COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NORFOLK, ss. SJC-12546

COMMONWEALTH OF MASSACHUSETTS

v.

NATHAN E. LUGO

ON DIRECT APPELLATE REVIEW OF
AN ORDER OF THE NORFOLK SUPERIOR COURT

BRIEF OF *AMICUS CURIAE*, THE BOSTON BAR ASSOCIATION

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THE BOSTON BAR ASSOCIATION

Pursuant to Supreme Judicial Court Rule 1:21(b)(i), the Boston Bar Association ("BBA") is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. The BBA is a bar association established almost 250 years ago and currently has nearly 13,000 members. There is no parent corporation or publicly-held corporation or publicly-held corporation that owns 10% or more of the BBA's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Secondary Sources

II. INTEREST OF AMICUS CURIAE

The Boston Bar Association ("BBA") was founded in 1761 by John Adams and other prominent Boston lawyers. It is the nation's oldest bar association. The BBA's mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. From its early beginnings, the BBA has served as a resource for the judicial, legislative, and executive branches of government. The BBA's diverse, member-driven leadership draws attorneys from all areas of the legal profession, including both prosecutors and criminal defense attorneys.

The BBA respectfully submits this brief pursuant to Mass. R. App. P. 17 and the Court's solicitation of amicus briefs to address the following issues:

> Where the defendant was convicted of murder in the second degree for a homicide he committed as a juvenile, whether imposing a mandatory sentence of life with the possibility of parole violated the Eighth Amendment of the United States Constitution or article 26 of the Massachusetts Declaration of Rights; whether a juvenile defendant convicted of murder in the second degree is entitled to an individualized sentencing hearing.

Commonwealth v. Nathan E. Lugo, No. SJC-12546, Amicus Announcement (June 2018).

The BBA has been actively involved in sentencing reform since as early as 1991, when it assembled a joint Task Force with the Crime and Justice Foundation to examine the effects of mandatory minimum sentencing in the Commonwealth. See Boston Bar Association, The Crisis in Corrections and Sentencing on Massachusetts, Final Report (February 1991), available at http://bit.ly/2BMbxhP. The Task Force determined that mandatory minimum sentences threatened public safety, greatly contributed to overcrowding in the prison system, and most importantly, reduced fairness and proportionality in sentencing. Id. at 27-29. The Task Force recommended repealing mandatory minimum sentences.[1]

Since the 1991 Task Force report, the BBA has continued to advocate for the repeal of mandatory minimum sentences.[2] See Testimony of the Boston Bar Asso-

[1] The Task Force did not at that time recommend abolishing mandatory minimum sentencing for first-degree murder. Id. at 28.

[2] See e.g., Boston Bar Association publications: "Myths of Mandatory Sentencing," June 23, 2011, available at http://bit.ly/2sfNSCt; "As We've Been Saying, Corrections Reform is Long Overdue," April 4, 2013, available at http://bit.ly/2EaQQty; "A Little Sanity in the Mandatory Minimum Sentencing Debate," August 15, 2013, available at http://bit.ly/2nSsNbK; "13 for '13," December 19, 2013, available at http://bit.ly/2C3LwGh.

ciation Before the Joint Committee on the Judiciary in Opposition to Mandatory Minimum Sentencing (June 9, 2015), available at http://bit.ly/2Ebnk6P.

The BBA also has a longstanding commitment to juvenile justice. In 1994, the BBA convened a Task Force to analyze the impact of major legislative changes intended to facilitate the transfer of juvenile cases to adult court. See Boston Bar Association, The Massachusetts Juvenile Justice System of the 1990s: Rethinking a National Model (1994), available at http://bit.ly/2nMOjPT.

In its report, the Task Force discussed the importance of treating children in the criminal justice system differently from adults. Id. at 2-4. Specifically, the Task Force determined that the legislative removal of discretion in certain transfer hearings, and the application of mandatory minimum sentences to juveniles, was antithetical to the concept of specialized rehabilitation for juveniles and weakened the integrity of the juvenile justice system:

> The different treatment accorded youths in the juvenile justice system is justified in large part by the belief that children have far greater capacity to reform than adults. . . . The mandatory minimum sentencing provisions, however, gainsay the efficacy of treatment and the possibility of re-

> form. They remove a juvenile's incentive to participate in the treatment process, and make it far more likely that the positive effects of treatment the juvenile receives in the juvenile system will be subsequently undone in the state prison environment. Moreover, these sentencing provisions operate even though a court has made the determination, by retaining the youth in the juvenile justice system, that the youth, despite the offense he or she has committed, is amenable to treatment and should be treated.

Id. at 34-36.

In 2013, the BBA unanimously approved a set of juvenile justice principles, including that there be individualized, evidentiary sentencing hearings for all juveniles convicted of first-degree murder. See Boston Bar Association, "Juvenile Life Without Parole, Memo and Final Report," December 17, 2013, available at http://bit.ly/2BKT3ht. See also Boston Bar Association, "Juvenile Justice Through the Possibility of Parole," January 9, 2014, available at http://bit.ly/2EcnDOS.

Consistent with its mission to facilitate access to justice and its sustained commitment to juvenile justice in particular, the BBA recently submitted an amicus brief in Commonwealth v. Lutskov, 480 Mass. 575 (2018), advocating for the SJC to find that all adult mandatory minimum prison sentences applied to juve-

niles violate article 26 of the Massachusetts Declaration of Rights ("art. 26"), unless the juvenile first receives the benefit of an individualized sentencing hearing.[3] See generally Lutskov, Brief of Amicus Curiae, Boston Bar Association. Specifically, the BBA submitted that the automatic imposition of a mandatory minimum adult prison sentence, without an individualized sentencing hearing, is presumptively disproportionate, in violation of art. 26, because it removes all discretion from the sentencing judge. Id.

As set forth more fully below, and consistent with its sustained involvement with issues of criminal justice and juvenile justice reform, the BBA urges this Court to find that the automatic imposition of life with the possibility of parole, without first holding an individualized sentencing hearing, violates art. 26 because it does not allow for consideration of, among other things, the juvenile's diminished ca-

[3] Consistent with its amicus brief in Lutskov and other prior BBA publications, the BBA believes that all juvenile defendants facing mandatory adult prison sentences, including first-degree murder defendants, should receive individualized sentencing hearings. For purposes of this brief, the BBA only discusses second-degree murder defendants, in response to the Court's amicus announcement.

pacity and his greater prospects for reform.[4] Consistent with this principle, the BBA urges this Court to find that all juvenile second-degree murder defendants are entitled to an individualized sentencing hearing.

III. STATEMENT OF THE CASE AND THE FACTS

The BBA adopts the statement of the case and statement of facts set forth in the brief filed by Defendant/Appellant Lugo ("Lugo Brief") to the limited extent the facts relate to the sole question raised by the amicus request and addressed in this brief and to the extent they detail the procedural history of this matter. However, the BBA takes no position as to any other factual issues raised in the Lugo Brief.

IV. SUMMARY OF THE ARGUMENT

Both federal and Massachusetts frameworks support the finding that art. 26 prohibits the automatic imposition of life with parole for juvenile second-degree murder defendants. See infra, pp. 7-8.

Where the Supreme Judicial Court has previously

[4] The BBA does not seek to be heard on the merits of Mr. Lugo's other claims of error related to his jury instructions or his motion to suppress, on which the BBA takes no position.

held that juveniles are constitutionally different from adults and require individual consideration at sentencing, art. 26's ban on cruel and unusual punishment necessitates the conclusion that all juvenile second-degree murder defendants are entitled to an individualized sentencing hearing to determine whether their sentence is appropriate and proportional. See infra, pp. 8-14.

V. ARGUMENT

A. The Application Of The Mandatory Minimum Sentence Of Life With The Possibility Of Parole To Juvenile Second-Degree Murder Defendants Violates Art. 26's Ban On Cruel And Unusual Punishment. To Guarantee That All Adult Sentences Applied To Juvenile Second-Degree Murder Defendants Are Proportional, Juvenile Judges Must Conduct Individualized Sentencing Hearings, Taking Into Consideration The Factors Established In Miller v. Alabama, 567 U.S. 460 (2012), And Must Be Able To Exercise Discretion In Sentencing Based On Such Consideration.

Applying recent federal and state constitutional precedents, and based on the facts and circumstances of this case, this Court should here find that the discretion born out of individualized sentencing hearings is required in all instances of sentencing for juvenile second-degree murder defendants and that the non-discretionary imposition of life with parole for

such juveniles violates art. 26.

In a progression of cases, the United States Supreme Court has repeatedly recognized that, ". . . children are constitutionally different from adults for purposes of sentencing," Miller v. Alabama, 567 U.S. 460, 471 (2012), and that the Eighth Amendment prohibition against cruel and unusual punishment precludes imposing certain sentences on juveniles. See also Roper v. Simmons, 543 U.S. 551 (2005) (death penalty for juveniles under eighteen unconstitutional); Graham v. Florida, 560 U.S. 348 (2010) (same, juvenile life without parole for non-homicide crime); Miller, supra at 479 (same, juvenile murder defendant mandatory life without parole).

The SJC has had multiple occasions to consider the impact of Miller on its own jurisprudence and analysis under art. 26. Notably, the SJC has repeatedly construed art. 26 proscription against cruel and unusual punishment as providing more protection against disproportionate sentencing of juveniles than its corollary in the Eighth Amendment. For example, in Diatchenko v. District for the Suffolk Dist., 466 Mass. 655 (2013) (Diatchenko I), the SJC held that the imposition of life without parole for juvenile murder de-

fendants violated art. 26's prohibition against cruel and unusual punishment, regardless of whether it was discretionary or mandatory.[5]

In Commonwealth v. Perez, 477 Mass. 677, 679 (2017) ("Perez I"), the SJC held that sentences for juvenile non-murder defendants of a term of years exceeding the 15-year minimum parole eligibility of a juvenile first-degree murder defendant presumptively violated art. 26's ban on cruel and unusual punishment, unless the sentencing judge found that such a sentence was warranted after full hearing on the factors articulated in Miller ("Miller hearing"). The concept of proportionality was central to this conclusion: "The essence of proportionality is that 'punishment for crime should be graduated and proportioned to both the offender and the offense.'" Perez I at 683 (citing Miller, supra, at 469).

One year later, in Commonwealth v. Perez, 480

[5] The SJC further held that, because Miller announced a "new rule" that did not clearly exist in precedent before Miller, Diatchenko and other similarly-situated juveniles serving life without parole were entitled to retroactive application of Miller's holding. 466 Mass. at 663-664. Similarly, should this Court conclude that its holding in this case establishes a "new rule" that did not clearly exist under prior case law, its holding should apply retroactively to Mr. Lugo and other similarly-situated juveniles.

Mass. 562 (2018) ("Perez II"), the SJC clarified what is required in a Miller hearing, emphasizing that "both the crime and the juvenile's circumstances must be extraordinary to justify a longer parole eligibility period." Id. at 628. In support of its decision, the SJC reiterated the familiar principles of juveniles' unique brain development, their vulnerability, and their diminished culpability. Id. at 629. Again, the Perez II court took care to point out that art. 26 "provide[s] a more protective analysis" than its federal corollary." Id.

In Commonwealth v. Lutskov, 480 Mass. 575 (2018), decided the same day as Perez II, the SJC applied its holding in Perez I and found that the defendant's 20-year mandatory minimum prison sentence, imposed without an individualized Miller hearing, violated art. 26 where it exceeded the 15-year parole eligibility for murder without any individual consideration that such a sentence was appropriate and proportional.[6] Lutskov

[6] The 15-year parole eligibility calculation derives from the lowest possible sentence available for first-degree juvenile murder defendants at the time Lutskov was sentenced in 2001, had he been entitled to the benefit of parole, post-Miller. See Perez II, 480 Mass. at 628, n.6. See also Commonwealth v. Brown, 466 Mass. 676, 688 (2013).

at 641.

After Diatchenko I but before Perez I, the SJC came face to face with the question of whether the mandatory sentence of life with parole for juvenile second-degree murder defendants violates art. 26. See Commonwealth v. Okoro, 471 Mass. 51 (2015). The SJC held that "at the present time" it was not persuaded that such a sentence was unconstitutional. Id. at 58. However, the Court plainly forecasted revisiting the issue in future and specifically left "open for future consideration 'the broader question whether discretion is constitutionally required in all instances of juvenile sentencing.'" Okoro, at 58, citing Brown, 466 Mass. at 688.

This Court is now presented with an opportunity to revisit its holding in Okoro. The BBA urges this Court to find that art. 26 prohibits the non-discretionary imposition of life with parole for juvenile second-degree murder defendants, and accordingly, such juvenile defendants are entitled to an individualized Miller sentencing hearing to ensure that their sentences are proportional.

The integral principle to the important question the SJC now ponders is proportionality. Cf. Perez I,

477 Mass. at 683 ("The touchstone of art. 26's proscription against cruel or unusual punishment, however, remains proportionality"). The BBA does not suggest that a sentence of life with parole eligibility at 15 years is inherently unconstitutional. Rather, art. 26 forbids the mandatory imposition of that sentence, without a determination first being made that such a sentence is appropriate and proportional to the individual juvenile and the facts of the case.

In Okoro, the SJC cited two key hesitations in declining to consider whether all juvenile homicide defendants require individualized sentencing. First, the SJC noted that the Supreme Court's decision in Miller did not read so broadly as to require individualized sentencing hearings for all juvenile homicide defendants.[7] Okoro, 471 Mass. at 58-59. Second, the SJC noted that judicial recognition of the principle that juveniles are constitutionally different from adults for sentencing purposes was, at that time, "of fairly recent origin." Id. at 59.

While neither of these reasons strictly compelled

[7] This was in direct response to Okoro's specific claim that Miller explicitly mandated individualized sentencing hearings for all juvenile homicide defendants receiving a life sentence. Okoro at 56.

the SJC's decision in Okoro, they certainly do not constrict the Court's analysis today. The SJC has steadily returned to Miller again and again in construing appropriate protections for juveniles facing less serious sentences. See discussion, supra, 8-11. Although Miller's holding spoke exclusively to juveniles facing non-discretionary life without parole, the core principles of proportionality and unique juvenile development are universal to all juvenile defendants. Cf. Miller, 567 U.S. at 473 (noting that "Graham [v. Florida]'s flat ban on life without parole applied only to nonhomicide crimes . . . [b]ut none of what it said about children— about their distinctive (and transitory) mental traits and environmental vulnerabilities— is crime-specific") (citation omitted).

Furthermore, the scientific conclusion that juveniles are developmentally unique is no longer a new concept. The Court in Okoro was prudent to "await further developments" to determine what might come of a "rapidly changing field of study and knowledge," Id. at 60. Time has only solidified this conclusion, not weakened it, as is evident in this Court's own recent jurisprudence.

It is a natural progression for this Court to

find that art. 26 prohibits the non-discretionary imposition of life with parole for juvenile second-degree murder defendants. The SJC emphasized in Perez II that a sentencing judge must carefully examine not only the offense but also "the juvenile's circumstances" as an individual and his "personal characteristics" to ensure proportionality. Perez II, 480 Mass. at 569, 571-73. In other words, each individual juvenile is significantly unique. Thus, despite this Court's having held in Okoro that mandatory life with parole did not offend art. 26, that holding can no longer stand where it does not afford individualized consideration. See Diatchenko I, 466 Mass. at 671 ("[T]he fundamental imperative of art. 26 [is] that criminal punishment be proportionate to the offender and the offense").

CONCLUSION

In the absence of meaningful consideration of the characteristics of youth derived from an individualized sentencing hearing, and the ability to exercise judicial discretion based on that consideration, the imposition of the mandatory minimum sentence of life with the possibility of parole for juvenile second-

degree murder defendants violates art. 26's prohibition against cruel and unusual punishment because it fails to ensure that such sentences are proportional. As such, art. 26 requires individualized sentencing consideration for all juvenile second-degree murder defendants.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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Certificate of Compliance

I, Meredith Shih, hereby certify pursuant to Mass. R. App. P. 16(k) that this brief complies with the rules of court that pertain to the filing of briefs, including those required by Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 17, 18, & 20.

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