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

BRIEF OF DEFENDANT-APPELLANT RAYMOND CONCEPCION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MASSACHUSETTS CASES

OTHER STATE CASES

FEDERAL CASES

MASSACHUSETTS STATUTES

SECONDARY SOURCES

INTRODUCTION

When Raymond Concepcion was fifteen years old, two adult gang members ordered him to shoot a stranger, promising that he could leave the gang if he complied. Concepcion has an IQ of 66. An expert testified that he functioned at a nine- or ten-year-old level even nearly two years after the offense.

Nonetheless, this child was automatically tried as an adult, convicted of first-degree murder, and sentenced to life imprisonment with an above-minimum parole eligibility date. Meanwhile, the adult codefendants who drove him to the victim and ordered him to shoot are serving twelve- to fourteen-year manslaughter sentences.

Concepcion's indictment, trial, and sentencing were devoid of the procedural protections that mandate consideration of his youth. He was entitled to a grand jury that was instructed as to mitigating circumstances and defenses before subjecting him to an adult trial; he was entitled to a judge who considered his "unique characteristics" before imposing an above-minimum life sentence. He received neither of these.

In addition to seeking redress for these violations of well-established law, Concepcion asks this Court to extend the constitutional protections for juveniles to his uniquely compelling circumstances. He contends that automatically trying

him as an adult was unconstitutional, as there was no individualized consideration of whether juvenile jurisdiction would have been more suitable. Concepcion further argues that a life-with-parole sentence was an unconstitutionally disproportionate punishment in light of his doubly diminished culpability as an intellectually disabled child.

ISSUES PRESENTED

I. A few days after Concepcion's indictment, this Court held in *Commonwealth v. Walczak,* 463 Mass. 808 (2012), that grand juries must be instructed as to mitigating circumstances and defenses in juvenile murder cases. The judge denied Concepcion's pretrial motion for a transcript of the grand jury instructions, foreclosing any argument under *Walczak*. Did this denial unconstitutionally preclude a viable defense and violate discovery law?

II. Concepcion was automatically tried as an adult under G.L. c. 119, § 74. Did his mandatory exclusion from juvenile court violate the federal and state constitutions by precluding individualized consideration of his youth?

III. Concepcion had an IQ of 66 and the cognitive function of a nine- or ten-year old, rendering him ineligible for maximum punishment in death penalty states. Yet he was sentenced without regard to his disability to the most severe type of punishment a child in Massachusetts can receive. Was his mandatory life sentence unconstitutionally cruel and/or unusual in violation of the Eighth Amendment and Art. 26?

IV. A child is constitutionally entitled to individualized consideration of his youth before receiving a presumptively disproportionate sentence. Must Concepcion be

resentenced, where the judge based his above-minimum sentence solely on the degree of guilt?

V. The jury was instructed that they could infer malice from Concepcion's use of a firearm and that they could find extreme atrocity or cruelty even if he did not intend to inflict suffering; they were not instructed as to duress or manslaughter. Did these instructions improperly disregard his youth and disability?

VI. Should this Court reduce Concepcion's degree of guilt pursuant to G.L. c. 278, § 33E, in light of the evidence of his impairments and the duress inflicted by adult gang members?

STATEMENT OF THE CASE

On December 4, 2012, a Suffolk County grand jury indicted Concepcion for murder, G.L. c. 265, § 1, and carrying a firearm without a license, G.L. c. 269, § 10(a). R. 1-2.[1] The trial judge refused to order the transcription and production of the grand jury instructions, which Concepcion had requested pursuant to *Walczak*. R. 39-42. On April 9, 2015, Concepcion's case was severed from his codefendants on the ground

[1] "R." refers to the record appendix; Grand Jury transcripts are contained in a separate sealed volume. "Tr." refers to the trial transcript by volume and page number; motion hearings are designated by date and page number. There are several errors in the transcript markings: March 7, the fifth day of trial, is contained in two individually numbered volumes, one with testimony and the other with the jury view. Unless otherwise noted, references to volume five are to the former. Further, the eighth day of trial (March 10) is erroneously marked Volume 9 and dated October 3. References are to corrected volume numbers with March 10 as volume 8, March 11 as volume 9, etc.

that he was unable to resist these adults' commands due to his age and cognitive limitations. R. 10. The codefendants pleaded guilty to manslaughter and were sentenced to twelve to fourteen years. 12/90.

Trial began on March 2, 2016 (Locke, J., presiding). R. 14. Concepcion did not contest that he shot the victim; his defense was that his mental impairments precluded him from forming the requisite intent. The trial judge instructed on both premeditation and extreme atrocity or cruelty. 12/50-58. On March 16, 2016, Concepcion was convicted of murder, premised solely on the latter theory, and received a life sentence with the opportunity for parole after twenty years. 12/78, 92-93.

STATEMENT OF FACTS

I. Concepcion shot a man on the order of older gang members and was immediately arrested.

The victim, Nicholas Martinez, had been a member of the Mission Hill gang. He left Boston in 2011, after implicating a fellow gang member in an earlier crime. 1/302, 311; 3/41-42. Martinez returned to the city and was killed on October 17, 2012, a month after the grand jury minutes in that case revealed him to be a cooperating witness. 1/302-303.

Martinez was fatally shot while the car he was driving was stopped at a red light on Southampton Street in Boston. 3/43-44. Witnesses saw a person

approach and shoot through the rear driver's side window and then fire more shots through the front window. 3/76-77, 222. The shooter climbed into the back seat of a car, which was stopped by state police on Route 93. 3/90-91, 128.

The person in the back seat was Concepcion, aged 15, 5'7" and 130 lbs. 3/150; 4/59, 69-70. The driver was Jaquan Hill, aged 19, 5'8" and 245 lbs. 3/151; 6/13. The front seat passenger was Shakeem Johnson, Hill's brother; he was 22 years old, over six feet tall and 300 pounds. 4/70-71. Hill and Johnson were members of the Mission Hill gang. 6/12-15, 38-39. Concepcion, who had moved from the Dominican Republic when he was twelve, had joined the gang five months earlier. 9/20-22; 11/128-129, 135; R. 86.

II. A clinician who treated Concepcion testified to his cognitive and emotional problems, immaturity, and manipulation by more sophisticated peers.

Norma Hollenbach, a mental health counselor, testified that she had worked with Concepcion almost daily for two years while he was in a DYS dentention center awaiting trial in this case. 8/44. She described Concepcion as lacking age-appropriate emotional regulation, including cycles of aggression and tearful distress. 8/45-47. In contrast to his age peers, Concepcion's crying and acting out seemed uncontrollable and not accompanied by understanding or insight. 8/47-48. He acted younger than his fifteen

years - sometimes more like an eight- to ten-year-old - in his lack of comprehension. 8/22-25. Concepcion was eager for acceptance and a follower: "other kids would tell him to do certain things and he would do them," including giving them his money. 8/21, 51. He could be set up to assault others "if another young man told him to do so"; he would not even "consider that other kids were setting him up." 8/51, 54.

Concepcion received intensive counseling at the detention center, and Hollenbach observed that he made progress in his behavior. 8/54. After two years of one-on-one academic instruction, he barely passed the English and Biology MCAS, landing at the low end of the "needs improvement" category. 8/70-71. He failed the math MCAS in each of two attempts. 8/71; 10/167.

III. Concepcion experienced repeated trauma as a younger child, including witnessing shootings.

Concepcion's mother testified that he had always had difficulty in school, and had the mentality of a considerably younger child. 9/24-25. When he still lived in the Dominican Republic, Concepcion witnessed multiple shootings when he was eight years old. 9/27-30. First, he observed his father being shot five times at his birthday party. 9/27. Although his father survived, Concepcion struggled emotionally and was unable to attend school for weeks. 9/27. Next, Concepcion was playing outside when someone robbed the

corner store and shot the owner. He witnessed this shooting (or its immediate aftermath) as well. 9/27-28. Concepcion was "very nervous and he cried all the time" after this incident, and needed to sleep in his mother's bed. 9/28. That same year, Concepcion also witnessed his uncle accidentally shoot himself, and a police officer shoot his brother when he got out of a car containing Concepcion and his mother. 9/29-30, 59-60. Both men survived. 9/29-30.

Upon moving to Boston at the age of twelve, Concepcion attended three different public schools, failing nearly all his subjects. 9/32-40. According to his mother, he did not like playing with the other children "because they wanted to play more advanced games and he wanted to play games that were more for little kids." 9/41.

IV. When interrogated by the police, Concepcion explained that older gang members told him to shoot a man he didn't know, and he complied in fear; he expressed shock and devastation when he learned that the man had died.

The police interrogation of Concepcion was videotaped and played for the jury.[2] 9/99. When asked to spell his last name, he said he did not know how. 10/15. He then misspelled his own name twice, and misstated the year of his birth. 10/16-20. Several

[2] After initially moving to suppress the statements, Concepcion withdrew the motion and filed a motion to admit the interview instead. R. 8-9.

times in the interview, Concepcion did not seem to comprehend the officers' questions. 10/15.

Concepcion initially denied involvement in the shooting, then confessed. R. 58-61. When the officers asked him why he shot the victim, he said, "I was scared," and that he believed he had to do it because it was the only way to "get out of this life." R. 63. A man Concepcion knew as "R" or "Fish" had told him that shooting the victim would get him out of the gang, and ordered him to get a gun. R. 63-64, 78-79, 93. He told the police that he had bought a gun either that evening or two months earlier from a man who sold them through Twitter.[3] R. 65-67, 72-73.

Concepcion told the police he knew something was going to happen that evening, but did not know what. R. 93. Fish told Concepcion to get into a car with a man he knew as Shah (Johnson) and another man he did not know (Hill); at some point Concepcion noticed that they were following another car. R. 62, 80, 94, 106-108, 113. Hill pointed out the victim and told Concepcion to "get him." R. 90-91, 112. Concepcion did not know the victim. R. 104. He told police he shot twice through the door at the victim, then got back into the car and either gave the gun to Shah or

[3] He claimed he hid the weapon in the bushes right behind the police station, not in a box or bag, without any camouflage or protection from the elements. The officer admitted this made no sense. 10/40.

threw it out the window. R. 98-100, 105.

When the officer stated that Martinez had died, Concepcion appeared shocked and began hyperventilating. 10/45-46. Concepcion said, "I don't feel good to talk," then stated, "I just killed somebody. I'm only fifteen." 10/51. The officer asked if Concepcion was sorry for what he did, and he responded, "I don't want no one made," and that he was sorry. 10/51.

Concepcion's mother was present at the interview; he exchanged some words with her that were edited out of the recording but elicited at trial.[4] 10/80. His mother said to him, "You let your mind be controlled, Reimito (Little Ray). You put an end to my life and my heart." 10/80-81. Concepcion said, "Mommy, I wanted to get out of that, wanted to get out of that, Mommy," referring to the gang. 10/80. He also said that the men in the car "put things in my head." 10/80-82. Both Concepcion and his mother were sobbing during these exchanges, and Concepcion was collapsed on the floor. 10/81.

[4] When Concepcion's mother arrived, police read his Miranda rights in her presence, translated into Spanish, and then gave them an opportunity to speak in private. R. 43-56. Several minutes later, Concepcion's mother said in Spanish that she would speak to police. R. 56. Police then began questioning Concepcion in English without translating for her. R. 56-57. After he confessed to the shooting, police for the first time began translating for his mother. 10/37; R. 84.

V. An expert testified that Concepcion had an IQ of 66 and functioned at a nine or ten-year-old level.

Psychologist Catherine Ayoub evaluated Concepcion's psychological, social and intellectual capacities.[5] 10/85-86. The Spanish version of the Wechsler intelligence test for children showed Concepcion's full-scale IQ to be 66. 10/124, 129. Dr. Ayoub attempted to give him the Minnesota Multiphasic Personality Inventory 2, most of which is at a ninth-grade reading level. 10/149-150. He could not answer the questions, so she stopped the test. 10/150. She opined that Concepcion was not intellectually capable of faking a poor performance on the tests, and was trying to appear to be a "normal teenager." 10/245.[6]

Concepcion lacked age-level adaptive skills. 10/224. His peers teased him because his behavior was

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[5] Dr. Ayoub's evaluation included observation and interviews of Concepcion and his family; interviews of clinicians who treated him at the detention center; review of educational, medical, and legal records, including the taped interrogation; and standardized or semi-standardized psychological testing. 10/111-113. She spent a total of ten hours with Concepcion, half in interview and half in testing. 10/119.

[6] On a Trauma Symptom Inventory test, Concepcion endorsed multiple traumatic behaviors, triggering an embedded validity test called atypical response scales. 10/138-141. Dr. Ayoub did not administer separate symptom validity tests, because they only have adult norms, do not apply to adolescents, and are contraindicated "particularly if you have other vehicles for assessing ... the validity of their statements." 10/202-203. Instead, she interviewed collateral contacts for confirmation. 10/142, 203.

"very naive." 10/224. His ability to converse with other children was compromised, sometimes leading to altercations. 10/225. The staff in his residential placement needed to help him establish routines around basic activities such as sleeping and eating. 10/225.

Boston Children's Hospital records referenced a history of traumatic brain injury, and the treating physician there noted concerns about cognitive delay. 10/244. Dr. Ayoub testified that she reviewed records from the Dominican Republic indicating that Concepcion suffered brain trauma there: he fell off a roof and was unconscious from fifteen minutes to an hour, then was hospitalized with a severe concussion. 10/248-249.

Dr. Ayoub's expert opinion was that at the time of the shooting, Concepcion lacked both intellectual and social reasoning skills. 10/221-222. He was a very simple and concrete thinker, with limited capacity for abstraction or problem-solving. 10/150-151. Concepcion's thought processes were more like a nine- or ten-year-old than an adolescent. 10/154. Accordingly, he was diagnosed with "global developmental delay of moderate severity," an intellectual development disorder. 10/228, 221. Dr. Ayoub testified that Concepcion also suffered from post-traumatic stress disorder (PTSD) and major depression/persistent depressive disorder. R. 32.

Dr. Ayoub opined that Concepcion had only a

limited ability to form a specific intent to kill on October 17, 2012. 10/154. Because of his cognitive limitations and trauma history, he lacked the "full ability to understand the full meaning of killing someone." 10/154. "He had much less capacity than...the average fifteen-year-old. He was really limited intellectually, and he was really limited psychologically." 10/156, 242.

Moreover, Concepcion's ability to foresee the consequences of his actions was constrained by his intellectual capacity as well as exposure to prior violent trauma. 10/155. Dr. Ayoub found his surprise at the fact that the victim died "quite unusual." 10/236-237. She attributed this to witnessing several shootings in which the victims did not die: "having people survive that trauma gave him a very different way of thinking about what it means to hurt someone." 10/155. Concepcion could not foresee consequences as well as the average fifteen-year-old. 10/156. As to the shooting, he had "a limited understanding of his situation and the consequences." 10/156.

VI. The Commonwealth's expert did not perform any testing, did not consult collateral sources, and interviewed Concepcion for little more than an hour; he concluded Concepcion was of average intelligence and not emotionally impaired.

Dr. Martin Kelly testified that he reviewed Dr. Ayoub's report, the police interview, the

Commonwealth's statement of the case, and school and DYS records. 11/30-31. His entire examination of Concepcion -- including introduction, *Lamb* warnings, and conclusion -- took only seventy-six minutes. 11/71-72. Dr. Kelly did not administer any tests, and the only contacts he spoke with were the prosecutor and one of the detectives. 11/72, 86.

In the interview, Concepcion parroted back basic facts that Dr. Kelly stated incorrectly. 11/80. When asked what grade he was in when he came to the U.S., Concepcion said he was not sure whether it was fifth or sixth. 11/85. Concepcion mistakenly agreed that at the time of the shooting he was in tenth grade: in fact, he was repeating the ninth. 10/88.

Nonetheless, Dr. Kelly claimed that Concepcion's overall cognitive ability was in the average range, with "adequate day to day street savvy to go about his circumstances... He can function in a classroom. He can be conceivably part of a gang." 11/66. He testified incorrectly that Concepcion "was on track" academically and had passed the MCAS. 11/49. In fact, Concepcion had twice failed the math portion of the MCAS, precluding graduation. 8/71; 10/167. Dr. Kelly claimed, "In my opinion he could have gotten a diploma, and he could have passed the MCAS." 11/74. He eventually conceded, when informed that Concepcion repeatedly failed the math portion of the MCAS, that

he could not have gotten a high school diploma. 11/74-76. Ultimately, Dr. Kelly opined that Concepcion had no psychological, cognitive, or emotional condition that removed the capacity to specifically intend to shoot the victim. 11/64-65.

SUMMARY OF ARGUMENT

Concepcion's youth and intellectual disability were unlawfully disregarded at his indictment, trial, and sentencing. First, the trial judge failed to require that the grand jury be instructed as to mitigating circumstances and defenses, as *Walczak* mandates for juveniles. (Pp. 14-23). Second, Concepcion's automatic trial as an adult was unconstitutional, as the statutory scheme permits no judicial discretion to consider whether a child would be more appropriately tried in Juvenile Court. (Pp. 23-33).

Third, Concepcion's mandatory life sentence constituted an unconstitutionally disproportionate punishment: he was too disabled to receive this maximum sanction. (Pp. 33-43). Fourth, even if a life sentence *could* be imposed on this child consistent with the Eighth Amendment and art. 26, here it was procedurally unlawful, as the judge failed to conduct a *Miller* hearing to consider the mitigating effects of his youth. (Pp. 43-47).

Fifth, several of the jury instruction rulings failed to reflect proper consideration of Concepcion's youth and disability. The jury was told that they could infer malice from his use of a firearm and that they could find extreme atrocity or cruelty even if he did not intend to inflict suffering, and they were not instructed as to duress or manslaughter. (Pp. 51-55). Finally, this Court should reduce the degree of guilt in light of the evidence of Concepcion's profound impairments and the duress inflicted by adult gang members. (P. 55).

ARGUMENT

I. Concepcion Did Not Receive The Required Consideration Of His Youth and Intellectual Disability At Indictment: The Grand Jury Instructions Were Unlawfully Withheld, Foreclosing His Argument Under *Walczak*.

A defendant's "status as a juvenile" must be "factored into the process" before a grand jury may return a murder indictment. *Walczak*, 463 Mass. at 827 (Lenk, J., concurring).

> In the unique instance of juvenile defendants whom the prosecutor seeks to charge with murder, the grand jury not only serve as [a] shield against unfounded accusation, but in recent years have become the sole gatekeeper between the adult and juvenile justice systems. When a juvenile defendant is indicted for murder, he will be

> treated, in all respects,[7] as an adult in the criminal justice system ...

Id. at 824-25. Accordingly, the *Walczak* plurality announced a new rule "in 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.

Id. at 810.

Concepcion was indicted on December 4, 2012; *Walczak* was decided barely a week later, on December 12. Concepcion moved for the transcription and production of the instructions, citing federal and state due process, *Walczak,* G.L. c. 221, § 86, and Mass. R. Crim. P. 14.[8] R. 36-38. The judge denied the motion, holding that because the new rule announced in *Walczak* was not a constitutional mandate, it did not apply to Concepcion's case. R. 39-42.[9]

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[7] *Walczak* predated *Diatchenko v. Dist. Att'y,* 466 Mass. 655 (2013), which changed the penalties for juveniles convicted of first-degree murder. In all other respects, this statement remains accurate.

[8] A non-evidentiary hearing on this motion took place on February 19, 2013. The recording was lost and no transcript could be generated.

[9] While discovery rulings generally are reviewed for abuse of discretion causing prejudicial error, mixed questions of law and fact receive *de novo* review. *Commonwealth v. Torres*, 479 Mass. 641, 647 (2018).

A. Transcription and production of the grand jury instructions were mandated by *Walczak*, due process, and Massachusetts procedural rules.

1. New criminal rules apply to cases where the conviction is not final and the issue is preserved.

The judge erred in ruling that *Walczak* does not apply retroactively to Concepcion. It is well-settled that a new rule of criminal law is applied to a case on direct appeal where the issue was preserved at trial. "[S]elective application of new rules violates the principle of treating similarly situated defendants the same." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987); *Commonwealth v. Augustine*, 467 Mass. 230, 257 n.41 (2014).

Here, the new rule at issue was announced even before Concepcion's trial. He preserved the issue by immediately moving for production of the grand jury instructions so he could determine whether the mandate of *Walczak* was fulfilled. This motion was entirely timely, allowing the judge to order the transcripts and ascertain compliance with current law before the trial began, so that any defect in the grand jury proceedings could be promptly addressed – precisely as *Walczak* contemplated. *See* 463 Mass. at 812, 836 n.34. Accordingly, Concepcion was in exactly the same position as a defendant who was indicted a week after *Walczak* rather than a week before. To fail to apply

Walczak to his preserved claim would be arbitrary and unfair.

2. The new rule is retroactive whether or not it is constitutional.

The ruling that *Walczak*'s new rule did not apply retroactively to Concepcion's case because it was not a constitutional mandate is incorrect for two reasons. First, the fragmented ruling in *Walczak was,* in fact, constitutional in nature. Chief Justice Gants's concurrence held that the Commonwealth owes a duty to instruct a grand jury as to the law whenever there is substantial evidence of mitigating circumstances or defenses, thereby "present[ing] a substantial due process issue as to the validity of a murder indictment..." *Id.* at 843-844 ("due process requires dismissal of the indictment without prejudice"). Justice Lenk's concurrence expressly contextualized the duty to instruct a grand jury owed to juvenile homicide defendants within art. 12 and the Eighth Amendment. *Id.* at 824, 830. [10] Neither opinion announced "a new common-law rule, a new interpretation of a State statute, or a new rule in the exercise of [] superintendence power"; thus, there is a "constitutional requirement that the new rule ... be applied retroactively." *Commonwealth v. Dagley*, 442

[10] Proper instruction of the grand jury also was required by the federal Due Process clause. *See Miller v. Alabama*, 567 U.S. 460, 479 (2012).

Mass. 713, 721 n.10 (2004).

Second, even if *Walczak* did *not* announce a constitutional rule, it still can and should retroactively apply to this case. *See Commonwealth v. Muller*, 477 Mass. 415, 431 (2017) (applying implicitly prospective rule to cases pending on direct review regardless of preservation); *Commonwealth v. Pidge*, 400 Mass. 350, 354 (1987) (applying new nonconstitutional rule where preserved issue at trial and raised on direct appeal); *Commonwealth v. Breese*, 389 Mass. 540, 547-48 (1983) (observing that "the Supreme Court has not distinguished between constitutional and nonconstitutional decisions in addressing the question of retroactivity"); *cf. Commonwealth v. Smith*, 95 Mass. App. Ct. 437, 443 (2019), and cases cited ("Recent case law suggests that flexibility and discretion are involved, even in cases involving common-law rules where no issue of constitutional dimension has been raised, when the issue in question has been preserved").

Commonwealth v. Pring-Wilson, 448 Mass. 718 (2007), is particularly apposite. There, the Court held that "fairness require[d]" applying the new evidentiary rule announced in *Commonwealth v. Adjutant*, 443 Mass. 649 (2005), to the defendant's direct appeal, even though that rule was expressly prospective and nonconstitutional. *Id.* at 736-737.

The Court observed that *Adjutant* had retroactively applied *its* new rule to its parties, even as it announced it as prospective new law, and that Pring-Wilson "was in the same shoes as Adjutant." *Id.* Here, too, *Walczak* announced a new rule of law *while applying that rule to those litigants*. And, like in *Adjutant,* Concepcion is in precisely the same position as Walczak, having preserved the issue before trial.

3. Even if this Court applies *Walczak* prospectively, its limitation to "future cases" includes Concepcion's trial.

A prospective application of *Walczak* yields the same result. The plain language of the plurality applies the new rule to "future cases." 463 Mass. at 810.[11] This is properly construed as applying to cases tried after December 4, 2012, the date of the opinion. *Cf. Dagley*, 442 Mass. at 721 (holding that new jury instruction requirement announced in *DiGiambattista* "applied only prospectively, i.e., to trials occurring after the issuance of that decision"); *Commonwealth v. Dwyer,* 448 Mass. 122, 124 (2006) (new protocol governing inspection of privileged third-party records applied prospectively "to all criminal cases tried after the issuance of the rescript"); *Commonwealth v.*

[11] *Walczak* did not provide more explicit guidance, in contrast to *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").

King, 445 Mass. 217, 218 (2005) (applying changes to fresh complaint doctrine prospectively to "only those sexual assault cases tried after the issuance of the rescript"). Concepcion's trial did not start until March 2, 2016, more than three years after *Walczak*.[12]

In sum, whether applied retroactively or prospectively, *Walczak* required the prosecutor to instruct the grand jury in Concepcion's case as to the elements of murder and on the mitigating circumstances raised by the evidence, and required the transcription and production of the grand jury instructions. Denying Concepcion's motion precluded him from pressing his substantive claim under *Walczak* and constituted an abuse of discretion that, reviewed *de novo*, resulted in reversible error.[13]

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[12] In *Commonwealth v. Grassie*, 476 Mass. 202, 219 (2017), this Court indicated that an adult defendant indicted three months before *Walczak* would not be bound by the rule if it applied notwithstanding his age. This dicta should not govern the result here, however, for a juvenile defendant presenting the issue on a fully developed record.

[13] Denying access to the transcripts also prevented Concepcion from obtaining full appellate review in violation of federal and state due process. *See Commonwealth v. Imbert*, 479 Mass. 575, 577–78 (2018), *quoting Meyer v. Chicago*, 404 U.S. 189, 194 (1971) (defendant is entitled to "record of sufficient completeness to permit proper consideration of his claims"); *Commonwealth v. Alvarez*, 422 Mass. 198, 212-213 (1996) ("deliberate blocking" of appellate rights violates due process).

The motion judge also should have allowed Concepcion's motion to transcribe and produce the grand jury

B. This Court should order the Superior Court to order production of the relevant transcripts, and to vacate the indictment if the instructions did not comport with *Walczak*.

This Court should remand this case with an order to produce the full transcript of the grand jury proceedings, so that Concepcion can review the jury instructions in light of *Walczak*'s mandate. The Commonwealth presented substantial evidence of mitigating circumstances or defenses: Concepcion's youth and intellectual disability, his difficulty understanding the consequences of his actions, his vulnerability and fear of the much older and larger gang members.[14] *Walczak,* 463 at 810. Each of these mitigating circumstances was relevant to his *mens rea*, and consequently the degree of guilt. The grand jury needed to understand the ramifications of Concepcion's age, obvious disability, and fear of the gang in order to make an informed decision as to whether murder or a lesser charge was more appropriate.

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instructions pursuant to the Mass.R.Crim.P. 14(a)(2), as *Walczak* rendered the instructions "material and relevant." *See also* Rule 14(a)(1)(A)(ii) and Reporter's Note; G.L. c. 221, § 86.

[14] This evidence included Concepcion's interrogation, including his statement to police that other gang members had ordered him to shoot the victim as his price for leaving; jail calls between the gang members saying the victim had been killed for being a snitch and wondering what "the kid" would say to police; and the detective's observations of Concepcion's mental incapacities. R. 114-121.

Accordingly, the grand jury should have been instructed as to "the elements of murder and on the significance of the mitigating circumstances and defenses," including the model jury instruction on mental impairments affecting intent. Moreover, here "the significance of the...defenses" includes the legal context that duress was not an available defense to murder. This fact alone might have impelled the grand jury to return a lesser indictment.

As *Walczak* observed, the grand jury is effectively the gatekeeper of juvenile versus adult jurisdiction; given the high stakes of this determination, they must be equipped with information and context, "suitable tools for their advanced task." *Id.* at 827-828, 832. If the grand jury was not properly instructed as to the elements of first-degree murder, mitigating circumstances, and applicable defenses, this failure is reversible error. *See id.* at 836 (holding that absence of required instructions was "fatal to the indictment"); *Commonwealth v. McCarthy*, 385 Mass. 160, 163-164 (1982). Thus, this Court should order the Superior Court, in the event that the transcripts show that the grand jury was not properly instructed, to dismiss the indictment.

II. Concepcion's Youth and Intellectual Disability Were Disregarded When He Was Automatically Tried As An Adult; His Mandatory Exclusion From Juvenile Court Violated The Federal And State Constitutions.

A. Massachusetts statutes automatically subjected Concepcion to an adult trial and a mandatory life-with-parole sentence without regard to his unique characteristics.

Before 1996, Massachusetts treated all children accused of crimes with attention to their youthful characteristics, acknowledging that "a child's capacity to be culpable...is not as fixed or as absolute as that of an adult." *Commonwealth v. Magnus M.*, 461 Mass. 459, 461 (2012). Even murder charges were adjudicated via juvenile delinquency procedures, in which the state acted in parens patriae and sought to ensure that "as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance." G.L. c. 119, § 53. Juvenile Court judges possessed broad discretion in the disposition of cases and transferred children to adult criminal court only in "exceptional circumstances." *A Juvenile v. Commonwealth*, 370 Mass. 272, 281-282 (1976).

The Youthful Offender Act of 1996 added a new category of quasi-criminal proceeding for minors over fourteen alleged to have committed certain felonies. G.L. c. 119, § 52. This did not, however, "eviscerate the longstanding principle that the treatment of

children who offend our laws are not criminal proceedings." *Commonwealth v. Connor C.*, 432 Mass. 635, 641 (2000). Accordingly, these cases remain in Juvenile Court, with broad judicial discretion in sentencing: ranging from DYS commitment until age 21 to sentencing as adults. G.L. c. 265, § 4; c. 119, § 58 (requiring judges to consider, inter alia, the offender's "age and maturity" and personal history).

But for children aged fourteen to seventeen accused of murder, the Youthful Offender Act ended this youth-specific discretion: it transferred mandatory jurisdiction to the Superior Court. G.L. c. 119, § 74. "The differences between being tried in the Superior Court and in the Juvenile Court are considerable." *Walczak*, 463 Mass. at 827 (Lenk, J., concurring). "Juveniles charged with murder are not entitled to the benefit of a juvenile justice system that is primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders, and geared toward the correction and redemption to society of delinquent children." *Commonwealth v. Soto,* 476 Mass 436, 439 (2017) (internal citations omitted).

If the prosecutor decides to indict a homicide as murder instead of manslaughter, there is no opportunity for a judge to consider the child's individual characteristics and determine whether he or

she is more fairly treated as a juvenile or an adult. Superior Court jurisdiction is automatic, with no transfer hearing, opportunity for remand, or other judicial consideration of youth. If conviction follows, the judge may not choose from the range of juvenile sentences permitted by § 58, but *must* impose life with statutorily-bounded parole. G.L. c. 119, § 72B; G.L. c. 265, § 2; G.L. c. 127, § 133A.

B. Automatic adult trial is unconstitutional because it fails to provide discretionary, youth-specific consideration where life imprisonment is at stake.

When the Youthful Offender Act was enacted, developmental differences between children and adults were not well-documented or incorporated into jurisprudence. More recently, however, the Supreme Court has relied on scientific evidence about juvenile psychology and neurology in adjudicating Eighth Amendment claims, concluding that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. [15] These differences result from children's "diminished culpability and greater prospects for reform":

[15] The constitutional prohibition on cruel and/or unusual punishments "guarantees individuals the right not to be subjected to excessive sanctions" and "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Diatchenko*, 466 Mass. at 669.

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.

Montgomery v. Louisiana, 136 S.Ct. 718, 733 (2016) (citations and internal quotation marks omitted). Consistent with a child's lesser culpability, *Miller* recognized that "the distinctive attributes of youth diminish the penological justifications" for imposing a harsh sentence. 567 U.S. at 472. Accordingly, individualized consideration of the mitigating effects of youth is required where juveniles are exposed to the harshest sentences. *Id.* at 477-478; *Commonwealth v. Perez* ("*Perez I*"), 477 Mass. 677, 686 (2017). "[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474.

The Supreme Court's analysis focused not just on the sentences imposed, but on the processes that yielded them. *Miller* observed that most jurisdictions authorizing maximum punishments for juveniles did so through the combination of two independent statutory

provisions: "One allowed the transfer of certain juvenile offenders to adult court, while another (often in a far-removed part of the code) set out the penalties for any and all individuals tried there." *Id.* at 485.[16] Thus, automatic adult trial under § 74 cannot be disentangled from the mandatory punishment that ensues: the jurisdiction predetermines the sentencing options, invariably yielding a life-with-parole sentence upon conviction. This brings the statutory scheme within the ambit of the Eighth Amendment and art. 26. *See id.*; *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").

Indeed, Justice Lenk's *Walczak* concurrence recognized that § 74 implicates the requirement of youth-specific consideration per the Eighth Amendment:

> Because grand jury indictment of a juvenile for murder pursuant to [§ 74] results in the treatment of the juvenile defendant as an adult for all purposes, it evokes many of the same concerns as the sentencing at issue in *Roper*, *Graham*, and *Miller*: it ignores the

[16] *Miller* uses the term "mandatory transfer" to describe all sentencing schemes in which a juvenile is automatically tried as an adult. More precisely, § 74 is a statutory exclusion, since murder prosecutions of children here do not even begin in Juvenile Court.

> fact that "the two classes differ significantly in moral culpability and capacity for change." While not eliminating the possibility that juveniles can in some instances be treated the same as adults, the animating purpose of these cases appears to be an effort to foreclose "criminal procedure laws that fail to take defendants' youthfulness into account at all."

Walczak, 463 Mass. at 831 (*quoting Graham v. Florida*, 560 U.S. 48, 76 (2010)). Thus, *Miller* is the touchstone in analyzing the statute's constitutionality. *See id.; Commonwealth v. Laplante*, 482 Mass. 399, 404 (2019) (*Miller* factors inform analysis of child's punishment under art. 26).

There is no youth-specific consideration in the operation of § 74 that satisfies *Miller*'s mandate:

> Unlike transfer practice prior to passage of the act, the Commonwealth's decision to seek an indictment for murder (and the grand jury's decision to return one) bypassed the Juvenile Court and any attendant protections for this defendant. 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).[17] Here,

[17] *See also Patterson*, 25 N.E.3d at 569 (Theis, J., dissenting) ("Like the laws involved in *Roper, Graham,* and *Miller,* [the exclusion from juvenile jurisdiction] is mandatory and inflexible...the statute contains no mechanism by which a judge can consider characteristics of juveniles before transferring them

Concepcion's youth and disability were disregarded at the moment the Commonwealth decided to indict him for murder rather than a lesser offense. No judge considered whether a child functioning at a nine- or ten-year-old level would be more properly adjudicated in Juvenile Court. Concepcion's trial was conducted identically to every adult murder defendant's, ungrounded by the principles of rehabilitation and redemption, and blind to "the inherent differences between juvenile and adult offenders." *Soto,* 476 Mass at 439. When the jury returned the guilty verdict, the judge had no discretion to sentence him to anything less than life with parole. He did not have the option to extend Concepcion's DYS commitment for the remainder of his childhood – a setting where he had made meaningful developmental and academic gains, with the help of counselors and tutors. R. 34.

Massachusetts's mandatory exclusion of murder defendants from juvenile jurisdiction is a relative rarity, reflecting an emerging national consensus against the practice. *See Miller,* 567 U.S. at 482-483. Most states that mandate adult trial for certain juveniles also provide "reverse waiver" options that allow a criminal court judge to exercise discretion

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to criminal court, where, if convicted, they face stiffer adult penalties, enhancements, and other rules to extend their time in prison.").

and return the matter to juvenile court.[18] *Miller* noted that only fourteen state statutes impose mandatory adult trial with no opportunity to seek remand or transfer back to juvenile court. 567 U.S. at 487 n.15. It cited § 74, disapprovingly, as an example of this minority approach. *Id.* Moreover, the national trend is away from automatic treatment of juveniles as adults.[19]

Section 74 thus flouts the requirement of discretionary, youth-specific consideration when life imprisonment is at stake. The 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.

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[18] *See United States Office of Juvenile Justice and Delinquency Prevention Statistical Briefing Book*, Juveniles Tried As Adults (2016); Appendix to Brief for Human Rights Watch as amicus curiae, *Hill v. United States of America, Inter-Am. Comm'n H.R.*, Case No. 12.866 (March 19, 2014); Griffin, Patrick, "Transfer Provisions," National Center for Juvenile Justice. Web addresses for all electronic secondary resources are provided in the Table of Authorities.

[19] Sarah A. Brown, Nat'l Conf. of St. Legislatures, *Trends in Juvenile Justice State Legislation: 2011-2015* (2015) (legislative trend is to rehabilitate youth in the juvenile justice system instead of sending them to punitive adult system); Neelum Arya, Campaign for Youth Just., *State Trends: Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System* at 33 (2011) (documenting trend in transfer laws); *People v. Willis,* 997 N.E.2d 947, 960 (Ill. App. 2013) ("we see a nationwide trend developing to treat juvenile offenders differently than adult offenders").

This provision – a relic of a legislative era in which the mitigating effects of youth were neither scientifically documented nor codified into law - should be struck down.[20]

C. The Second Paragraph of Section 74 is unconstitutional as applied to Concepcion.

Even if this Court concludes that the statute is not facially unconstitutional, it should hold that it was unconstitutional as applied to this disabled child. Even nearly two years after the offense, Concepcion functioned at a ten- or eleven-year old level, well below the minimum age to which the statute applies. R. 32. Moreover, his nearly two-year DYS detention had proven rehabilitative, precisely as intended by the juvenile system. R. 34. If a judge had the opportunity to consider whether this child was best served in Juvenile Court, with the possibility of

[20] By categorizing children as adults for jurisdictional purposes based solely on the crime charged, and by depriving them of judicial consideration of their youth, § 74 also violates federal and state due process. *Miller* gave new recognition to a child's longstanding entitlement to be adjudicated differently from adults and with consideration of the mitigating effects of youth, and identified a "substantive guarantee": protecting children from disproportionate punishment that fails to account for their youth. *Montgomery*, 136 S.Ct. at 734-735. Thus, consideration of juvenile status in adjudication of murder cases now should be considered a fundamental right. Section 74's sweeping deprivation of youth-specific consideration in murder cases is not narrowly tailored, or even rationally related, to the purpose of protecting public safety.

continuing his DYS placement until age 21, he or she quite likely would have determined that adult jurisdiction was inappropriate. Accordingly, the second paragraph of § 74 should be struck down, Concepcion's conviction should be vacated, and the case remanded for adjudication consistent with the remainder of the Youthful Offender Act. [21]

III. Imposing A Mandatory Life Sentence On This Intellectually Disabled Child Is Cruel And/Or Unusual Punishment In Violation Of The Eighth Amendment And Art. 26.

Concepcion has an IQ of 66: in a death penalty state, he would be too impaired to execute as a matter of law. *See Hall v. Florida*, 572 U.S. 701, 719-720 (2014). As explained below, sentencing him as if he had the same capacities and culpability as any other fifteen-year-old is unconstitutionally disproportionate. An intellectually disabled juvenile should not be sentenced as harshly as other juveniles, just as a disabled adult is not subject to the same maximum punishment as other adults.

A. Both juvenile and intellectually disabled defendants have diminished culpability, which is reflected in the constitutional bounds of sentencing.

[21] Repealing § 74 would permit the Commonwealth to decide between proceeding against a juvenile accused of murder by juvenile court complaint or indictment, with § 72B applying only to the latter defendants. To the extent that leaving § 72B intact is confusing or contradictory, this section should be repealed as well.

"The concept of proportionality is central to the Eighth Amendment," *Graham*, 560 U.S. at 59, and is assessed according to "'the evolving standards of decency that mark the progress of a maturing society.'" *Miller*, 567 U.S. at 469, quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).[22] In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that the Eighth Amendment forbids the execution of intellectually disabled persons. "Because of their disabilities in areas of reasoning, judgment, and control of their impulses...they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306, 321.

> Mentally retarded[23] persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to

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[22] Similarly, under art. 26, evaluating a claim of disproportionality involves inquiry into the nature of the offense and the offender in light of the degree of harm to society; a comparison between the sentence imposed and punishments prescribed for the commission of more serious crimes in the Commonwealth; and a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions. *Perez I*, 477 Mass. at 686.

[23] While *Atkins* used the language "mentally retarded," the Supreme Court and this Court now use the term "intellectually disabled." *See Hall*, 572 U.S. at 704.

> engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 317-18. Accordingly, the Court held, no legitimate penological purpose is served by executing a person with an intellectual disability. Because such individuals are less culpable, their actions do not merit that level of retribution, and their impairments make it less likely that they can be deterred by the possibility of the death penalty. *Id.* at 319-320. Moreover, the integrity of the criminal process is at issue: these persons face "a special risk of wrongful execution" because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel. *Id.* at 320-321.

A parallel thread of jurisprudence deems certain punishments unconstitutionally disproportionate when applied to juveniles. *See Miller,* 567 U.S. at 470, and cases cited; *Diatchenko*, 466 Mass. at 668-671. Taken together, these two strands of jurisprudence provide that children and the intellectually disabled each have diminished culpability based on their impulsivity, poor self-control, and illogical reasoning. These groups also share vulnerability to

outside pressures and criminal environments, making the most severe punishments excessive. *Atkins*, 536 U.S. at 317-321; *Montgomery*, 136 S.Ct. at 733-734.

B. Concepcion proved at trial that he is intellectually disabled.

There is no question that Concepcion falls "within the range of [intellectually disabled] offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 317. An intellectual disability diagnosis comprises (1) intellectual-functioning deficits, indicated by an IQ score approximately two standard deviations below the mean (around 70); (2) adaptive deficits, i.e. "the inability to learn basic skills and adjust behavior to changing circumstances"; and (3) the onset of these deficits while still a minor. *Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017).

There is ample record evidence that all three elements were satisfied here. Based on extensive interviews, direct observation, record review, and standardized testing, Dr. Ayoub concluded that Concepcion had significant intellectual functioning deficits; his full-scale IQ was 66.[24] 10/111-113, 129. Dr. Kelly performed no testing of his own and did not

[24] Because the testing took place after Concepcion had completed over eighteen months of tutoring, the jury could have inferred that this score was higher than if he had been tested at the time of the offense. Dr. Ayoub testified that IQ can increase where a child receives intensive education. 10/125-126.

challenge the accuracy of Dr. Ayoub's IQ test; he offered no empirical support for his conclusion that Concepcion's cognition was "average." 11/65. *Cf. Moore*, 137 S.Ct. at 1049 (Supreme Court precedent does not "license disregard of current medical standards").

Dr. Ayoub also testified that Concepcion lacked age-level adaptive skills. He could not reason like a teenager, and solved problems only by trial and error. 10/225; R. 32. Concepcion was unable to function appropriately with his peers because of his extreme immaturity. 10/224; R. 24-25. The DYS staff needed to help him structure basic activities such as sleeping and eating. 10/225; R. 26-27.[25] Hollenbach testified, based on near-daily observation over two years, that Concepcion functioned like an eight- or nine-year-old, and uncomprehendingly obeyed other children who told him what to do. 8/51, 8/72. Like the defendant in *Moore,* Concepcion experienced failure in both in academic and social settings from an early age. 9/24-25, 41. His limitations were painfully apparent even in his police interview, in which he was unable to consistently spell his own last name or

[25] Dr. Ayoub did not perform standardized testing as to Concepcion's adaptive skills, explaining that it was unnecessary where he was living in a closed facility under constant supervision, such that those skills could be directly observed and documented. 10/223-224.

state his birthdate. 10/15, 20.[26]

[26] *Moore* is highly instructive in interpreting the record in this case, particularly the experts' competing opinions as to Concepcion's intellectual abilities and adaptive deficits. There, the Court rejected the lower court's conclusion that evidence of the defendant's adaptive strengths (i.e. his ability to "live on the streets") overcame the evidence of his adaptive deficits (limited literacy, failing school performance, teasing by peers), and explained that "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits."* *Id.* at 1050. It also criticized the lower court's reliance on the defendant's improved behavior in prison, as "clinicians caution against reliance on adaptive strengths developed in a controlled setting." *Id.* *Moore* further rebuked the lower court's reasoning that the defendant's childhood abuse detracted from a finding that his intellectual and adaptive deficits were related, observing that "those traumatic experiences...count in the medical community as "*risk factors" for* intellectual disability." *Id.* at 1051. Finally, it rejected the finding that the defendant's deficits were more likely caused by "emotional problems" than by intellectual disability: "[t]he existence of a personality disorder or mental-health issue... is not evidence that a person does not also have intellectual disability." *Id.*

Each of these points is material to the assessment of Concepcion's intellectual functioning. Dr. Kelly made unsupported claims that Concepcion possessed "adequate day-to-day street savvy to go about his circumstances," including functioning in a classroom and being in a gang. 11/66. Whatever adaptive strengths he possessed, however, did not outweigh the severe adaptive deficits described *supra*. *See id.* at 1050. Similarly, Concepcion's trauma history and emotional problems do not undermine, much less negate, a conclusion that he also was intellectually disabled. *See id.* at 1051. That he improved his emotional regulation and academic performance during highly structured residential treatment does not demonstrate that he possessed the adaptive abilities to navigate life outside an institutional setting. *See id.* at 1050-1052.

In sum, there was abundant record evidence that Concepcion suffered both intellectual-functioning and adaptive deficits. Had the offense taken place in a death-penalty state, the Eighth Amendment would have precluded the imposition of maximum punishment as a matter of law. *See id.* at 1050.

C. Because Concepcion was intellectually disabled *and* a child at the time of the offense, his doubly diminished culpability warrants a lesser sentence than mandatory life imprisonment.

"[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 536 U.S. at 319. Concepcion falls into two categories that invoke special concerns about unconstitutional punishment: he is intellectually disabled *and* he was a child at the time of the offense. The key concern underlying both strands of jurisprudence is diminished culpability, such that the need for individualized, proportionate punishment is amplified. *Id.* at 306-307; *Miller*, 567 U.S. at 470.[27]

The record makes clear that this double burden was not just theoretical. Dr. Ayoub explained that as to Concepcion's ability to foresee the consequences of his actions, he had "much less capacity than... an average fifteen-year-old. He was really limited

[27] *See also State v. Ryan*, 361 Or. 602, 604 (2017) (considering intellectual disabilities when determining whether non-life mandatory sentence was unconstitutional for juvenile whose "mental age" fell below minimum age of criminal responsibility).

intellectually, and he was really limited psychologically." 10/156. Both his intellectual disability and his youth provide distinct and cumulative bases for a sentence that reflects his lessened moral culpability, diminished grounds for severe punishment, and offender-based barriers to a proportional sentence.[28]

Concepcion is not faced with the death penalty, nor life without the possibility of parole. The touchstone of proportionality animating both juvenile and intellectual disability jurisprudence is not limited to capital cases, however, or even to life sentences. *See, e.g., Perez I,* 477 Mass. at 686 (a juvenile defendant's aggregate sentence for non-murder offenses with parole eligibility exceeding that for murder must be assessed in light of the *Miller* factors).[29] *Miller* made clear that the "distinctive (and transitory) mental traits and environmental vulnerabilities" of juvenile defendants are not crime-specific. 567 U.S. at 473. Similarly, *Atkins*'s

[28] *See also UN Convention On The Rights Of The Child*, Article 37.

[29] *See also State v. Zuber*, 152 A.3d 197, 212-213 (N.J. 2017) (term-of-years sentence with parole eligibility after 55 years triggered protections of *Miller*); *State v. Gilbert*, 438 P.3d 133, 135-137 (2019) (sentencing courts possess discretion to consider downward sentences for juvenile offenders regardless of any sentencing provision otherwise limiting it).

concerns about intellectually disabled defendants reach beyond death penalty cases.[30]

No legitimate purpose is served by subjecting this intellectually disabled child to a maximum punishment, whether execution or a mandatory life sentence. Concepcion's severely compromised ability to reason, foresee consequences, and problem-solve vitiates deterrence as a legitimate purpose served by a mandatory life sentence:

> [I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable — for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses — that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Atkins, 536 U.S. at 320. To a defendant with an IQ under 70, a lifetime in prison is no more of a deterrent than execution. *See* E. Nevins-Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation,* 45 U.C. Davis. L. Rev. 1419, 1483 (2012) (intellectually disabled defendants are "highly unlikely to have the cognitive capacity to

[30] *See, e.g., People v. Coty*, 110 N.E.3d 1105, 1122 (Ill. App. 2018) (requiring *Miller*-type hearing before imposition of discretionary life or de facto life sentence on an intellectually disabled defendant).

perform the cost-benefit risk analysis that underlies any effective deterrence-based strategy").

Moreover, the problem that defendants like Concepcion are categorically more likely to receive maximum punishment also inheres in life sentences. *Atkins* enumerated the possibilities contributing to the "special risk" of wrongful conviction faced by the intellectually disabled: false confessions, lesser ability to make a persuasive showing of mitigation, diminished meaningful assistance to their counsel, being "typically poor witnesses," and that their demeanor may create an unwarranted impression of lack of remorse. *Atkins*, 536 U.S. at 320-321. These concerns are equally apposite to defendants in states that do not have the death penalty. *See Coty*, 110 N.E.3d at 1121.

The possibility of parole does not rescue the constitutionality of Concepcion's life sentence. The same factors that disadvantage the disabled at trial and sentencing also will make achieving parole more difficult, where the defendant's personal presentation and expression of remorse is central to the process. "A State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* 560 U.S. at 75.

In short, a child with the cognitive function of a nine- or ten-year old was sentenced to the most severe punishment any juvenile in Massachusetts can receive: life with the possibility of parole. Concepcion's disability did not shorten his sentence, nor was it even considered, thus violating the principle of proportionality.

Even if this sentence passes muster under the Eighth Amendment, it cannot stand under the more expansively interpreted art. 26. *Cf. Diatchenko*, 466 Mass. at 668-671. The tripartite test for disproportionality is satisfied here. While the nature of the offense is extremely serious, the first prong of the test "also requires consideration of the particular offender," including the "unique characteristics" both of juvenile offenders and intellectually disabled offenders; the analysis is "supplemented with the greater weight given to a juvenile defendant's age." *Perez I*, 477 Mass. at 684. Both of these dimensions diminish culpability and favor shorter sentences because the defendant can comprehend (and thereby benefit from) neither the deterrence nor the punishment purpose of incarceration. A mandatory life sentence for this disabled child thus is categorically disproportionate, and constitutes a substantial likelihood of a miscarriage of justice. This Court should remand for discretionary sentencing

in which the mitigating effects of Concepcion's youth and disability are taken into account, *see infra*.

IV. Concepcion's Youth and Intellectual Disability Were Disregarded In His Sentencing: The Judge Failed To Conduct A Miller Hearing And Imposed An Above-Minimum Life Sentence Based Solely On The Degree Of Homicide.

Even if Concepcion's life sentence was proportional, the sentencing *procedure* in this case was unconstitutional. Children are entitled to individualized, youth-specific consideration before receiving a presumptively disproportionate sentence. *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); *Miller,* 567 U.S. at 479. A hearing is conducted to identify any "extraordinary circumstance where the presumptive disproportionality of a juvenile sentence may have been dispelled," and requires consideration of:

> (1) the particular attributes of the juvenile, including immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds [him] from which he cannot usually extricate himself"; and (3) "the circumstances of the... offense, including the extent of [his] participation in the conduct and the way familial and peer pressures may have affected him.

Perez I, 477 Mass. at 686 (quoting *Miller*, 567 U.S. at

477). "Only after the judge weighs those factors, applies them uniquely to the juvenile defendant, and considers whether a [presumptively disproportionate] punishment...is appropriate in the circumstances, may such a sentence be imposed." *Id.*

Like the defendant in *Perez*, Concepcion received a presumptively disproportionate sentence. The judge applied the 2012 version of G.L. c. 279, § 24, which provided a discretionary range of 15-25 years for parole eligibility, and imposed a twenty-year minimum.[31] Even if the imposition of an above-minimum sentence, standing alone, does not require individualized consideration of youth, certainly the fact that Concepcion was intellectually disabled does: as explained in depth *supra*, section III, his disability exacerbated the characteristics of his youth to the very limits of criminal responsibility. Sentencing Concepcion without regard to his doubly limited culpability at least presumptively violates the precept of proportionality, such that the Eighth Amendment and art. 26 required a *Miller* hearing.

Nothing even approaching a *Miller* hearing took

[31] That version of the statute was enacted on August 2, 2012, just before the offense. G.L. c. 279, § 24, as amended through St. 2012, c. 192, § 46; G.L. c. 127, § 133A, as amended through St. 2012, c. 192, §§ 37-39. *See Commonwealth v. Brown*, 466 Mass. 676, 689 n.10 (2013) (defendant sentenced under version of parole eligibility statute in effect on date of crime).

place in this case, however. Concepcion's sentencing hearing involved no evidence other than two victim impact statements. 12/84-88. The judge referenced none of the *Miller* factors, much less found "extraordinary circumstances" warranting an above-minimum life sentence. Instead, he premised the sentence solely on the degree of homicide:

> In my judgment there has to be some recognition of the fact that this is a first-degree conviction based on extreme atrocity or cruelty that distinguishes it from second-degree where parole eligibility would be at fifteen years. The life sentence on Count 1 of the indictment is mandated by law. I'm going to set a minimum parole date at twenty years. That is recognizing the defendant's age, which of course is what entitles him to parole consideration on a first-degree murder, but I do think that there has to be some recognition of this being a first degree as opposed to a second-degree conviction, and for that reason I will establish a minimum sentence of twenty years.

12/92. Although he stated that he recognized Concepcion's age, that was limited to the general proposition that only children have the opportunity for parole in murder cases. The sentence did not reflect *any* facts specific to Concepcion, much less the mitigating aspects of his personal attributes, his upbringing, or the circumstances of his offense.

The judge's stated rationale – to distinguish first-degree murder from second-degree – cannot satisfy *Perez's* mandate. His exclusive focus on the

criminal conduct contravenes this Court's instruction to separately consider and make findings on a child's personal characteristics:

> The juvenile's personal and family history must also be considered independently; this consideration of the individual's personal and family history is also not the ordinary mitigation analysis associated with sentencing. We emphasize today that both the crime and the juvenile's circumstances must be extraordinary to justify a longer parole eligibility period.

Commonwealth v. Perez ("*Perez II*"), 480 Mass. 562, 569 (2018). As "the purpose of the *Miller* hearing has not been met in this case," *Perez I*, 477 Mass. at 687, Concepcion must be resentenced.

V. Concepcion's Youth and Intellectual Disability Were Improperly Disregarded In The Jury Instructions.

The trial judge gave or withheld several jury instructions, over defense objection, that should have applied differently to Concepcion due to his age and intellectual disability. While our current science-based understanding of juveniles was first given legal dimension in the context of the Eighth Amendment, it has relevance to jury instructions as well. In *J.D.B. v. North Carolina*, 564 U.S. 261, 272-281 (2011), the Supreme Court held 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." Citing *Roper* and *Graham*, the Court observed that children have a heightened susceptibility to influence or outside pressures; because this characteristic bore an "objectively discernible relationship" to the object of the Miranda analysis – that is, a reasonable person's understanding of his freedom of action – a child's age is "a reality that courts cannot simply ignore." *Id.* at 275-277. Here too, hallmark characteristics of youth – impetuosity, vulnerability, impaired decision-making – are relevant to the instructions discussed below, and the disregard of those characteristics requires a new trial.

A. The trial court erred in instructing the jury that they could infer malice from Concepcion's use of a weapon.

The instructions allowing the jury to infer guilt from the use of a weapon on the elements of intent and malice presumed that Concepcion contemplated and intended the consequences of his actions. 12/51-52, 60. Yet this is precisely what was contested at trial: Concepcion's defense was that he was incapable of forming the requisite *mens rea*, and did not even understand that death would result from a shooting. 10/154-156. Although this instruction has long been the law in Massachusetts, *see Commonwealth v. Odgren*, No. SJC-11573 (Sept. 4, 2019), *slip op*. at 10-13, here its application was prejudicial error.

The instruction effectively informed the jury that the Commonwealth had already proven that Concepcion was a rational actor, unconstitutionally shifting the burden and taking the fact-finding away from the jury. It failed to account for Concepcion's juvenile and disabled status, ascribing to him a normal adult's ability to reason and foresee the consequences of his actions contrary to legal and scientific understanding of the distinctive attributes of youth. Juveniles' diminished decision-making capacities, natural tendencies to engage in impulsive and risky behavior, and failure to properly consider or comprehend long-term consequences are directly relevant to the presumption of intended consequences built into the permissible inference of malice. Given that the jury appeared to accept the defense to the extent it vitiated premeditation, the inference likely played a role in the verdict, requiring a new trial.

B. The jury should have been instructed that a finding of extreme atrocity or cruelty requires specific intent.

The trial judge, consistent with current law, instructed the jury that the *mens rea* for first-degree murder based on extreme atrocity or cruelty was the same as for second-degree murder; there was no requirement that Concepcion intended either to kill the victim or to inflict suffering. *See Commonwealth v. Cunneen*, 389 Mass. 216, 227 (1983); 12/59-60. This

violated federal and state constitutional prohibitions against disproportionate punishment, as well as due process guarantees.

Of the *Cunneen* factors, only the first – indifference to or taking pleasure in the victim's suffering – pertains to the defendant's subjective state of mind.[32] Recently, however, some justices have questioned the fairness of allowing 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. *Commonwealth v. Berry*, 466 Mass. 763, 774-778 (2014) (Gants, J., concurring); *Commonwealth v. Riley*, 467 Mass. 799, 828-829 (2014) (Duffly, J., concurring). As these jurists recognized, the lack of an intent requirement risks a disproportionate punishment: it allows a defendant who intended neither to kill nor to cause grievous bodily harm to be punished as severely as those who intended to torture their victims.

While the absence of an intent requirement has been affirmed since these justices expressed their

[32] The other factors are objective: the victim's consciousness and degree of suffering, extent of physical injuries, number of blows, manner and force with which delivered, instrument employed, and disproportion between the means needed to cause death and those employed. *Id.* at 227. Here, the jury was permitted but not required to consider Concepcion's impairment in determining whether he acted with extreme atrocity or cruelty. 12/58.

doubts, this Court's recent rulings left the door open for a case whose facts raised serious concerns about its fairness.[33] This is precisely such a case. The defense focused squarely on Concepcion's inability to form the intent required for the various forms of homicide and to resist the pressures imposed by adult gang members. The fact that the jury rejected the option of first-degree murder based on premeditation suggests that they accepted this defense to some degree. The evidence of impaired intent and duress makes it reasonably likely that they also would have found insufficient proof that Concepcion intended an extremely atrocious or cruel killing. Thus, the lack of an intent requirement created a substantial likelihood of a miscarriage of justice.

C. The jury should have been instructed on the defense of duress.

The absence of jury instruction on duress was reversible error,[34] in light of the evidence that

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[33] *See Commonwealth v. Alleyne*, 474 Mass. 771, 786 (2016) (declining to modify instruction because facts did not justify it in that case); *Commonwealth v. Brown*, 474 Mass. 576, 591-592 (2016) ("we need not decide the question" because issue was unpreserved and defendant was also convicted of first-degree murder via deliberate premeditation). *But see Commonwealth v. Kolenovic*, 478 Mass. 189, 197 (2017).

[34] Because this issue was raised at trial but clear precedent precluded the defense, the error should be treated as preserved. 10/176, 2/25/16 at 61. *See Commonwealth v. Vasquez*, 456 Mass. 350, 357-358 (2010)

Concepcion shot the victim under threat by the gang, and his age and intellectual disability prevented him from resisting their commands. Concepcion's fear of retaliation from the gang was well documented in the record. Although it did not reach the jury, the prosecution's theory was that the gang had Concepcion kill Martinez because Martinez had implicated a fellow gang member in his grand jury testimony in a murder case. 1/295-300. Concepcion reported that gang members had repeatedly threatened to kill him and his family; he believed they would follow through with those threats regardless of his incarceration. R. 25. Indeed, this defense was deemed to justify severance from his codefendants, who still held sway over him even after his arrest. 8/156-158.[35]

Concepcion was precluded from presenting a defense of duress at trial because Massachusetts does not recognize it as a defense to murder:

> If 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. Persons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting than would those who

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(applying preserved error standard where objection would have been futile).

[35] While awaiting trial, he wrote a letter to the judge attempting to exculpate his codefendants (who were in the same unit); counsel argued this was motivated by his continuing fear of the gang. 8/154-156.

> know they must face the consequences of their acts.

Commonwealth v. Vasquez, 462 Mass. 827, 833-834 (2012). *See also Commonwealth v. Jackson,* 471 Mass. 262, 267 (2015) ("in an intentional killing, the threat of harm to the juvenile claiming duress, even the threat of death, is no greater than the harm to the victim being killed").

This rule rests on the premise that the defendant is making a reasoned choice between courses of action. Here, there was expert evidence of Concepcion's limited ability to resist the pressures imposed by adult gang members and to understand the consequences of his actions, including that he lacked the "ability to understand the full meaning of killing someone" due to his disability and exposure to nonfatal shootings. 10/154, 237-238, 242-243. Concepcion thus could not weigh consequences and choose rationally between shooting the victim - who Concepcion did not realize would die - and remaining in the gang that threatened him. *Cf. Roper,* 543 U.S. at 569 (children are more vulnerable to "negative influences and outside pressures"). Similarly, it is irrational to assume a fifteen-year-old with an IQ of 66 would be more likely to follow a gang leader's orders because he knew that he could claim a legal defense of duress.

In short, Concepcion's youth, disabilities, and trauma history made him prey for the adults who set

him on a man he did not know on the promise that he could escape the gang. The defense of duress should have been available to him at trial, and its absence was reversible error.

D. The jury should have been instructed on involuntary manslaughter.

Concepcion requested an instruction on involuntary manslaughter, which is required where any reasonable view of the evidence will permit the jury to find that the defendant engaged in wanton or reckless conduct resulting in death. 8/193-195, 9/106-109, 10/3-4, 12/7. *See Commonwealth v. Tavares*, 471 Mass. 430, 438 (2015). Although a "reasonable person" standard applies to the degree of risk created by the conduct at issue, it is subjectively premised on what the defendant knew. *Commonwealth v. Sires*, 413 Mass. 292, 303 n.14 (1992). What Concepcion "knew" was limited by his disability, youth, and trauma history, in which he witnessed shootings in which the victim did not die; the expert noted Concepcion's unusual surprise at the fact that the victim died from the shooting, and testified that seeing people survive similar trauma "gave him a very different way of thinking about what it means to hurt someone." 10/155, 237-238.

Thus, while a close-range shooting ordinarily would involve an obvious risk of harm consistent with

third-prong malice, here it involved a risk of substantial harm warranting an involuntary manslaughter instruction. Considering the facts in the light most favorable to the defendant, see *Commonwealth v. Acevedo*, 446 Mass. 435, 443 (2006), the failure to instruct was reversible error.

VI. This Court Should Reduce The Degree Of Guilt Pursuant To Chapter 278, § 33E.

This case presents uniquely compelling grounds for a reduction in the degree of guilt: an extremely vulnerable, low-functioning child was compelled by adults to shoot the victim. Concepcion's age and disability, as well as the coercive circumstances of the offense, reduce his culpability for the offense. Moreover, this Court should also consider the evidence of duress, which is cognizable under section 33E's plenary review even where unavailable as a legal defense. *See Vasquez*, 462 Mass. at 835. A verdict of manslaughter is more consonant with justice.

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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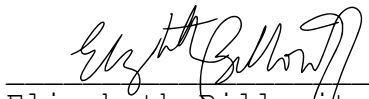
October 7, 2019

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 October 7, 2019:



Elizabeth Billowitz

Certificate of Compliance

I hereby certify that this 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 55 pages long, not counting the parts of the brief excluded by Rule 20(a)(2)(D).

Elizabeth Billowitz

ADDENDUM

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XVII. Public Welfare (Ch. 115-123b)
Chapter 119. Protection and Care of Children, and Proceedings Against Them (Refs & Annos)

M.G.L.A. 119 § 72B

§ 72B. Persons between the ages of fourteen and eighteen convicted of murder; penalties

Effective: July 25, 2014
Currentness

If a person is found guilty of murder in the first degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law for the offense.

If a person is found guilty of murder in the second degree committed on or after his fourteenth birthday and before his eighteenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law. Said person shall be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven when such person has served fifteen years of said confinement. Thereafter said person shall be subject to the provisions of law governing the granting of parole permits by the parole board.

The superior court shall not suspend the commitment of a person found guilty of murder in the first or second degree, nor shall the provisions of section one hundred and twenty-nine C or one hundred and twenty-nine D of chapter one hundred and twenty-seven apply to such commitment. In all cases where a person is alleged to have violated section one of chapter two hundred and sixty-five, the person shall have the right to an indictment proceeding under section four of chapter two hundred and sixty-three.

A person who is found guilty of murder and is sentenced to a state prison but who has not yet reached his eighteenth birthday shall be held in a youthful offender unit separate from the general population of adult prisoners; provided, however, that such person shall be classified at a facility other than the reception and diagnostic center at the Massachusetts Correctional Institution, Concord, and shall not be held at the Massachusetts Correctional Institution, Cedar Junction, prior to his eighteenth birthday.

The department of correction shall not limit access to programming and treatment including, but not limited to, education, substance abuse, anger management and vocational training for youthful offenders, as defined in section 52, solely because of their crimes or the duration of their incarcerations. If the youthful offender qualifies for placement in a minimum security correctional facility based on objective measures determined by the department, the placement shall not be categorically barred based on a life sentence.

If a defendant is not found guilty of murder in the first or second degree, but is found guilty of a lesser included offense or a criminal offense properly joined under Massachusetts Rules of Criminal Procedure 9 (a) (1), then the superior court shall make its disposition in accordance with section fifty-eight.

Credits
Added by St.1996, c. 200, § 14. Amended by St.2013, c. 84, §§ 24, 24A, eff. Sept. 18, 2013; St.2014, c. 189, § 2, eff. July 25, 2014.

M.G.L.A. 119 § 74

§ 74. Limitations on criminal proceedings against children

Effective: September 18, 2013
Currentness

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.

Credits
Amended by St.1933, c. 196, § 1; St.1948, c. 310, § 12; St.1960, c. 353, § 3; St.1964, c. 308, § 6; St.1967, c. 787; St.1985, c. 794, § 5; St.1996, c. 200, § 15; St.2013, c. 84, §§ 25, 26, eff. Sept. 18, 2013.

M.G.L.A. 119 § 74, MA ST 119 § 74
Current through Chapter 66 of the 2019 1st Annual Session

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Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 26

Art. XXVI. Excessive bail or fines; cruel or unusual punishments

Currentness

ART. XXVI. No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

M.G.L.A. Const. Pt. 1, Art. 26, MA CONST Pt. 1, Art. 26
Current through amendments approved August 1, 2019

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United States Code Annotated
Constitution of the United States
Annotated
Amendment VIII. Excessive Bail, Fines, Punishments

U.S.C.A. Const. Amend. VIII

Amendment VIII. Excessive Bail, Fines, Punishments

Currentness

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S.C.A. Const. Amend. VIII, USCA CONST Amend. VIII
Current through P.L. 116-58. Some statute sections may be more current, see credits for details.

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