

**SJC Nos. 11693, 09265**

SUPREME JUDICIAL COURT  
FOR THE COMMONWEALTH OF MASSACHUSETTS

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COMMONWEALTH,  
APPELLEE,

v.

SHELDON MATTIS  
DEFENDANT-APPELLANT.

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COMMONWEALTH,  
APPELLEE,

v.

JASON ROBINSON  
DEFENDANT-APPELLANT.

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ON APPEAL FROM THE SUFFOLK SUPERIOR COURT

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**BRIEF OF *AMICI CURIAE* BOSTON UNIVERSITY CENTER FOR  
ANTIRACIST RESEARCH, FRED T. KOREMATSU CENTER FOR LAW  
AND EQUALITY, CENTER ON RACE, INEQUALITY, AND THE LAW,  
AND CRIMINAL JUSTICE INSTITUTE AT HARVARD LAW SCHOOL  
IN SUPPORT OF DEFENDANTS-APPELLANTS AND AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Judicial Court Rule 1:21, the Boston University Center for Antiracist Research, the Fred T. Korematsu Center for Law and Equality, the Center on Race, Inequality, and the Law, and the Criminal Justice Institute at Harvard Law School are not publicly-held corporations, do not issue stock, do not have parent corporations and, consequently, there exist no publicly held corporations which own 10 percent or more of their stock.

## **PREPARATION OF AMICUS BRIEF**

Pursuant to Mass. R. App. P. 17(c)(5), amici and their counsel declare that:

- (a) no party or party's counsel authored this brief in whole or in part;
- (b) no party or party's counsel contributed money to fund preparing or submitting this brief;
- (c) no person or entity, including amicus curiae, contributed money that was intended to fund preparing or submitting this brief; and
- (d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

## **IDENTITY AND INTEREST OF AMICI CURIAE**

Amici curiae, the Boston University Center for Antiracist Research, the Fred T. Korematsu Center for Law and Equality, the Center on Race, Inequality, and the

Law, and the Criminal Justice Institute at Harvard Law School are academic centers or law school clinics at their respective universities that focus on research, education, and advocacy on issues regarding race, racial justice, or public defense.<sup>1</sup> Amici are keenly aware of the long history of race disproportionality in the criminal legal system, especially with regard to the administration of punishment, in this nation as well as in Massachusetts specifically. Amici submit this brief to provide critical contextual information about the interplay and intersection of race, racism, and youth that contributes to the extreme race disproportionality in Massachusetts among those sentenced as late adolescents to die in prison with no possibility of release.

## INTRODUCTION

This Court’s amicus solicitation asked whether to “extend its holding in *Diatchenko*” to conclude that “mandatory” life without parole (LWOP) for 18-20-year-olds violates art. 26 of the Massachusetts Declaration of Rights. The Court should go further and find that late adolescent LWOP—whether mandatory or discretionary—is unconstitutional.

In *Diatchenko v. District Attorney for the Suffolk Dist.*, 466 Mass. 655 (2013), this Court held that the reasons invalidating mandatory LWOP for children applied equally to discretionary LWOP for children, such that even *discretionary* LWOP sentences for juveniles violate art. 26 of the Massachusetts Declaration of Rights.

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<sup>1</sup> Amici and their interests are detailed individually in Addendum A.

The Court recognized the diminished culpability of children, their capacity for change, and the inability of courts to know whether a young person will “pose an ongoing and lasting danger to society,” *Diatchenko*, 466 Mass. at 671, citing *Graham v. Florida*, 560 U.S. 48, 71 (2010), counsel against LWOP sentences for juveniles. This Court’s key insight was that life sentences requiring an “absolute denial of any possibility of parole” are cruel and unconstitutionally disproportionate for juveniles. *Id.*

All LWOP sentences for 18-20-year-olds are likewise unconstitutionally cruel and disproportionate. Advances in developmental neuroscience and developmental psychology show that 18-20-year-olds are similar to younger teens in their impulsivity and susceptibility to peer influence, illustrating that this Court’s reasoning in *Diatchenko* applies with equal force to late adolescents.

The extreme race disproportionality in the imposition of LWOP sentences *for late adolescents in particular* further underscores the arbitrariness, punitiveness, and cruelty of such sentences. Black people are *sixteen times* more likely than their White peers to be serving LWOP for offenses at ages 18-20. Such dramatic race disproportionality suggests that late adolescents are particularly likely to be sentenced based on systemic racism and implicit biases in policing, prosecution, and sentencing, rather than their unique characteristics or the facts of their crimes.

Accordingly, this Court should extend *Diatchenko* and invalidate both mandatory *and discretionary* LWOP for 18-20-year-olds.

### **SUMMARY OF ARGUMENT**

The extreme racial disparity among late adolescents serving LWOP highlights the arbitrariness and lack of proportionality in the imposition of such sentences and demonstrates why they violate the Massachusetts Declaration of Rights. Amici describe the nature of that racial disparity, examine why it occurs, and explain why it necessitates a categorical ban on LWOP for 18-to-20-year-olds.

*First*, the racial disparity in LWOP sentences for 18-to-20-year-olds is uniquely severe. Black people are alarmingly overrepresented in Massachusetts prisons overall (*infra* at 16-18), but even setting aside this pronounced baseline racial disparity, Black 18-20-year-olds are dramatically more likely than White 18-20-year-olds to be sentenced to die in prison (*infra* at 19-23). The comparative Black/White disproportionality for 18-20-year-olds serving LWOP is *more than twice* that of (1) the state prison population and (2) those serving LWOP for offenses at 21 or older. Black people comprise less than 30% of the state prison population, but more than 45% of late adolescents sentenced to die in prison. The inverse is true for White people, who comprise more than 40% of the state prison population, but less than 30% of the 18-20 LWOP population. (*Infra* at 20-23.) This disparity cannot be explained by overall patterns in LWOP sentences. Consistent with their

representation in state prisons, White people comprise the plurality of people serving LWOP overall and the plurality of people serving LWOP for offenses at age 21 or above. But Black people are the plurality of people serving LWOP for offenses committed at ages 18-20. Indeed, 1.6 times more Black people than White people are serving LWOP for offenses at 18-20. Factoring in the Commonwealth's overall demographics, Black people are serving LWOP for offenses at ages 18-20 at a rate more than *sixteen times* the rate for White people. (*Infra* at 23-26.)

*Second*, disparate policing, prosecution, and punishment contribute to these observed disparities. Each of those systemic biases are driven by perceptions of young Black people as threatening, more culpable, and older than their biological age. (*Infra* at 26-33.) Disparate prosecution of joint venture and felony murder charges may particularly explain the uniquely pronounced racial disparities in LWOP among late adolescents.<sup>2</sup> (*Infra* at 34-38.)

*Third*, continuing to permit discretionary LWOP will not provide an adequate constitutional safeguard. The implementation of discretionary LWOP systems for juveniles in other jurisdictions demonstrates that such sentences are often arbitrary, unnecessarily long, and *more disproportionate* by race than those under mandatory LWOP. (*Infra* at 38-44.) The result of discretionary LWOP for 18-to-20-year-olds

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<sup>2</sup> Both Mr. Mattis and Mr. Robinson are Black and were prosecuted for first-degree murder as joint venturers. Mr. Robinson was convicted only of first-degree felony murder. Def. Mattis Br. at 77, 80.

in Massachusetts would almost certainly be the same: discretionary LWOP sentences would continue to fall most heavily on young Black people.

## ARGUMENT

### **I. The Racially Disproportionate Imposition of LWOP Sentences for Late Adolescents in Massachusetts Is Extreme, Underscoring the Arbitrariness, Punitiveness, and Cruelty of Such Sentences.**

#### **A. *Massachusetts' Overreliance on LWOP Sentences for Late Adolescents is Racially Disproportionate and Inherently Cruel.***

Massachusetts stands out—tied only with Louisiana—as the state with the highest proportion of its prison population serving LWOP.<sup>3</sup> The availability of LWOP for 18-20-year-olds contributes greatly to this shameful distinction. The Commonwealth's dramatic reliance on LWOP sentencing, racial disparities in the imposition of LWOP sentences, and the disproportionate impact of such sentences on late adolescents all merit this Court's consideration in understanding the cruelty of LWOP for 18-20-year-olds.

Though Massachusetts has the lowest incarceration rate in the country,<sup>4</sup> its punishment system stands out both in terms of the use of life sentences and racial

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<sup>3</sup> A. Nellis, The Sentencing Project, No End In Sight: America's Enduring Reliance on Life Imprisonment 16 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf#page=16> (Table 3) (14%).

<sup>4</sup> The Massachusetts incarceration rate still far exceeds other Western countries. See Massachusetts Profile, Prison Policy Initiative (2017), <https://www.prisonpolicy.org/profiles/MA.html>.

disproportionality in sentencing. More people were serving life sentences in 2020 than the *entire* state's prison population in 1970.<sup>5</sup> LWOP sentences for late adolescents account for a substantial share of the Commonwealth's LWOP population. Twenty percent of people serving LWOP—203 out of 1008—were ages 18-20 at the time of their governing offense.<sup>6</sup> In other words, one in five people serving LWOP in Massachusetts was sentenced to die in prison for conduct at age 18, 19, or 20.

The availability of LWOP for late adolescents also contributes to racial disproportionality among Massachusetts's prison population. More than one in four Black people (25.7%) sentenced to die in prison are there due to an offense committed at ages 18-20. The rate of people serving LWOP for offenses at ages 18-20 is higher for Black people, and lower for White people, than for any other racial or ethnic group.<sup>7</sup>

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<sup>5</sup> Nellis, *No End in Sight*, *supra* note 3, at 14.

<sup>6</sup> In response to a public records request, the Massachusetts Department of Correction (DOC) produced data on the number of people, as of October 1, 2022, sentenced to life without parole in the custody of the DOC, accounting for age at offense, racial and gender demographics, and the year of commitment to DOC custody. The raw data are reproduced in an addendum, and the relevant data for this brief are reproduced below.

<sup>7</sup> The data show that 25.7% of Black people are serving LWOP for offenses committed at ages 18-20, compared to 14.3% of White people, 22.4% of Hispanic people, and 17.2% of Asian people.

The use of LWOP in cases involving 18-20-year-olds has resulted in the prolonged confinement of an aging population.<sup>8</sup> Nearly half of the people sentenced to LWOP for offenses committed between the ages of 18-20 have served at least 25 years in prison already.<sup>9</sup> These 93 people have spent more time in prison than they had spent on earth at the time of their offenses—and have already served more than the minimum term in prison for a parole-eligible life sentence. Many have served longer than the longest minimums for juveniles who commit first-degree murder post-*Diatchenko*. See G.L. c. 279, § 24. Indeed, as of October 1, 2022, 16 people sentenced to die in prison for an offense committed at age 18, 19, or 20 had been incarcerated for over 40 years.<sup>10</sup> Because of their youth, such sentences have a disproportionate impact on, and are inherently cruel for, late adolescents.

**B. *Massachusetts Suffers from Dramatic Racial Disparities in Imprisonment.***

As of 2019, Massachusetts had the 12th worst Black/White disproportionality in incarceration in the country.<sup>11</sup> In the Commonwealth’s state prisons, 40.3% of

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<sup>8</sup> Nellis, *No End in Sight*, *supra* note 3, at 25 (“Lengthy prison sentences ignore the fact that most people who commit crime . . . age out of criminal conduct.”).

<sup>9</sup> 93 out of 203 people (45%) sentenced to life without parole for offenses committed between the ages of 18-20 entered DOC custody in 1997 or before.

<sup>10</sup> Sixteen people serving LWOP for offenses committed between the ages of 18-20 entered prison between 1964 and 1979.

<sup>11</sup> This brief focuses on Black/White disproportionality, but amici note that Massachusetts had the worst Latinx/White disproportionality in imprisonment in the U.S. See A. Nellis, *The Sentencing Project, The Color of Justice: Racial and*



criminally-sentenced people are White, whereas 29.9% are Black.<sup>12</sup> Though more White people than Black people are incarcerated, the rate at which these two groups are incarcerated is disproportionate.

There are two common ways to measure disproportionality: relative and comparative. Relative disproportionality is an in-group comparison, measuring the percentage of an incarcerated group relative to their percentage of the state's population. Per the 2020 U.S. Census, Massachusetts was 67.6% Non-Hispanic White and 6.5% Black.<sup>13</sup> White people in state prison (40.3%) are therefore substantially underrepresented relative to their demographic share in Massachusetts

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Ethnic Disparity in State Prisons 21 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> (Table 7, Appendix).

<sup>12</sup> These percentages show the criminally sentenced population in custody of the DOC. See Mass. Dep't of Corr., Prison Population Trends 2021 18 (2022), <https://www.mass.gov/doc/prison-population-trends-2021/download#page=24> (“Table: MA DOC Jurisdiction Population by Race/Ethnicity and Commitment Type on January 1, 2022”).

<sup>13</sup> Mass. Sec. of State, Massachusetts 2020 Census, <https://www.sec.state.ma.us/census2020/index.html> (click on “Ethnicity and Racial Population Shares – 2010 to 2020”).

(67.6%).<sup>14</sup> By contrast, Black people in state prison (29.9%) are substantially overrepresented relative to their demographic share in Massachusetts (6.5%).<sup>15</sup>

Relative disproportionality only tells part of the story. Here, because White people are underrepresented *and* Black people are overrepresented in state prison, the relative disproportionality figures understate the disparity. A comparative disproportionality ratio better captures differences between Black and White incarceration rates. The resulting Black/White comparative disproportionality is 7.66, meaning that Black people are incarcerated in Massachusetts state prisons at a rate 7.66 times the rate for White people, relative to their respective population representation.<sup>16</sup>

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<sup>14</sup> White people in state prison are underrepresented by a factor of .60 (*i.e.*, 40% less than their population share). The term “underrepresentation” is not intended to call for incarcerating more White people, but to highlight racial disproportionality in incarceration.

<sup>15</sup> Black people in state prison are overrepresented by a factor of 4.6 (*i.e.*, 360% more than their population share).

<sup>16</sup> This figure is calculated by dividing the Black overrepresentation factor of 4.6 by the White underrepresentation factor of .60. This tracks official incarceration rates. The Black incarceration rate in the MA DOC is 423.6 per 100,000 people, and the White incarceration rate is 54.5 per 100,000 people. The Black incarceration rate is thus 7.77 times the White incarceration rate. Exec. Off. of Pub. Safety and Security, Cross Tracking State & County Correctional Populations: State and County Populations by Demographics, <https://www.mass.gov/info-details/cross-tracking-state-county-correctional-populations#state-and-county-populations-by-demographics-> (last updated Nov. 22, 2022) (“Incarceration Rates per 100,000 Population by Race-Ethnicity,” “MA Department of Correction” column).

**C. *Race Disproportionality Is Even Worse for Those Serving LWOP.***

Racial disparity among people serving LWOP in Massachusetts is even greater than racial disparity in the broader prison population. As Table 1, *infra* at 22, shows, Black people comprise 29.9% of the state prison population, but 35.5% of people serving LWOP. Thus, even setting aside any comparison to the demographics of the Commonwealth as a whole, as compared to their share of the state prison population, Black people are *even more* overrepresented among people serving LWOP.<sup>17</sup> Compared to their share of the Massachusetts population (6.5%), the overrepresentation of Black people serving LWOP (at 35.5%) is even starker.<sup>18</sup>

In contrast, White people represent only 40.18% of people sentenced to LWOP, a number roughly equal to their prison population share (40.3%), despite representing 67.6% of the Commonwealth's overall population. Thus, like their underrepresentation in the state prison population, White people are substantially underrepresented among the LWOP population.<sup>19</sup>

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<sup>17</sup> Black people serving LWOP are overrepresented by a factor of 1.19 (*i.e.*, 19% greater than their share of the imprisoned population).

<sup>18</sup> Black people are overrepresented among people serving LWOP by a factor of 5.42 (442% more than their population share).

<sup>19</sup> White people are underrepresented among people serving LWOP by a factor of .60 (40% less than their population share).

Relative to their population representation, Black people are serving LWOP at a rate more than *nine times* the rate for White people (9.18)<sup>20</sup>—even higher than the baseline disparate rate (7.66) at which Black people are imprisoned compared to White people in Massachusetts.

**D. *The Most Extreme Race Disproportionality Exists for Late Adolescents Serving LWOP***

The racial disparity among people serving LWOP for offenses at ages 18-20 exceeds the racial disparity within the general prison population *and* exceeds the racial disparity among the broader population serving LWOP. White people are *even more* underrepresented, and Black people are *even more* overrepresented, among this population. Just 28.6% of people serving LWOP for offenses at ages 18-20 are White, even though White people comprise 40.3% of the prison population, 40.18% of the LWOP population, and 67.6% of the overall state population. By contrast, a shocking 45.3% of 18-20-year-olds sentenced to LWOP are Black, even though Black people comprise 29.9% of the prison population, 35% of the LWOP population, and just 6.5% of the overall state population.

The especially striking racial disparities among those serving LWOP for offenses at ages 18-20 reveal the particular racialized impacts of LWOP sentencing on late adolescents. White people are the plurality of people in state prison (40.3%),

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<sup>20</sup> This figure represents the comparative disproportionality between Black overrepresentation and White underrepresentation among the LWOP population.

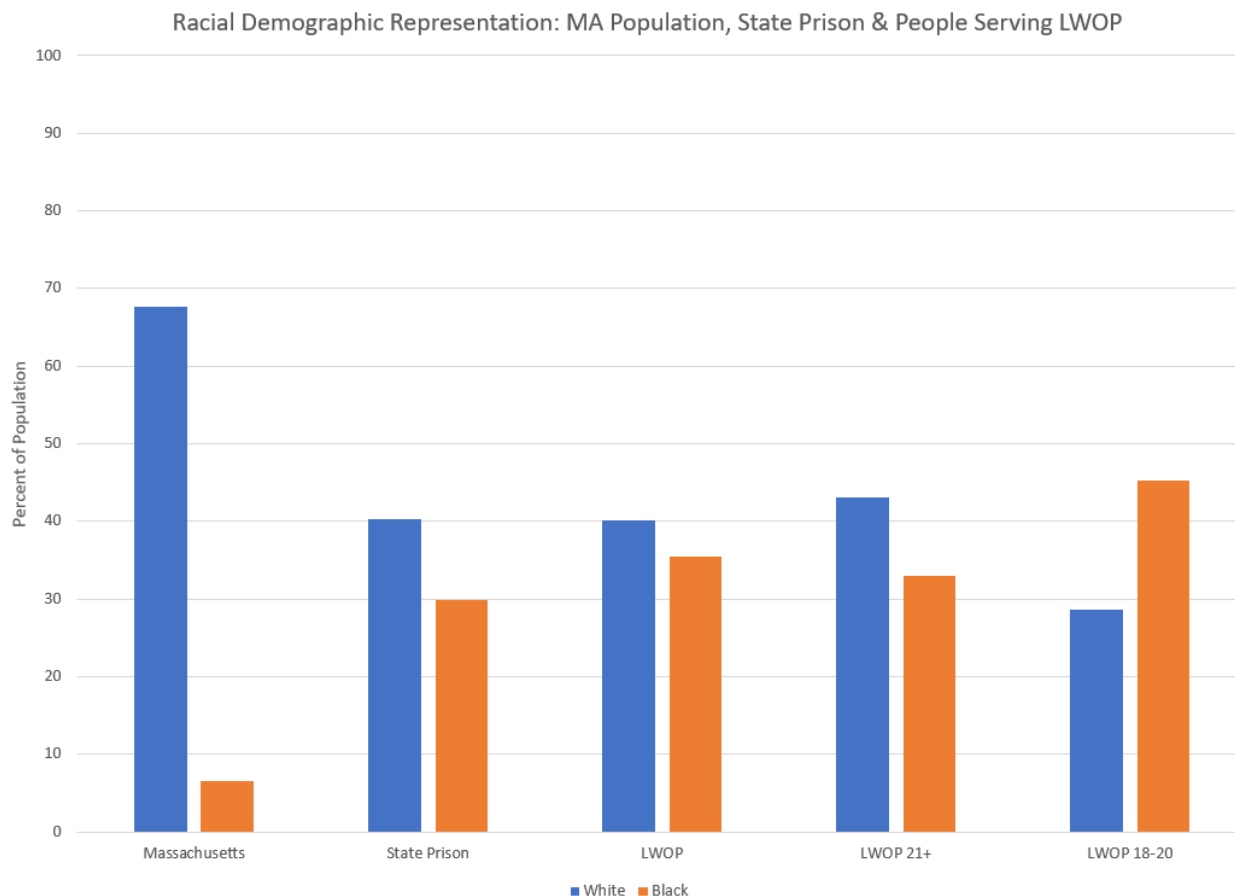
of people serving LWOP (40.18%), and of people serving LWOP for offenses at age 21 and above (43.11%), but when isolated to just people serving LWOP for offenses at ages 18-20, Black people become the plurality (45.32%). (Figure 2, Addendum B.) Thus, 1.6 times as many Black people (92) are sentenced to LWOP for offenses committed between 18-20 as White people (58). This dramatic shift is reflected in the following table and figure:

**Table 1: Racial Demographics, MA DOC and LWOP<sup>21</sup>**

	<b>Criminally Sentenced Population</b>	<b>People Serving LWOP</b>	<b>People Serving LWOP for Offense Committed Between Ages 18-20</b>	<b>People Serving LWOP for Offense Committed at Age 21 or Above</b>
White	2267 <b>(40.3%)</b>	405 <b>(40.18%)</b>	58 (28.57%)	347 <b>(43.11%)</b>
Black or African-American	1685 (29.9%)	358 (35.5%)	92 <b>(45.32%)</b>	266 (33.04%)
Hispanic	1506 (26.7%)	192 (19.05%)	43 (21.18%)	149 (18.51%)
Asian or Pacific Islander	96 (1.7%)	29 (2.88%)	5 (2.46%)	24 (2.98%)
Native American	28 (.5%)	12 (1.19%)	2 (.99%)	10 (1.24%)
Other / Unknown	49 (.87%)	12 (1.19%)	3 (1.48%)	9 (1.12%)
<b>Total</b>	<b>5631</b>	<b>1008</b>	<b>203</b>	<b>805</b>

<sup>21</sup> The plurality of each group is bolded. The DOC provided summary data as of October 1, 2022 and confirmed no people sentenced to LWOP for offenses between ages 18-20 entered DOC custody between 2020 and October 1, 2022. The state prison demographics are as of January 1, 2022, see note 12, *supra*.

**Figure 1:**



***E. The Even Greater Underrepresentation of White People and Even Greater Overrepresentation of Black People among 18-20-Year-Olds Serving LWOP Underscores the Cruelty and Arbitrariness of LWOP Sentencing for Late Adolescents.***

Close examination of the racial makeup of the 18-20 LWOP population reveals startling differences, suggesting the cumulative effect of Black disadvantage and White advantage is greatest for this age group. The percentage of White people in state prison (40.3%), serving LWOP (40.18%), and serving LWOP for offenses at age 21 or above (43.1%) are all similar. But White people are noticeably underrepresented among people sentenced to LWOP for offenses at ages 18-20

(28.57%).<sup>22</sup> By contrast, Black people comprise 29.9% of state prisons, 35% of the LWOP population, and 33% of those serving LWOP for offenses committed at age 21 or above, but nearly half (45.3%) of those serving LWOP for offenses committed at ages 18-20.<sup>23</sup> Thus, as reflected in the table below, Black/White disproportionality for 18-20 LWOP is *more than twice* that of the state prison population and of those serving LWOP for offenses at 21 or older.<sup>24</sup>

**Table 2: Black/White Disproportionality, Comparing the Demographics of People Serving LWOP for Offenses Committed at 18-20 to the Baseline State Prison Population and LWOP 21+**

	<b>LWOP 18-20</b>	<b>State Prison</b>		<b>LWOP 21+</b>	
	Percent of LWOP 18-20 Population	Percent of State Prison Population	LWOP 18-20 Representation Relative to Baseline Prison Population	Percent of LWOP 21+ Population	LWOP 18-20 Representation Relative to LWOP 21+ Population
White	28.57%	40.3%	.71	43.11%	.66
Black	45.32%	29.9%	1.52	33.04%	1.37
B/W Disparity			2.14		2.07

<sup>22</sup> White 18-20-year-olds sentenced to LWOP are underrepresented by a factor of .71 compared to their state prison population (*i.e.*, a 29% decrease in population share), .71 compared to their overall LWOP population (29% decrease), and .66 compared to LWOP 21+ (34% decrease).

<sup>23</sup> Black people serving LWOP for late adolescent offenses are overrepresented by a factor of 1.52 compared to their state prison population (*i.e.*, a 52% increase in population share), 1.29 compared to their overall LWOP population (29% increase), and 1.37 compared to LWOP 21+ (37% increase).

<sup>24</sup> Black people are serving LWOP for offenses at 18-20 disproportionately to White people by a factor of 2.14 compared to state prison population, and 2.07 compared to people serving LWOP for offenses committed at 21+.



Yet, the startling fact that 18-20 LWOP has *double* the Black/White disproportionality compared to both the state prison population and LWOP among people 21 and older becomes even starker if benchmarked against the demographics of the Commonwealth as a whole. White people serving LWOP as late adolescents (28.6%) are even more underrepresented when compared to the state population (67.6%).<sup>25</sup> By contrast, Black people serving LWOP as late adolescents (45.32%) are even more overrepresented when compared to the state population (6.5%).<sup>26</sup>

Taken together, Black people are serving LWOP for offenses at ages 18-20 at a rate more than *sixteen times* the rate for White people (16.6x).<sup>27</sup> The comparative Black/White disproportionality for state imprisonment versus the general population (7.66x) and for LWOP 21+ (7.93x) are already extraordinarily high, but the doubled disproportionality for 18-20 LWOP (16.6x) is staggering. (Figure 3, Addendum B).

\* \* \*

Black people are sentenced to die in prison for conduct at ages 18-20 in Massachusetts in a manner out of step with any relevant, available baseline: state imprisonment, all people serving LWOP, people serving LWOP for offenses at age

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<sup>25</sup> White people are underrepresented by a factor of .42, a lower rate than White people's underrepresentation in state prison (.60), LWOP overall (.59), and LWOP 21+ (.64).

<sup>26</sup> Black people are overrepresented by a factor of 6.97, a greater rate than Black people's overrepresentation in state prison (4.6), LWOP overall (5.42), and LWOP 21+ (5.08).

<sup>27</sup> In reference to general Massachusetts population demographics.

21+, and the overall state population. The particularly stark overrepresentation of Black people and underrepresentation of White people among those sentenced to LWOP for offenses committed as 18-20-year-olds suggests twin dynamics are at play: White late adolescents may benefit from being seen as young, less culpable, or more capable of change, whereas Black late adolescents are seen as older, more culpable, or less capable of change. As discussed *infra*, systemic racism and implicit bias contribute to these results, such that White adolescents may already be treated like still-developing young people, consistent with neuroscientific developments detailed in the record below, whereas Black adolescents are not. This underscores the cruelty and arbitrariness of LWOP sentencing for late adolescents—and the need to remedy this constitutional violation by extending *Diatchenko* to prohibit even the discretionary imposition of LWOP sentences for 18-20-year-olds.

**II. Racial Disparities in Policing, Prosecution, and Punishment Contribute Significantly to Race Disproportionality in LWOP among 18-20-Year-Olds.**

***A. Widespread Racial Disparities in Policing, Prosecution, and Punishment Stem from Systemic Racism and Implicit Biases.***

Sentencing inequities in Massachusetts among Black 18-20-year-olds are a manifestation of the nationwide problem of mass incarceration of Black people in the United States. In the criminal legal context, racism manifests through “a combination of police practices and legislative and executive policy decisions that systematically treat” Black people and other people of color more harshly than White

people.<sup>28</sup> Differential treatment of White and Black youth also reflects research regarding unconscious associations—implicit biases identified through someone’s actions, even if they are not aware they hold biased beliefs. See *Commonwealth v. Long*, 485 Mass. 711, 734 (2020) (discussing officer implicit bias and race-based traffic stops); *Commonwealth v. Buckley*, 478 Mass. 861, 878 (2018) (Budd, J., concurring) (same). For example, research shows that people unconsciously and unwarrantedly associate Blackness with criminality and violence.<sup>29</sup> See *Commonwealth v. Sweeting-Bailey*, 488 Mass. 741, 770 & n.9 (2021) (Budd, C.J., dissenting), quoting *Buck v. Davis*, 137 S. Ct. 759, 776 (2017) (describing the “‘powerful racial stereotype’ that Black men are ‘violence prone’”). People

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<sup>28</sup> Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 *Crime & Just.* 273, 274 (2010).

<sup>29</sup> See, e.g., Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 *Wis. L. Rev.* 669, 723 (2018); Spencer, Charbonneau & Glaser, *Implicit Bias and Policing*, 10 *Soc. & Personality Psych. Compass* 50, 55 (2016); Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 *J. Experimental Soc. Psych.* 1322, 1322 (2008); Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 *J. Personality & Soc. Psych.* 876, 878, 889-891 (2004); Quillian & Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 *Am. J. Soc.* 717, 718 (2001); Steffensmeier, Ulmer & Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 *Criminology* 763, 769 (1998).

unconsciously perceive Black youth as older<sup>30</sup> or more threatening<sup>31</sup> than similarly aged White youth. Black teenagers evoke the strongest stereotypes,<sup>32</sup> and these pernicious, unconscious associations may influence prosecutorial or judicial determinations regarding older adolescents.<sup>33</sup>

As a consequence, Black people experience disparate treatment at three crucial junctures: policing, prosecution, and punishment. First, Black people are more likely to enter the criminal legal system because of disparate policing. In 2016, Black people “comprised 27% of all individuals arrested in the United States—

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<sup>30</sup> Insel & Tabashneck, Ctr. for Law, Brain & Behavior at Mass. General Hospital, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers* 22 (2022), <https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence.pdf> [hereinafter CLBB], citing Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 *J. Personality & Soc. Psych.* 526 (2014).

<sup>31</sup> CLBB, *supra* note 30, at 23, citing Glasgow, Imbriano, Jin, & Mohanty, *Is Threat Detection Black and White? Race Effects in Threat-Related Perceptual Decision-Making*, 20 *Emotion* 1495 (2020); Halberstadt et al., *Racialized Emotion Recognition Accuracy and Anger Bias of Children’s Faces*, 22 *Emotion* 403, 404 (2020); Todd et al., *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 *Psych. Sci.* 384, 384-393 (2016); Hester & Gray, *For Black Men, Being Tall Increases Threat Stereotyping and Police Stops*, 115 *Proc. Nat’l Acad. Sci.* 2711 (2018); Priest et al., *Stereotyping Across Intersections of Race and Age: Racial Stereotyping Among White Adults Working with Children*, 13 *PLoS ONE* 1, 3 (2018).

<sup>32</sup> Priest et al., *supra* note 31, at 12.

<sup>33</sup> See generally Hetey & Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 *Psych. Sci.* 10 (2014); Smith & Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 *Seattle U. L. Rev.* 795 (2012); Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *Fordham L. Rev.* 13 (1998).

double their share of the total population.”<sup>34</sup> Black people are more likely to be pulled over while driving,<sup>35</sup> more likely to be arrested for drug offenses,<sup>36</sup> and more likely to be wrongfully convicted of murder from police misconduct.<sup>37</sup>

Second, once arrested, Black arrestees are 1.75 times more likely to be charged by prosecutors with a crime carrying a mandatory minimum sentence, often leading to longer overall sentences.<sup>38</sup> Prosecutors impose harsher pretrial and bail recommendations on Black arrestees, effectively leading more Black defendants to plead guilty.<sup>39</sup> Prosecutors are also more likely to charge Black minors as adults<sup>40</sup>

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<sup>34</sup> The Sentencing Project, Report to United Nations on Racial Disparities in the U.S. Criminal Justice System (2018), <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system>, citing 2016 FBI Uniform Crime Reporting.

<sup>35</sup> A. Nellis, *The Color of Justice*, *supra* note 11, at 14, citing Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 *Nature Hum. Behaviour* 736 (2020). See *Long*, 485 Mass. at 717-718 (also citing Pierson et al.).

<sup>36</sup> A. Nellis, *The Color of Justice*, *supra* note 11, at 14, citing Rothwell, *Drug Offenders in American Prisons: The Critical Difference Between Stock and Flow*, Brookings Inst. (2015).

<sup>37</sup> Gross et al., *Nat’l Registry of Exonerations, Race and Wrongful Convictions in the United States* 6 (Sept. 2022), <https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf>.

<sup>38</sup> Starr & Rehavi, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, 122 *J. Pol. Econ.* 1320, 1323 (2012) (“The initial mandatory minimum charging decision alone is capable of explaining more than half of the black-white sentencing disparities not otherwise explained by precharge characteristics”). See *Commonwealth v. Laltaprasad*, 475 Mass. 692, 702 (2016).

<sup>39</sup> See Smith & Levinson, *supra* note 33, at 811-812.

<sup>40</sup> See *id.*

and to charge Black defendants with felony murder,<sup>41</sup> both of which generally contribute to racialized sentencing disparities.

Third, even accounting for disparate treatment by police and prosecutors, Black defendants still receive disproportionate punishments because of judges' and juries' implicit biases.<sup>42</sup> In a study regarding LWOP sentences for youth, when presented with the same serious crime, study participants were more likely to find the youth culpable as an adult—and to support LWOP—when primed to believe the youth was Black versus White.<sup>43</sup> One cumulative effect of disparate policing, prosecution, and punishment is that nearly two-thirds of people serving LWOP for non-violent offenses nationwide are Black.<sup>44</sup>

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<sup>41</sup> Albrecht, *Data Transparency & The Disparate Impact of the Felony Murder Rule*, Duke Ctr. For Firearms Law (Aug. 11, 2020), <https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule> (discussing study finding that 74.8% of defendants charged with felony murder in Cook County, Illinois were Black).

<sup>42</sup> See Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 Yale L. J. 391, 402-403 (2017) (observing that defendants with darker skin tones and “Afrocentric features” received harsher punishments from sentencing judges).

<sup>43</sup> Rattan, Levine, Dweck & Eberhardt, *Race and the Fragility of the Legal Distinction between Juveniles and Adults*, 7 PLoS ONE 1, 4 (2020).

<sup>44</sup> Am. Civil Liberties Union, *A Living Death: Life Without for Nonviolent Offenses* 29 (Nov. 2013), <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf#page=31>.

**B. *Racial Disparities in Policing, Prosecution, and Sentencing Practices Contribute to the Racially Disproportionate Criminalization and Punishment of 18-20-Year-Olds.***

Racially disparate policing and prosecution of young people—even for low-level offenses—likely contribute to race disproportionality among the population sentenced to die in prison as 18-20-year-olds. In Massachusetts, Black and Latino youth are more likely to be referred to Juvenile Court than White youth and are far more likely to experience a custodial arrest versus a summons.<sup>45</sup>

This race-based differential treatment creates risk of further criminalization as older adolescents. Substantial research demonstrates the negative long-term impacts of experiencing a custodial arrest.<sup>46</sup> Moreover, “[e]xposure to toxic environments such as adult jails and prisons” further traumatizes late adolescents, “making them more vulnerable to negative influence, and as a result, increas[ing] recidivism among this group.”<sup>47</sup> Once a young person has cycled through the carceral system, they can

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<sup>45</sup> Mass. Juvenile Justice Policy and Data Board, *Racial and Ethnic Disparities at the Front Door of Massachusetts’ Juvenile Justice System: Understanding the Factors Leading to Overrepresentation of Black and Latino Youth Entering the System* 3-4 (2022), <https://www.mass.gov/doc/racial-ethnic-disparities-at-the-front-door-of-massachusetts-juvenile-justice-system-understanding-the-factors-leading-to-overrepresentation-of-black-and-latino-youth-entering-the-system/download>.

<sup>46</sup> *Id.* at 4 & n.6 (collecting studies).

<sup>47</sup> Siringil, Perker & Chester, Harvard Kennedy School, Malcolm Wiener Center for Social Policy, *Emerging Adults: A Distinct Population that Calls for an Age-Appropriate Approach by the Justice System* 2 (2017), <https://www.hks.harvard>.

be excluded from job opportunities or housing prospects.<sup>48</sup> The negative effects of criminal convictions are particularly pronounced for Black and Latino late adolescents, who already experience racialized exclusion from “high quality education, employment (especially higher income jobs), safe housing, credit, and good health care.”<sup>49</sup> The compounding effects of these conditions may contribute to repeat arrests, more serious charges (including career offender and subsequent-offense charges), cycles of incarceration, and, ultimately, racial disparities among 18-20-year-olds sentenced to LWOP.

**C. *Racial Disparities in Charging Decisions Drive Sentencing Disparities in Massachusetts.***

Research shows that police and prosecutorial discretion significantly shape racialized sentencing disparities in Massachusetts. Initial charging decisions account for more than 70% of racial disparities in sentence length, “even if defendants of color are not convicted of the more serious offenses with which they are initially charged.”<sup>50</sup> Moreover, “Black and Latinx defendants receiv[e] more severe initial

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edu/sites/default/files/centers/wiener/programs/pcj/files/MA\_Emerging\_Adult\_Justice\_Issue\_Brief\_0.pdf.

<sup>48</sup> U.S. Comm’n on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* 60 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>.

<sup>49</sup> CLBB, *supra* note 30, at 23.

<sup>50</sup> Bishop et al., *Criminal Justice Policy Program, Harvard Law School, Racial Disparities in the Massachusetts Criminal System 2* (2020), <http://cjpp.law.harvard.edu/assets/Massachusetts-Racial-Disparity-Report-FINAL.pdf>.



charges than White defendants for similar conduct,” and may even face steeper charges for *less* serious conduct.<sup>51</sup>

These findings regarding racial disparities in charging decisions hold for homicide offenses. Black and Latinx defendants “are much more likely to be initially charged with murder than White defendants.”<sup>52</sup> Data also suggests that courts may disproportionately sentence Black people to LWOP because of overcharging, *i.e.*, sweeping more people into murder charges.<sup>53</sup> Even where Black defendants are more likely to plead to lesser-included offenses, that may not counteract the effects of overcharging, which likely contribute to race disproportionality in LWOP sentencing.

Altogether, these findings suggest that Black people in Massachusetts are more likely to be charged with murder in circumstances where White people would not be. Given the substantial body of social science evidence demonstrating that Black youth are seen as older, more threatening, and more violent, these patterns of discretionary charging, particularly with respect to homicide offenses, contribute to the overrepresentation of Black people in LWOP sentencing for offenses committed at ages 18-20.

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<sup>51</sup> *Id.* at 63.

<sup>52</sup> *Id.* at 61.

<sup>53</sup> Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & Soc’y Rev. 587, 591-592 (1985).

**D. *Racial Disparities in the Prosecution of Joint Venture and Felony Murder Also Contribute to the Extreme Race Disproportionality Among 18-20-Year-Olds Serving LWOP.***

In holding LWOP unconstitutional for children, this Court recognized that young people are more vulnerable to impulsivity and peer pressure due to fundamental characteristics of their developing brains. *Diatchenko*, 466 Mass. at 660. Adolescents likewise have a “‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” *Id.*, quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (internal citation and quotations omitted). Adolescents are less mature, more prone to “‘impetuous and ill-considered actions and decisions,” *Roper v. Simmons*, 543 U.S. 551, 569 (2005), and “‘more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers[.]” *Diatchenko*, 466 Mass. at 660, quoting *Miller*, 567 U.S. at 471 (citation and quotations omitted).

Developmental neuroscience and psychology confirm that 18-20-year-olds are similar to younger teens in their impulsivity and susceptibility to peer influence. Def. Mattis Br. at 18-29 (summarizing testimony of multiple experts). “[L]ate adolescents are more likely to take risks in the presence of peers than when they are alone or when an adult is watching.”<sup>54</sup> As a result, “many crimes committed by

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<sup>54</sup> CLBB, *supra* note 30, at 24.

adolescents involve peers.”<sup>55</sup> Moreover, “during emotionally charged situations, late adolescents (ages 18–21) respond more like younger adolescents (ages 13–17) than like young adults (ages 22–25) due to differences in brain maturation.”<sup>56</sup> See Def. Mattis Br. at 20-21, 27-28, 40. Like younger adolescents, 18-20-year-olds “are not fully mature in their ability to anticipate future consequences or differentiate between positive and negative rewards.”<sup>57</sup> Thus, older adolescents are vulnerable to group dynamics that may expose them to culpability in ways they cannot foresee or understand.<sup>58</sup>

Joint venture offenses, particularly felony murder, implicate precisely the peer pressure and hot-cognition dynamics that are especially acute for adolescents. “Felony murder laws ignore the cognitive vulnerabilities of youth and emerging adults by assuming that they recognize the remote consequences of their own actions—and those of others in their group.”<sup>59</sup> Unsurprisingly, then, young people

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 2.

<sup>57</sup> Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139, 161 (2016).

<sup>58</sup> *Id.* at 162-164.

<sup>59</sup> Ghandnoosh, Stammen & Budaci, *The Sentencing Project & Fair and Just Prosecution, Felony Murder: An On-Ramp to Extreme Sentencing 2* (2021) <https://www.sentencingproject.org/wp-content/uploads/2022/03/Felony-Murder-An-On-Ramp-for-Extreme-Sentencing.pdf>.

are overrepresented among people charged with and convicted of felony murder.<sup>60</sup> The LWOP penalty for first-degree murder, including felony murder,<sup>61</sup> risks imposing LWOP sentences on young people who have not fully developed capacity to extricate themselves from negative situations or assess risk.

Further, research shows “[d]eeply concerning racial disparities in prosecutors’ use of discretion—in decisions about which homicides to prosecute as felony murder and how many people to charge as co-defendants—directly disadvantages people of color.”<sup>62</sup> One analysis of felony murder in Minnesota unearthed “racially inequitable charging practices,” finding that White defendants were more likely to plead down to felony murder, whereas Black defendants were more commonly convicted of felony murder as the most severe offense.<sup>63</sup> Similarly, researchers found that California prosecutors are more likely to bring murder charges under their “special

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<sup>60</sup> *Id.* at 2 (majority of people serving LWOP for felony murder in Pennsylvania and in Minnesota were 25 or younger at the time of their offense), citing L. Turner, Task Force on Aiding and Abetting Felony Murder, Report to the Minnesota Legislature (2022), [https://mn.gov/doc/assets/AAFMM-LegislativeReport\\_2-1-22\\_tcm1089-517039.pdf](https://mn.gov/doc/assets/AAFMM-LegislativeReport_2-1-22_tcm1089-517039.pdf). See, e.g., A. Lindsay, Philadelphia Lawyers for Social Equity, Life without Parole for Second-Degree Murder in Pennsylvania 11-27 (2021), <https://plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf>.

<sup>61</sup> G.L. c. 265, § 1

<sup>62</sup> Ghandnoosh, Stammen & Budaci, *supra* note 59, at 6.

<sup>63</sup> Egan, *Deadly force: How George Floyd’s killing exposes racial inequities in Minnesota’s felony-murder doctrine among the disenfranchised, the powerful, and the police*, 4 Minn. J.L. & Inequity 1, 11 (2021).

circumstances” law, triggering mandatory LWOP sentences, including for felony murder, against people of color.<sup>64</sup> Data from Pennsylvania, Illinois, and Missouri further confirm that Black people in particular are overrepresented among those with felony murder convictions.<sup>65</sup> Based on limited public analyses, Massachusetts has similarly stark disparities with respect to felony murder and LWOP sentencing.<sup>66</sup> One analysis of people currently serving LWOP for first-degree felony murder found that “83% are Black, Hispanic, and Asian persons and only 17% are White.” *Commonwealth v. Shepherd*, SJC-12405, Def. Third Motion for New Trial, Paper No. 43 (Feb. 15, 2022). This is striking because Black, Hispanic/Latino, and Asian persons comprise merely 26.3 percent of the Massachusetts population.<sup>67</sup>

In sum, joint venture and felony murder charges have particularly adverse impacts on youth and Black people. Where joint venture and felony murder convictions frequently result in LWOP sentences, racial disparities in the

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<sup>64</sup> Cal. Law Revision Comm’n, Comm. on Revision of the Penal Code, Annual report and recommendations 51 (2021), [http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC\\_AR2021.pdf](http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf); Grosso et al., *Death by Stereotype: Race, Ethnicity, and California’s Failure to Implement Furman’s Narrowing Requirement*, 66 UCLA L. Rev. 1394, 1442 (2019).

<sup>65</sup> Ghandnoosh, Stammen & Budaci, *supra* note 59, at 5.

<sup>66</sup> See Arsenault, Irons & Wren, *Unfinished Justice*, Bos. Globe (Mar. 26, 2022), <https://apps.bostonglobe.com/metro/investigations/spotlight/2022/03/unfinished-justice> (identifying 23 men sentenced to LWOP despite not having inflicted physical violence on the victim, all but one of whom were Black or Hispanic).

<sup>67</sup> Massachusetts 2020 Census, *supra* note 13 (click on “Ethnicity and Racial Population Shares – 2010 to 2020”).

prosecution of these offenses likely contribute to the massive Black/White disproportionality among people sentenced to LWOP as late adolescents.

### **III. Post-*Miller* Sentencing Demonstrates Why Discretionary LWOP is Insufficient to Protect Late Adolescents.**

The real-world implementation of discretionary LWOP demonstrates the need to categorically prohibit LWOP for 18-20-year-olds. The past decade of sentencing and resentencing of juveniles in the discretionary LWOP system under *Miller*, 567 U.S. 460, confirms the lack of workable standards or guidance, resulting in sentences that have been lengthy, arbitrary, and racially disproportionate. While this Court categorically banned LWOP sentences for juveniles shortly after *Miller* in *Diatchenko*, cases from other jurisdictions illustrate these problems.

#### **A. Post-*Miller* Sentencing Issues**

The issues with juvenile sentencing post-*Miller* all flow from a central flaw in a discretionary life-sentence system: there is no valid basis for judges to determine that a juvenile has demonstrated “irreparable corruption.” *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016). *Miller* and *Montgomery* both relied on developments in neuroscience finding that juveniles are categorically different than adults in their ability to make moral judgments and fully appreciate the consequences of their actions. Yet science does not support any distinction between juveniles who are “irreparably corrupt” and those whose crimes reflect “unfortunate yet transient immaturity.” *Id.* To the contrary, science demonstrates that there is no way to make

such a judgment because *all* juveniles are less mature and have a greater capacity for change than adults.<sup>68</sup> And that distinction does not stop at age 18—the same is true of late adolescents.<sup>69</sup>

Having been left with an impossible standard and little guidance from the Supreme Court, lower courts have varied widely in their approach to sentencing and resentencing juveniles post-*Miller*. Many courts have followed a set of guidelines from *Miller* (the “*Miller* factors”): (1) a young person’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences”; (2) a young person’s “family and home environment . . . no matter how brutal or dysfunctional”; (3) “the circumstances of the homicide offense, including the extent of [the young person’s] participation in the conduct” and the impact of “familial and peer pressures”; (4) the “incompetencies associated with youth”; and (5) the “possibility of rehabilitation.” *Miller*, 567 U.S. at 477-478. But courts have varied in how to apply these factors, with some treating the *Miller* factors as required elements and others as more of a balancing test—considering

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<sup>68</sup> See Steinberg & Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, in *The Changing Borders of Juvenile Justice: Transfer of Adolescents To The Criminal Court* (Fagan & Zimring eds., 2000); Steinberg, *A Social Neuroscience Perspective on Adolescent Risk Taking*, 28 *Dev. Rev.* 78, 99-100 (2008).

<sup>69</sup> See Johnson, Blum & Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 *J. Adolescent Health* 216 (2009).

only particularly persuasive factors and disregarding or weighing lightly inapplicable factors.<sup>70</sup> Further, courts have diverged in applying even the same factors. For example, one sentencing judge held that the *absence* of supportive family supported a LWOP sentence because of a risk of recidivism, while another held that the *presence* of supportive family supported a lengthy sentence because it indicated a more culpable defendant. Compare *State v. Seats*, 865 N.W.2d 545, 552 (Iowa 2015), with *People v. Jordan*, 185 Cal. Rptr. 3d 174, 182 (Cal. Ct. App. 2015).

Where two judges can use opposite information to reach the same conclusion, the resulting scheme offers largely unchecked discretion—allowing sentencing judges to impose LWOP or extremely long sentences arbitrarily. Further, state-level analyses of post-*Miller* resentencing show that, of those sentenced to LWOP as a juvenile who have undergone resentencing, the majority have not received an appreciably different outcome. For example, in Illinois, only 3 out of 43 juveniles resentenced post-*Miller* received a term of less than 50 years.<sup>71</sup> And in Michigan, only 24 of the 91 resentenced juveniles received anything other than life in prison.<sup>72</sup>

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<sup>70</sup> Duncan, *Youth Always Matters: Replacing Eighth Amendment Pseudoscience with an Age-Based Ban on Juvenile Life Without Parole*, 131 Yale L. J. 1936, 1947 (2022).

<sup>71</sup> Komp, *Resentencing Juveniles: States' Implementation of Miller and Montgomery Through Resentencing Hearings*, 53 UIC J. Marshall L. Rev. 311, 328 (2020).

<sup>72</sup> *Id.* at 331.



This discretionary system has predictably exacerbated racial disparities. The unconscious biases discussed *supra* are amplified when judges must make non-scientific assessments regarding a defendant’s degree of culpability and capacity for reform. In particular, studies have shown that judges are more likely to view children and late adolescents of color as inherently violent and more likely to reoffend.<sup>73</sup> Those biases have contributed to a growing disparity: approximately 70% of children newly sentenced to LWOP after *Montgomery* have been Black, compared with 61% before *Montgomery*.<sup>74</sup>

**B. *Examples of Lengthy and Arbitrary Sentences Post-Miller.***

Examples from individual cases illustrate the unsuitability of a discretionary system for imposing LWOP on juveniles and adolescents.

Brian Bassett was sentenced to three consecutive LWOP sentences in Washington. Prior to his crime, Mr. Bassett experienced a traumatic childhood that included being kicked out of his home by his parents and living in a “shack” with

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<sup>73</sup> See Marshall, *Miller v. Alabama and the Problem of Prediction*, 119 Colum. L. Rev. 1633, 1662 (2019); cf. Wilson, Hugenberg & Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. Personality & Soc. Psychol. 59, 77 (2017).

<sup>74</sup> Campaign for the Fair Sentencing of Youth, *Montgomery v. Louisiana Anniversary* (Jan. 25, 2020), <https://cfsy.org/wp-content/uploads/Montgomery-Anniversary-1.24.pdf>; see also Reichman Hoesterey, *Confusion in Montgomery’s Wake: State Responses, the Mandates of Montgomery, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 Fordham Urban L. J. 149, 185 (2017) (“discretion that stems from *Miller* and *Montgomery* will likely make the disparate racial impact even starker”).

another teenager. *State v. Bassett*, 192 Wash. 2d 67, 72 (2018). After *Miller*, the Washington State Legislature adopted a “*Miller-fix*” statute that permitted discretionary LWOP sentences for 16- and 17-year-olds convicted of aggravated first-degree murder and required sentencing courts to consider the *Miller* factors. RCW 10.95.030(3)(a)(ii) – (b); see also *Bassett*, 192 Wash. 2d at 74. Mr. Bassett sought resentencing and presented voluminous evidence of the mitigating characteristics of his youth, including testimony of a psychologist that he was “struggling to cope effectively with the stressors of homelessness,” among other things. *Bassett*, 192 Wash. 2d at 74. Mr. Bassett also presented evidence of rehabilitation: he had earned his GED, was on the honor roll, received a full-tuition community college scholarship, and mentored others in prison. *Id.*

Despite this mitigating evidence, the resentencing court re-imposed Mr. Bassett’s original sentence—three consecutive terms of LWOP. On appeal, the Washington Supreme Court held that such a system of discretionary life sentences for juvenile offenders constituted cruel punishment. *Id.* at 90-91. The court emphasized that Mr. Bassett’s resentencing was “an illustration of the imprecise and subjective judgments a sentencing court could make regarding transient immaturity and irreparable corruption,” including the sentencing judge’s finding that Mr. Bassett’s homelessness made him “more mature”—which “could have easily gone

the other way, with a judge finding that the instability and insecurity of homelessness caused Bassett to have less control over his emotions and actions.” *Id.*

Darwin Wells was sentenced to LWOP for a crime he committed at 15. Mr. Wells also experienced a traumatic childhood, including the death of both of his parents and a life of substance use disorder and drug sales under the influence of his uncles. *Wells v. Mississippi*, 328 So. 3d 124, 132 (Miss. Ct. App. 2020). Mr. Wells sought resentencing after *Miller* and was granted a resentencing hearing, where he presented testimony of a psychologist regarding the impact of his troubled youth on his mental state. *Id.* at 128.

Again, despite substantial mitigating evidence, the resentencing judge reimposed LWOP. Paradoxically, the judge cited Mr. Wells’ background selling drugs for his uncles as a child, concluding that those experiences rendered him “experienced and competent to deal with law enforcement.” *Id.* at 133. But unlike Mr. Bassett, Mr. Wells did not obtain relief from appellate courts. The Mississippi Court of Appeals affirmed the resentencing judge’s decision. *Id.* The Mississippi Supreme Court declined to hear his case. *Wells v. State*, 328 So. 3d 1252 (Miss. 2021).

*Bassett* and *Wells* both demonstrate how resentencing judges can use idiosyncratic or strained views of the *Miller* factors to justify LWOP sentences. The

only way to prevent such outcomes is to fully extend *Diatchenko* and prevent LWOP sentences categorically for late adolescents.

## CONCLUSION

The uniquely pronounced racial disparities among people serving LWOP for conduct at ages 18-20 indicate that such sentences are tainted by racial bias and constitute “unconstitutionally disproportionate” cruel punishment. These alarming disparities will be destined to repeat if this Court permits the discretionary imposition of LWOP for 18-20-year-olds.

**Dated:** January 17, 2023

Respectfully submitted,

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## **ADDENDUM A: *AMICI CURIAE* STATEMENTS OF INTEREST**

The **Boston University Center for Antiracist Research** (the “Center”) is a nonpartisan, nonprofit university-based center that seeks to facilitate antiracist policies and practices by unifying research, policy, narrative, and advocacy efforts. The Center’s animating goal is to eliminate racism through a rigorous, research-based, and integrative approach. Accordingly, the Center has a keen interest in challenging policies of criminalization and punishment that undermine fundamental principles of safety, justice, and healing, and disproportionately harm people of color. The Center joins this brief to emphasize that the availability of life without parole sentences for late adolescents not only contradicts the findings of developmental neuroscience, but also results in extreme racial disparities among those sentenced to die in prison as 18-20-year-olds. The Center does not, in this brief or otherwise, represent the official views of Boston University.

The **Fred T. Korematsu Center for Law and Equality** (“Korematsu Center”) is a non-profit organization based at the Seattle University School of Law. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of over 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. It has a special interest in ensuring fair treatment in our nation’s courts. It has filed amicus briefs in state and federal courts to inform courts about race disproportionality in the

treatment and punishment of Black people in the criminal legal system. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The **Center on Race, Inequality, and the Law** (the “Center”) at New York University School of Law was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color. Among the Center’s top priorities is wholesale reform of the criminal legal system, which has, since its inception, been infected by racial bias and plagued by inequality, including as it relates to the imposition of Life Without Parole sentences. The Center fulfills its mission through public education, research, advocacy, and litigation aimed at cleansing the criminal legal system of policies and practices that perpetuate racial injustice and inequitable outcomes.

The **Criminal Justice Institute at Harvard Law School** (“CJI”) is the curriculum-based criminal defense clinical program of Harvard Law School, providing classroom instruction and hands-on experience for students who represent indigent adults and juvenile clients facing misdemeanor and felony charges in the Boston criminal courts.<sup>75</sup> CJI also researches issues in the criminal legal system,

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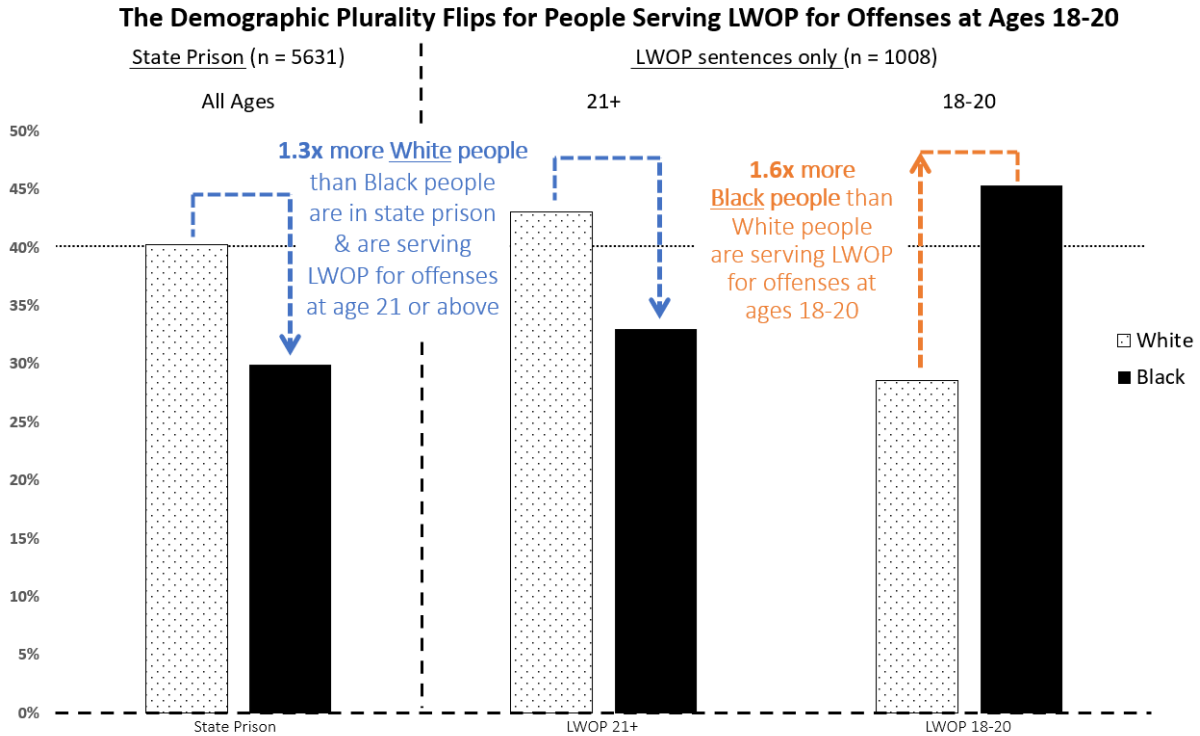
<sup>75</sup> The Criminal Justice Institute does not represent the official views of Harvard Law School or Harvard University.

particularly those that impact poor people and people of color both nationally and in Massachusetts. CJI advances issues of importance to our clients which may affect their rights in court, as well as broader issues that impact the administration of justice in the criminal legal system. The extreme race disproportionality among people serving life without parole sentences and the cruelty of death in prison sentences for young people ages 18-20 are critical, interwoven issues affecting CJI's clients.

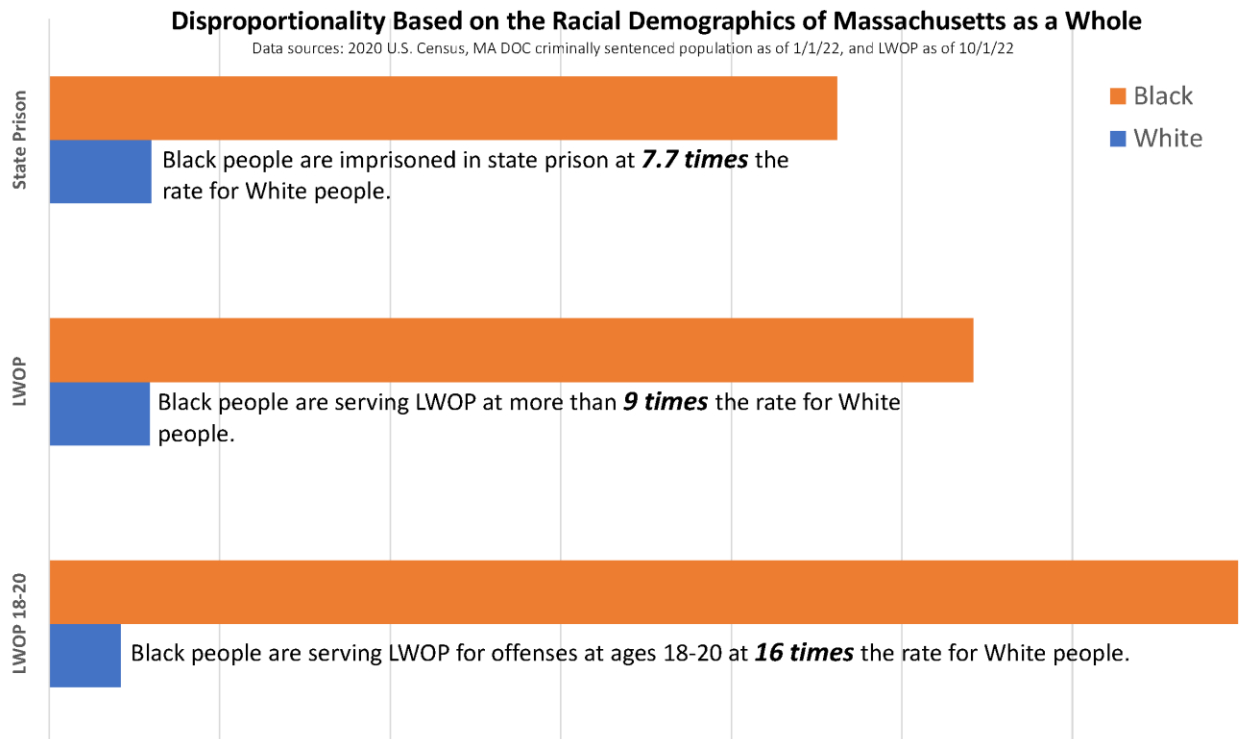


## ADDENDUM B: ADDITIONAL RACIAL DISPARITY CHARTS

**Figure 2 (referenced *supra* at 21):**



**Figure 3 (referenced *supra* at 25):**



**ADDENDUM C: DATA PRODUCED BY MA DOC IN RESPONSE TO  
A PUBLIC RECORDS REQUEST**

These summary tables were compiled and produced by the Mass. Department of Correction as an excel workbook in response to a public records request filed by undersigned counsel, Katharine Naples-Mitchell.

**First Sheet of Excel Workbook: *Offense Age***

<b>MA State Sentenced Life Without Parole by Offense Age and Sex as of 10/01/2022</b>			
<b>Age at Offense</b>	<b>Female</b>	<b>Male</b>	<b>Grand Total</b>
18	-	47	47
19	1	75	76
20	2	78	80
21	-	76	76
22	-	65	65
23	-	49	49
24	1	53	54
25	-	49	49
26	-	43	43
27	2	41	43
28	1	34	35
29	-	41	41
30	1	29	30
31	1	25	26
32	1	33	34
33	1	22	23
34	-	18	18
35	2	21	23
36	1	19	20
37	1	16	17
38	2	16	18
39	-	12	12
40	1	18	19
41	3	13	16
42	-	9	9
43	-	9	9
44	-	9	9

45	-	11	11
46	-	11	11
47	1	9	10
48	-	6	6
49	-	3	3
50	-	5	5
51	-	3	3
52	-	2	2
53	-	3	3
54	1	1	2
56	-	3	3
59	-	1	1
62	-	1	1
63	-	1	1
64	-	1	1
65	-	2	2
68	-	1	1
70	-	1	1
<b>Grand Total</b>	<b>23</b>	<b>985</b>	<b>1008</b>

<b>MA State Sentenced Life Without Parole by Offense Age and Sex as of 10/01/2022</b>			
<b>Age at Offense</b>	<b>Female</b>	<b>Male</b>	<b>Grand Total</b>
18		47	47
19	1	75	76
20	2	78	80
<b>Grand Total</b>	<b>3</b>	<b>200</b>	<b>203</b>

**Second Sheet of Excel Workbook: *Race/Ethnicity***

<b>MA State Sentenced Life Without Parole by Race/Ethnicity and Sex as of 10/01/2022</b>			
<b>Race</b>	<b>Female</b>	<b>Male</b>	<b>Grand Total</b>
WHITE	19	386	405
BLACK OR AFRICAN AMERICAN	3	355	358
HISPANIC		192	192
ASIAN OR PACIFIC ISLANDER		29	29
AMER. INDIAN OR NATIVE ALASKAN		12	12
UNKNOWN	1	11	12
<b>Grand Total</b>	<b>23</b>	<b>985</b>	<b>1008</b>

<b>MA State Sentenced Life Without Parole by Race/Ethnicity and Sex as of 10/01/2022*</b>			
<b>Race</b>	<b>Female</b>	<b>Male</b>	<b>Grand Total</b>
BLACK OR AFRICAN AMERICAN		92	92
WHITE	2	56	58
HISPANIC		43	43
ASIAN OR PACIFIC ISLANDER		5	5
UNKNOWN	1	2	3
AMER. INDIAN OR NATIVE ALASKAN		2	2
<b>Grand Total</b>	<b>3</b>	<b>200</b>	<b>203</b>

**\*Table for Offense Age of 18-20**

**Third Sheet of Excel Workbook: *Year Committed***

<b>MA State Sentenced Life Without Parole by Year Committed and Sex as of 10/01/2022</b>			
<b>Row Labels</b>	<b>F</b>	<b>M</b>	<b>Grand Total</b>
1964	-	2	2
1968	-	1	1
1969	-	2	2
1970	-	4	4
1971	-	3	3
1972	-	4	4
1973	-	2	2
1974	-	6	6
1975	-	11	11
1976	-	10	10
1977	-	6	6
1978	-	5	5
1979	-	4	4
1980	-	7	7
1981	-	11	11
1982	-	11	11
1983	-	7	7
1984	-	17	17
1985	-	12	12
1986	-	9	9
1987	-	11	11
1988	-	18	18
1989	1	17	18
1990	-	10	10
1991	1	10	11
1992	1	21	22
1993	-	24	24
1994	-	31	31
1995	1	34	35
1996	2	39	41
1997	-	40	40
1998	-	27	27
1999	1	18	19
2000	1	18	19

2001	-	30	30
2002	-	25	25
2003	-	17	17
2004	1	18	19
2005	1	26	27
2006	1	27	28
2007	1	25	26
2008	-	27	27
2009	2	32	34
2010	-	28	28
2011	-	23	23
2012	1	37	38
2013	-	36	36
2014	2	29	31
2015	1	18	19
2016	-	32	32
2017	-	21	21
2018	1	24	25
2019	1	23	24
2020	-	5	5
2021	2	12	14
2022	1	18	19
<b>Grand Total</b>	<b>23</b>	<b>985</b>	<b>1008</b>

<b>MA State Sentenced Life Without Parole by Year Committed and Sex as of 10/01/2022*</b>			
<b>Year Committed</b>	<b>F</b>	<b>M</b>	<b>Grand Total</b>
1964	-	1	1
1969	-	1	1
1970	-	2	2
1973	-	1	1
1975	-	1	1
1976	-	5	5
1978	-	4	4
1979	-	1	1
1980	-	1	1
1981	-	1	1
1982	-	3	3

1983	-	1	1
1984	-	2	2
1986	-	3	3
1987	-	3	3
1988	-	5	5
1989	-	2	2
1990	-	2	2
1991	-	5	5
1992	-	10	10
1993	-	9	9
1994	-	9	9
1995	-	4	4
1996	-	6	6
1997	-	11	11
1998	-	7	7
1999	1	4	5
2001	-	7	7
2002	-	5	5
2003	-	3	3
2004	-	4	4
2005	1	3	4
2006	-	6	6
2007	1	9	10
2008	-	5	5
2009	-	4	4
2010	-	6	6
2011	-	9	9
2012	-	7	7
2013	-	7	7
2014	-	5	5
2015	-	3	3
2016	-	5	5
2017	-	2	2
2018	-	5	5
2019	-	1	1
<b>Grand Total</b>	<b>3</b>	<b>200</b>	<b>203</b>

**\*Table for Offense Age of 18-20**

## CERTIFICATION OF COMPLIANCE

I, Katharine Naples-Mitchell, certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to those specified in Rule 16(k), 17, and 20. It complies with the type-volume limitation of Rule 20(2)(C) because it contains 7,489 non-excluded words. It complies with the type-style requirements of Rule 20 because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

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## CERTIFICATE OF SERVICE

On January 17, 2023, I served a copy of this brief on all parties through the e-file system and by electronic mail.

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