COMMONWEALTH OF MASSACHUSETTS

NORFOLK COUNTY SUPREME JUDICIAL COURT

NO. SJC-12546

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

V.

NATHAN LUGO,
Defendant-Appellant

ON APPEAL FROM JUDGMENTS IN THE NORFOLK SUPERIOR COURT

COMMONWEALTH'S BRIEF

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ISSUES PRESENTED

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II. Did the trial judge correctly decline to instruct on "accident" as a defense to shooting and killing a robbery victim to whose house the defendant drove with a loaded firearm and three confederates?

III. Was any risk of a miscarriage of justice presented by the absence of an unsupported "involuntary manslaughter" instruction in a robbery victim's shooting death?

IV. Was any risk of a miscarriage of justice presented by the absence of an instruction on voluntary manslaughter by means of "combat" with or "provocation" by a robbery victim who was not claimed to have interacted with the defendant before the defendant shot him to death from the driver's seat of his getaway vehicle?

V. Although the defendant had no standing in the matter, did the motion judge correctly find that police had reasonable cause to attempt to locate in real time

the cell phone with which a murder victim's teenage girlfriend used code words to inform police that something was wrong?

STATEMENT OF THE CASE

In December 2011 a Norfolk County grand jury returned indictments charging the defendant with offenses committed on November 26, 2011, three months before his eighteenth birthday: murder, armed robbery, conspiracy to violate drug laws, carrying an unlicensed firearm, and possessing ammunition (A. 3-7)[1].

On July 15, 2013, the defendant filed a motion to dismiss as unconstitutional so much of the G.L. c. 265, §1 indictment as charged first degree murder due to its mandatory sentence of life without possibility of parole (A. 33). He withdrew the motion on December 27, 2013, after this Court's December 24, 2013 decisions in Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655,666 (2013)(Diatchenko I) and Commonwealth

[1] Transcripts from the 2015 trial are noted as follows: Tr. I (Oct. 22); Tr. II (Oct. 26); Tr. III (Oct. 27); Tr. IV (Oct. 28); Tr. V (Oct. 29); Tr. VI (Nov. 2); Tr. VII (Nov. 3); Tr. VIII (Nov. 4); Tr. IX (Nov. 5); Tr. X (Nov. 6); and Tr. XI (Nov. 9). Pre-trial hearing transcripts are referred to as "M.H.," followed by a date and page number(s). References to the Commonwealth's Supplemental Appendix are preceded by "S.A."

v. Brown, 466 Mass. 676 (2013). See Miller v. Alabama, 567 U.S. 460, 477-478 (2012).

On July 15, 2013, the defendant filed a motion to dismiss the murder indictment based on the absence of grand jury instructions on "mitigation and defenses" (A. 33). On July 2, 2014, the trial court (Raymond P. Veary, J.) allowed the motion under Commonwealth v. Walczak, 463 Mass. 808 (2012), a case decided a year after his indictment and which applied only prospectively (A. 34).

In August 2014 a second grand jury indicted the defendant for murder (A. 8). No motion to dismiss or other challenge to its constitutionality was filed.

Trial before Thomas A. Connors, J., and a Norfolk County jury began on October 22, 2015. The defendant was convicted of second-degree murder, armed robbery, possession of a firearm without a license, possession of ammunition, and conspiracy to violate the controlled substance law (Tr. XI:5-6). For second-degree murder he was sentenced to life with the possibility of parole after fifteen years; concurrent sentences were imposed of 12-15 years state prison for armed robbery, 4-5 years state prison for possession of a firearm without a license, and 2 years, House of Correction, for

possessing ammunition and for conspiracy to violate the controlled substance law (Tr. XI:5,9-11,15,27).

In May 2017 the defendant filed a motion for new trial "and resentencing pursuant to Rule 30(b)" only as to his second-degree murder conviction; the trial judge denied the motion on March 27, 2018 (A. 92).

STATEMENT OF FACTS

In November 2011, the 21-year-old victim, Kyle McManus, was living with his parents in Randolph and dating 19-year-old Alison Deshowitz, whom he had known since middle school (Tr. III:71-72; VII:21). The defendant was a longtime school friend of Brian Moulton and Devonte Thames; Deshowitz was a friend of all three (Tr. VII:89-94). During the summer of 2011 Thames went to the defendant's Brockton house every day and Moulton visited frequently (Tr. VI:94-97; VII:89-93).[2]

On the morning of November 26, 2011, Moulton awoke after sleeping in the defendant's bedroom (Tr. V:25; VII:93-94). Before Moulton left to "drive around and

[2] Thames and Moulton testified at trial, while incarcerated and before they had been sentenced. Moulton anticipated a state prison sentence of ten years to ten years-and-one-day (Tr. VII:122-123). Thames anticipated an agreed state prison sentence of ten years for armed robbery and as an accessory after the fact of murder (Tr. VI:137-138, 141-143).

sell weed throughout" Brockton, Deshowitz and Thames arrived at the defendant's house (Tr. VI:94-97; VII:89-94). Thames then fell asleep on the defendant's couch, waking at 8:00 p.m. to hear Moulton asking Deshowitz "if she had a way to get money" and "if she had someone to stick," or rob (Tr. VI:97-102, 104).

Deshowitz said she "would find somebody" and used her phone to send the victim text messages claiming she was at her house and wanted to arrange a marijuana purchase by two "good people" from Easton who were "scared of getting robbed" (Tr. VI:105-107; Exhibit 43):

[DESHOWITZ] Yo I need 2 ounces u good
[DESHOWITZ] ?
[VICTIM:] Yip
[DESHOWITZ:] What kind of bud
[VICTIM:] Lemn afgan kush
[DESHOWITZ:] Will it be cheaper if they get 4?
[VICTIM:] The cheapest I can do is 3 a piece ths it
[DESHOWITZ] 4 for 1150?
[DESHOWITZ] 1175 is good
[VICTIM:] Ok but I only got 2 on me
[DESHOWITZ:] When are u pickin up?
[VICTIM:] 2day
[DESHOWITZ:] Because they don't wanna make 2 trips
[VICTIM:] Where r they cumn from
[DESHOWITZ] Easton
[VICTIM:] Ok r u gunna be w ya friend
[DESHOWITZ:] Yea I think so I'm at my house right now why do you want me to come?

[DESHOWITZ:] Ill go with them

[VICTIM:] Good cuz im only fuckn w chu

[DESHOWITZ:] Ok I got you just let me no when u want us to come

[VICTIM:] Iight I'll let u kno

[DESHOWITZ:] What time do u think it will be around

[VICTIM:] I'll hit you back when I find out

[DESHOWITZ:] Do you no what time yet sorry I just gotta be somewhere tonight and I'm waiting on this before I go out

[VICTIM:] Idk im still waitn

[DESHOWITZ:] Ok hmu when u get tonight if its to late tonight then hold it for me tomorrow

[VICTIM:] Of course, ya pplz r str8

[DESHOWITZ:] yea there good people trust me they went through me cuz there scared of getting robbed

[VICTIM:] Yeah iight well u kno ima business man, I aint punk

[DESHOWITZ:] Ok babe well deff let me no asap

[VICTIM] Me too

Deshowitz then told Moulton they had found someone to rob (Tr. VI:105-107). She, the defendant, Thames, and Moulton planned to drive to the victim's Randolph house that night to rob him of four ounces of marijuana with a street value around $1,100 (Tr. VII:95-100). Moulton would "flash" $800, his day's drug proceeds, "to put on a front that they were going to pay" (Tr. VII:95-100).

Approximately two-and-a-half hours later, Deshowitz texted the victim, who was with friends at "Not Your Average Joe's" restaurant in Randolph (Exhibit 43):

[DESHOWITZ:] ?

[DESHOWITZ:] You wanna do that tonight?

[DESHOWITZ:] ?

[DESHOWITZ:] Because I just talked to him. He wants to grab it tonight

[VICTIM] If we can meet @ ue house thts fine

[DESHOWITZ:] I think we could pick u up

[VICTIM:] Its up to you

[DESHOWITZ:] Ok I'm just trien to figure everything out I mean it mite be easier to just pick u up

[VICTIM] Up 2 you

[DESHOWITZ:] Ok I'm just waiting for the call b ack

[DESHOWITZ:] He's coming to pick me up right now ur gunna be at joes right

[DESHOWITZ:] He's coming to pick me up right now ur gunna be at joes right

[DESHOWITZ:] On are way

The defendant told Deshowitz, Thames, and Moulton that he was armed and had concealed a revolver under his "hoodie" as he drove them from Brockton towards Randolph in his mother's black Jeep Cherokee; Deshowitz sat behind him, Moulton sat in the front passenger seat, and Thames sat behind Moulton (Tr. III:112-115;VI:108-109; VII:61-62,101-104,125). Moulton referred to the revolver as "the Clint Eastwood" (Tr. VII:61-62,103-104).

The defendant drove to "Not Your Average Joe's," where the victim was sitting with Clayton Maddrey, Neil Doherty, and Doherty's girlfriend (Tr. IV:12-22,123-125). At about 10:35 p.m., Deshowitz approached the victim's table from a rear entrance and told him, "we've

been waiting outside, we got to go" (Tr. IV:23-24,126-127). She stood with her arms crossed as he used the bathroom before saying goodbye to his friends; he left with her by the back door at about 10:45 p.m. (Tr. IV:24-26; VI:109-111; VII:107).

The victim approached the parked Jeep and saw Thames and Moulton, whom he had met; he was "relieved to see" people he recognized, and said he would sell them marijuana "for cheap," $1000.00 (Tr. VI:111-112). The defendant then drove to the victim's house and waited in the Jeep while Thames and the victim went inside by rear porch stairs (Tr. VI:114,145; VII:107,110-111,123-124; VI:120). The victim introduced Thames to his parents and their friends before going into his room, where he asked Thames to watch him measure out and weigh four ounces of marijuana into a container he then put in a grocery bag; he returned outside still holding his open beer bottle from the restaurant (Tr. III:62-63,80-81; VI:113-117).

Meanwhile, at 11:00 p.m., as the victim's friends prepared to leave the restaurant, Doherty realized the victim had his car keys and called him to arrange to retrieve them by walking four blocks to the victim's house; Thames had overheard their phone conversation before Doherty, his girlfriend, and Maddrey cut through

the victim's rear side yard and called the victim's name; from his rear porch, the victim handed the car keys to Doherty, who saw another young man with the victim and noticed a dark Jeep in the victim's driveway (Tr. II:27-45,68,127-129;VII:84-85). From inside the Jeep, Moulton saw the victim on his porch, talking briefly with three people who did not approach the Jeep (Tr. VI:118-119,133; Tr. VII:108).[3]

The victim and Thames walked to the Jeep, its engine running, in the driveway in front of the victim's house; Thames entered the back seat with the marijuana while the victim waited to be paid, leaning inside the partially-open front passenger window where Moulton sat and counted out his day's drug proceeds as planned (Tr.VI:120-124,133-134,145-147;VII:62,110-111, 123-124).

When the victim said the money "didn't look like" the agreed amount, the defendant "threw the car in reverse" and backed out of the driveway as the victim was still leaning inside the front passenger window (Tr.VI:120-124,133-134,145-147;VII:62,111). The victim,

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[3] Moulton testified that Deshowitz remarked the people were "probably strapped"; the defendant "said don't worry about it" and displayed the wooden-gripped butt of the revolver he had carried from his home (Tr. VII:108-110; Tr. VIII:64).

who was 5' 5" tall and weighed 126 pounds, did not have a weapon; in his hand he had only the open beer from the restaurant (Tr. VI:133-134; VIII:64).[4] From the victim's rear side yard, Doherty saw the Jeep back up while the victim's arms were still inside the open passenger window and heard him scream "help" as he was "grabbed into the window" (Tr. II:38-41-45,129).

Doherty ran towards the moving Jeep, heard a pop, and saw a flash from its driver's side just before the victim "rolled off" and the Jeep sped away (Tr.II:45-47,53-55,129;VI:120-124,145-147;VII:81,86). Moulton testified he had ducked forward and down under the passenger side dashboard before the defendant extended his arm out over Moulton's back and shot the victim with a silver revolver (Tr. VI:120-124,145-147; VII:81,86).

Within a minute of a 911 call to Wales Avenue, Randolph Police arrived and found the victim's body lying in the street; he died from a .22 caliber gunshot wound to his chest that penetrated his aorta and lodged in his heart (Tr. I:30;II:47-48,129-130;IV:99-107,312-

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[4] According to Thames, "a little scuffle" took place between Moulton and the victim as the victim realized he was being robbed, and the victim may have thrown "beer on" Moulton, wetting him(Tr.VI:120-124,133-134,145-147; VII:62,111).

313;III:41-45,57-61;IV:98,110;VII:43; Exhibits 2-4,8,34, 35,40,42).

The defendant drove home, parked in his garage, and directed Deshowitz, Moulton, and Thames to remove their clothes and machine wash them there as a "precaution" to remove "the gun powder" (Tr. VI:128,131;VII:113-114). He, Deshowitz, and Moulton also machine-dried their jackets (Tr. VI:131). The three men separated the marijuana into four one-ounce portions and then decided to "call it a night" rather than attend a party (Tr. VI:128;VII:114-116,126-127; Exhibits 15-17).

Soon after Moulton's girlfriend picked him up from the defendant's house, the defendant called Moulton and directed him to return alone to assist in hiding his .22 Ruger revolver; Moulton returned and helped conceal the revolver in a hollowed-out area under a patio brick near the defendant's backyard pool and swingset (Tr. VII:119-120,128-129,131,61; Exhibits 21,24). They returned to the defendant's second floor bedroom, where the four smoked marijuana and watched a movie before going to the basement to sleep (Tr. VI:131-132; VII:120).

Based on information that the victim was last seen alive with Deshowitz, police went to her home, where her sister handed a phone to a detective who spoke to

Deshowitz; police then attempted to locate her cell phone by "pinging" it[5] (Tr. II:147-148; IV:35,42-47,58-61,69,71-73,77,79-82).

At about 5:00 a.m. the defendant's mother answered a police knock at her door and retrieved from a bedroom a key with which she unlocked a deadbolt lock on the basement door (Tr. II:150-152;IV:81-87;VI:62; Exhibits 14-16). Police arrested the defendant and Deshowitz, who were sleeping together in a bed; Moulton, who was in a recliner; and Thames, who slept on a couch (Tr. II:153-154; III:153-154; IV:88-94; VI:133;VII:120). The defendant's mother's Jeep was in the garage; its passenger side bore gunshot residue (Tr. III:112-115).[6] Large bags of marijuana and packaging were on a table in the defendant's bedroom; another bag of marijuana was in his dresser drawer (Tr. IV:96-97,103,163; Exhibits 15,15A,17,18,18A,19).

Outside the basement door, in a hollowed-out hole under a large patio brick, police found a .22 caliber New Model Single-Six Ruger revolver and a plastic

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[5] "Pinging" involves "using GPS technology to locate where [a] phone may be" (Tr. II:148).

[6] No shell casings were recovered from the vehicle or the area of the shooting (Tr. IV:33-35).

freezer bag containing six live .22 cartridges[7]; the bag bore the defendant's right palm print (Tr. IV:106-111;VI:13-23,58-60;VI:32-33,62-66,73-85; Exhibits 21-29,44,50-56,62-68,75). Firing the revolver, which was operable and could have fired the projectile recovered from the victim's heart, required three separate steps: loading, manually pulling back the hammer to lock it in place, and pulling the trigger in order to cause the hammer to fall (Tr. VI:22-33,35-40).

SUMMARY OF THE ARGUMENT

I. The trial judge correctly declined to "resentence" the defendant for second-degree murder after imposing the statutory life-with-possibility-of-parole sentence the defendant agreed was required, and which this Court has held to be a proportional and constitutional statutory sentence for murder. (pp. 14-30).

II. Based on evidence that the defendant planned the armed robbery, bringing to it a loaded gun he used to shoot and kill his unarmed victim, no "accident" instruction was required. (pp. 31-34).

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[7] The trial judge allowed the defendant's mid-trial motion to sever a charge of unlawful possession of ammunition and excluded evidence of an additional firearm, a 9-millimeter rifle, and 28 additional rounds of ammunition found with the revolver (Tr. IV:156).

III. No evidence supported an "involuntary manslaughter" instruction in the robbery victim's death by shooting. (pp. 34-39).

IV. There was no evidence the robbery victim even interacted with the defendant, and no basis for voluntary manslaughter instructions on unavailable theories that the victim engaged in "combat" with the defendant or "provoked" his own death. (pp. 39-43).

V. The defendant lacked standing to challenge real-time cell phone information regarding Deshowitz's phone's location; his own phone's geographical location was irrelevant to his convictions. (pp. 44-47).

ARGUMENT

I. THE TRIAL COURT CORRECTLY IMPOSED WHAT THE DEFENDANT AGREED WAS THE STATUTORILY REQUIRED SENTENCE FOR SECOND-DEGREE MURDER: LIFE WITH THE POSSIBILITY OF PAROLE IN FIFTEEN YEARS.

The trial judge correctly imposed the sentence the defendant agreed his second-degree murder conviction required under the parole eligibility statute in effect when he killed the victim: life with the possibility of parole in fifteen years. The judge appropriately did not *sua sponte* conduct a "*Miller* hearing" that the defendant did not request on that statutory sentence, which this

Court had ruled is a constitutional and proportionate legislative mandate.

The defendant waived his belated claim that "the statutes governing sentencing for juveniles convicted of [second-degree murder] are unconstitutional" (Def. Br. 21)[8]: he made no such constitutional challenge to his 2013 (post-Miller and post-Diatchenko I) murder indictment mandating his life sentence, or to the applicable parole eligibility statute, and at sentencing agreed his sentence was required.[9]

He independently waived his current claim by withdrawing his pre-trial motion to dismiss his initial

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[8] See, e.g., Commonwealth v. McDonagh, 480 Mass. 131, 138 (2018)(requiring "timely and precise objection" to "preserve a claimed error for appellate review"); Commonwealth v. Alebord, 467 Mass. 106, 112 (2014)(waiver of even structural right where claim not presented to trial court).

[9] The parole eligibility statute in effect when the victim was murdered provided for a parole application in fifteen years. G.L. c. 127, §133A, as amended through St. 2000, c. 159, §230. See Brown, 466 Mass. at 689-690 & n. 10 (sentencing governed by parole eligibility statute in effect at time of offenses). After Diatchenko I and Brown, the Legislature re-enacted the statutory mandatory life sentence for second-degree murder committed before the age of eighteen, and rendered fifteen-year parole eligibility a mandatory minimum that could be extended by a decade at sentencing (Tr. VIII:157-158). G.L. c. 265, §2(b); St. 2014, 189, §8 (upon imposition of life sentence for second-degree murder, parole eligibility shall be fixed to "not less than 15 years nor more than 25 years").

murder indictment once Diatchenko I and Commonwealth v. Brown, 466 Mass. 676, 680-689 (2013), settled his statutory sentence's constitutionality. At sentencing following his trial, which began only days after this Court's controlling October 9, 2015 publication of Okoro, he clearly was correct in conceding that the trial judge had "no leeway" to impose any sentence less than the constitutional mandatory life-with-possible-parole sentence (Tr. VIII:157-158; XI:14-15). Commonwealth v. Okoro, 471 Mass. 51, 62 (2015) ("[A] mandatory life sentence with parole eligibility after fifteen years for a juvenile homicide offender convicted of murder in the second degree does not offend the Eighth Amendment or art. 26"); Diatchenko I, 466 Mass. at 667-675; Brown, 466 Mass. at 680-689. See also Miller, 567 U.S. at 477-478.

The defendant has never identified any alternative lesser murder sentence that the sentencing judge arguably had authority to impose. See Brown, 466 Mass. at 684-686 (rejecting defendant's claim that art. 26 prohibits mandatory sentencing for juveniles or commands "multiple discretionary sentencing options in all cases in which a juvenile is sentenced to a prison term," and also rejecting prospect of permitting sentencing judges

to "creat[e] an entirely new penalty scheme ad hoc," enabling them to alter a juvenile's parole eligibility date "as if the Legislature never had established a penalty" for a murder).

Even now the defendant concedes that his statutory murder sentence is *neither* "cruel and unusual [nor] disproportional to the offense" of murder (Def. Br. 21). The sentencing judge therefore could not have erred by declining to "resentence" him for second-degree murder by means of a Rule 30 motion. See, e.g., Commonwealth v. Woods, 480 Mass. 231, 239 (2018)(defendant could not obtain requested post-conviction relief "on collateral review based on an alleged violation of a right that simply did not exist at the time of the trial"); Commonwealth v. Acevedo, 446 Mass. 435, 441 (2006).

The defendant's claim of "significant changes in the law since Okoro was decided" (Def. Br. 23) does not identify any change in the Commonwealth's law that even arguably supports his claim of entitlement to resentencing for second-degree murder. He ignores this Court's controlling rulings to the contrary, both before and since Okoro, which have deferred to the Legislature's determination that a murder conviction requires a life sentence. Since Diatchenko I, well

before this defendant's trial and sentencing, the Legislature has codified this Court's determination that a life sentence with a meaningful opportunity for parole in fifteen years is constitutional.

The defendant also ignores the nation-wide rejection of his post-sentencing claim that sentencing judges are free to undercut mandatory statutory murder sentences for juveniles in the absence of state legislation authorizing them to do so. See Brown, 466 Mass. at 680-689. He invokes only scant inapposite extra-jurisdictional dicta either preceding or considerably post-dating his sentencing, citing single Iowa and Florida cases for the proposition that "[s]everal other state courts have struck down mandatory sentences for juveniles," Def. Br. 23. However, the Iowa case, decided prior to Okoro, relied on the Iowa Constitution and post-Miller legislation authorizing sentencing judges to suspend even a "mandatory minimum" sentence for a juvenile, thereby statutorily "abolish[ing] mandatory prison sentencing for most crimes committed by juveniles." State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014). See 2013 Iowa Acts ch. 42,

§14.[10] Nor did the Florida court, in Horsley v. State, "strike down" mandatory sentences for juveniles; it agreed a convict whose appeal was pending when Miller was decided was entitled to the benefits of post-Miller state legislation authorizing trial judges to conduct hearings prior to sentencing juveniles to life without possibility of parole. 160 So.3d 393, 408 (Florida 2015).

The defendant's post-Okoro citations also are procedurally and substantively inapt. He cites a lone Washington case that struck down state legislation prohibiting sentencing judges from any consideration of a defendant's youth in discretionary sentencing among recommended ranges. State v. Houston-Sconiers, 391 P.3d 409 (Wash. 2017). He also quotes dicta in a North Carolina case in which a 15-year-old was sentenced pre-Miller to life without the possibility of parole; the court, however, upheld the legislative determination

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[10] In July 2014 the Iowa court "recognize[d] no other court in the nation" had found a constitutional prohibition to state legislation prescribing mandatory minimum sentences for juvenile offenders. State v. Lyle, 854 N.W.2d 378, 400. This Court's post-Lyle decisions, including Okoro, rejected the claim that art. 26 precludes the Commonwealth's statutory mandatory murder sentence. 471 Mass. at 58.

that a murder conviction commands a life sentence, and *rejected* the juvenile defendant's argument that a statute providing parole eligibility at 25 years upon a mandatory life sentence unconstitutionally precluded "discretion to consider mitigating circumstances and render an individualized sentence" for persons convicted of murder as juveniles. State v. Jefferson, 798 S.E.2d 121, 123, 126 (N.C. 2017).

As the defendant agreed at his sentencing, his murder sentence was commanded by a statute whose constitutionality he did not dispute. This Court's controlling rulings, not only Okoro but a half-decade of post-Miller cases, have preserved the Legislature's enduring "discernible intent" that a murder conviction requires a life sentence, and reinforced that a 15-year commitment is both a proportional minimum sentence to be served prior to seeking release on parole for murder and an appropriate benchmark for assessing the presumptive proportionality of aggregated sentences for juveniles convicted of non-murder offenses. See, e.g., Brown, 466 Mass. at 680; Commonwealth v. Perez I, 477 Mass. 677, 682-688 (2017); Commonwealth v. Perez II, 480 Mass. 562 at ___ (September 14, 2018); Commonwealth v. Lutskov, 480 Mass. 575 at ___ (September 14, 2018). This

defendant's motion for new trial provides no cause to reconsider this well-reasoned, firmly-settled case law.

The amicus announcement in this case reads:

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

This Court has already answered those questions, in a consistently reasoned line of cases years prior to the defendant's trial; it has thereafter reaffirmed that analysis. Beyond that, those questions were never raised in the trial court here. The trial judge was not asked to and did not have authority to override the Legislature's sentencing mandate and this Court's controlling decisions and, years after his sentencing, instead impose a murder sentence "contrary to *Okoro*," which remains governing law (Def. Br. 21).

Further, the defendant did not ask for a "Miller hearing" on his murder sentence. In comments confined to his armed robbery sentence (upon which the defendant did not seek "resentencing"), he conditionally considered "present[ing] the Court with a sentencing memorandum" were the court inclined to exceed the sentencing

guidelines for that offense (Tr. XI:14-15,17).[11] At sentencing for armed robbery, trial counsel then so persuasively argued traditional sentencing factors (such as education, employment history, and lack of "convictions on his adult record" [Tr. XI:19-21]) that the trial judge imposed only a 12-15 year sentence, rejecting the Commonwealth's 19-20 year recommendation; thus his parole eligibility date was not extended by a single day despite his additional convictions.

The trial judge imposed these concurrent sentences expressly to confer upon this defendant the benefit of his "youth" when, at just three months shy of eighteen,

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[11] The defendant's Rule 30 motion did not challenge his non-murder sentences, and he never moved to continue his sentencing for murder. He never submitted to the trial court specific factual mitigating information, in any form, from a defense expert with whom he had consulted well before trial or anyone else. See Commonwealth v. Fernandez, 480 Mass. 334 at ___ (August 24, 2018)(trial judge appropriately exercised discretion by denying trial continuance where defense sought medical expert brain evaluation of defendant who was juvenile at time of charged murder: "Beyond the belated nature of this request, the defendant did not support the motion with information or evidence - other than [his] age at the time of the offenses - indicating that the requested [evaluation] would yield helpful information," and "did not present evidence concerning [his] medical, psychological, or behavioral history; school records; or any information suggesting that he was a particularly psychologically troubled adolescent who might fall within the group of adolescents described in the literature.").

the defendant robbed and killed the victim. He fashioned for this "young defendant" a "sentencing structure" to ensure that despite his serious additional crimes, he will be eligible for parole at the earliest possible date his post-Diatchenko I murder sentence allowed: he will have "a parole hearing after the mandatory minimum [murder sentence] is done" (Tr. XI:25).

Moreover, the defendant's Rule 30 motion lacked support for its factual premise that he could have derived any benefit from a "Miller hearing" he did not request, which could not have yielded a better sentencing result for murder, but could have resulted in a substantially greater aggregate sentence and extended his parole eligibility date given his other convictions. His Rule 30 motion lacked "any evidence specific to him suggesting that a continuance to [memorialize the input of his] adolescent brain development expert" could have furnished any mitigating sentencing information in his case. See Fernandez, 480 Mass. at ___; Perez II, 480 Mass. at ___ (distinguishing "the ordinary mitigation analysis associated with sentencing" from record of particular juvenile's mitigating "personal and family history").

Well before trial, the defendant, who had the services of a juvenile brain development expert, Dr. Frank DiCataldo, could have memorialized any relevant information about his background and condition when he committed these crimes. Yet he has never proffered any mitigating individualized factual information about himself or his crimes (Tr. XI:12-13,19-24).[12] He has not

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[12] The defendant's Rule 30 motion was unaccompanied by any averment from trial counsel, his expert, or anyone else, that at sentencing there existed any individualized "mitigating factors" under Miller which could have been brought to the trial judge's attention. The record settles that Dr. DiCataldo's input would have been at best generic, confined to "unique [sic] things about [all] juveniles, their perception, their need for instant gratification, their likelihood of success and rehabilitation"(Tr. XI:15;S.A. 1). Contrast Commonwealth v. Harris, 468 Mass. 429, 439 (2014)(Dr. DiCataldo had tested defendant and opined he suffered from borderline personality disorder at time of killing). See Fernandez, 480 Mass. at ___ (no abuse of discretion in denying continuance for scan of juvenile defendant's brain based on general science regarding juveniles, where defendant failed to submit evidence such evaluation "would provide useful information" in his own murder trial).

Similarly, the defendant's pre-trial proffer concerning his expert's limitations had he called him as a trial witness noted his "leading expert" on "adolescent brain development" could only have "just give[n] the science in very general and broad terms" as to the "general" perception and development of an "adolescent brain" in "high-stress situations" (M.H. 10/21/15:24-25; S.A. 1). The trial judge was familiar with the expert's work, confined here to "the generality of issues of adolescent brain development, not a specific [issue] about this defendant as opposed to other adolescents of his age" (M.H. 10/21/15:25-26).

claimed that his egregious violent crimes arose from even the most quotidian hardship, or that he had suffered any organic, developmental, or environmental deficits. Even in his Rule 30 motion, he failed to submit any factual showing that when he committed these crimes he was compromised by any "distinctive mental attributes and environmental vulnerabilities" (Def. Br. 26). See Commonwealth v. Alicea, 464 Mass. 837, 850-852 (2013)(defendant failed to submit affidavits describing expert testimony that on facts of his case "could have assisted…in any meaningful fashion"); Commonwealth v. Bouley, 93 Mass. App. Ct. 709, 715 (2018)(claim of failure to present expert testimony "generally doomed" where defendant fails to supply affidavits disclosing purportedly helpful content of such possible testimony).

This defendant planned with three confederates to rob the victim of a quarter-pound of marijuana; armed himself with a .22 caliber revolver he kept hidden in a

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Nor was the trial judge required to presage what "the science in general" might indicate years after sentencing. See Fernandez, 480 Mass. at _____ (rejecting juvenile's post-conviction argument as mistakenly invoking "scientific and legal understanding of adolescent brain development as it exists in 2018, not the understanding of the science or law as it existed at the time of his trial").

hole under his family's backyard patio; drove his co-defendants to the victim's home while carrying and concealing that deadly weapon; robbed and killed the unarmed 21-year-old robbery victim; and fled in his mother's vehicle Jeep to his suburban home, where he concealed the murder weapon, directed the destruction of physical evidence, smoked some of the victim's stolen marijuana, watched a movie, and went to sleep with the victim's girlfriend.

The trial judge was not required to *sua sponte* conduct a "*Miller* hearing" trial counsel did not seek, on mitigating factors which this defendant's crimes did not exhibit, and hardships he has never purported to have suffered. Far from having been the product of any "horrific, crime-producing setting" from which he could not extricate himself, he had a comfortable and stable home and amenities provided by a supportive family not only "present throughout the course of the trial" but "present in his life in its entirety" (Tr. XI:20). Miller, 567 U.S. at 460, 468,471,477-479 (one juvenile defendant abused by drug-addicted mother, in and out of foster care, and attempted suicide multiple times from age of six).

This defendant was not a young teenager, but nearly eighteen and enrolled in college, "only a semester away from completing" an associate's degree (Tr. XI:20-21), living in his family's home when he chose to commit crimes in which he was by far the most culpable among four co-defendants: the lone armed perpetrator and shooter, methodically ordering the concealment and destruction of evidence after the robbery and killing. He was not an impressionable young follower who had succumbed to negative "familial and peer pressures." Miller, 567 U.S. at 468-471.

The defendant's assertion that he "should not have to wait until a parole hearing" to present what will be "stale" hypothetical expert evidence about *his own* maturity "at the time of the offense" (Def. Br. 28-29) both misapprehends this factual record and confuses the "quintessential judicial power" of sentencing with the executive function of considering a parole application and setting the terms for potential *release* from a committed sentence. Commonwealth v. Rodriguez, 461 Mass. 256, 264 (2012). See, e.g., Commonwealth v. Cole, 468 Mass. 294, 302 (2014)("judiciary may not interfere" with executive function of granting parole).

The defendant asserts that, notwithstanding Brown and its progeny, the sentencing judge somehow could have enabled him to escape the constraints of possible lifetime parole because lifetime parole supervision "may not be appropriate" for *every* convict who committed murder as a juvenile (Def. Br. 21-22). Whether this defendant will conduct himself so that he earns release on parole from his murder sentence is a question for another day, to be addressed by another entity from a different branch of government: the Parole Board. Cf. Deal v. Commissioner of Correction, 475 Mass. 307, 322 (2016)(rejecting argument that juvenile homicide offenders have constitutional right to be "released to the community at the conclusion of their minimum duration of confinement").

Diatchenko I, subsequently codified by the Legislature, and its progeny have provided a uniform approach and robust procedural framework recognizing the necessary constitutional separation of powers among a Legislature charged with determining what sentence the crime of murder requires, a trial court whose justices impose such constitutional mandatory sentences, and a Parole Board that performs the executive function of assessing when a given convict may be released from

commitment upon such a sentence. A possible grant of parole, and potential supervisory terms to be attached thereto for a given parolee, however, is neither a punishment nor a component of sentencing.

As this Court consistently has ruled, as a matter of constitutional separation of powers the Parole Board alone determines whether an adult convict has demonstrated release is suitable on parole, and what supervisory conditions may be attached to such release. See, e.g., Commonwealth v. Costa, 472 Mass. 139, 149 n. 6 (2015)(under art. 30, "A judge may not allow a motion to alter a sentence in order to 'nullify the discretionary actions of the parole board.'"), quoting Commonwealth v. Amirault, 415 Mass. 112, 117 (1993). See also Diatchenko v. District Attorney for Suffolk Dist., (Diatchencko II), 471 Mass. 12, 28 (2015).

The Parole Board's task will not be to reassess or revise this or any other convicted murderer's sentence, but to evaluate his record of comportment while serving it, to determine whether his crimes reflected "irreparable corruption" calling for further confinement. Miller, 567 U.S. at 471, 479-480; Diatchenko I, 466 Mass. at 669-670,673 (recognizing "the Legislature's primary role in establishing sentences for

criminal offenses," leaving in full effect statutory mandatory sentence of life imprisonment for juvenile convicted under G.L. c. 265, §2).[13] The trial judge correctly imposed the murder sentence that the defendant agreed was statutorily required, and did not insist upon a "Miller hearing" that the defendant did not seek and which could not have reduced that sentence.

[13] The Parole Board does not revisit the propriety of a sentence but assesses an inmate's entire record of behavior while serving it. See Greenman v. Massachusetts Parole Bd., 405 Mass. 384, 387 (1989). It will assess not whether an inmate should have been confined for a given term, but whether his or her release "is not incompatible with the welfare of society" because a convict has sufficiently changed while serving a sentence, and has while incarcerated "demonstrated maturity and rehabilitation," G.L. c. 127, §130; Diatchenko II, 471 Mass. at 18-19, 21-22, 30; Diatchenko I, 466 Mass. at 671, 674, quoting Graham v. Florida, 560 U.S. 48, 75 (2010). It will not simply reevaluate what preceded sentencing, but examine what behavior ensued: "the board is charged by statute with ascertaining the extent to which the inmate has been rehabilitated, and the extent to which, if released, he or she would pose a risk to the community." Diatchenko II, 471 Mass. at 46. See G.L. c. 127, § 130. The Parole Board will consider whether at the time of a parole application the defendant has sufficiently "demonstrated *maturity* and rehabilitation." Diatchenko I, 466 Mass. at 671 (emphasis supplied).

II. NO SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE AROSE FROM THE ABSENCE OF AN ACCIDENT INSTRUCTION BASED ON EVIDENCE THAT THE DEFENDANT PLANNED A ROBBERY, ARMED HIMSELF WITH A DEADLY WEAPON, AND SHOT THE UNARMED VICTIM IN THE HEART.

The trial judge correctly declined to instruct that "accident" was a defense to fatally shooting a robbery victim in the heart with a loaded gun the defendant carried to the robbery victim's home. The defendant did not object to the absence of an accident instruction, which would have contradicted the defense theory that he fired in defense of self or another, and risked the trial judge's revisiting defense-favoring rulings, including severing the indictment for possessing an additional unlicensed firearm (a rifle) and ammunition and excluding evidence that the defendant possessed and tried to sell it (Tr. IV:156; See M.H. 12/18/14:5).[14]

No evidence supported an "accident" instruction. Commonwealth v. Minico, 373 Mass. 298, 299 (1977)

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[14] Evidence that the defendant had more than one type of firearm and ammunition and selected the revolver would have been probative of the absence of "accident," evidencing his familiarity with and access to firearms and deliberate choice to equip himself with a more readily concealable, less cumbersome, easier to wield and fire weapon should his victim resist being robbed. See, e.g., Commonwealth v. Vazquez, 478 Mass. 443, 448 (2017)(bad acts admissible in trial judge's discretion to prove "absence of accident or mistake."); Commonwealth v. Cheremond, 461 Mass. 397, 408 (2012).

(defendant "not entitled to a charge on a hypothesis which is not supported by the evidence."). The defendant armed himself with a loaded firearm before driving three confederates to the victim's home to rob him of four ounces of marijuana; he assured his confederates they need not "worry" about the planned robbery because he had ready access to the deadly weapon; and as he backed out of the victim's driveway to make a quick getaway with the robbery's bounty he held his revolver out over his ducked-down confederate to fire into the robbery victim's chest. No reasonable inference was available that doing so was merely "an unintended happening that result[ed] in injury or loss." Commonwealth v. Parker, 25 Mass. App. Ct. 727, 731 n. 6 (1989).

"[I]t is a reasonable inference that one who attacks another with [a dangerous weapon] intends to kill that person," Commonwealth v. Keown, 478 Mass. 232, 250 (2017), citing Commonwealth v. Perez, 444 Mass. 143, 153 (2005). No witness suggested the defendant "accidentally" fired his gun into his robbery victim's heart, a process that required multiple distinct intentional steps, from acquiring and loading the deadly weapon to concealing and carrying it from another city to the intended victim's home, drawing it, lifting the

hammer, locking the hammer in place, aiming at the victim, and pulling the trigger to fire at him.[15]

Rational jurors not only could not have found the killing was an "unintentional event occurring through inadvertence, mistake, or negligence," but necessarily found beyond a reasonable doubt that the defendant intentionally shot the victim. Commonwealth v. Figueroa, 56 Mass. App. Ct. 641, 650 (2002).

By convicting the defendant of second-degree murder and armed robbery, jurors necessarily found beyond a reasonable doubt that he shot the victim with, at minimum, "conscious disregard for the risk to human life," and that he "intended to kill [the victim] or intended to cause him grievous bodily harm or intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result"

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[15] As the trial judge noted in denying the defendant's Rule 30 motion, finding that he would not have given any of the three additional instructions even had trial counsel objected to their absence, "no construct . . . can be put on the evidence other than that the handgun had been on the defendant's person underneath his jacket," and that he retrieved it and "pointed it at [the robbery victim] as [the victim] stood on the opposite side of the Jeep" which "the defendant was operating in reverse in attempting to complete the theft of drugs" from the victim (A. 77).

(Tr. IX:172; See IX:149,161). Those verdicts foreclosed a finding of "accident" and eliminated the possibility of a substantial risk of miscarriage of justice even had an "accident" instruction been supported. See Commonwealth v. Van Winkle, 443 Mass. 230, 240-241 (2005)(armed robbery conviction necessarily rejected defendant's claim he fired gun only as result of being punched by victim, and appropriately "had the effect of eliminating manslaughter from the jury's consideration"); Commonwealth v. Zaccagnini, 383 Mass. 615, 615-618 (1981)(no substantial risk of miscarriage of justice in absence of accident instruction where defendant convicted of armed assault with intent to murder after testifying victim's gun discharged during struggle).

III. NO SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE AROSE FROM THE ABSENCE OF AN INSTRUCTION ON INVOLUNTARY MANSLAUGHTER, AN UNSUPPORTED THEORY CONFLICTING WITH THE DEFENSE THEORY THAT THE VICTIM WAS SHOT IN DEFENSE OF SELF OR ANOTHER.

The trial judge granted defense requests to instruct the jurors on self-defense, defense of another, and voluntary manslaughter in the form of excessive force in defense of self or another (Tr. IX:150-160, 172-176; X:3-9). The defendant did not object to the jury charge, which correctly did not instruct on

competing, unsupported theories of involuntary manslaughter or voluntary manslaughter by "provocation" by or "sudden combat" with the robbery victim. See Commonwealth v. Leng, 463 Mass. 779, 787 (2012); Commonwealth v. Clemente, 452 Mass. 295, 329 (2008) (pursuing inconsistent defense theories "could only have undermined" credibility of defense).

The defendant's theory at trial was not that he "accidentally" or merely wantonly or recklessly shot his unarmed victim, but that he was entitled to shoot him in defense of himself or a confederate.[16] On appeal, he claims that jurors could have found he "pulled out the gun only to effectuate his and his companions' flight from the [victim's] driveway," because the robbery victim "presented an obstacle to [his] getaway" (Def. Br. 40-41). Drawing and shooting a loaded firearm towards a robbery victim to remove him as "an obstacle" to "speed[ing] away" from the robbery scene cannot rationally being viewed as merely "wanton or reckless."

[16] In denying the defendant's Rule 30 motion, the trial judge noted that the evidence did not support instructions on additional theories of voluntary manslaughter or involuntary manslaughter; accordingly, objection by trial counsel to their absence would have been fruitless.

See, e.g., Commonwealth v. Neves, 474 Mass. 355, 370 (2016)(defendant's claim jurors could have found his gun's discharge was unrelated to robbery's completion "require[ed] speculation rather than reasonable inferences, [and] does not withstand scrutiny"); Commonwealth v. Evans, 390 Mass. 144, 149-154 (1983)(defendant not entitled to involuntary manslaughter instruction where he testified his gun accidentally discharged during struggle with victim who was resisting robbery).

A trial judge "need not reconstruct all possible factual scenarios subsumed in the evidence presented, no matter how unreasonable, and charge the jury accordingly." Id. No reasonable factual inference was available that the victim's death at the receiving end of the defendant's firearm, even had he not been killed during the course of a robbery, was "an unintentional death" occurring during merely "wanton or reckless conduct," Commonwealth v. Cruz, 430 Mass. 182, 186 (1999). See Commonwealth v. Dyous, 436 Mass. 719, 732 (2002)(involuntary manslaughter instruction correctly refused where no evidence gun was "fired into the air or that the victim died as a result of firing into the air."); Commonwealth v. MacCauly, 391 Mass. 697, 704

(1984)(defendant's claim he accidentally shot victim during armed robbery did not require involuntary manslaughter instruction).

Further, by convicting the defendant of both armed robbery and second-degree murder, the jury necessarily found beyond a reasonable doubt not only that he bore *conscious disregard* for the risk to human life (Tr. IX:149,161), but also that he "intended to kill [the victim] or intended to cause him grievous bodily harm or intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result" (Tr. IX:172), and "that there were no mitigating circumstances that would reduce [his] culpability" (Tr. IX:173). Those verdicts precluded a finding the killing was either an "accident" or involuntary manslaughter. See, e.g., Commonwealth v. Vives, 447 Mass. 537, n. 6 (2007)(guilty verdict on armed robbery foreclosed possibility of error: jury appropriately would not have considered mitigation in robbery victim's death).

Accordingly, no substantial risk of a miscarriage of justice would have arisen even had an involuntary manslaughter instruction been supported. See Commonwealth v. Cruz, 430 Mass. at 186 (guilty verdicts

on underlying felonies precluded substantial risk of miscarriage of justice even had it been error to omit involuntary manslaughter instruction); Van Winkle, 443 Mass. at 240-241; Commonwealth v. Wallington, 467 Mass. 192, 208 (2014); Commonwealth v. Matchett, 386 Mass. 492, 505 n. 15 (1982); Commonwealth v. Randolph, 438 Mass. 290, 301 (2002)(even erroneous charge on provocation not prejudicial where defendant was convicted of armed assault with dangerous weapon); Commonwealth v. Fantauzzi, 91 Mass. App. Ct. 194, notes 2 & 9 (2017)(defendant conceded jurors would not even have considered lesser manslaughter verdict had they convicted him of second-degree murder, rendering claimed instructional error on lesser offense harmless). See also Commonwealth v. Juvenile (No. 1), 396 Mass. 108, 114-115 (1985)(murder verdict necessarily encompassed finding of culpable mental state exceeding manslaughter, rendering claimed instructional error on lesser offense "simply not relevant"); Commonwealth v. Fluker, 377 Mass. 123, 129 (1973)(second-degree murder conviction required finding defendant killed victim intentionally and without excuse or justification that would have been required for conviction of lesser manslaughter offense).

In sum, neither error nor a substantial risk of justice was presented by the absence of an involuntary manslaughter instruction.

IV. NO SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE AROSE FROM THE ABSENCE OF ADDITIONAL INSTRUCTIONS ON COMPETING THEORIES OF VOLUNTARY MANSLAUGHTER DUE TO "REASONABLE PROVOCATION" BY OR SUDDEN COMBAT WITH THE ROBBERY VICTIM.

There was no evidence of "reasonable provocation" by or "sudden combat" with the robbery victim whom the lethally-armed defendant shot and killed from the security of an SUV's driver's seat. The defendant did not testify, and no one testified that he was "provoked," objectively or subjectively, reasonably or unreasonably, to any degree, let alone to use deadly force against his unarmed victim. See Commonwealth v. Brum, 441 Mass. 199, 204 (2004) ("a provocation instruction is not appropriate when a defendant claims to have acted in self-defense but presents no evidence about his emotional state"). Accordingly, jurors could not have found the defendant subjectively acted on "any blindness or heat of passion on reasonable provocation." Commonwealth v Colon, 449 Mass. 207, 222 (2007), quoting Commonwealth v. Vinton, 432 Mass. 180, 189 (2000).

At best for the defendant, he shot and killed the empty-handed victim after the victim had fruitlessly

thrown a beer bottle at one of the defendant's three confederates, as the defendant backed out of the victim's driveway while the victim's upper arms were still trapped inside the passenger window. See Commonwealth v. Curtis, 417 Mass. 619, 629 (1994)(victim's attempt to strike defendant with bottle did not warrant manslaughter instruction where defendant initiated confrontation). "[V]iewing the evidence in the light most favorable to the defendant...[Nothing] makes a theory of reasonable provocation or sudden combat tenable" Commonwealth v. Brum, 441 Mass. at 206. See Commonwealth v. Carlino, 429 Mass. 692, 693 (1999).

No evidence permitted jurors either "to infer that a reasonable person would have become sufficiently provoked" or "that, in fact, the defendant was provoked" by his robbery victim to use lethal force against him. Commonwealth v. Parker, 402 Mass. 333, 344 (1988); Commonwealth v. Garabedian, 399 Mass. 304 (1987); Commonwealth v. McLeod, 394 Mass. 727 (1985) ("evidence must be sufficient to create a reasonable doubt in the minds of a rational jury that a defendant's actions were both objectively and subjectively reasonable").

There was no evidence of "combat" between the victim and the defendant. Indeed, there was no evidence

the victim had even looked at the defendant, a stranger, before the defendant fatally shot him, let alone that the 126-pound 5'5" victim engaged in "combat" with or "provoked" the defendant to pull out and fire a revolver at him from the safety of an SUV as he backed it away with the stolen marijuana. Contrary to the defendant's representation, there was no testimony that the victim threw "the beer bottle at the occupants of the front seat." Def. Br. 45.

Thames testified that when the victim realized he was being robbed, he "was struggling to try to get the money" from Moulton; Moulton merely became "wet" from the victim's beer before tucking his head under the dashboard, leaving the defendant with a clear path to shoot the unarmed victim to death while the victim's hands and upper body were still trapped in the passenger side window of the reversing Jeep (Tr. VI:122-126; VII:63,112-113).[17] Spilled beer would not have inflamed

[17] Moulton testified that the defendant had backed the SUV out onto the street while the victim's upper body was "still in the window, tussling" with him, and that he ducked down in his seat before hearing a gunshot from his left, after which the victim "was no longer in the window" (Tr. VII:111-113). There was no testimony that the victim threw anything "at" the defendant, who occupied the driver's seat. See Commonwealth v. Leclair, 445 Mass. 734, 741 (2006) (voluntary manslaughter

the passions of any reasonable person to fire a deadly weapon into the victim's heart. See Commonwealth v. Bianchi, 435 Mass. 316, 329 (2001)(no adequate provocation where victim punched defendant in face and defendant was armed with loaded weapon); Commonwealth v. Curtis, 417 Mass. 619, 629 n. 6 (1994)(even victims who struck first blows did not generate contact sufficient to mitigate their deaths); Commonwealth v. Rembiszewski, 363 Mass. 311, 321 (1973), S.C., 391 Mass. 123 (1984)("extravagant suggestion" that unarmed victim's scratching defendant "could serve as provocation for a malice-free but ferocious attack by the defendant with a deadly instrument"). See also Evans, 390 Mass. at 149-

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instruction due to "provocation" not warranted where victim did not objectively directly provoke defendant into violent response). On all witness accounts, the victim was in his own driveway, empty-handed outside the getaway vehicle's passenger side, opposite from the driver's side from which the defendant shot and killed him. See, e.g., Brum, 441 Mass. at 207 (once weapon was removed from victim's hand, any arguable threat to defendant was negated; no manslaughter instruction was warranted); Commonwealth v. Zukoski, 370 Mass. 23, 29 (1976)(purported threat from victim throwing glass had passed). See also, e.g., Commonwealth v. Vives, 447 Mass. 537 n. 6 (2007)(where defendant was convicted of armed robbery, jury would not have reached mitigation claims had they been raised: "The right to self-defense is forfeited by one who commits armed robbery."); Commonwealth v. Griffith, 404 Mass. 256, 265 (1989), quoting Commonwealth v. Maguire, 375 Mass. 768, 772-773 (1978).

154 (defendant, armed with loaded gun, was initial aggressor who intended to rob victim, and did not appear to have reasonable ground to believe he was in serious danger); Commonwealth v. Zezima, 387 Mass. 748, 755 (1982)(no testimony indicating defendant feared aggression even where defendant testified he had seen gun in victim's coat pocket and saw victim put hands in pockets); Commonwealth v. Harrington, 379 Mass. 446, 450 (1980). No view of the evidence "would permit a determination that the victim played even an inconsequential role in provoking [his] own death" as he was being robbed by four confederates. See Commonwealth v. Leclair, 445 Mass. 734, 744 (2006).

Further, the defendant's convictions of armed robbery and second-degree murder without mitigation foreclosed the possibility of prejudice, on any standard of review, in the absence of "reasonable provocation" and "sudden combat" instructions. Van Winkle, 443 Mass. at 240-241; Commonwealth v Colon, 449 Mass. 207,222 (2007); Commonwealth v. Vinton, 432 Mass. 180,189 (2000). The trial judge correctly did not instruct on voluntary manslaughter by means of claims of mitigation not presented by the evidence.

V. THE DEFENDANT LACKED STANDING TO OBJECT TO POLICE TRACKING OF A CO-DEFENDANT'S PHONE; NO INCULPATORY EVIDENCE WAS GLEANED FROM THE DEFENDANT'S PHONE.

The defendant lacked standing to contest the real-time "pinging" of Deshowitz's cell phone. Further, the motion judge's determination that the emergency exception applied to police attempts to locate Deshowitz's phone through real-time cell site location information (CSLI) amply was supported by his undisputed factual findings.[18] For example, Deshowitz, a teenager, had not returned to her home after being seen leaving a restaurant with her boyfriend shortly before he was robbed and killed by an at-large armed shooter who fled in a dark SUV and remained at large (A. 45-57); Deshowitz had then used code words over her phone to advise police that something was wrong and she could not speak freely (A. 45-57 & n. 7). See Commonwealth v. Raspberry, 93 Mass. App. Ct. 633 at notes 8, 9 (July 27, 2018)(if acquisition of real-time CSLI was "search," emergency exception applied where police had "objectively reasonable grounds to believe that

[18] The defendant does not challenge any of the motion judge's findings of fact in denying both defendants' motions to suppress following an evidentiary hearing (A. 56-57). See Neves, 474 Mass. at 360; Commonwealth v. Scott, 440 Mass. 642, 646 (2004).

emergency aid might be needed."); Commonwealth v. Entwistle, 436 Mass. 205, 214 (2012). See generally Commonwealth v. Cruzado, 480 Mass. 275 (August 10, 2018)(noting inherent "threat to public safety" posed by crimes "such as murder").

It was reasonable for authorities "to believe that an emergency existed" and for the motion judge to have concluded that their actions "were reasonable in the circumstances." Commonwealth v. Raspberry, 93 Mass. App. Ct. at __, quoting Commonwealth v. Knowles, 451 Mass. 91,96 (2008)("objectively reasonable" for police to obtain real-time CSLI to determine current location and track movements of person who made threats and may have had access to firearm).

The defendant's motion to suppress, however, was limited to the real-time location of his own "presumed mobile telephone number" (S.A. 2) at coordinates near his own house, to which Deshowitz's mother already had led police and where the defendant and Deshowitz were found sleeping (See A. 56-57). The defendant did not claim any possessory interest or expectation of privacy in the location of Deshowitz's phone. See Commonwealth v. Williams, 453 Mass. 203, 207-208 (2009); Commonwealth v. Fredericq, 93 Mass. App. Ct. 19, 26-27 (2018).

The defendant failed to meet his initial burden to establish that a search of his phone took place. See Commonwealth v. Alvarez, 480 Mass. 299 (August 22, 2018); Commonwealth v. D'Onofrio, 396 Mass. 711, 714-715 (1986). No historical information was obtained from it and no substantive content was examined. His number was "pinged" in real time to an area near his house, where police independently already had arrived and where multiple percipient witnesses testified he was asleep in his basement with Deshowitz (A. 51,56; See M.H. 2/7/2014 I:94-95). See, e.g., Carpenter v. United States, 138 S. Ct. 2206, 2217 n. 3 (2018)(accessing fewer than seven days' CSLI information might not be search); Commonwealth v. Raspberry, 93 Mass. App. Ct. at ___ (assuming, without deciding, that police use of real-time CSLI information to track defendant's changing location, in concert with content of intercepted messages, was "search" under art. 14).

Finally, that a cell phone the defendant used was apparently near his home as he slept was irrelevant at trial, where percipient witnesses testified without objection that the defendant and Deshowitz were asleep when police arrived. Cf. Vasquez, 478 Mass. at 446 (2017)(even if CSLI records were improperly admitted at

trial, including historical CSLI placing defendant at murder scene, information was cumulative and records "were not a significant part of the prosecution's case"). Contrast Commonwealth v. Webster, 480 Mass. 161 (July 27, 2018)(admission at trial of CSLI cell phone data, including inculpatory contents of calls and text messages among confederates as they travelled to and from murder scene); Commonwealth v. Dyette, 87 Mass. App. Ct. 548, 559-562 (2015)(improperly obtained content of cellular device "went to the heart of" case, offered and argued at trial as evidencing defendant's lies and consciousness of guilt).

CONCLUSION

The defendant's convictions should be affirmed.

Respectfully submitted,
On behalf of the Commonwealth
and Michael W. Morrissey,
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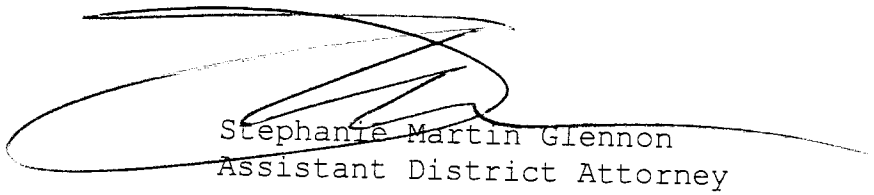
October 2018

CERTIFICATION OF COMPLIANCE

I, Stephanie M. Glennon, Esq., hereby certify that the within brief complies with the rules of court that pertain to the filing of appellate briefs, including, but not limited to: Mass. R. A. P. 16(a)(6); Mass. R. A. P. 16(e); Mass. R. A. P. 16(f); Mass. R. A. P. 16(h); Mass. R. A. P. 18; and Mass. R. A. P. 20.



Stephanie Martin Glennon
Assistant District Attorney

SUPPLEMENTAL APPENDIX

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

DEDHAM SUPERIOR COURT
DOCKET NO. 2014 CR 000673

COMMONWEALTH

v.

NATHAN LUGO

THE DEFENDANT'S NOTICE OF POTENTIAL EXPERT TESTIMONY

Now comes the defendant pursuant to Massachusetts Rule of Criminal Procedure 14(B) and notifies the Commonwealth that he may offer potential expert opinion testimony of Frank C. DiCataldo. He would testify generally to issues related to adolescent brain development, and adolescent psychology. He will explain the differences between an adult and an adolescent as it relates to perception, and decision making. Mr. DiCataldo will also rely on the literature and studies in his area of expertise[1].

Counsel for the defendant,

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30 Cottage Street
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(508)-584-2555
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Dated: August 26, 2015

[1] Counsel has attached a copy of the Curriculum Vitae of Frank C. DiCataldo to the motion.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

DEDHAM SUPERIOR COURT
DOCKET NO: NOCR2011-01153

COMMONWEALTH	**MOTION TO SUPPRESS CELLULAR SITE LOCATION INFORMATION AND EVIDENCE DERIVED THEREFROM OBTAINED BY LAW ENFORCEMENT WITHOUT A WARRANT**
v.	
NATHAN LUGO	

The Defendant, Nathan Lugo ("Lugo"), moves the court, pursuant to Mass. R. Crim. P. 13, to issue an order suppressing any and all evidence and observations of his presumed mobile telephone number, cellular tower site location information ("CSLI"), and so-called cellular "ping" results all of which were obtained by law enforcement from the Defendant's mobile phone without a warrant on November 26 & 27, 2011.

As reasons therefor, the phone number, cellular tower site location information, and "ping" information were obtained by law enforcement without a warrant in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article Fourteen of the Massachusetts Declaration of Rights. See Commonwealth v. Pitt, Docket NOCR2010-0061 (2012, Cosgrove, J).

The Defendant furthermore moves to suppress any and all evidence derived from the unlawful search, including an alleged firearm and additional fruits of a subsequent search warrant execution at 27 Breer Circle, Brockton, MA and any statements of

the co-defendants during police interrogation following their apprehension. Any and all physical evidence, observations, and statements were obtained as a result of the prior illegality and therefore must be suppressed as "fruits of the poisonous tree." See Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); Commonwealth v. Lahti, 398 Mass. 829 (1986); Commonwealth v. Bishop, 402 Mass. 449, 451-52 (1988); Commonwealth v. Canavan, 40 Mass. App. Ct. 642 (1996).

By his Attorney,

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Dated: July 10, 2013
m:cri\lugo.mtn.suppress.csli

CERTIFICATE OF SERVICE

I, Joseph F. Krowski, Jr., Esquire, hereby certify that I have this 10th day of July, 2013, served a copy of the Motion to Suppress Cellular Site Location Information Obtained by Law Enforcement without a Warrant Lynn M. Beland, ADA, Norfolk County District Attorney's Office, 45 Shawmut Road, Canton, MA 02021 by first class mail postage prepaid.

JOSEPH F. KROWSKI, JR., ESQUIRE