No. _____

In The
Supreme Court of the United States

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Steven James,
Petitioner

v.

Commonwealth of Massachusetts
Respondent

———u———

On Petition for Writ of Certiorari
to the Massachusetts Supreme Judicial Court

———u———

PETITION FOR WRIT OF CERTIORARI

———u———

Rosemary Curran Scapicchio
Counsel Of Record
107 Union Wharf
Boston, Massachusetts 02109
(617) 263-7400
scapicchio_attorney@yahoo.com

Dennis M. Toomey
4 High Street, Suite 211
North Andover, MA 01845
(857) 239-9999
toomey.attorney@gmail.com

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

This case presents two questions of national importance concerning the federal constitutional rights of juvenile homicide defendants (like Steven James) who were tried for first-degree murder and sentenced as adults and whose direct appeals became final before Miller v. Alabama, 132 S.Ct. 2455, 2468 (2012), and J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011).

1. Where Miller v. Alabama was made retroactively applicable to cases that were final after direct appeal, and because state postconviction courts must provide appellate review of federal constitutional claims in a manner that comports with due process, is the Massachusetts statute M.G.L. c.278 sec.33E (refusing to provide appellate review as a matter of right to a specific group of juveniles convicted of first-degree murder, whose post-Miller requests for relief are denied in the trial courts, because their direct appeal was already final before Miller) and the state court judge's decision below (that Miller is not "new and substantial" to warrant discretionary appellate review) contrary to clearly established federal law?
2. Where this Court adopted a reasonable juvenile standard in J.D.B. v. North Carolina for custody analysis, and based on the intersection of this Court's two lines of jurisprudence regarding juvenile brain science and due process rights applied to jury instructions, are jury instructions using an *adult* reasonable person standard at the trial of a *juvenile* (to prove murder and disprove manslaughter and self-defense to convict and sentence a juvenile to life in prison), contrary to and an unreasonable application of established federal constitutional law?

This Court's resolution of these issues would not only resolve confusion and

conflict between and within the states, but would also resolve the unconstitutional disparate treatment of similarly situated juvenile homicide defendants in Massachusetts, and would provide much needed guidance to the Massachusetts Supreme Judicial Court.

LIST OF PARTIES

Petitioner, Steven James, was the defendant in the state trial court and the appellant before the single justice gatekeeper of the Massachusetts Supreme Judicial Court.

Respondent, the Commonwealth of Massachusetts, was the plaintiff in the state trial court and the appellee before the single justice gatekeeper of the Massachusetts Supreme Judicial Court.

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PETITION FOR A WRIT OF CERTIORARI

Steven James respectfully petitions this Court for a writ of certiorari to review the decision of the single justice from the Massachusetts Supreme Judicial Court, which denied James's request for appellate review of the trial court's decision on his post-Miller Motion For A New Trial and related claims addressing challenges to the statutes used to convict and sentence him as well as his sentence, the manner in which he was effectively re-sentenced, the lack of a meaningful opportunity for parole, and claims relating to the denial of his motion to suppress statements and the use of an adult reasonable person standard in his trial jury instructions.

OPINION AND ORDER BELOW

The January 11, 2016 decision of the Massachusetts Superior Court (Plymouth County Superior Court) denying James' post-Miller Motion For A New Trial is unpublished and a copy is provided in the Appendix at Appendix A (A1).

The decision of the Massachusetts Supreme Judicial Court, interpreting a state statute and deciding that certain juvenile homicide defendants whose convictions were already final were not entitled to appellate review as a matter of right (even after Miller v. Alabama), is published at Commonwealth v. Steven James, 477 Mass. 549 (2017) and is attached as Appendix B (A54).

The August 28, 2018 decision on James' Gatekeeper Petition, specifically denying James appellate review of his post-Miller requests for relief, is unpublished and a copy is provided in the Appendix at Appendix C (A57). That August 28, 2018 decision is the final judgment of the state court on this matter.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter, invoked under 28 U.S.C. § 1257(a). This petition is timely filed within 90 days of the August 28, 2018 final state court judgment pursuant to Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. V:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VIII:
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV, sec. 1:
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.

ALM GL ch. 278, § 33E (Massachusetts General Laws)

Per Supreme Court Rule 14(f), this statute is set forth in the Appendix. (A68).

STATEMENT OF THE CASE

On February 21, 1994, 17-year-old Steven James was arrested for first-degree murder after a fight where the victim introduced a bat against James's friends. James voluntarily surrendered to police without a parent or guardian. James admitted that he hit the victim in the head with a bat. Several of the other boys involved in the fight were prosecuted in juvenile court. However, on April 19, 1994, James was selectively indicted as an adult for first-degree murder in a Massachusetts Superior Court.

James filed a Motion to Suppress Statements elicited by police during the juvenile interrogation without an interested adult or attorney present, but that motion was denied prior to trial and prior to J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011). After that, James was tried in Massachusetts Superior Court as an adult.

James had a horrific childhood, highlighted by a lack of fit biological parents and James being moved between 24 different foster homes and placements between ages 5-17. See Appendix A (A10-13); Appendix E (69-85).

Additionally, James was diagnosed with impulse control disorder and as learning disabled. (IV-69-72).[1] At the time of his arrest, 17-year-old James was reading at a fourth-grade level. (IV-124). Shortly before the incident that led to the murder charge, James was badly beaten by a group of men, whereby James suffered a concussion and facial injuries. (IV-151). Prior to this incident, James had no convictions.

The trial evidence revealed a perfect storm of juvenile impulsivity, highlighted by

[1] All references to "Tr." Are citations to the record transcripts on file with the Massachusetts Supreme Judicial Court, SJ-2016-0049.

sudden combat in a fight that James did not start, a call to help defend his friend from a man with a bat, and a lack of impulse control upon grabbing the bat.

On February 21, 1994, outside a restaurant parking lot, a teen named DiRenzo got into a fight with a man. The man went to his van and came out with a baseball bat. (II-218). DiRenzo yelled, "He has a bat!", (II-219-220), or "I think he has a gun!" or both. (II-227). Then DiRenzo yelled for help saying, "He's going to kill me," (II-227), prompting five or six teen-agers (including Steven James) to head over to help. (II-219).

The man with the bat (the alleged victim) was still holding the bat waving it back and forth. (III-85). Initially, James was in front of the man with his fists up as the man waved the bat. (III-85). One witness saw the man attempt to swing the bat. (III-175). Then one of the teens knocked the bat out of the man's hand. (III-86). The man stumbled. (III-87). James picked up the bat and hit the man in the head two or three times. (III-179). Through his tears, James said, "I can't believe what [I] did." (II-111).

James' case was tried before J.D.B. v. North Carolina, 564 U.S. 261 (2011). The trial judge did not give jury instructions tailored to a reasonable juvenile. In defining malice, the trial judge used model instructions that utilized the "reasonably prudent person" standard and adult "Cunneen" factors even though James was a juvenile, not a reasonable adult. (V-180). Based on the jury instructions, the jury was not instructed to consider any mitigation as it relates to juveniles. (See entire jury charge Tr. V).

James was convicted of first-degree murder by extreme atrocity and cruelty on April 11, 1995, and was sentenced to life in prison without the possibility of parole, without an individualized sentencing hearing and before Miller, 132 S.Ct. 2455, 2468 (2012). His co-defendants received sentences ranging from 5-15 years. James'

conviction was affirmed on direct appeal by the Massachusetts Supreme Judicial Court in 1998. See Comm. v. James, 427 Mass. 312 (1998).

On June 6, 2013, after Miller v. Alabama and J.D.B. were decided, James sought post-conviction relief[2] in Massachusetts Superior Court. On January 11, 2016, a motion judge who was not the trial judge denied James' requests without an evidentiary hearing or an individualized re-sentencing hearing. Appendix A (A53).

The motion judge in the trial court denied James' request for an individualized re-sentencing hearing under Miller, denied James' requests for a new trial, and denied claims relating to an attack on the constitutionality of the statute under which James was convicted and sentenced, challenges to the applicable murder and transfer statutes, the lack of any meaningful opportunity for parole, the need for suppression of statements, and the adult reasonable person jury instructions at trial. James's sentence was modified to a sentence of life in prison, without a re-sentencing hearing, without a specific trial court order regarding parole eligibility, and without any explicit new sentence decree to explain what the new sentence means. See Appendix A (A1-53).

On February 9, 2016, James sought leave to appeal his claims to the Massachusetts Supreme Judicial Court. James argued that such an appeal should not be discretionary but should be a matter of right. The matter was assigned to a single justice for review. On October 19, 2016, the single justice gatekeeper stayed the petition and reported a question to the full Massachusetts Supreme Judicial Court (a question that for practical purposes would answer whether juvenile homicide offenders

[2] The relief requested was called a Motion for New Trial in Massachusetts.

whose direct appeals were finalized before Miller had a right to appellate review of their post-conviction requests for relief, or whether such appellate review was merely discretionary based on M.G.L. c.278 sec.33E).

On August 1, 2017, the Massachusetts Supreme Judicial Court ruled that under Massachusetts statutory law, any juvenile homicide defendant who was convicted of first-degree murder and already had a direct appeal before Miller was not entitled to appellate review (of post-Miller requests for relief) as a matter of right. See Commonwealth v. James, 477 Mass. 549 (2017); Appendix B (A54-56). With the reported question answered, James' petition was sent back to the gatekeeper to rule on his petition and to decide if James would get discretionary post-Miller appellate review.

On August 28, 2018, a single justice of the Massachusetts Supreme Judicial Court, acting as a gatekeeper, entered judgment denying James' petition for appellate review of his post-Miller requests for relief because he found that James' claims were not new and substantial. See Appendix C (A57-67). That discretionary decision to deny James an appeal is itself not appealable pursuant to M.G.L. c.278 sec.33E.

To date, Steven James has now served almost 25 years of a life sentence.

REASONS FOR GRANTING THE WRIT

1. **Especially since Miller v. Alabama was made retroactively applicable to cases final after direct appeal, the Massachusetts rule (refusing to provide appellate review as a matter of right to a select group of juvenile homicide defendants because their direct appeal was final before Miller) and the state court judge's decision below (that Miller claims were not "new and substantial" to warrant discretionary appellate review) are both contrary to clearly established federal law and violate the Due Process Clauses of the 5th and 14th Amendments, the Cruel and Unusual Punishment clause of the 8th Amendment, and the Equal Protection Clause of the 14th Amendment.**

In Massachusetts, there is a statutory rule under M.G.L. c.278 sec.33E (see Appendix C at A68) whereby juvenile defendants convicted of first-degree murder, who have already had a direct appeal, are not entitled to any subsequent appeal as a matter of right. Juveniles convicted of second-degree murder are not subject to that rule, and those juveniles have a right to appeal requests for relief made after a direct appeal. But as to the select group of juveniles convicted of first-degree murder whose appeals are already final after direct review, those juveniles have no right to appeal any adverse judicial decisions made after their direct appeals.

James falls within that group of juveniles being treated differently, and James was denied a *right* to appeal after Miller. To add insult to constitutional injury, James was also denied a *discretionary* appeal because of a finding (which was contrary to Montgomery) that James's post-Miller claims were not new and substantial. See Appendix C (A57-67). Cf. Montgomery v. Louisiana, 136 S.Ct. 718, 734 (2016).

After this Court's decision in Miller v. Alabama, the Massachusetts Supreme Judicial Court interpreted M.G.L. c.278 sec.33E as still applying to juveniles convicted of first-degree murder, holding that even if a juvenile's sentence of life in prison without the possibility of parole is modified, the juvenile is still sentenced under a first-degree murder statute, and that the statute of conviction controls rather than the juvenile's sentence. See Comm. v. James, 477 Mass. 549 (2017). After Miller (but before Montgomery v. Louisiana), the Massachusetts Supreme Judicial Court also held that the only remedy for a juvenile sentenced to life without parole before Miller is not re-sentencing or an individualized sentencing hearing but rather administratively striking from the sentence the words "without parole". Diatchenko v. District Attorney, 466

Mass. 655, 673 (2013).

As such, after imposition of a life sentence, a small group of juveniles in Massachusetts are being treated differently. Juveniles convicted of first-degree murder (whose direct appeals became final before Miller) are being treated differently than other juvenile homicide offenders. Even though juveniles convicted of first-degree murder purportedly have parole eligibility now, just like juveniles convicted of second-degree murder, juveniles convicted of first-degree murder are still being treated differently as far as their rights to appeal. This select group of juveniles is afforded fewer protections than juveniles convicted of second-degree murder or juveniles convicted of first-degree murder whose direct appeals were not final before Miller.

What this means, in practical terms, is that if a juvenile was convicted of first-degree murder in Massachusetts and had their appeal become final on direct appeal before Miller, and then that juvenile seeks relief in the trial court after Miller, that juvenile has no right to appeal any adverse decision in the trial court. If a juvenile from that select group of juveniles being treated disparately seeks to challenge the administrative sentence modification without the opportunity for an individualized re-sentencing hearing, or to challenge the statutes utilized to convict and sentence and re-sentence, or the lack of a meaningful opportunity for parole, or seeks to raise any other federal constitutional claims, that juvenile has no right to appeal any adverse decision. Instead, the juvenile must apply to for a discretionary appeal called a gatekeeper petition per M.G.L. c.278 sec.33E. If that application is denied, the decisions of the trial court become unreviewable as a matter of right. That is what happened to James.

A. This Court should grant the writ to ensure Massachusetts complies with clearly established federal law.

In this case, James filed a post-conviction, post-direct appeal, post-Miller v. Alabama motion making multiple claims for relief. A motion judge in the trial court denied that motion. Appendix A (A53). The Massachusetts Supreme Judicial Court denied James an appeal as a matter of right. Appendix B (A54). The single justice of the Massachusetts Supreme Judicial court then decided in his discretion that James should not get any appellate review of his post-Miller requests for relief because he found James' claims were not new and substantial. Appendix C (A57-67).

This means that no full appellate court has ever reviewed the post-Miller claims raised by James. If this Court does not grant this petition, it is likely that no state appellate court ever will review James' federal constitutional claims. And given the state court deference and limitations under AEDPA, it is unlikely that federal habeas review will ever provide the necessary federal constitutional remedy.

i. All juveniles must have a *right* to appeal post-Miller claims.

This Court should grant the writ to ensure that Massachusetts complies with clearly established federal law requiring post-Miller retroactivity and due process and equal protection on appeal for post-conviction legal claims raised by all juvenile homicide defendants. See Montgomery v. Louisiana, 136 S.Ct. 718, 734 (2016).

The Massachusetts statutory rule, as interpreted by the Massachusetts Supreme Judicial Court and as applied to the particular class of juveniles including Steven James, is contrary to and an unreasonable application of clearly established federal law. This Court explicitly made Miller v. Alabama retroactively applicable to cases that were

already final after direct appeal. Montgomery v. Louisiana, 136 S.Ct. 718, 734 (2016). State postconviction courts are constitutionally required to supply a remedy. However, the Massachusetts statutory rule fails to provide appellate review as a matter of right to juvenile homicide offenders whose post-Miller requests for relief are denied in the trial courts, if their direct appeal was already final before Miller. Comm. v. James, 477 Mass. 549 (2017). While there are concerns of finality and letting states govern themselves, here Massachusetts has interpreted a statute in a manner that ignores the retroactive application of Miller. See Montgomery, 136 S.Ct. 718, 734 (2016).

If a juvenile homicide defendant whose appeal was already final before Miller seeks relief after direct appeal, that motion is reviewed by a motion judge sitting in the trial court. If that motion judge declines relief, there is currently no right to appeal that decision. Instead, the only option is to seek discretionary review by filing a gatekeeper application to a single justice of the Massachusetts Supreme Judicial Court. Only if that one single justice decides that the application presents claims that are "new and substantial" is a juvenile permitted to appeal. Otherwise, the trial court's decisions are unreviewable for a small class of juvenile homicide defendants.

The question is whether this state statute and statutory interpretation violates the federal constitution and this Court's precedent as applied to juveniles. The answer, respectfully, should be yes.

As an initial matter, denying defendants a right to appeal Miller claims runs contrary to Montgomery. See Montgomery v. Louisiana, 136 S.Ct. 718, 734 (2016). Given this Court's holding in Montgomery, all appeals relating to Miller are new and substantial because Miller was a new decision with full retroactive effect, even to cases

that are already final on collateral review.

This Court has held that all juvenile homicide defendants must receive the retroactive benefit of Miller, including cases on collateral review whose direct appeals are already final. See Montgomery, 136 S.Ct. 718 (2016). It follows that all juvenile homicide defendants who are denied relief sought related to Miller should have an automatic right to appellate review, an appeal as of right, regardless of when they were sentenced. See Montgomery, 136 S.Ct. 718, 734 (2016); Evitts v. Lucey, 469 U.S. 387, 393-400 (1985). If states are required as a constitutional matter to give retroactive effect to new substantive constitutional rules, the scope of such retroactive effect should include the *right* to appellate review of a decision denying petitioner's request for relief under the new rule. See Atkins v. Virginia, 536 U. S. 304, 317 (2002); Ex parte Siebold, 100 U. S. 371 (1880).

But the federal issue requiring this Court's intervention is not just the fact that requests for a re-sentencing hearing under Miller are unreviewable as a matter of right to juveniles like James, James is being denied the same opportunity to appeal all post-conviction claims that is afforded to other juveniles.

If Massachusetts' administrative sentence modification changed James' sentence to a sentence of life in prison (striking the words "without parole"), then James was in the same position as juveniles convicted of second-degree murder who are expressly sentenced to life in prison with parole, who have an automatic appeal as of right, and who are not required to petition to the gatekeeper for review of their post-conviction claims. Both classes of juveniles are convicted of murder and both are sentenced to life in prison. Since James' sentence was changed and this was James's first appeal after

Miller with that purported new sentence, James should be in the same position as juveniles convicted of first-degree murder whose appeals are not final on direct review.

Yet despite the equal footing, under Massachusetts law James (and the class of juveniles in his group) is not afforded the same equal protection and due process rights as those other juvenile classes. Even though James is a juvenile, Massachusetts gives James fewer protections than adults convicted of second-degree murder, fewer protections than juveniles convicted of second-degree murder, and fewer protections than juveniles convicted of first-degree murder whose convictions were not yet final on direct appeal before Miller.

That is fundamentally unfair and contrary to clearly established federal law. Montgomery, 136 S.Ct. 718 (2016). Since Massachusetts has provided a post-conviction process to litigate federal claims after direct appeal, that process must apply equally to all juveniles so that the state can grant appellate relief that federal law requires. See Montgomery, 136 S.Ct. 718 (2016)(if state collateral proceeding is open to a federal law claim, the state "has a duty to grant the relief that federal law requires."…In adjudicating claims under its collateral review procedures a State may not deny a controlling right asserted under the Constitution…)(internal citations omitted).

When Massachusetts denied a certain class of juvenile homicide defendants like James a right to appeal their post-Miller and post-conviction requests for relief, that state action is contrary to clearly established precedent from this Court and violates the Due Process Clauses of the 5th and 14th Amendments, the Cruel and Unusual Punishment clause of the 8th Amendment, and the Equal Protection Clause of the 14th Amendment. See Montgomery, 136 S.Ct. at 734 (2016); Evitts, 469 U.S. 387, 393 (1985).

This Court has clearly established that due process protects juveniles from unconstitutional criminal procedures. See, e.g, McKeiver v. Pennsylvania, 403 U.S. 528, 533-34 (1971); In re Winship, 397 U.S. 358 (1970); In re Gault, 387 U.S. 1 (1967); Haley v. Ohio, 332 U.S. 596, 601 (1948). It is also clearly established that if a state provides a particular form of appellate procedure, such as the opportunity for post-conviction relief after direct appeal pursuant to M.G.L. c.278 sec.33E, that procedure must comport with the dictates of the federal constitution, including due process and equal protection. See Evitts v. Lucey, 469 U.S. 387, 393-400 (1985)(defendant lacked adequate opportunity to present claims fairly in the context of state's appellate process; under Due Process Clause, appeal was *as of right*).

Yet here James and similarly situated juveniles are being treated differently and with fewer protections than other juvenile homicide defendants and are being deprived of an automatic right to appeal, making trial court decisions unreviewable as of right, restricting review to the discretionary standard of whether claims are "new and substantial." Due process and fundamental fairness and equal protection concerns require that all juvenile homicide defendants sentenced to life in prison have a right to automatic appellate review of their post-conviction claims. See Montgomery, 136 S.Ct. at 734; Winship, 397 U.S. 358 (1970); Gault, 387 U.S. 1 (1967); Evitts, 469 U.S. at 393.

This Court has previously invalidated a state rule which held that only certain defendants were entitled to free trial transcripts (only defendants who could convince the trial judge that "justice will thereby be promoted" by giving them transcripts). See Eskridge v. Washington State Board of Prison, 357 U. S. 214, 215 (1958) (per curiam) (invalidating state rule giving free transcripts only to defendants who could convince

trial judge that "justice will thereby be promoted"). Contrarily, the current Massachusetts rule is that only certain classes of juveniles receive appellate review as a matter of right (only those convicted of first-degree murder who were not sentenced or had not finished a direct appeal before Miller was decided, and defendants who could convince a single justice that such an appeal would raise "new and substantial" issues in the discretion of that judge, and juveniles convicted of second-degree murder).

Juveniles in the small group including Steven James are being denied automatic appellate review of their claims. This kind of discrimination and unequal protection is unconstitutional and violative of due process and equal protection rights. See Evitts, 469 U.S. 387, 393 (1985); Eskridge, 357 U. S. 214, 215 (1958); Draper v. Washington, 372 U. S. 487 (1963) (invalidating procedure providing for transcript only if defendant could satisfy that his appeal was not frivolous). After Massachusetts altered James' sentence, James is in a worse position for any post-conviction matters with fewer protections than other juveniles and even some adults serving similar sentences.

This kind of disparate treatment also runs contrary to Miller and this Court's treatment of juveniles. See Miller, 132 S.Ct. 2455, 2468 (2012). This Court has also held that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." Graham v. Florida, 560 U.S. 48, 76 (2010). Here, Massachusetts utilized procedural and statutory rules to deprive James of an automatic right to appeal without regard to his juvenile status. Massachusetts erroneously held that some juveniles can be procedurally denied a right to appellate review (regardless of sentence) because of the degree of murder and the application of a particular statute, but Miller dictates that it is not the crime but rather the sentence that is important

when analyzing constitutional protections. See id. James should not be denied the same right to appeal that is afforded to other juveniles serving the same sentence.

This is a particularly dangerous and nationally important violation of federal constitutional due process and equal protection rights. There are numerous juvenile homicide offenders who were sentenced and whose direct appeals became final before Miller. In light of Miller and advancements in juvenile brain science, those juvenile homicide defendants have a right to raise several appellate issues, including claims challenging the constitutionality of their life sentences, claims challenging the statutes under which they were charged and convicted and sentenced unconstitutionally, claims related to the parole process in a particular state, and challenges to the trial convictions and sentencing hearings that resulted in the life sentences. Yet under current Massachusetts statutory law, an entire class of juvenile defendants do not have an automatic right to appellate review of those claims. See Miller, 132 S.Ct. at 2468.

Additionally, this Court recently denied certiorari in a similar but inadequately briefed case that prompted Justice Sotomayor to write separately about how statutes that shield life sentences from judicial scrutiny raise "serious constitutional concerns." Campbell v. Ohio, 138 S. Ct. 1059, 1060 (2018)(statement of Sotomayor, J., respecting denial of certiorari)("I nonetheless write separately because a statute that shields from judicial scrutiny sentences of life with-out the possibility of parole raises serious constitutional concerns.").

Like the concerning Campbell case, the Massachusetts statute at issue here shields from appellate judicial scrutiny certain Massachusetts trial court decisions on post-Miller requests for relief. The difference is that here the claims are adequately

preserved and ripe for review. There are serious constitutional concerns where such important rulings are shielded from appellate review as a matter of right. This Court has repeatedly emphasized that "meaningful appellate review" for the most serious cases promotes reliability and consistency. See Clemons v. Mississippi, 494 U. S. 738, 749 (1990). Because there is an entire class of juveniles being denied meaningful (or any) appellate review of federal constitutional claims in Massachusetts, this Court should grant the writ.

ii. Even if appellate review can ever be *discretionary*, the state court finding here by one single judge – denying James a discretionary appeal by finding that James' post-Miller claims were not "new and substantial" – is contrary to clearly established federal law.

After it was unconstitutionally determined that James did not have any *right* to appeal after Miller, James was also denied a *discretionary* appeal in part because of a state court conclusion (which was contrary to Montgomery) from one single justice that James's post-Miller claims were not new and substantial. See Appendix C (A57-67). A single judge in Massachusetts essentially decided that Miller and juvenile brain science are not new and substantial. But after Montgomery, it is clear that Miller is new and substantial and that it applies to James regardless of procedural posture. See Montgomery v. Louisiana, 136 S.Ct. 718, 734 (2016).

The government may argue that Massachusetts is free to determine the scope of review available in post-conviction proceedings. However, this Court disagreed with such a blanket statement in Montgomery. See Montgomery, 136 S.Ct. at 734. Moreover, even if discretionary review is ever constitutionally acceptable, the conclusion here - that Miller and juvenile brain science advancements are not new and

substantial - is contrary to clearly established federal law. See id.

Post-Montgomery, single judges in Massachusetts are not permitted to ignore federal law made retroactive on collateral review. States may not disregard a controlling, constitutional command in their own courts. See Martin v. Hunter's Lessee, 1 Wheat. 304, 340–341, 344 (1816). See also Yates v. Aiken, 484 U. S. 211, 218 (1988).

Here, the commands of Miller and Montgomery are binding on state courts and by extension state statutes. See Montgomery, 136 S.Ct. at 734. But a single trial court judge essentially found that Miller and advancements in juvenile brain science were not material to James' 1995 trial and sentencing, and one single justice denied discretionary appellate review. A51,57, 60 ("As the jury was already exposed to testimony about the defendant's age and emotional development in his decision making, the new evidence does not raise a substantial issue meriting appellate review.").

Although this Court is careful to limit procedural components of substantive holdings to avoid intruding more than necessary upon the states' administration of their criminal justice systems, this Court must act where Massachusetts is allowing single judges to violate federal constitutional rights by ignoring recent, explicit binding retroactive precedent from this Court. See Moore v. Texas, 137 S.Ct. 1039 (2017)(state court inappropriately disregarded evidence relating to Atkins v. Virginia claim). Since Massachusetts provides a state procedure for post-conviction review after direct appeal, that procedure must satisfy and obey federal constitutional law, and yet here it does not. See Evitts, 469 U.S. 387, 393 (1985).

Because Massachusetts is denying post-Miller appeals as a matter of right to a certain class of juveniles including Steven James, and because Massachusetts is

denying discretionary appeals in a manner that is contrary to clearly established federal law, this Court should grant the writ.

B. This Court should grant the writ because of a split amongst and within the states.

In addition to the important federal constitutional rights being violated (by the post-Miller denial of a right to appeal and the denial of a discretionary appeal for juveniles like Steven James), and the fact that at least one Justice of this Court has expressed concern over a similar issue, this Court should grant this petition because there is currently disagreement between the several states on this issue. There is a split amongst various states about how to review claims made after Miller. This Court should grant certiorari in this case because this important issue, a question of federal law, is subject to a split of authority in the lower courts and it has not been, but should be, resolved by this Court. See Supreme Court Rule 10.

As referenced above, Massachusetts unconstitutionally limits certain juvenile homicide defendants right to appeal motions for a new trial made after Miller. Appendix B (A54). Like Massachusetts, Illinois appellate courts held post-Miller that states can maintain some discretion to consider requests for post-conviction relief based on state procedural rules, but they granted that relief based on Miller. See People v. Holman, 91 N.E. 3d 849, 863 (Ill. 2017)(granting petition for leave to appeal denial of Miller claims although conviction already final).

Contrarily, several other states have recognized that new procedural safeguards are necessary to guarantee that post-Miller requests for relief are litigated effectively. For example, Oklahoma directly contradicts the Massachusetts proposition (that there

is no appeal as of right for a post-Miller request for relief if a defendant's direct appeal was final before Miller). Although Oklahoma has state post-conviction procedural rules designed to limit multiple appeals, Oklahoma recognizes that the retroactive application of Miller necessitates appellate review now. See, e.g., Stevens v. State, 2018 OK CR 11, WL 2171002, at *2-8 (Okla. Crim. App. 2018)(Although conviction and sentence were final before Miller, and although the state post-conviction procedures ordinarily do not permit a second appeal, defendant's post-Miller application for post-conviction relief was his first opportunity to raise a claim under Miller, so appellate review was necessary); Luna v. State, 387 P.3d 956 (Okla. Crim. App. 2016).

Similarly, in Mississippi, in a case where a juvenile homicide defendant's direct appeal became final in 2006, the Mississippi Supreme Court reviewed its first post-Miller trial court decision in 2018 and held that appellate review was required and then went on to discuss the appropriate standard of review. See Chandler v. State, 242 So. 3d 65 (Miss. 2018), Chandler v. Mississippi, No. 18-203 (cert petition).

By demanding that trial court judges make written findings for review of all Miller requests, Wyoming also seems to contradict Massachusetts. See Davis v. State, 415 P.3d 666 (Wyo. 2018)(by holding that trial court judge had duty to make specific findings in 2016 for a request for Miller relief relating to a 1983 murder conviction, Wyoming implicitly acknowledged right to appellate review post-Miller, even for older cases). See also Bear Cloud v. Wyoming, 133 S.Ct. 183, 183–84 (2012).

In Georgia, juvenile defendants receive appellate court review of the trial court's Miller-related rulings, and the Georgia Supreme Court there reviews the trial court record on appeal. See Veal v. State, 784 S.E.2d 403, 411 (Ga.2017)(although a direct

appeal case, the decision discussed how Montgomery and retroactivity overcome any claims regarding the timeliness of claims). The Veal Court noted that Montgomery undercuts any claim that state courts still have significant discretion in these areas. See Veal v. State, 784 S.E.2d at 411. See also Commonwealth v. Batts, 163 A.3d 410, 415 (Pa. 2017)(discussing that Pennsylvania recognizes additional procedural safeguards are necessary to ensure review of juvenile homicide appeals post-Miller).

At least two federal Circuit Court of Appeals also appear to disagree with Massachusetts and Illinois on this issue. Malvo v. Mathena, 893 F.3d 265 (4th Cir. 2018)(by affirming the district court's ruling granting a writ of habeas corpus, vacating a juvenile life sentence, and remanding, the 4th Circuit implicitly held that appellate review is necessary for Miller claims); Johnson v. United States, 720 F.3d 720, ——, 2013 WL 3481221, at *1 (8th Cir.2013)(petitioner permitted to raise second successive challenge based on Miller, reasoning the petitioner successfully made out a prima facie case that Miller articulated "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."). See also Cruz v. United States, 11-CV-787 (JCH) (D. Conn. Mar. 29, 2018)(granting 2255 petition after petitioner granted permission to file a second successive habeas petition because of Miller's retroactive application).

There is also a split amongst the states on the type of findings required post-Miller, a split that in and of itself presupposes that there will be appellate review of such findings. See, e.g., People v. Skinner, No. 152448, 2018 WL 3059768, at *25 (Mich. June 20, 2018) (Markman, C.J., dissenting) (noting "the split of authority in state courts post-*Miller* on whether a court must make a specific 'finding' of irreparable corruption");

People v. Hyatt, 891 N.W. 2d 549, 577 (Mich. App. 2016)(appellate courts should review juvenile life sentences and find them to be inherently suspect). See also Landrum v. State, 192 So. 3d 459, 466 (Fla. 2016); Veal v. State, 784 S.E.2d 403, 412 (Ga. 2016). The confusion left in the wake of the retroactive application of Miller has spawned much disagreement and discussion. See Alice Reichman Hoesterey, *Confusion in Montgomery's Wake: State Responses, the Mandates of Montgomery*…,,45 FORDHAM URB. L.J. 149 (2017).

The disagreement amongst the several states makes this an important case for the petition to be granted. When this Court announces a new rule of constitutional law, made retroactive to cases on collateral review by this Court, that was previously unavailable, state courts should not be permitted to deny appellate review of claims brought pursuant to that new rule. And when federal constitutional law recognizes that juveniles are different from adults in a manner that requires constitutional protections, state courts should not be permitted to provide some juveniles with fewer constitutional protections than other juveniles or certain adults.

This Court should grant this petition to resolve the confusion and split amongst the several states. This Court should hold that all juvenile homicide defendants are entitled to appellate review for post-Miller claims of relief, and that the Massachusetts statute (M.G.L. c.278 sec.33E) currently being used to deprive such appeals is unconstitutional as applied to juvenile homicide defendants whose direct appeals became final before Miller.

There is also a split within Massachusetts' unconstitutional classes of juvenile murder defendants, where only certain juvenile homicide offenders get full non-

discretionary appellate review of claims made after Miller v. Alabama. Juvenile defendants like Steven James whose convictions became final before Miller are required to apply for discretionary review to secure the right to appeal. If a single judge in the trial court denies relief, there is no right for this class of defendants to appeal to a full appellate court. Contrarily, juvenile homicide defendants whose convictions were not final before Miller have an automatic right to appeal to the Massachusetts Supreme Judicial Court if the trial court judge errs.

This disparate treatment of similarly situated juvenile defendants, in connection with a new constitutional rule that is supposed to be equally retroactive and applicable to all, violates James' rights under the Equal Protection Clause of the 14th Amendment, the Due Process Clauses of the 5th and 14th Amendments, and the Cruel and Unusual Punishment clause of the 8th Amendment. See Montgomery, 136 S.Ct. 718, 734 (2016); Henderson v. United States, 568 U.S. 266 (2013)("To hold to the contrary would bring about unjustifiably different treatment of similarly situated individuals."); Evitts, 469 U.S. 387, 393-400 (1985). Juveniles like James sentenced to life in prison should have at least the same appellate rights and protections as other juveniles and adults serving the same sentences. Because the applicable statute denies James' the right to appeal, even for Miller claims made retroactive to cases on collateral review, M.G.L. c.278 sec.33E is unconstitutional as applied to James and similarly situated juvenile homicide defendants. See Miller, 132 S.Ct. 2455, 2468 (2012); Evitts, 469 U.S. 387, 393 (1985); Vance v. Bradley, 440 U.S. 93, 97 (1979). Because of a split between and within the states as to post-Miller appeals, this Court should grant the writ.

C. This Court should grant the writ because the appellate claims deemed unreviewable by Massachusetts are violations of clearly established federal constitutional law.

Massachusetts has held that James has no right to appeal at this time, and Massachusetts has denied appellate review of the claims raised by James. But the claims raised by James are federal constitutional claims which Massachusetts is obligated to remedy. This Court should grant the writ ensure that Massachusetts complies with its obligation to adjudicate federal constitutional violations.

The importance of this petition is best understood by briefly discussing the federal constitutional claims for which Massachusetts held James has no right to appellate review. James raised multiple federal constitutional claims, but the trial court judge denied the claims and the single justice of the Massachusetts Supreme Judicial Court denied James a right to appeal. Massachusetts violated clearly established federal law when it deprived James of an opportunity to appeal the claims he raised in the trial court after Miller.

First, James argued that his motion to suppress statements should have been allowed because James was a juvenile and in light of the circumstances of the statement. In denying post-conviction relief, the trial court judge relied on the prior finding that James was a "worldly seventeen year old man" (A40), and then James was denied a right to appeal that issue to an appellate court. This Court should grant the writ to ensure that Massachusetts complies with clearly established law requiring appellate consideration of a suspect's juvenile age in determining the voluntariness of statements or waiver of rights. See J.D.B. v. North Carolina, 564 U.S. 261 (2011). See also Dassey v. Dittmann, 201 F. Supp. 3d 963, 1006 (E.D. Wis. 2016), rev'd en banc, 877

F,3d 297 (7th Cir. 2017), cert petition denied, No. 17-1172 (June 25, 2018); Allison D. Redlich, The Susceptibility of Juveniles To False Confessions and False Guilty Pleas, 62 RUTGERS L. REV. 943 (2010).

At the time of James' motion to suppress, trial, and direct appeal, J.D.B. had not yet been decided and the voluntariness of James' statements was viewed in connection with Miranda. See Miranda v. Arizona, 384 U.S. 436, 457-58 (1966). Based on clearly established precedent from this Court and new juvenile brain science, we now know that 17-year-old juveniles are not "worldly" men. See Miller, 132 S.Ct. 2455, 2468 (2012); J.D.B., 564 U.S. 261 (2011). Instead, juveniles are not adults and juveniles are more likely to give a false confession or tell police what they want to hear or involuntarily waive rights and make involuntary statements without first consulting with an attorney or interested adult. See, e.g., Brandon L. Garrett, *Convicting the Innocent Redux*, *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEIGN THE INNOCENT*, 40, 43-46 (2017)(over one-third of false confessions involved juveniles).

Lower courts must do more than just mention a juvenile's age. This Court has clearly established that juvenile confessions require special attention to ensure that statements are voluntary. See J.D.B., 564 U.S. 261 (2011). See also Naomi E.S. Goldstein et. al, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2018); Martin Guggenheim and Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U.J.L. & POL'Y 109 (2012). Yet here James' statements were involuntary, he was not provided with an attorney or an opportunity to consult

with an interested adult, his juvenile status was not adequately considered during his motion to suppress, and James was denied an opportunity to appeal this post-conviction claim to an appellate court post-Miller. Especially where James had special needs, his federal constitutional suppression claim requires review by an appellate court. See Morgan Cloud, *Words Without Meaning: The Constitution, Confessions, And Mentally Retarded Suspects*, 69 U. CHICAGO L. REV. 495, 509-514 (2002). This is an important federal claim for which Massachusetts held James had no right to appellate review.

Second, James argued that the sentencing statutes used to convict and re-sentence him were unconstitutional. See Miller, 132 S.Ct. 2455, 2468 (2012). The trial court held that a re-sentencing hearing was not required after Miller, that the statutes at issue were constitutional, and that it was lawful to simply sever the words "without parole" from the paperwork describing James' sentence. This Court should grant the writ to ensure that lower courts comply with established law regarding appellate consideration of Miller claims.

Third, this Court should grant the writ because Massachusetts erroneously held that James has no right to appellate review of a claim that he lacks a meaningful opportunity for parole. See Montgomery, 136 S.Ct. 718, 734 (2016). James raised a federal constitutional claim that, based on the manner in which Massachusetts chose to administratively modify his sentence and based on the circumstances of the Massachusetts parole system, James had no meaningful opportunity for parole. The trial court denied relief because the parole board had previously released one juvenile (A46), and the single justice found this claim to not be "substantial" within the meaning of M.G.L. c.278 sec.33E.

Even if the prison decides to treat Massachusetts' administrative modification of James' sentence (striking "without parole" and leaving James with a life sentence) as making James potentially eligible for parole, the mere possibility that the prison may consider James for discretionary parole does not satisfy the constitutional prerogative of individualization for juveniles. This is especially true in Massachusetts, where parole rates have been dangerously low. *See* Patricia Garin, et al., *White Paper: The Current State of Parole in Massachusetts,* 2–3 (Feb. 2013), http://www.cjpc.org/2013/White-Paper-Addendum-2.25.13.pdf. See also Gordon Haas et. al., *The Massachusetts Parole Board* (2012), http://www.cjpc.org/2012/MA-Parole-Board-2012.pdf. This Court should grant the writ to ensure that lower courts comply with clearly established law requiring appellate consideration of James' claims regarding parole in connection with Miller. See Montgomery, 136 S.Ct. 718, 734 (2016).

Fourth, James argued that the applicable juvenile transfer statute was unconstitutional, the trial court judge held that there was no right to any preferred treatment as a juvenile (A38), and the single justice held that this Miller claim was not substantial within the meaning of M.G.L. c.278 sec.33E. This Court should grant the writ to ensure Massachusetts complies with established law requiring appellate consideration of the statutes and procedures used to try James as an adult and sentence him to life in prison. See Montgomery, 136 S.Ct. at 734; Kent v. United States, 383 U.S. 541, 556 (1966). See also Katherine I. Puzone, *An Eighth Amendment Analysis of Statutes Allowing or Mandating Transfer of Juvenile Offenders to Adult Criminal Court in Light of the Supreme Court's Recent jurisprudence Recognizing Developmental Neuroscience*, 3 Va.J. Crim. L. 52 (2015). This Court should also grant the writ because

the 8th Amendment and Miller should apply to juvenile transfer hearings. See Montgomery, 136 S.Ct. at 734.

Fifth, this Court should grant the writ so that James gets appellate court review of his federal claim that newly discovered juvenile brain science is material to his murder conviction and forms the basis of a viable mitigation defense. James argued that juvenile brain science was newly discovered evidence material to his first-degree murder conviction. See Miller, 132 S.Ct. at 2468. James submitted an affidavit from a juvenile brain expert with an opinion specifically about James and this case. A69-83. Even though James' trial occurred in 1995, the trial court found that new advancements in juvenile brain science would not be material to James' trial because the jury had heard about James' age and that James had a mental health disorder. (A50), and the single justice found juvenile brain science was not "substantial" within the meaning of M.G.L. c.278 sec.33E.

Juvenile brain development is distinct from general mental health disorders and is not cumulative. Contrary to the trial court's finding, new juvenile brain science and research establishes that multiple or sustained adverse childhood experiences have the potential to impede brain development and *amplify* deficiencies in juvenile impulse control. See Eduard Ferrer, *Transformation through Accommodation: Reforming Juvenile Justice by Recognizing and Responding to Trauma*, 53 AM. CRIM. L. REV. 549, 572 (2016); Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641 (2016). As such, the trial court erred in how it analyzed new juvenile brain science, but James was deprived of an opportunity to appeal. See Miller, 132 S.Ct. 2455, 2468 (2012).

The recent landmark cases from this Court clearly establish the fundamental principle that juveniles are different from adults. The precedent of this Court has clearly established that juvenile brain science is new and that it is important. New juvenile brain science is not cumulative of the fact that the jury merely knew the defendant's age at trial. New juvenile brain science is not cumulative of the fact that James also had special needs and mental health disorders. Even the oldest juveniles are still "less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions." See Amicus Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Mental Health America at 3-4, relied upon in Graham v. Florida, 540 U.S. 48 (2010), 2009 WL 2236778. at *4.

James' tragic childhood, special needs, and mental health disorders may have contributed to his alleged impulsive actions in this case, but those factors are not cumulative of new juvenile brain science (nor are they cumulative of how juvenile brain science bears on a juvenile's culpability for his impulsive actions or mitigation in verdict or sentencing). See Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate and Serve Youth Education-Related Disabilities Leads To Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 5 (2003) ("Of the 100,000 children who are arrested and incarcerated each year, as many as 50 percent suffer from a mental or emotional disturbance.").

The trial court decision in James' case implies that because the jury knew that

James was 17 and not intelligent, that the new juvenile brain science is not relevant. That decision is contrary to, and an unreasonable application of, clearly established precedent from this Court, and the erroneous conclusion of the trial court was deemed unreviewable. See Miller, 132 S.Ct. 2455, 2468 (2012); J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011)(A juvenile's age is far "more than a chronological fact."). This Court should grant the writ to ensure that lower courts comply with clearly established law regarding new juvenile brain science.

Sixth, this Court should grant certiorari to determine whether a jury's consideration of a reasonable person standard should require consideration of a reasonable juvenile, rather than a reasonable adult person, even if the juvenile is charged as an adult. See J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011). This is an important federal constitutional claim for which Massachusetts held that James had no automatic or discretionary right to appellate review post-Miller.

Massachusetts denied James an automatic right to appeal any of these claims to an appellate court. The single justice denied James a chance to appeal because he erroneously concluded that none of those claims (including claims related to J.D.B. and Miller and new juvenile brain science) were substantial, within the meaning of M.G.L. c.278 sec.33E, as applied to James' 1995 trial. The fact that James' age was known at trial is not the same thing as consideration of advances in juvenile brain science. This case is an excellent vehicle to decide the important federal constitutional questions raised. The danger of denying some juveniles an appeal in this setting is that mistakes will be made and then those mistakes are unreviewable. That is what happened here. The trial court made errors, and then those errors were deemed unreviewable.

Finally, for the many other similarly situated juvenile homicide offenders in Massachusetts and around the country serving life sentences, it is not hard to imagine what kind of post-Miller requests they would hope to appeal as a matter of right: claims regarding burden of proof at re-sentencing, re-sentencing to a de facto life sentence, failure to consider appropriate factors, and issues about whether there is a meaningful opportunity for parole. Especially in states like Massachusetts that decide not to provide re-sentencing and instead just administratively provide an opportunity for parole, there is a fertile breeding ground for federal constitutional violations and for situations where prisons may not give juvenile defendants a real chance for parole.

Given the importance of these issues as they relate to this Court's holdings in Miller and Montgomery, it violates due process and equal protection to limit review to a discretionary finding that claims are "new and substantial." Unless this Court intervenes, Massachusetts juvenile homicide offenders whose appeals became final before Miller will continue to be deprived of appellate review as a matter of right.

Based on the unconstitutional Massachusetts statute, the split amongst the states, and the important federal constitutional rights at issue, this petition should be granted. This Court should vote to grant the petition on this important question.

2. Using an *adult* reasonable person standard (to prove murder and disprove manslaughter and self-defense) in order to convict and sentence a *juvenile* homicide defendant to life in prison), as opposed to a reasonable juvenile standard (like the standard adopted in J.D.B. v. North Carolina) violates the Due Process Clauses of the 5th and 14th Amendments, the Equal Protection Clause of the 14th Amendment, the right to a jury trial under the 6th Amendment, and the Cruel and Unusual Punishment clause of the 8th Amendment.

This Court adopted a reasonable juvenile standard in J.D.B. for purposes of

considering a juvenile's actions during Miranda custody analysis. See J.D.B., 131 S.Ct. 2394 (2011)(whether juvenile would feel free to leave should be viewed through lens of a reasonable juvenile). However, when juveniles are charged with first-degree murder and tried as adults in Massachusetts, the jury instructions (as happened in James' case) utilize a reasonable adult person standard.

Based on the intersection of this Court's two historical lines of jurisprudence (regarding juvenile brain science and due process rights applied to jury instructions) jury instructions using an *adult* reasonable person standard (to prove murder and disprove manslaughter and excessive force in self-defense/defense of others in order to convict and sentence a juvenile to life in prison), given at the trial of a *juvenile* homicide offender, violates the juvenile's rights under the Due Process Clauses of the 5th and 14th Amendments, the right to a jury trial under the 6th Amendment, and the Cruel and Unusual Punishment clause of the 8th Amendment. See Moore v. Texas, 137 S.Ct. 1039 (2017); Miller, 132 S.Ct. at 2468; J.D.B., 131 S.Ct. 2394; Sullivan v. LA, 508 U.S. 275 (1993); Beck v. Alabama, 447 U.S. 625, 638 (1980); Sandstrom v. Montana, 442 U.S. 510 (1979); Winship, 397 U.S. 358 (1970).

This Court has clearly established that the prosecution bears the burden of proof beyond a reasonable doubt of all elements of the crime. See, e.g., U.S. v. Gaudin, 515 U.S. 506 (1995); Victor v. Nebraska, 511 U.S. 1 (1994); Sullivan v. LA, 508 U.S. 275 (1993). This argument is undoubtedly based upon the Due Process clause of the United States Constitution. Likewise, jury instructions may not shift the burden of proof. Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom, 442 U.S. 510 (1979). There is perhaps no more fundamental principle governing our system of criminal justice than

the "bedrock axiomatic and elementary principle" that a defendant may not be convicted of a crime absent proof beyond a reasonable doubt of every fact necessary to constitute the offense. See, e.g., Francis, 471 U.S. 307, 313-14 (1985); Mullaney v. Wilbur, 421 U.S. 684, 704 (1975); Winship, 397 U.S. at 364.

This Court has also held that laws must be constitutional as applied to particular defendants. See Spence v. Washington, 418 U.S. 405 (1974). When a challenge is made in a criminal case on an "as applied" basis, all laws and rules must be evaluated in light of the facts of the case at hand, and as applied to each defendant. See U.S. v. Mazune, 419 U.S. 554 (1975). See also Virginia v. Black, 538 U.S. 343 (2003)(statute overbroad and unconstitutional as applied because the model jury instruction related to the crime informed the jury that "[a]ny such burning ... shall be prima facie evidence of an intent to intimidate a person or group."); Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

Jury instructions that use an adult reasonable person standard to convict juveniles (like the instructions used to convict and sentence James) are unconstitutional as applied to juvenile defendants because they lessen the government's burden of proof. See Miller, 132 S.Ct. at 2468; J.D.B., 131 S.Ct. 2394 (2011); Gaudin, 515 U.S. 506 (1995); Mullaney, 421 U.S. 684, 704 (1975); Winship, 397 U.S. 358, 364 (1970). It is easier for the government to prove a juvenile did not act like a reasonable adult person because a juvenile's brain is different from an adult brain. See J.D.B., 564 U.S. 261 (2011)("Indeed, even where a 'reasonable person' standard otherwise applies, the common law has reflected the reality that children are not adults.").

The reasonable person standard emerged in the common law around the year 1837. See Reporter's Notes accompanying Restatement (Second) of Torts § 283 (1965)

(citing Vaughan v. Menlove, 3 Bing.N.C. 468, 132 Eng.Rep. 490 (1837)). Roughly 180 years have passed, and with the passage of time has come advances in scientific knowledge of the juvenile brain. Miller, 132 S.Ct. 2455 (2012).

Based on new science, this Court has already recognized that the differences between juveniles and adults warrant different constitutional protections and different treatment in two areas. See Miller, 132 S.Ct. at 2468(sentencing); J.D.B., 131 S.Ct. 2394 (2011)(custody analysis for suppression purposes). It is a logical extension of this Court's precedent and science to require jury instructions that reflect such differences. If juveniles are not miniature adults, Miller, 132 S.Ct. at 2470, then it follows that juveniles do not fit within the adult reasonable person standard that adult jurors are asked to apply. See Alison Burton, *A Commonsense Conclusion: Creating A Juvenile Carve Out to the Massachusetts Felony Murder Rule*, 52 HARV. C.R.-C.L. L. REV. 169 (2017); Alexandra Cohen et al., *When Is An Adolescent An Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCHOL. Sci. 549 (2016).

Juvenile homicide defendants should have a right to have the jury consider their culpability through the lens of what a reasonable juvenile would do or how a reasonable juvenile would act under similar circumstances. Asking an impulsive juvenile to satisfy an adult reasonable person standard is the functional equivalent of asking a newborn baby to walk. See Miller, 132 S.Ct. at 2468. See also *Tailoring Entrapment to the Adolescent Mind*, 18 U.C. DAVIS J. JUV. L. & POL'Y 94, 100 (2014) (arguing that for cases involving minors, entrapment should be evaluated from the perspective of an ordinary, law-abiding youth); Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in* J.D.B. v. North

Carolina *for the Purposes of the* Miranda *Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 503 (2012)*;* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1011 (2003) (juvenile's cognitive levels impact choices).

Based on the new scientific research and case law, the Massachusetts model jury instructions were and still are unconstitutional as applied to juveniles because of the absence of a reasonable juvenile standard, and because the factors for finding extreme atrocity and cruelty to prove first-degree murder do not account for juvenile impulsivity. See Miller, 132 S.Ct. 2455, 2468 (2012); J.D.B., 131 S.Ct. 2394 (2011); Yates v. Aiken, 484 U. S. 211 (1988); Francis, 471 U.S. 307 (1985); Winship, 397 U.S. 358, 364 (1970). The Massachusetts single standard applied to both juveniles and adults fails to take into account the reasons why juveniles are different from adults. This Court clearly established those differences in Miller and J.D.B. See J.D.B., 564 U.S. 261 (2011).

At James' trial, the judge instructed the jury using variations of the adult reasonable person standard for the instructions on disproving manslaughter (ordinary person standard), proving malice for murder (reasonably prudent person standard), and the extreme atrocity and cruelty "Cunneen" factors for proving first-degree murder. V-181,193. See Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983). Based on J.D.B., Miller, and new juvenile brain science, the jury instructions used to convict and sentence James were unconstitutional as applied to juveniles. See Miller, 132 S.Ct. 2455, 2468 (2012); J.D.B., 131 S.Ct. 2394 (2011); Francis, 471 U.S. 307 (1985). Cf. Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983).

In Cunneen, Massachusetts adopted a set of objective and subjective factors for a jury to consider in determining whether the Commonwealth proved extreme atrocity and cruelty first-degree murder beyond a reasonable doubt. Cunneen, 389 Mass. 216, 227 (1983). Those factors were indifference to suffering, degree of suffering, extent of injuries, number of blows, the force with which the blows were delivered, the instrument employed, and the disproportion between the means needed to cause death and those employed. See Cunneen, 389 Mass. at 227. A jury can convict for first-degree murder even if they find only one of those factors are present. Id.

After Miller, at least five of the "Cunneen" factors – the number of blows, the manner and force of delivery, the instrument used, indifference, and the disproportion between the means necessary to cause death and those employed – no longer provide evidence of extreme atrocity and instead can mitigate a juvenile's culpability. See Miller, 132 S.Ct. 2455, 2468 (2012). Juveniles act impulsively without consideration of consequences. See id. Therefore, the number of blows, force of delivery, instrument used, perceived indifference, and proportionality do not support a finding of cruelty or malice in a juvenile. Instead, those factors can be caused by the juvenile's under-developed brain, lack of impulse control, inability to reflect or to make decisions in a normal manner. See Miller, 132 S.Ct. 2455, 2468 (2012); J.D.B., 131 S.Ct. 2394 (2011). Impulsivity by its very nature can lead to a disproportionate yet unintended response. Juveniles will act impulsively, such that the manner of force used and disproportion may be irrelevant to an extreme atrocity and cruelty claim against a juvenile. A83.

The jury instructions used at James' trial used a reasonable adult person standard and also used "Cunneen" factors that contradict J.D.B. and Miller and new

juvenile brain science. Without the "Cunneen" factors instruction that is unconstitutional as applied to James, and without the reasonable adult person standard, James would not have been found guilty of first-degree murder.

Based on the unconstitutional Massachusetts instructions, a juvenile who joins a fight to defend his friend and sees another man waiving a baseball bat is supposed to react in the same manner as a reasonable adult. His conduct is viewed through the lens of a reasonable adult. Based on Massachusetts jury instructions, the number of blows is used to transform manslaughter or second-degree murder into first-degree murder. Yet science and precedent from this Court have taught us that impulsivity is a hallmark of the juvenile brain. Miller, 132 S.Ct. at 2470. See also A83-85.

Juveniles act impulsively and are less able to anticipate the consequences of their conduct. See Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009). A juvenile might swing a bat impulsively three times while an adult might stop at two swings or one. It is an unreasonable application of the logic of Miller and Graham to give an impulsive juvenile the same adult reasonable person standard instructions as an adult would receive. It is also an unreasonable application of neuroscience. What is reasonable to expect of an average adult is not reasonable to expect of an impulsive, immature, underdeveloped juvenile.

In a hot, emotional situation like a sudden group fight, juveniles are more prone to act emotionally and impulsively rather than reasonably or rationally or with conscious regard. See Naomi E.S. Goldstein et. al, *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2018)("in hot, high-arousal contexts, adolescents have

difficulty relying on objective information to make rational decisions. As a result, in hot contexts, adolescents are more prone to act emotionally and impulsively, without the controlled influence of a formal decision-making process."). See also Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 NATURE NEUROSCIENCE 1184, 1186 (2012). Yet the instructions in Massachusetts do not advise the jury to consider the special circumstances of juveniles in evaluating whether the number of blows changes the degree of culpability and the sentence. See Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333 (2003).

Legal reasoning that fails to consider age can lead to erroneous or fallacious reasoning. May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Here, the trial court judge denied James' request for relief on this juvenile issue ("subjective factors such as age" are *irrelevant* to the reasonably prudent person standard, A44) in a manner that violated clearly established precedent from this Court, and James was denied appellate review by a full appellate court. State courts like Massachusetts have wrongly assumed that since they are allowed to charge juveniles as adults, that they must be tried as adults, with the model homicide instructions applicable to adults and referencing the reasonable person standard.

As this Court is well aware, juveniles are not the same as adults. The impulsivity and immaturity and under-developed decision-making capabilities connected to their brain development pulls them outside the realm of the reasonable adult person. The way that juveniles act or react in certain situations (for example, how they react during a fight that they did not start, or how they react excessively

when feeling threatened, or how they act when they get drunk at a high school party, or how they act when there is peer pressure) cannot be viewed through the lens of a reasonable person. The juvenile brain is, for lack of a better term, not reasonable. See Graham v. Florida, 560 U.S. 48, 68 (2010); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. OF CLINICAL PSYCHOL. 459, 466 (2009).

As this Court has held in Miller, just because a juvenile is tried in adult court does not mean that they must be treated like adults in every area. Like sentencing and custody analysis, jury instructions implicate important federal constitutional rights. See Miller, 132 S.Ct. 2455, 2468 (2012); J.D.B., 131 S.Ct. 2394 (2011). See also Roper v. Simmons, 543 U.S. 551, 569 (2005); Atkins v. Virginia, 536 U.S. 304, 306 (2002). The instructions at James' trial lessened the burden of proof and violated the Due Process Clauses of the 5th and 14th Amendments. See Winship, 397 U.S. at 364.

The unconstitutional jury instructions applied to juveniles also implicates and violates the 8th Amendment prohibition against cruel and unusual punishment. See Moore, 137 S.Ct. 1039 (2017); Hall v. Florida, 134 S.Ct. 1986 (2014); Miller, 132 S.Ct. at 2468; Beck, 447 U.S. at 638. This Court held "rules that diminish the reliability of the guilt determination" can violate the 8th Amendment. Beck, 447 U.S. at 638. Using an adult reasonable person standard to convict juveniles diminishes the reliability of the guilt determination that led to the life sentence. See id. Massachusetts uses the reasonable person standard to convict juveniles as adults and to sentence juveniles to the harshest available sentences. Yet this Court has clearly established that juveniles are not deserving of the harshest punishments. See Miller, 132 S.Ct. at 2468.

Likewise, applying an adult reasonable person standard to juveniles charged as

adults, when similar juveniles adjudicated in juvenile courts could have their culpability analyzed in connection with their age, violates the Equal Protection Clause of the 14th Amendment. See Evitts v. Lucey, 469 U.S. 387, 393-400 (1985).

There is currently disagreement and discussion amongst the states about whether a reasonable person standard should be applied to juveniles charged as adults or juveniles adjudicated as juveniles. Unlike Massachusetts, Indiana has expressed doubt about the reasonable adult standard. See, e.g., Layman v. State, 17 N.E.3d 957 (Ind. Ct. App. 2014) (vacated on other grounds)(May, J. concurring) (questioning adult tortlike foreseeability standard in felony murder as applied to 17-year-old defendant). Other states have discussed the reasonable juvenile standard in various contexts. See, e.g., State v. Marshall, 39 Wash. App. 180, 183-184 (1984)(manslaughter must take into account juvenile's age); In re William G., 963 P.2d 287, 293 (Ariz. 1997)(15-year-old should be judged by standard of like age and intelligence).

Massachusetts violated and unreasonably applied established federal law by approving jury instructions which utilize an adult standard for juveniles. The trial court decided this important question in a way that conflicts with relevant decisions of this Court, and James was denied an appeal to the Massachusetts Supreme Judicial Court. See Penry v. Johnson, 532 U.S. 782 (2001); Williams v. Taylor, 529 U.S. 362, 404-05 (2000). This Court should grant the writ to answer this federal question. For a constitution to remain relevant, it must "be capable of wider application than the mischief which gave it birth. Weems v. United States, 217 U.S. 349, 373 (1910).

CONCLUSION

This is an important case for certiorari. In roughly three months, Steven James

will have been incarcerated for 25 years for swinging a baseball bat during a fight, a fight that he did not start, when he was 17-years-old. If this Court were to decide that James has a right to appellate review of the denial of his post-Miller requests for relief, or that claims regarding Miller and juvenile brain science are new and substantial, then James will be able to present his claims to a full appellate court in Massachusetts. If this Court were to decide that science and due process do not support using the reasonable adult person standard to determine the culpability of juvenile homicide defendants, then James would arguably be entitled to a new trial in Massachusetts.

This petition is about the compelling need for this Court to once again step into the conflicted fray of state court jurisprudence to lay down the constitutional law in a manner that protects the federal constitutional rights of all juvenile homicide defendants post-Miller. See Miller, 132 S.Ct. 2455, 2468 (2012).

Steven James respectfully asks this Court to please vote to grant the writ.

Respectfully submitted,
STEVEN JAMES
By his attorneys

Rosemary Curran Scapicchio
Counsel Of Record For Petitioner
107 Union Wharf
Boston, Massachusetts 02109
(617) 263-7400
scapicchio_attorney@yahoo.com

Dennis M. Toomey
4 High Street, Suite 211
North Andover, MA 01845
(857) 239-9999
toomey.attorney@gmail.com