977. *Id.* at 15. He is a licensed attorney in Pennsylvania and Massachusetts and is a board-certified forensic psychologist. *Id.* at 16. His special appointments have included Legal Director of the MacArthur Foundation Law and Neuroscience Project in the mid to late 2000s. *Id.* at 24-25. He has written scores of articles including many in leading journals on neuroscience and the law. *Id.* at 26-27.

10. Today, neuroscientists and behavioral psychologists know significantly more about the structure and function of the brains of 18 through 20-year-olds[10] than they did 20 years ago, for three primary reasons. First, although structural magnetic resonance imaging (sMRI) of the brain's anatomy has existed for almost 50 years, functional magnetic resonance imaging (fMRI), which measures physiological changes in the brain, has been widely available in university labs for only the last 15 to 20 years. See Morse at 30-31. Second, until the late 2000s, far more studies focused on the brains of juveniles, *i.e.*, those under age 18, than on the brains of 18 through 20-year-olds or 18 through 21-year-olds. See Steinberg at 104-105. Third, the number, scope and sophistication of developmental cognitive neuroscience studies and developmental psychology studies has continually increased. In March 2018, Dr. Steinberg (as lead author) and others published "Around the World" in *Developmental Science*. See 10/30/20 Hearing, Ex. 1, Tab U. The study, by far the largest study of its kind, used a combination of behavioral tests and self-reporting regarding 5,404 individuals between the ages of 10 and 30 from 11 countries on five continents. *Id.* at 1-2, 4.[11] Both Dr. Galvan, a defense expert in *Mattis*, and Dr. Morse, the Commonwealth's expert in *Mattis*, praised the study and found it authoritative and statistically sound. See Galvan at 94-95; Morse at 89. The study showed similar results across countries with

[10] The Court's age-based findings are made as to 18, 19, and 20-year-olds, referred to herein as "18 through 20-year-olds." Many of Dr. Galvan's studies included 21-year-olds in the group of "late adolescents" who were studied, whereas many of Dr. Steinberg's studies did not. Because the Court puts great weight on the similarity in results of studies conducted in two different disciplines, *i.e.*, developmental cognitive neuroscience and developmental psychology, using the different methods of behavioral study and brain imaging, the Court's findings include only that age range that was included in both experts' studies. Put another way, for purposes of assessing the constitutionality of mandatory life-without-parole sentences, the brain science relied upon by the Court lends some support for treating 18 through 21-year-olds differently than older persons, but much stronger support for treating 18 through 20-year-olds differently than older persons.

[11] The study was conducted in China, Colombia, Cypress, India, Italy, Jordan, Kenya, the Philippines, Sweden, Thailand, and the United States. *Id.* at 4.

different cultural views about accepted and encouraged behavior in teenagers and discipline of children and teenagers. "Around the World" at 3-4, 13.

11. The Court finds that the four experts who testified in *Robinson* and *Mattis* can provide and have provided expert opinions grounded on reliable theories that support the findings in paragraphs 13-20 below to a reasonable degree of scientific certainty based on their qualifications and experience, and the extensive study results and real-world observations that support their opinions, as noted herein. Consistencies in the results of many behavioral studies, consistencies in the results of many brain imaging studies, and consistencies between the results of these two types of studies, all conducted in different labs in different parts of the country and increasingly in other countries[12], give Dr. Steinberg and Dr. Galvan a high degree of confidence in the validity of their theories, study results, and opinions. See Steinberg at 49-50; Galvan at 191-193. See also brief testimony of Galvan at April 8, 2022 hearing. The increasing scientific rigor of many studies has further increased the confidence of Dr. Steinberg and Dr. Galvan in the validity of their theories, study results, and opinions. See Steinberg at 148-149, 175; Galvan at 54-59, 118, 137-138. The real-world behaviors of 18 to 20-year-olds, as reflected in F.B.I. crime statistics and Centers for Disease Control statistics on addiction and accidents, among other measures of harmful conduct, provide confirmatory support for the brain science findings. See Kinscherff at 104-106; Galvan at 99.

12. While there are limitations to the study results supporting the Core Findings in paragraphs 13-20 below, set forth in paragraph 22, they are inherent in behavioral science research, rapidly evolving scientific research, and/or all scientific research, see Steinberg at 87;

[12] Some studies have included both behavioral and brain imaging components. Steinberg at 91-92.

Morse at 30-35, and do not undermine the reliability of the expert opinions on which the Court relies or the Core Findings of Fact it reaches.

Core Findings of Fact

13. As a group, 18 through 20-year-olds in the United States and other countries have less "self-regulation," *i.e.*, they are less able to control their impulses in emotionally arousing situations, than individuals age 21-22 and older; their reactions in these situations are more similar to those of 16 and 17-year-olds than they are to those age 21-22 and older. See Galvan at 73-74, 78-84, 85-89, 100-101, 104-105, 214-216, 221-222; Steinberg at 30, 41, 49; Steinberg Supp. Aff. ¶ 21; Steinberg, et al., "Around the World" at 1-4, 15-17 (finding these results in 9 of 11 countries studied); Cohen, et al., "When Is an Adolescent an Adult?" at 549; Icenogle, et al., "Adolescents' Cognitive Capacity" at 70 (Bates 000037); Rudolph, et al., "At risk of being risky," §§ 2.11, 3.4, 4.1.

14. As a group, 18 through 20-year-olds in the United States and other countries are more prone to "sensation seeking," which includes risk-taking in pursuit of rewards, than are individuals under age 18 and over age 21. Because risk-taking in pursuit of rewards peaks during the late teens, rising steadily before this age range and falling steadily thereafter, developmental psychologists and developmental cognitive neuroscientists frequently refer to this phenomenon as the "upside-down U" or "inverted U," due to its shape on a graph where age is plotted on the x-axis and level of sensation-seeking is plotted on the y-axis. Galvan at 68-70, 73-74, 91-93; Steinberg at 62, 66; see, generally, Galvan, "Adolescent Brain Development: Decade in Review." See also Steinberg Supp. Aff. ¶ 20; Steinberg, et al., "Around the World" at 1-4, 11-13 (finding these results in 9 of 11 countries studied).

15. As a group, 18 through 20-year-olds are more susceptible to peer influence than are individuals age 21-22 and older, and the presence of peers makes 18 to 20-year-olds more likely to engage in risky behavior. See Steinberg at 43-44, 160-161; Steinberg Supp. Aff. ¶ 24; Galvan at 106, 245-246; Morse at 82; Steinberg, "A social neuroscience perspective" at 91-92, 98; Galvan, "Adolescent Brain Development: Decade in Review" at 852-853.

16. As a group, 18 through 20-year-olds have greater capacity to change than older individuals because of the plasticity of the brain during these years. Galvan at 42-44, 60, 62-63, 67-73, 109-110, 113-114; Casey, et al., "Making the Sentencing Case" at 329.

17. Consistent and reliable results have been obtained in many behavioral studies, sMRI studies, and/or fMRI studies (based on blood flow) that support the findings set forth in paragraphs 13 to 16. Galvan at 60-61, 63-64, 66-69, 76-80, 91-92, 98-101; Steinberg, et al., "Around the World" at 1-4, 7-8, 11-19; Steinberg Supp. Aff. ¶ 20; Steinberg at 65-66. See also additional articles cited *supra* at ¶¶ 13-15.

18. The primary anatomical (brain structure) and physiological (brain function) explanations for the findings set forth in paragraphs 13 to 16 are (1) the influence on the brain of the sharp increase during puberty of certain hormones; (2) the lack of a fully developed prefrontal cortex, the part of the brain that most clearly regulates impulses; and (3) the lack of fully developed connections (or connectivity) between the prefrontal cortex and other parts of the brain, including the ventral striatum, the part of the brain that most clearly responds to rewards and reward-related decision making. Galvan at 42-44, 63-65, 214-216; Steinberg at 22-25, 29-30; Steinberg, "A social neuroscience perspective" at 83-91.

19. The combination of heightened sensation seeking, less than fully developed self-regulation in emotionally arousing situations, and susceptibility to peer pressure, all of which are

associated with a less than fully developed prefrontal cortex and less than fully developed brain connectivity, makes 18 through 20-year-olds as a group particularly vulnerable to risk-taking that can lead to poor outcomes. The real-world behaviors of 18 through 20-year-olds, as reflected in measures of harmful conduct such as F.B.I. crime statistics and Centers for Disease Control statistics on addiction and accidents, support the brain science findings in this regard. Kinscherff at 28-32, 38; Steinberg, "A social neuroscience perspective"; Steinberg Supp. Aff. ¶¶ 25-26.

20. In contrast to how 18 through 20-year-olds respond in emotionally arousing situations, decision making in the absence of emotionally arousing situations, *i.e.*, "cold cognition," reaches adult levels around age 16. See Icenogle, et al., "Adolescents' Cognitive Capacity" at 82; Steinberg Supp. Aff. ¶¶ 22-23; Steinberg, "Why we should lower the voting age to 16," *New York Times* (March 2, 2018) (*Robinson* Hearing Ex. 1, Tab W).

21. Consistent with the above scientific findings, and cognizant of forensic research showing that most individuals who commit crimes in their late teens do not continue to commit crimes after their mid-20's, forensic psychologists have reduced their preparation of and reliance on long-term risk assessments of criminal defendants who commit violent crimes in their late teens and early 20s because of the reduced utility of such studies. See Kinscherff at 48, 51-52; Casey, et al., "Making the Sentencing Case" at 331-332, 335-336. See also 4/8/22 Hearing Exhibit 1 (age-crime curve).

22. Caveats this Court notes to the study results supporting the Core Findings in paragraphs 13-21 include the following. First, there are significant differences between the subjects in the studies discussed below as a whole and individuals who commit murder as a whole, including but not limited to the fact that potential subjects with serious mental illness are excluded from most studies. See Galvan at 193-195. Second, the subjects who participate in

behavioral and brain scan studies are not a fully randomized pool of the general population. See generally Galvan at 169-174; Morse at 33-34; Steinberg at 92, 177-178, 187-188, 199, 201-202, 208-209. Third, behavioral and brain scan study results look at the individuals in any age bracket as a group; there are significant differences in brain development among the individuals of any particular age or age bracket. See Steinberg at 136-175; Morse at 48-50, 60-61; Galvan at 213-218. Fourth, the conditions of brain science studies, *e.g.*, viewing images on a computer screen and/or being scanned in a lab, differ markedly from the real-world situations in which adolescents commit crimes, Galvan at 142, 219.[13] Fifth, the brain scan study results in the record establish *correlations* between the anatomy and function of certain parts of the brain and certain behaviors, which is different than establishing actual *causation* of those behaviors. Sixth, historically there were machine and human error problems with some early fMRI studies, but these problems were largely resolved by around 2013. See Steinberg at 52-54; Morse at 73-74. Lastly, while the results of many behavioral and brain scan studies discussed herein reinforce each other, each study is somewhat different and therefore the results do not constitute "replication" strictly speaking, as scientists often use the term. Morse at 44-45, 59-60. These caveats, individually and collectively, do not undermine the Core Findings of Fact.

V. RULING OF LAW AND LEGAL DISCUSSION

Proportionality is the touchstone for analyzing cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and the Commonwealth's counterpart to the Eighth Amendment, article 26 of the Massachusetts Declaration of Rights. See *Diatchenko I,* 466 Mass. at 669. See also *Commonwealth v. Concepcion*, 487 Mass. 77, 86 (2021). Moreover, "a

[13] That said, three of the experts testified that the studies on which they relied accurately predicted real-world behaviors. Galvan at 120; Steinberg at 99; Morse at 36.

sentencer [must] have the ability to consider the mitigating qualities of youth." *Diatchenko I*, 466 Mass. at 661, quoting *Miller*, 567 U.S. at 476 (internal quotation and additional citation omitted).

In *Miller*, the Supreme Court banned mandatory sentences of life in prison without the possibility of parole for defendants who were under age 18 at the time of their crimes, as cruel and unusual punishment in violation of the Eighth Amendment. 567 U.S. at 489. The Supreme Court held that judges could impose life-without-parole sentences for juveniles in the exercise of their discretion, but not mandatorily based solely on the provisions of a state or federal statute. *Id.*

In *Diatchenko I*, the SJC took the holding in *Miller* one significant step further, holding that *all* life-without-parole sentences for defendants who were under age 18 at the time of their crimes were "cruel or unusual punishment"[14] in violation of article 26 of the Massachusetts Declaration of Rights. 466 Mass. at 671. "The point of [the SJC's] departure from the Eighth Amendment jurisprudence was [its] determination that, under art. 26, the 'unique characteristics of juvenile offenders' should weigh more heavily in the proportionality calculus than the United States Supreme Court required under the Eighth Amendment." *Commonwealth* v. *Perez*, 477 Mass. 677, 683 (2017), citing *Diatchenko I*, 466 Mass. at 671.

The SJC has asked this Court to decide, in effect, whether the Supreme Court's holding in *Miller* should be extended in Massachusetts to all defendants who were age 18 through 20 at the time of their crimes. The Court concludes that it should. Both the Supreme Court and the SJC have established "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Diatchenko I*, 466 Mass. at 659.

[14] The SJC has not found any legal significance in the language difference between the Eighth Amendment, which bans "cruel *and* unusual punishment," and art. 26, which bans "cruel *or* unusual punishment." See, *e.g.*, *Michaud* v. *Sheriff of Essex Cnty.*, 390 Mass. 523, 533-534 (1983), and cases cited.

In the nine years since *Diatchenko I* was decided, extensive research in the fields of developmental cognitive neuroscience and developmental psychology has established that, as a class or group, the brains of 18 through 20-year-olds are not as fully developed as the brains of older individuals in terms of their capacity to avoid conduct that is seriously harmful to themselves and others. These scientific findings clearly bear on the "culpability of [this] class of offenders... ." *Id.* As applied to juveniles, the SJC considers life-without-parole sentences to be "strikingly similar, in many respects, to the death penalty... ." *Id.* at 670. Applying the Findings of Fact in this case to this SJC precedent, this Court holds that the non-discretionary (*i.e.*, mandatory) imposition of life-without-parole sentences for defendants who were age 18 through 20 at the time of their crimes is a "sentencing practice[ ] based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* at 659. Without minimizing the violence that is almost always involved in the crimes committed by 18 through 20-year-olds that result in first-degree murder convictions, including the crimes at issue in these two cases, the Court concludes that there is a mismatch between the culpability of 18 through 20-year-old offenders as a class and mandatory life-without-parole sentences, *i.e.*, sentences that preclude a judge from granting parole eligibility. Therefore, as applied to 18 through 20-year-olds, the statute that mandates such sentences, G.L. c. 265, § 2, violates article 26 of the Massachusetts Declaration of Rights. This does not mean that, under a given set of facts, a life-without-parole sentence cannot be imposed on such a defendant. The SJC has not asked this Court to decide whether *any* life-without-parole sentence for a defendant who was under age 21 at the time of the crime violates article 26, and therefore the Court does not decide this issue. This ruling means that requiring imposition of a mandatory life sentence in every case, without an individual, case-by-case factual assessment, is unconstitutional.

As noted above, this Court bases its constitutional ruling primarily on 15 years of extensive scientific research establishing that, as a class or group, 18 through 20-year-olds have brains that are not as developed as those of older individuals, and this lack of full brain development makes them more susceptible to behavior harmful to themselves and others. Eighteen through 20-year-olds have less "self-regulation," *i.e.*, they are less able to control their impulses in emotionally arousing situations, than individuals age 21-22 and older. Their reactions in these situations are more similar to those of 16 and 17-year-olds than they are to those age 21-22 and older. As a group or class, 18 through 20-year-olds are also more prone to "sensation seeking," *i.e.*, risk-taking in pursuit of rewards, than are individuals under age 18 and over age 21. And 18 through 20-year-olds are more susceptible to peer influence than are individuals age 21-22 and older; the presence of peers makes them more likely to engage in risky behavior than they otherwise would be. Consistent results have been obtained in many behavioral studies, sMRI studies, and fMRI studies. See *supra* at 15-17.

The primary anatomical (brain structure) and physiological (brain function) explanations for these phenomena are the influence on the brain of the sharp increase during puberty of certain hormones, the lack of a fully developed prefrontal cortex, the part of the brain that most clearly regulates impulses, and the lack of fully developed connections (connectivity) between the prefrontal cortex and other parts of the brain including the ventral striatum, the part of the brain that most clearly responds to rewards and reward-related decision making. See *supra* at 16-17.

The combination of heightened sensation seeking, less than fully developed self-regulation in emotionally arousing situations, and susceptibility to peer pressure, all of which are associated with a less than fully developed prefrontal cortex and less than fully developed brain connectivity, makes 18 to 20-year-olds as a group particularly vulnerable to risk-taking that can

lead to poor outcomes. The real-world behaviors of 18 through 20-year-olds, as reflected in F.B.I. crime statistics, Centers for Disease Control statistics on addiction and accidents, and many other measures of harmful conduct, support the brain science findings in this regard. See *supra* at 16-17.

The brain science and forensic science study results described in this opinion lend direct support to the conclusion that mandatory life-without-parole sentences for defendants who were age 18 through 20 at the time of their crimes constitute cruel or unusual punishment under article 26. Perhaps equally important, these study results also comport with the three reasons why the Supreme Court and the SJC drew the line at age 18 for purposes of applying the most severe penalties in our federal and state legal systems, the death penalty (federal) or mandatory life without parole (Massachusetts).

When the Supreme Court ruled in *Roper v. Simmons*, 543 U.S. 551 (2005), that applying the death penalty to defendants who were under age 18 at the time of their crimes constituted cruel and unusual punishment under the Eighth Amendment, the Court cited three general differences between juveniles (*i.e.*, persons under age 18) and adults. The first difference noted between juveniles and adults was that "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young." *Roper*, 543 U.S. at 569. The second difference was that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.*, citing Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 *Am. Psychologist* 1009, 1014 (2003). "The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Roper*, 543

U.S. at 570. The SJC adopted all three of these differences as reasons for its ruling in *Diatchenko I.* See *Diatchenko I,* 466 Mass. at 660.

The scientific study results in the record in this case call into question why, for purposes of applying these three factors, the line between juveniles and adults should be drawn between age 17 and age 18. A range of study results shows that 18 through 20-year-olds are more subject to peer pressure than older individuals, and brain imaging shows that 18 through 20-year-olds have greater capacity to change than older individuals because of the plasticity of the brain during these years. These study results also provide a reason for why "lack of maturity and an underdeveloped sense of responsibility" are "found in [this age group] more often than in adults and are more understandable... ." *Roper*, 543 U.S. at 569.

That the Supreme Court has expressly limited the protections of *Roper* and *Miller* to defendants under age 18, see *Jones* v. *Mississippi*, 141 S. Ct. 1307, 1314 (2021); *Roper*, 543 U.S. at 574, is not dispositive, for two reasons. First, the Court does not assume those decisions are fixed in stone, and their conclusions may change as the science changes. See *Watt*, 484 Mass. at 755-756. Second, and leaving future developments aside, the SJC has noted that it "often afford[s] criminal defendants greater protections under the Massachusetts Declaration of Rights than are available under corresponding provisions of the Federal Constitution." See *Diatchenko I*, 466 Mass. at 668-669, and cases cited therein.[15]

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[15] See, *e.g.*, *District Attorney for the Suffolk Dist.* v. *Watson*, 381 Mass. 648 , 650, 665 (1980) (concluding that death penalty contravened prohibition against cruel or unusual punishment in art. 26, notwithstanding constitutionality under Eighth Amendment); *Commonwealth* v. *Mavredakis*, 430 Mass. 848, 855-860 (2000) (defendant's right under art. 12 of Massachusetts Declaration of Rights to be informed of attorney's efforts to render assistance broader than rights under Fifth and Sixth Amendments to United States Constitution); *Commonwealth* v. *Gonsalves*, 429 Mass. 658, 660-668 (1999) (privacy rights afforded drivers and occupants of motor vehicles during routine traffic stops broader under art. 14 of Massachusetts Declaration of Rights than under Fourth Amendment to United States Constitution); *Commonwealth* v. *Amirault*, 424 Mass. 618, 628-632 (1997) (confrontation rights greater under art. 12 than under Sixth Amendment to United States Constitution). See also Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 Hastings Const. L.Q. 115, 119 (2022) ("state supreme courts have significant, if not unlimited

In ruling on defendants' motions, the Court has considered but has not strictly applied the three-pronged analysis adopted by the SJC in *Commonwealth v. Jackson*, 369 Mass. 904, 910 (1976), for deciding when a sentence is so disproportionate to the crime that it constitutes cruel or unusual punishment. This analysis "requires (1) an inquiry into the nature of the offense and the offender in light of the degree of harm to society, (2) a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth, and (3) a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions." *Commonwealth* v. *Sharma*, 488 Mass. 85, 89 (2021) (internal quotations and citations omitted). This approach does not apply neatly here; it appears that the SJC has used this three-part analysis solely to determine whether a *particular* sentence violates article 26, not to determine whether a sentencing *practice* violates art. 26. Compare *Cepulonis* v. *Commonwealth*, 384 Mass. 495, 497-499 (1981) (three-part analysis used to determine that 40-50 year sentence for possession of machine gun did not violate art. 26 or Eighth Amendment); *Perez*, 477 Mass. at 683-686 (three-part analysis used to determine that sentence in non-murder case with parole eligibility after 27 ½ years presumptively disproportionate); *Concepcion*, 487 Mass. at 86-89 (three-part analysis used to determine that life sentence with parole eligibility after 20 years for defendant convicted of first-degree murder committed at age 15 did not violate art. 26 or Eighth Amendment); and *Sharma*, 488 Mass. at 89-92 (sentences imposed on defendant age 17 at time of crimes of life in prison with parole eligibility after 15 years, followed by 7-10 year sentences -- concurrent with each other -- for armed assault with intent to murder remanded for individual determination using three-part test),

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freedom of action to provide greater protection under state constitutions") *id.* at 120 & n.20 (giving examples of *Diatchenko I* and *Monschke*).

with *Diatchenko I,* 466 Mass. at 667-671 (not applying three-part test while holding that *all* life-without-parole sentences for defendants under age 18 at the time of their crimes violates art. 26); *id.* at 672 (describing *Cepulonis* as addressing "punishment for particular offense"). The limitation of the three-pronged test in this case, as in *Diatchenko I,* is that first-degree murder is the most serious offense in the Commonwealth, and mandatory life in prison without parole is the most serious punishment in the Commonwealth, so these first two prongs do not lend themselves to a proportionality analysis. See *Commonwealth* v. *LaPlante*, 482 Mass. 399, 404 n.4 (2019) (deliberate murder case warranting "most severe punishment ... defies direct application of" this test). This leaves this third part of the test, *i.e.*, what has been done in other jurisdictions. Depending on one's perspective, application of this third prong can either support extending *Miller* to 18 through 20-year-olds or discourage it.

Only one state high court has held that mandatory life-without-parole sentences for defendants who were 18 through 20 years old at the time of their crimes violates the state analog to the Eighth Amendment, a constitutional ban on "cruel punishments." See *Matter of Monschke*, 197 Wash. 2d 305, 325 (2021), discussed *infra.* However, there are states in which some or all defendants of *any* age who are convicted of the most serious murder charge may receive parole eligibility as part of a life sentence, or a sentence of less than life in prison.[16] In seven states, there is no death penalty and a sentence of life in prison with parole eligibility is always a possible sentence for an adult defendant convicted of the most serious murder charge.[17] In New Jersey and New York, two other states that have no death penalty, life in prison with

[16] This Court endeavored to identify the statutes governing the most serious murder charge in all 50 states and the penalties for each such charge. However, court decisions have modified the law in some states, and this Court lacks the resources to monitor recent developments in the law of 50 different jurisdictions.

[17] Maine, Maryland, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

parole eligibility is a possible sentence for a defendant convicted of the most serious murder charge unless the judge or jury finds specified aggravating factors. In two of the nine above-referenced states, Maine and New Jersey, a defendant convicted of the most serious murder charge may also be sentenced to a determinate term of years that, based on the defendant's age and the length of the sentence, is often not a *de facto* life sentence. And in Illinois, which does not have the death penalty, a defendant convicted of the most serious murder charge may receive a determinate term of years but may *not* receive a sentence of life with the possibility of parole.[18]

Massachusetts is one of only 11 states in which life in prison without parole is the only possible sentence after an adult conviction on the most serious murder charge.[19] Death is the only alternative to a life-without-parole sentence after an adult conviction on the most serious murder charge in sixteen states.[20, 21] In Alaska, conviction of aggravated first-degree murder carries a mandatory 99-year sentence, which is a *de facto* life without parole sentence.

In 11 of the states that have the death penalty, some defendants convicted of the most serious murder charge may be sentenced to life in prison with parole eligibility.[22] However, a sentencing regime that includes the death penalty differs so significantly from a sentencing

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[18] See 730 ILCS 5/5-4.5-20(a); 730 ILCS 5/3-3-3(c).

[19] Colorado, Connecticut, Delaware, Hawaii, Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, and Virginia. There were 12 states, but the high court of one of those 12 states, Washington, ruled that mandatory sentences of life without parole for defendants who were age 18 through 20 at the time of their crime violate the state constitutional ban on "cruel punishments." See *Matter of Monschke*, *infra* at 27.

[20] Alabama, Arizona, Arkansas, California, Florida, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, Pennsylvania, South Dakota, Texas, and Wyoming.

[21] California and Pennsylvania currently have moratoriums on the death penalty. As a result, at this time, life without parole is the only possible sentence upon conviction of the most serious murder offense.

[22] Georgia, Idaho, Kentucky, Montana, Nevada, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, and Utah.

regime without the death penalty that this Court does not consider the sentencing laws in those states as support for its holding in this case.

As noted above, in *Matter of Monschke*, 197 Wash. 2d 305 (2021), the Supreme Court of Washington ruled (by a 5-4 vote) that the state's aggravated murder statute was unconstitutional as applied to 18 through 20-year-olds because it denied trial judges discretion to consider the mitigating qualities of youth. *Id.* at 306-307, 326. The court noted that constitutional protections for youthful criminal defendants have grown more protective over the years, *id.* at 313-317, and that the Washington courts would not necessarily defer to legislative line drawing when determining what constitutes cruel punishment, *id.* at 317-319. The court also discussed how what it called the "age of majority"[23] is inherently and necessarily flexible. *Id.* at 319-321. Finding no meaningful developmental difference between the brain of a 17-year-old and the brain of an 18-year-old, the court held that drawing an arbitrary line between these ages for sentencing purposes did not pass constitutional muster. See *id.* at 313, 329. [24]

In sum, the law in other jurisdictions on mandatory life-without-parole sentences can be used to support or to question the holding reached by this Court.

A principal argument against extending the protections of juvenile sentencing to 18 through 20-year-olds has been that the law recognizes these individuals as adults, and therefore criminal courts should treat them as adults. See, *e.g.*, *Matter of Monschke*, 197 Wash. 2d at 330 (Owens, J., dissenting) ("at this same moment [that individuals obtain the privileges of adulthood], they also obtain the full responsibilities and consequences of adulthood, and the

[23] The term "age of majority" is ambiguous. See *infra*.

[24] The dissent noted, among other things, that the majority's ruling does not eliminate line-drawing, it merely changes where the line is drawn, and emphasized the inherent difficulty in deciding which 18 through 20-year-old offenders should receive life-without-parole sentences. *Id.* at 330-331, 333 (Owens, J., dissenting).

court will no longer intervene on their behalf on the basis of age."). The SJC adopted this reasoning in declining to extend the constitutional ban on life-without-parole sentences for juveniles to this age group:

> The age of eighteen ..."is the point where society draws the line for many purposes between childhood and adulthood." *Roper* [], 543 U.S. [at] 574 []. That such line-drawing may be subject "to the objections always raised against categorical rules," *id.*, does not itself make [an 18-year-old's life-without-parole] sentence unconstitutional.

Commonwealth v. *Chukwuezi*, 475 Mass. 597, 610 (2016). See *Watt*, 484 Mass. at 756 n.17.

However, while society draws the adulthood line at age 18 for "many purposes," *Chukwuezi*, 475 Mass. at 610, there are significant exceptions to this rule. Through legislation, "the Commonwealth has recognized that merely attaining the age of eighteen years does not by itself endow young people with the ability to be self-sufficient in the adult world." *Eccleston* v. *Bankosky*, 438 Mass. 428, 436 (2003). In a variety of contexts, Massachusetts law treats individuals age 18 and slightly older the same as it treats juveniles. See, *e.g.*, *id.* (child support); *Commonwealth* v. *Cole C.*, 92 Mass. App. Ct. 653, 659 n.8 (2018) (juvenile court jurisdiction); *id.* at n.9 (state custody of delinquent child); G.L. c. 119, § 23(f) (state responsibility for former foster child); G.L. c. 138, § 34A (drinking age). See also *Eccelston*, 438 Mass. at 435 n.13 ("An individual may be considered emancipated for some purposes but not for others" and giving the example of the right to vote versus the end of parental support).

Moreover, the age of legal adulthood has changed between 21 and 18 in various contexts for reasons "unrelated to capacity." See *Matter of Monschke*, 197 Wash. 2d at 314-315. The ages for military conscription, voting and drinking alcohol provide important examples. For most of the nation's history, the "age of majority" was 21, not 18. See Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 Tul. L. Rev. 55, 64 (2016). "In 1942 wartime needs prompted Congress to lower the age of conscription from twenty-one to eighteen, a change

that would eventually lead to the lowering of the age of majority generally." *Id.* See also *Eccleston*, 438 Mass. at 435 n.14 (voting age lowered from 21 to 18 because age of conscription for service in Vietnam War was 18). Similarly, the drinking age has fluctuated, decreasing from 21 to 18 before reverting back to 21. See *Barboza* v. *Decas*, 311 Mass. 10, 12 (1942) (citing 1937 legislation which punished persons giving alcohol to individuals under 21); *McGuiggan* v. *New England Tel. & Tel. Co.*, 398 Mass. 152, 159 n.7 (1986) (noting "[t]he legal drinking age [had been] eighteen" but had been raised to 21 pursuant to a 1984 amendment). The 1984 increase in the drinking age was unmistakably due not to any new understanding about brain maturation but rather the incentive of federal funding. See 23 U.S.C. § 158; St.1984, c. 312, amending G.L. c. 138, §§ 12, 14, 30E, 34, 34A, 34B, 34C, and 64. See also *S. Dakota* v. *Dole*, 483 U.S. 203, 205 (1987) (states' federal highway funds partially contingent on state legislation compliance with congressional goal of national minimum drinking age).

As the foregoing show, the "age of majority" is a malleable concept that is not consistently based on science, as the decision in the cases at issue here must be. It thus should not mechanically govern highly consequential decisions about application of the criminal law. Further, the decision about what constitutes "cruel or unusual punishment" is a matter for the state courts, not the Legislature. See *Watson*, 381 Mass. at 666-667. See also *id.* at 686-687 (Quirico, J., dissenting); *Matter of Monschke*, 197 Wash. 2d at 325 (limit of judicial deference is violation of constitution under Washington state law); *Goodridge* v. *Dep't of Pub. Health*, 440 Mass. 309, 338-339 (2003) ("To label the court's role as usurping that of the Legislature ... is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.").

This Court recognizes that incomplete brain development is far from determinative of violent behavior. The great majority of 18 through 20-year-olds do not commit violent crimes. Moreover, dramatically different crime rates in different geographic areas indicate that many factors other than brain age contribute to violent crime. Based on the record in this case, these aggravating factors include access to drugs, access to guns, high childhood stress levels, negative peer influence including affiliating with others involved in criminal activity, mental illness, unstable housing, lack of emotional attachment, and absence of lawful means of earning income, as well as the absence of positive factors such as stable relationships, education, and access to youth and adult programs. See Kinscherff at 91-96, 118-120.[25] Having the brain of an average 18 through 20-year-old is neither a satisfactory explanation nor an excuse for the intentional killing of another human being. However, the reality that many factors other than brain development contribute to violent crime does not change the Court's constitutional analysis, for two reasons.

First, the Court's holding does not in any way excuse acts of violence by 18 through 20-year-olds. The consequence of the Court's ruling is that all individuals convicted of first-degree murder in Massachusetts who were 18 through 20 years old at the time of their crime will continue to receive sentences of life in prison and serve at least 15 years in prison, but some of them may become eligible for parole after serving 15 or more years of their sentences. Others, depending on the facts, may be sentenced to life without the possibility of parole, but only if that sentence is warranted.

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[25] Sociologists observe that "as people move into the roles of adulthood – as they become full-time employees, as they become spouses, as they become parents – there are all kinds of factors that make it less attractive to live a criminal lifestyle." Steinberg at 68. Adults have more "latitude to engage in emotionally meaningful relationships . . . [and] at some point most people decide that the costs and consequences of continued serious criminal misconduct is not preferable to living a more productive life." Kinscherff at 40.

Second, the presence of aggravating factors that increase the likelihood of committing a violent crime is largely beyond the control of any 18 through 20-year-old. The economic circumstances of one's parents or guardians, racial and other discrimination, and other individual and systemic inequalities ensure that some late teens are far more likely than others to live with these aggravating factors, and therefore more likely to perpetrate - and to be victimized by - violent crime. In deciding what constitutes cruel or unusual punishment, a court should consider the systemic impact of its ruling, particularly where the ruling involves a class of persons who, based on their age, have greater capacity than older persons to change.

As noted above, the SJC has not asked this Court to decide whether *any* life-without-parole sentence for a defendant who was under age 21 at the time of the crime violates article 26, and therefore the Court does not decide this issue. There are three separate theories under which intentional killings can be prosecuted as first-degree-murder, *i.e.*, premeditated murder, murder committed with extreme atrocity or cruelty, and felony murder.[26] The neuroscience and behavioral science supporting the Court's ruling do not apply with equal force to killings under all three theories. Nor do they apply with equal force to the wide range of individual conduct that can be prosecuted under each of the theories of first-degree murder.

VI. CONCLUSION AND ORDER

Article 26 of the Massachusetts Declaration of Rights establishes "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Diatchenko I*, 466 Mass. at 659. Moreover, as applied to juveniles, the SJC considers life-without-parole sentences to be "strikingly similar, in many respects, to the death penalty... ." *Id.* at 670. On the record of brain science and social science in this case, the

[26] The Legislature has enacted different lengths of time before parole eligibility for convictions under each of these three theories. See G.L. c. 127, § 133A; G.L. c. 279 § 24.

imposition of non-discretionary (*i.e.* mandatory) life-without-parole sentences for defendants who were age 18 through 20 at the time of their crimes constitutes a "sentencing practice[ ] based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* at 659 . Therefore, this sentencing practice constitutes "cruel or unusual punishment" in violation of article 26 of the Massachusetts Declaration of Rights.

Because Jason Robinson and Sheldon Mattis were respectively 19 years old and 18 years old at the time of their crimes, they are each entitled to a new sentencing hearing.

Dated: July 20, 2022

Robert L. Ullmann
Justice of the Superior Court

EXHIBIT B

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UNITED STATES,
v.
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Attorneys and Law Firms

Lisa Hoyes, Jan Alison Rostal, Federal Defenders of New York, Inc., Brooklyn, NY, Yuanchung Lee, Federal Defenders of New York, New York, NY, for Defendant.

Christopher J. Gunther, Michelle DeLong, Douglas M. Pravda, Peter Alfred Norling, United States Attorneys Office, Brooklyn, NY, Benjamin A. Saltzman, United States Attorney's Office for the Eastern District, New York, NY, for United States.

Statement of Reasons

ROSS, District Judge

***1** Amaury Rosario is before me for resentencing pursuant to the Supreme Court's decisions in *Miller v. Alabama* [1] and *Montgomery v. Louisiana*. [2] In *Miller*, the Court held that juveniles who commit homicides cannot be sentenced to *mandatory* terms of life imprisonment. Instead, only "the rare juvenile offender whose crime reflects irreparable corruption" can be lawfully sentenced to a lifetime in prison without the chance of parole. [3] Then, in *Montgomery*, the Court held that *Miller* applied retroactively to those juvenile offenders who had been sentenced to mandatory terms of imprisonment, but whose convictions had already become final before *Miller*, like the defendant here.

Miller and *Montgomery* are but the latest in a series that began with *Roper v. Simmons*, [4] which outlawed the death penalty for juveniles who commit crimes, and *Graham v. Florida*, [5] which outlawed life imprisonment without parole for juvenile offenders who commit crimes other than homicide. Collectively, these cases stand for the proposition that adolescents are different from adults—and must be treated differently by courts.

This line of cases is based not only on society's "evolving standard of decency," but also on our increasing understanding of adolescent brain development. The Supreme Court has delineated three areas of fundamental difference between juveniles and adults. First, juveniles are more prone to take risks and less attuned to the potential consequences of their actions. [6] Second, juveniles are more "susceptible to negative influences and outside pressures, including peer pressure." [7] And, third, the character of juveniles is not as well formed as that of adults; indeed, the vast majority of adolescent offenders eventually age out of criminality. [8] These conclusions are rooted not only in common sense, but also in neuroscience and social science. [9] And, according to the *Miller* court, with the passage of time and further studies, the evidence for these conclusions has "become even stronger." [10]

As explained by Dr. Laurence Steinberg, a professor of psychology at Temple University and an expert in adolescent cognitive development, recent research has established that the areas of the human brain dealing with "judgment and decision-making" continue to mature well into our 20s. [11] Thus, due to "neurobiological immaturity," even older adolescents "continue to demonstrate difficulties in exercising self-restraint, controlling impulses, considering future consequences, and making decisions independently from their peers." [12] For example, under calm conditions, "individuals between 18 and 21 were able to control their impulses as well as those in their mid-twenties. But under emotionally arousing conditions, 18- to 21-year-olds demonstrated levels of impulsive behavior comparable to those in their mid-teens." [13]

***2** These findings, taken together, are of significance in assessing all four of the classic penological justifications of punishment. As *Miller* states, retribution, deterrence, incapacitation, and rehabilitation typically will not justify the harshest sentences for juveniles who commit crimes, even for those who commit truly heinous crimes. [14] In the words of the *Miller* court, quoting *Graham*: because " '[t]he heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong

with a minor as with an adult.' Nor can deterrence do the work in this context, because 'the same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." [15] Similarly, "[d]eciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.' " [16] And, finally, rehabilitation cannot justify a sentence of life imprisonment because a life sentence " 'forswears altogether the rehabilitative ideal.' It reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." [17]

With those considerations in mind, I now turn to the statutory factors I must consider when imposing a sentence. [18] As an initial matter, it is undisputed that Rosario's guidelines sentence remains life imprisonment.

The nature and circumstances of the offense

Turning to the nature and circumstances of the offense, this was undoubtedly a heinous crime. Indeed, it is one of the most heinous crimes I have encountered in almost 25 years as a district court judge. Rosario, along with his co-defendants, shot and killed four unarmed people. A fifth victim, Eric Caraballo, survived only because the robbers ran out of bullets. This crime ripped a hole in the victims' families that, over 20 years later, remains almost unbearably raw. I was deeply moved by the words of Mr. Caraballo and the other victims's family members, both written and in court today. I cannot begin to comprehend their pain and suffering.

There are several aspects of his role in this offense, however, that somewhat mitigate Rosario's culpability, particularly in light of his youth—he was 17 years old at the time of the offense.

This crime was planned by Almein Cain and Julio Posada, men in their twenties, seven to ten years older than Rosario, both of whom had prior armed robbery convictions. Cain and Posada recruited two teenagers, Rosario and his co-defendant Sean Estrella, to help them rob the Compadre grocery store. Rosario's participation in the crime no doubt had particular value to them because he was familiar with this bodega—and the people who worked there, who in turn were familiar with him.

Cain brought three guns to this robbery: an Uzi, a revolver and a Tec9. Rosario's role in this crime was supposed to have been limited—he was told to hide in the basement of the bodega until after closing time, subdue anyone who remained, and let the other robbers in. As instructed, he descended to the basement to hide. He then stashed the Tec9 that Cain had given him in the space between the top of a wall and the basement ceiling, underneath some cardboard. Before closing time, however, Eric Caraballo, whom Rosario knew, discovered Rosario in the basement and told him to leave. Instead of grabbing his gun, Rosario accompanied Caraballo upstairs, left the bodega, and returned to the nearby van where his confederates were waiting. Rosario explained to Cain that there were too many people in the store to proceed with the robbery. When Rosario told Cain that he had left his gun behind, Cain became upset and ordered Rosario to return to the bodega.

When Rosario returned as directed, the other robbers rushed into the store behind him. Cain, who was wielding the Uzi, announced the holdup. Posada held the revolver. Neither Rosario nor Estrella was armed. Rosario was the only one of the robbers who was not wearing a face mask. Cain and Posada herded the robbery victims to the back of the store, and forced them to lie down. Rosario approached Cain to express his apprehension that the victims could identify him, having seen his face. Cain cocked the Uzi, handed it to Rosario, and told him to "do what he had to do." They then walked to the back of the store, where Rosario and Posada shot and killed four men, wounding a fifth—Eric Caraballo. At both his state and federal trials, Rosario denied responsibility for this crime, advancing a false alibi defense.

***3** Nonetheless, Rosario has since taken responsibility for his actions. He admitted his involvement in this crime to his parents a decade ago, and forthrightly accepted responsibility as part of his enrollment in the Bureau of Prison's Challenge Program, which I will discuss further later. He wrote in a recent letter to the court that, although he believed his choice was to "either shoot or be shot" when Cain put the Uzi in his hand, in the end he was the one who pulled the trigger. Rosario expressed what I believe to be heartfelt remorse for his actions, and acknowledged the pain and suffering that he has caused. Moreover, contrary to the government's contentions, I do not find his perjury during the prior proceedings to be of great import, especially when viewed in light of his relative youth and when compared to the severity of this crime.

I credit that Rosario intended to participate in a robbery, but found himself involved in a far more violent crime. Indeed, the fact that he hid the Tec9 so well that it was not found in the basement for over a year suggests that he did not intend to use it. Nevertheless, I am not persuaded by defense counsel's argument that Rosario was attempting to sabotage this robbery, or that he is eligible for a downward departure based on coercion and duress. Nor am I persuaded by the government's claim that Rosario had an opportunity to withdraw completely from this crime after he first left the bodega. When Rosario appeared at the van, he was ordered to return to the store by Cain, a significantly larger, older man, armed with an Uzi. Later, Cain directed Rosario to shoot. After returning to the bodega, Rosario was not even in possession of a gun until Cain thrust one into his hands. While this does not absolve Rosario of responsibility for pulling the trigger, it does show that he was a follower, not a leader in this crime.

An examination of the facts and circumstances of this crime helps bring into focus how Rosario's youth was a mitigating factor. Although an adult is presumed to foresee that an armed robbery might end in bloodshed, an adolescent might well not. Indeed, as Dr. Steinberg explained, "adolescents are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation." [19] Adolescents are also "more apt to focus on the potential rewards of a given decision than on the potential costs." [20] "In general, adolescents are more short-sighted and less planful, and they have more difficulty ... in foreseeing the potential outcomes of their actions." [21] Thus, when assessing his blameworthiness, it is necessary to keep in mind that Rosario ultimately participated in a different and dramatically more serious offense than the crime in which he initially agreed to participate. Further, the rapidly unfolding events were the kind of emotionally charged stressors likely to prompt even an older adolescent to act with childish impulsivity. [22]

None of this, of course, in any way diminishes the heinousness of Rosario's crime, or its impact on the victims and their families. But it does diminish his *culpability.* It also suggests that his crime, while unforgivable, may reflect circumstances far more than character.

The history and characteristics of the defendant

Turning next to the history and characteristics of the defendant, the circumstances of Rosario's arrest and confession in this case are, I believe, of some significance. Less than a month after the crime and before any other perpetrators had been identified by the police, Rosario accompanied his girlfriend to the 110th Precinct—the same precinct investigating the murders—on a wholly unrelated matter. While there, Rosario was recognized by an officer as the robber who had been described by the surviving victim, Eric Caraballo. The officer asked Rosario to remain at the police station for questioning. Rosario acceded, waived his *Miranda* rights, and agreed to give a statement. Although he initially denied participating in the robbery and killings, within less than half an hour he tearfully admitted to his participation in the crimes, explaining that he had hesitated to confess because one of the victims was a relative, and he feared how his parents would react. Subsequently, he identified Cain as a participant and provided information leading to the arrest of Cain, Estrella, and Posada. These circumstances, too, in no way absolve the defendant from responsibility for the brutal killings. But they do reinforce the impression that Rosario was laboring under psychological constraints characteristic of a juvenile.

***4** Turning briefly to factors relating to Rosario's upbringing, his parents, who undoubtedly loved their son, were nonetheless abusive in certain respects, further detailed in the record. By his teenage years, Rosario became unruly and risk taking, as evidenced by various matters developed in the record. His cousin recruited him into the La Familia gang. [23] And he acquired a juvenile record, largely involving small-scale robberies, resulting in incarceration at the Spofford juvenile detention center.

In 1998, after Rosario was acquitted of this crime in state court, he moved to Georgia with his common-law wife and his daughter. [24] There, he found a job at the Atlanta airport as a baggage handler and evidently did not engage in further criminal activities. [25] Within five months, however, he was again arrested, charged federally, and then convicted for the instant offense.

Although his prison disciplinary record was described by guards as "minor," [26] Rosario's first few years in federal prison were checkered. He was twice found to have possessed a dangerous weapon and once assaulted another inmate, although without causing serious injury. He also incurred several other less serious disciplinary infractions. But starting

in late 2004 or 2005, long before *Miller* raised the possibility that he might ever emerge from prison, he began to improve his behavior. His most serious disciplinary violation in the past 13 years was for possessing Tylenol 3, which he began using to treat a work injury.

Multiple prison staffers have attested to positive aspects of Rosario's character. In the words of one correctional officer, "He was a gentleman. Respectful to guards, inmates, everyone."[27] A prison psychologist noted that he was an "unusually brave inmate in that he was willing to challenge the negative norms of his peers and himself."[28]

Although, as a lifer, Rosario was ineligible to receive time off his sentence for his participation, he enrolled in the Bureau of Prison's Challenge program. This intensive residential treatment program aims to address and reduce criminal behavior, as well as address issues related to mental illness and substance abuse, via techniques taken from cognitive behavioral therapy. Staffers noted that Rosario "far exceeded his peers" in his engagement with the program.[29]

Other inmates also attest to his positive influence. For example, Rosario convinced one fellow inmate to follow his lead and leave the gang with which he was affiliated. Rosario then interceded on that inmate's behalf with gang leaders and persuaded them to permit the inmate's disaffiliation.

Further, in preparation for this re-sentencing hearing, Rosario was evaluated by two mental-health experts, a forensic psychiatrist working for the defense and a forensic psychologist working for the government. Of particular significance to the issue before me, both experts found that Rosario had been rehabilitated and that he no longer poses a significant risk to the public.

In the words of the government's expert, Dr. Berill, "it is clear in speaking to Mr. Rosario ... that he has grown and matured over the years and takes responsibility for his involvement in an extremely serious crime. [He] made no excuses for his behavior and reported that he continues to think about the instant offense on a regular basis. He reported that he has looked, particularly over the last ten years or so, for ways to improve his life and enhance his education."[30] Dr. Berill found that although Rosario may have some tendency to behave "in a verbally impetuous manner" and "might act in ways in that challenge authority ..., *there is no indication that he demonstrates a pronounced penchant for aggression, sadism or violence.*"[31] Dr. Berill concluded that, "ensuring that he is actively involved in treatment ..., *few clinical concerns emerge regarding the likelihood that Mr. Rosario would become involved in the type of violent crime that resulted in his current incarceration.*"[32]

***5** The defense expert, Dr. Bardey, opined that Rosario has achieved "complete rehabilitation."[33] Dr. Bardey found that, since his adolescence, Rosario has "demonstrably changed his way of thinking [and] behaviors."[34] Indeed, despite facing a life sentence, he "pursued and accomplished a record of reform, rejected violence, demonstrated an inherent intellectual curiosity and willingness to learn positive, prosocial skills to take advantage of his talents and his desire to be a positive example to others."[35] Dr. Bardey concluded that Rosario no longer displays "antisocial personality traits," nor any other psychiatric condition.[36] And, by his conduct in prison, Rosario has "demonstrated [a] lack of dangerousness" and a "minimal risk of recidivism."[37] Thus, "there is no reason to believe that ... [the] incapacitation of Mr. Rosario is necessary to protect society."[38]

The purposes of punishment

Keeping all this in mind, I turn to the four factors I am required by statute to consider—the need for the sentence imposed to provide just punishment for the offense, deterrence from criminal conduct, protection of the public, and rehabilitation of the defendant.[39]

The last three factors all militate in favor of Rosario's release. The undisputed evidence in the record supports the conclusion that Rosario has been rehabilitated. In the view of even the government's expert, he no longer poses a significant risk to public safety. Accordingly, there is no need for additional punishment to incapacitate him or deter him from committing future crimes. On the contrary, Rosario's record of rehabilitation "demonstrate[s] the truth" of what *Montgomery* calls "*Miller*'s central intuition—that children who commit even heinous crimes are capable of change."[40]

It is also doubtful that additional punishment can be justified by the goal of general deterrence. As the Supreme Court noted in *Miller*, " 'the same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to

consider potential punishment."[41] Moreover, Rosario has already been incarcerated for longer than he had been alive at the time of this crime. The 25-year sentence of imprisonment sought by the defense is an undeniably long one, especially to an adolescent. It is therefore unclear why an even longer term of imprisonment would have any significant marginal effect in promoting general deterrence.

Indeed, the only justification for any significant additional imprisonment is to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,"[42] but, even here, Rosario's youth at the time of the offense somewhat mitigates the heinousness of his crime. Of course, that Rosario's brain was still developing does not diminish the devastating harm he caused. Nonetheless, as the *Miller* Court concluded, the hallmarks of his youth—immaturity, recklessness, and impetuosity—do make him less blameworthy.[43] A just punishment must take into consideration the severity of the offense committed. But it must also account for a juvenile offender's lessened culpability and greater capacity for change. Our society's evolving standard of decency does not deem it a just punishment to sentence juveniles to die in prison, no matter how heinous their crimes, absent a showing of "irreparable corruption."[44] And, here, the record indicates that rather than "permanent incorrigibility," Rosario's crime "reflect[s] the transient immaturity of youth."[45]

The need to avoid unwarranted sentencing disparities

***6** Finally, I wish to address the government's argument concerning "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[46]

Much of the parties' submissions have focused on the other *Miller* re-sentencings that have occurred in this district, as well as other districts in the Second Circuit. I have reviewed the records of the other *Miller* cases in the Eastern District of New York, but find them to be of limited assistance in determining an appropriate sentence here.

In one obvious respect, this is the most heinous of the *Miller* cases in this district. No other case involved as many deaths. To some extent, this may be a matter of happenstance, not a difference in the offender's intent. The other *Miller* cases in this district include instances where juvenile offenders shot at a group of four or more people, but only killed one or two individuals, perhaps because they were not armed with a submachine gun designed to fire as many as thirty bullets over two seconds. But that does not alter the reality that four people are dead at Rosario's hands and another was seriously wounded.

The government also suggests that Rosario is among the most culpable of the *Miller* defendants in this district because he was just a month shy of 18, while some of the other *Miller* defendants were younger. I do not find this argument convincing. Apart from the fact that some of the other defendants in these cases were also 17 years old, no magic transformation occurs when a juvenile reaches the age of 18. The research is clear that human brains are not fully developed until we are in our mid-20s. The difference between adolescent and adult brains is a qualitative one; the distinction between 16 and 17 is one of degree, not kind.

In other respects, Rosario is the least culpable of the *Miller* defendants resentenced in this district.

Rosario is the only one who has submitted to a government evaluation to determine his dangerousness—an examination that showed that he does not presently show a penchant for sadism, violence, or aggression, and that he does not pose a significant risk to the public if he is released.

Rosario is also the only one of these individuals who desisted from criminal behavior after committing homicide. Two other *Miller* defendants, Kwok and Wang, used their killings to become leaders in their gang. A third, Raysor, who received a 28-year sentence after shooting at an entire family in a car and killing one of them, continued as a leader of a drug organization for another seven years before he was arrested. Another, Stone, continued with violent gang activities for three more years after shooting a rival drug dealer, including the commission of another attempted homicide and other violent crimes. A fifth, Wong, not only continued to participate in gang activities until his arrest; he also conspired with other gang members while he was on Rikers Island to kill a witness in his case. Rosario, on the other hand, moved to Georgia after being acquitted at his state trial, obtained employment as an airport baggage handler, and apparently sought to become a law-abiding citizen.

***7** Finally, this is the only *Miller* case in this district that involved a robbery gone wrong. While several of the other *Miller* defendants were ordered to shoot their victims by older

gang leaders, each of the other defendants can be said to have knowingly embarked on a mission to kill. Rosario, on the other hand, initially agreed to participate in an armed robbery, not to shoot anyone.

In sum, reference to these other cases, while instructive, does not answer the ultimate question before this court: what is an appropriate sentence in this case? At most, it provides me with a sense of the range of reasonable outcomes.

Conclusion

Before pronouncing sentence, I feel compelled to acknowledge yet again the eloquent and heartbreaking words of Eric Caraballo as well as his and the other victims' loved ones. This was a heinous crime that resulted in unimaginable loss. I have agonized over this case and have taken with the utmost seriousness the request that I re-impose a sentence of life imprisonment. But the harm that Amaury Rosario has inflicted, however great, is only one sentencing factor.

Ultimately, I am required to weigh a number of countervailing considerations. I must of course consider the four people Rosario killed and the one he wounded, as well as the trauma this heinous crime has caused—and continues to cause—the victim's families. But I must also consider Rosario's chronological youth and that the circumstances of this case reflect his extreme immaturity and his susceptibility to the malign influence of older co-defendants. And I must consider Rosario's record of rehabilitation in prison, as well as the evidence that he no longer poses a significant risk to society if released. Then, I must determine a sentence that gives due weight to each of these considerations.

Congress has commanded that I impose a sentence that is "sufficient, but not greater than necessary" to provide just punishment for the offense, afford deterrence from criminal conduct, protect the public, and rehabilitate the defendant.[47] Balancing all the pertinent sentencing factors, I conclude that a sentence of 28 years imprisonment is sufficient to serve these statutory goals without being unduly severe.

All Citations

Not Reported in Fed. Supp., 2018 WL 3785095

Footnotes

1 567 U.S. 460 (2012).

2 136 S. Ct. 718 (2016).

3 *Montgomery*, 136 S. Ct. at 734; *see also Miller*, 567 U.S. at 479–80.

4 543 U.S. 551 (2005).

5 560 U.S. 48 (2010).

6 *Miller*, 567 U.S. at 472; *Graham*, 560 U.S. at 68; Roper, 543 U.S. at 569.

7 *Roper*, 543 U.S. at 569; *accord Miller*, 567 U.S. at 472; *Graham*, 560 U.S. at 68.

8 *Miller*, 567 U.S. at 472; *Graham*, 560 U.S. at 68; Roper, 543 U.S. at 570.

9 *Miller*, 567 U.S. at 471.

10 *Id.* at 472 n.5.

11 Decl. of Laurence Steinberg ¶ 12, Ex. E to Defense Sentencing Mem., ECF No. 76–7 ("Steinberg Decl.").

12 *Id.* ¶ 25.

13 *Id.* ¶ 23.

14 *Miller*, 567 U.S. at 472.

15 *Id.* (first quoting *Graham*, 560 U.S. at 71, then quoting *Graham*, 560 U.S. at 72).

16 *Id.* at 472–73 (second and third alterations in original) (quoting *Graham*, 560 U.S. at 72–73)

17 *Id.* at 473 (alteration in original) (quoting *Graham*, 560 U.S. at 74).

18 *See* 18 U.S.C. § 3553(a)(1).

19 Steinberg Decl. ¶ 14.

20 *Id.* ¶ 15.

21 *Id.* ¶ 16.

22 *See id.* ¶ 23.

23 Letter from Melanie Carr, Ex. B to Defense Sentencing Mem., ECF No. 76-4, at 5.

24 *Id.* at 18.

25 *See id.*

26 Memo. from Jan Rostal (May 25, 2017), Ex. G to Defense Sentencing Mem., ECF No. 76-9, at 2.

27 *Id.* at 2.

28 Memo. from Jan Rostal (May 15, 2017), Ex. G to Defense Sentencing Mem., ECF No. 76-9, at 2.

29 *Id.* at 1.

30 Report of N.G. Berill, Ph.D., Ex. A to Gov't Sentencing Letter, ECF No. 88, at 15–16.

31 *Id.* at 14 (emphasis added).

32 *Id.* at 17 (emphasis added).

33 Bardey Report at 28.

34 *Id.* at 26.

35 *Id.* at 28.

36 *Id.* at 28.

37 *Id.* at 29.

38 *Id.*

39 18 U.S.C. § 3553(a)(2).

40 *Montgomery*, 136 S. Ct. at 736.

41 *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 72).

42 18 U.S.C. § 3553(a)(2)(A).

43 *Miller*, 567 U.S. at 472.

44 *Montgomery*, 136 S. Ct. at 726, 734; *see also Miller*, 567 U.S. at 479–80.

45 *Montgomery*, 136 S. Ct. at 734.

46 18 U.S.C. § 3553(a)(7).

47 18 U.S.C. § 3553(a).

EXHIBIT C

The Commonwealth of Massachusetts
Executive Office of Public Safety and Security
PAROLE BOARD
12 Mercer Road
Natick, Massachusetts 01760

Telephone # (508) 650-4500
Facsimile # (508) 650-4599

Charles D. Baker
Governor

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Lieutenant Governor

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Secretary

Gloriann Moroney
Chair

Kevin Keefe
Executive Director

RECORD OF DECISION

IN THE MATTER OF

KIM ANDREWS
W60418

TYPE OF HEARING: **Review Hearing**

DATE OF HEARING: **March 22, 2022**

DATE OF DECISION: **July 5, 2022**

PARTICIPATING BOARD MEMBERS: Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Tina Hurley, Colette Santa[1]

STATEMENT OF THE CASE: On April 5, 1996, after a jury trial in Suffolk County Superior Court, Mr. Andrews was convicted of first-degree murder in the death of 24-year-old Jimmy Hinson on the grounds of deliberate premeditation and extreme atrocity or cruelty and was sentenced to life in prison without the possibility of parole. Mr. Andrews was also convicted of unlawful possession of a firearm and was sentenced to a concurrent term of four to five years.

On December 24, 2013, the Supreme Judicial Court issued a decision in *Diatchenko v. District Attorney for Suffolk County & Others,* 466 Mass. 655 (2013) in which the Court determined that the statutory provisions mandating life without the possibility of parole are invalid as applied to juveniles convicted of first-degree murder. Further, the Court decided that such juvenile offenders are entitled to a parole hearing. Accordingly, Mr. Andrews became eligible for parole.

Mr. Andrews appeared before the Parole Board for a review hearing on March 22, 2022. He was represented by Attorney Michael Hussey. Mr. Andrews had been denied parole at his initial hearing in 2015 and at his review hearing in 2019. The entire video recording of Mr. Andrews' March 22, 2022, hearing is fully incorporated by reference to the Board's decision.

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, the age of the inmate at the time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as

[1] Chair Moroney was recused.

expressed at the hearing or in written submissions to the Board, we conclude we conclude by a unanimous vote that the inmate is a suitable candidate for parole.

Reserve to Interstate Compact – South Carolina but not before completion of the Culinary Arts program. Mr. Andrews became parole eligible in 2013 pursuant to the *Diatchenko* decision. At 17-years-old, Mr. Andrews murdered 24-year-old James Hinson and was convicted of first-degree murder. The Board considered the 2015 psychological assessment of Dr. Brown regarding the factors relevant to Mr. Andrews' status as a juvenile homicide offender. Mr. Andrews reports that he has a support network in South Carolina to include his family as well as counseling services and employment upon release. Mr. Andrews has been in lower security for two years without incident. The Board considered the *Diatchenko/Miller* factors in rendering its decision.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." 120 C.M.R. 300.04. In the context of an offender convicted of first or second-degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation." *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015). The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.*

In forming this opinion, the Board has taken into consideration Mr. Andrews' institutional behavior, as well as his participation in available work, educational, and treatment programs during the period of his incarceration. The Board has also considered a risk and needs assessment and whether risk reduction programs could effectively minimize Mr. Andrews' risk of recidivism. After applying this appropriately high standard to the circumstances of Mr. Andrews' case, the Board is of the opinion that Mr. Andrews is rehabilitated and merits parole at this time.

Special Conditions: Reserve to an approved home plan; Release to other authority – Interstate Compact, South Carolina; Waive work – two weeks; Curfew must be at home between 10 p.m. and 6 a.m.; ELMO-electronic monitoring; Supervise for drugs; testing in accordance with agency policy; Supervise for liquor abstinence; testing in accordance with agency policy; Report to assigned MA Parole Office on day of release; No contact with victim(s) family; Must have substance abuse evaluation – adhere to plan; Must have mental health counseling for adjustment/transition.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing.

/s/ Pamela Murphy p.p. 7/5/22
Pamela Murphy, General Counsel Date

EXHIBIT D

The Commonwealth of Massachusetts
Executive Office of Public Safety and Security
PAROLE BOARD
12 Mercer Road
Natick, Massachusetts 01760

Telephone # (508) 650-4500
Facsimile # (508) 650-4599

Charles D. Baker
Governor

Karyn Polito
Lieutenant Governor

Terrence Reidy
Secretary

Gloriann Moroney
Chair

Kevin Keefe
Executive Director

RECORD OF DECISION

IN THE MATTER OF

HOWARD HAMILTON
W53919

TYPE OF HEARING: **Review Hearing**

DATE OF HEARING: **March 31, 2022**

DATE OF DECISION: **July 5, 2022**

PARTICIPATING BOARD MEMBERS: Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Tina Hurley, Colette Santa[1]

STATEMENT OF THE CASE: On January 29, 1993, after a jury trial in Suffolk Superior Court, Howard Hamilton was convicted of first-degree murder in the death of 26-year-old Christopher Berry Bailey. He was sentenced to life in prison without the possibility of parole. He was also found guilty of two counts of assault to kill and two counts of assault and battery by means of a dangerous weapon and was sentenced to concurrent terms of nine to ten years on each indictment. Additionally, he was convicted of a firearm On that same date, he was found guilty of unlawful possession of a firearm and sentenced to a concurrent term of four to five years in state prison.

On December 24, 2013, the Supreme Judicial Court issued a decision in *Diatchenko v. District Attorney for Suffolk County & Others,* 466 Mass. 655 (2013) in which the Court determined that the statutory provisions mandating life without the possibility of parole are invalid as applied to juveniles convicted of first-degree murder. Further, the Court decided that such juvenile offenders must be afforded parole hearing. Accordingly, Mr. Hamilton became eligible for parole.

Mr. Hamilton appeared before the Parole Board for a review hearing on March 31, 2022. He was represented by Attorney Chetan Tiwari. This was Mr. Hamilton's third appearance before the Board having been denied at his initial hearing in 2014 and at his review hearing in 2019. The entire video recording of Mr. Hamilton's March 31, 2022, hearing is fully incorporated by reference to the Board's decision.

[1] Chair Moroney was recused.

DECISION OF THE BOARD: The Board after careful consideration of all relevant facts, including the nature of the underlying offense, the age of the inmate at the time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by a unanimous decision that the inmate is a suitable candidate for parole.

Reserve to his United States Immigration and Customs Enforcement (ICE) detainer. On June 3, 1990, 17-year-old Howard Hamilton and his co-defendants committed the shooting that resulted in the death of 26-year-old Christopher Berry Bailey. The other victims were shot in the incident and survived. He was convicted of first-degree murder. The Board considered Mr. Hamilton's age at the time of the offense as well as factors related to *Miller/Diatchenko* factors including that his participation in the crime was clearly peer driven. He has satisfied all program requirements and has benefitted from treatment and programming. The Board considered the expert evaluation of Dr. Mendoza and Dr. DiCataldo. In addition, the Board considered the testimony of Dr. DiCataldo. Mr. Hamilton has a solid support network that will assist in his reentry. He accepts full responsibility and appears remorseful.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." 120 C.M.R. 300.04. In the context of an offender convicted of first or second-degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation." *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015). The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.*

In forming this opinion, the Board has taken into consideration Mr. Hamilton's institutional behavior, as well as his participation in available work, educational, and treatment programs during the period of his incarceration. The Board has also considered a risk and needs assessment and whether risk reduction programs could effectively minimize Mr. Hamilton's risk of recidivism. After applying this appropriately high standard to the circumstances of Mr. Hamilton's case, the Board is of the unanimous opinion that Mr. Hamilton is rehabilitated and merits parole at this time.

Special Conditions: Reserve to his United States Immigration and Customs Enforcement (ICE) detainer; Approved home plan before release (in the event Mr. Hamilton is released from ICE custody); Waive work for two weeks; Must be at home between 10 p.m. and 6 a.m.; ELMO-electronic monitoring; Must take prescribed medication; Supervise for drugs; testing in accordance with agency policy; Supervise for liquor abstinence; testing in accordance with agency policy; Report to assigned MA Parole Office on day of release; No contact or association with co-defendants; No contact with victim(s) family; No contact with victim(s); Must have substance abuse evaluation – adhere to plan; Must have mental health counseling for adjustment/transition and post-traumatic stress disorder.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing.

/s/ Pamela Murphy
Pamela Murphy, General Counsel

7/5/22
Date

EXHIBIT E

The Commonwealth of Massachusetts
Executive Office of Public Safety and Security
PAROLE BOARD
12 Mercer Road
Natick, Massachusetts 01760

Telephone # (508) 650-4500
Facsimile # (508) 650-4599

Charles D. Baker
Governor

Karyn Polito
Lieutenant Governor

Terrence Reidy
Secretary

Gloriann Moroney
Chair

Kevin Keefe
Executive Director

RECORD OF DECISION

IN THE MATTER OF

SWINKELS LAPORTE
W96050

TYPE OF HEARING: **Initial Hearing**

DATE OF HEARING: **June 30, 2022**

DATE OF DECISION: **October 12, 2022**

PARTICIPATING BOARD MEMBERS: Gloriann Moroney, Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre[1], Tina Hurley, Colette Santa

STATEMENT OF THE CASE: On March 1, 2010, after a jury trial in Hampden Superior Court, Swinkels Laporte was convicted of first-degree murder in the death of 46-year-old Tracy Bennett. He was sentenced to life in prison without the possibility of parole. On that same date, Mr. Laporte was also convicted of four counts of Home Invasion and received a sentence of 30-35 years to be served from and after his life sentence, two counts of Armed Robbery while Masked, and received a sentence of 20-30 years to be served concurrently with the Home Invasion conviction and from and after his life sentence, one count of Carrying a Firearm without a License, and received a sentence of 2½-5 years to be served concurrently with the Home Invasion conviction and from and after his life sentence, and one count of Possession of Ammunition, and received a sentence of 2 years to be served concurrently with the Home Invasion conviction and from and after his life sentence, two counts of Assault and Battery, and received a sentence of 2½ years to be served concurrently with the Home Invasion conviction and from and after his life sentence, and four counts of Assault by Means of a Dangerous Weapon, and received a sentence of 4-5 years to be served concurrently with the Home Invasion conviction and from and after his life sentence.

On December 24, 2013, the Supreme Judicial Court issued a decision in *Diatchenko v. District Attorney for Suffolk District & Others*, 466 Mass. 655 (2013), in which the Court determined that the statutory provisions mandating life without the possibility of parole are invalid as applied to juveniles convicted of first-degree murder. Further, the Court decided that *Diatchenko* (and others similarly situated) must be given a parole hearing. Accordingly, Mr. Laporte became eligible for parole in 2022.

[1] Board member Dupre participated in the hearing but was no longer a board member at the time of the vote.

Mr. Laporte appeared before the Parole Board for an initial hearing on June 30, 2022. He was represented by Attorney Robert Hennessy. This was Mr. Laporte's first appearance before the Board. The entire video recording of Mr. Laporte's June 30, 2022, hearing is fully incorporated by reference to the Board's decision.

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, the age of the inmate at the time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by unanimous vote that the inmate is a suitable candidate for parole.

Reserve to Long Term Residential Program but not before completion of eighteen months in lower security. On August 29, 2007, 17-year-old Mr. Laporte committed an armed home invasion wherein 46-year-old Tracy Bennett was shot and killed. Mr. Laporte was exposed to violence and street crime from a very young age. Mr. Laporte was in the tenth grade at the time of the offense. He arrived to the United States from Haiti at the age of five years old and dealt with significant language and cultural obstacles as a child. Since his incarceration, he committed himself to his rehabilitation and has had a positive institutional adjustment. He earned his GED while incarcerated. He has completed Alternatives to Violence, Cognitive Skills, AVP, and is engaged in the Vet Dog program. Mr. Laporte has family support that will aid in his reentry. The Board considered the evaluation of Dr. Kinscherff who opines that Mr. Laporte is at lower risk to reoffend. As noted above, the Board considered the *Miller/ Diatchenko* factors. Mr. Laporte will benefit from a stepdown to lower security to aid in his transition and continue rehabilitative programming.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." 120 C.M.R. 300.04. In the context of an offender convicted of first-degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation." *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015). The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.*

In forming this opinion, the Board has taken into consideration Mr. Laporte's institutional behavior, as well as his participation in available work, educational, and treatment programs during the period of his incarceration. The Board has also considered a risk and needs assessment and whether risk reduction programs could effectively minimize Mr. Laporte's risk of recidivism. After applying this appropriately high standard to the circumstances of Mr. Laporte's case, the Board is of the unanimous opinion that Mr. Laporte is rehabilitated and merits parole at this time.

Special Conditions: Reserve to Long Term Residential Program – must complete; Waive work for program; Curfew – must be at home between 10pm and 6am; ELMO-electronic

monitoring; Supervise for drugs; testing in accordance with agency policy; Supervise for liquor abstinence; testing in accordance with agency policy; Report to assigned MA Parole Office on day of release; No contact with STG associates; No contact with victim's family; Counseling for adjustment/transition.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing.

Pamela Murphy, General Counsel

10/12/22
Date

EXHIBIT F

The Commonwealth of Massachusetts
Executive Office of Public Safety and Security
PAROLE BOARD
12 Mercer Road
Natick, Massachusetts 01760

Telephone # (508) 650-4500
Facsimile # (508) 650-4599

Charles D. Baker
Governor
Karyn Polito
Lieutenant Governor
Terrance Reidy
Secretary

Gloriann Moroney
Chair
Kevin Keefe
Executive Director

RECORD OF DECISION

IN THE MATTER OF

GEORGE MACNEIL
W39496

TYPE OF HEARING: **Review Hearing**

DATE OF HEARING: **January 6, 2022**

DATE OF DECISION: **June 15, 2022**

PARTICIPATING BOARD MEMBERS: Gloriann Moroney, Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Tina Hurley, Colette Santa

STATEMENT OF THE CASE: On February 2, 1983, after a jury trial in Essex Superior Court, George MacNeil was convicted of first-degree murder in the death of Bonnie Mitchell and was sentenced to life in prison without the possibility of parole.

On December 24, 2013, the Supreme Judicial Court issued a decision in *Diatchenko v. District Attorney for Suffolk District & Others*, 466 Mass. 655 (2013), in which the Court determined that the statutory provisions mandating life without the possibility of parole are invalid as applied to juveniles convicted of first-degree murder. Further, the Court decided that *Diatchenko* (and others similarly situated) must be given a parole hearing. Following the *Diatchenko* decision, Mr. MacNeil became eligible for parole.

Mr. MacNeil appeared before the Parole Board for a review hearing on January 6, 2022. He was represented by Attorney Elizabeth Caddick. This was Mr. MacNeil's second appearance before the Board having been denied at his initial hearing in 2019. The entire video recording of Mr. MacNeil's January 6, 2022, hearing is fully incorporated by reference to the Board's decision.

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, the age of the inmate at the time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by a unanimous vote that the inmate is a suitable candidate for parole.

Reserve to a Department of Mental Health (DMH) living environment with 24-hour staffing. Mr. MacNeil has served 35 years for the murder of 15-year-old Bonnie Mitchell. He was 16-years-old at the time of the offense. He has since been diagnosed with numerous mental health disorders which required extensive treatment. He appears to have stabilized to the extent he is ready to transfer to a DMH facility. He has been compliant with medications and treatment and has participated in appropriate programming. As per the expert evaluation of Dr. Lockwood he will benefit from the extensive structure and support of a DMH facility.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." 120 C.M.R. 300.04. In the context of an offender convicted of first or second-degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation." *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015). The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.*

In forming this opinion, the Board has taken into consideration Mr. MacNeil's institutional behavior, as well as his participation in available work, educational, and treatment programs during the period of his incarceration. The Board has also considered a risk and needs assessment and whether risk reduction programs could effectively minimize Mr. MacNeil's risk of recidivism. After applying this appropriately high standard to the circumstances of Mr. MacNeil's case, the Board is of the opinion that Mr. MacNeil is rehabilitated and merits parole at this time.

Special Conditions: Reserve to approved DMH group living facility with 24 hour staffing; Waive work – DMH; Curfew must be at home between 10 p.m. and 6 a.m.; ELMO-electronic monitoring; Must take prescribed medication; Supervise for drugs; testing in accordance with agency policy; Supervise for liquor abstinence; testing in accordance with agency policy; Report to assigned MA Parole Office on day of release; No contact with victim(s) family; Must have mental health counseling for post-traumatic stress disorder and anxiety disorder; Mandatory – follow all service provider recommendation; Mandatory – adhere to DMH case plan.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing.

Pamela Murphy, General Counsel

6/15/22
Date

EXHIBIT G

The Commonwealth of Massachusetts
Executive Office of Public Safety and Security
PAROLE BOARD
12 Mercer Road
Natick, Massachusetts 01760

Telephone # (508) 650-4500
Facsimile # (508) 650-4599

Charles D. Baker
Governor

Karyn Polito
Lieutenant Governor

Terrence Reidy
Secretary

Gloriann Moroney
Chair

Kevin Keefe
Executive Director

DECISION

IN THE MATTER OF

SHAWN SHEA

W93447

TYPE OF HEARING: **Initial Hearing**

DATE OF HEARING: **May 5, 2022**

DATE OF DECISION: **September 15, 2022**

PARTICIPATING BOARD MEMBERS: Gloriann Moroney, Dr. Charlene Bonner, Tonomey Coleman, Tina Hurley, Colette Santa

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, the age of the inmate at the time of the offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude that the inmate is not a suitable candidate for parole. Parole is denied with a review scheduled in three years from the date of the hearing.

1. STATEMENT OF THE CASE

On December 12, 2008, after a jury trial in Hampden Superior Court, Shawn Shea was convicted of murder in the first degree in the death of 14-year-old Dymond McGowan. He was sentenced to life in prison without the possibility of parole. On that same day, Mr. Shea was also found guilty of use of a firearm during the commission of a felony, for which he received a concurrent sentence of 5 years to 5 years and 1 day, and unlawful possession of a firearm, for which he received a concurrent sentence of 18 months. In 2011, Mr. Shea's convictions were affirmed on appeal.[1]

Mr. Shea was 17-years-old at the time of his offense. On December 24, 2013, the Massachusetts Supreme Judicial Court issued a decision in *Diatchenko v. District Attorney for the Suffolk District & Others*, 466 Mass. 655 (2013), in which the Court determined that the statutory

[1] *Commonwealth v. Shawn Shea,* 460 Mass. 163 (2011).

provisions mandating life without the possibility of parole were invalid as applied to those, like Mr. Shea, who were juveniles when they committed murder in the first degree. The Supreme Judicial Court ordered those inmates affected be given a meaningful opportunity to be considered for parole suitability. Accordingly, Mr. Shea became eligible for parole and is now before the Board for an initial hearing. Mr. Shea has served 15 years of his life sentence.

On the night of May 10, 2007, Shawn Shea, and three other men associated with the "SWAT Team" street gang in Springfield drove toward a house considered to be a "hang-out spot" for a rival gang.[2] On their way, the men stopped to obtain a .40 caliber Glock semiautomatic pistol. As they passed the targeted house, Mr. Shea leaned out the rear passenger window and fired six shots at a group of people standing on the first-floor porch and steps. A witness heard Mr. Shea yell "SWAT Team" as he did this. He later told witnesses that he "did the hit" or "hit up" the house. Dymond McGowan suffered a fatal gunshot wound to the abdomen, and a second victim received non-fatal injuries. Mr. Shea was arrested by the Springfield Police Department on May 16, 2007 for unrelated warrants. At that time, he was asked about his role in the shooting that killed Dymond McGowan, and admitted to being the shooter.

II. PAROLE HEARING ON MAY 5, 2022[3]

Shawn Shea, now 32-years old, appeared before the Parole Board for an initial hearing on May 5, 2022, and was represented by Attorney Lisa Newman-Polk. In his opening statement to the Board, Mr. Shea apologized to the McGowan family for the pain he caused them and to his own family for their shame and embarrassment at what he had done. He acknowledged that there were no excuses for his decision to shoot a gun out of a window into a crowd of people. Mr. Shea described his childhood as "chaotic" and characterized by abandonment. At age 16, he moved to Springfield, where he spent time with the "wrong" people and surrounded himself with poor role models. Mr. Shea became involved with a gang, who insisted that he "put in work" to show his allegiance. Mr. Shea explained that gang membership filled a void left by his childhood, allowing him to feel accepted. Mr. Shea stated that he had not been involved with any significant criminal activity prior to the governing offense, although he had been "shot at" multiple times.

When Board Members questioned him as to his intent when he fired shots out of a car window, Mr. Shea explained that a co-conspirator handed him the gun only 30-45 seconds prior to driving by the targeted house, so he didn't think about the consequences before shooting. Although he assumed that the people outside the house were affiliated with a rival gang, Mr. Shea claimed that he wasn't planning on shooting anyone, specifically, and only learned of Ms. McGowan's death the next day. Mr. Shea described Ms. McGowan as a friend, stating that he originally denied killing her to everyone, including himself. Mr. Shea further denied his role as the shooter until at least 2015, including his petition for habeas corpus in 2012, when he used an affidavit from a co-defendant stating that he was not the shooter.

Board Members questioned Mr. Shea as to his institutional adjustment, noting that he did not demonstrate any desire to change prior to the *Diatchenko* decision. Mr. Shea admitted that, during the earlier part of his incarceration, he was not motivated to rehabilitate himself. Until approximately 2016, he remained security threat group-involved and participated in fights relating

[2] Mr. Shea had two co-defendants, Alexander Vaughn and Donnell Godbolt.
[3] The entire video recording of Mr. Shea's May 5, 2022 hearing is fully incorporated by reference into the Board's decision.

to his affiliation. Board Members expressed concern that Mr. Shea has continued to demonstrate problems with conflict resolution, as demonstrated through his disciplinary history. Mr. Shea admitted that his biggest struggle has been getting into verbal confrontations, particularly with corrections officers. Board Members noted, however, that Mr. Shea has a significant support system among family in the community, as well as a workable parole plan. Upon further questioning, Mr. Shea acknowledged that he still has work to do regarding empathy towards the victim's family, as well as others who have suffered loss due to violence. He further acknowledged that available programs, such as Restorative Justice, could help in his rehabilitation.

The Board considered testimony in support of parole from Mr. Shea's aunt, mother, uncle, and fiancé. The Board also considered testimony in support of parole from Dr. Katherine Herzog. The Board considered testimony in opposition to parole from Ms. McGowan's father and his wife, as well as an opposition letter from Ms. McGowan's cousin. The Hampden County District Attorney's Office also submitted a letter of opposition.

III. DECISION

The Board is of the opinion that Shawn Shea has not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. Mr. Shea shot and killed 14-year-old Dymond McGowan and shot and injured another victim, who survived. Mr. Shea was in a vehicle and indiscriminately shot from the vehicle, which resulted in the death of Ms. McGowan, who was not the intended victim. The shooting was motivated by a dispute between gangs. Mr. Shea presented well during his initial parole hearing; however, the Board remains concerned that he needs to display a longer period of positive adjustment. Mr. Shea has had a problematic adjustment, as evidenced by 39 Disciplinary Reports, and spent a significant amount of time in disciplinary detention and, by his own admission, saw "the hole as just another cell." Mr. Shea needs to engage in additional rehabilitative programming to include Restorative Justice. The Board considered the expert opinion of Dr. Herzog; however, the Board is of the opinion that there is essential work to do prior to Mr. Shea being ready to be released to the community.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." 120 C.M.R. 300.04. In the context of an offender convicted of first or second-degree murder, who was a juvenile at the time of the offense, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation." *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015).

The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.* The

Board also recognizes the petitioner's right to be represented by counsel during his appearance before the Board. *Id.* at 20-24. In forming this opinion, the Board has taken into consideration Mr. Shea's institutional behavior, as well as his participation in available work, educational, and treatment programs during the period of his incarceration. The Board has also considered a risk and needs assessment, and whether risk reduction programs could effectively minimize Mr. Shea's risk of recidivism. After applying this standard to the circumstances of Mr. Shea's case, the Board is of the opinion that Shawn Shea is not rehabilitated and, therefore, does not merit parole at this time.

Mr. Shea's next appearance before the Board will take place in three years from the date of this hearing. During the interim, the Board encourages Mr. Shea to continue working toward his full rehabilitation.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing. Pursuant to G.L. c. 127, § 130, I further certify that all voting Board Members have reviewed the applicant's entire criminal record. This signature does not indicate authorship of the decision.

Pamela Murphy, General Counsel

9/15/22
Date

EXHIBIT H

The Commonwealth of Massachusetts
Executive Office of Public Safety and Security
PAROLE BOARD
12 Mercer Road
Natick, Massachusetts 01760

Telephone # (508) 650-4500
Facsimile # (508) 650-4599

Charles D. Baker
Governor

Karyn Polito
Lieutenant Governor

Terrence Reidy
Secretary

Gloriann Moroney
Chair

Kevin Keefe
Executive Director

RECORD OF DECISION

IN THE MATTER OF

O'NEIL FRANCIS
W89571

TYPE OF HEARING: **Review Hearing**

DATE OF HEARING: **April 7, 2022**

DATE OF DECISION: **August 10, 2022**

PARTICIPATING BOARD MEMBERS: Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Tina Hurley, Colette Santa[1]

STATEMENT OF THE CASE: On March 27, 2007, after a jury trial in Suffolk Superior Court, Mr. Francis convicted of second-degree murder in the death of 17-year-old Tacary Jones. He was sentenced to life in prison with the possibility of parole. On the same date, Mr. Francis received a 4 to-5-year concurrent sentence for unlawful possession of a firearm.

Mr. Francis appeared before the Parole Board for a review hearing on April 7, 2022. He was represented by student attorneys from Harvard Law School. This was Mr. Francis' second appearance before the Board having been denied in 2020. The entire video recording of Mr. Francis' April 7, 2022, hearing is fully incorporated by reference to the Board's decision.

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, the age of the inmate at the time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by a unanimous vote that the inmate is a suitable candidate for parole.

Reserve to a Long-Term Residential Program or Community Resources for Justice – Transitional Housing – Brooke House after six months in lower security. On March 18, 2005, 18-year-old Mr. Francis shot and killed 17-year-old Tacary Jones in Boston. Mr. Francis takes full responsibility for his role in the murder. The Board notes that he has fully invested in his rehabilitation and took the recommendations of the Board in 2020 seriously. He has completed significant programming and addressed all of his need areas. He has earned his general

[1] Chair Moroney was recused.

equivalency diploma, engaged in the culinary arts program, and completed two Restorative Justice Retreats. Mr. Francis scores low on the LS/CMI risk/needs assessment. He will benefit from a gradual step down and reentry counseling. The Board considered factors related to his young age at the time of the offense. The Board notes he has a solid support network and numerous job prospects.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society."

In forming this opinion, the Board has taken into consideration Mr. Francis' institutional behavior, as well as his participation in available work, educational, and treatment programs during the period of his incarceration. The Board has also considered a risk and needs assessment and whether risk reduction programs could effectively minimize Mr. Francis' risk of recidivism. After applying this appropriately high standard to the circumstances of Mr. Francis' case, the Board is of the opinion that Mr. Francis is rehabilitated and merits parole at this time.

Special Conditions: Reserve to Long Term Residential Program or Community Resources for Justice – Transitional Housing – Brooke House must complete; Waive work for program or two weeks; Curfew must be at home between 10 p.m. and 6 a.m.; ELMO-electronic monitoring; Supervise for drugs; testing in accordance with agency policy; Supervise for liquor abstinence; testing in accordance with agency policy; Report to assigned MA Parole Office on day of release; No contact or association with co-defendants; No contact with victim's family; Must have a substance abuse evaluation – adhere to plan; Must have mental health counseling for adjustment/transition.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing.

Pamela Murphy, General Counsel

8/10/22
Date

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable Massachusetts Rules of Appellate Procedure that pertain to the filing of amicus briefs, including but not limited to: Rule 17 and Rule 20. The brief complies with the length limit of Rule 20(a) because this document contains 5,130 non-excluded words. The brief complies with the typeface and type style requirements of Rule 20(a)(4)(B) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Ken Parsigian

Kenneth J. Parsigian

CERTIFICATE OF SERVICE

Under Massachusetts Rule of Appellate Procedure 13(e), I certify that on January 17, 2023, I served by electronic mail a copy of this Brief of Amicus Curiae Retired Massachusetts Judges, the Boston Bar Association, and the Massachusetts Bar Association in Support of Appellants in the matters of *Commonwealth v. Jason Robinson*, No. SJC-09265, and *Commonwealth v. Sheldon Mattis*, No. SJC-11693, pending before the Supreme Judicial Court of the Commonwealth of Massachusetts, on all counsel of record.

Kenneth J. Parsigian