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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12382

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

RAYMOND CONCEPCION,
Defendant-Appellant

BRIEF FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

SUFFOLK COUNTY

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STATEMENT OF THE ISSUES

I. Whether the motion judge properly denied the defendant's motion for transcripts of the grand jury instructions where the defendant was indicted prior to this Court's decision in *Commonwealth v. Walczack*, 463 Mass. 808 (2012).

II. Whether the defendant was properly tried as an adult under G.L. c. 119, § 74.

III. Whether, after conviction for first-degree murder, the defendant's mandatory life sentence with the possibility of parole amounted to cruel and unusual punishment, and whether, given the mitigating factors presented at trial a sentence of life with the possibility of parole within fifteen years is a more proportional sentence.

IV. Whether the defendant was entitled to a hearing under *Miller v. Alabama*, 567 U.S. 460, 470 (2012), where he did not receive a presumptively disproportionate sentence but his sentence should nonetheless be modified.

V. Whether the trial judge properly instructed the jury as to a permissible inference of malice and properly denied the defendant's request for jury instructions as to defenses not supported by the evidence.

VI. Whether this Court should reduce the defendant's verdict under G.L. c. 278 § 33E.

STATEMENT OF THE CASE

This is the direct appeal of the defendant, Raymond Concepcion, from his convictions for first-degree murder and carrying a firearm without a license.

On December 4, 2012, a Suffolk County grand jury returned indictments against the defendant (1284CR11110), then an intellectually impaired 15 year old, charging him with murder, in violation of G.L. c. 265, § 1 and carrying a firearm without a license, in violation of G.L. c. 269, § 10(a) (RA.1-2). [1] On February 19, 2013, the defendant filed a "motion for transcription of instructions to the grand jury" (RA.7). After hearing argument on the motion, the Honorable Jeffrey Locke denied it on February 22, 2013 (RA.7).

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[1] References to the Defendant's Record Appendix will be cited by page number as (RA.__), references to his brief will be cited by page number as (D.Br. __), and references to the trial transcript will be cited by date and page number as (Tr.[volume]:[page]). Like the defendant, the Commonwealth refers to March 10, 2016 transcript as volume VIII (D.Br.3 n.1).

The defendant filed a motion to dismiss on April 1, 2014 and filed a motion to suppress his statements on April 2, 2014 (RA.8). On July 11, 2014, after a non-evidentiary hearing, the Honorable Peter B. Krupp denied the defendant's motion to dismiss (RA.9). Later, on December 9, 2014, the defendant withdrew his motion to suppress statements (RA.9).

The defendant's jury trial began before the Honorable Jeffrey Locke began on February 29, 2016 (RA.13).[2] On March 16, 2016 the jury returned its verdict, finding the defendant guilty of first degree murder based on extreme atrocity or cruelty and unlawful firearm possession (RA.15-16). Judge Locke sentenced the defendant to a life with the possibility of parole after twenty years for the murder conviction, and sentenced the defendant to four-to-five years in state prison on the firearm conviction, to be served concurrently with his sentence for murder

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[2] Jaquan Hill (19 years old) and Shakeem Johnson (22 years old) were the driver and passenger in the vehicle that drove the defendant to the victim and fled with him after the shooting (Tr.XII:90). Each was charged as joint venturers; they pled guilty prior to the defendant's trial and were sentenced to twelve to fourteen years in state prison (Tr.XII:90).

(RA.16). The defendant filed a timely notice of appeal and his case entered in this Court on August 18, 2017 (RA.16-17).

STATEMENT OF FACTS

A. The Commonwealth's Case At Trial.

1. The Murder

On October 17, 2012, around 6:40 in the evening, the victim, Nicholas Martinez, was driving his car with his girlfriend[3] in the passenger seat and stopped at a red light on Southampton Street (Tr.III:70-73, 88). The defendant, armed with a gun in his right hand, walked in between the stopped cars and fired four gunshots into Mr. Martinez's vehicle (Tr.III: 73-78, 89-91, 112).[4] After the gunshots, the victim's car lurched forward and crashed into a median area (Tr.III:77-80, 90, 97). The victim's girlfriend got out of the vehicle and was hysterical (Tr.III:78-80, 113). Eventually, an ambulance arrived, removed the victim from his car to provide treatment, and transported the victim to

[3] The victim and his girlfriend shared a child in common (Tr.VII:133).

[4] Several witnesses described hearing at least one gun shot, followed by a pause, and a resumption of several more gunshots (Tr.III:76-77, 89, 205). One witness testified in particular to observing the gunman fire through the driver's side back window before he "adjusted himself and then shot right into the driver's window." (Tr.III:76).

Boston Medical Center (Tr.III: 80; 113-117).[5] The victim was pronounced deceased at the hospital (Tr.III:192).

Immediately following the murder, the defendant calmly returned to the rear passenger seat of a silver Nissan Maxima with tinted windows (Tr.III; 79-80, 90-91, 96, 136; IV:34-71). The getaway car sped off bearing right at Melnea Cass. Blvd towards I-93 (Tr.III: 79-80; 91; 97; IV:34-71). Boston Police Sergeant Detective James Wyse happened to be sitting in his unmarked cruiser when he heard the gunshots, saw the defendant entering the Nissan Maxima, and followed the getaway car with lights and sirens activated (Tr.IV: 34-71). Local officers from the State Police and Boston Police responded to pursue the getaway car (Tr.III:118-168). Ultimately, the getaway car came to a stop in the area of Victory Road due, in part, to gridlock (Tr.III:128; 146; 168) The driver, front-seat passenger, and the defendant were removed from the Nis-

[5] Treating EMT Terry Mentele noted approximately one gunshot wound to the victim's neck and several to his back (Tr.III:115-116). Mentele also noted the victim made gurgling noises while EMTs examined him and took his last agonal breaths before EMT's used a bag valve mask to assist with his breathing (Tr.III:116).

san Maxima and handcuffed before they were taken to Boston Police Headquarters (Tr.III:172-176).[6]

2. The Police Investigation

In the immediate aftermath of the shooting and stop of the Nissan Maxima, police began their investigation. In the vicinity of the stopped Nissan Maxima, officers conducted a line search along the southeast expressway to search for evidence (Tr.III:184-186; 192; IV:63-63). Officers located a firearm off the side of the highway between the jersey barriers and some fencing (Tr.III:193-198; IV:23, 63; Ex.16; 42). At the scene near 85 Southampton Street where the victim and the victim's car were, four shell casings were recovered (Tr.III: 237-154; Ex.24; 26; 28; 30). A projectile was also recovered from the door frame of the victim's passenger side door (Tr.VII: 47-48; Ex.83)

It became immediately apparent to law enforcement that the front passenger of the getaway car, Shakeem Johnson, was wearing a GPS monitor on his ankle (Tr.IV:71; V: 17; Ex.54). The subsequent examination of probation records revealed Johnson's movements leading up to,

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[6] Jaquan Hill was removed from the driver's seat; Shakeem Johnson was removed from the passenger seat; and the defendant was removed from the rear passenger seat (Tr.III:130-13, 150-156; IV:59).

during, and after the murder of Nicholas Martinez (V:17; Ex.54). Video surveillance from several different locations in Boston, combined with Johnson's GPS data, was obtained to demonstrate the route of travel leading up to, during, and after the murder (Tr.IV: 73-89; Ex.44-49).

Additional investigation revealed that the defendant tested positive for the presence of gunshot residue on his hands; the other two occupants of the getaway car tested negative for the presence of gunshot residue (Tr.V: 111-115). Police conducted a recorded interview of the defendant in the presence of the defendant's mother that lasted for approximately two hours (Tr.IX: 75-100; Ex.111). During that interview, the defendant initially denied involvement indicating he was just in the car to get a ride home and had come from "chilling with some girls." (Ex.111; RA.56). He later claimed he heard gunshots while he was in the back seat of his co-defendant's car (Ex.111; RA.58-59). Ultimately, the defendant told detectives that he shot the gun because he was scared and suggested other gang members told him it "was the only way out" of the Mission Hill gang (Ex.111; RA.63-77).

B. The Defendant's Case.

The defendant primarily advanced a defense that he was incapable of forming the intent required for murder due to his young age and intellectual disabilities (Tr.XI:138). Three witnesses testified on behalf of the defendant: a DYS clinician who testified to the defendant's behaviors while at DYS (Tr.VIII:43-73); the defendant's mother, who testified to the defendant's upbringing and exposures to trauma (Tr.VIII:142-153; IX:19-74); and a defense expert, who opined that the defendant only had a limited ability to form a specific intent to kill because of intellectual limitations (Tr.X:154).[7]

ARGUMENT

I. THE MOTION JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR GRAND JURY INSTRUCTIONS BECAUSE THE DEFENDANT WAS INDICTED BEFORE *WALCZAK* WAS DECIDED AND BEFORE THE COMMONWEALTH HAD AN OBLIGATION TO INSTRUCT ON THE LEGAL SIGNIFICANCE OF MITIGATION AND TRANSCRIBE THE GRAND JURY INSTRUCTIONS.

On December 12, 2012, in *Walczak*, 463 Mass. at 810, this Court held that:

[7] The Commonwealth presented its own expert testimony through Dr. Martin Kelly to rebut the defendant's expert opinions as to the defendant's ability to form the necessary intent (Tr.XI:21-116).

> [i]n future cases, where the Commonwealth seeks to indict a juvenile for murder and where there is substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility) presented to the grand jury, the prosecutor shall instruct the grand jury on the elements of murder and on the significance of the mitigating circumstances and defenses. The instructions are to be transcribed as part of the transcription of the grand jury proceedings.

Eight days earlier, on December 4, 2012, a Suffolk County grand jury had indicted the defendant for murder. Despite the plain language this Court used, advising that the pronouncement of *Walczak* would apply in "future cases, where the Commonwealth *seeks* to indict a juvenile for murder" (emphasis added) the defendant nonetheless presses forth a claim that: 1) Suffolk County prosecutors had an obligation to advise the grand jury of the legal significance of mitigating circumstances in the instant case; 2) Suffolk County prosecutors had an obligation to record and transcribe the grand jury instructions; and 3) the motion judge abused his discretion in denying the defendant's motion to produce transcripts of the grand jury instructions (D.Br.21-23). His claims must fail.

As this court's opinion makes clear, *Walczak* is a prospective rule that does not apply to a case such as this where the defendant was already indicted prior to issuance of that opinion. Discovery rulings are

reviewed for an abuse of discretion. *Commonwealth v. Torres,* 479 Mass. 641, 647 (2018). The motion judge's denial of the defendant's motion for transcripts of the grand jury instruction was proper given the clear import of this Court's guidance in *Walczak*: that in future cases, where a prosecutor is seeking a murder indictment against a juvenile, a prosecutor must instruct the grand jury on the legal significance of mitigating circumstances and must transcribe those instructions. The Court's mandate in *Walczak* clearly could not apply to the defendant as the defendant was already indicted before *Walczak*'s mandate and the Commonwealth had no way to predict such a mandate.

This Court's subsequent opinion in *Commonwealth v. Grassie*, 476 Mass. 202, 219 (2017) provides further support for the Commonwealth and motion judge's interpretation of *Walczak*. In *Grassie,* in response to the defendant's claims that *Walczak* entitled him to additional grand jury instruction, this Court noted the defendant was not entitled to relief under *Walczak* because the defendant was an adult, not a juvenile, and noted that:

> even if the *Walczak* case had applied to adults, that case was decided nearly three months after the indictments issued in the present case, and we stated in *Walczak* that

> other than the defendant then before the court, the rule would apply only to 'future cases.'

Grassie 476 Mass. at 219. (citations omitted). In consideration of this Court's unambiguous language about the prospective nature of *Walczak*, the motion judge properly denied the motion for grand jury instruction transcripts because they would yield nothing of value to the defendant.

Despite *Walczak's* clear language and *Grassie's* commentary, the defendant suggests he is entitled to the benefit *Walczak* conferred only upon future cases. Relying on a variety of cases, the defendant argues three reasons why *Walczak's* rule should be retroactive and thus applicable to him. His efforts are unpersuasive. He argues first that this Court should extend the general principle that new rules apply to cases on direct appeal where the issue was preserved at trial (D.Br.17); second, that new rules are retroactive whether or not they are constitutional (D.Br.18-19); and third, that even if this Court intended to only apply *Walczak* prospectively, the limitation to "future cases" should include the defendant's trial (D.Br.20-21). Had this Court used ambiguous language about the application of *Walczak*, perhaps the defendant's arguments would be more compelling; the fact remains that this Court

was quite clear in the application of *Walzcak* to future indictments, and any ambiguity about the prospective nature of its application was clarified by this Court's opinion in *Grassie*.

II. THE DEFENDANT WAS PROPERLY TRIED AS AN ADULT UNDER G.L. c. 119, § 74.

The defendant next argues that G.L. c. 119, §74 is unconstitutional because it required the defendant to be tried as an adult since he was charged with murder (D.Br.24-33). Specifically, he argues "[t]he failure to consider a child's attributes and background before subjecting him to adult jurisdiction and the ensuing mandatory punishment violates the Eighth Amendment and art. 26." (D.Br.31). The current state of the law is that the Eighth Amendment and Article 26 of the Massachusetts Declaration of Rights provide constitutional protections from cruel and unusual punishment; they do not provide jurisdictional guarantees (*i.e.* Juvenile or Superior court).

The Commonwealth acknowledges that both the United States Supreme Court and this Court have recognized that juvenile offenders present "'unique characteristics' germane to the analysis of their rights under the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights." *Commonwealth v.*

Freeman, 472 Mass. 503, 507 & n.7 (2015). Nonetheless, the defendant's allegation that those rights are violated by G.L. c. 119, §74 is misplaced. Section 74 does not speak to the punishment a juvenile offender faces, but instead confers jurisdiction to the juvenile court of certain offenders and offenses. Indeed, the defendant himself recognizes that the gravamen of his complaint is that "[i]f conviction follows, the judge may not choose from the range of juvenile sentences permitted by § 58, but *must* impose life with statutorily-bounded parole." (D.Br.24-25). Quite simply, G.L. c. 119, § 74 does not mandate sentencing for any crime, and for that reason alone, constitutional analysis under the eighth amendment and article 26 is inapposite. Furthermore, to the extent the defendant uses G.L. c. 119, § 74 to suggest his mandatory life sentence with the possibility of parole is cruel or unusual punishment, as recently as June 2020, this Court has affirmed the constitutionality of a mandatory life sentence with the possibility of parole after fifteen years for juvenile offenders convicted of first-degree murder. *See Commonwealth v. Watt,* 484 Mass. 742, 753-754 (2020).

As this Court previously stated in *Freeman*, it has "long recognized that '[i]mportant consequences flow from the recognition of delin-

quency as something legally and constitutionally different from crime.'" 472 Mass. at 507 (quoting *Metcalf v. Commonwealth,* 338 Mass. 648, 651-652 (1959)). Nonetheless, we have not extended strict scrutiny to statutes that implicate such interests by providing certain juveniles, but not others, access to Juvenile Court Jurisdiction." *Freeman* 472 Mass. at 506-507. Instead, this Court has previously affirmed the constitutionality of G.L. c. 119, § 74 after applying a rational basis analysis. *Id.* at 506-509. The defendant has offered no new basis for this Court to revisit its holding in *Freeman* and this Court should therefore decline to do so.

III. IMPOSING A LIFE SENTENCE WITH THE POSSIBILITY OF PAROLE AFTER TWENTY YEARS DOES NOT VIOLATE THE PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT HOWEVER PAROLE ELIGIBILITY AT FIFTEEN YEARS IS MORE PROPORTIONAL ON THESE FACTS.

The defendant claims his life sentence with the possibility of parole after twenty years is unconstitutionally disproportionate because he was intellectually disabled and fifteen when he murdered Mr. Martinez (D.Br.33). First, the Commonwealth contested the defendant's diagnosis of an intellectual disability at trial and presented expert testimony from Dr. Martin Kelly supporting that position (Tr.XI:22-116).

Second, the defendant's life sentence with the possibility of parole cannot be said to "shock the conscience" given the extreme atrocity with which he committed the murder in the instant case. For these reasons, the defendant's claim of cruel and unusual punishment must fail.

As this Court is well aware, Article 26 provides in part that "[n]o magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." Similarly, the Eighth Amendment provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[8] "Only where the punishment is so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity may [a court] declare a criminal sanction to be in violation of the Eighth Amendment or art. 26." *Opinion of the Justices to the H.R.*, 378 Mass. 822, 830 (1979); *accord Commonwealth v. Jackson*, 369 Mass.

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[8] The test for whether a punishment is cruel or unusual under Article 26 considers "(i) the nature of the offense and the offender in light of the degree of harm to society; (ii) a comparison of the challenged punishment with other punishments imposed within the State; and (iii) a comparison of the challenged punishment with punishments for the same or similar crimes in other jurisdictions." *Commonwealth v. Therriault*, 401 Mass. 237, 240 (1987); *accord Commonwealth v. Jackson*, 369 Mass. 904, 910-913 (1976).

904, 910 (1976). "The essence of proportionality is that 'punishment for crime should be graduated and proportioned to both the offender and the offense.'" *Commonwealth* v. *Perez*, 477 Mass. 677, 683 (2017) (citations omitted).

A. Though the defendant was fifteen when he murdered Nicholas Martinez, the defendant's sentence is proportional to him and the nature of the offense.

Relying on cases that conclude it is cruel and unusual punishment to sentence a juvenile offender to life in prison without the opportunity of parole, the defendant argues that his sentence of life with the possibility of parole violates the prohibition on cruel and unusual punishment (D.Br.35). *See Miller v. Alabama*, 567 U.S. 460, 470 (2012); *Diatchenko v. Dist. Att'y*, 466 Mass. 655, 668-671 (2013). In so arguing, he ignores that as recently as June 2020, this Court has affirmed the constitutionality of a mandatory life sentence with the possibility of parole after fifteen years for juvenile offenders convicted of first-degree murder. *See Watt*, 484 Mass. at 753-754. Like the defendant in *Watt,* this defendant has offered no new scientific or legal basis to revisit this Court's holding as to the constitutionality of mandatory life sentences

with the possibility of parole for juveniles convicted of first-degree murder. This Court should therefor decline to do so in this case.

While recognizing that a sentence of life with parole eligibility after twenty years is a legally permissible sentence for a juvenile convicted of first degree murder, the Suffolk County District Attorney questions whether in light of the defendant's age (two years younger than the defendant in *Watt*) and the intellectual impairment evidence presented during the trial (which was not a factor in the *Watt* case) the sentence is ultimately proportional.[9] At the time of sentencing, the judge had the discretion to set the parole eligibility date within the range of fifteen to twenty-five years. *See Commonwealth v. Brown*, 466

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[9] In making this argument, the Commonwealth is by no means conceding that the verdict was unsupported by the evidence. The evidence at trial established that while the victim and the mother of his child were stopped in traffic at a red light, the defendant approached the victim's car and fired two shots through the rear driver's side window (Tr.III:76-77, 89, 205). The defendant then paused, adjusted his position, and fired two more shots through the driver's side window before returning to the car he was driven in (Tr.III:76). The victim's car lurched forward before crashing into a median area (Tr.III:77-80; 90; 97). The defendant had shot the victim once in the neck and twice in the back (Tr.III:115-116; VII:169). The victim was heard making sounds like a "moan cry" (Tr.VII:157) and gurgling noises (Tr.III:116; VII:156) before he died. The victim was still taking agonal breaths by the time EMTs arrived before he was ultimately pronounced deceased at the hospital (Tr.III:116).

Mass. 676, 690 (2013). Given that the defendant was fifteen years old when he committed the murder, that he had documented intellectual limitations, and that he had experienced significant trauma, a life sentence with a parole eligibility date of fifteen years, the minimum sentence which could be imposed, seems far more appropriate. It should also be noted that the two co-defendants, who were nineteen and twenty-two years old at the time of the homicide, drove the defendant to and from the scene and allegedly pointed out the victim, received a plea from this office for a significantly shorter sentence (twelve to fourteen years) than the defendant. Accordingly, the Suffolk County District Attorney respectfully requests that the sentence be modified.[10]

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[10] The Commonwealth notes that the Legislature amended the sentencing statute to specify increased penalties for juveniles convicted of murder in the first degree after this Court decided *Diatchenko* v. *Dist. Att'y.*, 466 Mass. 655, (2013). *See* G. L. c. 279, § 24 (*b*), as amended through St. 2014, c. 189, § 6; *Commonwealth* v. *Okoro*, 471 Mass. 51, 55 n.4 (2015)."Under the new sentencing scheme, a juvenile convicted of murder in the first degree based on extreme atrocity or cruelty is subject to a mandatory sentence of life imprisonment with the possibility of parole after thirty years. *See* G. L. c. 279, § 24, second par." *Watt*, 484 Mass. at 754 n.11. The defendant in this case was sentenced for first-degree murder when the sentencing statute, as limited by *Diatchenko I*, mandated parole eligibility for juveniles after serving somewhere btween fifteen to twenty five years (Tr.XII:81). *See* G.L. c. 279, § 24, as amended through St. 2012, c. 192, § 46; *Diatchenko*, 466 Mass. at 673.

B. The current state of the law is that it is neither cruel nor usual to punish a defendant whose intellectual disabilities do not prevent him from forming the intent requisite for the crime.

Relying on the trial testimony of his expert witness, as well as *Atkins v. Virginia,* 536 U.S. 304 (2002), which held that it is cruel and unusual punishment to *execute* an intellectually disabled person, the defendant argues his sentence violates the Eighth Amendment and Article 26 because he is an intellectually disabled juvenile (D.Br.34-43). Under this Court's precedent, the claim is without merit. First, the rationale for concluding that executing an intellectually disable person is cruel or unusual punishment is entirely inapplicable to sentences bearing parole eligibility. Execution is final; parole eligibility offers the prospect of release upon rehabilitation. *See Diatchenko,* 466 Mass. at 674 (noting juveniles convicted of murder should have a meaningful opportunity for release after demonstrated maturity and rehabilitation).[11]

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[11] Rigorous review for parole eligibility is critical to an individual's rehabilitation and a meaningful reentry plan. Although the Suffolk County District Attorney's Office does not concede that Mr. Concepcion's sentence was "cruel or unusual," it does contemplate the impact that his age and intellectual disability may have on his ability to establish a record of accomplishment while incarcerated that can meet the aforementioned review. It is the District Attorney's hope that every oppor-

The defendant's claim does ignore that the evidence of his intellectual functioning and the degree of his intellectual disability was much disputed and decided against him at trial. The jury's verdict establishes that the Commonwealth proved beyond a reasonable doubt that the defendant was able to form the requisite intent for murder regardless of the state of his intellectual abilities. The rejection by the jury of the defendant's claim that his intellectual disability rendered him incapable of forming the requisite intent for murder accordingly forecloses any reasonable claim that his life sentence with parole eligibility for first degree murder violates provisions against cruel or unusual punishment. It is neither cruel nor unusual to punish an individual whose is mentally capable of forming the requisite intent for the crime of which he was convicted. Indeed, no court in this Commonwealth has ever held it is cruel or unusual punishment to sentence an intellectually disabled person convicted of first-degree murder to life with the possibility of pa-

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tunity is made available for Mr. Concepcion to avail himself with all of the constructive tools, treatment and assistance that would position him for parole consideration, if appropriate.

role.[12] For these reasons, if no other, his claim must fail under the Commonwealth's precedent.

Upon this conflicting evidence, and proper instruction from the judge, the jury concluded that the Commonwealth proved beyond a reasonable doubt that the defendant formed the requisite intent for murder. Consequently, his life sentence with the possibility of parole for first degree murder is proportional to the offense he committed and his intellectual abilities; and consistent with the law of the Commonwealth, his sentence is neither cruel nor unusual.

IV. WHILE THE DEFENDANT WAS NOT ENTITLED TO A *MILLER* HEARING, AND IN ANY EVENT, THE JUDGE HEARD AMPLE EVIDENCE AT TRIAL REGARDING THE DEFENDANT'S AGE AND ABILITIES BEFORE SENTENCING THE DEFENDANT TO LIFE WITH PAROLE ELIGIBILITY AFTER TWENTY YEARS, THE SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE ASKS THAT THE SENTENCE BE MODIFIED.

As the defendant highlights, juveniles are entitled to individualized, youth-specific considerations before receiving a presumptively disproportionate sentence (D.Br.44). *See Perez*, 477 Mass. at 686-687. The current state of the law in Massachusetts, and contrary to his claims, is

[12] Indeed, the Commonwealth is aware of no case in this country that has so held.

that the defendant did not receive a presumptively disproportionate sentence because he was not sentenced to life without the possibility of parole. *See Diatchenko*, 466 Mass. at 659 (life sentence without the possibility of parole for juveniles convicted of murder is a disproportionate sentence and violates art. 26); *Perez*, 477 Mass. at 686 (a juvenile's aggregate sentence for "non-murder offenses with parole eligibility exceeding that applicable to a juvenile defendant convicted of murder is presumptively disproportionate"). Instead, the defendant was sentenced to life with the possibility of parole for first-degree murder. Where that sentence is not a presumptively disproportionate sentence, he was not entitled to a *Miller* hearing. *See Watt*, 484 Mass. at 753-754 (rejecting defendant's claim that a mandatory life sentence for juveniles entitles defendant to an individualized sentencing hearing in which is juvenile status is considered).[13]

Nonetheless, the sentencing judge was well aware of *Miller, Diatchenko,* and *Brown* when crafting his sentence (Tr.X:200). The judge had presided over the trial and heard every single piece of mitigating

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[13] Again, the instant defendant is two years younger that the defendant in *Watt*. And, the instant defendant has documented intellectual deficiencies, unlike *Watt*.

evidence that the defendant could offer at a *Miller* hearing with respect to both his age and his alleged intellectual disabilities. Such evidence included the testimony of the defendant's DYS clinician as to how he functioned in DYS custody (Tr.IX:41-73); the testimony of the defendant's mother regarding the defendant's upbringing and alleged trauma exposure (Tr.IX:149-154; X:19-75); the testimony of defense expert, Dr. Ayoub (Tr.X: 84-192); and the defendant's school records (Ex.107).

Additionally, the defendant's attorney specifically referenced the mitigating trial evidence during the sentencing hearing. Trial counsel referenced the defendant's cognitive and emotional capabilities, suggested the defendant was "used" by two older gang members, highlighted the defendant's age, and explicitly stated "I think that the evidence that you have with respect to sentencing was presented at trial, and I won't harp on it." (Tr.XII: 91-92). Put simply, the trial judge was well versed in all relevant factors, including the defendant's personal history, age, and his emotional and intellectual capabilities when he sentenced the defendant. Though, for the reasons stated *supra*, the defendant's sentence should be modified in so far as he receives a parole eligi-

bility date of fifteen years, given the significant mitigating factors present in this case.

V. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN REFUSING TO CRAFT SPECIFIC JURY INSTRUCTIONS RELATED TO THE DEFENDANT'S YOUTH AND INTELECTUAL ABILITIES.

The defendant next claims the trial judge abused his discretion in instructing the jury that they could infer malice from the defendant's use of a firearm (D.Br.48). The defendant further alleges the judge erred by failing to instruct that extreme atrocity or cruelty requires specific intent; failing to instruct on the defense of duress; and failing to instruct on involuntary manslaughter (D.Br.49-55). The judge committed no error.

A. The judge properly instructed on a permissible inference of malice.

At trial, the defendant objected to the judge's instruction to the jury that they are permitted, but not required, to infer malice from the defendant's use of a firearm (Tr.XII:7). There was no error in so instructing because the judge's instruction was a correct statement of the law. *See Commonwealth v. Odgren*, 483 Mass. 41, 47-48 (2019). Indeed, the very claim this defendant makes, that the instruction "effectively in-

formed the jury that the Commonwealth has already proven" that the defendant was a rational actor, was rejected by this Court in *Odgren*. *Id.* The judge explicitly instructed:

> As a general rule, you are permitted but not required to infer that a person who intentionally uses a dangerous weapon on another person intends to kill that person, or cause grievous bodily injury, or intends to do an act which in the circumstances known to him a reasonable person would know creates a plain and strong likelihood that death would result.

(Tr.XII:51-52). "Such an instruction is appropriate in cases where evidence of mental impairment has been introduced so long as they clearly are permissive." *Id.* at 48. There was no error in the judge's instruction.

B. The judge properly declined to instruct that extreme atrocity or cruelty required a specific intent to inflict suffering.

As the defendant acknowledges in his brief (D.Br.50-51), and as this Court recently affirmed in *Commonwealth v. Castillo*, 485 Mass. 852 (2020), "proof of malice aforethought is the only requisite mental intent for a conviction of murder in the first degree based on murder committed with extreme atrocity or cruelty." *Commonwealth v. Cunneen*, 389 Mass. 216, 227 (1983). Nonetheless, the defendant presses forth his claim that it is unfair for a jury to find that a defendant acted with extreme atrocity or cruelty without proof that he intended, or was

indifferent to the victim's suffering (D.Br.50). This Court's decision in *Castillo* corrects any general risk that a conviction for extreme atrocity or cruelty may be based solely on the degree of a victim's suffering. *Castillo* 485 Mass. at 867 ("to the extent that the *Cunneen* factors may, in some instances, permit a jury to find extreme atrocity or cruelty based only on the degree of a victim's suffering, without considering whether the defendant's conduct was extreme in either its brutality or its cruelty, we now revise them"). The judge therefore committed no error in declining to instruct as requested, and the defendant's appellate claim must fail. Moreover, any risk of unfairness contemplated by this Court in *Castillo* is plainly not applicable to this defendant. This defendant fired two shots at the victim before pausing, adjusting his position so that he was closer to the victim, and fired two more shots at him. In doing so, his use of a firearm was lethal, and the manner in which he committed the killing was excessive and out of proportion to what was needed to kill a person. The injuries sustained by the victim were obviously severe, with testimony revealing he let out a "moan cry," gurgling noises, and agonal breaths until at least the time that EMTs arrived. The defendant was successful at striking the victim with three of the

four bullets he shot. The failure to instruct as the defendant suggests therefor did not create a substantial likelihood of a miscarriage of justice.

C. The defendant was not entitled to an instruction on duress.

As the defendant acknowledges in his brief, Massachusetts does not recognize duress as a defense to murder (D.Br.52). *See Commonwealth v. Vasquez*, 462 Mass. 827, 833-834 (2012); *see also Commonwealth v. Jackson* 471, Mass. 262, 267 (2015) (foreclosing the defense of duress to juveniles charged with an intentional murder). The defendant invites this Court to revisit its holdings and find it was error for the judge to not instruct on duress because the defendant claims he was incapable of making a reasoned choice between two courses of action: shooting the victim or remaining in the gang that threatened him (D.Br.53). This Court should decline to do so for the very reason articulated in *Vasquez*: that "[i]f duress is recognized as a defense to the killing of innocents, then a street or prison gang need only create an internal reign of terror and murder can be justified, at least by the actual killer." 462 Mass. at 833-834 (quoting *People v. Anderson*, 28 Cal. 4th 767 (2002)). That is precisely the justification the defendant is attempt-

ing here: that he was afraid of gang members and therefor committed the murder. That is not and should not be a defense to murder in the Commonwealth of Massachusetts.

D. The judge properly declined to instruct the jury on involuntary manslaughter.

At trial the judge declined the defendant's request to instruct the jury on the charge of involuntary manslaughter (Tr.VII:193; IX:106-108; X:3; XII:5). This Court will therefore consider whether the absence of the instruction amounted to prejudicial error. It will find none.

Commonwealth v. Watt is again instructive to the instant case. Watt, a 17 year old juvenile, similarly argued he was entitled to an involuntary manslaughter instruction. This Court wrote:

> Involuntary manslaughter is an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct" (quotation and citation omitted). *Commonwealth v. Carrillo*, 483 Mass. 269, 275 (2019). "Wanton or reckless conduct is conduct that creates a high degree of likelihood that substantial harm will result to another." *Id.,* quoting Model Jury Instructions on Homicide 88 (2018) (involuntary manslaughter). *See Commonwealth v. Welansky,* 316 Mass. 383, 399 (1944). Based on the evidence presented to the jury, Watt, the apparent shooter, intentionally shot multiple times at the two victims. "Firing a [firearm] multiple times, directed toward specific individuals, provides a sufficient basis to conclude that the defendant understood the likely deadly consequences of his actions." *Common-*

> *wealth v. Pina*, 481 Mass. 413, 424 (2019), quoting *Commonwealth v. Braley*, 449 Mass. 316, 332 (2007). On the facts of this case, no reasonable jury could conclude that Watt was the shooter but that his conduct was simply wanton or reckless.

Watt, 484 Mass. at 752. Where this defendant fired two shots at the victim at close range, then paused and placed himself in a position even closer to the victim before firing an additional two shots, "no reasonable jury could conclude that [the defendant] was the shooter but that his conduct was simply wanton or reckless." *Id.* The defendant suggests that while a close-range shooting death involving multiple gunshots would ordinarily implicate third-prong malice, it would not do so here because the defendant's subjective knowledge was limited by his intellectual disability, youth, and trauma history (D.Br.54-55). In so arguing he ignores the fact that this Court has previously rejected similar arguments raised by juveniles with mental impairments. In *Commonwealth v. Pagan,* 471 Mass. 537 (2015),[14] this Court held:

> Even if a mental impairment negates malice, a necessary element of murder, a defendant would not be entitled to an instruction on involuntary manslaughter. "A killing without malice aforethought does not automatically constitute involuntary manslaughter." *Commonwealth v. Sires*, 413 Mass.

[14] Though the defendant in *Pagan* was 16 and suffered from "untreated ADHD and a troubled childhood." *Pagan*, 471 Mass. at 544.

> 292, 302 (1992). Before an instruction on involuntary manslaughter may be given, the defendant would be required to adduce evidence of the "traditional elements" of involuntary manslaughter that the jury might believe.

Id. at 548. There was no evidence presented to the jury that the defendant engaged in wanton or reckless conduct; his request for an involuntary manslaughter instruction was therefore properly denied.

VI. THIS COURT SHOULD DECLINE TO REDUCE THE DEFENDANT'S DEGREE OF GUILT PURSUANT TO G.L. c. 278 § 33E.

The defendant should not be granted relief pursuant to G.L. c. 278, § 33E. This Court exercises its power under § 33E sparingly, using it only to avert a miscarriage of justice. *Commonwealth v. Pina*, 430 Mass. 66, 80 (1999); *Commonwealth v. Lake*, 410 Mass. 47, 51 (1991). The Commonwealth believes that there was none here. Moreover, the interests of justice do not warrant any reduction of the murder verdict. The weight of the evidence established that the defendant exited the car he was in with two fellow gang members and ambushed the victim while he was stopped at a red light. The defendant first fired two shots at the victim before pausing to position himself closer to the victim. The defendant then shot at the victim twice more. The mother of Mr. Martinez's child was in the car during this homicide and was forced to wit-

ness Mr. Martinez's final moments as he struggled for air before ultimately succumbing to his injuries. This evidence fully justified a verdict of first-degree murder. However, the sentence that set parole eligibility at twenty years (as opposed to fifteen) is not consistent with the multiple mitigating factors presented during trial. The verdict should not be disturbed, but the sentence should be adjusted.

CONCLUSION

For the foregoing reasons in response to the defendant's legal arguments, the Commonwealth respectfully requests that this Honorable Court affirm the defendant's convictions but to modify the defendant's sentence to life with the possibility of parole in fifteen years.

Respectfully submitted
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ADDENDUM

G.L. c. 119, § 74. Limitations on criminal proceedings against children.

Except as hereinafter provided and as provided in sections fifty-two to eighty-four, inclusive, no criminal proceeding shall be begun against any person who prior to his eighteenth birthday commits an offense against the laws of the commonwealth or who violates any city ordinance or town by-law, provided, however, that a criminal complaint alleging violation of any city ordinance or town by-law regulating the operation of motor vehicles, which is not capable of being judicially heard and determined as a civil motor vehicle infraction pursuant to the provisions of chapter ninety C may issue against a child between sixteen and 18 years of age without first proceeding against him as a delinquent child.

The juvenile court shall not have jurisdiction over a person who had at the time of the offense attained the age of fourteen but not yet attained the age of 18 who is charged with committing murder in the first or second degree. Complaints and indictments brought against persons for such offenses, and for other criminal offenses properly joined under Massachusetts Rules of Criminal Procedure 9 (a) (1), shall be brought in accordance with the usual course and manner of criminal proceedings.

G.L. c. 265, § 1. Murder defined.

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

G.L. c. 269, § 10(a). Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment.

a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

G.L. c. 278, §33E. Capital cases; review by supreme judicial court.

In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean: (i) a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

G.L. c. 279, § 24. Indeterminate sentence to state prison; determination of sentence for offender aged fourteen through seventeen.

If a convict is sentenced to the state prison, except as an habitual criminal, the court shall not fix the term of imprisonment, but shall fix a maximum and a minimum term for which he may be imprisoned. The maximum term shall not be longer than the longest term fixed by law for the punishment of the crime of which he has be convicted, and the minimum term shall be a term set by the court, except that, where an alternative sentence to a house of correction is permitted for the offense, a minimum state prison term may not be less than one year. In the case of a sentence to life imprisonment, except in the case of a sentence for murder in the first degree, and in the case of multiple life sentences arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, the court shall fix a minimum term which shall be not less than 15 years nor more than 25 years.

In the case of a sentence of life imprisonment for murder in the first degree committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 20 years nor more than 30 years; provided, however, that in the case of a sentence of life imprisonment for murder in the first degree with extreme atrocity or cruelty committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of 30 years; and provided further, that in the case of a sentence of life imprisonment for murder in the first degree with deliberately premeditated malice aforethought committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 25 years nor more than 30 years.

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k). This brief complies with the length limit of Mass. R. App. P. 20: it is written in 14-point Century Schoolbook and 6,698 non-excluded words, as determined by using Microsoft Word 2010.

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No. SJC-12382

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

RAYMOND CONCEPCION,
Defendant-Appellant

BRIEF FOR THE COMMONWEALTH
ON APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT

SUFFOLK COUNTY

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. No. SJC-12382

COMMONWEALTH OF MASSACHUSETTS,
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v.

RAYMOND CONCEPCION,
Defendant-Appellant

COMMONWEALTH'S CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service of the brief for the Commonwealth on the defendant via his counsel Lisa Billowitz at lisa.billowitz@gmail.com.

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