The Commonwealth of Massachusetts
MIDDLESEX DISTRICT ATTORNEY
15 Commonwealth Avenue Woburn, MA 01801
www.middlesexda.com

Gerard T. Leone, Jr.
District Attorney

Tel: 781-897-8300
Fax: 781-897-8301

October 24, 2012

Middlesex Superior Court
Criminal Clerk's Office
Attn: Mary Aufiero
200 World Trade Center
Woburn, MA 01801

Re: Commonwealth v. Benjamin Peirce, MICR 2010-1188

Dear Ms. Aufiero:

Enclosed for filing please find the Commonwealth's Opposition to the Defendant's Motion to Report Questions in the above referenced case. A courtesy copy was provided to Judge Tuttman today.

Please let me know if I may answer any questions.

Very truly yours,

Michael A. Kaneb
Assistant District Attorney
(781) 897-6830

cc: John Salsberg, Esq.
Margaret Fox, Esq.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT
DOCKET NO. 2010-1188

COMMONWEALTH

V.

BENJAMIN PEIRCE

COMMONWEALTH'S OPPOSITION TO
DEFENDANT'S MOTION TO REPORT QUESTIONS

Now comes the Commonwealth to oppose the defendant's Motion to Report Questions pursuant to rule 34 of the Massachusetts Rules of Criminal Procedure. The defendant's motion should be denied where the law has not been unsettled in the manner the defendant contends. The defendant will suffer no prejudice from the denial of his motion where, if convicted, he may raise his claims in the normal course of appeal.

Discussion

I. Miller Does Not Leave in Question Whether A Juvenile Offender Convicted of Murder May be Sentenced for His Crime

In pressing the urgency of his motion, the defendant makes sweeping claims about the dictates of the United States Supreme Court's recent decision in Miller v. Alabama, 132 S.Ct. 2455 (2012). These claims do not find support in the Court's decision in Miller or in the law of this Commonwealth. The narrow holding of Miller is that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without a possibility of parole for juvenile offenders." Id. at 2469. Such a sentence is not unconstitutional, however, where it is imposed by a judge after consideration of certain characteristics and factors particular to the individual defendant and his crime. See id. at 2466 n.6, 2468-2469, 2471 ("Our decision does not

categorically bar a penalty for a class of offenders or type of crime. . . . [I]t mandates only that a sentencer follow a certain process . . . before imposing a particular penalty."). The nature and extent of a juvenile offender's participation in the crime is among the inventory of considerations a judge must weigh before imposing a sentence of life without the possibility of parole. See id. at 2469. But Miller does not exempt from this potential penalty a juvenile offender convicted of murder on the basis of accomplice liability or under a theory of felony-murder, despite the defendant's contentions to the contrary. See id. (Mot. 2, 4, 8)[1] Miller therefore does very little to change the law of homicide in the Commonwealth as it applies to juvenile offenders.

The defendant's invocation of art. 26 of the Declaration of Rights (Mot. 1, 2) does not cast doubt on the analysis laid out above. There is no authority for the proposition that the prohibition in art. 26 against "cruel or unusual punishments" sweeps more broadly or means anything different than the nearly identical ban against "cruel and unusual punishments" under the Eighth Amendment. See Michaud v. Sheriff of Essex County, 390 Mass. 523, 533-534 (1983). See also Commonwealth v. Diatchenko, 387 Mass. 718, 722, 725-726 (1982) (analysis of constitutionality of life sentence imposed on minor defendant identical under Eighth Amendment and art. 26). Consequently, there is no reason to believe that a court applying State constitutional law would go beyond Miller's holding to "categorically bar" the sentence of life without the possibility of parole for juvenile offenders (Mot. 2) or indeed establish any requirements for the sentencing juvenile offenders beyond those compelled by the Eighth Amendment.

---

[1] The defendant seizes upon Justice Breyer's suggestion that he would not permit the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile offender who "himself neither kills nor intends to kill the victim." See Miller, 132 S.Ct. at 2475 (Breyer, J. concurring). (Mot. 4) Where Justice Breyer joined the Court's opinion "in full," see id., his concurrence is without legal effect and adds nothing to the requirements established by the majority opinion. The defendant's reliance on the concurrence to argue otherwise is simply incorrect.

Contrary to the defendant's contentions, then, Miller does not leave any uncertainty as to "what sentence may be imposed" where a defendant who was under 18 at the time of his crime is convicted of murder in this Commonwealth. (Mot. 9, 11) If convicted of murder in the first degree, a juvenile offender may still be sentenced to life in prison without the possibility of parole. See Miller, 132 S. Ct. at 2469, 2471. Miller simply requires that the judge or jury "follow a certain process" and weigh certain considerations before imposing that sentence. See id. at 2468-2469, 2471. Miller also demands as an alternative a sentence that permits the possibility of parole where, in view of those same considerations, that lesser penalty is warranted. See id. at 2469. See also G. L. c. 279, § 5 (sentence to be determined by court where punishment not set by statute). The availability of a lesser penalty for juvenile offenders convicted of murder in the first degree does not put the maximum permissible sentence in doubt—this is after all the sentencing structure that applies to most felony offenses. See, e.g., G. L. c. 265, § 17 (conviction for armed robbery punishable "by imprisonment in the state prison for life or for any term of years"). See also G. L. c. 279, § 24 (indeterminate sentences to state prison), as amended by St. 2012, c. 192, §§ 45 & 46.

Furthermore, nothing in Miller calls into question the constitutionality of the existing statutory sentence for murder in the second degree. Although the defendant argues otherwise (Mot. 8-9), Miller did not enact a categorical ban on all mandatory sentencing for juveniles—only on mandatory life sentences that do not allow for the possibility of parole. See Miller, 132 S.Ct. at 2460, 2469, 2471. Therefore, a juvenile offender who is convicted of murder in the second degree may, as provided by statute, be sentenced to life in prison with a minimum parole eligibility date as established by the Legislature. See G. L. c. 265, § 2 and G. L. c. 127, § 133A.

The range of permissible sentences for a juvenile offender convicted of murder therefore remains clear following Miller. On a conviction of murder in the second degree, Miller leaves the mandatory statutory sentence untouched. On a conviction of murder in the first degree, Miller modifies the traditional sentence of life without the possibility of parole only by requiring an individualized sentencing hearing and the judge's consideration in the alternative of a sentence that provides eligibility for parole. See Miller, 132 S.Ct. at 2469, 2471. Practically speaking, the effect of this change is to narrow the gap between the penalty for a conviction of murder in the first degree and the penalty for a conviction of murder in the second degree. When considered against the mandatory sentence that applied to a conviction of murder in the first degree prior to the Miller decision, this is a change that the defendant can only view as favorable.

II. Miller Establishes the Requirements of Due Process that Must be Met Before a Juvenile Offender Convicted of Murder in the First Degree May be Sentenced for His Crime

Despite the revision in his favor worked by Miller, the defendant claims prejudice from the change. In particular, he complains that Miller does not "articulate what process is due" in the sentencing of a juvenile offender convicted of murder in the first degree and that, as a result, he is unfairly disadvantaged as he weighs the Commonwealth's willingness to accept a plea to a lesser charge carrying a fixed sentence against the risk of trial on the charge of murder in the first degree. (Mot. 11, 13) This may be the sole instance in which the defendant understates the scope of the Miller decision. Miller is clear on the process that is required when a juvenile offender has been convicted of murder and faces a potential sentence of life imprisonment without the possibility of parole. First and foremost, the juvenile offender is entitled to an individualized sentencing hearing and the sentencing judge's consideration of any mitigating factors that may justify the second chance offered by parole. See id. at 2460, 2468-2469, 2475. Furthermore, no

juvenile offender may be sentenced to life without the possibility of parole unless, after considering the offender's "youth and attendant circumstances," the judge concludes that he is an "offender whose crime reflects irreparable corruption." See id. at 2468-2469, 2471.

Beyond establishing this set of procedural protections, the Miller decision articulates in some detail the particular factors that must be reviewed at the required sentencing hearing. See Miller, 132 S.Ct. at 2468. These include (1) the juvenile's chronological age and, relatedly, his level of maturity, impetuosity, and ability to appreciate risks and consequences; (2) the juvenile's family and home environment; (3) the circumstances of the homicide offense, including the extent of the juvenile's participation in the conduct and the way various social pressures may have influenced his participation; (4) any "incompetencies associated with youth" that might have limited the juvenile's ability to deal with police investigators and the criminal justice system; and (5) the possibility of rehabilitation. See id.

The parameters of a sentencing procedure that will meet the requirements of Miller and satisfy due process therefore are not the mystery the defendant pretends. Indeed, the factors that the Supreme Court has said must figure into the judge's sentencing decision are familiar ones. They largely restate those individual-specific considerations that have long been weighed by the trial judge in sentencing defendants convicted in the courts of the Commonwealth. Beyond considering "the nature of the offense and the circumstances surrounding the commission of the crime," trial judges regularly weigh "a variety of [additional] factors in imposing a sentence," such as "evidence of the defendant's character, family life, and employment situation," and even "evidence of similar or recurrent criminal conduct if it is relevant in assessing the defendant's character and propensity for rehabilitation." See Commonwealth v. Coleman, 390 Mass. 797, 805

(1984). See also Massachusetts Sentencing Guidelines, Attachment D (1998) (inventory of aggravating and mitigating factors to be considered in sentencing).

The defendant misrepresents the true grounds of his complaint. What is uncertain after Miller is not the process that is required to sentence a juvenile offender convicted of murder in the first degree, but what the actual result of that process will be in any individual case. The parole eligibility date for a plea to murder in the second degree remains fixed by statute, but whether a particular juvenile offender will ever be eligible for parole if convicted of murder in the first degree, or when he will be eligible—is now left to the discretion of the trial judge. The defendant is correct to observe that the precise differential between the two penalties is now unknowable in advance. But this is not prejudice—it is the benefit of Miller's dispensation. Presumably the defendant would not welcome a return to mandatory sentencing for a conviction of murder in the first degree simply to relieve his uncertainty.

For the defendant to characterize this as a problem that somehow implicates his right to the effective assistance of counsel (Mot. 10-11, 13) diverts attention from the real issue. The defendant's motion really raises a much simpler question: whether due process requires that a defendant know the exact sentence he will receive if he rejects the prosecution's offer to plead to a lesser offense and instead is convicted at trial of the crime with which is charged. Once asked, the question answers itself. Due process does not require this kind of certainty regarding the risk of trial. What the defendant complains of is the same kind of uncertainty regularly faced by any defendant who must decide whether to plea to a lesser offense with a fixed or recommended sentence or proceed to trial and risk conviction on a greater offense carrying an indeterminate sentence. See generally G. L. c. 279, § 24, as amended by St. 2012, c. 192, §§ 45 & 46. Indeed, even a defendant willing to forego his right to trial altogether and enter a plea to a particular

offense is not always entitled to know in advance the sentence to which he exposes himself. See generally Mass. R. Crim. P. 12.

III. The Defendant Will Suffer No Prejudice by Raising His Claims in the Normal Course of Appeal

In any event, normal provisions for post-conviction appeal will provide the defendant ample means to challenge any sentence he may receive should he be convicted at trial. To begin with, Mass. R. Crim. P. 25(b)(2) empowers the trial judge to reduce a jury's verdict to a lesser charge and re-sentence the defendant where the judge concludes for any reason that such a disposition would be "more consonant with justice." See Commonwealth v. Woodward, 427 Mass. 659, 666 (1998), and cases cited. A defendant may also seek review of his sentence by appeal to the Appellate Division of the Superior Court. See G. L. c. 278, §§ 28A-28C. Moreover, should the defendant be convicted of murder in the first degree, every aspect of his trial and conviction will be subject to the "exacting scrutiny of plenary review" on direct appeal. See Commonwealth v. Randolph, 438 Mass. 290, 297 (2002). Following that review, the Supreme Judicial Court may direct the entry of a lesser degree of guilt and remand the case to the Superior Court for re-sentencing for "any . . . reason that justice may require." See G. L. c. 278, § 33E. Moreover, even absent the special provisions of § 33E, the lawfulness of any sentence may be independently reviewed on direct appeal. See Woodward, 427 Mass. at 683. ("If a sentence is unlawful, we set aside the imposed sentence and remand the case to the trial judge for appropriate resentencing.") Even a defendant who chooses to resolve his case by entering a guilty plea does not forgo the opportunity to contest the propriety of his sentence, see Mass. R. Crim. P. 29, or to raise a broader challenge to the conviction on grounds that "justice may not have been done." See Commonwealth v. DeMarco, 387 Mass. 481, 482 (1982) (motion to withdraw guilty plea treated as motion for new trial pursuant to Mass. R. Crim. P. 30(b)).

The defendant's argument that the novelty of his situation leaves him unable to rely on the advice of counsel does not warrant special treatment of his claim. (Mot. 10-11, 13) Even where a defendant shows that ineffective assistance of counsel caused him to reject a plea to a lesser charge and that this rejection led to trial, conviction, and a more severe sentence, an appellate court has a range of options available to it to remedy the error. See Lafler v. Cooper, 132 S.Ct. 1376, 1388-1389 (2012). On a proper showing of prejudice, the appropriate remedy will usually be either to re-sentence the defendant in a manner that accounts for the disadvantage or to reduce the conviction to the lesser offense that was erroneously rejected before trial. See id. at 1389. A new trial is not required. See id.

Interlocutory review is also not appropriate where the issues the defendant has raised regarding the sentence he may face as a juvenile offender may never in fact present themselves in his case. The defendant may face the possibility of life in prison without the possibility of parole only if he is convicted of murder in the first degree. Where a claim, "though predominantly legal in character, depends upon future events that may never come to pass, or that may not occur in the form forecasted, then the claim is unripe." Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 537 (1st Cir. 1995). The rule applies equally to criminal proceedings: "Eighth Amendment challenges are generally not ripe until the imposition, or immediately pending imposition, of a challenged punishment or fine." Cheffer v. Reno, 55 F.3d 1517, 1523 (1995), and cases cited. If the defendant is convicted of a lesser offense than murder in the first degree, or if he is acquitted, he will have no stake in the determination of the issues he now seeks to put before a reviewing court. This is one reason that, as a general rule, the appellate courts of the Commonwealth "will not reach questions that may become unnecessary to decide." See Commonwealth v. Bankert, 67 Mass. App. Ct. 118, 121 (2006). Deferring constitutional

questions until resolution of the contested issue becomes a practical necessity also protects a reviewing court from becoming entangled in abstract disagreements that have not been fully developed through the application of specific facts. See Doe v. Bush, 323 F.3d 133, 138 (1st Cir. 2003). See also Commonwealth v. Lotten Books, Inc., 12 Mass. App. Ct. 625, 626 n.3 (1982) (explaining reasons that report of questions premature). Accordingly, "[i]t is a traditional and salutary practice of [the Supreme Judicial Court] to decline to answer a constitutional question until the circumstances of a case are established and require an answer to the constitutional question." Commonwealth v. Two Juveniles, 397 Mass. 261, 264 (1984).

Nothing would be gained in this case from circumventing the normal course of appeal. This is not a situation where the defendant lacks an opportunity to secure relief by bringing a claim of error at a later time. It is also not a situation where, by resolving the defendant's claims prior to trial, the court or the Commonwealth will be relieved of extraordinary and burdensome procedural requirements that would otherwise apply. Contrast Commonwealth v. Colon-Cruz, 393 Mass. 150, 156 n. 8 (1984) (noting special procedures required for prosecution of death penalty cases).

Finally, the defendant's most expansive challenges to the sentence he may face if convicted of murder cannot be evaluated in the absence of the factual record properly developed at trial. The defendant has argued, for instance, that Miller does not go far enough and that a life sentence without the possibility of parole should not be imposed on a juvenile offender convicted solely on a theory of felony murder. (Mot. 2, 4, 8) Even if a reviewing court were to conclude that defendant is correct on this point and that the Supreme Court in Miller was wrong, the ruling would provide him no relief where, in the absence of a trial record, there can be no factual finding as to what part he played in the crime or what his intent was in participating.

The defendant's insistence that the law of manslaughter must provide the maximum permissible sentence for his participation in the crime charged (Mot. 11-13) faces the identical problem. Whether the defendant was incapable of forming the mental state required for a conviction of murder—either because of his youth, some mental disability, or a combination of factors—cannot be resolved through the report of a question of law. "[A] defendant's knowledge or state of mind [is] an issue peculiarly in the province of the finder of fact," and therefore the trial judge should not report a question whose resolution depends on the inferences a jury might draw on that issue. See Commonwealth v. Giang, 402 Mass. 604, 608 (1988).

Certainly, nothing in Miller suggests that, as a matter of law, all juvenile offenders are incapable of forming the mental state required for a conviction of murder. Miller concluded, after all, that the mandatory sentencing scheme before it was impermissible exactly because it failed to account for differences in individual circumstances and differences in culpability among juvenile offenders convicted of murder. See Miller, 132 S.Ct. at 2469. The cases the defendant relies on in support of his claim that, because of his youth and impulsiveness, only a sentence of manslaughter may be imposed on him, likewise do not establish a general rule that he may apply to his circumstance. (Mot. 12-13) The determination that a reduction in the jury's verdict from murder to manslaughter may be "more consonant with justice" is always a decision unique to the facts of a particular case. Whether the facts of the defendant's case could ever justify such a reduction cannot be answered in the absence of a trial record.

Conclusion

For the foregoing reasons, the Commonwealth respectfully requests that the Court deny the defendant's Motion to Report Questions.

Respectfully Submitted
For the Commonwealth

GERARD T. LEONE, JR
DISTRICT ATTORNEY

By: _____

Elisha Willis
Michael A. Kaneb
Assistant District Attorneys
15 Commonwealth Avenue
Woburn, MA 01801
Tel: (781) 897-8300
BBO Nos. 654159, 676615

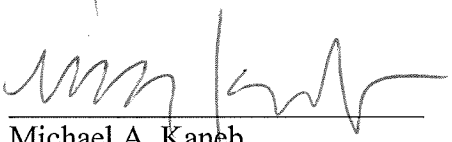
Dated: October 24, 2012

CERTIFICATE OF SERVICE

I, Michael A. Kaneb, hereby certify that I have served the Commonwealth's Opposition to Defendant's Motion to Report Questions on counsel for the defendant by placing a copy in our office depository for mailing, first class mail, postage prepaid, to the following address on the date noted below:

John Salsberg, Esq.
Margaret Fox,, Esq.
Salsberg and Schneider
232 Lewis Wharf
Boston, MA 02110

Signed under the pains and penalties of perjury, on this 24 day of October, 2012.



Michael A. Kaneb
Assistant District Attorney
Middlesex District Attorney's Office
15 Commonwealth Avenue
Woburn, MA 01801