COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
NO. SJC-11693

SUFFOLK, SS.

COMMONWEALTH,
Appellee

V.

SHELDON MATTIS,
Appellant

ON APPEAL FROM AN ORDER OF
THE SUFFOLK SUPERIOR COURT

BRIEF OF AMICI CURIAE FOR THE EASTERN DISTRICT ATTORNEY

FOR THE COMMONWEALTH:

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The District Attorney for the Eastern District respectfully submits this Amicus Brief on the following question:

> Whether this court should extend its holding in Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655 (2013), to conclude that the imposition of a mandatory sentence of life without parole ["LWOP"] for those convicted of murder in the first degree, who were eighteen through twenty years old at the time of the crime, violates art. 26 of the Massachusetts Declaration of Rights.

Interest of the amicus

As the chief law enforcement officer for the Eastern District, the District Attorney has the statutory obligation to direct and control the investigation of homicides district-wide and to prosecute such cases in the Superior Court. See G.L. c. 12, §§ 12, 13, and 27; G.L. c. 38, § 4. In the Eastern District, there are at least 24 defendants who were convicted of first degree murder committed while between the ages 18 and 20. A ruling extending juvenile protections to 18-20 year olds would likely be retroactive and would constitute a major alteration in the law, mandating first resentencing hearings and then potential parole hearings, recurring until release, in long adjudicated cases. In the wake of any such ruling, the District Attorney would shoulder the burden in his district, expending resources to litigate resentencing hearings and to appear at parole hearings as needed. In accordance with the Victim's Bill of Rights, the Office would be tasked, through its victim witness staff, with guiding and assisting victims and their families through the major disruption to their lives attending the change. G.L. c. 258B, § 3, 5.

The impact of any such ruling may reach beyond murder sentences. Extending juvenile protections by invalidating mandatory LWOP for 18, 19, and 20 year olds would call into question the constitutionality of countless other non-homicide sentences for this age group, even for multiple felonies including rape and sexual assault and other violent offenses, where the aggregate parole

eligibility date exceeds 15 years. See Commonwealth v. Perez, 477 Mass. 677, 688 (2017) (Perez I)(juvenile sentences for non-homicide offenses that exceeded that applicable to a juvenile convicted of murder in the same timeframe are presumptively disproportionate under art. 26). In short, any such ruling would upend the settled expectations and the lives of countless victims and their families in the Eastern District.

Introduction

In Miller v. Alabama, 567 U.S. 460 (2012), relying on developmental science first noted in Roper v. Simmons, 543 U.S. 551 (2005), the United States Supreme Court held that the 8th Amendment[1] bars mandatory LWOP for juvenile offenders, and mandates an individualized sentencing hearing that considers the hallmark features of youth -- the so-called "Miller factors"[2] -- before sentencing such a juvenile to LWOP. Citing this same science, this Court held in Diatchenko v. District Attorney for the Suffolk Dist. (Diatchenko I), 466 Mass. 655, 668

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[1] The 8th Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[2] The "Miller factors" are:

> (1) the defendant's 'chronological age and its hallmark features -- among them, immaturity, impetuosity, and failure to appreciate risks and consequences';
>
> (2) 'the family and home environment that surrounds' the defendant;
>
> (3) 'the circumstances of the homicide offense, including the extent of [the defendant's] participation in the conduct and the way familial and peer pressures may have affected him' or her;
>
> (4) whether the defendant 'might have been charged and convicted of a lesser offense if not for incompetencies associated with youth -- for example, [the defendant's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the defendant's] incapacity to assist his [or her] own attorneys'; and
>
> (5) 'the possibility of rehabilitation.' "

Commonwealth v. Costa, 472 Mass. 139, 147 (2015), quoting Miller v. Alabama, 567 U.S. 460, 477-478 (2012).

(2013) that Art. 26[3] provides greater protections, and bars even discretionary imposition of LWOP for juveniles. For the purpose of both rules, "juveniles" were defined as those under age 18. Diatchenko I, 466 Mass. at 659 & n. 8 ("When we use the term 'juvenile' offenders here, we are referring to defendants who were under the age of eighteen at the time they committed murder in the first degree. See G.L. c. 119, § 72B, as amended through St. 2013, c. 84, § 24.").

Defendants Sheldon Mattis and Jason Robinson were, respectively, 18 and 19 at the time of their commission of first-degree murder.[4] Under G.L. c. 265, § 2, both were sentenced to mandatory LWOP. They now have proffered developmental science, most post-dating Diatchenko, which finds among 18 to 20 year olds markers of neuronal immaturity similar to juveniles. The proffered science pertains to average neuronal immaturity in this age set; it was not particularized to these defendants. The defendants' essential claim was straightforward: since the science shows developmental similarities among juveniles and 18-20 year olds, art. 26 at a minimum forbids mandatory imposition of LWOP for this age group, and requires Miller hearings before the imposition of any such sentence.[5] On remand order of this Court, the Superior Court (Ullman, J.) conducted an evidentiary hearing at which the affidavits and testimony of four

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[3] Article 26 of the Massachusetts Declaration of Rights provides, in part: "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

[4] Robinson was convicted of felony murder in the March 27, 2000 shooting death of business owner Inaam Yazbek. Brief of the Commonwealth, Commonwealth v. Robinson, 2017 WL 11712152 at *3 (2017). Mattis was convicted of the September 25, 2011 murder, on theories of deliberate premeditation and extreme atrocity or cruelty, in the shooting death of 16-year-old Jaivon Blake. Commonwealth v. Watt, 484 Mass. 742, 744 (2020).

[5] The defendants additionally claim that art. 26 forbids even discretionary imposition of LWOP for this age group. This question was not reached by the lower court, which viewed it as beyond the scope of the remand. Ullman decision, 31. On this question, not addressed in this brief, the Eastern District Attorney agrees with the position and arguments of the Suffolk District Attorney.

experts were admitted -- Dr. Laurence Steinberg, a developmental psychologist; Dr. Adriana Galvan, a developmental cognitive neuroscientist; and Drs. Robert Kinscherff and Stephen Morse, both attorneys and forensic psychologists. Ullman decision, 10-11. Also admitted were seven scientific articles ranging from 2008 to 2022, six of which were co-authored by Drs. Steinberg and/or Galvan. Id. On the basis of this evidence, Judge Ullman made certain "core findings" concerning age and brain development, id. at 15-18, and held on the basis of those findings that art. 26 forbids mandatory LWOP for 18-20 year olds. Id. at 2. Following remand, though the vast majority of Courts have declined to extend Miller to legal adults,[6] the defendants ask this Court to join one state, Washington, that has extended Miller to 18 through 20 year olds,[7] and one other, Michigan, that has extended it to 18 year olds,[8] each over vigorous dissents.

The Court should not accept this invitation. In deciding the question, this Court should strictly apply its own tripartite standard for evaluating punishments as "cruel or unusual" under art. 26.[9] Applying this standard is essential because it demarcates the boundary between legislative and judicial functions mandated by art. 30.[10] Adherence to it ensures that legislative prerogatives are not trespassed,

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[6] See e.g., Arkansas, Benton v. Kelley, 602 S.W.3d 96, 98-99 (2020) (declining to extend Miller to those under 21); Connecticut, Woods v. Comm'r of Corr., 232 A.3d 63, 80-84 (2020) (declining to extend Miller to 18); Minnesota, Nelson v. State, 947 N.W.2d 31, 38-40 (Minn. 2020) (declining to extend Miller to 18); and Missouri, State v. Barnett, 598 S.W.3d 127, 132-33 (Mo. 2020)(declining to extend Miller to 18; "Barnett's policy considerations are better addressed to the legislature, which has the authority to amend section 565.020, if it determines Missouri should adopt the prevailing developments in psychology and brain science to expand the definition of juvenile to include offenders older than 18 years of age.").

[7] In re Monschke, 197 Wash.2d 305, 326 (Wash. 2021).

[8] People v. Parks, --- N.W.2d ---, 2022 WL 3008548 (Mich. 2022).

[9] In reaching the conclusion that art. 26 bars mandatory LWOP, the lower Court "considered but did not strictly appl[y]" this standard. Ullman decision, 24.

[10] Article 30 provides,

that an ongoing democratic process is not short-circuited, and that constitutional analysis does not become a proxy for imposition of the policy preferences of the judiciary. Application of that standard would hold the current sentencing scheme constitutional, in light of the gravity of the crime and nature of offender in this older age group, the punishments for other offenses, and those in other jurisdictions for the highest degree of murder. While Judge Ullman's core findings are not clearly erroneous, for the reasons that follow, they do not compel differing constitutional treatment for 18-20 year olds than for those 21 and older.

An additional threshold point bears noting. While the defendants' claims pertain only to sentencing, the developmental science on which the defendants rely does not. The proffered science is also plainly relevant to and, per decisions of this Court, may be used to litigate a defendant's mental state at the time of the crime in the guilt phase. See Commonwealth v. Fernandes, 487 Mass. 770, 782 (2021), cert. denied sub nom. Fernandes v. Massachusetts, 142 S. Ct. 831 (2022)(permitting expert testimony with respect to "'general principles and characteristics of the undeveloped adolescent brain' when it is accompanied by other evidence, such as testimony by a different expert, or medical or school records, specific to the defendant"). Post-trial, it may be used to argue for a reduction of the degree of murder under G.L. c. 278, § 33E or Mass. R. Crim. P. 25(b)(2), or in support of a new trial motion, again where particularized to an individual defendant. See Commonwealth v. Johnson, 486 Mass. 51, 69 & n. 16 (2020)("We agree that the mental maturity of an individual defendant is relevant to our analysis under § 33E."). The question before this Court concerns the

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> 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 that it may be a government of laws and not of men.

legislature's ability to fix punishment for those in this age group after they were convicted, in a fair trial and beyond a reasonable doubt, of the required elements of first degree murder.

ARGUMENT

I. This Court should strictly apply the art. 26 standard for assessing disproportionality because it demarcates the boundary between legislative and judicial functions.

"'The function of the Legislature in defining crimes and their punishments is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety.'" Commonwealth v. Brown, 466 Mass. 676, 684–685 (2013), quoting Weems v. United States, 217 U.S. 349, 379 (1910)(cleaned up).[11] Accord Slome v. Chief of Police of Fitchburg, 304 Mass. 187, 189 (1939)("Judicial inquiry does not extend to the expediency, wisdom or necessity of the legislative judgment for that is a function that rests entirely with the law-making department."). "Courts act with great restraint when they review the exercise of that legislative authority [in fixing punishments] in the light of [art. 26.]" Commonwealth v. Marcus, 16 Mass. App. Ct. 698, 699 (1983)(Kass J.), citing Commonwealth v. Jackson, 369 Mass. 904, 908 (1976). In judging the constitutionality of statutes, this Court does not pass on their "wisdom," "propriety" or "efficacy," nor does it assess "policy argument[s] . . . [that] should be addressed to the Legislature." Jackson, 369 Mass. at 908. This "deference to legislative judgments reflects neither an abdication of nor unwillingness to perform the judicial role; but rather a recognition of the separation of powers and the 'undesirability of the judiciary

[11] The Legislature has "full power and authority ... to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, ... either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same ...." Part II, c. 1, s 1, art. 4, of the Massachusetts Constitution.

substituting its notions of correct policy for that of a popularly elected Legislature.'" Commonwealth v. Leno, 415 Mass. 835, 841 (1993) quoting Zayre Corp. v. Attorney Gen., 372 Mass. 423, 433 (1977). This deference applies "[p]erhaps especially where such matters are hotly debated by those representatives." Kligler v. Att'y Gen., No. SJC-13194, 2022 WL 17744330, at *11 (Mass. Dec. 19, 2022).

In holding that art. 26 bars mandatory LWOP for 18 through 20 year olds, the lower Court "considered but did not strictly appl[y]" the tripartite analysis adopted by this Court in Jackson, 369 Mass 904 and Cepulonis v. Commonwealth, 384 Mass. 495, 497(1981). Ullman Decision, p. 24. The defense brief bypasses the three-part standard, though this Court has repeatedly utilized it in the ensuing four decades, and re-affirmed it a year ago. Commonwealth v. Sharma, 488 Mass. 85, 89–90 (2021). As grounds for not "strictly applying" the standard, the lower Court noted that the "approach does not apply neatly here," since "it appears that the SJC has used this three part analysis solely to determine whether a particular sentence violates article 26, not determine whether a particular sentencing practice violates art. 26." Ullman Decision, p. 24, citing cases.

But the standard is not only for assessment of particular sentences. Judge Ullman's observation may reflect only that most art. 26 challenges are to particular defendants' individual sentences. Nevertheless, the case in which this Court established the standard concerned whether a mandatory minimum 1-year sentence for unlicensed firearm possession under G.L. c. 269, § 10(a) "constitute[d] an unconstitutional exercise of legislative power" under art. 26. Jackson, 369 Mass. at 906-907 – i.e., at issue was whether a sentencing practice embodied in legislation was constitutional, not one individual sentence. Where, as in Jackson, the defendant's claim would invalidate not merely one defendant's

sentence, but an act of the legislature as applied to a whole segment of the population, it is all the more imperative that this Court apply a standard whose very purpose is to ensure against encroachment on legislative functions. Jackson, 369 Mass. at 909–910 (guidelines adopted "in an effort to avoid a subjective approach" in evaluating art. 26 claims); Diatchenko I, 466 Mass. at 669 (citing both Cepulonis and Jackson); Cepulonis, 384 Mass. at 497 ("The burden is on a defendant to prove such disproportion **because** the Legislature is given broad discretion in determining the punishment for a given offense.")(emphasis added); Sharma, 488 Mass. at 89–90 ("**Because** the Legislature has broad discretion in prescribing penalties for criminal offenses, the defendant has the burden of proving disproportionality.")(emphasis added).

"'The touchstone of art. 26's proscription against cruel or unusual punishment ... [is] proportionality.'" Sharma, 488 Mass. at 89–90, quoting Commonwealth v. Concepcion, 487 Mass. 77, 86 (2021). "'The essence of proportionality is that punishment for crime should be graduated and proportioned to both the offender and the offense'" Id., citation omitted. "To reach the level of cruel and unusual, the punishment must be so disproportionate to the crime that it 'shocks the conscience and offends fundamental notions of human dignity.'" Commonwealth v. LaPlante, 482 Mass. 399, 403 (2019), quoting Cepulonis, 384 Mass. at 497. In assessing this question, art. 26, like the 8th Amendment, "draw[s] [its] meaning from the evolving standards of decency that mark the progress of a maturing society." Commonwealth v. Jones, 479 Mass. 1, 17 (2018), citations omitted. See Diatchenko I, 466 Mass. at 669; Libby v. Commissioner of Correction, 385 Mass. 421, 435 (1982) ("Article 26, like the Eighth Amendment, bars punishments which are 'unacceptable under contemporary moral standards'")(citation omitted). "In divining contemporary standards of decency, we may look to State statutes and regulations, which reflect the public attitude as

to what those standards are." Good v. Commissioner of Correction, 417 Mass. 329, 335 (1994). This Court "look[s] to 'objective indicia of society's standards' ... to determine whether there is a national consensus against the sentencing practice at issue." Jones, 479 Mass. at 17, quoting Roper, 543 U.S. at 563. While Courts "'determine in the exercise of [their] own independent judgment whether the punishment in question violates' contemporary moral standards to the extent that it is a constitutional violation . . . the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures" Jones, 479 Mass. at 17 (citation omitted).

This Court "appl[ies] a three-pronged proportionality analysis." Sharma, 488 Mass. at 89. "To determine whether a sentence is disproportionate 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.' " Id., quoting Concepcion, 487 Mass. at 86, Cepulonis, 384 Mass. at 497-498. [12]

[12] Notably, in Monschke, the Washington case, the majority did not apply either of its established tests to determine the constitutionality of sentences, tests that overlap with our test in Jackson/Cepulonis. See In re Monschke, 197 Wash.2d 305, 336-337 (2021) (Owens, J., dissenting) (noting that majority "sidestepped" both standards). See State v Fain, 94 Wash. 2d 387, 397, 617 P.2d 720 (1980) (en banc)(examining "(1) the nature of the offense; (2) the legislative purpose behind the . . . statute; (3) the punishment defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction."); State v Bassett, 192 Wash. 2d 67, 90 (2018)("categorical-bar" test examines "(1) whether there is objective indicia of a national consensus against the sentencing practice at issue and (2) the court's own independent judgment based on '"the standards elaborated by controlling precedents and by the [c]ourt's own understanding and interpretation of the [cruel punishment provision]'s text, history, ... and purpose'").

II. APPLICATION OF THE JACKSON/CEPULONIS STANDARD SUPPORTS THE CONSTITUTIONALITY OF G.L. c. 265, § 2

G.L. c. 265, § 1 provides in relevant part:

> 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. . . .The degree of murder shall be found by the jury.

The sentencing statute in effect at the time of the defendants' crimes provides, in relevant part,

> . . . Any other person who is guilty of murder in the first degree shall be punished by imprisonment in the state prison for life. . . . No person shall be eligible for parole under [G.L. c. 127, § 133A] while he is serving a life sentence for murder in the first degree, but if his sentence is commuted therefrom by the governor and council under the provisions of [G.L. c. 127, § 152] he shall thereafter be subject to the provisions of law governing parole for persons sentenced for lesser offenses.

G.L. c. 265, § 2, as amended through St.1982, c. 554, § 3.

A. "The nature of the offense and the offender in light of the degree of harm to society"

The first factor supports the constitutionality of the statute. As to the offense, the Supreme Court has noted a categorical distinction between murder and other types of offenses:

> The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. There is a line 'between homicide and other serious violent offenses against the individual.' Serious nonhomicide crimes 'may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.' This is because '[l]ife is over for the victim of the murderer,' but for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not beyond repair.' Although an offense like robbery or rape is 'a serious crime deserving serious punishment,' those crimes differ from homicide crimes in a moral sense.

Graham v. Florida, 560 U.S. 48, 69-71 (2010) (citations omitted). "[I]n terms of moral depravity and of the injury to the person and to the public" murder simply cannot be compared to other serious violent offenses. Kennedy v. Louisiana, 554

U.S. 407, 428 (2008). This Court has noted this same distinction between homicide and other violent offenses under art. 26. Perez I, 477 Mass. at 685, quoting Graham, 560 U.S. at 69 ("We agree that under art. 26, "[t]here is a line 'between homicide and other serious violent offenses against the individual.'")

We deal here not merely with murder, but the subset of murders our legislature deems worthy of the greatest punishment – those with deliberate premeditation, extreme atrocity or cruelty, or in the course of the commission of another life felony (e.g., aggravated rape, armed robbery, arson, etc.). "The severity of this particular crime cannot be minimized even if committed by a juvenile offender." Diatchenko I, 466 Mass. at 674. Thus, "[i]t is plainly within the purview of the Legislature to treat juveniles who commit murder in the first degree more harshly than juveniles who commit other types of crimes, including murder in the second degree." Id. at 672. The gravity of the crime, in short, cannot be understated; it is perhaps the greatest moral wrong, unsurpassed in its devastating impact and finality. It is therefore unsurprising that the people of this state, through the Legislature, would have chosen to impose the most severe punishment authorized by law in the Commonwealth – mandatory LWOP.

As to the offender, in a series of cases beginning in 2005, the Supreme Court and this Court recognized that "children are constitutionally different from adults for purposes of sentencing." Miller, 567 U.S. at 471. These decisions looked in part to "science and social science" to confirm that "juveniles have diminished culpability and greater prospects for reform," and therefore are "less deserving of the most severe punishments." Miller, 567 U.S. at 471–72. See Roper, 543 U.S. at 551 (8th Amendment forbids sentencing juveniles to death); Graham, 560 U.S. at 48 (8th Amendment forbids LWOP on a juvenile non-homicide offender); Miller, 567 U.S. at 471 (8th Amendment prohibits mandatory LWOP on juvenile murderer); Diatchenko I, 466 Mass. at 669-670 (art. 26

prohibits discretionary LWOP for juveniles). All four of these cases defined juveniles as those under 18 -- a line first drawn in Roper. In arguing that the line should be moved, as noted, the defendants rely primarily on what they deem recent advances in developmental neuroscience and social science, as reflected in the core findings. There are several problems with this approach.

First, under the decisions of the Supreme Court and this Court, drawing the line at age 18 has never rested exclusively, or even primarily, on the science of brain development. It is not as a result of recent advances in neuroscience that it has become known that adolescent development continues beyond the age of 18. While the core findings are not clearly erroneous, nor are they surprising; to some extent, they confirm what "any parent knows," Roper, 543 U.S. at 569, about 18-20 year olds. As the Supreme Court of Delaware has observed, though Roper and its progeny are rooted in "psychology and brain science," the "choice to divide childhood from adulthood at age 18 was not based solely -- and perhaps not even primarily -- on scientific evidence." Zebroski v. State, 179 A.3d 855, 861-862 (Del. 2018). Rather, after examining the "scientific and sociological" differences between children and adults, and using that evidence to show that juveniles tend to be less culpable for their behavior, the Court in Roper then "'retreat[ed]' from the science 'to [a] more conventional, law-controlled analysis' when the time came to decide who would count as a juvenile." Zebroski, 179 A.3d at 861-862, quoting Emily Buss, What the Law Should (and Should Not) Learn from Child Development Research, 38 Hofstra L. Rev. 13, 40 (2009). The Court in Roper concluded:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The 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. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and

> adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Roper, 543 U.S. at 574. Thus, "[t]he choice of age 18 was not, then, an attempt to identify -- using the most advanced science of the time -- the developmental boundary between childhood and adulthood. It was based on societal markers of adulthood -- the age at which the states allow individuals to vot[e], serv[e] on juries, [and] marry[ ] without parental consent. . . . It was not science that convinced the Court where to draw that line -- it was society's collective judgment about when the rights and responsibilities of adulthood should accrue." Zebroski, 179 A.3d at 861-862, citation omitted. Accord United States v. Gonzalez, 981 F.3d 11, 19 (1st Cir. 2020), cert. denied, 141 S. Ct. 1710 (2021)(argument for extension of Miller incorrectly assumed "that the raison d'être behind the Court's age-specific decisions rests exclusively on the science surrounding brain development").

In 2016, this Court rejected an art. 26 challenge to an 18 year old's mandatory LWOP sentence for first degree murder on much these same grounds. "The age of eighteen 'is the point where society draws the line for many purposes between childhood and adulthood.' That such line drawing may be 'subject to the objections always raised against categorical rules' does not itself make the defendant's sentence unconstitutional." Commonwealth v. Chukwuezi, 475 Mass. 597, 610 (2016), quoting Roper, 543 U.S. at 574. See also Commonwealth v. Watt, 484 Mass. 742, 756 n. 17 (2020)("[W]e have held on more than one occasion that 'there is a rational basis for making determinations of parole eligibility based on age.'"), and cases cited. This Court subsequently noted the lack of a developed factual record on brain development in 18-20 year olds that would permit it to reach an "informed conclusion" as to this group,[13] and, in this

[13] See e.g., Commonwealth v. Garcia, 482 Mass. 408, 413 (2019)(noting that "minimal record on brain development in this case consisting of one expert's

case, invited the creation of one. But the Court is not bound to rest its decision solely on that record. Doing so would be plainly inconsistent with the precedents of the Supreme Court and this Court.

To be sure, Miller and Diatchenko I did rely on developmental science, but they did so in the context of lines already drawn by the federal and state legislatures for criminal sentencing at age 18. Here, the defendants seek a judicially created line, effectively asking this Court to identify, based on its own independent assessment of brain science, the developmental boundary line between childhood and adulthood. Unanchored constitutional line drawing on the basis of cutting edge science is not a task to which Courts are well suited. The judiciary simply lacks the broad-based fact-finding capabilities of the legislature that are essential to such an undertaking. Vega v. Commonwealth, 490 Mass. 226, 241–242 (2022)(Wendlandt, J. concurring in result)(noting Court's "inability to conduct the type of broad-based and extensive fact finding through means available to the Legislature"); Commonwealth v. J.A., 478 Mass. 385, 391 n.2 (2017) (Cypher, J., concurring)("In a time when social science is rapidly evolving, the Legislature is in a better position than a court to act on advances in social science research . . ."); People v. Parks, --- N.W.2d ---, 2022 WL 3008548 *33 (Mich. 2022)(Clement, J, dissenting) ("Unlike the Legislature, the judiciary resolves disputes between parties. That function does not easily translate to evaluating the strength of scientific claims. [] Despite the decades of legal experience the justices on this Court have, I do not believe we are well-suited for this foray into neuroscience."). Further, creation of the factual record on which to base such a significant alteration of the law is not a task to be left to the parties in

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testimony presented during trial rather than at sentencing, does not allow us to reach an informed conclusion on . . . individuals in their late teens or early twenties").

a single case. Doing so raises "the danger that courts, litigants, and scholars will pick and choose among the sources to find the research that supports their own predilections (what Justice Scalia calls 'look [ing] over the . . . crowd and pick[ing] out its friends' in his Roper dissent)." Emily Buss, What The Law Should (And Should Not) Learn From Child Development Research, 38 Hofstra L. Rev. 13, 37 (2009). The danger is particularly acute here where, even before the taking of any evidence on remand, the parties took the same position with respect to the applicability of Miller to 18-20 year olds.

Second, the approach would create instability and uncertainty in murder sentencing and beyond. Basing a ruling solely on developmental science would set this Court on a difficult path. While the line now sought is at age 21, if the Court accepts the argument, that line promises to be a shifting one, since the science upon which the defendants rely demonstrates that maturation continues well into the mid-twenties. The point was underscored recently by the report of a legislatively convened task force studying issues related to "emerging adults" in the criminal justice system, which it defined as those between ages 18 and 24. See "Emerging Adults in the Massachusetts Criminal Justice System" Report of the Task Force on Emerging Adults in the Criminal Justice System (February 26th, 2020)("Task Force Report").[14] The Task Force was charged, inter alia, with "[e]valuating the advisability, feasibility and impact of changing the age of juvenile court jurisdiction to defendants younger than 21 years of age," Task Force Report, p. 4. It held ten sessions from January through November 2019, and took testimony from stakeholders including law enforcement, community-based organizations, formerly incarcerated emerging adults, as well as scientific

[14] The Task Force Report, further discussed below, is available at https://malegislature.gov/Reports/9250/SD2840_Emerging%20Adults%20Criminal%20Justice%20Task%20Force%20Report-Final.pdf.

experts in brain development. Id. The findings make clear that development continues well into the mid-20s. Id., 11-12 ("In part, due to the brain development process, an individual's ability to self-regulate sensation-seeking behavior does not fully mature until between the ages of 23 and 26."). See also Emily Buss, Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition, University of Chicago Law Review: Vol. 89: Iss. 4, Article 1, 869 (2022) ("Imaging studies, which have now been conducted on individuals across the globe,[] demonstrate that this maturity gap persists well into the twenties,[] closing gradually as the brain matures").

Moreover, if science must dictate the constitutional line, the line should also presumably account for other measurable characteristics in discrete populations. This would include accounting for significant gender-based developmental differences,[15] or cognitive decline in the elderly,[16] for example. See Parks, 2022 WL 3008548, at *34 (Clement, J. dissenting). Taken to its logical end point, the defendant's position would have no limitation and would require an individualized hearing to determine whether the opportunity for parole was appropriate in every case in which the defendant was sentenced to mandatory LWOP. The point acquires even more force where a given characteristic is not merely assumed based upon group averages but rather particularized to the individual defendant -- for example, an individual's baseline intelligence. But see Commonwealth v. Jones, 479 Mass. 1, 17 (2018)(declining under art. 26 to extend

[15] See also Emily Buss, What the Law Should (And Should Not) Learn from Child Development Research, 38 Hofstra L. Rev. 13, 39-40 (2009)("[T]he pace of maturity appears to diverge predictably and consistently between girls and boys, with girls maturing in many respects relevant to law at an earlier age than boys.[].")

[16] See Strough & Bruine de Bruin, Decision Making Across Adulthood, 2 Ann. Rev. Developmental Psychol. 345, 357 (2020) ("Age-related declines in fluid reasoning ability and working memory can compromise the quality of older adults' decision making when decisions are complex.")

Miller to developmentally disabled first degree murder defendant). Yet, "[i]t is for the Legislature to determine 'that society can best be protected against the evil aimed at by a rigorous application of an inflexible rule.'" Jackson, 369 Mass. at 919-920. "Considerations of efficiency and certainty require a bright line separating adults from juveniles." United States v. Marshall, 736 F.3d 492, 500 (6th Cir. 2013). The defendants' approach promises an ever shifting line, and far-reaching uncertainty in adult sentencing, threatening the stability and legitimacy of the law.

Third, if the proffered science is to be the basis of so fundamental a change in the law, the caveats to the research acknowledged by Judge Ullman, Ullman decision, 17-18, warrant careful consideration. Notable among these, "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." Ullman decision, 17-18. This is concerning, particularly where at issue is not just any "crime," but the highest degree of murder.[17] The lower court acknowledged these caveats, but did not discuss them beyond stating in a single sentence, "These caveats, individually and collectively, do not undermine the Core Findings of Fact." Ullman decision, 18. Also, while the core findings show developmental similarities between juveniles and 18-20 year olds, they do not expressly acknowledge that these characteristics are necessarily present to a lesser degree in this older cohort. See In re Jones, 42 Cal.

[17] Other important caveats include "significant differences between the subjects in the studies discussed below as a whole and individuals who commit murder as a whole"; "the subjects who participate in behavioral and brain scan studies are not a fully randomized pool of the general population."; "there are significant differences in brain development among the individuals of any particular age or age bracket". Ullman decision, 17-18. Further, "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." Id. See Stephen J. Morse, Brain Overclaim Redux, 31 Law & Ineq. 509, 513 (2013).

App. 5th 477, 482 (2019)("While young adults share many of the attributes of youth, they are by definition further along in the process of maturation, and the law need not be blind to the difference."). Assessing whether, in older age cohorts, these caveats may acquire more force, particularly in the context of decisions to commit first-degree murder, is a task best suited to the legislature.

In the end, focus on developmental science obscures that the decision where to draw the line for purposes of murder sentencing is, perhaps primarily, a grave question of morality and social policy. Possibly in recognition of this, the legislative Task Force noted above heard not only from scientific experts, but also from a much broader set of stakeholders on questions related to sentencing emerging adults. As a matter of current social policy, many of our most important and weighty rights are still conferred upon us when we turn 18: the civic rights of voting and serving on a jury; see U.S. Const. amend. 26; G.L. c. 234, § 1; entering into marriage, see G.L. c. 207, § 24; joining the military without parental consent, see 10 U.S.C. § 505(a); applying for a firearms identification card, see G.L. c. 140, § 129B(v); running for elected office in the Massachusetts Legislature, see Article 20 of the Articles of Amendment to the Constitution of the Commonwealth; entering into a binding contract under common law, see Sharon v. City of Newton, 437 Mass. 99, 107-08 & n. 9 (2002). These and many other examples reflect our society's determination that, by the age of 18, an individual possesses sufficient cognitive, emotional, and practical faculties to not only make important, life-altering personal decisions, but to also make decisions that could greatly affect the lives of others and society as a whole. While certain other rights accrue at 21, this only underscores the "age of majority" is a highly context dependent question best suited to legislative determination. Eccleston v. Bankosky, 438 Mass. 428, 435, 436 & n.13 (2003)("An individual may be considered emancipated for some purposes but not for others"). The context here

is singular and unique: sentencing for the gravest crime for an individual considered a legal adult in many important respects. In full view of current developmental brain science, the legislature could determine that the familiar risky decisions that are the hallmark of late adolescence into the mid-twenties -- e.g., binge drinking, drug use, risky sexual behavior, criminal behavior even including violence -- are vastly different from decisions to end other human lives in circumstances that meet the definition of first-degree murder. It could determine that such choices are so uncommon, so final and irrevocable, and so devastating in their impact that they warrant full adult responsibility at an earlier age than, for example, consuming alcohol, tobacco, or marijuana; gambling; or becoming a police officer. Along with the grant of important rights at age 18, it could determine that 18 year olds are concomitantly fully responsible for choices to commit first degree murder.

As commentators have observed, a ruling that 18 year olds are *not* sufficiently mature to accept adult responsibility for the gravest crime could be used to support arguments against the grant of rights and autonomies at that age. See e.g. Buss, What The Law Should (And Should Not) Learn..., 38 Hofstra L. Rev. 13, 43-44 (2009)("The ability to understand relevant information and to reason in a logical fashion . . .and the way these abilities can be compromised by peer pressure, reckless impulses, or under-regulated emotions, while perhaps most salient in the typical criminal scenario, clearly can affect children's choices about what to say in school, whether to seek out an abortion, or whether to declare opposition to one's community's religious faith in open court, as well.") It would be anomalous, for example, to deem an 18 year old not fully responsible for committing the crime of first degree murder due to his increased susceptibility to peer influence and emotional decision-making, but to deem him mature enough to sit on a jury passing judgment on a person charged with that same crime.

The legislative response in the wake of the Miller and Diatchenko decisions is further proof that our society continues to adhere to the notion that age 18 is the appropriate line between juvenile and adult criminal liability for murder. In 2014, it enacted "An Act Relative to Juvenile Life Sentences for First Degree Murder," G.L. c. 279, § 24 as amended through St. 2014 c. 189, § 6, which amended first-degree murder sentencing for juveniles to provide for parole eligibility after not less than 30 years for extreme atrocity or cruelty, not less than 25 years for deliberate premeditation, and not less than 20 years for felony murder. The Legislature could have amended the age at which a person convicted of murder in the first degree becomes eligible for an adult sentence of life in prison without the possibility of parole; that it did not shows that it continues to deem those aged 18 and older as worthy of a sentence of mandatory LWOP, see Roberts v. Enter. Rent-A-Car Co. of Boston, 438 Mass. 187, 192 (2002). See Cepulonis, 384 Mass. at 496 n. 2.

Even more recently, the Task Force on Emerging Adults in the Criminal Justice System shows that legislative deliberation concerning emerging adults is ongoing and includes consideration of the most recent developmental brain science. See Task Force Report, 6, 11-13. On the basis of their findings, the Task Force made seven formal recommendations,[18] and made five "additional proposals for legislative consideration."[19] Id. at 9-10. None of these

[18] These included expanding the reach and scope of targeted programming for justice involved emerging adults; expanding gender-responsive programming for facilities holding emerging adult women; increasing opportunities for diversion for emerging adults; expansion of specialized housing for incarcerated emerging adults and monitoring progress and outcomes; expanding the use of the Positive Youth Development approach to facilities serving emerging adults, including staff trainings; and expanding Department of Youth Services programming and best practices to all facilities serving emerging adults, including staff trainings. Task Force Report, p. 8-9.

[19] These were,

recommendations or proposals included raising the age for juvenile sentencing for murder; where addressed, the proposals expressly excluded murder and other serious offenses from special consideration for "emerging adults." Id. at 9 (proposal 3, create a "young adult offender" category for 18-20 year olds within the jurisdiction of the Juvenile Court; and proposal 4, provide District Court judges discretion to refer 18-20 year olds to juvenile court; both "Exclude[] certain high-level offenses modeled after the current youthful offender standard"), id. at 10 (proposal 5, create an emerging adult court session in juvenile or district court with "[a]utomatic jurisdiction for individuals between the ages of 18-25, excluding murder charges and certain sex offenses."). Further, the legislature is also currently considering the propriety of mandatory life without parole as a sentence for any defendant.[20] The democratic process, in short, is ongoing, and involves consideration of these very same issues.[21]

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1. Raise the age to include 18, 19, and 20 years olds in the juvenile justice system;

2. Raise the age to include 18 year olds in the juvenile justice system;

3. Create a "young adult offender" category for individuals aged 18-20 within the jurisdiction of the Juvenile Court system;

4. Provide District Court and Boston Municipal Court judges discretion on their own or by motion of either party to refer eligible cases to Juvenile Court;

5. Create an emerging adult court session in juvenile or district court.

Task Force Report, p. 9-10,

[20] See e.g. Bill H.1852 192nd (Current)("An Act relative to life without parole" would abolish mandatory LWOP for all defendants regardless of age); Bill H.1542, 191st (2019 - 2020)("An Act relative to life without parole," same).

[21] Also see "An Act Expanding Juvenile Jurisdiction," St.2013, c. 84, effective on September 18, 2013, which, inter alia, "amended the upper limit of the operative ages in the definitions of a 'delinquent child' and 'youthful offender' under G.L. c. 119, § 52 from seventeen years of age to eighteen." Watts v. Commonwealth, 468 Mass. 49, 50-51 (2014), citing St.2013, c. 84, §§ 25, 26.

B. 'a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth,'

There are no more serious offenses than first degree murder and no more severe sentences than mandatory LWOP in the Commonwealth. In this sense, as Judge Ullman and this Court have observed, first degree murder "defies direct application" of the second prong. Commonwealth v. LaPlante, 482 Mass. 399, 404, n.4 (2019). This does not mean that the factor weighs in favor of holding the statute unconstitutional. To the contrary, the fact that this crime stands alone in terms of its seriousness suggests the legislature was well within its bounds in assigning the most serious mandatory penalty.

C. 'a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions.'

As noted, "[i]n deciding whether a punishment is cruel and unusual, courts look to "'objective indicia of society's standards' ... to determine whether there is a national consensus against the sentencing practice at issue." Jones, 479 Mass. at 17, quoting Roper, 543 U.S. at 563. The defendants can point to no such consensus. Massachusetts is far from an outlier in providing for mandatory LWOP for 18 year olds convicted of the highest degree of murder. Seventeen states[22] and the federal government[23] carry mandatory LWOP as the minimum sentence for the equivalent of first-degree murder. See Parks, --- N.W.2d ---,

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[22] 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); 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, N.H. Rev. Stat. Ann. 630:1-a; North Carolina, N.C. Gen. Stat. 14-17(a); Pennsylvania, 18 Pa. Cons. Stat. 2502 and 1102; and South Dakota, S.D. Codified Laws 22-16-4 and 22-6-1.

[23] See 18 U.S.C. § 1111.

2022 WL 3008548 *19. That other states provide for different penalties, either harsher (i.e., death) or more lenient, "may indicate no 'more than different exercises of legislative judgment,' rather than 'a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice.'" Cepulonis, 384 Mass. at 498–499, quoting from Weems, 217 U.S. at 381. And the decisions of two sister state Courts are far from "a national consensus" in favor of extending Miller to adults as a matter of constitutional law. Jones, 479 Mass. at 17.

CONCLUSION

Where the current sentencing scheme survives application of this Court's tripartite test for assessing disproportionality, this Court should rule the scheme constitutional under art. 26. There may be strong policy reasons in support of individualized sentencing for those in the defendants' age group and, indeed, if brain science is the sole criterion, for those even older than age 21. Likewise, there may be strong policy reasons to eliminate mandatory LWOP as a sentence altogether. But it is not the role of this Court to weigh these policy considerations. Perhaps particularly as to the gravest crimes with the greatest societal impact, "[i]t is for the Legislature to determine 'that society can best be protected against the evil aimed at by a rigorous application of an inflexible rule.'" Jackson, 369 Mass. at 919–920 ("Although we acknowledge the serious debate as to the effectiveness of mandatory sentences, it is not our function to inquire as to 'the expediency, wisdom or necessity of the legislative judgment . . ."). Given the ongoing legislative deliberations on these very points, the principle of judicial restraint and deference to the democratic process arguably applies with even greater force, particularly in light of the superior fact-finding capabilities of the legislature. Kligler, No. SJC-13194, 2022 WL 17744330, at *11.

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RULE 16(k) CERTIFICATION

I, David F. O'Sullivan, counsel for the Eastern District Attorney, hereby certify that this brief complies with the rules of Court that pertain to the filing of briefs and appendices, including but not limited to Mass. R. App. P. 16(a)(13)(addendum), 16(e)(references to the record), 18 (appendix to the briefs), 20 (form and length of briefs, appendices, and other documents), and 21 (redaction).

Compliance with the applicable length limit of Rule 20 was ascertained as follows: the brief uses Times New Roman font, in 12 point, The number of non-excluded pages is 23.

Date: December 30, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2022, the Eastern District Attorney's amicus brief in the case of Commonwealth v. Sheldon Mattis, Supreme Judicial Court No. 11693 was sent electronically to Cailin M. Campbell, Esq. at cailin.campbell@mass.gov; Ryan Schiff, Esq. at rschiff@elkinslawllc.com; Paul Rudof, Esq. at paulrudof@elkinslawllc.com; and Ruth Greenberg, Esq. at ruthgreenberg44@gmail.com.

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