COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
NO: SJC-11453

GREGORY DIATCHENKO,

Plaintiff, Appellant,
v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT, et. al.,
Defendants, Appellees.

ON DIRECT APPEAL PURSUANT TO ORDERS
OF THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

NO: SJC-11454

COMMONWEALTH,
Appellant,
v.

MARQUISE BROWN,
Appellee.

ON DIRECT APPELLATE REVIEW FROM ORDERS
OF THE SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

BRIEF OF AMICUS CURIAE, HERBY J. CAILLOT IN SUPPORT OF POSITIONS OF GREGORY DIATCHENKO AND MARQUISE BROWN

By the Attorney for
HERBY J. CAILLOT

JOHN J. BARTER
ATTORNEY AT LAW
BBO No: 032150
83 Atlantic Avenue
Boston, MA 02110
(617)367-2545

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STATEMENT OF INTEREST OF AMICUS CURIAE
HERBY J. CAILLOT

Herby J. Caillot is an individual who is currently incarcerated and in the custody of the Massachusetts Department of Corrections having been convicted of murder in the first degree by joint venture. On the date of the offense as alleged in the indictment Herby Caillot had recently turned seventeen years of age. On October 5, 1998, a Plymouth County jury convicted Herby Caillot and an adult co-defendant of the shooting murder of Carlo Clermy as "joint venturers." *Commonwealth v. Caillot*, Mass. 712 (2007) (*Caillot I*); *Commonwealth v. Caillot*, 454 Mass. 245 (2009) (*Caillot II*).

The Superior Court imposed the only sentence expressly specified by Massachusetts statutory law, mandatory life without parole. *See* M.G.L. Ch. 265, § 2; M.G.L. Ch. 127, § 133A. The Superior Court recognized that it had no discretion to impose any other sentence. "[A]s a result of the verdict the law leaves the judge no discretion in this matter. *The law, upon a conviction of first degree murder, commands and compels the sentence of life imprisonment without parole*. Consequently, I must impose that sentence at this time, and I do." Trial Transcript, October 5, 1998 Vol 11, pp. 10-11 (emphasis

added)(Sikora, J.).

This Court affirmed the judgment of conviction and sentence in a decision issued on July 10, 2009. See *Caillot II*, 454 Mass. 245. A habeas corpus petition was timely filed in the United States District Court for the District of Massachusetts challenging the underlying conviction on several grounds. *Caillot v. Gelb*, USDC No: 12-CV-10581-JLT. That petition has been stayed to allow the issues raised by the decision of the United States Supreme Court in *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012), and *Jackson v. Hobbs*, 567 U.S. __, 132 S. Ct. 2455 (2012), to be considered by the courts of the Commonwealth.

The *Miller* issues were presented by Herby Caillot to the Plymouth Superior Court in a Revised Motion for Post-Conviction Relief which was filed on April 23, 2013. A Motion to Report Questions of Law Pursuant to Rule 34 was filed on June 3, 2013, addressing the *Miller* issues raised by Herby Caillot's case. The Superior Court did not report the questions of law but instead determined that the *Caillot* case would be stayed pending this Court's consideration of the *Diatchenko* and *Brown* cases.

Mr. Caillot, as *amicus curiae*, has an interest in the issues that are raised by this case. Part of that

interest derives from the likelihood that this Court will enter direct rulings in the *Brown* and *Diatchenko* cases which may have an effect upon the development of the law interpreting the implications of the *Miller* case. Equally importantly, Mr. Caillot has an interest because any rulings of this Court may be perceived by the trial courts to have a conclusive application to the dozens of cases beyond those of Mr. Brown and Mr. Diatchenko even though the relevant legal and factual issues that may be presented by each case may be different. This amicus curiae brief is intended to illustrate some of the variations that may arise in cases where a person under the age of eighteen has been sentenced to mandatory life without parole following a conviction for first degree murder.

The issues raised by this case are extremely important to Herby J. Caillot, and to his family. Mr. Caillot was arrested for murder weeks after his seventeenth birthday. His subsequent teen years were spent in confinement with adult offenders, most of whom were older, larger, and stronger than he was. As a "lifer," pursuant to Department of Correction policies he has been assigned to the lowest priority when it comes to

having access to educational and vocational programs, and he has been held in higher level security facilities, consistent with the practices of the Department of Corrections.

At this point Mr. Caillot has spent more than sixteen years in prison. In fact, Mr. Caillot has spent a "life time" in prison, in the sense that his time in prison is now approximately equal to the time that he lived on "the outside" prior to being arrested for this offense. The thirty four year old man who is now in prison is in a genuine sense a different person than the young Herby Caillot who was arrested in Brockton and charged with the murder of Carlo Clermy in 1996.

The decisions of the United States Supreme Court in *Miller* and *Jackson* teach us that important advances in medicine, neurology, psychology, and social science, all establish that young people do not have the full capacity for making good judgments and they are by nature impulsive, but at the same time these new scientific findings show that young people have a tremendous capacity to develop maturity, judgment, and social skills, and to become productive members of society, if provided with the opportunity. To put it simply, young people are different from adults and the law requires

that youth, inexperience, and the capacity for change be taken into account in the criminal justice system. A system of criminal laws that makes permanent judgments about individuals based upon isolated events occurring in youth and which imposes the penalty of mandatory life without parole is unconstitutional. That much is clear from the decision in *Miller*. "[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 132 S. Ct. at 2030.

The question now is what should be done when we have a statutory system in the Commonwealth that is unconstitutional? Mr. Caillot urges this Court, in considering this question, to recognize that each person serving a term of mandatory life without parole is a separate individual. Each had a separate set of life circumstances leading up to the conviction, each had separate experiences developing a trial strategy, each had a separate record developed at trial, and each has had separate experiences while incarceration. Each should have a full opportunity to advocate the legal and factual issues that distinguish his case from all others, and to seek the relief that is appropriate and tailored to his case.

Mr. Caillot submits this brief in response to the announcements issued by this Court on May 24, 2013, soliciting amicus briefs from parties interested in the pending *Diatchenko*[1] and *Brown*[2] cases. Mr. Caillot does not seek to have this Court decide the merits of any issue in his case, which is pending in the Superior

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[1] In *Diatchenko*, SJC No. 11453, this Court sought amicus briefs as follows:

> ANNOUNCEMENT: The justices are soliciting amicus briefs. Whether the Supreme Court's holding in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), applies to the petitioner in this case, who as a juvenile committed murder in the first degree and was tried, convicted, and sentenced to a mandatory life term without the possibility of parole before the *Miller* case was decided (see *Commonwealth v. Diatchenko*, 387 Mass. 718 [1982]), and who remains incarcerated on that conviction and sentence; and, if *Miller* does apply, what is the appropriate remedy for a defendant in the petitioner's situation.

[2] In *Brown*, SJC No. 11454, this Court sought amicus briefs as follows:

> ANNOUNCEMENT: The justices are soliciting amicus briefs. Following the Supreme Court's decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), what is the appropriate sentence or range of sentences, and what is the appropriate sentencing procedure, for a defendant who has been convicted of murder in the first degree and who was seventeen years old at the time of the offense. (The offense in this case occurred before the *Miller* case was decided; the trial and conviction occurred after *Miller*; and the defendant is awaiting sentencing.)

Court, but instead he seeks to address certain issues raised in the amicus solicitations, and to raise awareness of the diversity of cases and the complexity of issues that fall into the general classification of "juvenile life without parole" ("JLWOP") matters.

ISSUES PRESENTED

1. What remedy is required for defendants who were convicted of first degree murder in the Commonwealth, based upon indictments alleging that the criminal conduct occurred before the defendant's eighteen birthday, and who are consequently serving mandatory sentences of life without the possibility of parole?

2. What is the appropriate sentence, or range of sentences for a defendant who is convicted of first degree murder based upon conduct arising prior to the defendant's eighteenth birthday, and what is the appropriate sentencing procedure?

STATEMENT OF THE CASE

The Amicus adopts the statement of the case as set forth in the Corrected Brief for Petitioner, Gregory Diatchenko, SJC No. 11453, at pp. 2-11, and the Brief of Appellee Marquise Brown, No. 11454, at pp. 2-3.

STATEMENT OF FACTS

The Amicus adopts the statement of facts as set forth in the Corrected Brief for Petitioner, Gregory Diatchenko, SJC No: 11453, at pp. 2-11, and in the Brief Appellee, Marquise Brown, SJC No. 11454, at p. 3.

SUMMARY OF ARGUMENT

I. The relief granted in the *Miller* and *Jackson* cases was to reverse the judgments of the state courts, and to remand for further proceedings "not inconsistent" with the Court's opinion. See, pp. 11-12. It would be inconsistent with the *Miller* opinion to deny relief to JLWOP defendants who seek relief from their unconstitutional sentences on collateral review. The *Jackson* case itself arose on collateral review from state court proceedings, and the Supreme Court ordered the same relief as it did for *Miller*, which arose from a direct appeal from the state's high court. Where the Supreme Court ordered such relief in a case arising on collateral

review, and where the Court's decision announced a rule of substantive constitutional criminal law, relief is clearly warranted for all defendants including those seeking relief from an unconstitutional sentence in collateral proceedings. See, pp. 12-16. The principles as discussed in the *Miller* opinion support remand to the trial courts that need not be limited to re-sentencing, and may include a new trial, and in any case must afford an opportunity to develop relevant legal and factual issues. See, pp. 17-24. New trial proceedings may be appropriate when requested by a JLWOP defendant who did not have advance notice of the nature of the proceedings against him or the opportunity to develop a trial strategy, and to conduct pre-trial, and trial proceedings with knowledge of the actual sentencing scheme and the principles of *Miller* that would ultimately apply to him. In such circumstances the JLWOP defendants have been denied due process of law, the right to a jury trial, and the right to effective assistance of counsel, as guaranteed by the state and federal constitutions. See, pp. 24-28.

II. Any sentence to be imposed on remand must be in accordance with existing constitutional and statutory law and it must appropriately consider the juvenile status of

the defendant. Any sentence must recognize the JLWOP defendant's status as a juvenile. Where the statutes of the Commonwealth require a sentence of "mandatory life without parole," M.G.L. Ch. 265, § 2; M.G.L. Ch. 127, § 133A, those provisions are unconstitutional, and must be viewed as a nullity. Pursuant to M.G.L. Ch. 279, § 5, the Court should look to the other statutes of the Commonwealth for guidance in sentencing. The most applicable statutes to provide such guidance are the laws relating to juveniles, and the laws relating to manslaughter, because each is consistent with the principles discussed in the *Miller* opinion. See, pp. 28-38. Neither the legislature nor the Courts may create a new sentencing scheme applicable to defendants who have already been convicted as that would violate the constitutional doctrine of separation of powers and the constitutional prohibition on *ex post facto* laws. The existing statutes allow for sentencing of JLWOP defendants either as juveniles, taking guidance from the penalties in the juvenile court system, or to a term of years taking guidance from the most serious homicide offense which permits a trial court to use judgment, consider evidence, and impose an indeterminate sentence. See, pp. 38-44.

ARGUMENT

I. A JUDGMENT OF CONVICTION, AS WELL AS A SENTENCE OF "MANDATORY LIFE WITHOUT PAROLE," SHOULD BE VACATED IN FULL IN JLWOP CASES, AND DEFENDANTS SHOULD HAVE THE OPPORTUNITY FOR A NEW TRIAL WHERE THE ISSUES AND PRINCIPLES DISCUSSED IN *MILLER v. ALABAMA*, 567 U.S. __, 132 S.Ct. 2455 (2012), AND *JACKSON v. HOBBS*, 567 U.S. __, 132 S.Ct. 2455 (2012), MAY BE INTEGRATED INTO A DEFENSE STRATEGY, FACT FINDING, AND TRIAL PROCEEDINGS.

A. The Relief Granted by the Supreme Court's Decision in *Miller* and *Jackson* Was to Reverse the Judgments and Remand the Cases for Further Proceedings "Not Inconsistent With" the Court's Opinion.

In the concluding paragraph of the majority decision in *Miller v. Alabama*, the Court summarized its holding, and the relief to be afforded.

> *Graham* [*v. Florida*, 560 U.S. __, (2010)], *Roper* [*v. Simmons*, 543 U.S. 551 (2005)], and our individualized sentencing decisions make clear that *a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles*. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment. *We accordingly reverse the judgments of the Arkansas Supreme Court and the Alabama Court of Criminal Appeals and remand the cases for further proceedings not inconsistent with this opinion*.

Miller v. Alabama, 132 S.Ct. at 2475 (emphasis added).

Just as the state court judgments in the *Miller* and *Jackson* were reversed and the cases remanded for appropriate action in light of the decision of the Supreme Court, so too the judgments in the Massachusetts JLWOP cases should be reversed and there should be further proceedings in the Superior Court, consistent with *Miller*, for each defendant who is serving a mandatory juvenile life without parole sentence.

B. It Would be Inconsistent With the *Miller* Opinion to Deny Relief to JLWOP Defendants Who Seek Relief From Their Unconstitutional Sentences on Collateral Review.

The decision in *Miller* arose from two cases coming to the Court from distinct procedural postures.[3] *Miller* was a direct appeal from a decision of the Court of Criminal Appeals of Alabama, while *Jackson v. Hobbs*, 567 U.S. __, 132 S. Ct. 2455 (2012) arose from a state habeas petition, which was dismissed in the trial court, and that dismissal was affirmed by the Arkansas Supreme Court. Mr. Jackson was convicted of that murder, but in his appeal to the Supreme Court of Arkansas he did not raise any issues in connection with his being sentenced to life without parole and his conviction was affirmed,

[3] As the dissenting opinion of Justice Alito observed, these two cases were "carefully selected." *Id*. at 2489.

and became final. See *Jackson v. State*, 359 Ark. 8, 197 S.W.3d 757 (2004).[4] Several years later Mr. Jackson filed a petition for a writ of habeas corpus in the trial court challenging the judgment in his case and arguing that as a juvenile he could not be imprisoned for "mandatory life without parole," based upon the Eighth and Fourteenth Amendments, and provisions of the Arkansas Constitution. The trial court denied relief and Mr. Jackson appealed once again to the Supreme Court of Arkansas. The Supreme Court of Arkansas concluded that because Mr. Jackson was sentenced in accordance with the governing statute it would afford no relief. "Jackson has failed to allege or show that the original commitment was invalid on its face or that the original sentencing court lacked jurisdiction to enter the sentence. We hold that the circuit court's dismissal of the petition for writ of habeas corpus was not clearly erroneous." *Jackson v. Norris*, 2011 Ark. 49 (2011).

Mr. Jackson filed a petition for writ of certiorari to the Supreme Court of the United States, and that petition was granted on November 7, 2011, the same day

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[4] As the Supreme Court observed: "Jackson did not challenge the sentence on appeal, and the Arkansas Supreme Court affirmed the conviction." See 359 Ark. 87, 194 S.W. 3d 757." 567 U.S. __, 132 S.Ct. at 2461.

the certiorari was granted in *Miller*. See *Jackson v. Hobbs*, __ U.S. __, 132 S.Ct. 548 (2011) (Docket No: 10-9647); *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 548 (2011) (Docket No: 10-9646). In the orders granting certiorari, the Supreme Court noted that the two cases would be "argued in tandem." *Id*. Not only were the cases "argued in tandem" on the same day, the Court issued its decision in a single opinion addressing both cases on equal footing and affording precisely the same relief to each petitioner. The Supreme Court did not rule that Mr. Miller was entitled to relief, because he was proceeding on a direct challenge from his conviction, but that Mr. Jackson was not entitled to relief, because he was seeking relief arising from collateral proceedings in a case where judgment had been final years earlier.

The Supreme Court intended that its decision apply both to cases on direct appeal, such as *Miller*, and to cases where collateral relief is sought, such as *Jackson*. The rule of *Miller* and *Jackson* applies to cases seeking collateral relief. "[O]nce a new rule is applied to the defendant in a case announcing a new rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague v. Lane*, 489 U.S. 288, 300 (1989). Since the Supreme Court announced and

applied this rule in the context of a case that arose on collateral relief, the rule must apply in all cases seeking to present the issue in collateral proceedings.

The retroactivity principles discussed in the plurality opinion in *Teague v. Lane*, 488 U.S. 289, 310-311 (1989), are limited to new constitutional rules of criminal "procedure." As the Supreme Court made clear in *United States v. Bousley*, 523 U.S. 614, 620 (1998), "because *Teague* by its terms applies *only to procedural rules*, we think it is inapplicable to the situation in which the Court decides the meaning of a criminal statute enacted by Congress." *United States v. Bousley*, 523 U.S. 614, 620 (1998)(emphasis added). "New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms." *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004). "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Id*. at 353. "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant . . . faces punishment that the law cannot impose upon him.'" *Id.* at 352. Each JLWOP defendant was sentenced to "mandatory life without parole." Under *Miller* such a mandatory

punishment may not, as a matter of substantive constitutional law, be imposed upon a juvenile. *Miller*, 132 S. Ct. at 2030. The *Miller* and *Jackson* cases apply with equal force to cases where the underlying judgments became final before *Miller* and *Jackson* were decided, and thus relief consistent with the opinion in those cases should be afforded in collateral proceeding.

Any person serving a JLWOP sentence is serving a sentence "in violation of the Constitution or laws of the United States or the Commonwealth of Massachusetts." Rule 30(a) Mass. R. Crim. P. As a result, a motion for relief may be filed "*at any time, as of right*. . ." (emphasis added) *Id*. In addition, a trial judge may "grant at new trial *at any time if it appears that justice may not have been done*." Rule 30(b) Mass. R. Crim. P. (emphasis added). In light of *Miller* it cannot be said that justice has been done where a juvenile has been serving a sentence of life without parole.

C. The Principles as Discussed in the *Miller* Opinion Support Remand for Proceedings That Need Not be Limited to Re-Sentencing, and in Any Case Such Proceedings Should Afford an Opportunity to Develop Relevant Legal and Factual Issues.

The Supreme Court in *Miller* does not limit the relief on remand to re-sentencing and there should be no such limitations imposed directly or by implication by the Courts of the Commonwealth. Following a review of the factors that distinguish a juvenile from an adult offender, and after holding that the sentences of life without parole imposed in *Miller* and *Jackson* were unconstitutional, the Court "reverse[d] the judgments"[5] in those cases and remanded "for further proceedings not inconsistent with this opinion." *Miller* at 132 S.Ct. at 2475. The scope of the remand was defined broadly by the content of the Supreme Court's opinion. The Court did not order that the cases be "remanded for resentencing,"

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[5] In *Miller* the Supreme Court proceedings arose in a petition for certiorari from the judgment where Mr. Miller was convicted of murder and sentenced to life without parole. See *Miller v. State*, 63 So. 3d 676 (Ala. Crim. App. 2010). As a result, when the Supreme Court reversed the judgment it vacated both the judgment of conviction and the sentence. *Jackson* arose from a petition for certiorari challenging the dismissal of a state habeas corpus case so when the judgment was reversed, the habeas corpus proceedings was reinstated. See *Jackson v. Norris*, 378 S.W. 3d 1003 (2011)(Sup. Ct. Ark.). The relief ordered by the Supreme Court is not limited to resentencing.

as it has done in many other cases. See, e.g., *Pepper v. United States*, 131 U.S. 1229, 1251 (2012)(Kagan, J.)(". . . the case is remanded for resentencing consistent with this opinion."); *Lewis v. United States*, 523 U.S. 155, 173 (1998)("We . . . vacate the . . . judgment in respect to petitioner's sentence and remand the case for resentencing."); *McKay v. North Carolina*, 494 U.S. 433, 435 (1990)("We therefore vacate petitioner's death sentence and remand for resentencing.").

The broad instruction on remand shows that when a juvenile is convicted and sentenced to mandatory life without parole many systemic aspects of the criminal justice system, which affect each stage of the criminal process, are implicated. Accordingly, consideration of the full case, including the possibility of a new trial, is "not inconsistent with" the *Miller* opinion, and would be consistent with the scope of the remand as ordered in that case. *Miller v. Alabama*, 132 S.Ct. at 2475

This Court recently suggested that the "significant considerations" in *Miller* may go beyond the realm of sentencing. *Commonwealth v. Walczak*, 463 Mass. 808, 812 (2012)(plurality decision)("The decision to indict for murder and bypass the Juvenile Court is now made by the

grand jury without taking the defendant's youth into consideration in any way, a procedure that is in tension with significant considerations recognized in recent decisions of the United States Supreme Court. See *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012); *Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010); *Roper v. Simmons*, 543 U.S. 551, 564, 569 (2005).")(Lenk, J., concurring). Justice Lenk's concurring opinion noted that the considerations in *Miller* may have an application at the earliest phase of criminal proceedings, specifically at the grand jury stage where the nature of the charges and the charging document are determined. Due to the broad range of issues discussed in *Miller* and the importance of those issues in the various stages of the criminal justice system its application should not be limited to re-sentencing.

Miller recognized that the "hallmark features" of youth including "immaturity, impetuosity, and failure to appreciate risks and consequences" have implications throughout the procedural steps in the criminal justice system. "Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth - - for example, his inability to deal with police officers or prosecutors

(including on a plea agreement) or his incapacity to assist his own attorneys." *Miller,* 132 S.Ct. at 2468. Recognizing the significance of a child's limitations in both pretrial and trial proceedings, and ordering appropriate relief, is "not inconsistent with" the opinion in *Miller*.

Mr. Caillot's case provides examples of a juvenile who had a diminished ability to "deal with police officers." *Id*. The police questioned Herby Caillot while he was in a hospital emergency room having suffered a gun shot wound to his hand. At the time of questioning Herby Caillot had access neither to counsel nor the assistance of a trusted adult.[6] While Herby Caillot did not admit to any offense his statements to the police were still seized upon by the Commonwealth and used against him at trial. A child's fate may be sealed by his first contact with a police officer following a reported offense, yet the child would not have the experience or judgment to know how to exercise his

[6] The "humane practice rule" issue was raised in Mr. Caillot's direct appeal, *Caillot II,* at 454 Mass. 263-264 & n. 13, but in light of *Miller*, which emphasizes that "hallmark features of youth," including mental capacity, judgment, and understanding, the question of whether any statements made by Mr. Caillot were voluntary, and whether they should have been admitted into evidence at all, takes on a new dimension.

rights. An equivocal choice of words by a child in a stressful situation may be characterized as a confession, or as an acknowledgment of guilt by a police officer or a prosecutor.[7] In light of the principles described in *Miller*, including brain science and developmental issues, simply offering an opportunity for re-sentencing is not a sufficient remedy because a child may never have been convicted at all, or may have been convicted of a lesser offense, if the frailties of youth had been given appropriate attention in the investigation, pre-trial motion, and trial stages. See *Miller,* 132 S.Ct. at 2468.

[7] When Herby Caillot was first questioned by the police in the hospital he was asked "what happened" and he responded that he "didn't remember." In closing argument the prosecutor featured this as evidence of guilt, arguing: "Now does that sound like somebody – would it be natural for a person who got shot in the hand that was an innocent victim to want to do everything to help the police corral the person that shot him?" Transcript 9: 131-132. In fact, it would not be at all unusual for a child, when placed in a stressful situation to answer "I don't remember" in any number of situations. The teaching of *Miller* is that past practices in evaluating what children may do or say requires re-examination. The admissibility of statements of children that are made without counsel, and without an adult guardian, and the application of the humane practice rule with regard to a child's statements, must be re-evaluated in light of *Miller* and the scientific and social science data referenced in that case.

The decision in *Miller* implicates the fact finding proceedings and the record that would typically be created at trial, recognizing that "the circumstances of the homicide offense, including the extent of his participation in the conduct" must be taken into account. *Id*. "Our holding requires factfinders to attend to exactly such circumstances - - to take into account the differences among defendants and crimes." *Id* at 2469 & n. 8. Among the issues that may be developed at trial would be the nature of the child's participation in the offense. *Id*. Justice Breyer's concurrence in *Miller*, which was joined by Justice Sotomayor, highlighted the importance of the question of whether a juvenile "killed or intended to kill." 132 S.Ct. at 2475-2476.

As the Supreme Court recognized in *Graham*, supra, lack of intent normally diminishes the "moral culpability" that attaches to a particular crime, making those who do not intend to kill "categorically less deserving of the most serious forms of punishment. . ." *Graham* 130 S.Ct. 2016. "Given *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim." *Miller*, 132 S.Ct. 2575-2476 (Breyer concurring).

Justice Breyer questioned whether life without parole is ever appropriate for a juvenile in a "felony-murder" case, a "transferred intent" case, an "aider and abettor" case, or a case based upon "reckless disregard." *Id*. Justice Breyer recognized that "this artificially constructed kind of intent does not count for intent for purposes of the Eighth Amendment." *Id.* at 2476. A "joint venture" theory of criminal culpability would be comparable to the "artificially constructed kind of intent" discussed by Justice Breyer.

Under *Miller*, the development of the factual record takes on an added dimension. A well-developed defense would be attentive not only to issues of "guilt" but also to sentencing issues. An attorney who was aware that the sentence was not "fixed in stone" but instead, that a more favorable sentence may be achieved by conceding certain issues in the guilt phase or focusing the evidence and developing the record on mitigation issues, would proceed differently with the defense. An attorney beginning the defense of a person under the age of eighteen would obviously take such considerations into account if a case were to go to trial today, and would seek to develop a record that would address the *Miller* factors. That being the case, a defendant who went to

trial five, ten, or thirty years ago should not be deprived of the opportunity for a new trial where all of these appropriate strategic considerations may be taken into account.

Miller articulates the governing constitutional law, and recognizes important new developments in adolescent brain science. The benefit of the *Miller* opinion should be equally available to all, and it should not be denied to those who were tried and sentenced under the unconstitutional Massachusetts statute. All defendants who were sentenced under this unconstitutional sentencing regime should have equal protection of the law, as guaranteed by the Constitution and laws of the United States and the Commonwealth. All defendants should have the opportunity for a new trial and an individualized sentencing hearing.

D. A Juvenile Who Had No Notice of the Issues That Would Be Material at Trial, and Accordingly Had No Opportunity to Develop a Trial Strategy, and to Present a Defense in Light of the Factors Itemized in *Miller*, Is Denied Rights to a Fair Trial by Jury, to Due Process of Law, to Effective Assistance of Counsel, to Present a Defense, and to Confront and Cross Examine, as Guaranteed by the Fifth, Sixth, and Fourteenth Amendments, and by Article 12 of the Declaration of Rights and the Constitution of the Commonwealth.

The courts have recognized that where significant sentencing enhancements are at issue facts supporting a

heightened penalty should be set forth in the charging document and subject to proof beyond a reasonable doubt by a jury at trial. There is a constitutional right to have sentencing facts alleged and proved to a jury by a standard of proof beyond a reasonable doubt. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Ring v. Arizona*, 536 U.S. 584, 597 n.3 (2002); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005); *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151 (2013). These federal constitutional rights are guaranteed by the Fifth Amendment and the right to a trial by jury under the Sixth Amendment and are applicable to the states through the due process clause of the Fourteenth Amendment. *Id*.

A defendant has analogous rights under the constitutional provisions of the laws of the Commonwealth. Article 12 provides that "[n]o subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him. . . ." The charging document must provide notice of the nature of the offense as well as any enhanced or mandatory sentencing provision. "It is fundamental tenet of due process that '[n]o one may be required at peril of life, liberty or property to

speculate as to the meaning of penal statutes.'" *United States v. Batchelder*, 442 U.S. 114, 123 (1979), quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). See *Commonwealth v. Pagan*, 445 Mass. 161, 174 (2005). This principle applies to sentencing as well as substantive provisions. *Id*. See also, *United States v. Evans*, 333 U.S. 483 (1948); *Commonwealth v. Gagnon*, 387 Mass. 567, 569 (1982), *S.C.*, 387 Mass. 768 (1982), cert. denied, 461 U.S. 921, and 464 U.S. 815 (1983).

When a child under the age of eighteen is tried under a regime where there is a mandatory penalty, and it is only later revealed that such a penalty is unconstitutional, the meaning of the penal statute as it may apply to the sentence, is rendered uncertain nunc pro tunc, thereby violating due process of law. See *Commonwealth v. Pagan*, 445 Mass. 161, 169-170 (2005). In *Pagan* there was an enhanced sentencing provision, but its terms were not clearly defined, and this Court found that its provisions were "hopelessly confusing and unconstitutionally vague." The sentencing statute in *Pagan* did not state whether the Commonwealth or the defendant would be required to bear the burden of proof. *Pagan*, 445 Mass. at 172. In each JLWOP case, each defendant was similarly disadvantaged by having no

advance notice, by way of indictment or otherwise, that there were several sentencing issues that would need to be developed at the time of trial in order to provide a factual basis for a moderated sentence. As a result, such defendants had no opportunity at the investigation stage, pre-trial stage, or at trial to develop a strategy that would allow him or her to build a record that would take the actual potential penalties into account.

When particularly harsh penalties are at issue, such as the death penalty, legislatures have made provisions to proceed before a jury in a bifurcated fashion, with a guilt phase, followed by a sentencing phase, where aggravating and mitigating factors are considered and determined by a jury. See M.G.L. Ch. 279, §§ 68-70. While *Miller* requires a hearing at which such mitigating or aggravating circumstances shall be taken into account there is no corresponding legislation allocating the burden of proof, the standard of proof, or specifying whether the fact finder shall be a judge or a jury. As a result JLWOP defendants were required to proceed to trial without knowing the lawful-constitutional penalty, or the nature of the sentencing hearing that would ultimately be deemed necessary.

In short, an opportunity for resentencing does not provide the level of notice, fairness, fact-finding by a jury, or due process of law that is anticipated by *Miller*, or by the above-cited constitutional provisions. In the absence of a formal charging document that accurately specifies the possible sentences, and that itemizes aggravating factors, and in the absence of a statutory procedure that provides notice that mitigating factors may be developed and presented to the fact finder, and in the absence of an opportunity to have such facts considered by the jury as fact finder based upon a pre-determined statutory sentencing procedure, a defendant is denied the rights guaranteed by the Fifth and Sixth Amendments, due process of law as guaranteed by the Fourteenth Amendment, and rights guaranteed under Article 12 of the Declaration of Rights and the Constitution of the Commonwealth.

II. ANY SENTENCE MUST BE IN ACCORDANCE WITH EXISTING CONSTITUTIONAL AND STATUTORY LAW AND IT MUST APPROPRIATELY CONSIDER THE JUVENILE STATUS OF THE DEFENDANT.

A. Any Sentence Must Be Tailored to the Juvenile and Consistent with the Constitution and the Laws of the Commonwealth and the United States.

Under the laws of the Commonwealth "[i]f no punishment for a crime is provided by statute, the court

shall impose such sentence, according to the nature of the crime, as conforms to the common usage and practice in the commonwealth." M.G.L. Ch. 279, § 5. In these cases a punishment is "provided by statute," however the statute providing that punishment is unconstitutional leaving no direct statutory punishment. There is no doubt that the Massachusetts statutory scheme provides for "mandatory life without parole." M.G.L. Ch. 265, § 2; M.G.L. Ch. 127, § 133A. There is also no doubt that this statutory scheme is unconstitutional under *Miller* and *Jackson*. *Miller*, 132 S. Ct. at 2030. Moreover, the Supreme Court has recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S.Ct. at 2464.

When determining what sentence should be imposed in the absence of a constitutional sentencing provision, the Courts should examine the Massachusetts statutes to find a sentencing alternative that is applicable to juveniles, and then incorporate that alternative sentencing statute when carrying out the directive of M.G.L. Ch. 279, § 5. The only statutes that do not impose "life without parole," that consider the unique characteristics of juveniles, and that "conform[s] to common usage and practice in the commonwealth" are the penalties that are

associated with the juvenile court system.

In general, for purposes of criminal law a child may be charged in the adult criminal courts once the age of seventeen is reached. See, M.G.L. Ch. 119, § 52. However, the juvenile court has no jurisdiction over a "person who at the time of the offense attained the age of fourteen but not yet attained the age of seventeen who is charged with committing murder in the first or second degree." M.G.L. Ch. 119, § 74. As a result, under the current sentencing scheme, a person charged with the acts which would constitute murder for an adult, who is a juvenile, under the age of fourteen, would proceed in the juvenile court where punishment could include being committed to the division of youth services until the age of eighteen. M.G.L. Ch. 119, § 58. Since any other penalties as provided by statute for a child under eighteen convicted of first degree murder is unconstitutional, the Courts must look to such juvenile sanctions for guidance in determining what penalty may "conform to common usage."

The Massachusetts statutes setting the penalties for juveniles over the age of fourteen convicted of murder have changed over time so there are JLWOP defendants who may fall into a few different statutory schemes. In 1996

the law was modified to require that any juvenile over the age of fourteen receive the same statutory punishment as an adult. See M.G.L. Ch. 119, § 72B, St. 1996, c. 200, § 14. This is the current state of the statutory law.

Prior to the 1996 legislation a defendant could remain in the juvenile court system and if a "child who has passed his fourteenth birthday" was adjudicated delinquent by reason of first degree murder such child was "committed to a maximum confinement of twenty years." See, St. 1992, c. 398, §§ 4, 5. At that time there was a process whereby the child could be transferred to the adult criminal session, but only after a two stage hearing where a judge would first determine whether there was probable cause that the juvenile committed the crime, and if so the court would determine the juvenile's dangerousness and amenability to rehabilitation. *Commonwealth v. Dale D.*, 431 Mass. 757, 758-759 (2000). See M.G.L. Ch. 119,§ 61, as amended through St. 1993, c. 12, § 3; St. 1992, c. 398, § 3. See, *Walczak*, supra, 463 Mass. at 808, (Lenk, J. concurring) citing, *A Juvenile v. Commonwealth*, 370 Mass. 272, 281-282 (1976). The 1996 legislation eliminated the transfer procedure, so there is now no stage where a court may consider a child's dangerousness or amenability to rehabilitation, and all

children over the age of fourteen indicted for murder in any degree are tried and sentenced as adults. M.G.L. c. 119, § 74. See *Walczak*, 463 Mass. at 826-827.

At this point in time the juvenile court, under statutory law, does not have jurisdiction of a child between the age of fourteen and seventeen accused of murder. However, where the only specifically-applicable sentencing provision is unconstitutional the sanction for punishing a child who is under the age of fourteen presents the best reference point and the only constitutional alternative sentencing scheme for the specific offense. *Miller* requires a re-drawing of the arbitrary lines that have been set for distinguishing children from adult offenders. *Miller* has set the line at the age of eighteen so anyone under eighteen would be a juvenile when it comes to a sentencing. The juvenile sentencing option is the only penalty for the same offense that "conforms to common usage" and therefore should be adopted by this Court pursuant to M.G.L. Ch. 279, § 5.

The Commonwealth will argue that any such sentence would be too lenient and that such a result could not have been intended by the legislature. But when the choice is between an unconstitutional sentence and one

that may be perceived as "lenient" this Court must favor the lawful and constitutional alternative. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Commonwealth v. Crosscup*, 369 Mass. 228, 234 (1975), quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971). See *Commonwealth v. Zapata*, 455 Mass. 530, 535-536 (2009); *Commonwealth v. Burton*, 450 Mass. 55, 59-60 (2007); *Commonwealth v. Donovan*, 395 Mass. 20, 29 (1985). The rule of lenity must be applied even if it "may seem contrary to common sense." *Zapata, supra*, 455 Mass. at 535. As a matter of due process, the rule of lenity must be applied even if it yields "what may appear to be an anomalous result." *Id*, citing, *Commonwealth v. Burton*, 450 Mass. 55, 60 (2007).

The legislature has provided this fail-safe provision that directs the Court to sentence a defendant "according to the nature of the crime, as conforms to the common usage and practice in the commonwealth." M.G.L. Ch. 279, § 5. A JLWOP defendant may not, under the system of laws as it has been modified by *Miller*, be sentenced under M.G.L. Ch. 265, § 2. In addition, the system of laws in effect does not specify a procedure for conducting a "*Miller* hearing," which would specify issues

such as who shall be the fact finder, what shall be the burden of proof, and who shall bear that burden of proof. However, the system of laws does provide one other penalty for facts that would constitute first degree murder by a juvenile, and while that penalty by its terms applies to those under the age of fourteen it provides the only salient reference point for an existing penalty that conforms to "usage and practice in the commonwealth." See M.G.L. c. 279, § 5. The system of laws, as it is currently in effect, allows a sentencing court to look to the other laws of the Commonwealth, and to fashion a sentence by reference to those laws. Since *Miller* has made it clear that juveniles, under the age of eighteen, may not be subject to the existing mandatory sentencing scheme, and that juveniles are different from adults for sentencing purposes, the laws applicable to juveniles, which do not carry a penalty of "mandatory life without parole," ought to be utilized by the trial court as the proper reference point.

B. A Sentence To A Term of Years, Such as The Sentence Provided for Manslaughter Would be Consistent With the Principles of *Miller*, and Consonant With Justice.

As argued above, the most analogous and the appropriate sentence would be found in the sentencing scheme for juveniles. In the alternative, if an adult sentencing scheme were to be employed, the manslaughter statute provides the best template for adult sentencing that would be "according to the nature of the crime" and it would conform "to the common usage and practice in the commonwealth." M.G.L. Ch. 279, § 5. The crime of manslaughter shall be punished "by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail or a house of correction for not more than two and one half years." M.G.L. Ch. 265, § 13.

Voluntary manslaughter has been described as "an unlawful killing which occurs in circumstances which negate the element of malice." *Commonwealth v. Squailia*, 429 Mass. 101, 109 (1999). Voluntary manslaughter involves an intentional killing "which is mitigated by extenuating circumstances." *Id*. Involuntary manslaughter is "an unlawful homicide unintentionally caused by an act that constitutes such disregard of the probable

consequences to another as to amount to wanton or reckless conduct." *Commonwealth v. Jones*, 382 Mass. 387, 389-390 (1981), citing *Commonwealth v. Campbell*, 352 Mass. 387, 397 (1967).

Miller recognizes that adolescents have a diminished ability to control impulses, conform behavior, and to appreciate the consequences of their actions. In addition, an adolescent offender is less culpable than an adult who has a fully formed brain and a broad range of life and social experience. These factors all tend to negate malice, making any such murder offense by an adolescent comparable to a manslaughter. The newly recognized brain science research supports a conclusion that a murder by a juvenile is analogous to manslaughter, because there are mitigating factors that arise from the very nature of the adolescent brain, and its inherent limitations, which tend to negate malice. As a result, a trial Court may, consistent with M.G.L. Ch. 279, § 5, fashion a sentence that would be a term of years not to exceed twenty years by looking to the nature and elements of the offense of manslaughter.

Sentencing under the manslaughter statute may be particularly consonant with justice and consistent with *Miller*, because manslaughter is the most serious offense

which does not carry a "mandatory life," penalty and therefore allows for a meaningful sentencing hearing under our current statutes, where the nature of the offense and the defendant's characteristics may be presented to the Court, and where the Court may take these factors into consideration in deciding upon an appropriate sentence.

In *Commonwealth v. Woodward*, 427 Mass. 659 (1998), the trial court reduced a jury verdict of second degree murder to manslaughter finding that the actions of the defendant were "characterized by confusion, inexperience, frustration, immaturity and some anger, but not malice (in the legal sense) supporting a conviction for second degree murder." *Id* at 669. As *Miller* has recognized, these same factors of immaturity, inexperience, and confusion are characteristic of the adolescent brain. As a result, the characteristics of youth themselves serve to mitigate the element of malice, and to make the nature of the offense more like manslaughter. *See Carella v. California*, 491 U.S. 263, 265 (1989)(a conviction of murder founded upon a state of mind sufficient only to support a manslaughter conviction violates due process).

Even if a jury verdict of murder is warranted by the evidence, a reduction to a manslaughter-type sentence

may still be more consonant with justice. *Commonwealth v. Keough*, 385 Mass. 314, 319-321 (1982). A judge may reduce a verdict of murder to manslaughter where it is consonant with justice. *Id* at 318. A court may determine in light of the *Miller* factors, that the nature and elements of the offense of manslaughter provide the best sentencing analogue, pursuant to M.G.L. Ch. 279, § 5, and impose a sentence in accordance with M.G.L. Ch. 265, § 13, to a term of years not to exceed twenty years.

C. Aside From the Unconstitutional Mandatory Sentence of Life Without Parole, Every Other Life Sentence Requires Parole Eligibility at Fifteen Years So Any Life Sentence Requiring a Longer Term Prior to Parole Eligibility Would Itself be Unconstitutional.

The only penalty expressly provided by statute for murder in the first degree is life without the possibility of parole. M.G.L. Ch. 265, § 2, M.G.L. Ch. 127, § 133A. That sentence is mandatory and it has been imposed as such upon JLWOP defendants. However it is unconstitutional. The only other adult penalty for murder as provided under those statutes is for murder *in the second degree* and that adult penalty provides for mandatory life with parole eligibility after fifteen years. *Id*. There is no statutory provision for a sentence of life with a possibility of parole after any

different number of years. In any case, the sentence for murder in the second degree is itself a "life sentence," which may be appropriate for adults, but it should not be imposed automatically upon juveniles under the age of eighteen.[8] As the Supreme Court recognized in *Miller* any life sentence upon a juvenile should be rare and uncommon. See *Miller*, 132 S.Ct at 2469.

The constitutional separation of powers doctrine and the prohibition on *ex post facto* laws, prevents the judiciary or the legislature from creating any new doctrine or any new statute that would subject a JLWOP defendant to a less favorable sentencing option than those which currently exist.

1. The Separation of Powers Doctrine Prohibits Creation of a New Sentencing Scheme by the Courts.

The Constitution of the Commonwealth expressly provides for separation of powers and allocates roles to

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[8] Since the system of laws in effect has not permitted JLWOP defendants to be considered for parole, since all such defendants have been held in custody situations that give "lifers" the lowest status for participating in vocational programs, and since such defendants were never given the hope of release from custody, a sentence which would after-the-fact, afford an "opportunity" for a parole hearing after fifteen years would not achieve a just result. All JLWOP defendants should be allowed, as a matter of law and equity, to be released if they have served fifteen years, and all such defendants should have the opportunity to advocate for lower sentences.

each branch of government.

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Mass. Const., Part I, Art. 30. Only the Legislature can modify the provisions of the law. "[F]ull power and authority are hereby given and granted to [the legislature], from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution. . ." Mass. Const., Part II, c. 1, Art. 4. "The court is ever solicitous to maintain the sharp division between the three departments of government as declared by art. 30 of the Declaration of Rights." *Attorney General v. Brissenden*, 271 Mass. 172, 183 (1930). "These limitations, though sometimes difficult of application, must be scrupulously observed." *Opinion of the Justices*, 302 Mass. 605, 622 (1939).

The statutory penalty of mandatory life without parole was enacted by the legislature, but it violates

the federal constitution, specifically the Eighth Amendment, and by implication Article 26 of the Massachusetts Constitution. While the Courts may declare a provision of law unconstitutional, it is not the Court's function "to rewrite a statute." *Commonwealth v. Biagiotti*, 451 Mass. 599, 602-603 (2008). "'If the law is to be changed, the change can only be made by the Legislature.'" *Commonwealth v. Villalobos*, 437 Mass. 797, 804 (2002) quoting *Commonwealth v. Jones*, 417 Mass. 661, 664 (1994). The Courts may not re-write the provisions of M.G.L. Ch. 265, § 2, and M.G.L. Ch. 127, § 133A, however to the extent that such provisions are unconstitutional they may not be enforced.

2. The Constitutional Prohibition of *Ex Post Facto* Laws Prevents the Creation of an Enhanced Penalty for Past Criminal Conduct if No Such Penalty is Part of Current Constitutional Statutory Law.

The Courts may not *legislate* a new sentencing scheme once an aspect of the existing scheme is determined to be unconstitutional. By the same token, the legislature may not create a new sentencing scheme after the date of the offense that places a defendant at a disadvantage. In either case it would be an *ex post facto* law even if it is nominally more lenient than the previously existing, but unconstitutional, penalty of mandatory life without

parole. *Ex post facto* laws are prohibited by the state and federal constitutions. See *Commonwealth v. Cory*, 454 Mass. 559, 564 (2009); *Johnson v. United States*, 529 U.S. 694, 699 (2000); *Miller v. Florida*, 482 U.S. 423, 430 (1987); *Peugh v. United States*, __ U.S. __, 133 S.Ct. 2072 (2013). *Ex post facto* laws are prohibited by Article 1 § 10 of the United States Constitution and Article 24 of the Massachusetts Declaration of Rights. See *Commonwealth v. Welch*, 444 Mass. 80, 90-91 (2005). Although the *ex post facto* clause of the U.S. Constitution, by its terms, applies to acts by the legislature and not the judiciary, the Supreme Court has made clear that "the limitations on *ex post facto* judicial decision making are inherent in the notion of due process." *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). As the *Rogers* Court explained, the Due Process Clause contains the basic principle of "fair warning." *Id*. at 457. "Deprivation of the right to fair warning, . . . can result from . . . an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face." *Id, citing Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

The express penalty of "mandatory life without parole" is unconstitutional for those under the age of

eighteen. Life without parole is the most severe sanction available under the laws of the Commonwealth. The next most severe sentence in the Massachusetts General Laws, is life with the possibility of parole after fifteen years. M.G.L. Ch. 127, § 133A. The creation of a new penalty, whether by the court or by the legislature, would be an unconstitutional *ex post facto* law to the extent that it imposed a penalty more severe than the penalties that now exist as constitutional laws within the Commonwealth.

In the absence of the sentence of "mandatory life without parole," which may not be imposed, the sentence should be determined by reference to a constitutional penalty that existed in the statutes of the Commonwealth on the date of the offense and which "conforms to the common usage and practice in the commonwealth." M.G.L. Ch. 279, § 5. As argued above, this should be the same penalty that would be imposed in the juvenile court system. In no event may the legislature create, nor may a court impose a sentence more severe than life with the possibility of parole after fifteen years, upon a juvenile since no such penalty would conform to the laws of the Commonwealth, nor was such a penalty in common usage in the Commonwealth on the date of the offense. If

such a penalty were enacted into law it could only be applied to cases arising after the effective date of such legislation.

III. Supreme Court Precedent and a Growing Number of Medical and Academic Studies Reveal That Minors Have Diminished Culpability and a Great Capacity for Change and Rehabilitation, but None of These Matters Were Taken into Account in the Massachusetts Sentencing Statute or at the Trial in these Cases.

At the outset of the *Miller* opinion the Court recognized that a mandatory life without parole sentencing scheme "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' *Graham v. Florida,* 560 U.S. ___, ___, 130 S. Ct. 2011 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold 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.'" *Miller* 132 S.Ct. at 2460.

Even before *Miller* the Supreme Court established in *Roper* and *Graham* that children are "constitutionally different from adults for purposes of sentencing."

> Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the

> most severe punishments." *Graham*, 560 U.S., at ___, 130 S.Ct. 2011. Those cases relied on three significant gaps between juveniles and adults. First, children have a "'lack of maturity and an underdeveloped sense of responsibility,' " leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.*, at 570, 125 S.Ct. 1183.

Miller 132 S.Ct. at 2464.

The "lessened culpability" and the "capacity for change" are well documented in the scientific and medical research literature, and these considerations go to the heart of the issues of fairness and proportionality. The science associated with these considerations was persuasive to the Supreme Court, and those considerations should be equally applicable in all JLWOP cases. The scientific research that drove the analysis in *Miller* was not considered in these JLWOP cases, but it must now be considered in conjunction with fashioning an appropriate remedy in each JLWOP case, and each such defendant should be afforded the opportunity to develop a factual record in trial court proceedings.

These scientific developments, which were so important to the Supreme Court in *Miller* and *Jackson* go to the very heart of the questions of intent, malice, and premeditation, as well as to issues of proportionality in sentencing. In light of this new science these issues must be made available to be considered substantively by the fact finder and by the court both at the trial and in sentencing.

CONCLUSION

It is respectfully requested that this Honorable Court consider the views expressed in this Brief of Amicus Curiae Herby J. Caillot, and that the Court find (1) *Miller* and *Jackson* are applicable to all Massachusetts JLWOP cases, including those on collateral review; (2) each JLWOP case should be considered by the trial court based upon the merits of the case, and the nature of the relief that is sought, and that relief should include reversing the judgment of conviction and vacating the sentence of mandatory life without parole; (3) each JLWOP defendant should be sentenced to a term of years which may not exceed the term of years that may have been imposed in juvenile court proceedings on the date of the offense for being delinquent by reason of violating M.G.L. c. 265, § 1; or in the alternative, to

a term of years pursuant to the manslaughter statute, M.G.L. Ch. 265, § 13, because that is the statutory provision that provides the most analogous offense that carries a non-mandatory sentence, and therefore allows a trial court to conduct a hearing and exercise discretion in sentencing within the existing statutory scheme, taking *Miller* factors into account; (4) any sentencing hearing must take into account each of the factors and considerations described in the *Miller* opinion, and must include the opportunity for a full evidentiary hearing on such issues.

Respectfully submitted by
the Attorney for
Herby Caillot,

John J. Barter
Attorney at Law
BBO No: 032150
83 Atlantic Avenue
Boston, MA 02110
(617) 367-2545

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(K)

I, John J. Barter, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.

John J. Barter

CERTIFICATE OF SERVICE

Two copies of the Brief and Addendum of Amicus Curiae, have this day been served by first class mail upon counsel for all parties of record.

Signed under the penalties of perjury this 30 day of August, 2013.

John J. Barter

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
NO: SJC: NO: 11453 & 11454

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