COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11453; SJC-11454

GREGORY DIATCHENKO,
PETITIONER-APPELLANT,

V.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT, ET AL.,
RESPONDENTS-APPELLEES.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER-APPELLANT,

V.

MARQUISE BROWN,
RESPONDENT-APPELLEE.

AMICUS CURIAE BRIEF ON BEHALF OF: (i) AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS; (ii) CHARLES HAMILTON HOUSTON INSTITUTE FOR RACIAL JUSTICE AT HARVARD LAW SCHOOL; (iii) CHILDREN'S LAW CENTER OF MASSACHUSETTS; (iv) CITIZENS FOR JUVENILE JUSTICE; (v) FRANCINE SHERMAN, DIRECTOR, JUVENILE RIGHTS ADVOCACY PROJECT AT BOSTON COLLEGE LAW SCHOOL; (vi) HON. GAIL GARINGER (RET.), CHILD ADVOCATE FOR THE COMMONWEALTH OF MASSACHUSETTS; (vii) LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND ECONOMIC JUSTICE; (viii) MASSACHUSETTS ASSOCIATION OF COURT APPOINTED ATTORNEYS; (ix) MASSACHUSETTS BAR ASSOCIATION; and (x) SEVENTEEN (17) LAW SCHOOL PROFESSORS FROM MASSACHUSETTS LAW SCHOOLS.

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INTERESTS OF THE AMICI

The institutional and individual amici on whose behalf this brief has been written each has an interest in protecting children against "cruel or unusual" punishment under art. 26 of the Massachusetts Declaration of Rights. The amici and their interests are as follows:

American Civil Liberties Union of Massachusetts

The American Civil Liberties Union of Massachusetts ("ACLUM") is a nonprofit, statewide membership organization which defends the civil rights and civil liberties established by the United States and Massachusetts Constitutions. ACLUM has consistently guarded against punishments it has regarded as "cruel or unusual" within the meaning of art. 26 of the Declaration of Rights. *See Dist. Atty for the Suffolk Dist. v. Watson*, 381 Mass. 648 (1980) (arguing as counsel for Watson); *Commonwealth v. Jackson*, 369 Mass. 904 (1976) (arguing as amicus).

Charles Hamilton Houston Institute for Racial Justice, Harvard Law School

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School ("CHHIRJ") continues the unfinished work of Charles Hamilton Houston, one

of the Twentieth Century's most talented legal scholars and litigators. The CHHIRJ marshals resources to advance Houston's dream of a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers to focus on, among other things, reforming criminal justice policies.

Children's Law Center of Massachusetts

Founded in 1977, the Children's Law Center of Massachusetts ("CLCM") is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in juvenile justice, child welfare, and education matters. The CLCM provides technical assistance and training to attorneys and other professionals who provide services and advocacy for children and families. CLCM attorneys regularly participate as faculty at the MCLE and other continuing legal education seminars and have filed amicus curiae briefs in juvenile justice and child welfare cases in the past. CLCM's mission is to promote and secure equal justice and to maximize opportunity for low-income children and youth. In seeking to realize it's

mission, CLCM is committed to ensuring that children facing incarceration receive individualized sentencing consideration recognizing the fundamental characteristics of their youth and other relevant developmental factors.

Citizens for Juvenile Justice

Citizens for Juvenile Justice ("CfJJ") is an independent, non-profit, statewide policy organization that works to improve the juvenile justice system in Massachusetts. Its advocacy is shaped by the conviction that both children in the system and public safety are best served by a fair and effective system that recognizes the ways children are different from adults and focuses primarily on children's rehabilitation. As part of its effort to educate the public and policymakers about important juvenile justice issues, CfJJ is interested in explaining why juvenile sentencing practices should take into account the fundamental characteristics of youth—and why sentencing juveniles to life, or to terms that effectively amount to life, is inconsistent with the state Constitution and the values of the Commonwealth.

Francine Sherman, Esq., Director, Juvenile Rights Advocacy Project, Boston College Law School

Francine Sherman is a Clinical Associate Professor at Boston College Law School where she has been teaching juvenile justice for the past twenty years and where she founded and directs the Juvenile Rights Advocacy Project. She speaks and writes widely about juvenile justice and in particular about girls in the justice system. She has testified before Congress, and served on the U.S. Department of Justice National Advisory Committee on Violence Against Women focusing on children and teens victimized by domestic violence and sexual assault. She currently serves on the Advisory Board of OJJDP's National Girls Institute. She is the author of a number of books and articles and is an ongoing consultant to the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative on strategies to reduce the detention of girls nationally.

Hon. Gail Garinger (ret.), Child Advocate for the Commonwealth of Massachusetts

Hon. Gail Garinger (ret.) is the Child Advocate for the Commonwealth of Massachusetts. The Child Advocate is charged with investigating reports of "critical incidents" and child abuse and neglect

involving children receiving services from state agencies, advising the public and government officials on ways to improve services to children and families, and advocating for the humane and dignified treatment of children placed in the care or under the supervision of the Commonwealth, including those serving life sentences. Before Governor Patrick appointed her as Child Advocate in 2008, Judge Garinger served as a juvenile court judge in Massachusetts for thirteen years, the last eight years as First Justice of the Middlesex County Division of the Juvenile Court Department. A Harvard Law School graduate, she has also served as General Counsel at Children's Hospital Boston and has significant private practice experience in children's health and welfare law.

Judge Garinger firmly believes that imposing life without parole sentences for crimes committed by minors is inconsistent with evolving standards of decency, and the constitutions of both the United States and Massachusetts.

Lawyers Committee for Civil Rights and Economic Justice

The Lawyers' Committee for Civil Rights and Economic Justice ("LCCR") was founded in 1968 and is a non-profit civil rights law office that specializes in law reform, litigation, and advocacy to redress race and national origin discrimination. The LCCR's mission is to provide a "safeguard for the civil, social, and economic rights of residents in the Greater Boston area and throughout Massachusetts." LCCR has worked for many years to help historically disenfranchised communities to address racial disparities in employment, housing, education, voting, and the criminal justice system. Given the disproportionate representation of people of color in the criminal justice system, the Lawyers' Committee has an interest in seeing an end to juvenile life without parole sentencing.

Massachusetts Association of Court Appointed Attorneys

The Massachusetts Association of Court Appointed Attorneys ("MACAA") is a statewide bar association founded in 2003 for the purpose of ensuring that the highest quality of legal representation is given to each person entitled to counsel, regardless of their

ability to pay. Its membership consists of attorneys involved all practice areas where indigent persons are afforded the right to counsel in the commonwealth.

MACAA members represent indigent persons in both the juvenile courts and criminal court, including cases involving young people, under the age of 18, who have been charged with murder. As a result, MACAA has a strong interest in ensuring that the constitutional rights of young defendants are fully protected and realized.

Massachusetts Bar Association

The Massachusetts Bar Association ("MBA"), founded in 1910, is a non-profit organization that serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence and respect for the law. The MBA is the largest bar association in Massachusetts, with approximately 12,000 members state-wide. It is comprised of a House of Delegates that consists of a president, president-elect, two vice-presidents, treasurer, secretary, the two most immediate, living past presidents, 18 regional delegates, seven at-large delegates, chairs of the sixteen section councils and others. The MBA is

governed by a set of bylaws, which were most recently approved by the members in August 2010. The mission of the MBA is to provide professional support and education to members, and to provide advocacy on behalf of lawyers, legal institutions, and the public. The MBA's interest in public policy, and the profound implications for public policy of sentencing juveniles to life without parole, led the MBA to sign onto this brief as an amicus.

Law School Professors

The individuals listed below are all law professors at law schools in Massachusetts. Their areas of expertise include: Administrative Law, Capital Punishment and Capital Punishment Jurisprudence, Constitutional Law, Criminal Law, Criminal Procedure, and International Human Rights. Together, these amici bring decades of experience in teaching, research and the direction of legal clinics. As legal academics, these amici have an interest in ensuring that our criminal laws are constitutional and comply with evolving standards of decency.

- **Robert Bloom, Boston College Law School**[1]
- **Eric Blumenson, Suffolk University Law School**

[1] Institutional affiliations of all listed law professors are for identification purposes only.

- Rosanna Cavallaro, Suffolk University Law School
- Stanley Z. Fisher, Boston University School of Law
- Judge Nancy Gertner (ret.), Harvard Law School
- Daniel Givelber, Northeastern University School of Law
- Stephanie Roberts Hartung, Suffolk University School of Law
- Frank Herrmann, Boston College Law School
- Wendy J. Kaplan, Boston University School of Law
- Daniel Kanstroom, Boston College Law School
- Daniel S. Medwed, Northeastern University School of Law
- David Rossman, Boston University Law School
- Giovanna Shay, Western New England University School of Law
- David Siegel, New England School of Law
- Kenneth W. Simons, Boston University School of Law
- Robert D. Sloane, Boston University School of Law
- Carol S. Steiker, Harvard Law School

ISSUES DISCUSSED

Whether the prohibition against "cruel or unusual" punishment in art. 26 of the Massachusetts Declaration of Rights is broader and affords defendants greater protection than the prohibition against "cruel and unusual" punishment in the Eighth Amendment of the United States Constitution;

Whether art. 26 is more protective of the rights of juvenile offenders than the Eighth Amendment;

Whether art. 26 should be interpreted by this Court as going beyond the Eighth Amendment as interpreted by the United States Supreme Court in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), and, more specifically, whether it should be interpreted to prohibit categorically any and all sentences of life without the possibility of parole for juveniles convicted of homicide.

STATEMENT OF THE CASE

Massachusetts should be ashamed of itself. Although the Commonwealth has long led the nation in protecting the rights of minorities and the most vulnerable, it has fallen short when it comes to the treatment of children who commit crimes, especially the worst crimes.

Today, the United States is the only country in the world where juvenile offenders are sentenced to life in prison without the possibility of parole ("JLWOP"). And Massachusetts, notwithstanding its proud civil rights history, is one of a fast shrinking group of states that still permits this cruel and strikingly unusual practice. Massachusetts is among the worst of the worst, with more children serving life without parole sentences in the Commonwealth than in all but seven other states. This case affords an opportunity for change.

In three cases over the past eight years, the United States Supreme Court has articulated the many ways in which children are different from adults, and juvenile offenders are different from adult criminal defendants. The court has explained why what may not be "cruel and unusual" punishment for adults is "cruel and unusual" when it comes to kids. First, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that the death penalty may not be applied to

juvenile offenders. Then, in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010), the Court determined that life without the possibility of parole is likewise unconstitutional for juveniles convicted of non-homicide offenses. And most recently, in *Miller*, 132 S. Ct. 2455, the Court determined that *mandatory* life without parole for juveniles is unconstitutional in homicide cases.

But in *Miller*, the Court stopped short of categorically finding all life without parole sentences for juveniles unconstitutional. The Court observed that "given all we have said in *Roper*, *Graham*, and [*Miller*] about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469. But the court left open the possibility of the "uncommon" sentence. Here, amici urge this Court to take one step beyond *Miller* and find as a categorical matter that *all* life without parole sentences for juveniles violate art. 26 of the Massachusetts Declaration of Rights. Such sentences should not just be "uncommon" in Massachusetts. They should be unconstitutional, and therefore, impossible.

In asking this Court to interpret art. 26 as affording broader rights than the Eighth Amendment, amici are not

requesting anything unprecedented. This Court has long recognized that although "the U.S. Constitution sets a floor below which no state can go, the expectations with respect to liberty and privacy of those who authored the Massachusetts Constitution and the community that Constitution governs today require more." Robert J. Cordy, *The Law of American State Constitution: Criminal Procedure and the Massachusetts Constitution*, 45 New. Eng. L. Rev. 815, 833 (2011) ("*Cordy Article*"). In fact, there has been "a line of Massachusetts cases decided over the past three decades that [has] parted ways with federal law jurisprudence and provided greater protections under state constitutional law." Roderick L. Ireland, *Tomorrow's Issues in State Constitutional Law: How we do it in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted its State Constitution to Address Contemporary Legal Issues*, 38 Val. U. L. Rev. 405, 406 (2004)("*Ireland Overview*"); *see also infra* at 8-12.

In fact, this Court has already interpreted art. 26 as affording greater protections than the Eighth Amendment. Specifically, in *Watson*, 381 Mass. At 666-67, this Court parted ways with the U.S. Supreme Court over the death penalty, finding that penalty unconstitutional under art. 26, notwithstanding its authorization under the Eighth

Amendment.[2] The *Watson* court categorically prohibited the death penalty in Massachusetts as "unacceptably cruel under contemporary standards of decency," and because the penalty would inevitably be applied with "unconstitutional arbitrariness and discrimination." *Id.* at 650. The Court noted that the "word 'unusual' [as used in art. 26] may suggest the need for an ongoing comparison of punishments meted out for comparable crimes in similar cultures," but it focused its analysis exclusively "on the constitutional prohibition of 'cruel' punishments." *Id.* at 661. The Court did not reach the issue of "whether the phrase 'cruel *and* unusual' [in the Eighth Amendment] and the phrase 'cruel *or* unusual' [in art. 26] have the same or a distinct meaning." *Id.* at 676 (Liacos, J., concurring).

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[2] Two years after this Court's decision in *Watson*, the voters in Massachusetts passed a referendum amending art. 26. The amendment, which is now included in the Massachusetts Constitution as art. 116, states that: "No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death." Following the addition of art. 116 to the state Constitution, the Massachusetts legislature passed a new death penalty statute, c. 554 of the Acts of 1982, which was subsequently ruled unconstitutional by this Court under art. 12. *See Commonwealth v. Colon-Cruz*, 393 Mass. 150 (1984). Notwithstanding the 1982 amendment to art. 26, and the legislative and judicial events that followed, *Watson* remains good law. More importantly, the reasoning of the *Watson* court applies directly and with force to JLWOP and why it should be found unconstitutional.

Here, amici ask this Court to reach the issue and find that under art. 26 punishments may not be inflicted if they are either "cruel" or "unusual." As a matter of plain English, as well as this Court's precedents in other contexts, there is no question that the disjunctive "or" is distinct from the conjunctive "and." *See infra,* Argument § 2. And this linguistic distinction, without more, provides a "basis for the SJC to depart from analogous Supreme Court decisions." *Ireland Overview* at 412.

But even if this Court does not find that "or" as used in art. 26 creates a sharp distinction between "cruel" and "unusual," and finds instead that the two concepts are related and overlapping, amici maintain the Court should still find that the protective reach of art. 26 is broader than that of the Eighth Amendment. Under art. 26, each concept—"cruel" and "unusual"—is broader than its counterpart in the Eighth Amendment. Just as a punishment violates art. 26 if it is either "cruel" or "unusual," likewise it may be both "cruel" and "unusual" under art. 26 even though it is neither "cruel" nor "unusual" under the Eighth Amendment. In the case of JLWOP, the punishment is both "cruel" and "unusual" under art. 26.

Unusual: The touchstone of whether a practice is "unusual" within the meaning of art. 26 is whether or not

it is in keeping with the "evolving standards of decency that mark the progress of a maturing society." *Commonwealth v. O'Neal*, 367 Mass. 440, 451 (1975) ("O'Neal I") (Wilkins, J., concurring) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). As far as JLWOP is concerned, the world is no longer evolving. It has evolved. The United States stands alone as the only country in the world that locks up children under 18 for the rest of their lives without any opportunity for parole. Ours is not just the only country with a "similar culture," *Watson*, 381 Mass. at 661, but the only country—period—that continues to permit JLWOP sentences. And even within the United States, there is an unmistakable trend toward abolishing the sentence. Massachusetts is on a fast track to becoming an outlier in an outlier country. *See infra*, Argument, § 3B and 3C.

Cruel: JLWOP sentences are unconstitutionally "cruel" in large measure for the same reasons this Court previously found the death penalty violative of art. 26. The penalty is out of keeping with contemporary standards of decency, and in the new post-*Miller* discretionary world it will inevitably be applied in an arbitrary, capricious, and discriminatory manner. In addition, the punishment is "cruel" because it is greater than necessary to serve the penological interests of sentencing, and it is

disproportionate in light of the nature of children and the degree of harm it causes for society. *See infra*, Argument, § 4A-C.

There are reasons why, as a community, we hurt deeper and mourn harder for the death of a child. Life without parole sentences functionally take the lives of children before they have had a chance to change and grow into responsible adults. We as a society, and in particular we in Massachusetts, should be better than that. The cases now before this Court concerning JLWOP afford us the opportunity to do better.

Just as "the death penalty brutalizes the State which condemns and kills its prisoners," *Watson*, 381 Mass. at 671, so too does the penalty of JLWOP. As Nelson Mandela once said, "there can be no keener revelation of a society's soul than the way in which it treats its children." *See* Speech at the Launch of the Mandela Children's Fund (May 8, 1995) (available at http://db.nelsonmandela.org/). Massachusetts's practice of putting children in prison for the rest of their lives without any opportunity for parole betrays a disease in our state's soul. Amici ask this Court to effect a cure by taking one small step beyond *Miller* and categorically recognizing, once and for all, that here in Massachusetts

under art. 26, children are different, and that even those children who commit the most heinous offenses should have, if not an automatic second chance, at least a second look. Abolishing life without parole for juvenile offenders would accomplish that goal.

ARGUMENT

1. The Massachusetts Declaration of Rights Provides Greater Protections Than the U.S. Constitution.

The Constitution of the Commonwealth of Massachusetts is a sovereign document and an independent source of rights, which "preceded and is independent of the Constitution of the United States." *Commonwealth v. Upton*, 394 Mass. 363, 372 (1985). As John Adams put it, the "Constitution for Massachusetts . . . made the Constitution of the United States." *See* Ronald M. Peters, Jr., *The Mass. Constitution of 1780: A Social Compact* (1978) at 14. Even in areas where the language of the State and Federal Constitutions is similar or the same, this Court has often noted its right and obligation to interpret the state Constitution independently. *See, e.g., Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 328 (2003).

The Federal Constitution sets the floor on individual rights and protections, but this Court, exercising its independent right and duty, has often raised that floor.

As former Chief Justice Wilkins explained: "I think of the Supreme Court as describing a common base from which we can go up. . . . We are not trying to be contrary. We are, however, entitled to our own views, indeed constitutionally required to have them." Herbert P. Wilkins, *Remarks to Students at New England School of Law*, 31 New Eng. L. Rev. 1205, 1213 (1997). *See also Ireland Overview*, 38 Val. U. L. Rev. at 407; *Cordy Article*, 45 New Eng. L. Rev. at 832.

The instances in which this Court has extended federal constitutional protections under the Declaration of Rights or rejected federal limitations on individual rights are legion. They include:

- ***Death Penalty:*** *Watson*, 381 Mass. at 648 (finding the state death penalty statute unconstitutional under art. 26, notwithstanding the Supreme Court's holding in *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) that "the punishment of death does not invariably violate the [U.S.] Constitution");

- ***Gay Rights/Marriage Equality:*** *Goodridge*, 440 Mass. at 328 (holding that due process and equal protection under the Massachusetts Constitution protects the right of same-sex couples to marry, a matter not yet decided under the U.S. Constitution);

- ***Abolition of Slavery:*** *Commonwealth v. Jennison*, 1873-1875 Proc. of Mass. Hist. Soc., 292 (1875) (in 1783, long before slavery had been abolished at the federal level, and before the U.S. Constitution even came into existence, SJC Chief Justice William Cushing announced in a charge to a jury that slavery was incompatible with the new Massachusetts Constitution); *see also* The Massachusetts Constitution, Judicial Review and Slavery: The Quock

Walker Case, at http://www.mass.gov/courts/sjc/constitution-slavery-e.html;

- ***Abortion Rights:*** *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 651 (1981) (holding that statutes restricting payment of state Medicaid funds for abortions to cases in which an abortion is necessary to prevent the death of the mother impose an impermissible burden on the due process rights protected by art. 10, notwithstanding the Supreme Court's holding in *Harris v. McRae*, 448 U.S. 297 (1980) that such restrictions are permissible under the U.S. Constitution);

- ***Right to Counsel:*** *Commonwealth v. Mavredakis*, 430 Mass. 848 (2000) (holding that preventing a suspect under interrogation from being contacted by his/her attorney or third parties is unconstitutional under art. 12, notwithstanding the Supreme Court's holding in *Moran v. Burbine*, 475 U.S. 412 (1986) that police have no duty under the Fifth and Sixth Amendments to inform a suspect that an attorney is attempting to render legal services);

- ***Privacy and Possessory Rights***: *Commonwealth v. Blood*, 400 Mass. 61, 71 (1987) (holding that one-party consent authorizing electronic surveillance violates art. 14, notwithstanding the Supreme Court's holding in *United States v. Caceres*, 440 U.S. 741 (1979) that warrantless surveillance with one party consent does not violate the Fourth Amendment); *Commonwealth v. Balicki*, 436 Mass. 1 (2002) (declining to follow *Horton v. California*, 496 U.S. 128 (1990) in abandoning the inadvertence requirement to the plain view doctrine, and holding that even if the inadvertent discovery requirement furthers no privacy interest under the Fourth Amendment, it continues to protect possessory interests under art. 14);

- ***Search and Seizure:*** *Commonwealth v. Gonsalves*, 429 Mass. 658, 662 (1999) (declining to follow *Maryland v. Wilson*, 519 U.S. 408 (1997), and guaranteeing "protections to drivers and occupants of motor vehicles under art. 14" that are not recognized under the Fourth Amendment); *Commonwealth v. Lyons*, 409 Mass. 16 (1990) (holding that under art. 14,

investigative stops must be supported by "reasonable suspicion," a more stringent standard than the federal "totality of the circumstances" test applied in *Alabama v. White*, 496 U.S. 325 (1990));

- ***Standing in Criminal Cases:*** *Commonwealth v. Amendola*, 406 Mass. 592 (1990) (adopting automatic standing rule, which had been rejected by the U.S. Supreme Court in *United States v. Salvucci*, 448 U.S. 83 (1980), and enabling defendants to automatically contest the legality of searches and seizures resulting in evidence against them);

- ***Right Against Self-Incrimination:*** *Opinion of Justices to Senate*, 412 Mass. 1201 (1992) (rejecting reasoning of *South Dakota v. Neville*, 459 U.S. 553 (1983), and holding that proposed statute, under which refusal to submit to a breathalyzer test would be admissible evidence, would violate art. 12's right not to furnish evidence against oneself);

- ***Custodial Statements***: *Commonwealth v. Martin*, 444 Mass. 213 (2005) (rejecting Supreme Court's reasoning in *United States v. Patane*, 542 U.S. 630 (2004), and requiring suppression of defendant's uncoerced but unwarned statements; noting that adoption of the Supreme Court's reasoning "would have a corrosive effect" on "the broader rights embodied in art. 12");

- ***Election Law***: *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83 (1983) (holding that candidate for public office has constitutional right under art. 9 to solicit signatures upon the premises of a private shopping mall, notwithstanding the absence of any such right under the First Amendment);

- ***Confrontation Rights:*** *Commonwealth v. Amirault*, 424 Mass. 618 (1997) (interpreting art. 12 as providing for broader confrontation rights than the Sixth Amendment as interpreted by the Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990), and finding that special seating arrangements for child witnesses, in which witnesses are seated facing the jury, deprive defendants of their art. 12 right to confront witnesses "face to face");

- ***Right to Immunity from Prosecution:*** *Attorney Gen. v. Colleton*, 387 Mass. 790 (1982) (departing from the Supreme Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972), which held that a grant of "use and derivative-use immunity" was sufficient to compel testimony in contravention of the Fifth Amendment, and holding that a grant of full "transactional immunity" is needed to displace the privilege against self-incrimination in art. 12);

- ***Right of Free Expression***: *Commonwealth v. Sees*, 374 Mass. 532 (1978) (holding that an ordinance prohibiting nude dancing on premises where alcohol is sold violates art. 16, notwithstanding the Supreme Court's conclusion in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) that such prohibitions do not violate the First Amendment).

These cases make clear that the "Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ . . . the same language." *Goodridge*, 440 Mass. at 328.

2. Article 26 of the Declaration of Rights Provides Greater Protections Than the Eighth Amendment.

In interpreting the State Constitution, this Court has departed from Supreme Court precedent and expanded upon federal constitutional rights even when the language in the two Constitutions is identical. *See generally supra.*, Argument § 1. But "[t]extual differences between the State and Federal Constitutions provide [an added] basis for the SJC to depart from analogous Supreme Court decisions." *Ireland Overview* at 412. Here, the explicit textual

difference between the Eighth Amendment's "cruel ***and*** unusual" language and art. 26's "cruel ***or*** unusual" language provides an additional basis for invalidating JLWOP.

Although the legislative history of art. 26 is scarce, it is clear that when the provision was written in 1780, the drafters chose to use the word "or." Subsequently, the Northwest Ordinance, passed by the Congress of the Confederation in 1787, similarly prohibited "cruel ***or*** unusual" punishment. But the Eighth Amendment, passed by the First Congress two years later, prohibited "cruel ***and*** unusual" punishment. Since the Federal Constitution, including much of the Bill of Rights, was modeled on the Massachusetts Constitution—*see, e.g.*, *Upton*, 394 Mass. at 372; *Wilkins*, 31 New Eng. L. Rev. at 1213—we may infer that "or" was changed to "and" in the Eighth Amendment based on a conscious choice to require a greater showing before a punishment could be found unconstitutional at the federal level. *See, e.g.*, *Mavredakis*, 430 Mass. at 859 ("all the words of the Constitution must be presumed to have been chosen advisedly").

As a simple linguistic matter, "or" is different than "and." Not surprisingly, the differences between the two words have been recognized not only by Webster's and Oxford, but by this Court and the Supreme Court. *See,*

e.g., *Bleich v. Maimonides Sch.*, 447 Mass. 38, 46-47 (2006) ("It is fundamental to statutory construction that the word 'or' is disjunctive unless the context and the main purpose of all the words demand otherwise") (internal quotations omitted); *Chisom v. Roemer*, 501 U.S. 380, 397 (1991) ("It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.'").

In fact, other states with constitutional prohibitions on "cruel ***or*** unusual" punishment have explicitly found that their state prohibitions are more expansive than those in the Federal Constitution. For example, in *People v. Bullock*, 485 N.W. 2d 866, 872 (Mich. 1992), the Michigan Supreme Court observed:

> [T]he Michigan provision prohibits 'cruel *or* unusual' punishments, while the Eighth Amendment bars only punishments that are both 'cruel *and* unusual.' This textual difference does not appear to be accidental or inadvertent. . . . While the historical record is not sufficiently complete to inform us of the precise rationale behind the original adoption of the present language by the Constitutional Convention of 1850, it seems self-evident that any adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.' *The set of punishments which are either 'cruel' or 'unusual' would seem necessarily broader than the set of punishments which are both 'cruel' and 'unusual.'*

Bullock, 485 N.W. at 872 & n. 11 (emphasis added); *see also People v. Haller*, 174 Cal. App. 4th 1080, 1092 (Cal. App. 3d 2009); *Johnson v. State*, 61 P.3d 1234, 1249 (Wyo. 2003).

This Court has already read art. 26 as broader than the Eighth Amendment when, in *Watson*, 381 Mass. at 671, it abolished the death penalty in Massachusetts. Specifically, the *Watson* court found the death penalty "cruel" within the meaning of art. 26 notwithstanding the Supreme Court's holding in *Gregg*, 428 U.S. at 153, that the penalty was not "cruel" under the Eighth Amendment. The *Watson* court did not reach the issue of whether the death penalty was also unusual. *Watson*, 381 Mass. at 661. And it did not explicitly decide whether a punishment could violate art. 26 by being either "cruel" or "unusual." *Id.* at 676 (Liacos, J., concurring). Implicitly, the Court held that either/or would be sufficient, but it did not expressly so hold.

Here, amici ask the Court to find that a punishment violates art. 26 if it is either "cruel" or "unusual." But even if the Court does not find the two concepts entirely distinct from one another, it must still find JLWOP unconstitutional, as it is both "cruel" and "unusual." Not only is the phrase "cruel or unusual" in art. 26 broader than the phrase "cruel and unusual" in the Eighth Amendment, but each concept within the phrase, standing alone, is broader than its Eighth Amendment counterpart. With respect to the "cruel" prong, this is evidenced by

the holding of *Watson*. This case affords the Court the opportunity to make clear that a punishment may likewise be deemed constitutionally "unusual" in Massachusetts even if it has been authorized federally. In any event, the punishment of JLWOP is both "cruel" and "unusual" under art. 26. Unquestionably, it is at least one of the two.

3. JLWOP Sentences Are "Unusual."

A. The United States Is the Only Country in the World That Imposes JLWOP.

We start with the "unusual" prong because life sentences for juveniles without the opportunity for parole are so clearly and objectively unusual, particularly when measured by global standards. And, of course, global standards can and should be considered when determining whether a practice is "unusual" within the meaning of art. 26. As this Court has observed, "the word 'unusual' may suggest the need for an ongoing comparison of punishments meted out for comparable crimes in similar cultures." *Watson*, 381 Mass. at 661. *See also Trop*, 356 U.S. at 100-02 (interpreting the meaning of "cruel and unusual" warrants review of the laws and practices of similar nations).

"[A]rt. 26, like the Eighth Amendment, 'must draw its meaning from the evolving standards of decency that mark

the progress of a maturing society.'" *O'Neal I*, 367 Mass. at 451 (Wilkins, J., concurring)(citing *Trop*, 356 U.S. at 101). *See also Libby v. Comm'r of Correction*, 385 Mass. 421, 431 (1982). Article 26, and in particular its prohibition on "unusual" punishments, must be interpreted "progressively." *Commonwealth v. O'Neal*, 369 Mass. 242, 250 n.10 (1975) ("*O'Neal II*") (Tauro, CJ., concurring).

On the issue of JLWOP, the world has spoken, and it has spoken with a single voice. There is a "global consensus" that has condemned the practice of putting children in prison for the rest of their lives without any opportunity for parole. *See Graham*, 130 S. Ct. at 2033. The United States stands alone in permitting JLWOP.[3]

No person is known to be serving a JLWOP sentence anywhere in the world other than the United States. *See id.*; C. de la Vega and M. Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983, 990 (2008). This is not only true in countries with "similar cultures." *Watson*, 381 Mass. at 661. Name any country on the globe with a past or current reputation

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[3] As of the time of the Supreme Court's *Graham* decision, it was unclear whether Israel also engaged in the practice of imposing JLWOP sentences on children. But since then, Israel has made it clear that although it permits juveniles to be given life sentences, juveniles will be considered for parole in all instances. *See* Brief for Amnesty International, *et al.*, as Amici Curiae Supporting Petitioners, at 17, *Miller*, 132 S. Ct. 2455.

for barbarism or a poor human rights record—Afghanistan, Iran, Iraq, Libya, Syria, etc.—not a single one engages in the practice of throwing kids in jail and throwing away the key. Shamefully, the United States is the only exception.[4]

B. Even Within the United States, the Trend Is Away From JLWOP Sentences.

Even among states within the United States, there is a definite trend toward abolishing JLWOP. Eighteen states and the District of Columbia have taken the lead. The District of Columbia and thirteen states—Alaska, California, Colorado, Delaware, Kansas, Kentucky, Montana, Nebraska, New Mexico, Oregon, Texas, Utah, and Wyoming—have legally banned JLWOP. Another five states—New York, New Jersey, Maine, Vermont, and West Virginia—have a *de facto* prohibition, with no juveniles serving LWOP sentences. *See USF Juvenile Life Without Parole Resource Guide*, http://www.usfca.edu/law/jlwop/resource_guide/ (updated through Nov. 2012) ("USF JLWOP Guide").

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[4] JLWOP sentences are contrary not just to international practice, but to international treaties and laws. For example, the U.N. Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia, explicitly prohibits JLWOP sentences. *See* U.N. Convention on the Rights of the Child, art. 37, 1577 U.N.T.S. 3 (Nov. 20, 1989). Similarly, the prohibition on JLWOP has been recognized as an obligation of the International Covenant on Civil and Political Rights, which the United States ratified in 1992. *See* International Covenant on Civil and Political Rights, art. 14(4), 999 U.N.T.S. 17 (Dec. 16, 1966).

The trend away from JLWOP has been especially pronounced in the wake of the Supreme Court's 2012 *Miller* decision:

- Just three weeks after *Miller*, the Governor of Iowa commuted 38 JLWOP sentences.[5]

- In 2012, North Carolina and Pennsylvania passed laws abolishing JLWOP for 2nd degree and felony murder. 2012 N.C. Sess. Laws 148 (S.B. 635); 2012 Pa. Laws. 1655 (S.B. 850).

- In 2012, California, one of the states (along with Massachusetts) with the highest number of juveniles serving life without parole, passed the Fair Sentencing of Youth Act, which retroactively provides re-sentencing and parole opportunities to all of the nearly 300 defendants serving life without parole sentences that they received as children. *See* 2012 Cal. Legis. Serv. Ch. 828 (S.B. 9) (West).

- In February 2013, the Governor of Wyoming signed legislation abolishing life without parole for children. *See* 2013 Wyoming Laws ch. 18 (H.B. 23).

- In March 2013, the Governor of South Dakota signed into law a sentencing structure that affords judges the discretion to sentence children not just to life with parole, but to a sentence of a determinate term. *See* 2013 South Dakota Laws S.B. 39 (West).

In addition to the 18 states and the District of Columbia that have in law or practice abolished life

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[5] The Governor commuted the sentences from life to 60-year terms. Just three days ago, on August 16, 2013, in *State v. Ragland*, -- N.W.2d --, No. 12-1758, 2013 WL4309970 (Iowa 2013), the Iowa Supreme Court held that *Miller* applies retroactively in Iowa, and further held that the Governor's commutations did not remove the 38 JLWOP cases from the mandate of *Miller* because the 60-year sentences, as commuted, were unconstitutionally "cruel and unusual" punishment in Iowa.

without parole for juveniles, approximately 15 other states, including Massachusetts, have proposed legislation over the past year aimed at limiting and/or abolishing life without parole sentences for children. If only eight of the states pass their bills, the majority of states in the United States will no longer sanction JLWOP. Regardless, it is clear that an already "unusual" practice is quickly becoming more and more "unusual" even in the United States, the world's one outlier country.[6]

C. Massachusetts's Law and Practice Regarding JLWOP Are Among the Very Harshest in the Country, and Stand in Sharp Contrast to This State's Proud History of Protecting Civil Rights, Including the Rights of Juveniles.

Although Massachusetts is one of the states with pending legislation addressing JLWOP, many of the proposed bills would continue to authorize the punishment.[7] As a constitutional matter, the fate of juvenile homicide offenders should not be left to the vicissitudes of the legislative process. *See, e.g.*, *Goodridge*, 440 Mass. at 339 ("We owe great deference to the Legislature to decide

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[6] There is, of course, no "majority rule" requirement for a practice to be considered constitutionally "unusual" under either the State or Federal Constitution. *See, e.g.*, *Graham*, 130 S. Ct. at 2023-30 (holding life without parole for non-homicide juvenile offenders is unconstitutionally "cruel and unusual" notwithstanding the fact that 39 states utilized the practice).

[7] *See, e.g.*, S. 714, 188th Leg. (Mass. 2013), H. 1426, 188th Leg. (Mass. 2013), and H. 1319, 188th Leg. (Mass. 2013), all of which would allow for JLWOP sentences in certain circumstances.

social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues."). This is a constitutional matter. It is a human rights matter. It is a civil rights matter. It is a matter of protecting and offering a chance at redemption to a despised and powerless minority, namely children convicted of homicide. It is exactly the sort of matter upon which this Court, utilizing the Declaration of Rights, has previously acted and must act here.

That we find ourselves in the current situation is remarkable, especially given Massachusetts's progressive history, and its past record of being in the forefront of civil rights, and among the national leaders in protecting the rights of children. Massachusetts has long recognized that children are not simply mini-adults, and our laws have afforded

> minors a unique and protected status. The law presumes different levels of responsibility for juveniles and adults and, realizing that juveniles frequently lack the capacity to appreciate the consequences of their actions, seeks to protect them from the possible consequences of their immaturity.

Commonwealth v. A Juvenile (No. 1), 389 Mass. 128, 132 (1983). Indeed, the recognition that "children were not considered as responsible for their misbehavior as were adults" and "children in their developing years were more

conducive to rehabilitation than adults" influenced the very development of a separate juvenile court system in Massachusetts. *See* Roderick Ireland, 44 *Massachusetts Practice, Juvenile Law* § 1.3, n.1 (2d ed. 2006) (citation omitted). Massachusetts's recognition of the immaturity and vulnerability of children drove the creation of Massachusetts law that today mandates that "the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance." G.L. c. 119, § 53.

In fact, those in Massachusetts who are among the individuals closest to the juvenile system of justice, namely current and former juvenile court justices, are especially cognizant of the special status of children and the many differences between kids and adults. Notably, a group of these justices—former Massachusetts Juvenile Court Judges Margaret S. Fearey, Gail Garinger, Martha P. Grace, Julian Houston, Gordon Martin, and Lillian Miranda—who have "collectively spent decades presiding over cases involving thousands of serious (often violent) juvenile offenders," submitted an amicus brief on behalf of the

petitioner in *Miller*, arguing that "juvenile offenders, including those who commit homicide offenses, are categorically different from adult offenders." *See* Brief of Former Juvenile Court Judges as Amici Curiae in Support of Petitioners, at 6, *Miller*, 132 S. Ct. 2455. The former Massachusetts judges further noted that the distinguishing characteristics of youth can contribute to juvenile criminality, *id.* at 9-13, and explained how life without parole sentences significantly limit a juvenile's ability to reform and change, *id.* at 20-26.

Notwithstanding Massachusetts's history, and notwithstanding the compelling views expressed by its own former Juvenile Court judges, Massachusetts is among the most extreme states in the nation, and unquestionably "unusual" in the harshness with which it treats juveniles charged and then convicted of homicide offenses:

- Massachusetts is one of only two states that automatically tries children as young as 14 who are accused of murder as adults, and then upon conviction sentences them to life without parole. Children's Law Center, *Until They Die a Natural Death: Youth Sentenced to Life Without Parole in Massachusetts* (Sept. 2009) ("CLCM Report") at 7.

- According to the Committee for Public Counsel Services, there are 62 juvenile offenders serving JLWOP sentences in Massachusetts. As of November 2012, no more than nine states had more juveniles serving JLWOP sentences: Alabama, Arkansas, California, Florida, Illinois, Louisiana, Michigan, Missouri, and Pennsylvania. *See* USF JLWOP Guide.

But, since then, California has given all juvenile lifers the opportunity to be resentenced, Pennsylvania has abolished JLWOP for 2nd-degree and felony-murder, and there have been developments in other states as well. *See supra.*, Argument § 3B.

- In the traditionally progressive Northeast, incorporating the New England states, New York, and New Jersey, Massachusetts stands alone in the harsh and unforgiving manner in which it treats juvenile homicide offenders. CLCM Report at 7. Indeed, Massachusetts has more children serving JLWOP sentences than all of the other northeast states combined. National Conference of State Legislatures, JLWOP (Feb. 2010).

- The Massachusetts number of juveniles serving life without parole is particularly shocking when compared to New York and New Jersey, two states that dwarf Massachusetts in both population and juvenile crime, but neither of which has a single individual serving JLWOP. *See* Office of Juvenile Justice and Delinquency Prevention, 2010 Statistics, http://ojjdp.gov/ojstatbb/ezaucr/asp/ucr_display.asp In 2010, Massachusetts had 664,600 juveniles with an arrest rate of 2,341 per 100,000 juveniles; New York had 1.99 million juveniles with an arrest rate of 4,697 per 100,000; and New Jersey had 957,100 juveniles with an arrest rate of 4,240 per 100,000. *Id.* (search drop-down menu for data on each state).

Just as it is an objective fact that JLWOP is "unusual" in the world, and just as it is an objective fact that the trend in the United States is decidedly away from this most unusual practice, it is also an objective fact that Massachusetts is "unusual" among the "unusual." Its record on JLWOP is among the worst in the United States. Insofar as Article 26 "'must draw its meaning from the evolving standards of decency that mark the progress of a

maturing society,'" *O'Neal I*, 367 Mass. at 451 (Wilkins, J., concurring), it is high time for Massachusetts to evolve and mature. Our practice of JLWOP is unquestionably "unusual" within the meaning of art. 26, and on that basis alone, it should be abolished.

4. JLWOP Sentences Are "Cruel."

The punishment of JLWOP is as "cruel" within the meaning of art. 26 as it is "unusual." The fundamental test of whether a punishment is "cruel" under art. 26 is disproportionality. *See, e.g., O'Neal II*, 369 Mass. at 247-48. Article 26, like the Eighth Amendment, "guarantees individuals the right not to be subjected to excessive sanctions." *Roper*, 543 U.S. at 560. This is a "right" that "flows from the basic 'precept of justice 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, in turn quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). By definition, "excessive" sanctions are disproportionate and, therefore, unconstitutionally "cruel."

Proportionality is the core test of art. 26 "cruelty" because, as this Court has noted:

> Of necessity, every punishment contains an element of cruelty. . . . However, society tolerates a degree of cruelty when such cruelty

> is necessary to serve its legitimate needs. It is only when the level of cruelty is disproportionate to the magnitude of the crime, and as a consequence does not serve the needs of society, that a court will find the punishment too cruel and, thus, 'cruel' within the meaning of art. 26.

O'Neal II, 369 Mass. at 247-48; *see also Watson*, 381 Mass. at 661. In fact, this Court has long recognized that in certain circumstances, "imprisonment for a long term of years might be so disproportionate to the offense as to constitute cruel and unusual punishment" under art. 26. *Cepulonis v. Commonwealth*, 384 Mass. 495, 496-97 (1981).

Any punishment that is so disproportionate "that it shocks the conscience and offends fundamental notions of human dignity," is "cruel" and violative of art. 26. *Opinion of the Justices*, 378 Mass. 822, 830 (1979). Likewise, any punishment that is not in keeping with "the evolving standards of decency that mark the progress of a maturing society," *O'Neal I*, 367 Mass. at 451 (Wilkins, J., concurring), is disproportionate, and should be deemed "cruel" and unconstitutional under art. 26.

In assessing whether a sentence is disproportionate, and thus "too cruel" to pass constitutional muster under art. 26, this Court has utilized a three-part test: (i) whether the "challenged penalty" is disproportionate in comparison to "penalties prescribed for the same offense in

other jurisdictions"; (ii) whether the punishment is disproportionate to "punishments prescribed for the commission of more serious crimes in the Commonwealth"; and (iii) whether the punishment is disproportionate given "the nature of the offense and the offender in light of the degree of harm to society." *Cepulonis*, 384 Mass. at 497-98. When applied to the penalty at issue, *i.e.*, JLWOP, each of the three parts of the test illustrate the disproportionality, and thus the cruelty, of the penalty.

A. The Sentence of JLWOP is Disproportionate to the Penalty for Juvenile Homicide Offenders in Other Jurisdictions.

As discussed in detail above, the penalty of JLWOP for homicide offenses is non-existent in any "jurisdiction" in the world outside of the United States, and increasingly non-existent in jurisdictions throughout the United States. The fact that the penalty is becoming an extinct species highlights its unusualness, and likewise shows why it is "cruel." After all, jurisdictions around the globe have abolished the penalty not just to go along with the majority, but because the penalty "shocks the conscience and offends fundamental notions of human dignity." *See Opinion of the Justices*, 378 Mass. at 830. As a practical matter, the penalty is unusual precisely because it is cruel. Indeed, if a "comparison of the challenged penalty

with the penalties prescribed for the same offense in other jurisdictions," *Cepulonis*, 384 Mass. at 498, were the sole test of disproportionality and "cruelty," JLWOP would necessarily be unconstitutionally "cruel" under art. 26.

B. JLWOP Offends Contemporary Standards of Decency, and Will Inevitably Be Applied In An Arbitrary and Capricious Manner.

The second part of the disproportionality test "involves a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes." *Cepulonis*, 384 Mass. at 498. There is, of course, a sense in which this part of the test could never be applied in any first degree murder case "because there are no crimes more serious than [first degree murder]." *Commonwealth v. Diatchenko*, 387 Mass. 718, 726 (1982). But if this were true, no penalty for first degree murder, including the death penalty, could ever be deemed "cruel" under art. 26. Yet, as we know, this Court has already held that the death penalty is unconstitutionally "cruel." *See Watson*, 381 Mass. at 665.

In *Watson*, 381 Mass. at 650, the death penalty was found unconstitutionally "cruel" because it offended "contemporary standards of decency" and would inevitably be applied in an arbitrary and capricious, and discriminatory

manner. For these same reasons, JLWOP sentences should be deemed unconstitutionally "cruel."

Contemporary standards of decency: The *Watson* court found that "the death penalty is unacceptable under contemporary standards of decency in its unique and inherent capacity to inflict pain." 381 Mass. at 664. When applied to children, the sentence of life without the possibility of parole is no different from the death penalty. As this Court has observed:

> The imposition of a life sentence without possibility of parole is a solemn and awesome act. Like a sentence of death, it is intended to remove a person from our midst for the rest of his natural life. It is more awesome when imposed on [a juvenile], who may expect to live out his young manhood, middle, and late years all in confinement.

Commonwealth v. Fuller, 421 Mass. 400, 414 (1995). Such sentences effectively sentence a juvenile to die in prison—a "death sentence without an execution date." Berry, *More Different than Life, Less Different than Death*, 71 Ohio L. J. 1109, 1124 (2010). As the Supreme Court noted in *Graham*,

> Life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The state does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except

> perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.

130 S. Ct. at 2027. In the case of juveniles, these considerations are magnified. "[L]ife without parole is an especially harsh punishment for a juvenile." *Id.* at 2028; *see also Fuller*, 421 Mass. at 414. A "juvenile offender [] will on average serve more years and a greater percentage of his life in prison than an adult offender." *Graham*, 130 S. Ct. at 2028. A "16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.*

Whether measured in absolute terms (number of years in prison) or relative terms (percentage of life spent in prison), life without parole for juveniles is disproportionately harsh when compared to the same punishment for adults. With the death penalty having been abolished under art. 26, the application of life without parole sentences to children offends "contemporary standards of decency in its unique and inherent capacity to inflict pain," *Watson*, 381 Mass. at 664, for 50, 60, 70 or even 80 years for each individual so sentenced. The unending hopelessness of the sentence is a "mental agony [that] is simply and beyond question, a horror." *Id.*

Arbitrary and Capricious: In support of the finding that the death penalty would inevitably be applied arbitrarily, this Court noted the disconnect between the "thousands of persons . . . convicted of criminal homicides" and the "minute fraction of those cases" in which "death was inflicted." *Id.* at 665. The Court observed that "[n]o rational basis [could] be offered to explain why the few were executed and many others were not," *id.*, and therefore found the death penalty "inescapably capricious," and "wantonly and freakishly inflicted." *Id.* at 665-66. Notwithstanding the "discipline" built into Massachusetts's then still untested, post-*Furman* death penalty statute, this Court struck down the statute as unconstitutionally "cruel" based on its belief that the "arbitrariness in sentencing" would inevitably continue. *Id.* Here, if anything, there is even more reason to believe that the sentence of JLWOP will be applied arbitrarily.

Post-*Miller*, *mandatory* JLWOP sentences are no longer an option. As a result, to the extent life sentences continue to be authorized for juveniles convicted of first degree murder, courts or juries will necessarily be asked to determine, as a matter of discretion, if children convicted of that crime should be sentenced to life without

parole or life with the possibility of parole. And this decision, this choice to give children either a glimmer of hope or absolute and permanent hopelessness, will in each and every case be made blind, without an adequate track record, and with inevitable inconsistency and unreliability. The age of the juvenile defendants who will be subjected to the choice, and their immaturity, and amenability to growth and change, guaranty that the line between the uncommon few who receive life without parole sentences and the rest who do not, will be arbitrary and capricious, and, therefore, "cruel" under *Watson* and art. 26. As the Supreme Court states in *Roper*, 543 U.S. at 573:

> It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. . . . If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation.

In *Watson*, this Court did not wait for the then new post-*Furman* death penalty statute to be applied arbitrarily before striking it down. Instead the Court found that the arbitrary application would be inevitable. The same is true here. And the constitutional result should be the same.

Discrimination: The final reason cited in *Watson* for finding the death penalty unconstitutionally "cruel" was this Court's observation that the penalty had "disproportionately been imposed and carried out on the poor, the Negro, and the members of unpopular groups," and that the discrimination would "inevitably persist." *Id.* at 669-70. Here, in Massachusetts, there is likewise no question that JLWOP sentences have disproportionately been meted out to persons of color, particularly African-American teenagers who have been tried and convicted of first degree murder in Suffolk County. For instance:

- Although African-Americans make up only 6.5% of the population of Massachusetts, they make up 47% of those serving JLWOP sentences. CLCM Report at 7.

- Sixty-one percent of youth under age 18 sentenced to life without parole in Massachusetts are people of color. *Id.*

- Although Suffolk County makes up only 11% of the State's population, over 50% of the children serving life without parole were sentenced for crimes that occurred in Suffolk County. *Id.*

There is little question that such discrimination will persist in the post-*Miller* world. Just as this Court in *Watson* "reject[ed] any suggestion that racial discrimination is confined to the South or to any other geographical area," 381 Mass. at 670, it should reject any suggestion that discrimination is a thing of the past, and

that African-American and other minority teenagers convicted of first degree murder in the Commonwealth will receive fair and unbiased treatment if and when it comes to meting out life without parole as opposed to lesser sentences. The discrimination that contributed to this Court's determination that the death penalty was unconstitutionally "cruel" continues today. This stubborn persistence of discrimination should result in the abolition of JLWOP sentences.

C. The Degree of Harm to the Society As Well As the Penological Purposes of Sentencing Militate Against the Preservation of JLWOP Sentences.

The final prong of the disproportionality analysis focuses on the "offender" and the "degree of harm to society" caused by the punishment. *Cepulonis*, 384 Mass. at 497. This prong also takes into account the "penological purposes of the prescribed punishment" and whether the punishment is greater than necessary to achieve the requisite penological purposes. *Jackson*, 369 Mass. at 910. In all respects, this prong weighs heavily in favor of the abolition of JLWOP under art. 26.

i. The Degree of Harm to Society

With respect to the nature of the offender and the degree of harm to society caused by JLWOP, there can be no doubt that the punishment is disproportionate. When

applied to children, the punishment causes egregious harm to society, as it robs society not just of the life of the young offender's victim, but also of the life of the young offender before that offender has had the opportunity to mature and prove that he/she is more than his/her offense.

Most fundamentally, the punishment fails to take into account the many significant differences between children and adults. These differences, all of which are crucially important with regard to sentencing, include three especially relevant considerations identified by the Supreme Court in both *Graham* and *Miller*: (i) children have a "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking"; (ii) children are "more vulnerable ... to negative influences and outside pressures, including from their family and peers," as well as a lack of "control over their environment" and a lack of ability "to extricate themselves from horrific, crime-producing settings"; and (iii) children's characters are "not as well formed as an adult's," and their actions are "less likely to be evidence of irretrievable depravity." *Miller*, 132 S. Ct. at 2464; *Graham*, 130 S. Ct. at 2026.

These same differences between children and adults have long been recognized in numerous areas of

Massachusetts law, including contracts, torts, voting, and criminal law and procedure. *See, e.g.*, Ireland, *Juvenile Law* § 1.3, n. 1. In criminal law and procedure, the Commonwealth has been particularly sensitive to the differences between children and adults, routinely affording children greater protection and enhanced safeguards. *See, e.g., Commonwealth v. Guyton*, 405 Mass. 497, 502 (1989); *A Juvenile*, 389 Mass. at 132. Indeed, as discussed above, the very existence of the Juvenile Court and the Commonwealth's delinquency system is testimony to Massachusetts's recognition of the differences between juveniles and adults, and the recognition of the undeniable fact that juveniles as a class are less culpable and more amenable to rehabilitation. *See generally* G.L. c. 119, § 53; *Police Comm'r of Boston v. Mun. Court of Dorchester Dist.*, 374 Mass. 640, 666 (1978).

As Justice Lenk noted in her concurring opinion in *Commonwealth v. Walczak*, 463 Mass. 808, 811 (2012), "an indictment for murder brought against a juvenile defendant carries an added and significant consequence." Justice Lenk further observed that the decision to indict a juvenile "for murder and bypass the Juvenile Court is now made by the grand jury without taking the defendant's youth into consideration in any way [is] a procedure that is in

tension with significant considerations recognized in [*Roper, Graham,* and *Miller*]." *Id.* The sentencing of juveniles who are convicted of first degree murder to life without parole, even if the sentencing is issued as a matter of discretion, is even more in tension with those "significant considerations." Indeed, any such sentence necessarily ignores the differences between children and adults. Any and all JLWOP sentences fly in the face of our legal tradition, and disregard everything that science has taught us over the past 20 years about human brain development and the capacity for children to change.[8] In every instance when a child is sentenced to JLWOP, we prematurely give up on that child forever. The harm to society in every such instance is not only disproportionate, it is irretrievable and cruel.

To illustrate this inherent cruelty of JLWOP sentences, and show how society is harmed when we give up on children, amici briefly summarize the histories of

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[8] Research has consistently shown that personality traits change significantly during the developmental transition from adolescence to adulthood, the process of identify-formation typically remains incomplete until at least the early twenties, and the vast majority of adolescents who engage in delinquent behavior desist from crime as they mature. *See, e.g.*, Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 Am. Psychologist 739, 742 (2009); Elizabeth Scott & Laurence Steinberg, *Rethinking Juvenile Justice* at 52 (2008); Brent Roberts et al., *Patterns of Mean-Level Change in Personality Traits Across the Life Course*, 132 Psychol. Bull. 1, 14-15 (2006).

several current Massachusetts prisoners,[9] all of whom are serving life without parole sentences for murders committed when they were juveniles:

James Costello
Commonwealth v. Costello, 392 Mass. 393 (1984)

- Underlying murder occurred in 1981 when Costello was 15 years old;
- Costello is now 47 years old and has been incarcerated for approximately 32 years;
- Convicted along with adult co-defendant;
- Long history of sexual abuse by Father John Geoghan;
- Acknowledged sexual abuse for the first time while in prison years after the fact, and received counseling;
- Earns GED;
- Learns Spanish and becomes interpreter for Spanish population in prison;
- Earns professional welder's certification;
- Earns professional cooking certification;
- Is baptized and becomes a Christian minister;
- DOC employees describe Costello as "reliable," "a good worker," "very respectful," and "very trustworthy."

Steven Ward
Ward v. Commonwealth, 407 Mass. 434 (1990);
Commonwealth v. Ward, 412 Mass. 395 (1992)

- Underlying murder occurred in 1988 when Ward was 16 years old;
- Ward is now 41 years old and has been incarcerated for approximately 25 years;
- History of child abuse in biological family and foster care;
- History of drug and alcohol abuse in high school;
- Earned GED in 1991;
- Earned BA in Libertal Arts, *magna cum laude*, from Boston University in 1999;

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[9] The information included in the summaries was obtained from counsel for the various individuals. All the information is readily verifiable. Upon request, undersigned counsel will provide appropriate affidavits supporting the enumerated facts.

- Graduated from advanced welding program consisting of 220 hours of coursework, and obtained welder certification;
- Took OSHA training courses on occupational health and safety;
- Master upholsterer, who has been employed in the mattress/upholstery shop at MCI-Norfolk for the past 22 years;
- Active participant in Fresh Air Program helping inmates who are disabled or suffer from Alzheimer's disease;
- Active participant in numerous prison programs including Alcoholics Anonymous, Narcotics Anonymous, Alternatives to Violence, Library Discussion Groups, and Restorative Justice Program;
- Very few d-tickets with no charges of violence in past 20 years.

Gregory Diatchenko

Commonwealth v. Diatchenko, 387 Mass. 718 (1982)

- Underlying murder occurred in 1981 when Diatchenko was 17 years old;
- Diatchenko is now 49 years old, and has been incarcerated for approximately 31 years;
- Obtained GED in prison;
- Has been MCI-Norfolk's chief plumber for many years;
- Became a Zen Buddhist while in prison, and is now the head of the Zen Buddhist community at MCI-Norfolk;
- D-report free for the past 15 years;
- Actively pursuing BA through Boston University's Metropolitan College (now just 5 courses short of completion).

Louis Costa

Commonwealth v. DiBenedetto, et al., 414 Mass. 37 (1992);
Commonwealth v. Tanso, 411 Mass. 640 (1992);
Commonwealth v. DiBenedetto, et al., 427 Mass. 414 (1998);
Commonwealth v. DiBenedetto, et al., 458 Mass. 657 (2011);
Commonwealth v. Costa, No. SJ-2009-0372 (pending)

- Underlying double murder occurred in 1986 when Costa was 16 years old;
- Costa is now 42 years old, and he has been incarcerated for approximately 26 years;
- Earned GED in prison in 1989;

- Earned BA in History, *cum laude*, from Boston University's Metropolitan College in 2010;
- Was on Dean's List every semester he attended the BU college program through which he earned his BA;
- Member of Boston University Honors Society;
- Participated in Justice and Public Safety seminar, a class taught by two Harvard professors, and made up of inmates (invitation only) and students from Harvard and Boston Universities;
- Obtained paralegal certificate, and barber's license;
- Member of MCI-Norfolk's Education Committee;
- A coordinator of MCI-Norfolk's Restorative Justice Seminar in 2012 and 2013, which involved inmates, DAs, judges, and prison and government officials[10];
- D-ticket free for more than 20 years;
- MCI-Norfolk guards describe Costa as "respectful," "polite," "hard worker," "smart and wonderful person";
- Numerous MCI-Norfolk guards, have said in words or substance to Costa's counsel: "I hope you get him out. He deserves better. He's just a great person. He's done his time. Enough is enough."

These are just four of many similar examples. In every instance, the crimes for which they were convicted were horrid. But these young men have proven, against all odds, that they are the very opposite of incorrigible. Their achievements are that much more impressive given the fact that they were accomplished while each man has been serving a life without parole sentence, with no end and no hope in sight (at least prior to *Miller*). We can only imagine the potential each of these men have, and how much more each

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[10] *See* Pierre R. Berastain, *Restorative Justice Behind Prison Walls*, HuffPost (July 11, 2013)(available at http://www.huffingtonpost.com/pierre-r-berastain/); *see also* S. 52, 188th Leg. (Mass. 2013) ("An Act Promoting Restorative Justice Practices").

might have accomplished, had they been given at least the opportunity for parole. There is no doubt that society was deeply harmed by the crimes these men were convicted of committing. But there is just as little doubt that society has been further harmed by their endless periods of incarceration. At a minimum, they and future juvenile homicide offenders should have the glimmer of hope that comes with a meaningful possibility of parole.[11]

ii. The Absence of Any Legitimate Penological Purpose

The disproportionality analysis also requires consideration of whether any legitimate penological purpose is served by the punishment at issue. *Jackson*, 369 Mass. at 910. "A sentence lacking any legitimate penological

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[11] Obviously, the summary profiles of the five featured juvenile homicide offenders accentuate the positive. Only their achievements are mentioned. Although we believe that each of the five is an impressive person, and that each would perform as admirably outside of the prison walls as he has inside, it is at least theoretically possible that the Commonwealth may be able show that one or more of them is dangerous and/or that they should not be paroled for other reasons. This is not the time or place to have that debate. The point here is not to prove that each should be paroled. The point is that each should have the chance. Each should be considered. It is theoretically conceivable (though extraordinarily doubtful) that, in the end, none of the five, and no other past or future juvenile homicide offender, would be paroled or obtain a sentence other than life imprisonment. The point here - the constitutional point - is that each should have the chance. The point is that it is simply impossible to determine when children are 14, 15, 16 and 17, and commit horrible crimes, who they really are, and how they are going to turn out. The evil of JLWOP is that it deprives society of the opportunity to find out. It uses a one size fits all approach that harms the juvenile offenders, and harms the rest of us in the process.

justification is by its nature disproportionate to the offense." *Graham*, 130 S. Ct. at 2028.

In Massachusetts, as elsewhere, there are four main penological justifications for punishment: (i) Deterrence; (ii) incapacitation; (iii) retribution; and (iv) rehabilitation. *See, e.g., O'Neal II*, 369 Mass. at 251, n.11; *Graham*, 130 S. Ct. at 2028-30. But none of these justifications is advanced when children are sentenced to life without parole, even if those children have committed a homicide. As the Supreme Court observed in *Miller*, "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 132 S. Ct. at 2465. Indeed, "[n]one of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. . . . So Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to non-homicide offenses." *Id.* at 2465.

A review of the four standard penological justifications for punishment, and their lack of applicability to JLWOP, regardless of the crime, makes clear why the reasoning of *Graham*, and its categorical bar

on life without parole, should be extended to homicide offenses under art. 26.

Deterrence: With regard to deterrence, "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Roper*, 543 U.S. at 571. "Because juveniles' 'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,' they are less likely to take a possible punishment into consideration when making decisions." *Graham*, 130 U.S. at 2028-29 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

Just as scientific-knowledge and common-knowledge about children offer no reason to believe that juvenile homicide offenders engage in any substantive cost-benefit analysis when it comes to the death penalty, *see Roper*, 543 U.S. at 561-62, they offer no reason to believe these same offenders undertake any real cost-benefit analysis with respect to life without parole. All scientific evidence points to kids, as a class, thinking in the moment, not long-term. *See, e.g.*, Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1012 (2003). In

this regard, the death penalty serves as no more of a deterrent than life without parole, and life without parole serves as no more of a deterrent than life with the possibility of parole. There is no reason to believe that a child who is about to kill is going to be deterred because the sentence he's going to receive if caught is JLWOP as opposed to life with the possibility of parole some day far off in the future. *Id.*

The question that must be asked with regard to deterrence is not whether life without parole would be a deterrent in and of itself, but whether it is necessarily a "better" deterrent than a lesser form of punishment, such as life with the potential for parole. *See, e.g., O'Neal II*, 369 Mass. at 252. When it comes to children, there is no evidence that life without parole is a better deterrent than life with parole. *See Graham*, 130 S. Ct. at 2028-29; *O'Neal II*, 369 Mass. at 255; Amicus Brief of American Psychological Assoc., *Miller*, 132 S. Ct. 2455 (discussing scientific research demonstrating why deterrence arguments do not apply to juveniles).[12]

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[12] *See, e.g.*, Simon Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 Law & Soc'y Rev. 521, 526-32 (1988); Eric Jensen & Linda Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime & Delinq. 96, 100-102 (1994).

Isolation and Incapacitation: The penal interest in isolating and incapacitating violent offenders cannot justify JLWOP. As the Supreme Court observed in *Graham*:

> To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. 'It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'

130 S. Ct. at 2029 (quoting *Roper*, 543 U.S. at 573).

"Deciding that a juvenile offender forever will be a danger to society, would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth." *Miller*, 132 S. Ct. at 2565. Because of the attributes of youth, the actions of juvenile offenders, regardless of how horrific their crimes, are "less likely to be evidence of irretrievable depravity." *Id.* at 2458. The short profiles presented above of four juvenile homicide offenders illustrate the point. Each was convicted of committing a horrific offense. Yet each has proven himself retrievable, and at least deserving of parole consideration.

The Supreme Court has further observed that a "life without parole sentence improperly denies the juvenile

offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Graham*, 130 S. Ct. at 2029. But the Supreme Court has, to date, stopped short of categorically abolishing life without parole for juvenile homicide offenders under the federal Constitution. This Court should take that extra step.

The Supreme Court's reasoning in *Graham* pertains just as readily to homicide offenders as it does to violent juvenile offenders who either fortuitously or by design stop short of committing homicide. *Miller*, 132 S. Ct. at 2465. Certainly, the penal interest in incapacitating the violent cannot override the art. 26 imperative against disproportionate sentences, or erase the fact that it is the very rare child whose violent tendencies are incorrigible. *Id.* at 2469 ("appropriate occasions for sentencing juveniles to this harshest possible penalty [JLWOP] will be uncommon").

In fact, abolishing JLWOP sentences for those convicted of first degree murder would not even compromise the state's interest in incapacitation of the very few, if any, children who may be incorrigibly violent. After all, the argument being advanced here is merely that all

juvenile homicide offenders have a constitutional right to parole consideration, not a right to automatic parole.[13]

Retribution: Although retribution is a legitimate vehicle "to express condemnation of the crime and to seek restoration of the moral imbalance caused by the offense," it does not justify JLWOP. *See Graham,* 130 S. Ct. at 2028. "[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Id.* But "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." *Roper,* 543 U.S. at 571.

Because juvenile homicide offenders have diminished culpability as compared to adult homicide offenders, the penal interest in retribution is not served by sentencing juvenile offenders to life without parole. This is especially true in the Commonwealth, which does not permit

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[13] There are, of course, many practical, public policy, and even scientific reasons why no child should ever receive a life sentence, *i.e.*, why juvenile homicide offenders should, at worst, be sentenced to a term of years. *See, e.g.*, Brief of Juvenile Law Center et al. as Amici Curiae, Brief of American Psychological Assoc. et al. as Amici Curiae, and Brief of Amnesty International et al. as Amici Curiae, in *Miller,* 132 S. Ct. 2455. Amici recognize the legitimacy and import of those reasons. But the request being made in this amicus brief is more modest. It is a request that a constitutional ceiling—life with parole eligibility—be established for juveniles.

capital punishment and where the sentence at issue is the most severe potential penalty. As the Supreme Court has stated: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth or immaturity." *Id.* at 571. In Massachusetts, given the abolition of the death penalty, *every case* in which a child is serving JLWOP is one in which the Commonwealth's most severe penalty has been imposed on a youth whose culpability for the offense of conviction was diminished by reason of age and immaturity. *See Watson* 381 Mass. at 666; *Roper*, 543 U.S. at 571.

Rehabilitation: A sentence of life without parole is the antithesis of rehabilitation. "The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the state makes an irrevocable judgment about that person's value and place in society." *Graham*, 130 S. Ct. at 2030. Far from justifying JLWOP, maximizing the possibility of rehabilitation would require a lesser sentence—one that would give all juvenile offenders the hope of leaving prison. As the Supreme Court noted in *Graham*:

> Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society,

> no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.

130 S. Ct. at 2032. In contrast, a juvenile who knows he/she will have a chance to leave prison has every reason and incentive to mature, grow, and change. The constitutional rule amici are seeking here is one that would give children who commit first degree murder the same chance currently given to other violent offenders, including other homicide offenders. The possibility of parole eligibility, which is all amici are requesting, is a chance, not a guarantee, of freedom. Every child deserves, and the art. 26 mandate against disproportionality requires, that chance.

CONCLUSION

In finding the death penalty unconstitutional under art. 26, this Court quoted Thomas Jefferson as having said: "'I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me.'" *Watson*, 381 Mass. at 671. Like the death penalty before it, the sentence of JLWOP should be abolished here in Massachusetts because human beings are never infallible. Particularly when it comes to children,

virtually any judgment is destined to be wrong. The one common denominator among children is that they change. They are unpredictable. They are not the adults they are going to become. And any permanent judgment that is made about them, any judgment that deprives children of any hope or any future outside of prison walls, is necessarily arbitrary, inherently cruel, and bound (far more often than not) to be wrong.

The world has recognized the cruelty of JLWOP sentences, which is precisely the reason the sentence has been extinguished worldwide. By any measure, the challenged punishment does not comport with human dignity. It is degrading. It will inevitably be meted out arbitrarily. It is unacceptable in contemporary society. And it is excessive. *See Watson*, 381 Mass. at 675 (Liacos, J. concurring). Amici ask that it be abolished. More importantly, art. 26 mandates its abolition as being unconstitutionally "cruel or unusual."

Respectfully submitted,

On behalf of AMICI:

American Civil Liberties Union of Massachusetts;

Charles Hamilton Houston Institute for Racial Justice at Harvard Law School;

Children's Law Center of Massachusetts;

Citizens for Juvenile Justice;

Francine Sherman, Esq., Director, Juvenile Rights Advocacy Project at Boston College Law School;

Hon. Gail Gariner (ret.), Child Advocate for the Commonwealth of Massachusetts;

Lawyers Committee for Civil Rights and Economic Justice;

Massachusetts Association of Court Appointed Attorneys;

Massachusetts Bar Association; and

Seventeen (17) individual law professors at Massachusetts law schools

By their attorneys,

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Dated: August 19, 2013

MASS. R. APP. P. 16(K) CERTIFICATE OF COMPLIANCE

I, Kunal Pasricha, hereby certify that the foregoing Brief of Amici Curiae complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum or decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).

Kunal Pasricha, BBO#647141

CERTIFICATE OF SERVICE

I, Kunal Pasricha, counsel for AMICI, hereby certify that I have served two copies of this **BRIEF OF AMICI CURIAE** by causing it to be delivered first class mail, postage prepaid this 19th day of August, 2013 to all counsel of record:

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