COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NORFOLK COUNTY NO. SJC-12546

COMMONWEALTH

V.

NATHAN LUGO

REPLY BRIEF OF THE DEFENDANT ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

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I. Mr. Lugo's Mandatory Sentence Of Life With Parole Was Unconstitutional And The Trial Judge Violated His Right To Due Process During The Sentencing Hearing.

A. Preservation And Procedural Issues.

The Commonwealth contends that Mr. Lugo waived his claim that the statutes governing sentencing for juveniles convicted of second degree murder are unconstitutional by not making this argument at the time of sentencing. Commonwealth's Brief (CB) 15. The Commonwealth's claim of waiver should be rejected. Trial counsel and the court understood that the controlling law at the time required the judge to sentence Mr. Lugo to life with parole eligibility after fifteen years. This Court's decision in *Commonwealth v. Okoro*, 471 Mass. 51 (2015), rejecting the claim that a life with parole sentence was unconstitutional following *Miller v. Alabama*, 567 U.S. 460 (2012), was published in 2015, shortly before Mr. Lugo's sentencing that same year. Trial counsel is not required to make futile arguments to the sentencing court. See *Commonwealth v. Vasquez*, 456 Mass. 350, 358

(2010)("[B]ecause an objection to the admission of a drug certificate would have been futile, the rationale for denying the defendant a more favorable standard of review is not applicable.")

The Commonwealth also claims waiver based on counsel's failure, at the time of sentencing, to ask for a *Miller* hearing with respect to the second degree murder charge specifically. CB 21. The Commonwealth is taking a hypertechnical view of preservation. Counsel appropriately stated that he understood the sentencing judge had "no leeway in the second degree charge," but noted his objection to the court's denial of his motion for a continuance of the sentencing hearing generally, citing his desire to present evidence from his previously hired psychologist about Mr. Lugo's "background" and "unique things about juveniles, their perception, their need for instant gratification, their likelihood of success and rehabilitation." (TR19 17-18). This issue is therefore preserved.

Finally, the Commonwealth faults counsel for not attaching an affidavit from Mr. Lugo's juvenile expert and psychologist, Frank DiCataldo, to his Rule 30

motion. CB 22-6.[1] Pursuant to *Commonwealth v. Lutskov*, 480 Mass. 575 (2018), and *Commonwealth v. Perez*, 477 Mass. 677 (2017)(*Perez I*), Mr. Lugo is entitled to a full *Miller* hearing in the sentencing court where witnesses can testify about his "immaturity, impetuosity and failure to appreciate risks and consequences," home and family environment at the time of the offense and the circumstances of the offense including the way "peer pressures may have affected him," and he need not have presented this information first in the form of an affidavit to the motion judge. In addition, at a *Miller* hearing, Mr. Lugo is entitled to present evidence of subsequent rehabilitation. See *Lutskov*, 480 Mass. at 584 ("relevant evidence of the defendant's 'particular attributes' of youth include evidence of postconviction rehabilitation, including any good behavior in prison after he was sentenced as a juvenile.)

As this Court's amicus announcement suggests, Mr. Lugo's claim of error with respect to sentencing does not turn on the particulars of his situation, but is

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[1] *Commonwealth v. Fernandez*, 480 Mass. 334 (2018), cited in the Commonwealth's brief is not on point as that case involved a motion to continue the criminal trial made on the eve of trial.

instead about general principles; whether a mandatory sentence of life for a juvenile convicted of second degree murder is constitutional under the United States Constitutions and Massachusetts Constitutions, and whether a juvenile defendant convicted of second degree murder is entitled to an individualized sentencing hearing.

B. A Mandatory Life With Parole Sentence For Juveniles Is Unconstitutional Under The Eighth Amendment And Article 26 Because It Does Not Allow The Court To Impose A Sentence Of Less Than Life.

In its brief, the Commonwealth misrepresents what counsel stated in Mr. Lugo's initial brief. The Commonwealth contends: "Even now the defendant concedes that his statutory murder sentence is neither 'cruel and unusual [nor] disproportional to the offense.' CB 17. What counsel in fact stated was that Mr. Lugo was not contending that *parole eligibility after fifteen years* violated the Eighth Amendment or art. 26. DB 21. Mr. Lugo *does* contend that a mandatory life sentence for juveniles convicted of second degree murder violates both the United States and Massachusetts Constitutions because it does not allow the judge discretion to sentence the defendant to a term less than life based on the *Miller* factors.

Mr. Lugo adopts the reasoning of the amici concerning the constitutionality of the Commonwealth's sentencing statutes with respect to juveniles convicted of second degree murder. In addition, he contends that if this Court finds the sentencing statutes to be unconstitutional, it will be announcing a new substantive rule that should be applied retroactively to Mr. Lugo and other juvenile homicide defendants.[2] See *Diatchenko v. District Attorney For the Suffolk District* (Diatchenko I), 466 Mass. 655, 666 (2013)(applying *Miller* retroactively to all juveniles convicted of first degree murder).

C. The Judge Erred In Concluding That Mr. Lugo Was Not Entitled To An Individualized Sentencing Hearing.

In *Lutskov,* 480 Mass at 584, this Court remanded the case for resentencing and a *Miller* hearing despite a mandatory minimum sentence for armed home invasion that this Court held must be imposed. Mr. Lugo asks that, at a minimum, he be treated similarly to *Lutskov* and his case sent back to the trial court for a consideration of the *Miller* factors as applied to him.

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[2] Other defendants include Steven Montez Brown, who at fourteen, was the youngest defendant to be sentenced for second degree murder in the Commonwealth. See 2014-P-1739.

Even if this Court rejects Mr. Lugo's claim that the operative statutes are unconstitutional and finds that the sentencing judge has a duty to reimpose the mandatory sentence of life with parole eligibility after fifteen years, Mr. Lugo should be permitted to make a record of how the *Miller* and *Perez I* factors apply to his case sooner than his first parole hearing.

Although the purpose of a parole hearing is different from sentencing, the parole board must determine whether Mr. Lugo's crimes reflected "irreparable corruption." CB 29. That will necessarily involve an examination of the *Miller* and *Perez I* factors, including an examination of the defendant's executive functioning, relationship with his peers and co-defendants, and home and family circumstances at the time of the offense. Juvenile defendants convicted of second degree murder must have an opportunity to present this evidence at the time of sentencing because the passage of time will make it extremely difficult for them to marshal the evidence fifteen years later. For instance, if the juvenile psychologist hired by trial counsel in this case dies or otherwise becomes unavailable before Mr. Lugo's

parole hearing, he will lose valuable evidence of his mental state at the time of the offense. It will be useful for the parole board to have a benchmark of Mr. Lugo's juvenility to compare to his maturity at the time of the hearing so that it can determine whether he is suitable for parole.

II. The Judge Erred In Refusing The Defendant's Request To Instruct The Jury On The Defense Of Accident And On Involuntary Manslaughter.[3]

A. The Evidence Was Sufficient to Warrant The Instructions.

The Commonwealth makes numerous misleading statements in its brief. For instance, the prosecutor claims: "the defendant told Deshowitz, Thames, and Moulton that he was armed and had a concealed revolver under his 'hoodie' as he drove them from Brockton towards Randolph." CB 7. That was not the evidence at trial. Moulton testified that he asked Mr. Lugo if he had his "Clint Eastwood" while they were still in the driveway, but was unsure if Thames and Deshowitz heard the answer. (TR15 102-4). More importantly, both Moulton and Thames testified that the plan, as hatched

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[3]As stated in his initial brief, Mr. Lugo contends that trial counsel was ineffective in submitting a written request to charge on involuntary manslaughter, but then not arguing it in the charging conference or objecting to its omission.

by Deshowitz and Moulton, was to commit an unarmed robbery and the use of a gun to take the marijuana was not discussed.[4] (TR15 21-2, TR16 20, 22). Consistent with their testimony, the jury acquitted him of conspiracy to commit armed robbery.[5] Although Mr. Lugo made an extremely poor decision in bringing a loaded gun with him, there was no evidence that use of the revolver during the robbery was planned or even contemplated by Mr. Lugo and his companions as suggested by the Commonwealth.

The Commonwealth notes in its statement of facts that firing the revolver "required three separate steps: loading, manually pulling back the hammer to lock it in place; and pulling the trigger." CB 13. It is noteworthy that neither Thames nor Moulton saw Mr. Lugo do the first or second step. Based on this lack of evidence, as well as trial counsel's cross

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[4] Commonwealth's contention on page 31, n. 14 that Mr. Lugo brought the gun to the robbery in case McManus resisted being robbed instead of for self protection or in case it was needed in defense of his companions is not supported by any testimony in the record.

[5] Although the jury convicted Mr. Lugo of armed robbery, that was likely as a result of the court's instruction that the use of a gun during flight from a robbery was sufficient evidence for them to find an armed as opposed to an unarmed robbery. (See TR17 168).

examination of the ballistics expert as cited in Mr. Lugo's initial brief, jurors could have reasonably inferred that the first two steps were taken prior to the group entering the Jeep, and that the third step, the firing of the revolver by exerting a mere three pounds of pressure, occurred accidentally as Mr. Lugo was simultaneously backing out of the driveway and reaching over Moulton with his free hand while holding the gun. (See TR14 44-5, TR16 120-1, 123).

In addition to the absence of testimony about Mr. Lugo pulling back the hammer of the revolver, none of the witnesses testified that they saw him aim the gun at McManus's chest or heart, or even aim it at all as suggested by the Commonwealth. See CB 32-3. The evidence at trial was that the only bullet fired passed through McManus' wrist before entering his heart. (TR12 99, 105, 112-4; TR14 121, 126). Based on the foregoing, there was sufficient evidence from which jurors could have concluded that the discharge of the gun was not intended, and was either a pure accident or the result of wanton or reckless conduct. See *Commonwealth v. Figueroa*, 56 Mass. App. Ct. 641, 647-51, *review denied*, 439 Mass. 1102

(2003)(discussing two types of "accident" and their relationship to involuntary manslaughter).

B. The Failure To Give The Instructions Was Prejudicial And Resulted In A Substantial Risk Of A Miscarriage Of Justice.

The Commonwealth makes the circular argument that because the jury found Mr. Lugo guilty of armed robbery and second degree murder, they could not have found that the shooting was accidental or the result of reckless and wanton conduct. CB 33-4. Most of the cases relied upon by the Commonwealth are felony murder cases, however. See *Commonwealth v. Van Winkle*, 443 Mass. 230 (2005); *Commonwealth v. Evans*, 390 Mass. 144, 151-2 (1983)(accident not a defense to felony murder). Compare *Commonwealth v. Neves*, 474 Mass. 355, 368-70 (2016)(court erred in not giving involuntary manslaughter instruction where the jury was instructed on all three theories of murder, but the error was harmless where evidence of felony murder was overwhelming).

Here, the jury found Mr. Lugo not guilty of felony murder. As a result, accident was still a legally cognizable defense, and the judge should have instructed the jury on both accident and the lesser included offense of involuntary manslaughter.

Evidence that Mr. Lugo possessed a rifle at his house would not have negated evidence of an accident as claimed by the Commonwealth, nor would not have it required the judge to revisit his ruling severing charges related to Mr. Lugo's possession of this weapon. See CB 31. Mr. Lugo's possession of a rifle at his house does not foreclose the possibility of an accidental discharge of the revolver in McManus' driveway.

Although the theory of an accidental or reckless shooting may have been inconsistent with self-defense, trial counsel made a tactical decision to pursue these alternate theories by arguing accidental discharge of the gun during the charging conference and in his closing argument, and there was evidence to support both theories. (See TR16 166; TR17 76). The judge's error in not giving the defendant's requested accident instruction or an instruction on involuntary manslaughter resulted in the removal of a legal basis for the jury to acquit Mr. Lugo of second degree murder or find him guilty of the lesser included offense of involuntary manslaughter. Jurors were never informed that accident negates malice, an essential element of second degree murder. See *Commonwealth v. Zezima*, 387 Mass. 748, 756 (1982)(reversing conviction on this

basis). The court's failure to give the instructions was therefore prejudicial and resulted in a substantial risk of a miscarriage of justice.

III. The Judge Erred In Not Instructing The Jury On Reasonable Provocation And Sudden Combat In Connection With Voluntary Manslaughter And Trial Counsel Was Ineffective For Not Arguing Them At the Charging Conference And Objecting To Their Omission.

A. The Additional Instructions Were Warranted By The Evidence.

In her statement of facts, the prosecutor omits almost all of the evidence that gave Mr. Lugo a reason to believe that McManus or his friends had a gun. That evidence consisted of the following: 1) Deshowitz' statement when she returned to the car that McManus's friends had offered him a gun in the bar (TR15 17-18); 2) McManus's statement on the way to his house that he could shoot Mr. Lugo and his companions in the legs and get away with it (TR15 106-7; TR16 28-30); and 3) Deshowitz's statement in McManus's driveway that McManus's friends, including Doherty who was at the window of the Jeep when McManus was shot, were "strapped" or carrying firearms. (TR15 67, 108).

The Commonwealth at times seems to contend that McManus threw only beer on Moulton, while at other times acknowledging testimony that McManus threw the

bottle at Moulton or over Moulton into the front seat of the Jeep. (See CB 40-2; TR14 122-3). McManus was also "scuffling" or fighting with Moulton with his arms. (TR14 122, 125-6; TR15 111-2). Compare *Commonwealth v. Curtis*, 417 Mass. 619, 629 (1994)(no provocation instruction required where the defendant initiated the confrontation with the victim).

The autopsy revealed that McManus had cocaine in his system as well as alcohol, and jurors could reasonably have inferred this contributed to his combative behavior. (See TR12 109). Based on McManus's actions as well as statements indicating that McManus and/or Doherty had a gun, a reasonable person in Mr. Lugo's position would have felt an "immediate and intense threat, and lashed out in fear as a result." See *Commonwealth v. Acevedo*, 446 Mass. 435, 445 (2006).

While Mr. Lugo did not testify at the trial and therefore did not present direct evidence of his mental state at the time of the shooting, there was circumstantial evidence of his fear and heightened emotional state. His girlfriend[6], Deshowitz, was

[6] The Commonwealth's own witnesses, Thames and Moulton, described Deshowitz as Mr. Lugo's girlfriend. (See

screaming while McManus struggled with Moulton. (TR16 45). Moulton testified that on the drive back to Mr. Lugo's house, the defendant stated that he thought McManus had a gun. (TR16 52). Moulton also testified that everyone in the car was upset after they fled McManus's house. (TR16 51). Finally, Thames testified that Mr. Lugo told him afterwards that he was scared. (TR15 83-4). This evidence was sufficient to establish the subjective element of provocation for the purposes of an instruction. Testimony by the defendant is not required in every case.

The Commonwealth falsely contends that McManus's hands and upper body were "trapped" inside passenger window by the moving Jeep. See CB 40-1. Moulton and Thames testified that rather than being trapped, McManus was attempting to climb into the Jeep as it backed out of the driveway. (TR14 122; TR15 62-3; 111-12). That he fell away form the Jeep after he was shot also demonstrates that he was not trapped by window. (TR14 121, 126).

TR14 100; TR15 94). The Commonwealth's contention that after shooting McManus, Mr. Lugo "went to sleep with victim's girlfriend" is a thinly veiled attempt to appeal to the emotions of members of this Court. See CB 26.

Based on the foregoing and viewing the evidence in the light most favorable to Mr. Lugo, as this Court must, there was sufficient evidence of reasonable provocation and/or sudden combat to warrant the instructions.

B. The Error Resulted In Prejudice To Mr. Lugo And A Substantial Risk Of A Miscarriage Of Justice.

A defense theory of reasonable provocation and/or sudden combat would not have been inconsistent with self-defense or defense of another. See *Acevedo*, 446 Mass. at 445-6 (finding ineffective assistance of counsel in the failure to ask for a voluntary manslaughter instruction where an instruction on self-defense was given). In addition, because voluntary manslaughter involves the jury finding an additional element of the offense, it is not accurate to say that the jury's guilty verdict on second degree murder and armed robbery foreclosed the possibility that it would find Mr. Lugo guilty of voluntary manslaughter based on reasonable provocation and/or sudden combat. See *Id.*; CB 43.

As this Court noted in *Acevedo*, *id.*, the jury could have found that the requirements for self-defense, defense of others, or even imperfect self

defense were not met for any one of a number of reasons, but that the homicide did not rise to the level of second degree murder because of the presence of the mitigating factors of reasonable provocation and/or sudden combat. As a result, trial counsel's deficient performance deprived Mr. Lugo of an otherwise available, substantial ground of defense.

CONCLUSION

For all of the foregoing reasons and those discussed in his initial brief, this Court should reverse the judgments of conviction and order a new trial in Mr. Lugo's case. In the alternative, this Court should remand his case for resentencing.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I, Katherine C. Essington, counsel to the defendant, hereby certify that, pursuant to Mass. R.A.P. 16 (k), the defendant's reply brief complies with the rules of court that pertain to the filing of briefs.

/s/ Katherine C. Essington
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CERTIFICATE OF SERVICE

I, Katherine C. Essington, counsel for the defendant herein, hereby certify that on this 25th day of October, 2018, I mailed two copies of the foregoing Reply Brief, postage prepaid, to Stephanie Glennon, District Attorney's Office, 45 Shawmut Rd., Canton, MA 02021, and one to the defendant.

/s/ Katherine C. Essington
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