COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY NO. SJC-11453

GREGORY DIATCHENKO

V.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
CHAIR, MASSACHUSETTS PAROLE BOARD, &
COMMISSIONER, DEPARTMENT OF CORRECTION

CORRECTED BRIEF FOR THE PETITIONER ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

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V.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

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ISSUES PRESENTED

1. Whether Gregory Diatchenko is entitled to be sentenced anew, in accord with the fundamental rights set out in Miller v. Alabama, 132 S.Ct. 2455 (2012), where he will die in prison under an unconstitutional life-without-parole punishment imposed upon him as a minor, in 1981, if the Eighth Amendment rule announced and retroactively applied by the Supreme Court in Miller is not similarly made retroactively applicable to him.

2. Whether the continuing violation of Diatchenko's right to be free from cruel and unusual punishment would be exacerbated rather than redressed by a mere declaration of parole eligibility, where: (a) such a remedy would ignore his right under Miller to have "judge or jury" determine whether a sentence other than death in prison would be appropriate in light of the age-related and other mitigating factors present in his case; (b) the unconstitutional sentence to which he has long been subjected has, in contravention of Miller, "forsw[orn] altogether the rehabilitative ideal," and; (c) a parole board would have unfettered discretion to deem him unsuitable for release.

3. Whether, in order to restore Diatchenko's right to due process of law, this Court should use its supervisory, declaratory, and equitable authority to vacate the unconstitutional punishment imposed on him in 1981, and order re-sentencing by the Superior Court, in a manner and to a term that guarantees him the "meaningful opportunity for release" that Miller mandates.

STATEMENT OF THE CASE AND FACTS RELEVANT TO ISSUES RAISED BY THE PETITION FOR RELIEF

This case is before the Court on reservation and report by a single justice (Botsford, J.) of a petition for relief pursuant to G.L. c.211, §3, and for declaratory relief pursuant to G.L. c.231A, filed on behalf of Gregory Diatchenko (the petitioner) in the Supreme Judicial Court for Suffolk County on March 19, 2013 (R. 4-5, 7-39, 302-304).[1/]

[1/]The record, designated by the single justice in the reservation and report, is cited herein by page number as "(R.)," and is reproduced in a separate volume submitted with this brief.

A. The reservation and report.

In pertinent part, the reservation and report states:

> The petitioner was convicted of murder in the first degree in November, 1981, and was given the mandatory sentence of life without the possibility of parole pursuant to G.L. c.265, §2. He was seventeen years old at the time of the offense. This court affirmed his conviction and rejected his argument that a mandatory sentence of life without parole is unconstitutional. Commonwealth v. Diatchenko, 387 Mass. 718 (1982). He continues to be incarcerated on that conviction and sentence.
>
> In Miller v. Alabama, 132 S. Ct. 2455 (2012), the United States Supreme Court held that it offends the Eighth Amendment of the United States Constitution to impose a mandatory sentence of life without parole on a juvenile offender convicted of murder. Because G.L. c.265, §2, requires the imposition of such a sentence on all defendants convicted of murder in the first degree, regardless whether they are adults or juveniles, and thus required such a sentence for this petitioner, the petitioner commenced this matter claiming that in light of Miller, his sentence is unconstitutional. His petition raises significant issues including, among others, whether the holding in the Miller case applies to individuals who were both convicted and sentenced before Miller was decided, and, if Miller does apply, what is the appropriate remedy for a defendant in the petitioner's situation.
>
> Because the issues are novel and significant and have potential consequences for a number of other individuals who are similarly situated, [Footnote raised into text: The parties appear to agree that there are sixty-one other individuals in the

> Commonwealth in the same position as the petitioner, i.e., currently serving mandatory life sentences without the possibility of parole for convictions of murder in the first degree that pre-date Miller v. Alabama, 132 S. Ct. 2455 (2012), and who were juveniles at the time of their offenses.] they ought to be decided in the first instance by the full court and not a single justice. By reserving and reporting the entire matter, and not just specific questions, it is my intention to put the full court in the best position to resolve as many of the issues as is possible on this record. The parties are free to brief any and all issues raised by the petition, and the District Attorney is free, if he wishes, to continue to interpose his objections to the matter being decided.

(R. 303-304).

B. The new Eighth Amendment landscape.

The Supreme Court held in Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (Miller), that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"

In reaching this conclusion, Miller interweaves two lines of Eighth and Fourteenth Amendment precedent: (1) the recognition (based largely on the science of adolescent brain functioning and development) that, as compared to adults, minors are less blameworthy and more deserving of mercy, "even when they commit

terrible crimes"[2]; and (2) the principle (taken from the Court's death penalty jurisprudence, see Miller, at 2467, citing Woodson v. North Carolina, 428 U.S. 280 [1976], Lockett v. Ohio, 438 U.S. 586 [1978], and Eddings v. Oklahoma, 455 U.S. 104 [1982]), that any person whom a state would subject to its harshest punishments is entitled to have his sentencer reach an "individualized" determination as to whether such punishment is justifiable in light of any and all relevant evidence militating against it.[3]

Sentencing schemes that punish minors by automatically sentencing them to life without parole violate both of these lines of Eighth Amendment precedent, Miller holds, because they (a) render "youth (and all that accompanies it) irrelevant" to the sentencing calculus, and (b) preclude the sentencer from assessing on an individualized basis "whether the law's harshest

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[2] Id. at 2465, citing Roper v. Simmons, 543 U.S. 551 (2005) (banning the death penalty for persons under the age of eighteen), and Graham v. Florida, 130 S. Ct. 2011 (2010) (banning life without parole for persons under the age of eighteen convicted of non-homicide offenses).

[3] Like a death sentence, "[i]mprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'" Miller, at 2467, quoting Graham v. Florida, 130 S. Ct. at 2027. See Argument IIA, post, at 30-32.

term of imprisonment proportionately punishes a juvenile offender."[4]

Miller identifies three salient characteristics that make children "constitutionally different"[5] for purposes of Eighth Amendment proportionality analysis:

- children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk taking;
- children are "more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their environment" and lack the ability to extricate themselves from horrific, crime-producing settings, and;
- a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."[6]

In specifying these characteristics, Miller relies upon and endorses the validity of neurological and psychological research confirming that (a) "adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as

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[4] Id. at 2466

[5] Id. at 2464.

[6] Id. at 2464, quoting Roper v. Simmons, 543 U.S. at 569-570.

impulse control, planning ahead, and risk avoidance,"[7/] and (b) "[a]dolescents' behavioral immaturity mirrors the anatomical immaturity of their brains."[8/]

Miller explicitly declines to reach the question whether the Eighth Amendment requires "a categorical bar" on life-without-parole sentences for juveniles. "But given all we have said ... 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."[9/]

In order to ensure that constitutionally dispro-portionate punishment is not inflicted on a child, Miller mandates that, before sentence may be imposed, at least the following factors be taken into account by the sentencer:

- the child's chronological age and asso-ciated "immaturity, impetuosity, and failure to appreciate risks and con-sequences;"
- the child's "family and [the] home environment that surrounds him;"

[7/] Id. at 2464 n.5, quoting Brief for Amici Curiae, American Psychological Association et al. 4.

[8/] Brief for Amici Curiae, American Medical Association et al. 10, filed in Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633).

[9/] Miller, at 2469 (emphasis added).

- "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;"
- the "incompetencies associated with youth" when dealing with "police officers or prosecutors (including on a plea agreement) or ... his own attorneys," which put the juvenile "at a significant disadvantage in criminal proceedings," and;
- "the possibility of rehabilitation."[10]

Finally, Miller substantively safeguards the rights of minors facing life without parole not to be erroneously subjected to such extreme punishment by "requir[ing]" the sentencer to consider not merely "how children are different," but also "how those differences counsel against irrevocably sentencing them to a lifetime in prison."[11]

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[10] Id. at 2468 (citations omitted).

[11] Id. at 2469 (emphasis added).

C. The petition for relief pursuant to G.L. c.211, §3, and G.L. c.231A.[12]

Gregory Diatchenko was 17 years old on May 9, 1981, when he robbed Thomas Wharf and stabbed him to death, near Kenmore Square in Boston. Commonwealth v. Diatchenko, 387 Mass. 718, 719 (1982). See also R. 41-42 (Affidavit of Gregory Diatchenko, ¶¶5-7); R. 93 (Affidavit of Benita Diatchenko, ¶2).

On November 24, 1981, following indictment by a Suffolk County grand jury and trial by jury before the Suffolk Superior Court (Brogna, J., presiding) (R. 101-106), Diatchenko was convicted of murder in the first degree, and immediately sentenced pursuant to G.L. c.265, §2, to "be imprisoned in the Massachusetts Correctional Institute, Walpole for the term of [his] natural life" (R. 220-221). See also R. 53 (Affidavit of Attorney Jeffrey S. Beckerman, ¶¶11-12); R. 94

[12] Diatchenko's petition for relief appears at R. 7-39. Affidavits in support of the petition appear at: R. 41-46 (Gregory Diatchenko); R. 47-51 (John Kennedy); R. 52-66 (Attorney Jeffrey S. Beckerman); R. 67-68 (Paul Pelan); R. 69-70 (Joseph Aleta, III); R. 71-75 (Craig Richards); R. 76-78 (Sean C. Harding); R. 79-96 (Attorney Patricia Garin); and R. 93-96 (Benita Diatchenko). A table of contents of the appendix submitted in support of the petition appears at R. 99, and the appendix itself appears at R. 101-205.

(Affidavit of Benita Diatchenko, ¶10). "Defense counsel attempted to introduce mitigating factors at the sentencing phase of the trial but the judge refused to consider them." Commonwealth v. Diatchenko, 387 Mass. at 721.

In 1982, this Court affirmed Diatchenko's conviction and sentence, rejecting his prescient claim that the life-without-parole sentence mandated by G.L. c.265, §2,[13] was constitutionally disproportionate in light of "mitigating factors" particular to his case, e.g., that he was a "minor" who had "had a troubled adolescence which resulted in mental and emotional disturbances." Commonwealth v. Diatchenko, 387 Mass. at 725.

Now 49 years old, Diatchenko "continues to be incarcerated on that conviction and sentence" (R. 303). He is currently imprisoned at M.C.I., Norfolk, to which he has been classified by the Department of Correction (DOC) for 28 of his 31 years behind bars (R. 43 [Affidavit of Gregory Diatchenko, ¶¶11-12]; R. 53-54,

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[13] See G.L. c.265, §2 (requiring that "[w]hoever" has been found guilty of first degree murder "shall" be punished by imprisonment in the state prison for life, and "shall" be ineligible for parole). See also G.L. c.127, §133A (providing that certain classes of prisoners, "except prisoners serving a life sentence for murder in the first degree," shall be parole eligible).

56, 61 [Affidavit of Jeffrey S. Beckerman, ¶¶13-14, 26-28, 53-54]; R. 94 [Affidavit of Benita Diatchenko, ¶9]).

Following Miller, it can no longer be maintained that Massachusetts' sentencing scheme for the punishment of first degree murder is constitutional as applied to persons under eighteen at the time of their offense, because, as stated in the reservation and report in this case, Miller holds that

> it offends the Eighth Amendment of the United States Constitution to impose a mandatory sentence of life without parole on a juvenile offender convicted of murder, ... [and] [b]ecause G.L. c.265, §2, requires the imposition of such a sentence on all defendants convicted of murder in the first degree, regardless whether they are adults or juveniles.

(R. 303). See also Miller, at 2474 & n.15 (identifying Massachusetts as among those jurisdictions that unconstitutionally mandate death-in-prison sentences for children convicted of murder).[14]

SUMMARY OF THE ARGUMENT

1. In pleadings that his office has submitted in

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[14] DOC and the Massachusetts Parole Board (Parole Board) acknowledged in the single justice proceedings in this case "that the statutory scheme outlined in G.L. c.265, §2, must change to meet the constitutional requirements set forth in Miller" (R. 210).

opposition to Rule 30 motions filed by prisoners in "Miller" cases before the Suffolk Superior Court, the District Attorney for the Suffolk District insists that the only cognizable avenue of relief for a juvenile offender who has been serving an unconstitutional life-without-parole sentence under Miller is to "request a parole hearing from the Parole Board at the appropriate time" (R. 118). "If that request is denied," the District Attorney observes, then "the defendant may cho[o]se to file a lawsuit regarding that decision of the Parole Board" (R. 129).

The petitioner reads the District Attorney's argument as a claim that a prisoner in his position is entitled to nothing more than a mere declaration of parole eligibility, and argues that such a response to Miller would be constitutionally inadequate to vindicate his substantive Eighth and Fourteenth Amendment rights to the "meaningful opportunity" for release that Miller demands,[15/] on the grounds and for the reasons set out at ¶¶42-59 of his petition for relief (R. 25-30), and in Argument II, post, at 29-38.

[15/]See Miller, at 2469 (a state seeking to incarcerate a juvenile offender for life "must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'"), quoting Graham v. Florida, 130 S. Ct. at 2030.

2. In contrast to the illusory relief recommended by the District Attorney for the Suffolk District, Diatchenko contends that he is equitably entitled under the circumstances shown by his petition to be sentenced anew to no more than twenty years in State prison, i.e., punishment consistent with a conviction for an unlawful killing committed under malice-negating circumstances comparable to the factors that diminish minors' blameworthiness as a matter of Eighth Amendment law under Roper, Graham, and Miller.

In the alternative, if this Court concludes that the petitioner must still be subject to the possibility of a death-in-prison sentence, Diatchenko seeks an opinion from the Court making clear that no such punishment may be imposed absent proof that any proffered evidence of his "irretrievable depravity" outweighs mitigating evidence of his age-related characteristics and "capacity for change" beyond a reasonable doubt, on the grounds and for the reasons set out at ¶¶30-41 of the petition for relief (R. 21-25), and in Argument III, post, at 39-45.

3. Diatchenko's conviction and sentence became "final"[16/] shortly after this Court rejected his appeal in 1982, i.e., some thirty years before Miller was decided. Miller is thus "of no use" to Diatchenko or to any similarly-situated Massachusetts prisoner[17/] "unless it is held to be retroactive to convictions already made final at the time it was decided." Commonwealth v. Melendez-Diaz, 460 Mass. 238, 242 (2011). Accordingly, the petitioner first addresses this threshold issue, which he did not brief before the single justice but which was reserved and reported by her (R. 303).

[16/]"A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." Caspari v. Bohlen, 510 U.S. 383, 390 (1994).

[17/]The petitioner believes there are about fifty-five Massachusetts prisoners in DOC custody whose Miller rights will be unenforceable if Miller is not held to be retroactive; and another six to eight DOC prisoners convicted and sentenced as minors to life without parole under G.L. c.265, §2, before June 25, 2012 (the date Miller came down) whose convictions are not final, see n.16, because they have yet to be reviewed by this Court. These latter few juvenile offenders presumably will be afforded the benefit of Miller even if Diatchenko and the other 54 prisoners in his shoes are not so fortunate. See, e.g., Commonwealth v. Galicia, 447 Mass. 737, 739 (2006) (defendant entitled to confrontation clause rule announced in Crawford where "direct appeal was still pending at the time Crawford was decided"), citing Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

ARGUMENT

I.

DIATCHENKO IS ENTITLED TO BE SENTENCED ANEW, IN ACCORD WITH THE FUNDAMENTAL CONSTITUTIONAL RULE ANNOUNCED IN MILLER V. ALABAMA, AND SIMULTANEOUSLY APPLIED TO KUNTRELL JACKSON, WHOSE CASE WAS BEFORE THE SUPREME COURT ON COLLATERAL REVIEW, SO THAT DIATCHENKO MAY SIMILARLY BE RELIEVED OF THE CRUEL AND UNUSUAL PUNISHMENT IMPOSED UPON HIM AS A MINOR.

A. *Miller* has already been made retroactive by the Supreme Court's granting of substantive relief to petitioner Kuntrell Jackson, whose conviction became final eight years before *Miller* was decided.

The Supreme Court "refuse[s] to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated." Teague v. Lane, 489 U.S. 288, 316 (1989) (plurality opinion) (emphasis added). This approach "avoids the inequity resulting from the uneven application of new rules to similarly situated defendants." Ibid. In light of this basic principle, the Supreme Court has already made clear that a prisoner in Gregory Diatchenko's position is entitled to benefit from the rule announced in Miller v. Alabama, 132 S. Ct. 2455 (2012), notwithstanding the fact that his conviction was final when Miller was handed down.

Miller simultaneously decided two cases, Miller v. Alabama, 132 S. Ct. 2455 (2012) (No. 10-9646), and Jackson v. Hobbs, 132 S. Ct. 2455 (2012) (No. 10-9647). The rule that Miller announces -- "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments,'" Miller, at 2460 -- was applied by the Supreme Court to provide substantive relief both to petitioner Evan Miller, whose case was before the Court on direct review, Miller, at 2463, and to petitioner Kuntrell Jackson, whose case was before the Court on collateral review. Id. at 2461-2462 (detailing history of Jackson's trial, conviction and sentence, direct appeal, and collateral attack on his sentence).

Jackson's conviction and sentence became final under Teague in 2004. Jackson v. State, 359 Ark. 87 (2004). Seven years later, the Arkansas Supreme Court affirmed the denial of Jackson's post-conviction petition for a writ of habeas corpus, in which he had asserted that his mandatory life-without-parole sentence for murder was unconstitutional in light of Roper v. Simmons, 543 U.S. 551 (2005), and Graham v. Florida, 130 S. Ct. 2011 (2010), because he was under

eighteen at the time of his offense. Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011). Jackson's petition for a writ of certiorari to the Arkansas Supreme Court of its judgment denying him post-conviction relief was granted by the United States Supreme Court and decided on the merits "in tandem" with Miller's case. Jackson v. Hobbs, 132 S. Ct. 548 (2011) (No. 10-9647).

After concluding that both Alabama's and Arkansas' sentencing schemes violated the Eighth Amendment's ban on cruel and unusual punishment -- because those schemes mandated, respectively, that Miller (Alabama) and Jackson (Arkansas) be sentenced to die in prison without providing "judge or jury ... the opportunity to consider ... their age and age-related characteristics," Miller, at 2474 -- the Supreme Court "reverse[d]" both state court judgments before it and "remand[ed] the cases for further proceedings not inconsistent with" its opinion. Ibid.[18/]

The Supreme Court could not have ruled in Jackson's case in the first place unless he was

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[18/] Following remand, the Arkansas Supreme Court agreed that Jackson was "entitled to the benefit of the ... Supreme Court's opinion in his own case," and ordered that he be resentenced in accord with Miller. Jackson v. Norris, ___ S.W.3d ___ (Ark. 2013), Ark. LEXIS 201, *9 (Ark. April 25, 2013).

entitled to the benefit of the rule the Court announced -- otherwise, any opinion issued on the matter would have been merely "advisory." Teague v. Lane, 489 U.S. at 316. By granting Jackson's post-conviction petition for writ of certiorari and applying the rule announced in its opinion to provide Jackson with substantive relief, the Supreme Court expressed beyond any legitimate question that the rule of Miller is to operate retroactively. See Saffle v. Parks, 494 U.S. 484, 487 (1990) (new rule will be "neither announce[d] nor appl[ied]" in a case before the Supreme Court on collateral review unless it is "first determine[d]" that the petitioner would be entitled to the benefit of that rule under Teague).

"Matters of basic principle are at stake," Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting),[19/] for "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Teague v. Lane, 489 U.S. at 300.

[19/] Teague adopts Justice Harlan's "classic" dissent in Desist and his "even more searching" separate opinion in Mackey v. United States, 401 U.S. 667 (1971). Danforth v. Minnesota, 552 U.S. 264, 272 (2007).

Gregory Diatchenko and Kuntrell Jackson are "similarly situated" under Teague, because their convictions each were final on June 25, 2012, when Miller was decided. Accordingly, "evenhanded justice" requires that Diatchenko, like Jackson, be given a fair opportunity under Miller to escape from the unconstitutional punishment imposed upon him as a minor. Any result to the contrary would "violate[] the principle of treating similarly situated defendants the same," Commonwealth v. Bray, 407 Mass. 296, 299 (1990), quoting Griffith v. Kentucky, 479 U.S. 314, 323 (1987), as well as Diatchenko's right to equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution.[20]

B. *Miller* is retroactive because its rule both prohibits the imposition of a "category of punishment" upon a "class of defendants," and also implicates the "fundamental fairness and accuracy" of criminal proceedings seeking to imprison a minor until he dies.

Teague requires that a rule of constitutional law announced by the Supreme Court be available to benefit

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[20] For cases that have relied on the granting of post-conviction relief to Kuntrell Jackson as grounds for concluding that Miller is retroactive under Teague, see People v. Williams, 982 N.E.2d 181, 197 (Ill. App. 2012), and People v. Morfin, 981 N.E.2d 1010, 1022-1023 (Ill. App. 2012).

a defendant whose conviction is final where the rule is either (1) "substantive" or (2) a "watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Schriro v. Summerlin, 542 U.S. 348, 351-353 (2004) (citations omitted). The rule that Miller announces is both.

1. *Miller* is substantive.

A rule is "substantive" -- and thus either not subject to Teague's retroactivity bar or treated as an exception to it, see Schriro v. Summerlin, 542 U.S. at 352 n.4 -- if it "alters ... the class of persons that the law punishes." Id. at 353. Such a rule must be given retroactive force because it necessarily carries a "'significant risk'" that the defendant "faces a punishment that the law cannot impose upon him." Id. at 352, quoting Bousley v. United States, 523 U.S. 614, 620 (1998).

As incisively summarized in an unpublished opinion issued by the Federal District Court for the Eastern District of Michigan, Miller is "substantive" under the Schriro formulation of the Teague doctrine because "Miller alters the class of persons (juveniles) who can receive a category of punishment (mandatory life without parole)." Hill v. Snyder, 2013 U.S. Dist.

LEXIS 12160, *6 n.2 (E.D. Mich. Jan. 12, 2013) (O'Meara, J.). See also People v. Morfin, 981 N.E.2d 1010, 1022 (Ill. App. 2012) (Miller is "substantive" because it mandates a sentencing hearing "for every minor convicted of first degree murder" in Illinois, at which "a sentencing range broader than" the mandatory life-without-parole sentence that would otherwise be required "must be available for consideration").

Moreover, "given all ... [the Supreme Court has] said about children's diminished culpability and heightened capacity for change," the cases in which minors may be sentenced to die in prison are to be "uncommon" under Miller, because children only "rare[ly]" feature the combination of psychological maturity and "irretrievabl[e] deprav[ity]" required for such extreme punishment to be constitutionally justifiable. Miller, at 2469, citing Roper v. Simmons, 543 U.S. at 573, and Graham v. Florida, 130 S. Ct. at 2026.

It must be emphasized that Miller commands not merely that the sentencer consider "how children are different" but also "how those differences counsel against irrevocably sentencing them to a lifetime in prison." Miller, at 1269 (emphasis added). In thus

announcing a new substantive Eighth Amendment element -- irretrievable depravity -- which must be proved if a State is to sentence a minor to a lifetime of incarceration, Miller necessarily narrows the class of children who may be so punished consistently with the United States Constitution, and therefore announces a "substantive" rule retroactively applicable under Teague. See People v. Morfin, supra, 981 N.E.2d at 1024 (Sterba, J., concurring) (concluding that Miller is retroactive because a rule that does not ban a particular punishment outright but "prohibits the mandatory imposition of that sentence" is "substantive" rather than "procedural"), citing Sumner v. Shuman, 483 U.S. 66 (1987). Compare Commonwealth v. Hampton, 64 Mass. App. Ct. 27, 29-33 (2005).[21]

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[21] Seizing on a line from Miller in which the Court states its opinion requires "only that a sentencer follow a certain process -- considering an offender's youth and attendant characteristics -- before imposing" life without parole on a minor, the Minnesota Supreme Court held, in a 3-2 decision, that Miller is "procedural, not substantive," and hence Teague-barred. Chambers v. State, 831 N.W.2d 311, ___ (Minn. 2013), LEXIS 2013 Minn. LEXIS 313, *38-39 (Minn. May 31, 2013) (quoting Miller, at 2471) (emphasis added by Chambers majority). Of course, any rule requires "a certain process" to be implemented. If that were enough to make a rule non-substantive under Teague, then the engine of Miller -- its requirement that sentencers consider how a minor's age-related characteristics "counsel against" imposition of life without parole --

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Similarly, there exists a "significant risk" that Diatchenko is now being punished by a life-without-parole sentence "that the law cannot impose on him," Schriro v. Summerlin, 542 U.S. at 352, because he has not been afforded any opportunity to show judge or jury that his moral culpability for the homicide of Thomas Wharf was diminished by factors the consideration of which Miller requires, including

- his youth and associated neurological, psychological, and behavioral immaturity, impetuosity, and inability to appropriately weigh and appreciate the risks, rewards, and consequences of his own behavior;
- his traumatic and unstable family environment and upbringing;
- his substance abuse and alcohol addiction, and his extreme intoxication at the time of the offense;
- the deleterious influences of his damaged nuclear family and irresponsible peer group;
- the incompetencies associated with youth, exacerbated by alcohol and drug abuse, which put him at a

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[21] (CONTINUED FROM PREVIOUS PAGE) would be "merely pro forma." Chambers v. State, at *67 (Paul Anderson, J., dissenting). See also id. at *83 (Page, J., dissenting) (Chambers majority's conclusion that Miller is "procedural" because it only requires the sentencer to "'follow a certain process' ... ignores the realities of Minnesota law," under which "there is no such 'certain process'") (quoting Miller) (emphasis added by Justice Page).

> significant disadvantage when dealing with his own attorney.

(R. 24).[22/]

2. *Miller* announces a "watershed" rule of criminal procedure.

Miller also completely undermines the "fundamental fairness and accuracy," Schriro v. Summerlin, 542 U.S. at 352, of the pro forma sentencing proceeding (R. 220-221) resulting in Diatchenko's life-without-parole sentence, because: (1) the District Attorney for the Suffolk District was not inconvenienced at that proceeding with any burden of showing that Diatchenko was one of those "rare" adolescents whose offense reflected "irreparable corruption" rather than "unfortunate yet transient immaturity," Miller, at 2469 (quoting Roper and Graham); and (2) the record before this Court of Diatchenko's post-imprisonment "propensity for rehabilitation," Commonwealth v. White, 436 Mass. 340, 343 (2002),[23/] see Argument IIIA, post, at 39-43, amply

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[22/]See also R. 47-51 (Affidavit of John Kennedy, ¶¶6-24) (describing Diatchenko's severe teenage alcohol and substance abuse issues and acute intoxication on May 9, 1981).

[23/]See Commonwealth v. White, 436 Mass. at 343-345 (where sentence originally imposed was unlawful, defendant entitled to be sentenced "anew," id. at 344-345 n.3, and to consideration upon such resentencing of all
(CONTINUED ON NEXT PAGE)

demonstrates his "capacity for change," Miller, at 2469, and thus the substantial likelihood that he is now being subjected to punishment that the Eighth and Fourteenth Amendments forbid.

Finally, by requiring the sentencing of minors facing life without parole to be "individualized," see Miller, at 2469-2470, Miller necessarily effects a sea change in the procedural rights due juveniles before such punishment may be imposed conformably with the Eighth and Fourteenth Amendments.[24/] Thus, it may aptly be said that Miller announces a "watershed" rule of criminal due process for children facing life without parole, and is retroactive under Teague for this reason too. See People v. Williams, 982 N.E.2d at 197

[23/](CONTINUED FROM PREVIOUS PAGE) information regarding his "efforts to better himself in prison during the time that elapsed between his original sentencing and his resentencing," id. at 340-341).

[24/]For example, a minor facing life without parole must be entitled under Miller: (1) to discover and confront any evidence proffered in support of an allegation of irreparable depravity, (2) to procedural guarantees ensuring exclusion from consideration by the sentencer of any such evidence that is unreliable or more prejudicial than probative; and (3) to obtain and present all favorable proofs (including neurological and other scientific testing and results) relevant to diminished culpability and amenability to rehabilitation. Such "Miller rights" will fundamentally alter the sentencing phase of any trial in which the Commonwealth seeks to sentence a minor to life without parole.

(concluding that Miller announces a "watershed" rule because it requires "the observance of procedures that are implicit in the concept of ordered liberty" at hearings in which minors face death-in-prison sentences) (citations omitted). Compare Commonwealth v. Walczak, 463 Mass. 808 (2012) (Lenk, J., concurring) (identifying Massachusetts procedural law pertaining to the prosecution of juveniles charged with homicide that is "in tension" with the Eighth Amendment, id. at 811, because such procedures, contrary to Miller's command, "remove youth from the balance," id. at 832, quoting Miller, at 2466).

3. Massachusetts law, as embodied in Rule 30(a), requires that Diatchenko be afforded relief from his unconstitutional sentence, whether or not any remedy would be made available to him in federal *habeas corpus*.

The "source" of the rule announced in Miller is not the Supreme Court but "the Constitution itself." Danforth v. Minnesota, 552 U.S. 264, 271 (2008). For this reason, Diatchenko's right not to be automatically sentenced to die in prison "necessarily pre-exist[ed]" the Supreme Court's "articulation" of that right in Miller. Danforth v. Minnesota, 552 U.S. at 271. To be sure, Teague "limit[s] the authority of federal courts

to overturn state convictions." Danforth v. Minnesota, 552 U.S. at 280. But Teague has nothing to do with this Court's independent authority to "provide a remedy" for the long-standing violation of Diatchenko's constitutional right to be free from cruel and unusual punishment, whether or not five members of the Supreme Court would permit a federal habeas court to do so. Danforth v. Minnesota, 552 U.S. at 282.[25]

Rule 30(a) of the Rules of Criminal Procedure states:

> Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

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[25]Petitioner is aware of two cases in which federal circuit courts have held that Miller is not retroactive. Craig v. Cain, 2013 U.S. App. LEXIS 431 (5th Cir. Jan. 4, 2013) (per curium); In re Morgan, 713 F.3d 1365, rehearing en banc denied, ___ F.3d. ___ (11th Cir. 2013), 2013 U.S. App. LEXIS 11756 (11th Cir. June 10, 2013). Dissenting from the denial of rehearing en banc in In re Morgan, Judge Wilson underscored his view that the Eleventh Circuit is "cling[ing] to the belief" that Miller is not retroactive notwithstanding the fact that the Department of Justice has conceded it is, and has accordingly "decided upon a uniform policy -- its United States Attorneys will advocate in favor of Miller's retroactivity in cases on collateral review all across the country." Id. at *38 (emphasis in original).

Mass. R. Crim. P. 30(a), as appearing in 435 Mass. 1501 (2001) (emphasis added).

Rule 30(a) provides Diatchenko with an entirely adequate state law tool to "correct" the unconstitutional sentence imposed upon him following his 1981 conviction in this case. See Commonwealth v. Negron, 462 Mass. 102, 103-104 (2012) (Rule 30[a] entitles defendant to "[c]ollateral[ly] attack[]," id. at 103, conviction allegedly violating prohibition against double jeopardy). That the conviction resulting in Diatchenko's unconstitutional sentence is final under Teague is immaterial, because Teague does not implicate the retroactive reach of state law, Danforth v. Minnesota, supra, and because Massachusetts law provides that the violation of Diatchenko's substantive sentencing rights under Miller may be corrected "at any time, as of right." Commonwealth v. Negron, supra, 462 Mass. at 105 (quoting Rule 30[a]). See and compare Commonwealth v. Clarke, 460 Mass. 30, 34 n.7 (2011); Commonwealth v. Melendez-Diaz, 460 Mass. 238, 248 (2011).[26]

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[26] Diatchenko is seeking only a new sentencing hearing, not a new trial, for which reason the finality concerns underlying Teague and this Court's cases which follow Teague are less compelling. See, e.g., Commonwealth v. Bray, 407 Mass. 296 (1990); Commonwealth v. Sullivan, 425 Mass. 449 (1997); Commonwealth v. Burnett, 428

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The heart of Miller -- that the Eighth Amendment's "principle of proportionality" forbids the automatic sentencing of a child to a lifetime behind bars -- reflects a deliberative judgment regarding "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). To permit some juvenile offenders but not others to be subjected to such punishment would be an intolerable miscarriage of justice.[27/]

II.

THE CONTINUING VIOLATION OF DIATCHENKO'S SUBSTANTIVE DUE PROCESS RIGHTS UNDER MILLER WOULD BE EXACERBATED RATHER THAN REDRESSED WERE HE MERELY TO BE DECLARED PAROLE ELIGIBLE.

The District Attorney for the Suffolk District is of opinion that the only cognizable avenue of relief for a juvenile offender serving an unconstitutional life-without-parole sentence after Miller is to "request a parole hearing from the Parole Board at the

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[26/](CONTINUED FROM PREVIOUS PAGE) Mass. 469 (1998); Commonwealth v. Melendez-Diaz, 460 Mass. 238 (2011) (all involving Rule 30(b) attacks on final convictions).

[27/]See People v. Williams, 982 N.E.2d at 197 (just as it is "cruel and unusual" after Miller to subject minors to mandatory life without parole, so would it "also be cruel and unusual to apply that principle only to new cases").

appropriate time" (R. 118). Such a "request" by Diatchenko would of course be an exercise in futility, because the Parole Board "lacks statutory authority to grant ... a parole hearing" to any individual serving a sentence for first degree murder, as the Parole Board itself acknowledged during the single justice proceedings in this case (R. 210).

For this reason, the approach recommended by the District Attorney should be taken as a claim that Diatchenko is entitled after Miller to no more than a judicial declaration of parole eligibility. So taken, the claim should be rejected, because such a declaration would be ineffectual as a matter of law in vindicating Diatchenko's rights under Miller to a sentence that provides him "some meaningful opportunity" for release from prison before life's end based on "demonstrated maturity and rehabilitation." Miller, at 2469, quoting Graham v. Florida, 130 S. Ct. at 2030.

A. A declaration of parole eligibility would not redress Diatchenko's right to have "judge or jury" decide, before sentence is imposed, whether punishment less extreme than death in prison is warranted in light of the circumstances mitigating his culpability for the offense.

Miller holds that "judge or jury must have the opportunity to consider mitigating circumstances before

imposing" life without parole on a juvenile offender. Miller, at 2475 (emphases added). Further, in "likening life-without-parole sentences imposed on juveniles to the death penalty itself," Miller, at 2466, Miller incorporates and extends Supreme Court death penalty precedent requiring the sentencer to consider all relevant evidence proferred "as a mitigating factor," Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original), militating in favor of the exercise of mercy, before a state's harshest available sentences may validly be imposed. See also Sumner v. Shuman, 483 U.S. at 76 ("Not only [does] the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but 'Lockett requires the sentencer to listen' to that evidence"), quoting Eddings v. Oklahoma, 455 U.S. at 115 n.10.

Thus, what Diatchenko has been denied is the "constitutionally indispensable" right, see Woodson v. North Carolina, 428 U.S. at 304, to fair consideration by judge or jury, prior to imposition of sentence, of all relevant factors present in his case counseling in favor of a sentence providing reasonable hope for release based on demonstrated maturity and rehabilitation.

"The Parole Board does not impose sentence or 're-sentence.'" Massachusetts Parole Board, "Guidelines for Life Sentence Decisions" (R. 150). Indeed, it "does not have the legal authority or means to do so." Ibid. Thus, a mere declaration of parole eligibility could not redress the violation of Diatchenko's federal constitutional sentencing rights as guaranteed by the Eighth and Fourteenth Amendments. Miller v. Alabama, 132 S. Ct. 2455 (2012).

B. It would be "perverse" under the circumstances to put Diatchenko's fate in the hands of a parole board with unfettered discretion to deem him unsuitable for release.

Diatchenko has been subjected to punishment that "forswears altogether the rehabilitative ideal." Miller, at 2465, quoting Graham v. Florida, 130 S. Ct. at 2030:

> [D]efendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. ... For juvenile offenders, who are most in need of and receptive to rehabilitation, ... the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.
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> * * *
>
> Life without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with

> society, no hope. ... 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.
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> * * *
>
> [By] withhold[ing] counseling, education, and rehabilitation programs for those who are ineligible for parole consideration ... life without parole for juvenile ... offenders ... [leads to] the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.

Graham v. Florida, 130 S. Ct. at 2030-2033.

For more than thirty years, Diatchenko has been imprisoned under a cruel and unusual sentence that treats the possibility of his rehabilitation as a legal and moral irrelevancy.[28] To purport to remedy such constitutional indifference merely by granting him an opportunity to put himself before a board with

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[28] Prisoners in DOC custody serving life-without-parole sentences are "not eligible for certain ... programs, ... [t]he successful completion of ... [which] is a precondition for a viable request for parole" (R. 90-91 [Affidavit of Attorney Patricia Garin, ¶¶64, 65]). See also R. 65 (Affidavit of Attorney Jeffrey S. Beckerman, ¶76 ["Greg's self-improvement over the years has been all the more impressive because, as a 'lifer,' he has not been able to participate in certain wait-listed programs which may have been available to other inmates who have parole or wrap-up dates"]); R. 149 (Department of Correction, "New Procedure to Participate in Programming," Sept. 23, 2011) ["[O]ffenders serving life sentences will be referred to the low risk/ alternative track of programming which includes all volunteer facilitated programming, faith based programs and self-help groups"]).

unfettered discretion to deem him unsuitable for release would be cruel in its own right.[29]

C. Massachusetts' law of parole fails to provide Diatchenko with the "meaningful opportunity for release" that *Miller* requires.

"A prisoner in the Commonwealth does not have a liberty interest in the future grant of parole." Doe v. Massachusetts Parole Bd., 82 Mass. App. Ct. 851, 858 (2012), citing Quegan v. Massachusetts Parole Bd., 423 Mass. 834, 836 (1996). Put differently, "there is no set of facts which, if shown, mandate a decision favorable to ... [an] individual" prisoner seeking release on parole. Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 10 (1979).

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[29] The Parole Board generally will not release any prisoner who has not first spent a period of incident-free time in a minimum security prison (R. 84 [Affidavit of Attorney Patricia Garin, ¶24]). Diatchenko's requests to be classified to a minimum security facility, however, have been denied over the years solely because first degree "lifers are not to be considered for minimum or below," per DOC policy (R. 145 [Department of Correction, "Male Objective Classification Operational Manual," Code E]). See R. 65 (Affidavit of Attorney Jeffrey S. Beckerman, ¶74) (quoting DOC classification report dated October 16, 2006, stating that the "majority of [the] board recognizes [Diatchenko's] suitability for Level 3 [i.e., minimum security] based on D-report free behavior since 1998, program compliance, excellent work and housing reports, however not eligible due to sentence structure").

Furthermore, the "Legislature's pronouncement" in G.L. c.127, §130, that "[n]o prisoner shall be granted a parole permit merely as a reward for good conduct," has been held by this Court to make a prisoner's "allegedly model behavior" while incarcerated legally irrelevant to the Parole Board's wholly discretionary decision as to the "suitability" of granting a parole permit to any particular prisoner at any particular time. Greenman v. Massachusetts Parole Bd., 405 Mass. 384, 388 (1989). And because such suitability is predicated on the "purely subjective" appraisal and "discretionary assessment of a multiplicity of imponderables," Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. at 10 (citations omitted), any decision that a prisoner is not presently a suitable candidate for release is effectively final and insulated from meaningful judicial review. Accordingly, assuming Diatchenko were to be declared parole eligible on the 1981 sentence imposed in this case, and assuming even further (for the sake of argument) that the Parole Board agreed that the instant petition for relief adequately demonstrates current maturity and rehabilitation under Miller, still Diatchenko would have no cognizable right to be

released at any particular time in the future by the Parole Board, which still could deem him unsuitable for supervision in the community on the basis of any one of the "multiplicity of imponderables" endorsed by Greenholtz.[30]

With "no more than a mere hope" of favorable treatment, Greenholtz, 442 U.S. at 11, Diatchenko would also likely face the Parole Board pro se. This is because, as the District Attorney for the Suffolk District conceded during the single justice proceedings in this case, Diatchenko "has no right to counsel before the [P]arole [B]oard" (R. 263), and because the Parole Board has seldom found it necessary to ensure that counsel is appointed to represent an indigent prisoner unable to represent himself at a parole release hearing, although it has the discretion to do so. See 120 Code Mass. Regs. §300.08(2)(b); R. 92 (Affidavit of Attorney Patricia Garin, ¶72).

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[30] For example, the Parole Board can, and routinely does, deny a permit simply because a parole officer finds a parole-eligible prisoner's proposed living arrangements to be unsuitable. Compare Coffin v. Superintendent, Mass. Treatment Center, 458 Mass. 186, 187 n.4 (2010) (parole violated on grounds that parolee "fail[ed] to provide an address where the parole board could install a telephonic landline connection for a global positioning system").

Of course, absent any cognizable interest in the future grant of parole, Doe v. Massachusetts Parole Bd., supra, there is nothing a lawyer could actually do for Diatchenko to ensure that he is provided a meaningful opportunity for release by the Parole Board. It is thus all the more troubling that, pursuant to its own "Guidelines for Life Sentence Decisions" (R. 150-151), the current Parole Board,[31] has not permitted a single parole eligible juvenile serving a life sentence for second degree murder to go free. That is, this Parole Board has a "juvenile lifer release rate" of "zero percent" (R. 83-88 [Affidavit of Attorney Patricia Garin, ¶¶22-50]) (analyzing "Records of Decisions" pertaining to nineteen prisoners "serving parole eligible life sentences for crimes committed when they were juveniles" whose parole applications were decided by the Parole Board between April 13, 2011, and March 1, 2013).

[31] "By 'current Parole Board,' petitioner refers to the Parole Board as it was radically re-constituted after the much-publicized shootout, on December 26, 2010, that killed police officer John Maguire and parolee Dominic Cinelli" (R. 9). See also R. 82-83 (Affidavit of Attorney Patricia Garin, ¶¶16-21); R. 152-161.

Nor should the Parole Board's institutional blindness to the principle that "children are different," Miller, at 2469, 2470, be surprising: Massachusetts' law of parole is not intended to promote the rehabilitation of adolescent prisoners, and is intended to err on the side of public safety, as Greenholtz, Greenman, and the Parole Board's "Guidelines for Life Sentence Decisions" make crystal clear. Moreover, Miller has not been the law for long, and its mandate will take time and institutional reform throughout the criminal and juvenile justice system to be fully implemented. Under these circumstances, it cannot reasonably be expected that merely granting Diatchenko and similarly-situated prisoners an unenforceable hope of favorable consideration by an administrative board at some time in the future will do anything to breathe life into the promise of Miller.

III.

THIS COURT SHOULD USE ITS SUPERVISORY, DECLARATORY, AND EQUITABLE AUTHORITY TO VACATE THE CRUEL AND UNUSUAL SENTENCE IMPOSED UPON DIATCHENKO IN 1981, AND ORDER RE-SENTENCING BY THE SUPERIOR COURT, IN A MANNER THAT COMPLIES WITH MILLER'S MANDATE AND TO A TERM THAT EMBRACES ITS PROMISE.

A. Diatchenko should be resentenced to a term of years not inconsistent with the harshest sentence that could have been imposed on a defendant convicted of manslaughter in 1981.

For the reasons thus far argued, law and equity require that the sentence imposed on Diatchenko in 1981 be vacated, and that he be sentenced anew in accord with Miller and with the substantive and declaratory relief requested in ¶¶13, and 77-79 of his petition for relief (R. 11-12, 38-39).

More specifically, this Court should use its supervisory, declaratory, and equitable authority to order that Diatchenko be resentenced to a term of not more than twenty years in State prison -- i.e., punishment consistent with the harshest sentence available for a defendant convicted of manslaughter in 1981, see G.L. c.265, §13, as amended through St. 1971, c.426. Such a remedy would equitably address the crux of the moral and legal problem created by virtue of the lengthy infliction of constitutionally excessive

punishment in this case: Because Diatchenko was only seventeen years old at the time that he entered Thomas Wharf's Cadillac on May 9, 1981, the frontal lobes of his adolescent brain had not yet had time to mature, and thus his capacity, at that time, to make rational decisions, observe socially appropriate rules of conduct, inhibit inappropriate impulses, and foresee the risks and consequences of his own behavior all were significantly diminished, as matter of both fact and law. Miller v. Alabama, 132 S. Ct. 2455 (2012).[32] For the very reasons these neuro-biological realities diminished Diatchenko's moral culpability for purposes of imposition of proportionate punishment, so too did

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[32] See the primary studies cited and relied upon by the Supreme Court in the amicus briefs filed in Miller, Graham, Roper, and J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011), e.g., Brief for Amici Curiae, American Psychological Association et al. Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647); Brief for Amici Curiae, J. Lawrence Aber et al., Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647); Brief for Amici Curiae, American Medical Association et al., Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647); Brief for Amici Curiae, American Medical Association, et al., Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7142); Brief for Amici Curiae, American Psychological Association et al., Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633); Brief for Amicus Curiae, American Bar Association, J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (No. 09-11121).

they diminish, or tend to negate, the malice necessary to establish his legal liability under G.L. c.265, §2. See and compare Commonwealth v. Woodward, 427 Mass. 659, 669 (1998) (upholding, under Rule 25(b)(2), judge's reduction of second degree murder conviction to manslaughter, and imposition of time-served sentence thereon, where youthful[33/] defendant's intentional act in shaking baby to death resulted from "confusion, inexperience, frustration, immaturity and some anger," but not necessarily "malice in the legal sense"); Commonwealth v. Grey, 399 Mass. 469, 472-474 (1987) (reversing fifteen year-old defendant's conviction for second degree murder where jury not permitted to consider "mental impairment[s] for which ... [the] defendant was not responsible," id. at 471, including his "impulsive" aggression reflex, in determining whether homicide by stabbing was committed with legal malice).

Substantive sentencing relief is also equitably appropriate for Diatchenko on the following additional

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[33/] The defendant's age is not noted in the Woodward opinion but she is described as having "worked as an au pair for the [victim's] family" for a few months prior to the homicide. 427 Mass. at 660.

grounds demonstrated by his petition:

- Diatchenko has been confined in State prison for over thirty-one years (i.e., more than 150% of the maximum term for a conviction of manslaughter);

- the conditions of Diatchenko's lengthy imprisonment have not taken into consideration either the age-related and other factors diminishing his moral culpability for the offense or his heightened capacity for change;

- in appealing his sentence to this Court in 1982, Diatchenko accurately identified the defects in the mandatory life-without-parole sentence imposed on him as a minor, but he was nonetheless denied sentencing relief at that time through no fault of his own;

- notwithstanding structural impediments to rehabilitation (including his ineligibility for classification to a minimum security facility), Diatchenko "made a commitment to use whatever resources were available to [him] to become not just a better person but a responsible, caring adult" (R. 42 [Affidavit of Gregory Diatchenko, ¶9]);

- consistent with his personal commitment, Diatchenko has matured behind bars into a moral and law-abiding adult, as summarized at ¶36 of his petition for relief:

  > After an early period of adjustment -- typical for recently-imprisoned teenagers -- Diatchenko settled down, obtained his GED,

> participated in such programs as were open to him, and maintained employment. At the age of 21, he was transferred from Walpole to M.C.I., Norfolk, where eventually he became a leader of the Lifers Group and the prison's chief plumber. Ten years ago, Diatchenko began the study of Zen Buddhism. He has since taken the "Five Precepts" and become the leader of M.C.I., Norfolk's Zen Buddhist community. In 2007, he enrolled himself in Boston University's Prison Education Program, in which he has excelled. Diatchenko is now five classes shy of receiving his Bachelor of Arts degree. He has not received a disciplinary report in 15 years.

(R. 22).[34]

B. In the alternative, the Court should enter all appropriate orders necessary to ensure on resentencing that cruel and unusual punishment is not again inflicted on Diatchenko.

In the event that a resentencing hearing is ordered to be held without such limitation on the

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[34] See also R. 43-46 (Affidavit of Gregory Diatchenko, ¶¶9-13, and attached resume describing education, employment, and program participation from 1981 to 2013); R. 53-66 (Affidavit of Jeffrey S. Beckerman, ¶¶13-77); R. 67-68 (Affidavit of Paul Pelan, ¶¶3-7); R. 69-70 (Affidavit of Joseph Aieta, III, ¶¶3-6); R. 71-73 (Affidavit of Craig Richards, ¶¶3-13); R. 89-91 (Affidavit of Attorney Patricia Garin, ¶¶57-61), and R. 94-95 (Affidavit of Benita Diatchenko, ¶¶12-17).

potential term of imprisonment as has been argued for above, Diatchenko requests a declaration that life without the possibility of parole may not be imposed upon him, because such punishment necessarily constitutes "cruel or unusual punishment[]" prohibited by art. 26 of the Declaration of Rights when imposed upon a minor, on the grounds and for the reasons stated at ¶¶60-76 of the petition for relief (R. 30-38).

If, however, the Court concludes that the petitioner is again to face a sentence of life imprisonment without any possibility of release, Diatchenko seeks an opinion stating that, before such sentence may be imposed, the District Attorney for the Suffolk District shall be required to prove to judge or jury beyond a reasonable doubt: (a) that Diatchenko is irretrievably depraved, and (b) that such depravity outweighs evidence of age-related and any other relevant mitigating factors, including evidence of his capacity for change -- failing which proof, Diatchenko shall be entitled, under the Eighth and Fourteenth Amendments of the United States Constitution, and arts. 1, 10, 12, and 26 of the Declaration of Rights, to judgment of

conviction and an appropriate sentence on so much of Suffolk County indictment number 035624 as alleges manslaughter. In re Winship, 397 U.S. 258 (1970). Gregg v. Georgia, 428 U.S. 153 (1976). Miller v. Alabama, 132 S. Ct. 2455 (2012).

CONCLUSION

For the above-stated reasons, the petition for relief should be granted.

Respectfully submitted,

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By his Attorney,

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ADDENDUM

United States Constitution

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts Declaration of Rights

Article One

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article Ten

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the

expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of an individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of an individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

Article Twelve

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

<u>Article Twenty-six</u>

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. 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.

<u>Massachusetts General Laws</u>,

<u>Chapter 127, §130</u>

No prisoner shall be granted a parole permit merely as a reward for good conduct. Permits shall be granted only if the board is of the opinion, after consideration of a risk and needs assessment, that there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society. In making this determination, the parole board shall consider whether, during the period of incarceration, the prisoner has participated in available work opportunities and education or treatment programs and demonstrated good behavior. The board shall also consider whether risk reduction programs, made available through collaboration with criminal justice agencies would minimize the probability of the prisoner re-offending once released. The record of the board's decision shall contain a summary statement of the case indicating the reasons for the decision, including written certification that each board member voting on the issue of granting a parole permit has reviewed the

entire criminal record of the applicant, as well as the number of members voting in favor of granting a parole permit and the number of members voting against granting a parole permit. Said record of decision shall become a public record and shall be available to the public except for such portion thereof which contains information upon which said decision was made which said information the board determines is actually necessary to keep confidential to protect the security of a criminal or civil investigation, to protect anyone from physical harm or to protect the source of any information; provided, however, that it was obtained under a promise of confidentiality. All such confidential information shall be segregated from the record of decision and shall not be available to the public. Said confidential information may remain secret only as long as publication may defeat the lawful purposes of this section for confidentiality hereunder, but no longer. A prisoner to whom a parole permit is granted shall be allowed to go upon parole outside prison walls and inclosure upon such terms and conditions as the parole board shall prescribe, but shall remain, while thus on parole, subject to the jurisdiction of such board until the expiration of the term of imprisonment to which he has been sentenced or until the date which has been determined by deductions from the maximum term of his sentence or sentences for good conduct or until such earlier date as the board shall determine that it is in the public interest for such prisoner to be granted a certificate of termination of sentence. In every case, such terms and conditions shall include payment of any child support due under a support order, as defined in section 1A of chapter 119A, including payment toward any arrearage of support that accrues or has accrued or compliance with any payment plan between the prisoner and the IV-D agency as set forth in chapter 119A, provided, however, that the board shall not revise, alter, amend or revoke any term or condition related to payment of child support unless the parole permit itself is revoked.

Chapter 127, §133A

Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth,

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

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

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

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

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

Chapter 211, §3

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

<u>Chapter 231A, §1</u>

The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not; and such proceeding shall not be open to objection on the ground that a merely declaratory judgment or decree is sought thereby and such declaration, when made, shall have the force and effect of a final judgment or decree and be reviewable as such; provided, that nothing contained herein shall be construed to authorize the change, extension or alteration of the law regulating the method of obtaining service on, or jurisdiction over, parties or affect their right to trial by jury. When a declaration of right, or the granting of further relief based thereon, shall involve the determination of

issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, or issues which the court, in accordance with the practice of courts of equity, considers should be tried by a jury, such issues may be submitted to a jury in the form of questions, with proper instructions by the court, whether a general verdict be required or not.

Chapter 265, §2

Whoever is guilty of murder committed with deliberately premeditated malice aforethought or with extreme atrocity or cruelty, and who had attained the age of eighteen years at the time of the murder, may suffer the punishment of death pursuant to the procedures set forth in sections sixty-eight to seventy-one, inclusive, of chapter two hundred and seventy-nine. Any other person who is guilty of murder in the first degree shall be punished by imprisonment in the state prison for life. Whoever is guilty of murder in the second degree shall be punished by imprisonment in state prison for life. No person shall be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven while he is serving a life sentence for murder in the first degree, but if his sentence is commuted therefrom by the governor and council under the provisions of section one hundred and fifty-two of said chapter one hundred and twenty-seven he shall thereafter be subject to the provisions of law governing parole for persons sentenced for lesser offenses.

Chapter 265, §13

Whoever commits manslaughter shall, except as hereinafter provided, be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail or a house of correction for not more than two and one half years....

Massachusetts Rules of Criminal Procedure,

Rule 30(a)

(a) Unlawful Restraint. Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

Code of Massachusetts Regulations

Title 120, Chapter §300.08 (2013)

(1) The Massachusetts Parole Board does not permit representation by counsel at initial release hearings or at any review hearing except for those inmates serving a life sentence with attendant parole eligibility. The Massachusetts Parole Board permits representation by attorneys or law students under an attorney's supervision at parole rescission hearings, preliminary parole revocation hearings, and final parole revocation hearings. Representation by another inmate is not permitted.

(2) Only the parole hearing panel, the inmate, parole staff, and a representative of the superintendent of the institution where the inmate is incarcerated will routinely attend initial release and review hearings.

(a) Under special circumstances, individuals other than those enumerated in 120 CMR 301.08(2) may attend specified initial and review hearings, but only with the permission of the parole hearing panel. See also Victim Access Hearings, 120 CMR. 401.00 et seq.

(b) The parole hearing panel may, in its discretion, permit a qualified individual to represent an inmate who, because of a mental, psychiatric, medical, physical condition or language barrier is not competent to offer testimony at or understand the proceedings of an initial release or review hearing.

CERTIFICATE OF COMPLIANCE

I the undersigned, counsel to the defendant herein, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision), 16(e) (references to the record), 16(f) (reproduction of statutes, rules, regulations), 16(h) (length of briefs), 18 (appendix to the briefs), and 20 (form of briefs, appendices, and other papers).

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