COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-11693

COMMONWEALTH OF MASSACHUSETTS,
Appellee
V.

SHELDON MATTIS,
Appellant

COMMONWEALTH'S BRIEF ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

ISSUE PRESENTED

Whether a life without the possibility of parole sentence for those 18-21 who have been convicted of first degree murder is constitutional after an individualized sentencing hearing where the record supports that a judge could, with confidence, find that an individual in this age range is irretrievably depraved.

STATEMENT OF THE CASE

On December 21, 2011, a Suffolk County grand jury returned indictments charging the defendant, Sheldon Mattis,[1] with murder, in violation of G.L. c. 265, § 1; armed assault to murder, in violation of G.L. c. 265, § 18(b); assault and battery with a dangerous weapon, in violation of G.L. c. 265, § 15A; carrying a firearm without a license, in violation of G.L. c. 269, § 10(a); and carrying a loaded firearm without a license, in violation of G.L. c. 269, § 10(n) (CA.7).[2]

On November 6, 2013, the defendant's trial began before Judge Christine Roach (CA.12). On November 22, 2013, the defendant was found guilty of all offenses (CA.15). On December 2, 2013, the defendant was sentenced to life, without the possibility of parole for his first degree murder conviction; two ten to fifteen year sentences for

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[1] The defendant was indicted and tried along with a co-defendant Nyasani Watt.

[2] "(CA._)" herein refers to the Commonwealth's record appendix.

armed assault to murder and assault and battery convictions, and a one year to one year and a day sentence for carrying a loaded firearm without a license (CA.15). The same day, the defendant timely filed a notice of appeal (CA.15).

After extensive post-conviction litigation (CA.15-21), this Court denied the defendant's appeal of the denial of his post-conviction motions, affirmed his convictions, but remanded the case to Superior Court for a reexamination on "the boundary between defendants who are seventeen years old and thus shielded from the most severe sentence of life without the possibility of parole, and those who are eighteen years old and therefore exposed to it." *Commonwealth v. Watt*, 484 Mass. 742, 756, 765 (2020).

Judge Christine Roach heard from three experts on young adult brain science, Dr. Adriana Galvan, Dr. Robert Kinscherff, and Dr. Robert morse over three days (January 14, February 19, March 1, 2021) (CA.23-24). Judge Roach did not make factual findings and instead, on May 4, 2021, entered "Order of Transmittal of Record to Supreme Judicial Court," in which she explained she did not read the remand from this Court to require factual findings or legal rulings (CA.25, 27-29). On June 10, 2021, the case was transmitted to this Court (CA.25).

On December 29, 2021, this Court remanded the case back to the Superior Court and assigned it to Judge Robert Ullmann (CA.36). In particular, Judge Ullmann was ordered to make factual findings and to "consider and address whether the imposition of a mandatory sentence of life without the possibility of parole for Mattis and those convicted of murder in the first degree who were eighteen to twenty-one at the time of the crime, violates article 26 of the Massachusetts Declaration of Rights" (CA.36).

On July 20, 2022, after supplemental briefing and argument, Judge Ullmann issued Findings of Facts and Rulings of Law, ultimately concluding that the mandatory imposition of a life without the possibility of parole sentence from those 18-21 violated art. 26 of the Massachusetts Declaration of Rights (CA.26, 38-69). On August 10, 2022, the case was transmitted to this Court (CA.26).

STATEMENT OF FACTS

1. The Crime.

As already set forth by this Court:

> On September 25, 2011, [Kimoni] Elliott was visiting [Jaivon] Blake at Blake's home near the intersection of Geneva Avenue and Everton Street in the Dorchester section of Boston. In the afternoon, Elliott walked from Blake's home to a nearby convenience store, located at the intersection of Geneva Avenue and Levant Street, to purchase rolling papers for marijuana cigarettes. He waited outside the store looking for someone old enough

to make the purchase. An individual identified as Mattis approached on a bicycle and agreed to buy the rolling papers for Elliot. After doing so, Mattis asked Elliott where he was from; Elliott replied, "Everton." The two parted ways, and Elliott met Blake in a nearby parking lot.

As Elliott and Blake began to walk toward Blake's home, they were shot from behind by a male riding a bicycle. Witnesses described the shooter as wearing jeans, a red shirt, and a baseball cap; clothes fitting these descriptions were later seized from the defendants' houses, and two witnesses described Watt as wearing similar clothing on the day of the shooting. Blake suffered a single gunshot wound to the torso and died hours later at a hospital; Elliott survived gunshot wounds to his neck and right arm. Hours later, Watt had changed his clothes, and a friend helped him to take the braids out of his hair so that he could "change his look." Later that evening, he, Mattis, and others were "celebrating because [of] something [Watt] did."

Jeremiah Rodriguez, a key witness for the Commonwealth, testified that he, Watt, and Mattis were playing football on Levant Street in front of Rodriguez's house when they watched Elliott walk to the convenience store. After Mattis went to the store to interact with Elliott, he returned to the area outside Rodriguez's house and said to Watt and Rodriguez, "[B]e easy, because that's them kids." A few minutes later, Rodriguez observed Mattis meet with Watt at the corner of Levant Street and Geneva Avenue, hand Watt a gun, and pat him on the back. Rodriguez also testified that he heard Mattis tell Watt, "[T]hat's them walking up there right now" and that he "needed to go handle that." Watt then rode away on the bicycle. At trial, Rodriguez identified Watt in a surveillance video recording depicting him riding toward the scene of the shooting shortly before it occurred and wearing clothes generally matching eyewitness accounts of the shooter's appearance. Soon thereafter, while on his back porch, Rodriguez heard gunshots.

At trial, the Commonwealth's theory was that Watt and Mattis jointly planned and executed the shooting as part

> of an escalating gang feud. The defendants' primary theories were misidentification of Watt as the shooter and the unreliability of Rodriguez's testimony establishing Mattis's participation.
>
> The jury convicted both defendants of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty. Watt, who was seventeen at the time of the shooting, received a life sentence with the possibility of parole after fifteen years. Mattis, who was eight months older than Watt, and eighteen at the time, was sentenced to life imprisonment without the possibility of parole.

Watt, 484 Mass. at 744-745.

2. The Remand.

After the evidentiary hearings and order from this Court, Judge Ullmann found that the four experts who testified provided "opinions that support the findings below to a reasonable degree of scientific certainty based on their qualifications and experience, extensive study results and clinical observations supported by peer-reviewed publications, and evolving but recognized principles that have been subjected to rigorous testing" (CA.47). The judge also found that "neuroscientists and behavioral psychologists know significantly more about the structure and function of the brains of 18 through 20-year-olds than they did 20 years ago" because of function magnetic resonance imagine (fMRI), a shift in studying the brains of those 18-20, and an increase in "scope and sophistication of developmental cognitive neuroscience studies and developmental psychology studies" (CA.50).

Judge Ullmann made "core findings of fact" including that:

> As a group, 18 through 20-year-olds in the United States and other countries have less "self-regulation," *i.e.*, they are less able to control their impulses in emotionally arousing situations, than individuals age 21-22 and older; their reactions in these situations are more similar to those of 16 and 17-year-olds than they are to those age 21-22 and older.

(CA.52) (internal citations omitted). The judge went on to explain,

> As a group, 18 through 20-year-olds in the United States and other countries are more prone to "sensation seeking," which includes risk-taking in pursuit of rewards, than are individuals under age 18 and over age 21. Because risk-raking in pursuit of rewards, than are individuals under age 18 and over age 21. Because risk-taking in pursuit of rewards peaks during the late teens, rising steadily before this age range and falling steadily thereafter, developmental psychologists and developmental cognitive neuroscientists frequently refer to this phenomenon as the "upside-down U" or "inverted U," due to its shape on a graph where age is plotted on the x-axis and level of sensation seeking is plotted on the y-axis."

(CA.52) (internal citations omitted). The judge further found that "18 through 20-year-olds are more susceptible to peer influence than are individuals age 21-22 and older, and the presence of peers make 18 to 20-year-olds more likely to engage in risky behavior" (CA.53). Likewise, "[a]s a group 18 though 20-year-olds have greater capacity to change than older individuals because of the plasticity of the brain during these years" (CA.53). And, "[c]onsistent and reliable results have been obtained in many behavioral studies, sMRI studies, and/or

fMRI studies (based on blood flow), that support the" above findings (CA.53).

Further, the judge explained, "[t]he primary anatomical (brain structure) and physiological (brain function) explanations for the findings set forth," above, "are (1) the influence on the brain of the sharp increase during puberty of certain hormones; (2) the lack of a fully developed prefrontal cortex, the part of the brain that most clearly regulates impulses; (3) the lack of fully developed connections (or connectivity) between the prefrontal cortex and other parts of the brain, including the ventral striatum, the part of the brain that most clearly responds to rewards and reward-related decision making" (CA.53).

> The combination of heightened sensation seeking, less than fully developed self-regulation in emotionally arousing situations, and susceptibility to peer pressure, all of which are associated with a less than fully developed prefrontal cortex and less than fully developed brain connectivity, makes 18 through 20-year-olds as a group particularly vulnerable to risk-taking that can lead to poor outcomes. The real-world behaviors of 18 through 20-year-olds, as reflected in measures of harmful conduct such a F.B.I. statistics and Centers for Disease Control statistics on addiction and accidents, support the brain science findings in this regard.

(CA.53-54) (internal citations omitted).

The judge further found, "[i[n contrast to how 18 though 20-year-olds respond in emotionally arousing situations, decision making

in the absence of emotionally arousing situations, i.e., "cold cognition," reaches adult levels around age 16" (CA.54). "Consistent with the above scientific findings, and cognizant of forensic research showing that most individuals who commit crimes in their late teens do not continue to commit crimes after their mid-20s, forensic psychologists have reduced their preparation and reliance on long-term risk assessments of criminal defendants who commit violent crimes in their late teens and early 20s because of the reduced utility of such studies" (CA.54).

In addition to the above factual findings, the judge made a number of caveats:

> First, there are significant differences between the subjects in the studies discussed below as whole and individuals who commit murder as a whole, including but not limited to the fact that potential subjects with serious mental illnesses are excluded from most studies. Second, the subjects who participate in behavioral and brain scan studies are not a fully randomized pool of the general population. Third, behavioral and brain scan study results look at the individual in any age bracket as a group; there are significant differences in brain development among the individuals of any particular age bracket. Fourth, the conditions of brain science studies, *e.g.*, viewing images on a computer screen and/or being scanned in a lab, differ markedly from the real-world situations in which adolescents commit crimes. Fifth, the brain scan study results in the record establish *correlations* between the anatomy and function of certain parts of the brain and certain behaviors, which is different than establishing actual *causation* of those behaviors. Sixth, historically there were machine and

> human error problems with some early fMRI studies, but these problems were largely resolved around 2013. Lastly, while the results of many behavioral and brain scan studies discussed herein reinforce each other, each study is somewhat different and therefore the results do not constitute "replication" strictly speaking, as scientists often use the term. These caveats, individually and collectively, do not undermine the Core Findings of Fact.

(CA.54-55) (internal citations omitted and emphasis in original).

Based on above the judge ruled:

> The SJC has asked this Court to decide, in effect, whether the Supreme Court's holding in Miller should be extended in Massachusetts to all defendants who were age 18 through 2 at the time of their crimes. The Court concludes that it should. Both the Supreme Court and the SJC have established "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Diatchenko I.*, 466 Mass. at 659. In the nine years since *Diatchenko I* was decided, extensive research in the fields of developmental cognitive neuroscience and developmental psychology has established that, as a class or group, the brains of 18 through 20-year-olds are not as fully developed as the brains of older individuals in terms of their capacity to avoid conduct that is seriously harmful to themselves and others. These scientific findings clearly bear on the "culpability of [this] class of offenders . . .." *Id.* As applied to juveniles, the SJC considers life-without-parole sentences to be "strikingly similar, in many respects, to the death penalty . . .." *Id.* at 670. Applying the Findings of Fact in this case to the SJC precedent, this Court holds that the non-discretionary (*i.e.*, mandatory) imposition of life-without-parole sentences for defendants who were age 18 through 20 at the time of their crimes is a "sentencing practice[ ] based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* at 659. Without minimizing the violence that is almost always involved in the crimes committed by 18 through 20-year-olds that result in first-degree murder convictions, including the

> crimes at issue in these two cases, the Court concludes that there is a mismatch between the culpability of 18 though 20-year-old offenders as a class and mandatory life-without-parle sentences, *i.e.*, sentences that preclude a judge from granting parole eligibility. Therefore, as applied to 18 through 20-year-olds, the statute that mandates such sentences, G.L. c. 265, § 2, violates article 26 of the Massachusetts Declaration of Rights. This does not mean that, under a given set of facts, a life-without-parole sentence cannot be imposed on such a defendant. The SJC has not asked this Court to decide whether any life-without a parole sentence for a defendant who was under the age of 21 at the time of the crime violates article 26, and therefore the Court does not decide this issue. This ruling means that requiring imposition of a mandatory life sentence in every case, without an individual, case-by-case factual assessment, is unconstitutional.

(CA.56-57).

The judge based the ruling

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

> The primary anatomical (brain structure) and physiological (brain function) explanations for these phenomena are the influence on the brain of the sharp increase during puberty of certain hormones, the lack of a fully developed prefrontal cortex, the part of the brain that most clearly regulates impulses, and the lack of fully developed prefrontal cortex, the part of the brain that most clearly regulates impulses, and the lack of fully developed prefrontal cortex, the part of the brain that mostly clearly regulates impulses, and the lack of fully developed connections (connectivity) between the prefrontal cortex and other parts of the brain including the ventral striatum, the part of the brain that most clearly responds to rewards and reward-related decision making.
>
> The combination of heightened sensation seeking, less than fully developed self-regulation in emotionally arousing situations, and susceptibility to peer pressure, all of which are associated with a less than fully developed prefrontal cortex and less than fully developed brain connectivity, make 18 to 20-year-olds as a group particularly vulnerable to risk-taking that can lead to poor outcomes. The real-world behaviors of 18 through 20-year-olds, as reflected in F.B.I. crime statistics, Center for Disease Control statistics on addiction and accidents, and many other measures of harmful conduct, support the brain science in this regard.
>
> The brain science and forensic study results described in this opinion lend direct support to the conclusion that mandatory life-without-parole sentences for defendant who were age 18 though 20 at the time of their crimes constitute cruel or unusual punishment under article 26. Perhaps equally important, these study results also comport with the three reasons why the Supreme Court and the SJC drew the line at age of 18 for purposes of applying the most severe penalties in our federal and state legal systems, the death penalty (federal) or mandatory life without parole (Massachusetts).

(CA.57-59).

The judge explained that the evidence presented at the hearing

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

(CA.60). However,

> That the Supreme Court has expressly limited the protections of *Roper* and *Miller* to defendants under age 18, see *Jones v. Mississippi*, 141 S.Ct. 1307, 1314 (2021); *Roper*, 543 U.S. at 574, is not dispositive, for two reasons. First, the Court does not assume those decisions are fixed in stone, and their conclusions may change as the science changes. See *Watt*, 484 Mass. at 755-756. Second, and leaving future developments aside, the SJC has noted that "it often afford[s] criminal defendants greater protections under the Massachusetts Declaration of Rights than are available under corresponding provisions of the Federal Constitution." See *Diatchenko I*, 466 Mass. at 668-669, and cases cited therein.[3]

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3 "*See, e.g.*, *District Attorney for the Suffolk Dist. v. Watson*, 381 Mass. 648,650,665 (1980) (concluding that death penalty contravened prohibition against cruel or unusual punishment in art. 26, notwithstanding constitutionality under Eighth Amendment); *Commonwealth v. Mavredakis*, 430 Mass. 848, 855-860 (2000) (defendant's right under art. 12 of Massachusetts Declaration of Rights to be informed of attorney's efforts to render assistance broader than rights under Fifth and Sixth Amendments to United States Constitution); *Commonwealth v. Gonsalves*, 429 Mass. 658, 660-668 (1999) (privacy rights afforded drivers and occupants of motor vehicles during routine traffic stops broader under art. 14 of Massachusetts Declaration of Rights than under Fourth Amendment to United Stat s Constitution); *Commonwealth v. Amirault*, 424 Mass. 618, 628-632

(CA.60).

Consider the question under Massachusetts law the Court considered the three-prong test articulated in *Commonwealth v. Jackson*, 369 Mass. 904, 910 (1976).

> This analysis "requires (1) an inquiry into the nature of the offense and the offender in light of the degree of harm to society, (2) a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth, and (3) a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions." *Commonwealth v. Sharma*, 488 Mass. 85, 89 (2021) (internal quotations and citations omitted). This approach does not apply neatly here; it appears that the SJC has used this three-part analysis solely to determine whether a particular sentence violates article 26, not to determine whether a sentencing practice violates art. 26. Compare *Cepulonis v. Commonwealth*, 384 Mass. 495, 497-499 (1981) (three-part analysis used to determine that 40-50 year sentence for possession of machine gun did not violate art. 26 or Eighth Amendment); *Perez*, 477 Mass. at 683-686 (three-part analysis used to determine that sentence in non-murder case with parole eligibility after 27 ½ years presumptively disproportionate); *Concepcion*, 487 Mass. at 86-89 (three-part analysis used to determine that life sentence with parole eligibility after 20 years for defendant convicted of first-degree murder committed at age 15 did not violate art. 26 or Eighth Amendment); and *Sharma*, 488 Mass. at 89-92 (sentences imposed on defendant age 17 at time of crimes of life in prison with

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(1997) (confrontation rights- greater under art. 12 than under Sixth Amendment to United States Constitution). *See also* Scott L. Kafker, State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval, 49 Hastings Const. L.Q. 115, 119 (2022) ("state supreme courts have significant, if not unlimited freedom of action to provide greater protection under state constitutions") *id.* at 120 & n.20 (giving examples of *Diatchenko I* and *Monschke*)" (CA.60, n.15).

> parole eligibility after 15 years, followed by 7-10 year sentences -- concurrent with each other -- for armed assault with intent to murder remanded for individual determination using three-part test), with *Diatchenko I*, 466 Mass. at 667-671 (not applying three-part test while holding that all life- without-parole sentences for defendants under age 18 at. the time of their crimes violates art. 26); id at 672 (describing *Cepulonis* as addressing "punishment for particular offense"). The limitation of the three-pronged test in this case, as in *Diatchenko I*, is that first-degree murder is the most serious offense in the Commonwealth and mandatory life in prison without parole is the most serious punishment in the Commonwealth, so these first two prongs do not lend themselves to a proportionality analysis. See *Commonwealth v. LaPlante*, 482, Mass. 399, 404 n.4 (2019) (deliberate murder case warranting "most severe punishment ... defies direct application of" this test). This leaves this third part of the test, *i.e.*, what has been done in other jurisdictions. Depending on one's perspective, application of this third prong can either support extending *Miller* to 18 through 20-year-olds or discourage it.

(CA.61-62).

The Court explained that "the law in other jurisdictions on mandatory life-without parole sentences can be used to support or to question the holding reached by this Court" (CA.64). Indeed,

> Only one state high court has held that mandatory life-without-parole sentences for defendants who were 18 through 20 years old at the time of their crimes violates the state analog to the Eighth Amendment, a constitutional ban on "cruel punishments." See Matter of Monschke, 197 Wash. 2d 305,325 (2021), discussed infra. However, there are states in which some or all defendants of any age who are convicted of the most serious murder charge may receive parole eligibility as part of a life

> sentence, or a sentence of less than life in prison.[4] In seven states, there is no death penalty and a sentence of life in prison with parole eligibility is always a possible sentence for an adult defendant convicted of the most serious murder charge.[5] In New Jersey and New York, two other states that have no death penalty, life in prison with parole eligibility is a possible sentence for a defendant convicted of the most serious murder charge unless the judge or jury finds specified aggravating factors. In two of the nine above- referenced states, Maine and New Jersey, a defendant convicted of the most serious murder charge may also be sentenced to a determinate term of years that, based on the defendant's age and the length of the sentence, is often not a de facto life sentence. And in Illinois, which does not have the death penalty, a defendant convicted of the most serious murder charge may receive a determinate term of years but may not receive a sentence of life with the possibility of parole.[6]
>
> Massachusetts is one of only 11 states in which life in prison without parole is the only possible sentence after an adult conviction for the most serious murder charge.[7]

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4 "This Court endeavored to identify the statutes governing the most serious murder charge in all 50 states and the penalties for each such charge. However, court decisions have modified the law in some states; and this Court lacks the resources to monitor recent developments in the law of 50 different jurisdictions" (CA.62, n.16).

5 "Maine, Maryland, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin" (CA.62, n.17).

6 "See 730 ILCS 5/5-4.5-20(a); 730 ILCS 5/3-3-3(c)" (CA.63, n.18).

7 "Colorado, Connecticut, Delaware, Hawaii, Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, and Virginia. There were 12 states, but the high court of one of those 12 states, Washington, ruled that mandatory sentences of life without parole for defendants who were age 18 through 20 at the time of their crime violate the state constitutional ban on "cruel punishments." See *Matter* of *Monschke*, *infra* at 27" (CA.63, n.19).

> Death is the only alternative to a life-without-parole sentence after an adult conviction on the most serious murder charge in sixteen states.[8, 9] In Alaska, conviction of aggravated first-degree murder carries a mandatory 99-year sentence, which is a de facto life without parole sentence.
>
> In 11 of the states that have the death penalty, some defendants convicted of the most serious murder charge may be sentenced to life in prison with parole eligibility.[10] However, a sentencing regime that includes the death penalty differs so significantly from a sentencing regime without the death penalty that this Court does not consider the sentencing laws in those states as support for its holding in this case.

(CA.62-64).

The judge also explained that

> [W]hile society draws the adulthood line at age 18 for "many purposes," *Chukwuezi*, 475 Mass. at 610, there are significant exceptions to this rule. Through legislation, "the Commonwealth has recognized that merely attaining the age of eighteen years does not by itself endow young people with the ability to be self-sufficient in the adult world." *Eccleston v. Bankosky*, 438 Mass. 428, 436 (2003). In a variety of contexts, Massachusetts law treats individuals age 18 and slightly older the same as it treats juveniles. See, e.g., *id.* (child support); *Commonwealth v. Cole C.*, 92 Mass. App. Ct. 653, 659 n.8 (2018) (juvenile

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8 "Alabama, Arizona, Arkansas, California, Florida, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, Pennsylvania, South Dakota, Texas, and Wyoming" (CA.63, n.20).

9 "California and Pennsylvania currently have moratoriums on the death penalty. As a result, at this time, life without parole is the only possible sentence upon conviction of the most serious murder offense" (CA.63, n.21).

10 "Georgia, Idaho, Kentucky, Montana, Nevada, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, and Utah" (CA.63, n.22).

court jurisdiction); id. at n.9 (state custody of delinquent child); G.L. c. 119, § 23(f) (state responsibility for former foster child); G.L. c. 138, § 34A (drinking age). See also *Eccelston*, 438 Mass. at 435 n.13 ("An individual may be considered emancipated for some purposes but not for others" and giving the · example of the right to vote versus the end of parental support).

Moreover, the age of legal adulthood has changed between 21 and 18 in various contexts for reasons "unrelated to capacity." See *Matter of Monschke*, 197 Wash. 2d at 314-315. The ages for military conscription, voting and-drinking alcohol provide important examples. For most of the nation's history, the "age of majority" was 21, not 18. See Vivian E. Hamilton, Adulthood in Law and Culture, 91 Tul. L. Rev. 55, 64 (2016). "In 1942 wartime needs prompted Congress to lower the age of conscription from twenty-one to eighteen, a change that would eventually lead to the lowering of the age of majority generally." *Id*. See also *Eccleston*, 438 Mass. at 435 n.14 (voting age lowered from 21 to 18 because age of conscription for service in Vietnam War was 18). Similarly, the drinking age has fluctuated, decreasing from 21 to 18 before reverting back to 21. See *Barboza v. Decas*, 311 Mass. 10, 12 (1942) (citing 1937 legislation which punished persons giving alcohol to individuals under 21); *McGuiggan v. New England Tel. & Tel. Co.*, 398 Mass. 152, 159 n.7 (1986) (noting "[t]he legal drinking age [had been] eighteen" but had been raised to 21 pursuant to a 1984 amendment). The 1984 increase in the drinking age was unmistakably due not to any new understanding about brain maturation but rather the incentive of federal funding. See 23 U.S.C. § 158; St.1984, c. 312, amending G.L. c. 138, §§ 12, 14, JOE, 34, 34A, 34B, 34C, and 64·. see also *S. Dakota v. Dole*, 483 U.S. 203, 205 (1987) (states' federal highway funds partially contingent on state legislation compliance with congressional goal of national minimum drinking age).

As the foregoing show, the "age of majority" is a malleable concept that is not consistently based on science, as the decision in the cases at issue here must be. It thus should not mechanically govern highly consequential decisions

about application of the criminal law. Further, the decision about what constitutes "cruel or unusual punishment" is a matter for the state courts, not the Legislature. *See Watson*, 381 Mass. at 666-667. See also id at 686-687 (Quirico, J., dissenting); *Matter of Monschke*, 197 Wash. 2d at 325 (limit of judicial deference is violation of constitution under Washington state law); *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 338-339 (2003) ("To label the court's role as usurping that of the Legislature . . . is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.").

(CA.65-66).

The judge also explained

This Court recognizes that incomplete brain development is far from determinative of violent behavior. The great majority of t8. through 20-year-olds do not commit violent crimes.

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

First, the Court's holding does not in any way excuse acts of violence by 18 through 20- year-olds. The consequence

> of the Court's ruling is that all individuals convicted of first-degree murder in Massachusetts who were 18 through 20 years old at the time of their crime will continue to receive sentences of life in prison and serve at least 15 years in prison, but some of them may become eligible for parole after serving 15 or more years of their sentences. Others, depending on the facts, may be sentenced to life without the possibility of parole, but only if that sentence is warranted.
>
> Second, the presence of aggravating factors that increase the likelihood of committing a violent crime is largely beyond the control of any 18 through 20-year-old. The economic circumstances of one's parents or guardians, racial and other discrimination, and other individual and systemic inequalities ensure that some late teens are far more likely than others to live with these aggravating factors, and therefore more likely to perpetrate - and to be victimized by - violent crime. In deciding what constitutes cruel or unusual punishment, a court should consider the systemic impact of its ruling, particularly where the ruling involves a class of persons who, based on their age; have greater capacity than older persons to change.
>
> As noted above, the SJC has not asked this Court to decide whether any life-without- parole sentence for a defendant who was under age 21 at the time of the crime violates article 26, and therefore the Court does not decide this issue. There are three separate theories under which intentional killings can be prosecuted as first-degree-murder, *i.e.*, premeditated murder, murder committed with extreme atrocity or cruelty, and felony murder.[11] The neuroscience and behavioral science supporting the Court's ruling do not apply with equal force to killings under all three theories. Nor do they apply with equal force to the wide range of individual conduct that can be prosecuted under each of the theories of first-degree murder.

(CA.67-68).

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11 "The Legislature has enacted different lengths of time before parole eligibility for convictions under each of these three theories. *See* G.L. c. 127, § 133A; G.L. c. 279 § 24" (CA.68, n.26).

Ultimately, the judge held:

> Article 26 of the Massachusetts Declaration of Rights establishes "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Diatchenko I*, 466 Mass. at 659. Moreover, as applied to juveniles, the SJC considers life-without-parole sentences to be "strikingly similar, in many respects, to the death penalty...." *Id* at 670. On the record of brain science and social science in this case, the imposition of non-discretionary (*i.e.* mandatory) life-without-parole sentences for defendants who were age 18 through 20 at the time of their crimes constitutes a "sentencing practice[ ] based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id*. at 659. Therefore, this sentencing practice constitutes "cruel or unusual punishment" in violation of article 26 of the Massachusetts Declaration of Rights.

(CA.68-69).

ARGUMENT

A LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE FOR THOSE 18-21 WHO ARE CONVICTED OF FIRST DEGREE MURDER IS CONSTITUTIONAL UNDER ART. 26 SO LONG AS THERE IS AN INDIVIDUALIZED SENTENCING HEARING.

In *Commonwealth v. Watt*, 484 Mass. 742, 756 (2020), this Court explained that it "was likely time for us to revisit the boundary between defendants who are seventeen years old and thus shielded from the most severe sentence of life without the possibility of parole, and those who are eighteen years old and therefore exposed to it." This Court explained that the reexamination should happen on an updated record reflecting the latest advances in scientific research on

adolescent brain development and its impact on behavior. *Id*. On further remand this Court asked whether the imposition of a mandatory life without the possibility of parole sentence for a conviction of first degree murder for those 18-21 years old violated art. 26 of the Massachusetts Declaration of Rights. After remand and based on current science, common sense, and contemporary standards, this Court should hold that while the mandatory imposition of a life without the possibility of parole sentence for those 18-21 years old violates art. 26 of the Massachusetts Declaration of Rights, the imposition of such a sentence after an individualized sentencing hearing remains constitutional.

A. The Current Legal Landscape.

Central to the analysis of whether a sentence is constitutionally permissible, under the Eighth Amendment or art. 26 of the Massachusetts Declaration of Rights, is whether the sentence is proportional. *Diatchenko v. DA*, 466 Mass. 655, 669 (2013). Proportionality recognizes "'that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Miller*, 132 S. Ct. at 2463 (quoting *Roper*, 543 U.S. at 560). "Analysis of disproportionality occurs 'in light of contemporary standards of decency which mark the progress of society.'" *Diatchenko*, 466 Mass. at

669 (quoting *Good v. Commissioner of Correction*, 417 Mass. 329, 335 (1994)). For a sentence to violate the Eighth Amendment and art. 26, "'the punishment must be so disproportionate to the crime that it 'shocks the conscience and offends fundamental notions of human dignity.'" *Cepulonis v. Commonwealth*, 384 Mass. 495, 496 (1981) (quoting *Jackson*, 369 Mass. at 910); *accord Diatchenko*, 466 Mass. at 669.

To answer the question of whether a mandatory sentence of life without the possibility of parole for those aged 18-20 is constitutional, it is necessary to start with the current legal landscape. In 2012 in *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that the mandatory imposition of a life without parole sentence for those under 18 violated the Eighth Amendment. The Court explained that such a sentence constituted cruel and unusual punishment because

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for 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.

Id. at 477-478. To reach this conclusion, the Court relied upon commonsense, science, and social science. *Id*. at 471. The decision did not categorically ban the imposition of a life without parole sentence for those under 18. *Id*. at 480. Instead, the court held, that before such a sentence could be imposed a judge must have a hearing in which he or she makes an individualized determination considering mitigating circumstances. *Id*. at 489.

In 2013, this Court in *Diatchenko*, considered the retroactivity of *Miller* under Massachusetts law and the constitutionality of life without parole sentences for those under 18 under art. 26 of the Massachusetts Declaration of Rights. This Court held *Miller* was retroactive, *id*. at 661, and went one step further than the Supreme Court holding that the imposition of a sentence of life without the possibility of parole for those under 18 under any circumstance violated art. 26, *id*. at 669-670.

In so holding, this Court explained:

> Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an 'irretrievably depraved character,' *Roper*, 543 U.S. at 570, can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a

> sentence of life without parole should be imposed on a juvenile homicide offender. *See Miller*, 132 S. Ct. at 2464. Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved.

Id. at 669-670.

In the nine years since *Diatchenko* was decided, this Court has repeatedly declined to extend its holding to those 18 and older. *See, e.g.*, *Commonwealth v. Garcia*, 482 Mass. 408, 413 (2019); *Commonwealth v. Colton*, 477 Mass. 1, 18-19 (2017); *Commonwealth v. Chukwuezi*, 475 Mass. 597, 610 (2016). Though declining such an extension, the Court also repeatedly recognized that research has continued into the issue of the age with which individuals reach "'neurobiological maturity,'" which may have an effect on the constitutionality of "'life without parole sentences for individuals other than juveniles.'" *Watt*, 484 Mass. at 742 (quoting *Garcia*, 482 Mass. at 412-413 and *Commonwealth v. Okoro*, 471 Mass. 51, 60 n.14 (2015)).

The same is true of the Supreme Court, which in the years post-*Miller* has upheld that the imposition of a life without the possibility of parole sentence for those under 18 is constitutional so long as there is an individualized sentencing hearing. S*ee Jones v. Mississippi*, 141 S.Ct. 1307, 1317 (2021); *Montgomery v. Louisiana*, 577 U.S. 190, 195

(2016). In doing so, the Court left undisturbed the age of 18 as the divisional line between juveniles, who must have the characteristics of their youth considered before a sentence of life without the possibility of parole can be imposed, and adults, who are not extended the same protections. *See Jones*, 141 S.Ct. at 131; *Montgomery*, 577 U.S. at 195. Federal circuits have held the same. *See United States v. Gonzalez*, 981 F.3d 11, 17-22 (1st Cir. 2020); *United States v. Sierra*, 933 F.3d 95, 97 (2nd Cir. 2019).

Under state law, twenty-five states and the District of Columbia do not have a statute that require a mandatory life without the possibility of parole sentence for the equivalent of a first-degree murder conviction regardless of the age of the offender.[12] Six states permit the imposition of such a sentence, regardless of age, only upon

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[12] Those states are: Alaska, Alaska Stat 12.55.125; District of Columbia, DC Code 22-2104; Georgia, Ga Code Ann 16-5-1; Idaho, Idaho Code 18-4004; Illinois, 730 Ill Comp Stat 5/5-4.5-20(a); Indiana, Ind Code 35-50-2-3; Kentucky, Ky Rev Stat Ann 532.030; Maine, Me Stat, tit 17-A, § 1603; Maryland, Md Code Ann, Crim Law 2-201; Montana, Mont Code Ann 45-5-102(2); Nevada, Nev Rev Stat 200.030(4); New Jersey, NJ Stat Ann 2c:11-3; New Mexico, NM Stat Ann 31-18-14; New York, NY Penal Law 70.00; North Dakota, ND Cent Code 12.1-32-01; Ohio, Ohio Rev Code Ann 2929.02; Oklahoma, Okla Stat, tit 21, § 701.9; Oregon, Or Rev Stat 163.115; Rhode Island, RI Gen Laws 11-23-2; South Carolina, SC Code Ann 16-3-20; Tennessee, Tenn Code Ann 39-13-202; Utah, Utah Code Ann 76-5-203; Virginia, Va Code Ann 18.2-10 and 18.2-32; West Virginia, W Va Code 61-2-1 and 61-2-2; Wisconsin, Wis Stat 939.50; and Wyoming, Wyo Stat Ann 6-2-101.

proving aggravating factors.[13] Nineteen states, including Massachusetts, have statutes that impose a mandatory sentence of life without the possibility of parole for the equivalent of a first-degree murder conviction.[14] Two of these states, Washington and Michigan, have considered the divisional line between juvenile and adult post-*Miller* and extended individualized sentencing hearing for certain individuals over the age of 18.

Most recently, Michigan, held that its own state constitution offered more protections than the Eighth Amendment and ruled that the mandatory imposition of a life without parole sentence for those 18 years old was cruel and unusual because it "no longer comports with

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[13] Those states are: California, Cal Penal Code 190.2; Connecticut, Conn Gen Stat 53a-35a and 53a-54b; Hawai'i, Haw Rev Stat 706-656 and 706-657; Kansas, Kan Stat Ann 21-6620, 21-5401(a)(6), and 21-6617; Texas, Tex Penal Code Ann 12.31 and 12.32; and Vermont, Vt Stat Ann, tit 13, §§ 2303 and 2311.

[14] Those states are: Alabama, Ala Code 13A-6-2(c); Arizona, Ariz Rev Stat Ann 13-1105(D); Arkansas, Ark Code Ann 5-10-101; Colorado, Colo Rev Stat 18-3-102 and 18-1.3-401; Delaware, Del Code Ann, tit 11, §§ 636(b)(1) and 4209(a); Florida, Fla Stat 782.04(1)(a) and (b) and 775.082(1)(a); Iowa, Iowa Code 707.2 and 902.1(1); Louisiana, La Stat Ann 14:30; Massachusetts, G.L. c. 265, §§ 1 and 2(a); Michigan, MCL 750.316(1)(a); Minnesota, Minn Stat 609.185 and 609.106; Mississippi, Miss Code Ann 97-3-21; Missouri, Mo Rev Stat 565.020; Nebraska, Neb Rev Stat 28-303 and 29-2520; New Hampshire, NH Rev Stat Ann 630:1-a; North Carolina, NC Gen Stat 14-17(a); Pennsylvania, 18 Pa Cons Stat 2502 and 1102; South Dakota, SD Codified Laws 22-16-4 and 22-6-1; Washington, RCW 10.95.030.

the 'evolving standards of decency that mark the progress of a maturing society.'" *People v. Parks*, 2022 Mich. LEXIS 1483, *16 (2022) (quoting *People v. Lorentzen*, 387 Mich. 167, 179 (1972)). Critical to the holding was the recognition that 18-year-old brains have unique characteristics. *Id*. at 34.

> Because of the dynamic neurological changes that late adolescents undergo as their brains develop over time and essentially rewire themselves, automatic condemnation to die in prison at 18 is beyond severity—it is cruelty. The brains of 18-year-olds, just like those of their juvenile counterparts, transform as they age, allowing them to reform into persons who are more likely to be capable of making more thoughtful and rational decisions. This means that 18-year-olds, as they age, are likely to begin to take fewer risks, further understand consequences, become less susceptible to peer pressure, and have decreased aggressive tendencies. All of this suggests that 18-year-olds, much like their juvenile counterparts, are generally capable of significant change and a turn toward rational behavior that conforms to societal expectations as their cognitive abilities develop further.

Id. at *34. Thus, the court reasoned, "the logic articulated in *Miller* about why children are different from adults for purposes of sentencing applies in equal force to 18-year-olds." *Id*. at *35. Notably, the Court did not hold that the imposition of a life without the possibility of parole sentence after an individualized sentencing hearing would be unconstitutional and instead remanded the case for resentencing. *Id*. at *45-46.

Washington state too recognized that its state constitution offered more protections than the Eighth Amendment and held that the mandatory imposition of a life without the possibility of parole sentence for those 18-20 years of age was unconstitutional. *In re Monschke*, 197 Wash 2d 305, 329 (2021). In reaching that ruling, the court relied upon brain science that established "no meaningful neurological bright line exists between age 17 and age 18 or, as relevant here, between age 17 on the one hand, and ages 19 and 20 on the other hand," *id*. at 326, as well as "a long history of arbitrary line drawing," between juveniles and adults. *Id*. at 306. Like Michigan, the Washington court did not hold that the imposition of a life without the possibility of parole sentence after an individualized sentencing hearing would be unconstitutional and instead remanded the case for resentencing. *Id*. at 329.

B. Due to the Varied Nature of Young Adult Brain Development and the Possibility that an Individual In this Age Group Could be Irretrievably Depraved, A Sentence of Life Without the Possibility of Parole is Constitutional After an Individualized Sentencing Hearing.

Now, after remand and the creation of a robust record concerning young adult brain development, the question this Court must answer is whether the imposition of a life without the possibility of parole sentence for those 18-21 convicted of first degree murder

violates art. 26 of the Massachusetts Declaration of Rights. As framed by this Court in *Diatchenko*, the specific question that needs to be asked is whether, in light of current scientific research on brain development and its influence on behavior, a judge could, with integrity, make a finding "that a particular offender [between 18-21], at that point in time, is irretrievably depraved." *Diatchenko*, 466 Mass. at 670. The answer to this question based on the record is yes. After an individualized sentencing hearing, a judge could, with confidence, make such a determination. Because such a determination could be made, a life without the possibility of parole sentence is not categorically unconstitutional under art. 26 for those between the ages of 18-21.

Whether a life without a possibility of parole sentence may be constitutionally imposed is a different question from whether the *mandatory* imposition of this sentence is constitutional. Indeed, the Supreme Court in *Miller* (unlike the Supreme Judicial Court in *Diatchenko*) held that while a sentence of life without parole itself was constitutional, the mandatory imposition for those under 18 was not. 567 U.S. at 480. In reaching that conclusion, the Supreme Court in *Miller*, relied not just on neuroscience but also sources such as commonsense. *Id*. at 471. Michigan and Washington relied on the same

factors. *See Monschke*, 197 Wash 2d at 326; *Parks*, 2022 Mich. LEXIS 1483, *34. In contrast, in *Diatchenko*, the Supreme Judicial Court eschewed a sentencing hearing for those under 18 because there was a consensus that the brains of those under 18 were not fully developed either "structurally or functionally," and thus a judge could not "find with confidence that a particular offender, at that point in time, is irretrievably depraved." 466 Mass. at 669-670.

Here, the record supports that while some mitigating factors may exist, there is not a consensus that these factors unconditionally cause the brains of those 18-21 to not be fully developed in meaningful ways. Though there is a consensus that brains are not fully developed until an individual reaches their mid-twenties (Galvan, at 60;[15] Kinscherff, at 41-42; Morse, at 79; Steinberg, at 27), there was also agreement that there was variability in brain maturation (Galvan, at 156; Kinscherff, at 108, 111-112; Steinberg, 2012). Also, there was agreement that certain brain functions mature at different rates (Galvan, at 127, 134, 156; Morse, 110; Laurence Steinberg, "Should the Science of Adolescent Brain Development Inform Public Policy?" Issues in Science and Technology, p.76 (Spring 2012)). For example, cognitive

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[15] The transcript from the evidentiary hearing will be reference by the expert who testified and the page number (*see, e.g.*, [expert], at [page]).

capacity reaches adult levels prior to psychosocial maturity. Icengogle, et.al., "Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a 'Maturity Gap' in a Multinational, Cross-Sectional Sample," Law and Human Behavior Vol. 43, No. 1, 69-85, p.73 (2019).

Additionally, the maturity of brain functioning varies whether a task is completed with hot cognition or cold cognition (Galvan, at 87-89; Kinscherff, at 111-112; Steinberg, at 54, 113). In cold cognition or a non-emotionally aroused state, the brain of an individual who is 18-21 functions like an adult brain (Galvan, at 88-89; Kinscherff, at 112; Steinberg, at 54, 113). However, in hot cognition, or an emotionally aroused state, the brain of an individual who is 18-21 does not behave uniformly, and functions like that of a younger individual (Galvan, at 88-89; Kinscherff, at 112; Steinberg, at 155). Experts agreed that a murder, the applicable crime here, could be committed in cold cognition; meaning the individual's brain was functioning as well as an adult (Galvan, at 230; Kinscherff, at 112).[16] It is also easy to imagine, however, a murder which occurs in an emotionally aroused state

[16] Dr. Kincherff gave an example of a murder that was planned over a period of time or an individual who commits a murder and uses "thoughtful means to evade detection" (Kincherff, at 113-114).

during which the brain of an individual 18-21 may be exhibiting less mature behavior.

In general, the experts agreed that those 18-20 showed heightened levels of impulsivity, risk taking, and being influenced by peers while in an emotionally aroused state (Galvan, at 100, 109; Kinscherff, at 43-44; Morse, at 95-96; Steinberg, at 173). However, risk taking, impulsivity, and being influenced by peers measured by the studies and written about in the articles presented is largely different than the factors that drive violent crime (Galvan, at 105); and cannot predict future criminal behavior (Kinscherff, at 47). There are common denominators in such risk behaviors; one, is that they peak at certain age and then decline; the other, is that they are tied to vulnerabilities like peer influence and impulsivity (Kinscherff, at 106; Galvan, at 93-99 and Exs. 3-4, 7).

This phenomenon -- the peak of such risk-taking behaviors followed by a decline -- observed in neuroscience is consistent with the age crime curve (Kinscherff, at 42, 86-86). The age crime curve, which is widely accepted (Kinscherff, at 32), is universal and demonstrates that criminal behavior peaks for individuals somewhere around 17-22 and then substantially moderates and drops off (Galvan, at 112; Kinscherff, at 42, 85-86; Morse, at 97; Steinberg, at 66). According to

Dr. Kinscherff, the age crime curve demonstrates that individuals are generally able to make better choices as they mature neurodevelopmentally and socially (Kinscherff, at 124). This is also consistent with the development of the prefrontal cortex, the area of the brain involved in controlling impulses, which continues to develop into an individual's mid-20s (Galvan, at 61; Kinscherff, at 41; Morse, 84-85; Steinberg, at 21-24, 27).

There was also a consensus amongst experts that brain plasticity is indicative of the capacity of an individual to change (Galvan, at 111; Kinscherff, at 136; Steinberg, at 33). While it is known that brain plasticity continues to develop as an individual ages, there no firm age known when this development invariably stops (Galvan, at 109). Indeed, there is no simple answer at all as to when a brain can be considered fully developed because brains do not follow age boundaries (Galvan, at 127). This is consistent with the general consensus that brain maturation varies from individual to individual (Galvan, at 56; Kinscherff, at 108, Steinberg 2012). There was also a consensus that many individuals between the ages of 18-21 have the capacity to make good decisions, to be mature, and to understand the consequences of their actions (Galvan, at 149; Kinscherff, at 123; Morse, at 56).

Further, as the Supreme Court recognized in *Miller*, the attributes of youth are a matter of commonsense. 567 U.S. at 471. The record in this case echoes the same. *See, e.g.*, Steinberg 2017 (Science confirms much of "what every parent already knows" that those 18-21 are less mature than those who are older); Galvan, at 231 ("maturity is a matter of 'we know it when we see it'"). Indeed, as recognized by the Supreme Court years ago, though in a different context, "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach." *Roper v. Simmons*, 543 U.S. 551, 574 (2005). As a matter of commonsense, and as explained by the science cited above, the same is true of those 18-21.

All of the above demonstrates that the brain maturation of those ages 18-21 is highly varied. It is varied amongst individuals, and it is varied based on the emotional state of the individual who committed the crime. That there is such variation is in direct contrast to the characteristics of youth considered by the Supreme Court in *Miller* and the Supreme Judicial Court in *Diatchenko*. Indeed, it was because these characteristics do not vary based on the individual involved or the nature of the crime committed, that this Court came to the decision that the imposition of a mandatory life without parole sentence for

those under 18 violated art. 26. *Diatchenko*, 466 Mass. at 660 (quoting *Miller*, 567 U.S. at 472).

The same cannot be said here. First, though there was a myriad of evidence presented to the Court much of it was unrelated to criminal activity, the experts were quick to caution that neuroscience alone would not answer the legal question, and there was testimony that more than just brain development explains how people act (Galvan, at 223; Kinscherff, at 92; Morse, at 53; Laurence Steinberg, "Should the Science of Adolescent Brain Development Inform Public Policy?" Issues in Science and Technology, p.76 (Spring 2012)). Further, the experts agreed that it would be a mistake to assume that biology *causes* behavior (Galvan, at 242), or that it was "sensible conjecture" that younger individuals commit more crimes than older individuals due to brain differences (Steinberg, 2017; Galvan, at 245).

That being said, it is undisputed that the brains of those 18-21 are still developing (Galvan, at 60; Kinscherff, at 41-42; Morse, at 79; Steinberg, at 27). It is also undisputed that the brains of those 18-21 years old function like adults in certain non-emotionally heightened situations (Galvan, at 88-89; Kinscherff, at 112; Steinberg, at 54, 113). Indeed, this record established that it is entirely possible that an 18-21 year old could commit a premeditated murder in cold cognition and

that his or her brain would have been functioning the same as an adult (Galvan, at 230; Kinscherff, at 112). However, the record also established the opposite -- that it is possible that an 18-21 year old committed a murder in hot cognition during which his or her brain was not functioning the same as an older adult (Galvan, at 88-89; Kinscherff, at 112; Steinberg, at 155). Because both are credibly possible, an individualized sentencing hearing, as contemplated in *Miller*, should be required before a sentence of life without the possibility of parole is imposed on an individual who is convicted of first degree murder for a murder committed when he or she was between the ages 18-21. During such a hearing, individualized mitigating circumstances and the nature of the murder should be presented and considered. But, as the science discussed above reveals, after hearing such evidence, a judge could, with confidence, make a determination that a "particular offender [between 18-21], at that point in time, is irretrievably depraved." *Diatchenko*, 466 Mass. at 669-670. Thus, a sentence of life without the possibility of parole for an offender between the ages of 18-21 is constitutional under art. 26 as long as a judge has considered the appropriate individualized factors – related to both the defendant and the nature of the murder – before imposing such a sentence.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court hold that the mandatory imposition of a sentence of life without the possibility of parole for those 18-21 years old violates art. 26 but that the imposition of such a sentence after an individualized sentencing hearing for that group remains constitutional.

Respectfully submitted
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December X, 2022

ADDENDUM TABLE OF CONTENTS

ADDENDUM

G.L. c. 127, § 133A. Eligibility for parole; notice and hearing; parole permits; revision of terms and conditions; revocation; arrest; right to counsel and funds for expert.

Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth, except prisoners confined to the hospital at the Massachusetts Correctional Institution, Bridgewater, except prisoners serving a life sentence for murder in the first degree who had attained the age of 18 years at the time of the murder and except prisoners serving more than 1 life sentence arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, shall be eligible for parole at the expiration of the minimum term fixed by the court under section 24 of chapter 279. The parole board shall, within 60 days before the expiration of such minimum term, conduct a public hearing before the full membership unless a member of the board is determined to be unavailable as provided in this section. Notwithstanding the previous sentence, the board may postpone a hearing until 30 days before the expiration of such minimum term, if the interests of justice so require and upon publishing written findings of the necessity for such postponement. For the purposes of this section, the term unavailable shall mean that a board member has a conflict of interest to the extent that he cannot render a fair and impartial decision or that the appearance of a board member would be unduly burdensome because of illness, incapacitation, or other circumstance. Whether a member is unavailable for the purposes of this section shall be determined by the chair. Board members shall appear unless said chair determines them to be unavailable. Under no circumstances shall a parole hearing proceed pursuant to this section unless a majority of the board is present at the public hearing. Unless a board member is unavailable due to a conflict of interest, any board member who was not present at the public hearing shall review the record of the public hearing and shall vote in the matter.

Said board shall at least thirty days before such hearing notify in writing the attorney general, the district attorney in whose district sentence was imposed, the chief of police or head of the organized police department of the municipality in which the crime was committed and the victims of the crime for which sentence was imposed, and said officials and victims may appear in person or be

represented or make written recommendations to the board, but failure of any or all of said officials to appear or make recommendations shall not delay the paroling procedure; provided, however, that no hearing shall take place until the parole board has certified in writing that it has complied with the notification requirements of this paragraph, a copy of which shall be included in the record of such proceeding; and provided further, that this paragraph shall also apply to any parole hearing for an applicant who was convicted of a crime listed in clause (i) of subsection (b) of section 25 of chapter 279 and sentenced and committed to prison for 5 or more years for such crime and does not show that a pardon has been issued for the crime.

After such hearing the parole board may, by a vote of two-thirds of its members, grant to such prisoner a parole permit to be at liberty upon such terms and conditions as it may prescribe for the unexpired term of his sentence. If such permit is not granted, the parole board shall, at least once in each ensuing five year period, consider carefully and thoroughly the merits of each such case on the question of releasing such prisoner on parole, and may, by a vote of two-thirds of its members, grant such parole permit.

Such terms and conditions may be revised, altered and amended, and may be revoked, by the parole board at any time. The violation by the holder of such permit or any of its terms or conditions, or of any law of the commonwealth, may render such permit void, and thereupon, or if such permit has been revoked, the parole board may order his arrest and his return to prison, in accordance with the provisions of section one hundred and forty-nine.

If a prisoner is indigent and is serving a life sentence for an offense that was committed before the prisoner reached 18 years of age, the prisoner shall have the right to have appointed counsel at the parole hearing and shall have the right to funds for experts pursuant to chapter 261.

G.L. c. 265, § 1. Murder defined. Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the

second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

G.L. c. 265, § 15A. Assault and battery with dangerous weapon; victim sixty or older; punishment; subsequent offenses.

(a) Whoever commits assault and battery upon a person sixty years or older by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

Whoever, after having been convicted of the crime of assault and battery upon a person sixty years or older, by means of a dangerous weapon, commits a second or subsequent such crime, shall be punished by imprisonment for not less than two years. Said sentence shall not be reduced until two years of said sentence have been served nor shall the person convicted be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served two years of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relating to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this subsection.

(b) Whoever commits an assault and battery upon another by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than 10 years or in the house of correction for not more than 21/2 years, or by a fine of not more than $5,000, or by both such fine and imprisonment.

(c) Whoever:

(i) by means of a dangerous weapon, commits an assault and battery upon another and by such assault and battery causes serious bodily injury;

(ii) by means of a dangerous weapon, commits an assault and battery upon another who is pregnant at the time of such assault and battery, knowing or having reason to know that the person is pregnant;

(iii) by means of a dangerous weapon, commits an assault and battery upon another who he knows has an outstanding temporary or permanent vacate, restraining or no contact order or judgment issued pursuant to section 18, section 34B or section 34C of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A, or section 15 or 20 of chapter 209C, in effect against him at the time of such assault and battery; or

(iv) is 18 years of age or older and, by means of a dangerous weapon, commits an assault and battery upon a child under the age of 14;

shall be punished by imprisonment in the state prison for not more than 15 years or in the house of correction for not more than 21/2 years, or by a fine of not more than $10,000, or by both such fine and imprisonment.

(d) For the purposes of this section, "serious bodily injury" shall mean bodily injury which results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

G.L. c. 265, § 18(b). Use of firearms while committing a felony; second or subsequent offenses; punishment.

Whoever, while in the commission of or the attempted commission of an offense which may be punished by imprisonment in the state prison, has in his possession or under his control a firearm, rifle or shotgun shall, in addition to the penalty for such offense, be punished by imprisonment in the state prison for not less than five years; provided, however, that if such firearm, rifle or shotgun is a large capacity weapon, as defined in section 121 of chapter 140, or if such person, while in the commission or attempted commission of such offense, has in his possession or under his control a machine gun, as

defined in said section 121, such person shall be punished by imprisonment in the state prison for not less than ten years. Whoever has committed an offense which may be punished by imprisonment in the state prison and had in his possession or under his control a firearm, rifle or shotgun including, but not limited to, a large capacity weapon or machine gun and who thereafter, while in the commission or the attempted commission of a second or subsequent offense which may be punished by imprisonment in the state prison, has in his possession or under his control a firearm, rifle or shotgun shall, in addition to the penalty for such offense, be punished by imprisonment in the state prison for not less than 20 years; provided, however, that if such firearm, rifle or shotgun is a large capacity semiautomatic weapon or if such person, while in the commission or attempted commission of such offense, has in his possession or under his control a machine gun, such person shall be punished by imprisonment in the state prison for not less than 25 years.

A sentence imposed under this section for a second or subsequent offense shall not be reduced nor suspended, nor shall any person convicted under this section be eligible for probation, parole, furlough or work release or receive any deduction from his sentence for good conduct until he shall have served the minimum term of such additional sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

G.L. c. 265, § 2. Punishment for murder; parole; executive clemency.

(a) Except as provided in subsection (b), any person who is found guilty of murder in the first degree shall be punished by imprisonment in the

state prison for life and shall not be eligible for parole pursuant to section 133A of chapter 127.

(b) Any person who is found guilty of murder in the first degree who committed the offense on or after the person's fourteenth birthday and before the person's eighteenth birthday shall be punished by imprisonment in the state prison for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of chapter 279.

(c) Any person who is found guilty of murder in the second degree shall be punished by imprisonment in the state prison for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of chapter 279.

(d) Any person whose sentence for murder is commuted by the governor and council pursuant to section 152 of chapter 127 shall thereafter be subject to the laws governing parole.

G.L. c. 265, § 1. Murder defined.

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

G.L. c. 269, § 10(a), (n). Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment.

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden,

superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

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(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 21/2 years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

G.L. c. 279 § 24. Indeterminate sentence to state prison; determination of sentence for offender aged fourteen through seventeen.

If a convict is sentenced to the state prison, except as an habitual criminal, the court shall not fix the term of imprisonment, but shall fix a maximum and a minimum term for which he may be imprisoned. The maximum term shall not be longer than the longest term fixed by law for the punishment of the crime of which he has be convicted, and the minimum term shall be a term set by the court, except that, where an alternative sentence to a house of correction is permitted for the offense, a minimum state prison term may not be less than one year. In the case of a sentence to life imprisonment, except in the case of a sentence for murder in the first degree, and in the case of multiple life sentences arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, the court shall fix a minimum term which shall be not less than 15 years nor more than 25 years.

In the case of a sentence of life imprisonment for murder in the first degree committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 20 years nor more than 30 years; provided, however, that in the case of a sentence of life imprisonment for murder in the first degree with extreme atrocity or cruelty committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of 30 years; and provided further, that in the case of a sentence of life imprisonment for murder in the first degree with deliberately premeditated malice aforethought committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 25 years nor more than 30 years.

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k) and Mass. R. App. P. 20(a)(2)(F). The brief is written in 12-point Century Schoolbook and contains 8,811 non-excluded words, as determined by using Microsoft Word 2010.

/s/ *Cailin M. Campbell*
Cailin M. Campbell

COMMONWEALTH'S CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service on the defendant by e-filing a copy of the brief and record appendix and sending it to his counsel: Ryan Schiff, rschiff@elkinslawllc.com; Paul Rudof, paulrudof@elkinslawllc.com; Ruth Greenberg, ruthgreenberg44@gmail.com.

Respectfully submitted
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For the Suffolk District

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