COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12382

COMMONWEALTH,
Plaintiff-Appellee,

v.

RAYMOND CONCEPCION,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
OF SUFFOLK COUNTY

REPLY BRIEF OF DEFENDANT-APPELLANT RAYMOND CONCEPCION

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I. The Grand Jury Instruction Requirements Mandated By *Commonwealth v. Walczak* Apply To This Case, Notwithstanding *Walczak's* Prospective Language.

The Commonwealth contends that the requirement of grand jury instructions for juvenile murder indictments does not apply retroactively to this case, but completely fails to address a critical point: that the new rule is not common law, but constitutional in nature. *See Commonwealth v. Walczak,* 463 Mass. 808, 843-844 (2012) (Gants, C.J., concurring); *id.* at 824, 830 (Lenk, J., concurring); D. Br. at 18. It is foundational that new constitutional rules apply to defendants whose cases are not yet finalized on appeal at the time, at least where they preserved their claims below. *Griffith v. Kentucky,* 479 U.S. 314, 323, 329 (1987) (after new constitutional rule is declared, "the integrity of judicial review" requires application to all similar cases that have not gone to final judgment; *Commonwealth v. Dagley*, 442 Mass. 713, 721 n.10 (2004) (where new criminal rule "stem[s] from a constitutional requirement," defendant may claim benefit if his case was pending on direct appeal when new rule was announced). *See also* E.B. Cypher, Criminal Practice and Procedure § 1:21 (4th ed. 2014) (distinguishing between new constitutional and new non-constitutional rules for purposes of retroactivity).

This Court's most recent retroactivity cases implicitly affirm this longstanding principle, even in the face of express prospective language. In *Commonwealth v. Martin*, 484 Mass. 634, 644-646 (2020), this Court considered whether the changes to the felony-murder doctrine announced in *Commonwealth v. Brown*, 477

Mass. 805, 807 (2017), should apply to a defendant whose case was on appeal at the time. Significantly, *Brown*'s new rule was plainly prospective, explicitly applying only to "trials that commence after the date of the opinion in this case." *Id.* at 807. Yet *Martin's* analysis did not rely on that language; rather, it turned on whether *Brown's* new rule was common-law or constitutional. 484 Mass. at 644-45. Because *Brown* constituted a "change to our substantive criminal law" rather a "new constitutional rule," this Court held that *Griffith* and its progeny were inapplicable. *Id.* Accordingly, it stated "where we revise our substantive common law of murder, we are free to declare that our new substantive law shall be applied prospectively, much like the Legislature may do when it revises substantive criminal statutes." *Id.* at 645.[1] In *Commonwealth v. Castillo*, 485 Mass. 852 (2020), this Court reiterated these principles when it held that changes to jury instructions concerning extreme atrocity or cruelty are to be applied "only in murder trials that commence after the date of issuance of this opinion," observing that the elements of murder liability "rest in the domain of the common law" such that it was free to declare the change prospective.[2]

[1] *Martin* further held that retrial would have been unfair to the Commonwealth, because new instructions would likely still have resulted in the same verdict. *Id.* at 646. This is not the case here; had the grand jury been properly instructed as to Concepcion's mitigating circumstances and defenses, they quite likely would have returned a lesser charge.

[2] In *Castillo*, this Court did not apply the new rule even in that case, but instead gave the defendant relief via section 33E.

The implication of these cases is that this Court is *not* free to declare new *constitutional* rules fully prospective – that is, it does not have discretion to deny their application to cases that were not finalized when the new rule was announced.[3] The trial judge in this case acknowledged as much when he denied Concepcion's motion for transcription on the incorrect premise that *Walczak* was not constitutional in nature. R. 39-42. Here, because *Walczak* announced a new rule stemming from a constitutional requirement, which Concepcion's trial counsel immediately invoked and preserved, it should apply to this case.

In light of *Martin's* central focus on the doctrinal foundation of the new rule, *Walczak*'s pronouncement that its new requirement applies only in "future cases" is beside the point for purposes of Concepcion's case. *See Martin,* 484 Mass. at 644-45; *see also Commonwealth v. Muller*, 477 Mass. 415, 431 (2017), *accord Commonwealth v. Waweru*, 480 Mass. 173, 187-188 (2018) (applying implicitly prospective rule of *Commonwealth v. Lawson*, 475 Mass. 806, 816 (2016), to cases pending on direct review where issue was preserved at trial); *Commonwealth v. Johnston,* 467 Mass. 674, 703-04 (2004) (although defendant's trial was completed before explicitly prospective decision changing jury instructions related to criminal responsibility and intoxication, "he is entitled to the benefit of changes in decisional law that are

[3] This Court may, of course, exercise its discretion to make a new non-constitutional rule retroactive to pending cases. *See, e.g., Commonwealth v. Pring-Wilson*, 448 Mass. 718 (2007); *Commonwealth v. Pidge,* 400 Mass. 350, 354 (1987). Concepcion requests that this Court do so, should it deem *Walczak's* new rule not constitutional in nature. D. Br. at 19-20.

announced after trial and pending his direct review"); *Commonwealth v. Smith*, 95 Mass. App. Ct. 437, 443 (2019) (collecting cases holding that new rules are applicable to cases pending on direct review where the issue was preserved at trial, noting that they "arise in the context of claimed constitutional error, even though the rule is described more generally").[4]

Commonwealth v. Grassie, 476 Mass. 202 (2017), does not foreclose application of *Walczak* here. There, the defendant sought to expand the holding in *Walczak* to adults as well as juveniles. Thus, the primary holding was that "*Walczak* does not require additional instructions to be provided to the grand jury in cases, like this one, involving accused persons who are adults." *Id.* at 219. This Court's additional cursory statement -- that *Walczak* applies to "future cases" and was decided months after Grassie's indictment -- does not appear based on any briefing about, or explicit consideration of, the complex doctrine of retroactivity. *Id.* This Court should apply the requirements of *Walczak*, either mandatorily or in its discretion, and remand this case for compliance in the grand jury proceedings.[5]

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[4] Even if this court had the discretion to circumscribe the application of *Walczak* to pending cases, the plain language of the opinion is not to the contrary. Its reference to "future cases" reasonably should be construed as encompassing, at a minimum, future trials. *See* D. Br. at 20-21. The Court certainly was capable of crafting language that was more precisely limiting; that it did not do so weighs in Concepcion's favor. *Compare with Commonwealth v. Woods*, 466 Mass. 707, 720 (2014) ("this rule is only required to be applied prospectively to grand jury testimony elicited after the issuance of the rescript in this case").

[5] These issues are not mooted by Concepcion's subsequent trial and conviction. *See Robin v. Commonwealth*, 480 Mass. 1025 (2018)

II. The Second Paragraph Of G.L. c. 119, § 74, Not Only Mandates Jurisdiction But Predetermines Punishment; Accordingly, It Must Comply With *Miller*'s Mandate To Consider The Distinctive Attributes Of Youth.

The Commonwealth contends that § 74 does not mandate sentencing for a particular crime and is merely jurisdictional, such that "constitutional analysis under the eighth amendment and article 26 is inapposite." Comm. Br. 18-19. Both the U.S. Supreme Court and this Court, however, have acknowledged that the mandatory consequences of juvenile jurisdiction implicate *Miller's* concerns. *Miller v. Alabama*, 567 U.S. 460, 485 (2012) (discussing interplay between statutory provisions transferring juveniles to adult court and prescribing penalties for those tried there); *Walczak*, 463 Mass. at 831 (indicting juveniles for murder under § 74 "evokes the same concerns" as *Miller*, *Roper* and *Graham*) (Lenk, J., concurring). As Justice Lenk noted, the animating purpose of *Miller*, *Roper* and *Graham* is "to foreclose 'criminal procedure laws that fail to take defendants' youthfulness into account at all.'" *Id.* (*quoting Graham v. Florida*, 560 U.S. 48, 76 (2010)).[6]

Thus, where both mandatory adult trial and mandatory life sentencing inheres in the statutory scheme, punishment cannot be

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(denial of motion for transcription of grand jury instructions did not warrant interlocutory appeal, as defendant could raise denial of motion on direct appeal of subsequent conviction and obtain relief).

[6] Indeed, the Supreme Court has extended the *Miller/Roper/Graham* analysis outside the realm of sentencing. *See J.D.B. v. North Carolina*, 564 U.S. 261, 272-281 (2011) (holding that a juvenile's perception of custody must be evaluated through the lens of a "reasonable juvenile" "lack[ing] experience, perspective and judgment" and "possessing only an incomplete ability to understand the world around them").

disentangled from jurisdiction. Accordingly, § 74 implicates the requirement of youth-specific consideration per the Eighth Amendment and Art. 26. *See id.; see also People v. Patterson*, 25 N.E.3d 526, 557 (Ill. 2014) (Theis, J., dissenting) (mandatory transfer scheme analyzed under Eighth Amendment because it "mandatorily plac[es] juveniles in criminal court based only on their offenses, and thereby expos[es] them to vastly higher adult sentences and, in effect, punishing them"); Cara Drinian, *The Miller Revolution*, 101 Iowa L. Rev. 1787, 1825-1826 (2016) (*Miller*, *Roper*, and *Graham* "give newfound traction" to challenges to constitutionality of mandatory transfer statutes and suggest they should be considered through lens of capital jurisprudence).

The Commonwealth does not even attempt to argue that the second paragraph of section 74 contains sufficient individualized consideration of youth to satisfy *Miller*. "The murder indictment, not unlike the mandatory sentence held unconstitutional in *Miller*, results in the identical treatment of juveniles and adults without any consideration of the defendant's status as a juvenile, and thus "remov[es] youth from the balance." *Walczak*, 463 Mass. at 832 (Lenk, J., concurring) (quoting *Miller*, 567 U.S. at 474).[7]

[7] The present lack of youth-specific consideration for juvenile murder defendants starkly contrasts with earlier and parallel statutory schemes. From 1975 to 1996, a Juvenile Court judge's decision to transfer a case to Superior Court was based not only on the seriousness of the charged crime, but the amenability of the child to rehabilitation within the juvenile system, an inquiry that examined his or her prior record, family and school situation, and psychological stability. *A Juvenile v. Commonwealth*, 370 Mass. 272, 283 n.14 (1976). Transfer was warranted only in "exceptional circumstances." *Id.* at 281-282.

Because there is no point in the indictment or trial at which a judge exercises youth-specific discretion to consider whether a child's murder case would be more appropriately adjudicated with the protections of juvenile court (including more flexible sentencing), the provision is unconstitutional.[8]

Contrary to the Commonwealth's contention, Comm. Br. at 19, 25, the possibility of parole many years later does not mend section 74's infirmity. The most the Parole Board can offer a

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In the current scheme for youthful offenders, Juvenile Court judges retain broad discretion in sentencing, ranging to committing them to DYS until age twenty-one, up to sentencing them as adults. G.L. c. 119, § 58. While judges are directed to impose the sentence "that best protects the 'present and long-term public safety,'" *id.*, they still are required to consider the offender's "age and maturity" as well as the nature, circumstances and seriousness of the offense; any victim impact statement; a report by a probation officer concerning the history of the youthful offender; the youthful offender's court and delinquency records; the success or lack of success of any past treatment or delinquency dispositions regarding the youthful offender; the nature of services available through the juvenile justice system; and the likelihood of avoiding future criminal conduct. G.L. c. 119, § 58. Only children charged with murder receive none of this consideration. *Id.* at § 74.

[8] Section 74 was enacted in 1996 in response to at least one high-profile juvenile murder case, long before our current scientific understanding of adolescent neuropsychology. *See, e.g.* Leslie Miller, *Was Teen Obsessed Or Falsely Accused?*, Associated Press, Jan. 10, 2011: https://www.southcoasttoday.com/article/19970919/news/309199970 The Boston Bar Association, among others, opposed the legislation, noting that automatic transfer to Superior Court of juveniles charged with murder "den[ied] both the defendant and society the benefit of the reasoned decision by a Juvenile judge as to how each particular juvenile should be controlled, treated and otherwise assisted in the best interests of society and the defendant." *See* Letter dated July 23, 1996 from the Boston Bar Assn to Governor Weld. (On file in State Archives).

juvenile murder defendant is a retrospective consideration of rehabilitation and release after fifteen years at the earliest. This is vastly more severe than a starting point of flexible judicial sentencing that includes the possibility of DYS custody until age twenty-one -- in Concepcion's case, an option that would have allowed him additional years of rehabilitation in a setting where he had made developmental and academic gains, with the help of counselors and tutors, in the time between his arrest and his trial. R. 34.

Second, children are entitled to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* 560 U.S. at 75. The very qualities that entitle Concepcion to judicial consideration of his youth and disability – including his immaturity, vulnerability, and impaired decision-making – constrain his chances of release on parole. Even the Commonwealth acknowledges that parole may be a pipe dream for a defendant like Concepcion: it "[c]ontemplate[s] the impact that his age and intellectual disability may have on his ability to establish a record of accomplishment while incarcerated ... It is the District Attorney's hope that every opportunity 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." Comm. Br. at 25 n.11. The Commonwealth's "hope," though laudable, does not secure the constitutional guarantee of a meaningful parole process for this most vulnerable defendant.

That this Court recently affirmed the constitutionality of a mandatory life sentence with the possibility of parole after fifteen years for a juvenile offender convicted of first-degree murder is beside the point. *See Commonwealth v. Watt,* 484 Mass. 742, 753-754 (2020). *Watt* did not involve a challenge on any grounds to the second paragraph of section 74, nor was there any discussion of mandatory adult trial. Concepcion is not arguing that no juvenile accused of murder can ever be tried as an adult, or that no juvenile can ever be sentenced to life with parole. Rather, his position is that judicial consideration of individual youthful attributes is required at the critical juncture of juvenile versus adult trial: a fork in the procedural road that determines sentencing. *See Walczak*, 463 Mass. at 827 (Lenk, J., concurring). Because the current statutory scheme vests all discretion in the prosecutor's charging decision, supplemented only by the parole board at a minimum of fifteen years later, it contravenes *Miller.*

The Commonwealth's citation to *Commonwealth v. Freeman,* 472 Mass. 503 (2015), similarly is inapposite. That case also did not involve a challenge to the second paragraph of section 74, or a *Miller*-based Eighth Amendment/Article 26 claim of any kind. Rather, the *Freeman* defendants advanced an equal protection claim concerning the retroactive application of legislation expanding juvenile court jurisdiction to seventeen-year-olds. Concepcion is not claiming that juveniles have a fundamental interest in, or right to, juvenile court jurisdiction per se; rather, he asserts a right to youth-specific judicial consideration before being

deemed an adult for purposes of trial and life-with-parole sentencing.[9]

III. Concepcion's Life Sentence Is Disproportionate In Light Of His Youth And Intellectual Disability; The Commonwealth Now Concedes What Its Trial Expert Attempted To Dispute.

The Commonwealth correctly questions the proportionality of the sentence imposed by the trial judge: life with the possibility of parole after twenty years. Comm. Br. at 23-25. Citing Concepcion's age, "documented intellectual limitations," and "significant trauma," as well as the much shorter sentences for his adult codefendants, it states that parole eligibility at fifteen years is "far more appropriate" and requests that the sentence be modified accordingly. *Id.* at 25. While the Commonwealth's concession is welcome, it does not go far enough to remedy the disproportionate punishment. For the reasons set forth in Concepcion's opening brief, his life sentence is unconstitutionally disproportionate in light of his youth, intellectual disability, and circumstances of the offense. D. Br. at 33-44.

The Commonwealth notes that it "contested the defendant's diagnosis of an intellectual disability at trial and presented expert testimony from Dr. Martin Kelly supporting that position."

[9] Accordingly, the Commonwealth's assertion that "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" is disingenuous. Comm. Br. 20. Concepcion does not ask this Court to "revisit" any settled question of law, but rather to apply *Miller* to the second paragraph of section 74, an issue of first impression in this Court.

Comm. Br. at 20; *see also id.* at 26. While it is true that the Commonwealth sought to dispute this point at trial, it now explicitly concedes Concepcion's "intellectual disability" and "documented intellectual limitations," *id.* at 25 & n.11 – in contravention of Dr. Kelly's assertion at trial that Concepcion's cognitive ability was "average."[10] 11/65. The Commonwealth also concedes that Concepcion experienced "significant trauma" worthy of consideration in sentencing, also contrary to Dr. Kelly's testimony. Comm. Br. at 24; 11/43, 52, 111-112.

The Commonwealth certainly is correct to abandon its trial expert's absurd claim that Concepcion was of average intelligence. While the defense expert performed extensive testing over several hours, including the Wechsler intelligence test for children (which showed Concepcion's full-scale IQ to be 66), Dr. Kelly performed none. Nor did he counter or challenge the defense expert's intelligence testing process or results, or offer any

[10] A juvenile is considered intellectually disabled for federal constitutional purposes if he or she (1) has intellectual-functioning deficits, indicated by an IQ score of around 70 or less; and (2) has adaptive deficits, such as the inability to learn basic skills or adjust behavior to changing circumstances. *See Moore v. Texas*, 137 S.Ct. 1039, 1045 (2017); *Atkins v. Virginia*, 536 U.S. 304 (2002). This is consistent with Massachusetts' statutory definition of a person with an intellectual disability as someone who is characterized by "significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social and practical adaptive skills and beginning before age 18," G.L. c. 123B, § 1; both the statute and *Moore* incorporate the same professional standard provided by the American Association on Intellectual and Developmental Disabilities. *Moore*, 137 S.Ct. at 1045.

empirical support for his assessment of Concepcion's cognitive abilities. 10/111-113, 129; 11/65.

The two experts' evaluations were a study in contrast. While Dr. Ayoub spent a total of ten hours with Concepcion in interviews and testing, 10/119, Dr. Kelly administered no tests and his examination of Concepcion totaled only seventy-six minutes. 11/71-72. Dr. Ayoub interviewed Concepcion's family members and the clinicians who treated him at the DYS detention center, 10/111-113; Dr. Kelly spoke only to the prosecutor and a detective. 11/86. Moreover, Dr. Kelly's trial testimony was riddled with both factual and medical errors: he asserted, contrary to the DSM, that PTSD must be based on experiencing something or witnessing it directly,[11] and stated incorrectly that Concepcion's past traumatic experiences "were not ones that he apparently witnessed and no mention of the characteristic symptoms." 11/46-47. He had to be corrected when he claimed, contrary to the educational records he had supposedly reviewed, that Concepcion had passed the MCAS and was on track to graduate high school. 11/48-49, 73-76. The Commonwealth also did not contest or counter the other evidence in the record of Concepcion's intellectual impairment, including the documentation of his cognitive problems in earlier medical records

[11] This is explicitly contradicted by the plain language of the DSM-V, which states that PTSD can also be based on learning that a relative or close friend was involved with the trauma or via indirect experience such as being a first responder. American Psychiatric Association, (2013) Diagnostic and statistical manual of mental disorders, (5th ed.). Washington, DC: Author, *available at https://www.ptsd.va.gov/professional/ptsd-overview/dsm5_criteria_ptsd.asp.*

and his inability to spell his own name when asked by the police. 11/76-78, 83-84.

While this Court must defer to the jury's credibility determinations, it is entirely appropriate, under this Court's section 33E review powers, to consider the weight of the evidence. *See Commonwealth v. Billingslea*, 484 Mass. 606, 623-624 (2020). *Cf. Moore*, 137 S.Ct. at 1049 (Supreme Court precedent does not "license disregard of current medical standards"). Moreover, *Moore* makes clear that Dr. Kelly's observations as to Concepcion's "street smarts" and improved performance in DYS custody must be mapped against Concepcion's continued adaptive deficits, and certainly do not preclude an intellectual disability diagnosis. *Id.* at 1050; *see* D. Br. at 38 n.26.

Next, the Commonwealth asserts, "It is neither cruel nor unusual to punish an individual whose [sic] is mentally capable of forming the requisite intent for the crime of which he was convicted." Comm. Br. at 25-27. This entirely misses the point of *Atkins*, *Moore*, *Roper*, *Graham* and *Miller*, none of which turn on individual defendants' ability to form intent; if they were so unable, their convictions would be reversed for insufficiency of evidence. Rather, those cases address whether their *punishments* violate the Eighth Amendment because of group characteristics shared by juveniles or the intellectually disabled. *Atkins*, 536 U.S. at 318-319; *Moore*, 137 S.Ct. at 1048-1049; *Roper v. Simmons*, 543 U.S. 551, 569-572 (2005); *Graham*, 560 U.S. at 67-69; *Miller*, 567 U.S. at 471-474. Concepcion, of course, falls into both categories.

The constitutional protections extended to juveniles are to be continuously reviewed "in light of evolving constitutional standards." *Freeman*, 472 Mass. at 507 n.7, quoting *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 343 (2003). This Court has repeatedly left open for future consideration the question of constitutionality of a mandatory life-with-parole sentence for juvenile homicide offenders. *See Commonwealth v. Brown*, 466 Mass. 676 (2013); *Commonwealth v. Okoro*, 471 Mass. 51, 59 (2015); *Commonwealth v. Lugo*, 482 Mass. 94, 120 (2019); *Watt*, 484 Mass. at 754. Here, the Commonwealth is incorrect when it contends, "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." Comm. Br. 22-23. To the contrary, Concepcion offers a first-impression argument that he is entitled to discretionary sentencing because of his intellectual impairment in combination with his youth: both conditions diminish his culpability, heighten his vulnerability, and mitigate the grounds for severe punishment. D. Br. at 39-44.

IV. The Judge Failed To Conduct The Required *Miller* Hearing.

Concepcion and the Commonwealth are in agreement that the trial record was replete with evidence pertaining to the factors that must be considered in a *Miller* hearing: Concepcion's particular attributes, including immaturity, impetuosity, and failure to appreciate risks and consequences; his family and home environment; and the circumstances of the offense, including role of peer pressure. *See Perez I*, 477 Mass. 677, 686 (2017); *Miller*,

567 U.S. at 477. Comm. Br. at 29. That this evidence was in the record, however, does not mean that the judge performed his duty to *weigh* the factors articulated in *Miller, apply* them uniquely to the individual defendant, and *consider* whether the sentence is appropriate. *See Commonwealth v. Perez* ("*Perez II*"), 480 Mass. 562, 568-569 (2018). More specifically, "the juvenile's personal and family history must be considered independently; the criminal conduct alone is not sufficient to justify a greater parole eligibility period than is available for murder." *Id.* at 569.[12]

There simply is no basis to infer that the trial judge performed any of the required analysis. He referenced none of the *Miller* factors, nor any facts related to them; he did not even hint that he found "extraordinary circumstances" warranting an above-minimum sentence, but instead premised the sentence solely on the degree of homicide found by the jury. 12/92.

The Commonwealth has requested that Commonwealth be resentenced to life with the possibility of parole after fifteen years, the shortest sentence the judge could have imposed under present law. If this Court reduces the sentence accordingly, or

[12] The Commonwealth contends that "the defendant did not receive a presumptively disproportionate sentence because he was not sentenced to life without the possibility of parole." Comm. Br. at 28. Life without parole is not the only sentence that creates a presumption of disproportion, however. *See, e.g., Perez I*, 477 Mass. at 686-687 (art. 26 requires individualized consideration of mitigating youthful characteristics before imposing sentence with longer period of incarceration before parole eligibility than that for child convicted of murder). Concepcion contends that his intellectual disability and/or above-minimum sentence warranted a *Miller* hearing. D. Br. 45.

orders resentencing on any other grounds, this issue may be moot. Clarification by this Court, however, on the issues of (1) what constitutes a presumptively disproportionate sentence and (2) whether a judicial *Miller* analysis can be presumed from the trial record may be warranted for resentencing, and/or provide welcome guidance to other litigants.

V. Any Foreclosed Jury Instruction Issues Can And Should Be Addressed Via Section 33E Review.

The Commonwealth's brief points to the recent decisions of this Court in *Castillo*, 485 Mass. 852, 153 N.E.3d 1210, *Watt,* 484 Mass. 742, *Commonwealth v. Odgren*, 483 Mass. 41 (2019), and the older case of *Commonwealth v. Vasquez*, 462 Mass. 827 (2012), in arguing that Concepcion's instructional claims are foreclosed. Comm. Br. 30-36. Even if this Court declines to expand or modify any of those holdings (*see* D. Br. at 47-55), Concepcion's youth and disability, the lack of intent to inflict suffering, the absence of malice implied by his use of a firearm, and the duress imposed by the adult codefendants are permissible bases for considering a reduction in verdict under G.L. c. 278, § 33E.

In *Vasquez*, 462 Mass. at 833-34, this Court held that duress was unavailable as an affirmative defense to murder because "[p]ersons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting than would those who know they must face the consequences of their acts." *See* Comm. Br. at 33. This rationale does not fairly apply to a child with limited ability to resist the pressures imposed by adult gang members and to understand the consequences of his actions; it is

surpassingly unlikely that Concepcion had the cognitive capacity to even comprehend the availability of a legal defense of duress, much less make a reasoned decision whether to yield to the adult gang members on that basis. In any event, the *Vasquez* Court expressly contemplated a situation such as this: "Although we hereby reject duress as a defense to deliberately premeditated murder, murder committed with extreme atrocity or cruelty, and murder in the second degree, we do not foreclose the possibility that, in exceptional and rare circumstances of duress, justice may warrant reduction of a defendant's guilt in our review under G.L. c. 278, § 33E." *Id.* at 835.

In *Castillo,* this Court held that a victim's substantial degree of conscious suffering may support a finding of extreme atrocity or cruelty *only* where it is the reasonably likely consequence of the defendant's actions -- not where it "stands alone as a factor, divorced from the egregiousness of the defendant's conduct" -- and revised the model jury instructions accordingly. 153 N.E.3d at 1222-1223. While the ruling was explicitly prospective, the defendant there received a reduction in verdict under § 33E. *See id.* at 1223. The SJC observed that nothing about the facts of the case, in which a man was shot in the cumulation of an argument stemming from a chance encounter between two groups of strangers, indicated that the defendant had intended to cause the victim any especial suffering. *Id.* at 1224. The Commonwealth's brief attempts to distinguish those facts because Concepcion fired multiple shots, but still primarily relies on the victim's degree of suffering - as evinced by his

"moan cry, gurgling noises, and agonal breaths." Comm. Br. at 32. As with Castillo (who shot his victim in the back), firing multiple shots into the victim's car was "stupid, senseless, and cowardly," yet nothing suggests that Concepcion "caused the person's death by a *method* that *surpassed* the cruelty inherent in any taking of human life." *Id.*, *quoting Commonwealth v. Sok*, 439 Mass. 428, 437 (2003).

Concepcion's case is particularly suited to a reduction under § 33E. This Court's authority includes the discretion to reduce a first-degree murder conviction "in circumstances where the jury do not have that option." *Brown*, 477 Mass. at 806 (reducing degree of guilt although the verdicts of felony-murder "were neither contrary to our joint venture felony-murder jurisprudence nor against the weight of the evidence"); *see also Commonwealth v. Jefferson*, 416 Mass. 258, 265-267 (1993) (§ 33E review opens facts as well as law to reviewing court's consideration, including facts such as defendant background or characteristics to which jury may not have had access). "Nowhere is the exercise of sound discretion more important than in cases involving juveniles with mental health challenges." *Commonwealth v. Newton N.*, 478 Mass. 747, 757 (2018).

Regardless of the soundness of the legal basis for his conviction or the justness of the rule precluding duress as a defense in general, Concepcion *in particular* is not nearly as morally culpable as his brutal crime of public shooting would indicate: his youth, history of trauma, and serious mental disabilities made him easy prey for the larger, older, and smarter gang members who threatened his family and then pointed him like

a weapon towards a man he did not know on the promise that afterward he would be allowed to leave the gang. *Contrast Commonwealth v. Jackson*, 471 Mass. 262, 264-268 (2015) (§ 33E reduction not warranted on grounds of duress where seventeen-year-old defendant with no mental disabilities was told by fellow gang member the day before the murder that he would face unnamed "consequences" if he did not kill the victim, whose murder was planned and carried out by the defendant acting alone). While neither fear nor the promise of freedom could justify the shooting of the victim, Concepcion's extreme youth and vulnerability meant that he was ill-equipped to extricate himself from the untenable choice he faced, and this Court should consider reduction in the degree of guilt to manslaughter to reflect the difference between his motive and state of mind and that of a defendant who, alone or with others, played at least some role in initiating the murder he committed.

CONCLUSION

For the foregoing reasons, either individually or in combination, Concepcion respectfully requests that this Court vacate his conviction and order a new trial. In the alternative, he requests that the degree of guilt be reduced and his case remanded for resentencing.

Respectfully submitted,

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November 17, 2020

Certificate of Service

I hereby certify that a true copy of this brief was served upon counsel for the Commonwealth via the Odyssey File and Serve System on November 17, 2020:

Elizabeth Billowitz

Certificate of Compliance

I hereby certify that this reply brief complies with the rules of court set forth in Mass. R. A. P. 16 that pertain to the form and filing of briefs because it is in 12-pt monospaced font and 20 pages long, not counting the parts of the brief excluded by Rule 20(a)(2)(D).

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