No. _____

In The
Supreme Court of the United States

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Steven James,
Petitioner

v.

Commonwealth of Massachusetts
Respondent

———u———

On Petition for Writ of Certiorari
to the Massachusetts Supreme Judicial Court

———u———

APPENDIX TO PETITION

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COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
PLCR1994-95293-97

COMMONWEALTH

vs.

STEVEN JAMES

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

On April 11, 1995, 17 year old Steven James ("James") was convicted of first degree murder by reason of extreme atrocity or cruelty for beating Edward Sullivan to death with a baseball bat. Thereafter, the Supreme Judicial Court affirmed his conviction. See Commonwealth v. James, 427 Mass. 312 (1998). He now moves for a new trial on the grounds that the closure of the courtroom during jury selection violated his right to a public trial, and he received ineffective assistance of counsel in numerous respects.

James further moves for a new trial arguing that based on new scientific evidence about juvenile brain development and recent U.S. Supreme Court and Supreme Judicial Court case law, the following are unconstitutional as applied to 17 year old juveniles: the law in effect at the time of his trial concerning the transfer of murder defendants to Superior Court, the law relating to the suppression of statements to police, the jury instructions on homicide, and the homicide sentencing statute. In addition, James contends that he is entitled to a new trial because the grand jury was not instructed on the law of homicide, and the trial jury was not allowed to consider a "juvenile mitigation defense." Finally, he argues that newly discovered evidence would have had an impact on the jury's deliberations. James filed three separate motions for funds to retain a parole expert,

a psychiatric/rehabilitation expert, and an adolescent brain expert, which this Court allowed.

For the reasons discussed below, the defendant's motion for a new trial is **DENIED** without an evidentiary hearing.

BACKGROUND

On April 19, 1994, James was indicted in Superior Court on one count of murder, three counts of assault and battery, and one count of assault and battery with a dangerous weapon. The jury heard the following evidence at trial. On the evening of February 21, 1994, 17 year old James went out with several of his friends, including Maurice Pope, Steve DiRenzo, John Uminski, Jay Hanson, and Eric Johanson. Johanson drove the group to the Timberland Bowling Alley in Abington. The group remained inside the bowling alley less than five minutes. While there, Tracey Flynn heard James say to DiRenzo, Hanson and Johanson, "We are looking for someone to fuck up." As the group drove out of the parking lot, they saw two young men they did not know, Robert Hall and Kevin Flanagan, walking toward the bowling alley. Hall was wearing a cowboy hat. Hanson yelled out, "Nice hat" and someone else in the car yelled, "Hey pussy." Hall and Flanagan did not respond.

Johanson backed up the car and James, Uminski, DiRenzo and Hanson got out and ran after Hall and Flanagan. James ran up to Flanagan and punched him in the head. James then ran after Hall yelling, "I'm on your ass," and hit him in the back of the head. When Hall fell to the ground in a fetal position, James crouched over him and punched him in the head about seven times and kicked him the ribs and knee about three times. Meanwhile, Uminski, Hanson, and DiRenzo punched and kicked Flanagan. After James got up and ran back to the car, Hall went into the bowling alley bathroom, passed out, and was taken to the hospital for his injuries. Back in the car, some of the group bragged about the fight and laughed, but James told Pope that when he fights, he

blanks out and does not think about what he is doing.

The group next drove to Tedeschi's where they met up with another car driven by Howie Peterson, who was with Steven Adamo and Dave Cook. Hanson got into Peterson's car. Both cars proceeded to the Whitman Fun Center, where they encountered Keith Ricketson. As Ricketson left the Fun Center, Uminski ran up and hit him in the back of the head. As Ricketson crouched on the floor covering his head, James stood over him and punched him several times in the head, face, and body, as did two or three other teenagers. When Pope went over to break it up, James ended up hitting Pope because he was out of control. Back in the car, James told Pope that when he gets mad, he cannot control himself. The others in the car were bragging about the incident, but it seemed to Pope like James did not know what he had done.

Both cars then proceeded to the D'Angelo's parking lot in Rockland. DiRenzo got into a verbal altercation with a man in a parked van, Edward Sullivan, calling him a pussy and challenging him to get out of the van and fight. DiRenzo threw a plastic bottle at Sullivan, who then exited the van. DiRenzo charged at Sullivan, who held him off with a baseball bat retrieved from the van. Sullivan never swung the bat or hit anyone with it. DiRenzo yelled to his friends that Sullivan had a bat and was going to kill him.[1] James, Hanson, and Uminski ran over and joined in taunting Sullivan, who attempted to shoo them away with the bat. Hanson began rummaging through a trash barrel in the parking lot. Uminski ran around to the back of the van and slammed the door on Sullivan, who stumbled almost to the ground. James then grabbed the bat. At that point, Pope returned to the car because he knew there would be a fight. As he did so, he heard the sound of glass breaking.

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[1]One witness testified that she initially told police that DiRenzo yelled that he thought Sullivan had a gun.

A group of about six people, including James, converged on Sullivan, hitting and kicking him as he lay face down on his stomach. Sullivan did not fight back and repeatedly pleaded, "enough." James picked up the bat and jumped around swinging it. He then hit Sullivan three times in the head, using both hands to swing the bat. Witnesses heard glass breaking as the assailants fled the scene. Back in the car, Uminski laughed and stated, "No one will ever fuck with us again." James, who was crying, told Pope that he had hit the man three times with the bat and could not believe what he had done. When Pope asked him why, James repeatedly stated that he did not know why he had done it. Later that night, witnesses observed James laughing and crying at the same time, stating that he had cracked a guy over the head with a bat and could not believe what he had done. James told Cook that he had hit the guy three times with the bat and felt it go through his skull, and that he had called his mother to tell her what he had done. He reassured his mother that she had done the best she could and said he was "going on the run."

When a responding police officer arrived on the scene, he found Sullivan laying on the pavement with a large, thick pool of blood around his head. His body was "pulsating" but he was unresponsive. There was clear and green broken glass around his head. Sullivan appeared to be drowning in his own blood, leading the officer to lift his head up so he could breathe. Sullivan's head was "pretty well broken up." Police found a bloody wooden baseball bat with a cracked handle about 15 feet away from Sullivan's body. An EMT called to the scene observed glass fragments in Sullivan's face and hair, which was dripping wet with blood and beer, and a large hole in the back of his head. Following two days in the hospital, Sullivan died from a severe head injury. The jury heard evidence that later that evening, James called the police station and reported that he thought he had killed someone with a baseball bat. James returned to the crime scene and approached Sergeant Fritton, who read him *Miranda* rights, arrested him, and brought him to the police station.

James appeared scared but did not have any difficulty communicating with police. After he was booked, James agreed to speak to police in a videotaped interview. He was slightly agitated and nervous but coherent. James's videotaped statement was played for the jury. James told police that DiRenzo was over by the van, looking scared, and called the others over. James stated that Sullivan did not swing the bat, even once, and there was no issue of self-defense. James said that he grabbed the bat when Sullivan fell and the others were punching Sullivan on the ground. Because the others were not punching Sullivan in the head, James took three full swings at his head with the bat. James stated that Sullivan went limp after the second hit, and the third hit went right through Sullivan's skull. James stated that when he saw a bottle shatter on Sullivan's head, he ran away.

The medical examiner testified that Sullivan had contusions on his chest consistent with being kicked or punched, and multiple abrasions on his hands, knees, right hip, left elbow, right forearm, and lip. Sullivan also had two black eyes and lacerations on his nose and forehead consistent with having been hit with a glass bottle. Sullivan had three distinct blunt object lacerations on the back of the head which were inflicted with enormous force with a club-like object. These lacerations were associated with massive fracturing of the back of the skull, which was "shattered like an eggshell," and tearing and laceration of the brain from pieces of the skull. The cause of Sullivan's death was multiple blunt force injuries to the head, each of which was itself potentially fatal.

Pope, who worked with James at Burger King, testified that James often exploded at their supervisor over small things. On the night of the murder, the supervisor had attempted to fire James, who had received three prior warnings, but he quit first. Pope testified that beginning in the fall, James was regularly getting into trouble with his fists.

Lani Nicholson, a psychiatrist in the child and adolescent unit of South Shore Mental Health,

testified for the defense that James became her patient in August of 1992. She diagnosed James with impulse control disorder but not intermittent explosive disorder, which under the DSM-III[2] required that there be no aggressive or assaultive behavior in between the aggressive outbursts. She continued to treat James until the time of his arrest. By the time of trial, the diagnostic criteria had changed in DSM-IV, and Dr. Nicholson diagnosed James with intermittent explosive disorder, characterized by repeated episodes of failure to resist aggressive impulses involving the infliction of injury on others. At the time of the attack on Sullivan, James had been prescribed Haldol, an anti-psychotic medication used to control agitative, assaultive behavior; Inderal for impulsive, aggressive behavior; and Lithium as a mood stabilizer. Dr. Nicholson testified that James took these medications orally under the supervision of his foster mother, and she believed he was compliant with the regimen, based in part on his blood tests. She opined that if he failed to take the prescribed medication, he would be at higher risk for impulsive, assaultive behavior.

Dr. Nicholson testified that James had a history of "mouthing off" at school and work, which she considered to be impulsive behavior. He also had a history of assaultive behavior at his residential placements and other school settings. Dr. Nicholson testified that psychological testing showed that James had significant emotional problems that affected his ability to behave in a socially appropriate manner. She noted that he had a long history of different placements since entering DSS custody at the age of five or six.

Dr. Nicholson saw James five days before the murder and he appeared to be serious, thoughtful, and stable. Since 1992, James's behavior had steadily improved and he increasingly remained in control of his aggressive outbursts. He had gone from a residential placement to a foster

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[2]The DSM is a manual, published by the American Psychiatric Association, used by clinicians and researchers to diagnose and classify mental disorders.

home. He held a job, attended public school, was on the football and wrestling teams and had not physically attacked anyone in those settings. Dr. Nicholson agreed that James was not completely unable to control his actions. In October of 1993, James's social worker noted that James was looking forward to taking driver's education and purchasing a car, discussed future goals, and did not want constant fighting to interfere. Dr. Nicholson agreed that this showed James had the capacity for goal oriented thinking. Dr. Nicholson was asked to assume that a 17 year old with impulse control disorder was warned five times about his behavior at work and quit his job, got into a physical confrontation at a bowling alley, went to an arcade and had a further physical confrontation, and went to a parking lot where his friend yelled to him and he saw a six foot man with a baseball bat confronting his friend. Dr. Nicholson opined, to a reasonable psychological certainty, that such a situation could provoke an outburst grossly out of proportion to the circumstances.

Forensic psychologist Paul Nestor testified that he met with James three times for a total of twelve hours of interviews and tests. James was of low to average intelligence, read at a fourth grade level, and could complete arithmetic at a sixth grade level. Minnesota Multiphasic Personality Inventory testing showed that he scored in the abnormal range on scales for schizophrenia and mania. Dr. Nestor reviewed James's records and learned that James's mother was 14 or 15 at the time of his birth and abandoned him when he was two. James became a resident of the Kennedy Memorial Hospital and was diagnosed with cerebral dysfunction of unknown etiology. He then bounced from different treatment and long-term care facilities and foster homes for most of his childhood. He was expelled from the Taunton Public School system when he was eight years old.

Dr. Nestor's testing of James revealed some problems with impulsivity as well as a conduct disorder. In November of 1991, South Shore Mental Health diagnosed James with posttraumatic

stress disorder and impulse control disorder. Dr. Nestor explained that a patient with impulse control disorder is unable to control aggressive impulses and reacts completely out of proportion to the circumstances. In 1991, James was prescribed Lithium and Inderol to control his impulsivity, aggression, and mood swings. In December, his social worker noted that he had been showing increased aggression with minimal to no provocation. In 1992, James was suspended from school several times for physical and verbal aggression. In February of 1992, James was diagnosed with severe and enduring impulse control disorder. Dr. Nestor noted that James's dosage of Mellaril was reduced at the end of the year. In January of 1993, Dr. Nicholson noted in James's file that even with medication, he suffered from verbal and physical aggressiveness, agitation, inability to calm himself, poor socialization skills, and disorganized thinking. In March of 1993, James admitted that he was not taking his Mellaril. In April of 1993, Dr. Nicholson began treating him with Haldol, a major tranquilizer used as an anti-psychotic medication. Dr. Nestor testified that the medical records showed that James was badly beaten up in late October of 1993 and expelled from school.

Dr. Nestor opined to a reasonable degree of psychological certainty that James suffered from intermittent explosive disorder, a specific type of impulse control disorder. He formed this opinion based on the diagnostic criteria of the DSM-IV: failure to resist aggressive impulses, a reaction completely out of proportion to the provocative stimulus, and episodes that are discrete and short-lived and not caused by another mental disorder. Dr. Nestor opined that James's conduct at the bowling alley and the Whitman Fun Center were attributable to the conduct disorder but that his use of the bat to kill Sullivan was more consistent with intermittent explosive disorder. Dr. Nestor found it significant that James did not bring the baseball bat to the altercation and opined that James did not intend to use the bat as a weapon. James told Dr. Nestor that he did not think that a bat could hurt someone that badly. Dr. Nestor opined that given James's age and emotional development, he

did not understand the lethality of the bat. Dr. Nestor opined that while hitting Sullivan with the bat, James was out of control and could not control himself due to intermittent explosive disorder. James's tearful reaction after the incident was consistent with impulse control disorder, in that he acted impulsively and thought about the consequences after the fact, feeling remorse and shame. On cross-examination, Dr. Nestor agreed that James had a diminished but still substantial capacity to appreciate the wrongfulness of his conduct. Dr. Nestor agreed that the fact that James was in a group may have influenced his behavior.

The Commonwealth then presented testimony by forensic psychiatrist Martin Kelly, who interviewed James and examined his medical and other records. Dr. Kelly agreed that James had a problem controlling his impulses but disagreed that it amounted to an impulse control disorder. Dr. Kelly opined that James suffered from a conduct disorder, but not from intermittent explosive disorder, which requires that the person display a pattern of outbursts, not just selective outbursts, and lose control and be aggressive no matter the circumstances. Dr. Kelly opined that James did not have any mental disease or defect that prevented him from being able to premeditate, form a specific intent, or act in a cruel or atrocious manner. Dr. Kelly testified that premeditation requires only a second or less than a minute, and James's statement about "fucking someone up" demonstrated specific intent and premeditation. Dr. Kelly opined that James's action in picking up the bat during the altercation also demonstrated specific intent and premeditation. Dr. Kelly conceded that James was on several major psychiatric drugs to treat his symptoms, and that he had a history of physical aggression throughout his life.

On April 11, 1995, the jury returned a verdict of murder in the first degree by reason of extreme atrocity or cruelty, and this Court (Steadman, J.) sentenced James to life in prison with no

possibility of parole.[3] Upon direct appeal, James argued that there was insufficient evidence of extreme atrocity or cruelty, his videotaped confession should have been suppressed, the jury instructions failed to adequately address the impact of his mental impairment from intermittent explosive disorder on extreme atrocity or cruelty, the jury instructions failed to address the relationship between mental impairment and sudden combat, and the judge erred in failing to re-instruct the jury on manslaughter. The Supreme Judicial Court rejected these arguments and upheld the murder conviction. See Commonwealth v. James, 427 Mass. 319 (1998). Thereafter, James filed for habeas corpus relief challenging the admissibility of his confession, but such relief was denied. See James v. Marshall, 322 F.3d 103 (1st Cir. 2003).

In connection with his new trial motion, James has submitted copious medical records and Department of Social Services records, which reveal that he lived with his mother until he was almost three years old, at which time he lived with his father for several years. The records indicate that both parents were neglectful and physically abusive. In February of 1983, when James was six years old, his father voluntarily placed him in the custody of the Department of Social Services and he was admitted to the Kennedy Hospital for in-patient treatment. That year, James was evaluated for concerns about learning difficulties and difficult behavior, including physical fighting with other children, purposeful self-injury, and aggressive swearing with adults. He was diagnosed with cerebral dsyfunction of unknown etiology. He was given an Individualized Education Program, which described him as neurologically impaired and exhibiting many impulsive and destructive behaviors. After a failed foster placement due to his aggressiveness, he was placed in a short-term residential placement at the Nazareth Child Care Center, although he maintained contact with his

[3]James was also convicted of assault and battery on Kevin Flanagan, assault and battery and assault and battery with a dangerous weapon on Robert Hall, and assault and battery on Keith Ricketson.

foster mother. In 1984, James's therapist noted that he engaged in self-abusiveness, daily fights at school without any provocation, and sexualized behaviors. He was diagnosed with Conduct Disorder, socialized non-aggressive. While at Nazareth, he was described as "very difficult to control, very aggressive and defiant, and at times displays suicidal gestures and ideation."

In 1985, James was placed at the Robert F. Kennedy Children's Center. A December 1986 conference report stated that James exhibited very aggressive and provocative behavior, had destroyed his personal property, and punched and kicked holes in the walls of his room and ripped his door off the hinges. The report describes James as a physically and verbally aggressive boy who was very impulsive in his actions, with self-destructive tendencies and low self-esteem due to feelings of loss and abandonment by adults in his life. The report further described him as "a very damaged child."

In 1986, James was given a psychiatric evaluation due to verbal and physical threats to his peers and staff at his residential school. Possible dyslexia and attention deficit disorder were noted and it was noted that he was on trials of Imipramine and Mellaril at that time. Projective tests indicated that James had "some extreme emotional and psychological deficits," including poor reality testing and judgment, with a lack of common sense and practical thinking. A February 1986 proposed service plan stated that James "is a verbally and physically aggressive boy who is very impulsive in his actions. [He] has a low frustration level and poor self-esteem due to feelings of loss and abandonment by adults in his life."

In April of 1987, James was diagnosed with Attention Deficit Disorder, with a note in his file that the use of medication should be considered. At that time, his foster mother was appointed as his legal guardian. A report in May of 1987 described him as "still an extremely disturbed child emotionally with severe psychological defects . . . Of greatest importance, is his inability to perceive

reality in an appropriate way. His critical thinking skills are impaired." An October 1987 Report of Neuro/Psychological Examination noted that he experienced a chaotic, unstable early childhood as a result of abandonment by his parents, leading to permanent DSS custody and placement in numerous different foster homes. He was removed from three different foster homes due to impulsivity, aggression and constant disobedience and threatening behavior, and placed in a series of residential treatment facilities. Educational testing revealed an average IQ, a learning disability, low self-esteem, and behavioral issues which interfered with learning. The examiner reported emotional problems leading to serious forms of aggression, including placing himself in danger and fantasizing about harming younger children and animals. James was attending twice monthly psychotherapy sessions at that time. James was scheduled to be terminated from his residential placement at the Robert F. Kennedy Children's Center that month and experienced a drastic decline in his behavior, resulting in extremely defiant and aggressive behavior. However, the report noted that James had made significant progress at the Center in controlling his aggressive behavior.

James was placed in the Children's Study Home where he was described as showing the following symptoms in a June 3, 1988 evaluation: verbal and physical aggression, difficulty accepting limits, low self esteem, impulsiveness, and low frustration tolerance. In July of 1988, his psychiatrist recommended Disiprimine to help James control his behavior and ADD. In October of 1988, James's foster mother resigned her guardianship. In November of 1988, James exhibited a pattern of aggressive behavior including "an unusually high number of restraints and incidents of physical aggression over the last few months." A November 1988 psychological evaluation noted that James functioned in the mid to high-average range, but once upset, lost the ability to control his aggression, making him a threat to anyone in his presence. James was discharged from the Children's Study Home in December of 1988 and entered Our Lady of Providence Residential

School. His quarterly educational progress report indicated that he initially displayed very violent and unsafe behaviors which sometimes required restraints and kept him out of the classroom most of the time. He also ran away from the school on more than one occasion.

A June 18, 1989 psychological evaluation concluded that James was "a seriously disturbed boy who has tried to master the chaos in his world by riding the whirlwind, by proactively seizing the initiative in harmful encounters rather than passively enduring them." In August of 1989, James was discharged from Our Lady of Providence because of his uncontrollable aggressive behavior and his "intensely volatile personality," with a recommendation for a more secure facility and intense psychotherapy. In 1990, James was placed with the long term foster care program Mentor Inc., residing in a foster home and attending weekly counseling at the Whitman Counseling Center. In May of 1991, he was summonsed into Barnstable District Court on charges of malicious destruction of property, and in August was placed in an Old Colony YMCA facility. In September of 1991, James was diagnosed with post-traumatic stress disorder and affective and impulse disorder during a two month stay at the Somerville Hospital Adolescent Psychiatric Unit and prescribed Lithium, Inderal, and Benadryl. He was then placed in the South Shore Educational Collaborative Residential Program. In 1992, James was diagnosed with impulse control disorder characterized by explosive outbursts and prescribed Mellaril, Lithium, and Inderal.

In 1993, James resided in a foster home and attended Rockland High School. In late October of 1993, James was the victim of an assault and battery at Rockland Plaza by two teenagers, one of whom was later convicted of murdering two men in Brockton. James suffered a concussion and a facial injury in this attack. James was expelled from Rockland High School on November 3, 1993 for carrying brass knuckles at school on October 28.

In support of his new trial motion, James has also submitted numerous articles published in

psychological and criminal justice journals concerning adolescent brain development and juvenile justice. "Adolescent Development and Juvenile Justice," an article published by Laurence Steinberg in the *Annual Review of Clinical Psychology* (October 2008), states that based on brain development, adolescents do not achieve adult levels of social and emotional maturity until late adolescence or early adulthood, making them more susceptible to peer influence, less oriented toward the future, more sensitive to short-term rewards, and more impulsive and prone to take risks. The article concludes that adolescents should be viewed as inherently less culpable than adults for their crimes and punished less severely. Similarly, in "Should the Science of Adolescent Brain Development Inform Public Policy?" published in *Issues of Science and Technology* (Spring 2012), Steinberg argues that although immature adolescent brain development is not a disease, mental illness or defect, it is relevant to assessing culpability because neuroscience supports the notion that some aspects of criminal behavior may be beyond an adolescent's control. However, Steinberg suggests that neuroscience is more useful in setting general social policy, such as the jurisdiction of the juvenile court, than in determining the adjudication of individual criminal cases.

"Less Capable Brain, Less Culpable Teen?," published by Kristen Burillo in *The Civic Column* (September 2010), notes that MRI studies show that the pre-frontal cortex, which controls executive functions such as planning, judgment, insight, self-evaluation and emotional regulation, is the last area of the brain to mature. Adolescents therefore rely heavily on other areas of the brain, such as the limbic system, which controls socioemotional functions. In addition, the communication between different parts of the adolescent brain is not yet perfected through the processes of synaptic pruning and myelination. This leads adolescents to risky, impulsive behavior when emotionally aroused or in the presence of peers, and to seek immediate rewards, which are more emotionally arousing. Dopamine levels during adolescence also impact the perception of risks and rewards.

Burillo concludes that based on their immature brain development, juveniles are less culpable than adults.

"Affiliation With Antisocial Peers, Susceptibility to Peer Influence, and Antisocial Behavior During the Transition to Adulthood," published by Kathryn Monahan, Laurence Steinberg and Elizabeth Cauffman in *Developmental Psychology* (2009), describes a study of serious juvenile offenders ages 14 through 22 to measure affiliation with antisocial peers and resistence to peer influence over the course of five years. The study found that in early to mid-adolescence, antisocial behavior is influenced by both affiliation with antisocial peers and socialization (peer influence on one's own antisocial behavior), while in late adolescence it is influenced only by socialization.

"Peers increase adolescent risk taking by enhancing activity in the brain's reward circuitry," published by Jason Chein, Dustin Albert, Lia O'Brien, Kaitlyn Uckert and Laurence Steinberg in *Developmental Science* (2010), describes a study of 40 subjects between the ages of 14 and 29 using a simulated driving game in which risk taking was encouraged by monetary incentives. The game was performed both alone and while observed by peers, with a functional MRI used to measure brain activity. The study found that the adolescents, but not the adults, took more risks when observed by their peers, and that adolescents showed greater activity in the incentive processing system of the brain, the ventral striatum and orbitofrontal cortex, when they made decisions about risk in the presence of their peers, whereas adults showed more activity in the prefrontal cortex, which governs deliberative decision-making by keeping impulses in check.

"Braking and Accelerating of the Adolescent Brain," published by B.J. Casey, Rebecca Jones and Leah Somerville in the *Journal of Research on Adolescence* (2011), reviews numerous MRI and other brain development studies and concludes that the pre-frontal cortex, the portion of the brain that controls emotion, behavior and the evaluation of risks and rewards, does not fully develop until

late adolescence or early adulthood. Adolescents therefore rely more heavily on different areas of the brain, such as the limbic system, to make decisions and judgments, and are more emotional and impulsive in doing so.

"Premotor functional connectivity predicts impulsivity in juvenile offenders," published by Benjamin Shannon et. al. in *Proceedings of the National Academy of Sciences* (July 5, 2011), examines functional MRI activity in juvenile offenders and typical young adults and concludes that there was better functional connectivity with the premotor cortex, which governs attention and control, in young adults and less impulsive juveniles that there was in more impulsive juveniles.

In further support of his new trial motion, James has submitted a 2013 article highlighting the changes between the DSM-IV-TR and the DSM-5. With respect to intermittent explosive disorder, those changes are summarized as follows:

> The primary change in DSM-5 intermittent explosive disorder is the type of aggressive outbursts that should be considered: physical aggression was required in DSM-IV, whereas verbal aggression and non-destructive/noninjurious physical aggression also meet criteria in DSM-5. DSM-5 also provides more specific criteria defining frequency needed to meet criteria and specifies that the aggressive outbursts are impulsive and/or anger based in nature, and must cause marked distress, cause impairment in occupational or interpersonal functioning, or be associated with negative financial or legal consequences.

DSM-5 clarifies, as part of the diagnostic criteria, that "[t]he recurrent aggressive outbursts are not premeditated (i.e., they are impulsive and/or anger-based) and are not committed to achieve some tangible objective (e.g., money, power, intimidation)." Under the subheading, "Risk and Prognostic Factors," DSM-5 states: "Individuals with a history of physical and emotional trauma during the first two decades of life are at increased risk for intermittent explosive disorder." It further states:

> Research provides neurobiological support for the presence of serotonergic abnormalities globally and in the brain, specifically in

> the areas of the limbic system (anterior cingulate) and orbitofrontal cortex in individuals with intermittent explosive disorder. Amygdala responses to anger stimuli during functional magnetic resonance imaging scanning, are greater in individuals with intermittent explosive disorder compared with healthy individuals.

In addition, James has submitted the affidavit of Patricia Garin, a partner at the firm Stern, Shapiro, Weissberg & Garin who focuses on criminal defense and prisoner rights, with a concentration on issues relating to parole. Garin notes that in 2011 and 2012, the Parole Board did not grant parole to any inmates serving parole eligible life sentences for crimes committed when they were juveniles. She further notes that as of March 1, 2013, the current Parole Board had issued nineteen decisions for juvenile lifers and did not appear to consider youth to be a mitigating factor in rendering its decisions. The Parole Board applied the Guidelines for Life Sentence Decisions to juvenile offenders even though they do not include any of the factors discussed in the recent United States Supreme Court cases *Roper*, *Graham*, and *Miller*. Garin notes that a prisoner's institutional history is an important factor in parole, but adolescents who enter the Department of Correction typically adjust poorly to prison culture and have many disciplinary reports in their first three to five years of incarceration. Garin opines that juvenile lifers need the assistance of counsel at their parole hearings, which require at least 100 hours of preparation.

Finally, James has submitted the affidavit of Frank DiCataldo, a licensed psychologist and designated forensic psychologist who has conducted hundreds of evaluations of criminal defendants with respect to competency to stand trial, criminal responsibility, sentencing, violence risk, and civil commitment. His research specialty is in the area of risk assessment of juvenile offenders, the post-release adjustment of juvenile homicide perpetrators, and the assessment of sexually abusive juveniles. DiCataldo has examined all of the relevant legal and medical documents in James's case.

DiCataldo explains that recent research in developmental psychology and neuroscience show

that adolescent brains are not yet fully developed in areas related to impulse control, decision-making, planning, and the calculation of risk. Because adolescents' prefrontal cortex is not full developed, they have underdeveloped control of impulses, accurate risk assessment, and management of anger and aggression. Adolescents therefore are less likely than adults to inhibit impulsive decisions and behavior and to consider alternative courses of action. They act impulsively and emotionally and are less capable of thinking ahead and weighing the risks and benefits of their behavior.

DiCataldo opines that at the time 17-year old James killed Sullivan on February 21, 1994, he was vulnerable to underdeveloped psychological capacities including lower capacity for emotional regulation, immature judgment, poor impulse control, and greater vulnerability to peer influence. He further opines that James was suffering from a mental impairment that substantially reduced his ability to control or inhibit his emotional reaction and behavior. The recent attack on James by a group of young males in the Fall of 1993 may have impaired his perception and ability to control his emotions and behavior on the night of the homicide.

If permitted to testify at a new trial, DiCataldo would explain to a jury that James was not the ordinary reasonably prudent person contemplated by the law and the reasonableness and criminal degree of his conduct must be viewed in connection with his still-developing adolescent brain and his mental disorders. DiCataldo would testify that James cannot be considered an "ordinary person" for purposes of provocation because his juvenile brain and mental health diagnoses made it more likely that any perceived provocation would incite impulsive passion, anger, and loss of control. Because of James's unique characteristics, he was much more likely than an ordinary person to act impulsively and passionately without reflection in situations involving provocation or sudden combat.

With respect to extreme atrocity or cruelty, DiCataldo would testify that due to his still-developing brain and unique diagnosis, James could act impulsively without reflection and without an intent to apply a particular amount of force, a particular number of blows, or particular injuries inflicted. He opines that given James's diagnoses and adolescent brain, "it is likely that any subsequent swings after the first swing were performed impulsively and with diminished control."

Finally, DiCataldo states that since James's trial, there have been significant advances in the scientific understanding of the Intermittent Explosive Disorder diagnosis, etiology, and clinical characteristics. New research has indicated a moderate genetic influence in the disorder and identified brain abnormalities in individuals with the disorder. A history of childhood trauma and low parental care has been identified as a risk factor for the disorder. The research shows that individuals with the disorder have higher levels of aggression, are more likely to mis-attribute hostile intentions to socially ambiguous situations, and have more immature psychological defenses including acting out. DiCataldo opines that a jury hearing this evidence would likely conclude that James suffered from a mental impairment which impaired his ability to control and regulate his emotions and conduct.

In opposition to James's new trial motion, the Commonwealth has submitted statistics from the Parole Board showing that in 2013, the Board held fifteen life sentence hearings for offenders who were under the age of 18 on the date of their offense. Of those fifteen defendants, eight were granted parole, a parole rate of 53%. In contrast, in 2013, the Parole Board granted parole to only nineteen of the 91 life sentence adult offenders who applied, a parole rate of 21%. Further, since June of 2013, the Parole Board has updated its Guidelines for Life Sentences Decision to provide that "an inmate who committed the offense as a juvenile will be evaluated with recognition of the distinctive attributes of youth, including immaturity, impetuosity, and a failure to appreciate risks

and consequences." Commonwealth v. Noonan, 2014 Mass. Super. LEXIS 95 at *24 (July 21, 2014) (Salinger, J.). Finally, the Commonwealth has submitted copies of several Parole Board decisions granting parole to juveniles convicted of second degree murder. The Commonwealth did not present expert testimony in connection with this new trial motion.

DISCUSSION

A motion for a new trial pursuant to Mass. R. Crim. P. 30(b) may be allowed if it appears that justice may not have been done. Commonwealth v. Scott, 467 Mass. 336, 344 (2014); Commonwealth v. Cavitt, 460 Mass. 617, 625 (2011). The granting of a motion for a new trial is addressed to the sound discretion of the judge. Id.

I. EVIDENTIARY HEARING

James requests an evidentiary hearing on all the issues raised by his motion. The decision whether to hold an evidentiary hearing on a motion for a new trial is within the judge's sound discretion, and a judge may rule on the motion without a hearing if no substantial issue is raised by the motion or affidavits. Commonwealth v. Morgan, 453 Mass. 54, 64 (2009). Evaluation of whether the motion and supporting materials raise a substantial issue involves consideration of the seriousness of the issue itself and the adequacy of the showing made with respect to that issue. Scott, 467 Mass. at 344; Morgan, 453 Mass. at 64. An adequate showing is one which contains sufficient credible information to cast doubt on the issue raised. Commonwealth v. Marrero, 459 Mass. 235, 240 (2011); Commonwealth v. Candelario, 446 Mass. 847, 859 (2006). The judge may consider whether an evidentiary hearing would produce evidence beyond the paper submissions and thus would accomplish something useful. Marrero, 459 Mass. at 241. This Court concludes that none of the grounds raised by James is substantial enough to require an evidentiary hearing, and that his new

trial motion can be resolved justly on the written materials submitted by the parties.

II. VIOLATION OF RIGHT TO A PUBLIC TRIAL

James contends that he is entitled to a new trial because his constitutional rights were violated by the closure of the courtroom during jury selection. He has submitted a copy of an affidavit by Attorney Kevin Reddington submitted to the court in the case *Commonwealth* v. *Morganti*, PLCR1998-00940, averring that prior to 2004, it was common practice in Plymouth County and in the Brockton Superior Court to exclude the public from jury selection proceedings. The defendant has a Sixth Amendment right to a public trial which includes the jury selection process. Commonwealth v. Morganti, 467 Mass. 96, 100-101, cert. den., 135 S.Ct. 356 (2014); Commonwealth v. Lavoie, 464 Mass. 83, 86, cert. den., 135 S.Ct. 2356 (2013). The burden is on the defendant to demonstrate that the public was excluded from his trial. Commonwealth v. Buckman, 461 Mass. 24, 28 (2011), cert. den., 132 S.Ct. 2781 (2012); Commonwealth v. Cohen (No. 1), 456 Mass. 94, 107 (2010).

Assuming, without deciding, that the courtroom was in fact closed to the public during jury selection, James nonetheless is not entitled to a new trial. The right to a public trial, like other structural rights, can be waived through the actions of the defendant or his counsel. Lavoie, 464 Mass. at 88. A procedural waiver of the public trial right occurs when the defendant or his counsel fails to timely object to a courtroom closure at trial and further fails to raise the issue at the first possible post-trial opportunity. Morganti, 467 Mass. at 102; Lavoie, 464 Mass. at 87, n.8. Such a procedural waiver occurs even when the failure to object is inadvertent. Commonwealth v. Wall, 469 Mass. 652, 672 (2014). Here, there has been a procedural waiver because trial counsel did not object to the alleged closure at any point during the trial, and James did not raise the issue in his direct appeal. See Morganti, 467 Mass. at 102; Commonwealth v. Dyer, 460 Mass. 728, 736 (2011),

cert. den., 132 S.Ct. 2693 (2012).

James also seeks a new trial based on counsel's incompetence. Where the defendant contends that counsel's failure to object to a courtroom closure constituted ineffective assistance, the court examines whether counsel's conduct fell below that which may be expected from an ordinary fallible lawyer and whether the defendant suffered prejudice as a result. Commonwealth v. LaChance, 469 Mass. 854, 857 (2014); Commonwealth v. Alebord, 467 Mass. 106, 114, cert. den., 134 S.Ct. 2830 (2014). The failure to object to the exclusion of the public during James's jury selection in 1995 cannot be deemed incompetent, given the custom and practice in many counties and the uncertain state of Supreme Judicial Court precedent at that time. See Alebord, 467 Mass. at 114.

More importantly, James cannot demonstrate the requisite degree of prejudice to be entitled to a new trial. The court will not presume prejudice from counsel's failure to object; rather, the defendant must show that the error created a substantial risk of a miscarriage of justice. LaChance, 469 Mass. at 857-860. Such a risk exists when the court has a serious doubt whether the result of the trial might have been different had the error not been made. Commonwealth v. Roderiques, 462 Mass. 415, 426 (2012); Commonwealth v. Randolph, 438 Mass. 290, 297 (2002). Errors of this magnitude are extraordinary events, and relief is seldom granted. Randolph, 438 Mass. at 297; Commonwealth v. Mora, 82 Mass. App. Ct. 575, 583, rev. den., 463 Mass. 1113 (2012). The court considers the case as a whole and grants relief only if, in the context of the entire trial, the error materially influenced the verdict. Commonwealth v. King, 460 Mass. 80, 85 (2011); Randolph, 438 Mass. at 298.

Applying this standard, James has not demonstrated a substantial likelihood of a miscarriage of justice from the alleged courtroom closure. The exclusion of the public from jury selection will

rarely have an effect on the verdict or undermine the court's reliance on the outcome of the proceeding. LaChance, 469 Mass. at 859. James does not allege that the impanelment was unfair in any respect, that the presence of members of the public would have affected the course of the impanelment, or that the impaneled jury was anything but impartial. See Wall, 469 Mass. at 673; Commonwealth v. Horton, 434 Mass. 823, 832-833 (2001). Because James cannot show that the alleged courtroom closure materially influenced the verdict, there is no substantial likelihood of a miscarriage of justice and his motion for a new trial based on violation of the right to a public trial must be denied.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

James further moves for a new trial on the ground that trial counsel was ineffective in several respects. In analyzing ineffective assistance of counsel under art. 12 of the Massachusetts Declaration of Rights, the court's inquiry is whether there has been serious incompetency, inefficiency or inattention of counsel, conduct falling measurably below that expected from an ordinary fallible lawyer. Commonwealth v. Phinney, 446 Mass. 155, 162 (2006); Breese v. Commonwealth, 415 Mass. 249, 252 (1993).[4] When claiming ineffective assistance of counsel in a capital case, the defendant bears the burden of demonstrating that counsel's conduct created a substantial likelihood of a miscarriage of justice; i.e., that one or more errors by counsel was likely to have influenced the jury's conclusion. Commonwealth v. Cassidy, 470 Mass. 201, 222 (2014); Commonwealth v. Anderson, 445 Mass. 195, 211 (2005).

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[4]If the test for effective assistance of counsel under the Declaration of Rights is met, the requirements of the Federal Constitution are necessarily satisfied as well. See Commonwealth v. Montanez, 410 Mass. 290, 295 n.7 (1991); Commonwealth v. Fuller, 394 Mass. 251, 256 (1985).

A. CLOSING ARGUMENT

James first contends that defense counsel's closing argument was ineffective because counsel stated that there was "overkill" in the assault and noted that James made "atrocious statements on the phone about just having killed a guy." James argues that these comments were inflammatory and amounted to an abandonment of his mental capacity defense. Statements extracted from closing argument must be considered in the context of the entire argument, the evidence at trial, and the judge's instructions to the jury. Cassidy, 470 Mass. at 222; Marrero, 459 Mass. at 245. Subjective critiques of defense counsel's actions are insufficient to support an ineffective assistance of counsel claim absent a showing of an error likely to affect the jury's conclusions. Commonwealth v. Denis, 442 Mass. 617, 625 (2004).

The comments by defense counsel were reasonable in light of the undisputed brutality of the beating endured by the victim, and did not amount to an abandonment of James's defense. The notion that striking Sullivan with a baseball bat three times while he lay on the ground helpless was "overkill" was consistent with the defense theory that James's conduct was the product of an irrational, uncontrollable outburst rather than a premeditated act. It also was consistent with the expert testimony that James did not understand the amount of harm likely to be caused by the baseball bat. See Commonwealth v. Urrea, 443 Mass. 530, 540-541 (2005) (statement in closing that stabbing victim 23 times was "excessive" was not improper concession on extreme atrocity or cruelty where defense counsel clearly argued that due to mental impairment, defendant did not understand the extent of the harm he was inflicting). Similarly, the comment about James making "atrocious" statements by telling police that he killed someone and felt the bat go through his head was simply an acknowledgment of the brutality of the killing. This Court discerns no error in these

comments that would have influenced the jury's conclusions. See Marrero, 459 Mass. at 244.

James also argues that counsel deprived him of his defense by characterizing it as one of "diminished capacity" and referring to the expert testimony as "mental stuff." No aspect of a trial is more important than the opportunity to marshal the evidence favorable to the defense to create a reasonable doubt before submission of the case to the jury. Commonwealth v. Farley, 432 Mass. 153, 157 (2000). A summation which leaves a client denuded of a defense constitutes ineffective assistance of counsel. Commonwealth v. Triplett, 398 Mass. 561, 569 (1986). James is correct that Massachusetts does not recognize a defense of "diminished capacity" as such. See Commonwealth v. Sleeper, 435 Mass. 581, 593 (2002). However, when considered in its entirety and in the context of the evidence, defense counsel's argument adequately conveyed the theme of the defense: James suffered from a mental disorder which precluded him from premeditating the attack and harboring malice, and further precluded him from controlling his actions and appreciating the severity of the injury that would be caused by the baseball bat. See Urrea, 443 Mass. at 535 (describing mental impairment defense). See also Sleeper, 435 Mass. at 603-604 (defendant not prejudiced by defense counsel's use of term "insane" as colloquialism to describe defendant's distraught state of mind where it was clear to jury that defense was mental condition which affected ability to form intent). Cf. Triplett, 398 Mass. at 569 (closing argument urging jury to believe key prosecution witness's testimony, which contradicted defendant's testimony with respect to circumstances of shooting, eroded any theory of voluntary manslaughter and denuded client of his defense); Commonwealth v. Westmoreland, 388 Mass. 269, 273-274 (1983) (closing argument which failed to mention expert testimony supporting insanity defense or inability to premeditate, and focused instead on voluntary manslaughter although there was no evidence of provocation, was abandonment of realistic defense constituting ineffective assistance); Commonwealth v. Street, 388 Mass. 281, 284-285 (1983)

(closing argument which failed to argue insanity based on substantial expert testimony and instead argued for second degree murder constituted abandonment of defense and ineffective assistance of counsel). Although the reference to "mental stuff" was not eloquent, it would have been apparent to the jury that defense counsel was referring to the expert testimony about James's intermittent explosive disorder. See Denis, 442 Mass. at 627-628 (one can always craft more eloquent and forceful closing in hindsight).

Finally, James argues that the closing argument deprived him of a defense because counsel failed to address provocation, sudden combat, excessive force, or defense of another. The trial transcript reveals that defense counsel informed the judge that he was not requesting self-defense instructions and the judge, on the record, opined that it was a reasonable tactic, in light of the evidence and the focus on the mental disorder defense. Moreover, with respect to defense of another, at the moment he hit Sullivan with the bat, Sullivan was face down on the ground begging for mercy and thus posed no threat to DiRenzo or anyone else in the group. Accordingly, it was not ineffective assistance to fail to emphasize defense of another and excessive force in the closing. See Commonwealth v. Colon, 449 Mass. 207, 219, cert. den., 552 U.S. 1079 (2007) (failure to argue defense of another in closing not ineffective assistance where only meager amount of trial evidence supported defense); Commonwealth v. Blake, 409 Mass. 146, 162 (1991) (defense counsel not obligated to pursue all theoretic defenses no matter how little basis in evidence existed for them).

Although the jury was instructed on provocation by the deceased and sudden combat, counsel did not specifically mention those mitigating factors in his closing argument. Such a strategy was reasonable in the light of the substantial evidence that Sullivan never swung the bat or threatened anyone with it, but rather used it only to "fend off" the onslaught by six or seven teenagers, and that he was lying face down on the ground when James attacked him. See Commonwealth v. Lennon,

463 Mass. 520, 524-525 (2013) (provocation and sudden combat require that victim present threat of serious harm to defendant by attacking or striking a blow against him); Commonwealth v. Eberhart, 2010 WL 58954 at *1 (Mass. App. Ct. Rule 1:28) (no sudden combat where victim held knife but did not lunge at defendant and defendant made first physical contact). Under these circumstances, it was reasonable to focus the closing argument on mental impairment precluding the ability to premeditate, act with extreme atrocity or cruelty, and harbor malice, rather than diluting that argument by also mentioning defense of another, provocation, or sudden combat.

B. FAILURE TO RAISE PRIOR ASSAULT AS DEFENSE

James further contends that trial counsel was ineffective for failing to raise as a defense that he had been the victim of a violent beating several months before he killed Sullivan. James's brief argues "[a]s a result of that beating . . . . [he] became much more susceptible to fear, anger, nervous excitement, and heat of passion. [He] feared another beating and so he reacted quicker. There is also evidence he carried brass knuckles to defend himself after he was victimized." DiCataldo states in his affidavit in support of a new trial that "[t]he experience was likely psychologically traumatic and may have impaired his perception and ability to control his emotions and behavior on the night of his arrest." However, despite defense counsel's consultation with several expert witnesses who testified at trial, there was no expert evidence at the time of the trial to support the argument that the October 1993 beating impacted James's mental state in February of 1994 by making him "more susceptible to fear, anger, nervous excitement, and heat of passion." Cf. Commonwealth v. Anestal, 463 Mass. 655, 677-678 (2012) (defendant entitled to jury instruction on excessive use of force in self-defense based on expert testimony that battered woman syndrome caused her to perceive imminent serious bodily harm or death from victim). Accordingly, it was not ineffective assistance

instructions adequately conveyed to the jury the Commonwealth's burden of proof with respect to any mitigating circumstances raised by the defendant. See Commonwealth v. Niemic, 427 Mass. 718, 720-721 (1998).

In addition, James contends that the malice instruction erroneously told the jury that third prong malice could be inferred, removing his state of mind defense from the jury. Third prong malice is sometimes referred to as inferred malice, because a jury can infer malice if in the circumstances known to the defendant a reasonably prudent person would have known that there was a plain and strong likelihood of death from the contemplated act. Commonwealth v. Azar, 435 Mass. 675, 682 (2002). The judge so instructed the jury here. Moreover, the judge instructed that with respect to whether the Commonwealth met its burden of proof on the element of malice, the jury should consider the defendant's mental impairment. Accordingly, the statement that third prong malice could be inferred did not lessen the Commonwealth's burden of proof or eliminate James's state of mind defense.

James next argues that counsel should have objected to the extreme atrocity or cruelty instruction because the judge told the jury that their analysis was not limited to the *Cunneen* factors but did not tell the jury what else to consider. An instruction which does not limit the jury to the *Cunneen* factors is erroneous. Commonwealth v. Smith, 460 Mass. 318, 323 (2011).[5] However, such an error does not create a substantial likelihood of a miscarriage of justice where in view of the trial evidence, it is substantially unlikely that the jury did not base its verdict on at least one of the

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[5]The *Cunneen* factors are whether the defendant was indifferent to or took pleasure in the victim's suffering; the consciousness and degree of the victim's suffering; the extent of the injuries to the victim; the number of blows delivered; the manner, degree and severity of the force used; the nature of the weapon, instrument or method used; and the disproportion between the means needed to cause death and those employed. Commonwealth v. Semedo, 422 Mass. 716, 721 (1996).

of voice spectrogram techniques and compositional analysis of bullet lead were newly discovered evidence).[14]

A defendant seeking a new trial bears the burden of demonstrating that any newly discovered evidence is admissible. Commonwealth v. Wright, 469 Mass. 447, 462 (2014); Commonwealth v. Weichell, 446 Mass. 785, 799 (2006). Youth is a relevant factor in evaluating whether the defendant's capacity for self-control may have been affected at the time of a homicide. Okoro, 471 Mass. at 67 n.23. It is proper for an expert to testify regarding the development of adolescent brains and how this could inform an understanding of a particular juvenile defendant's capacity for impulse control and reasoned decision-making on the night of the victim's death. Id. at 66. Such testimony assists the jury in determining whether a juvenile defendant was able to form the intent for deliberate premeditation or malice at the time of the incident. Id. Thus, much of Dr. DiCataldo's proffered testimony about adolescent brain development and its effect on James's actions on the night of February 21, 1994 would be admissible at a new trial.[15]

The critical question then becomes whether such expert testimony casts real doubt on the justice of James's conviction because it probably would have been a real factor in the jury's deliberations. See Scott, 467 Mass. at 360; DiBenedetto, 458 Mass. at 664. Notably, to obtain a new trial, the defendant need not show that the verdict would be different with the expert testimony. Id. The jury in this case heard expert testimony concerning James's specific severe mental condition,

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[14]This Court is not persuaded that Okoro established a new rule regarding expert testimony that does not apply to James's case on collateral review. Okoro did no more than affirm as proper the trial court's admission of particular expert testimony concerning adolescent brain development. It did not create a rule permitting such testimony that did not exist previously.

[15]However, Dr. DiCataldo most likely would not be permitted to testify with respect to what he opines is the proper language for jury instructions on provocation, sudden combat, or malice.

enumerated factors. Id. at 323-324. Such is the case here where the jury heard evidence that James beat the victim with a baseball bat three times, using enormous force and shattering his skull, while the victim lay helpless on the ground pleading for mercy, being kicked and punched by five other teenagers, and each blow with the bat was sufficient to cause death. See Commonwealth v. Semedo, 422 Mass. 716, 726-727 (1996) (no substantial likelihood of miscarriage of justice from instruction which failed to limit jury to *Cunneen* factors where up to twelve assailants beat, kicked, and stabbed victim for five to ten minutes while he pleaded for help).

James also argues that counsel was ineffective in failing to object to manslaughter instructions that combined provocation and sudden combat into one instruction, depriving him of a proper instruction on sudden combat. Upon direct appeal, the Supreme Judicial Court ruled that the sudden combat instructions in this case adequately conveyed the law to the jury. See James, 427 Mass. at 317. Accordingly, this Court will not revisit the issue here.

Finally, James argues that counsel should have objected to the judge's use of the phrase "moral certainty" four times in the reasonable doubt instructions. Use of "moral certainty" language is reversible error if it suggests to a reasonable juror a higher degree of doubt than is required for acquittal, allowing conviction based on a degree below that required by due process. Commonwealth v. Pinckney, 419 Mass. 341, 343 (1995). Due process requires that the charge on reasonable doubt adequately impress on the jury the need to reach a subjective state of near certitude of the guilt of the accused. Commonwealth v. Russell, 470 Mass. 464, 468 (2015).

The "moral certainty" language, although often criticized, is permissible when used in conjunction with the traditional *Webster* charge. Id. at 469;[6] Commonwealth v. LaBriola, 430 Mass.

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[6]In *Russell*, the SJC exercised its inherent supervisory power to require that "going forward," courts should use Instruction 2.180 of the District Court Model Instructions instead of the *Webster* charge. See Russell, 470 Mass. at 477. This action does not affect James's case.

of counsel to omit this weak defense, which would not likely have made a difference in the outcome, and to focus on the stronger mitigation evidence supported by expert testimony. See Commonwealth v. McCray, 457 Mass. 544, 554 (2010).

C. FAILURE TO OBJECT TO JURY INSTRUCTIONS

James next contends that counsel was ineffective for failing to object to jury instructions that were erroneous in several respects. He first argues that counsel should have objected to the murder instructions because they did not contain a clear element specifying that the Commonwealth had the burden of disproving mitigation beyond a reasonable doubt. See Commonwealth v. Nieves, 394 Mass. 355, 359-360 (1985) (instruction that places burden on defendant to disprove malice violates the due process clause). When evaluating jury instructions, the court considers the charge in its entirety. Commonwealth v. Walker, 466 Mass. 268, 284 (2013). While the murder instructions did not expressly state that the Commonwealth had to prove the absence of mitigating circumstances, the instructions were clear that to convict of murder, the Commonwealth had to prove beyond a reasonable doubt that the defendant acted with malice aforethought, and that with respect to extreme cruelty or atrocity, the jury should consider the defendant's mental impairment on that issue and:

> The Commonwealth, again, does not have to prove on the issue that the Defendant was entirely free of mental impairment, but the Commonwealth does have to prove that the Defendant was not so substantially impaired, he could not act with extreme atrocity or cruelty. The Commonwealth must prove to you beyond a reasonable doubt that the Defendant could and did use atroci[ty] and cruelty in killing the victim in this case.

The judge further instructed that: "[t]he burden is on the Commonwealth to prove beyond a reasonable doubt the Defendant did not act in the heat or passion or sudden provocation. You may not return a verdict of guilty of murder unless the Commonwealth meets that burden." These

569, 570 (2000); Pinckney, 419 Mass. at 345. Use of "abiding conviction" language does much to alleviate any concerns that the phrase "moral certainty" might be misunderstood in the abstract. LaBriola, 430 Mass. at 573. Here, the judge gave the traditional *Webster* charge. Moreover, the phrase "moral certainty" was not illustrated with the sort of examples from everyday life that could lessen the required degree of certainty to an unconstitutional level. See Commonwealth v. Andrews, 427 Mass. 434, 445 (1998). Accordingly, the instruction accurately conveyed the meaning of reasonable doubt to the jury and counsel was not ineffective for failing to object to it.

D. FAILURE TO REQUEST ADDITIONAL INSTRUCTIONS

James argues that counsel should have requested an instruction that mental disorders are relevant to provocation and sudden combat. The Model Instructions on Homicide do not contain any such requirement. Moreover, as discussed *infra*, James was not entitled to a "reasonable juvenile" instruction based on his subjective mental characteristics.

James further argues that counsel should have requested instructions on excessive force in defense of another, self-defense, and mistaken belief in the threat of danger. Defense of another requires that a reasonable person in the defendant's position would have believed that his intervention was necessary to protect the third party and would have believed that the third party was being unlawfully attacked and was entitled to use deadly force to protect himself. Commonwealth v. Young, 461 Mass. 198, 208-209 & n.19 (2012). Failure to request defense of another and excessive force instructions was not ineffective where James struck Sullivan with the bat while Sullivan was lying face down on the ground, unarmed, being kicked and punched by the group, and pleading for the assault to stop. Indeed, James's confession indicated that he did not perceive Sullivan as a threat when he attacked with the bat. On these facts, even if the jury had been

instructed to consider James's impulse disorder and history of abuse in connection with his perception of the situation, there is no substantial likelihood that the jury would find that the Commonwealth failed to disprove self-defense or defense of another. Cf. Anestal, 463 Mass. at 677-678 (defendant entitled to jury instruction on excessive use of force in self-defense based on expert testimony that battered woman syndrome caused her to perceive imminent serious bodily harm or death from batterer, where her statement to police indicated she was in actual fear at moment of stabbing).

Finally, James argues that although scientific evidence about brain development was not available at the time of trial, defense counsel should have requested an instruction that the jury could consider his age as a mitigating factor, based on the fact that he was a juvenile being tried as an adult. Because James has failed to cite any authority arguably supporting such an instruction at the time of trial in 1995, counsel cannot be deemed ineffective in this regard.

IV. CONSTITUTIONAL ARGUMENTS

Based on the recent scientific research concerning adolescent brain development and recent United States Supreme Court and SJC case law concerning juveniles, James contends that numerous aspects of his trial violated his due process rights as a seventeen year old juvenile.

A. SUMMARY OF RECENT CASE LAW

In Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court held that it violates the Eighth Amendment's prohibition on cruel and unusual punishment to impose the death penalty on an offender who was under the age of 18 when he committed murder. Id. at 568. The Court concluded that juveniles lack the extreme moral culpability that warrants death because of their lack of maturity, impulsiveness, susceptibility to negative influences such as peer pressure, and the

transient nature of their character deficiencies. Id. at 569-570.

In Graham v. Florida, 560 U.S. 48 (2010), the Supreme Court held that it violates the Eighth Amendment to sentence a juvenile to a mandatory life sentence without the possibility of parole for a non-homicide offense. Id. at 74. The Court concluded that such a sentence is grossly disproportionate to the crime in light of developments in psychology and brain science that show fundamental differences between juvenile and adult minds, including the fact that the parts of the brain involved in behavior control continue to mature through late adolescence. Id. at 68. The Court noted that none of the penological sentencing justifications support life without the possibility of parole for juveniles, given their lesser culpability, inability to consider possible punishment when making decisions, and greater amenability to rehabilitation. Id. at 72-74.

In J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011), the Supreme Court held that in determining whether a suspect is in custody for purposes of *Miranda*, the court will consider the suspect's age as part of its objective analysis as long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer. Id. at 2406. The Court noted that the law generally recognizes that children are less mature and responsible than adults, lack the experience and judgment to recognize and avoid choices that are detrimental to them, and are vulnerable and susceptible to outside pressures. Id. at 2403. The Court concluded that age is a relevant factor in the custody analysis because a reasonable child subjected to police questioning will sometimes feel pressured to submit although a reasonable adult would feel free to go. Id.

In Miller v. Alabama, 132 S.Ct. 2455 (2012), the Supreme Court extended its reasoning in *Graham* and held that it violates the Eighth Amendment to sentence a juvenile to a mandatory life sentence without the possibility of parole for any crime, including homicide. Id. at 2464. The Court

concluded that a sentencing scheme which mandates a life sentence without parole poses an unacceptable risk of disproportionate punishment because the penalty does not take into account the juvenile's immaturity, impetuosity and failure to appreciate risks, the influence of his family and home environment, and the circumstances of the offense, including the extent of participation and the influence of peer pressure. Id. at 2468. The Court noted that the Eighth Amendment does not categorically preclude imposition on a juvenile of a life sentence with no possibility of parole, but requires consideration of the mitigating qualities of youth and the nature of the crime before imposing such a penalty. Id. at 2471. The Court opined that given the diminished culpability of juveniles and their heightened capacity for rehabilitation, the occasions when a juvenile may be sentenced to life without the possibility of parole will be uncommon. Id. at 2469.

The following year, the Supreme Judicial Court examined the mandatory sentencing provisions of G.L. c. 265, § 2 as applied to juveniles and concluded that *Miller* applies retroactively to cases on collateral review. Diatchenko v. District Atty. for the Suffolk Dist., 466 Mass. 655, 661 (2013). The SJC held that the mandatory sentencing scheme for life without the possibility of parole set forth in G.L. c. 265, § 2 violates the Eighth Amendment and art. 26 of the Massachusetts Declaration of Rights as applied to defendants who were under the age of 18 when they committed murder. Id. at 667. The SJC concluded that because a juvenile's brain is not fully structurally or functionally developed, a sentencing judge can never ascertain with confidence that a juvenile murderer has an irretrievably depraved character so as to warrant a life sentence with no possibility of parole. Id. at 670. Accordingly, the SJC concluded that even the discretionary imposition on a juvenile of life without parole constitutes cruel and unusual punishment in violation of art. 26. Id. at 671. The SJC held that the remedy for this violation is not re-sentencing but rather, the striking from the juvenile's life sentence of the ineligibility for parole. Id. at 673. The juvenile thus is

entitled to receive from the Parole Board "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 674.

The same day, the SJC held that a juvenile who had not yet been sentenced for first degree murder at the time *Miller* was announced must be given a life sentence with the possibility of parole after fifteen years, the sentence under G.L. c. 265, § 2 for a conviction of second degree murder. Commonwealth v. Brown, 466 Mass. 676, 682 (2013). The SJC emphasized that this remedy is temporary until the Legislature creates a new constitutional sentencing scheme for juveniles convicted of homicide. Id. at 691. The SJC noted that the imposition of a mandatory sentence on juveniles convicted of first degree murder would be permissible as long as they are eligible for parole after some period of time that is not so lengthy as to be the equivalent of life without parole. Id. at 688, 691 n.11.[7]

More recently, the SJC held that a mandatory life sentence with parole eligibility after 15 years for a juvenile convicted of second degree murder is permissible under the Eighth Amendment and art. 26. Commonwealth v. Okoro, 471 Mass. 51, 58 (2015). The SJC declined to hold that juvenile homicide defendants are constitutionally entitled to individualized, judicially determined sentencing. Id. at 58-59. In addition, the SJC addressed the proper role of expert testimony with respect to adolescent brain development when a juvenile is tried for murder. First, the SJC reaffirmed that the fact that children may lack the maturity to fully understand the consequences of their actions does not mean that juveniles by virtue of their age lack the ability to formulate the

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[7]Thereafter, the Legislature amended G.L. c. 265, § 2 to provide that a juvenile convicted of first degree murder shall be sentenced to life imprisonment with parole eligibility after a minimum term of 20 to 30 years, but if convicted of murder with extreme atrocity or cruelty the sentence shall be life with parole eligibility after 30 years, and if convicted of murder with deliberate premeditation, the sentence shall be life with parole eligibility after a minimum term of 25 to 30 years. See Stat. 2014, c. 189, §§ 5,6. These changes apply to crimes committed after July 25, 2014. Id. at § 8.

specific intent to commit murder. Id. at 65. The court must defer to the Legislature's determination that juveniles are capable of committing murder. Id. Accordingly, an expert may not testify that based solely on his tender age, a defendant cannot form the necessary intent for murder. Id. The SJC thus rejected the argument that youth itself is a "disorder." Id. at 67 n.23.

However, youth is a relevant factor in evaluating whether the defendant's capacity for self-control may have been affected at the time of a homicide. Id. Thus, it is proper for an expert to testify regarding the development of adolescent brains and how this could inform an understanding of a particular juvenile defendant's capacity for impulse control and reasoned decision-making on the night of the victim's death. Id. at 66. Such testimony assists the jury in determining whether a juvenile defendant was able to form the intent for deliberate premeditation or malice at the time of the incident. Id.

Finally, the SJC concluded that due process entitles juveniles convicted of murder to access to counsel in connection with the constitutionally mandated parole hearing. Diatchenko v. District Atty. for the Suffolk Dist., 471 Mass. 12, 24 (2015) ("Diatchenko II"). In addition, a judge has discretion under G.L. c. 261, §§ 27A-27G to authorize the payment of expert witness fees in connection with a parole hearing when the judge concludes that expert assistance is reasonably necessary to protect the juvenile homicide offender's meaningful opportunity for parole. Id. at 27. This requires a showing "that the juvenile offender requires an expert's assistance to effectively explain the effects of the individual's neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual's present capacity and future risk of reoffending." Id. A juvenile offender who is denied parole is entitled to judicial review in the nature of certiorari to determine whether the parole board abused its discretion in its consideration of the distinctive attributes of youth. Id. at 31.

B. DUE PROCESS FOR 17 YEAR OLD JUVENILES

James argues that based on this precedent recognizing the fundamental differences between juvenile and adult brains, numerous aspects of his trial violated his constitutional rights to due process and to mount a defense. Due process requires the prosecution to prove beyond a reasonable doubt each element of the crime with which the defendant is charged, and guarantees fundamental fairness at a criminal trial. Sandstrom v. Montana, 442 U.S. 510, 520 (1979); Commonwealth v. Ortiz, 466 Mass. 475, 481 (2013); Commonwealth v. Ly, 450 Mass. 16, 22 (2007). The Sixth Amendment and art. 12 of the Declaration of Rights guarantee a defendant the right to present a defense, including the right to present his version of the facts by calling and cross-examining witnesses. Washington v. Texas, 388 U.S. 14, 18-19 (1967); Commonwealth v. Freeman, 442 Mass. 779, 785 (2004).

1. Transfer Statute

James contends that the transfer statute in effect at the time of his trial, G.L. c. 119, §§ 61, 74, which automatically sent 17 year olds accused of murder to Superior Court, is unconstitutional because it deprived him of the right to have mitigating factors considered by a judge before a decision was made to try him as an adult. However, *Miller* does not mandate judicial consideration of the mitigating characteristics of juveniles before prosecution as an adult; rather, it mandates that mitigating circumstances be considered before subjecting a juvenile to the harshest possible penalty of a life sentence without the possibility of parole. See Miller, 132 S.Ct. at 2475. Cf. Diatchenko, 466 Mass. at 671 (discretionary imposition of life without parole on juvenile constitutes cruel and unusual punishment in violation of art. 26). The Supreme Court addressed the imposition of a particular punishment on juveniles but did not speak to a juvenile's right to be tried under the

jurisdiction of a specialized, less punitive Juvenile Court. Indeed, *Miller* noted that many states use mandatory transfer systems in which juveniles who commit murder are tried as adults, but discussed them only in the context of their efficacy with respect to mitigating harsh mandatory punishments, and did not hold that it violates due process to try juveniles as adults. See Miller, 132 S.Ct. at 2474.

This Court concludes that nothing in the recent Supreme Court or SJC precedent warrants the conclusion that the automatic transfer of 17 year old juveniles accused of murder to Superior Court is unconstitutional. Cf. People v. Harmon, 2013 WL 5783384 at *13 (Ill. App. Ct.) *(Roper, Graham* and *Miller* did not invalidate statutes cutting off juvenile court jurisdiction at 17 and transferring 17 year old to adult court because such statutes do not impose punishments but rather, govern the forum in which guilt will be adjudicated). Apart from sentencing which takes into account mitigating factors, there is no constitutional right to any preferred treatment as a juvenile offender. See Commonwealth v. Freeman, 472 Mass. 503, 506 (2015) (rejecting argument that treatment as juvenile is fundamental right requiring strict scrutiny analysis and upholding prospective application only of statutory expansion of Juvenile Court jurisdiction to 17 year olds); Commonwealth v. Wayne W., 414 Mass. 218, 222-223 (1993) (noting that Legislature could abolish Juvenile Court jurisdiction over certain crimes without violating juvenile's constitutional rights). Cf. Commonwealth v. Ogden O., 448 Mass. 798, 805 n.6 (2007) (expressing deference to Legislature's judgment about how criminal justice system should treat juveniles).

This Court recognizes that James's transfer to Superior Court automatically resulted in a mandatory life sentence without parole. See Commonwealth v. Walczak, 463 Mass. 808, 811 (2012) (Lenk, J. concurring) (noting that murder indictment deprives defendant of opportunity to have his case handled in Juvenile Court, with its significant protections). Nonetheless, a new trial is not required because James is entitled to the remedy articulated by the SJC in *Diatchenko*, a meaningful

opportunity to seek parole from the Parole Board. See id., 466 Mass. at 674.

Further, this Court is not persuaded that mandatory transfer under G.L. c. 119, §§ 61, 74 violated James's right to due process. Nothing in *Miller* gives juveniles a fundamental liberty interest in having their youth considered as a mitigating factor before being tried as an adult. See People v. Harmon, 2013 WL 5783384 at *14-15. See also Wayne W., 414 Mass. at 222-223 (noting that juvenile has no constitutional right to preferred treatment in Juvenile Court). Nor does the requirement of procedural fairness mandate such an opportunity, as long as youth as a mitigating factor ultimately is considered in connection with the imposition of punishment.

2. Motion to Suppress

James contends that he is entitled to a new trial because his motion to suppress his statement to police should have been allowed based on his status as a juvenile. He argues that his confession was inadmissible because he lacked a meaningful opportunity to consult with an adult prior to speaking to police. The SJC has stated that in order to demonstrate a knowing and intelligent waiver of *Miranda* rights by a juvenile who is at least 14 but under the age of 17, the Commonwealth must show either that the juvenile had a meaningful opportunity to consult with a parent or other interested adult, or that the juvenile possesses a high degree of intelligence, experience, knowledge, or sophistication. See Commonwealth v. Smith, 471 Mass. 161, 165 (2015); Commonwealth v. Ray, 467 Mass. 115, 132 (2014); Commonwealth v. A Juvenile, 389 Mass. 128, 134 (1983).[8] James argues that the law at the time of his trial, which treated 17 year olds as adults rather than juveniles,

[8]In denying James's motion to suppress, the trial judge noted that because James was "a worldly seventeen year old man," a valid *Miranda* waiver did not require consultation with a parent or other interested person.

is unconstitutional as applied because it deprived him of an opportunity to consult with an interested adult, and studies on adolescent brain development show that a 17 year old brain is still developing, while recent case law recognizes the qualities which may prevent a juvenile from making a rational decision to waive his right against self-incrimination.

Nothing in *Roper*, *Graham*, *Miller* or their progeny mandates, as a constitutional matter, identical treatment of 16 and 17 year olds in the criminal justice system. See Ogden O., 448 Mass. at 803-805 n.6 (expressing deference to judgment of Legislature about how criminal justice system should treat juveniles). Cf. Wayne W., 414 Mass. at 222-223, 226 (juvenile has no constitutional right to preferred treatment and for purposes of equal protection, juveniles charged with murder are not suspect class with constitutionally protected right to stay in juvenile justice system). Moreover, nothing in *J.D.B.* dictates that a 17 year old juvenile must be given an opportunity to consult with an interested adult before his *Miranda* waiver is deemed valid. Cf. Commonwealth v. Bermudez, 83 Mass. App. Ct. 46, 52-53 (2012) (applying *J.D.B.* and concluding that juvenile was not in custody where his age, "a few months shy of his eighteenth birthday, placed him on the cusp of majority, and far removed from the tender years of early adolescence.").

The Supreme Judicial Court recently exercised its power of superintendence to extend to 17 years olds the common law rule that juveniles be afforded an opportunity to consult with an interested adult before waiving *Miranda* rights. See Smith, 471 Mass. at 166. This extension, however, is not a constitutional rule and applies only prospectively. Id. at 167. Accordingly, this Court rejects the argument that due process requires that a 17 year old juvenile waiving his rights be given the same opportunity to consult with an adult as is afforded to younger juveniles.

3. Homicide Instructions

James contends that the standard homicide instructions are unconstitutional as applied to juveniles because they employ an adult "reasonable" or "ordinary" person standard instead of a "reasonable juvenile" standard.[9] The murder instructions at James's trial incorporated this standard in the definition of third prong malice,[10] and the manslaughter instructions incorporated it in the instructions relating to reasonable provocation and sudden combat.[11] James emphasizes that the qualities associated with the "reasonable person," prudence, knowledge, intelligence, judgment and restraint, are the same qualities that the Supreme Court has recognized are missing in juveniles. See Miller, 132 S.Ct. at 2468 (noting that hallmark features of juvenile are immaturity, impetuosity, and failure to appreciate risks and consequences). Accordingly, James argues that the homicide instructions are unconstitutional as applied to juveniles because "[t]o convict a person for a failure to conform to a standard he was always incapable of meeting is not the proper object of the criminal law."

This Court is not persuaded that *Roper*, *Graham*, *Miller* and their progeny mandate, as a constitutional matter, employment of a "reasonable juvenile" standard throughout the homicide instructions. Although those decisions broadly address the impact of juvenile brain development on criminal culpability, their constitutional basis is the Eighth Amendment prohibition against cruel and

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[9]This Court notes that the SJC Model Homicide Instructions were not promulgated until 1999. Prior to that, Superior Court judges typically employed informally approved pattern jury instructions.

[10]"The third prong of malice, in the circumstances known to the Defendant, a *reasonably prudent person* would have known that according to common experience, there was a plain and strong likelihood that death would follow the contemplated act." (emphasis added).

[11]"A provocation sufficient to reduce an unlawful killing from murder to manslaughter is that provocation which would likely produce in *an ordinary person* such a state of passion, anger, fright, or nervous excitement as would eclipse his capacity for reflection or restraint . . . ." (emphasis added).

and provocation, but opining that *Roper* and *Miller* relate to juvenile sentencing, not culpability). Cf. In re J.G., 228 Cal App. 4th 402, 410 (Cal. Ct. App. 2014) (opining that *J.D.B.* "reasonable juvenile" custody standard may apply to Fourth Amendment seizure analysis which, like custody issue, focuses on how reasonable person perceives his interaction with police).

James also argues that a "reasonable juvenile" instruction is mandated by Commonwealth v. Walczak, 463 Mass. 808 (2012), in which the SJC held: "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. Justice Lenk reasoned that this procedure was necessary because a murder indictment deprives a defendant of the opportunity to have his case handled in Juvenile Court, with its significant protections. Id. at 811, 824 (Lenk, J. concurring) (noting that under statutory scheme mandating Superior Court handling of all murder cases, grand jury became "the sole gatekeeper between the adult and juvenile justice system."). Although *Walczak* deals with culpability in a broad sense, its plurality holding appears to be based on policy concerns about the initial charging decision, with its implications for jurisdiction and ultimate sentencing, rather than the substantive law of murder. See id. See also id. at 843 n.6 (Gants, J., concurring). In the view of this Court, *Walczak* does not stand for the proposition that due process requires homicide instructions incorporating a "reasonable juvenile" standard. Thus, based on existing precedent, the constitutional rights to due process and to present a defense do not mandate the use of a "reasonable juvenile" standard when instructing a jury on issues such as malice,

unusual punishment. Indeed, the SJC has repeatedly noted that *Miller* is not a watershed rule of criminal procedure necessary to ensure the fairness of a criminal conviction but rather, is a constitutional rule pertaining to sentencing. See Okoro, 471 Mass. at 57; Diatchenko, 466 Mass. at 666 n.11.

Moreover, this Court is not persuaded that the Supreme Court decision in *J.D.B.*, holding that a suspect's age must be considered as part of the objective *Miranda* custody analysis, mandates the use of a "reasonable juvenile" standard with respect to the elements of homicide.[12] The rule in Massachusetts has long been that consideration of subjective factors such as age is irrelevant to the reasonably prudent person standard used in the third prong of malice. See Commonwealth v. Reed, 427 Mass. 100, 106 (1998). This Court has not found any case extending *J.D.B.* to the context of jury instructions, nor does James cite any such case. California courts have concluded that Supreme Court precedent does not mandate the use of a reasonable juvenile standard with respect to determinations of criminal culpability. See People v. Prado, 2015 WL 242430 at *4 (Cal. Ct. App.) (concluding that no statutory or decisional authority required court to instruct jury that whenever murder instructions refer to "reasonable person," jury must consider that "person" to be a reasonable juvenile); People v. Guzman, 2014 WL 5392509 at *19-20 (Cal. Ct. App.) (noting that court need not reach argument that defendant was entitled to "reasonable juvenile" instruction on self-defense

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[12]This Court acknowledges that several legal commentators have argued in favor of this proposition. See, e.g., Marsha Levick, The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina For Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles be Far Behind?, 47 Harv. C.R.-C.L. L. Rev. 501, 517-518 (Summer 2012) (suggesting that "reasonable juvenile" standard should apply to self-defense, duress, provocation, negligent homicide, and felony murder). Cf. Jason Zolle, Transforming Juvenile Justice: Making Doctrine out of Dicta in Graham v. Florida, 112 Mich. L. Rev. First Impressions 30, 31 (Sept. 2013) (suggesting that *Graham* dicta that criminal procedure laws that fail to take youthfulness into account at all are flawed could be broadly conceived of as substantive due process right reaching all aspects of criminal procedure).

provocation, and self-defense.[13]

Even if there were a new rule requiring that the jury be instructed to employ a reasonable juvenile standard throughout the homicide instructions, such a rule would not apply retroactively to James's conviction, which was affirmed seventeen years ago. A new constitutional rule applies retroactively to cases on collateral review only where it is a rule of fundamental fairness central to an accurate determination of the defendant's guilt or innocence, such that its absence creates an impermissibly large risk that the innocent will be convicted. Diatchenko, 466 Mass. at 665; Commonwealth v. Gilday, 409 Mass. 45, 48 (1991); Commonwealth v. Peppicelli, 70 Mass. App. Ct. 87, 99, rev. den., 450 Mass. 1102 (2007). The SJC has stated that the rule set forth in *Miller* is not a watershed rule of criminal procedure necessary to ensure the fairness of a criminal conviction. See Okoro, 471 Mass. at 57; Diatchenko, 466 Mass. at 666 n.11. Similarly, any rule requiring the jury to take into account a juvenile's brain development when assessing the elements necessary to convict of murder would not be a watershed rule. See Commonwealth v. Szczuka, 413 Mass. 1004, 1006 (1992) (new rules that jury should be instructed to consider defendant's mental impairment when deciding whether murder proven beyond reasonable doubt do not apply retroactively); Gilday, 409 Mass. at 47-48 (new rule that jury should be instructed to consider defendant's intoxication when deciding whether malice proved beyond reasonable doubt does not apply retroactively). Accordingly, James would not be entitled to the benefit of any new rule concerning the use of a "reasonable juvenile" standard in the homicide instructions.

4. Sentencing Statute

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[13]James's separate argument that he is entitled to a new trial based on the prosecutor's failure to instruct the grand jury on murder, manslaughter, and mitigating defenses must fail because the *Walczak* rule is not constitutionally mandated and the SJC expressly announced that it is to apply only prospectively. See Walczak, 463 Mass. at 810.

James next argues that he is entitled to a new trial because his life sentence is unconstitutional under *Miller* and *Diatchenko* and there is no constitutional vehicle for re-sentencing him without a new trial. James contends that after striking the mandatory sentence of life without the possibility of parole, G.L. c. 265, § 2 is void for vagueness. See Commonwealth v. Gagnon, 387 Mass. 567, 569 (1982), cert. den., 464 U.S. 815 (1983) (penal statute is void for vagueness when it requires one to speculate as to potential sentence imposed). However, the SJC has already concluded that the invalid life sentence is severable from the remainder of the statute and the appropriate remedy for the constitutional violation is not re-sentencing, but rather, the striking from a juvenile's life sentence of the ineligibility for parole. Diatchenko, 466 Mass. at 673-674. Accordingly, James is not entitled to a new trial based on a void for vagueness analysis.

James further contends that a new trial is necessary because the Parole Board does not employ individualized criteria for juvenile offenders and thus does not provide a meaningful opportunity for consideration of mitigation evidence. This Court disagrees with that assessment. Since June of 2013, the Parole Board has updated its Guidelines for Life Sentences Decision to provide that "an inmate who committed the offense as a juvenile will be evaluated with recognition of the distinctive attributes of youth, including immaturity, impetuosity, and a failure to appreciate risks and consequences." Commonwealth v. Noonan, 2014 Mass. Super. LEXIS 95 at *24 (July 21, 2014) (Salinger, J.). In addition, the Board has granted parole to at least one offender who committed first degree murder as a juvenile. Id. at *25. In light of these circumstances, this Court is not persuaded that James has no meaningful opportunity to seek release from the Parole Board based on the circumstances of his offense and his demonstrated maturity and rehabilitation. Cf. id. at *23-25, 28 (rejecting argument of juvenile who pled guilty to second degree murder that he has no meaningful opportunity for parole, even where his first two bids for parole were denied).

Finally, to date, the SJC has not held that the prohibition on cruel and unusual punishment in art. 26 entitles juvenile homicide defendants to individualized, judicially determined sentencing. See Okoro, 471 Mass. at 58-59. Accordingly, James' claim with respect to individualized sentencing must fail.

V. NEWLY DISCOVERED EVIDENCE

Finally, James contends that he is entitled to a new trial based on newly discovered evidence. The defendant must establish that the evidence is both newly discovered and that it casts real doubt on the justice of the conviction. Commonwealth v. Cowels, 470 Mass. 607, 616 (2015); Scott, 467 Mass. at 360; Commonwealth v. Shuman, 445 Mass. 268, 272 (2005). The evidence must be material and credible and carry a measure of strength in support of the defendant's position. Cowels, 470 Mass. at 617; Shuman, 445 Mass. at 272. Accordingly, newly discovered evidence that is cumulative of evidence admitted at trial carries less weight than new evidence that is different in kind. Commonwealth v. DiBenedetto, 458 Mass. 657, 664 (2011); Commonwealth v. Cintron, 435 Mass. 509, 518 (2001). The court does not decide whether the verdict would have been different but whether the new evidence probably would have been a real factor in the jury's deliberations. Cowels, 470 Mass. at 618; Scott, 467 Mass. at 360; DiBenedetto, 458 Mass. at 664. The strength of the evidence against the defendant is relevant in assessing the probable effect of newly discovered evidence. DiBenedetto, 458 Mass. at 664.

A. EVIDENCE ABOUT INTERMITTENT EXPLOSIVE DISORDER

James argues that the DSM-V, which was not yet published at the time of his trial, is newly discovered evidence which establishes that during an impulsive outburst, patients with intermittent

explosive disorder do not act with intent, premeditation, or forethought as to consequences. He contends that this information would have been a factor in the jury's deliberations because at the time of trial, the DSM-IV did not contain this information but merely set forth the diagnostic criteria of several discrete episodes of failure to resist aggressive impulses that result in serious assaultive acts or destruction of property.

The defendant bears the burden of showing that the evidence at issue was unknown to counsel at the time of trial and could not have been uncovered by exercising reasonable pretrial diligence. Commonwealth v. Grace, 397 Mass. 303, 306 (1986). See, e.g., Cowels, 470 Mass. at 616 (DNA test results were newly discovered where technology was only at experimental stage at time of defendant's trial and had not yet been ruled admissible in court). Here, although the DSM-V did not exist at the time of James's trial, it is not "new" in the sense required for a new trial. Evidence is not newly discovered where it is merely a broadening of research already present in legal and scientific circles. Shuman, 445 Mass. at 275. Simply because recent studies may lend more credibility to expert testimony that was or could have been presented at trial does not make it newly discovered. Shuman, 445 Mass. at 275; Commonwealth v. LeFave, 430 Mass. 169, 181 (1999). The DSM-IV existed in 1995 and recognized intermittent explosive disorder as a mental disorder. Indeed, Dr. Nicholson testified at James's trial that James suffered from that disorder. The more explicit statements in DSM-V concerning the impulsive, non-premeditated nature of the patient's aggressive outbursts represent a mere broadening of the research rather than truly new evidence. Similarly, Dr. DiCataldo's proposed expert testimony about the advances in research and understanding of intermittent explosive disorder since James's trial is not newly discovered evidence.

Even if the DSM-V could be deemed newly discovered evidence, there is no substantial risk

that the jury would have reached a different conclusion had it been admitted at trial. Dr. Nicholson testified that at the time of the killing, James was taking several psychiatric medications, including Haldol, Inderal and Lithium, to control his aggression and stabilize his mood. Dr. Nestor testified that James had been diagnosed with posttraumatic stress disorder and impulse control disorder, in which the individual is unable to control aggressive impulses and acts without thinking. Dr. Nestor opined that James suffered from intermittent explosive disorder and that while hitting Sullivan with the bat, he was out of control and could not control himself due to that disorder, and did not appreciate the harm posed by use of the baseball bat. Evidence that according to DSM-V, patients with intermittent explosive disorder do not act with intent, premeditation, or forethought as to consequences during an impulsive outburst would thus be cumulative of what the jury heard from the expert witnesses. See Shuman, 445 Mass. at 275-276 (post-trial study linking Zoloft to state of violent urges and agitation known as akathisia in individuals with no previous mental illness, expert testimony in civil litigation linking Zoloft to akathisia, FDA advisory warning of akathisia as side effect of Zoloft, and expert opinion that defendant was in drug induced state of akathisia at time of murder did not warrant new trial where defense experts testified at trial to connection between SSRIs such as Prozac and violence and opined that defendant was paranoid, depressed, robotic, and panicky at time of killing).

James argues that the DSM-V would be helpful in rebutting the testimony of the Commonwealth's expert witness, Dr. Kelly, who opined that James suffered from a conduct disorder, but not from intermittent explosive disorder, which requires that the person lose control and be aggressive no matter the circumstances. The DSM-V states that the predicate for a diagnosis of intermittent explosive disorder is only three behavioral outbursts involving damage within a 12-month period. James thus argues that a jury hearing this evidence would be less likely to credit Dr.

Kelly's testimony that he did not suffer from intermittent explosive disorder. However, the jury heard an examining psychologist and James's treating psychiatrist diagnose him with the disorder. They also learned that at the time of the murder, James had been prescribed multiple psychiatric drugs to control his symptoms. The DSM-V would be cumulative of these experts's diagnosis and would not have been a real factor in the jury's deliberations concerning whether the Commonwealth proved malice beyond a reasonable doubt. Similarly, Dr. DiCataldo's proposed expert testimony about the advances in research and understanding of intermittent explosive disorder since James's trial would be largely cumulative of the expert testimony at trial and would not likely be a real factor in the jury's deliberations.

B. SCIENCE CONCERNING ADOLESCENT BRAIN DEVELOPMENT

James further contends that recent scientific research regarding the underdeveloped juvenile brain constitutes newly discovered evidence which would have been a real factor in the jury's deliberations with respect to whether he committed first degree murder. He asserts that the new scientific evidence "establishes that juveniles may be incapable of specific intent, premeditation, or the forethought of consequences necessary to prove extreme atrocity and cruelty murder" and argues that the jury should be allowed to consider his "under-developed frontal cortex and related juvenile inability to control impulses." This Court agrees that Dr. DiCataldo's expert opinion, based on recent scientific advances in adolescent brain development, qualifies as newly discovered or newly available evidence. See Okoro, 471 Mass. at 60 (recognizing that adolescent brain development is rapidly changing field of scientific study and knowledge). See also Commonwealth v. Cameron, 473 Mass. 100 (2015) (Commonwealth conceded that more precise DNA testing which showed that DNA on victim's underwear was female, not male, was newly available evidence); Commonwealth v. Lykus, 451 Mass. 310, 331 (2008) (National Academy of Sciences reports questioning reliability

intermittent explosive disorder, and its effects on his ability to control his actions and understand the risk of death posed by the use of the bat, yet still concluded that he acted with malice. In the view of this Court, it is highly unlikely that additional expert testimony concerning adolescent brain development would be a real factor in the jury's deliberations with respect to first degree murder because Dr. DiCataldo's proposed testimony concerning James's reduced ability to control his emotions and behavior is largely cumulative of Dr. Nestor's trial testimony that James could not control his actions when beating Sullivan and did not understand that a bat could harm someone so badly. See DiBenedetto, 458 Mass. at 664; Cintron, 435 Mass. at 518 (to warrant new trial, newly discovered evidence must not be merely cumulative of evidence admitted at trial). It seems highly improbable that a jury would give serious consideration to an expert's explanation about adolescent brain development as mitigating this homicide where they disbelieved expert testimony that a serious diagnosed mental illness mitigated it. Accordingly, James has not demonstrated that Dr. DiCataldo's expert opinion constitutes newly discovered evidence that warrants a new trial.

VI. REDUCTION OF VERDICT TO MANSLAUGHTER

Alternatively, James requests that this Court reduce the first degree murder verdict to manslaughter pursuant to Mass. R. Crim. P. 25(b)(2).[16] A trial judge may reduce the verdict, despite the presence of sufficient evidence to support it, to ensure that the result in every criminal case is consonant with justice. Commonwealth v. Pagan, 471 Mass. 537, 542, cert. den., 2015 U.S. LEXIS 7592 (2015); Commonwealth v. Almeida, 452 Mass. 601, 613 (2008); Commonwealth v. Chhim, 447 Mass. 370, 381 (2006). The judge should consider the whole case broadly to determine whether there was any miscarriage of justice. Commonwealth v. Lyons, 444 Mass. 289, 291 (2005).

[16]Rule 25(b)(2) does not provide an outer limit of time in which a defendant must file a motion to reduce the verdict. Commonwealth v. Gilbert, 447 Mass. 161, 166 (2006).

However, the judge should use this discretionary power sparingly and not sit as a second jury. Almeida, 452 Mass. at 613; Chhim, 447 Mass. at 381.

It is appropriate to reduce a verdict where the weight of the evidence, although technically sufficient to support the jury's verdict, points to a lesser crime. Almeida, 452 Mass. at 613; Commonwealth v. Hamilton, 83 Mass. App. Ct. 406, 410, rev. den., 465 Mass. 1103 (2013). If the weight of the evidence indicates that the defendant did not act with malice, a murder verdict is appropriately reduced to manslaughter. Pagan, 471 Mass. at 542; Almeida, 452 Mass. at 614; Chhim, 447 Mass. at 381. A defendant's personal circumstances may be considered in conjunction with evidence that points to a lesser degree of guilt, although personal circumstances alone do not justify reduction of a verdict. Commonwealth v. Rolon, 438 Mass. 808, 825 (2003).

James argues that based on the new juvenile case law, the new studies on juvenile brain development, the evidence that he did not start the fight and his mental history, a verdict of manslaughter is more consonant with justice. Foremost, in exercising discretion under Rule 25(b)(2), the judge should not consider evidence that was only introduced in connection with a motion for a new trial. Commonwealth v. Reavis, 465 Mass. 875, 894 (2013). Further, in deciding whether to reduce a verdict, the SJC has noted the importance of the trial judge's advantage with respect to face to face evaluation of the witnesses and the evidence at trial. Id. at 891; Chhim, 447 Mass. at 381. This Court did not preside at the trial at which the defendant was convicted almost twenty years ago, and thus cannot effectively weigh the credibility of the evidence presented. However, it appears that the jury did not credit the testimony of the two defense experts who testified that because James suffered from intermittent explosive disorder, he could neither control his angry impulses nor appreciate the nature of the harm caused by beating the victim three times in the head with a baseball bat. The jury found that James acted with malice and with extreme atrocity or cruelty

in beating the victim while he lay face down on the ground, helpless and pleading for mercy. Based on the transcript, this Court cannot conclude that the first degree murder verdict was against the weight of the evidence, or that justice was not done in this case. Cf. Pagan, 471 Mass. at 544-545 (judge properly reduced verdict to second degree murder based on trial evidence of spontaneity, including that there was only slim evidence of premeditation, defendant had untreated ADHD and depression, and he inflicted only one stab wound, not multiple deadly blows, on victim). Accordingly, this Court declines to reduce the verdict to manslaughter pursuant to Mass. R. Crim. P. 25(b)(2).

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendant's Motion For A New Trial be **DENIED**.

Cornelius J. Moriarty II
Justice of the Superior Court

DATED: January 11, 2016

COMMONWEALTH vs. STEVEN JAMES.

477 Mass. 549

March 6, 2017 - August 1, 2017

Suffolk County

Present: Gants, C.J., Lenk, Hines, Lowy, & Budd, JJ.

Records And Briefs:

(1) SJC-12196 01 Appellant James Corrected Brief
(2) SJC-12196 02 Appellee Commonwealth Brief
(3) SJC-12196 03 Appellant James Reply Brief

Oral Arguments

Practice, Criminal, Capital case, Postconviction relief.

This court concluded that a juvenile who has been convicted of murder in the first degree, and whose conviction has been affirmed by this court after plenary review, is thereafter subject to the gatekeeper provision of G. L. c. 278, § 33E. [550-552]

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on February 9, 2016.

The case was reported by Hines, J.

Rosemary Curran Scapicchio (Dennis M. Toomey also present) for the defendant.

Mary E. Lee, Assistant District Attorney, for the Commonwealth.

HINES, J. The narrow question before us, here on a reservation and report from a single justice of the county court, is whether a juvenile who has been convicted of murder in the first degree, and whose conviction has been affirmed by this court after plenary review, is thereafter subject to the gatekeeper provision of G. L. c. 278, § 33E. We conclude that the gatekeeper provision applies. The case should now proceed in the county court as a gatekeeper matter.

Background. The defendant, Steven James, was convicted in 1995 of murder in the first degree on a theory of extreme atrocity or cruelty. He was sentenced to a mandatory term of life without the possibility of parole, pursuant to G. L. c. 265, § 2, as amended through St. 1982, c. 554, § 3. See Commonwealth v. James, 427 Mass. 312 , 313, 318 (1998). He was seventeen years old when the killing occurred in 1994, id. at 315, and under the law at that time was considered an adult for purposes of the criminal proceedings. See Watts v. Commonwealth, 468 Mass. 49 , 50-51 (2014). On appeal, this court "reviewed the entire record and conclude[d] that relief pursuant to G. L. c. 278, § 33E, [was] not warranted," and affirmed James's conviction. James, supra at 318.

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In 2013, James filed a motion for a new trial in the Superior Court, with multiple subsequent supplements. A judge other than the trial judge, who had since retired, held a nonevidentiary hearing and denied the motion. However, because James was under the age of eighteen at the time of the killing, he was resentenced to life with the possibility of parole. See Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655 , 658 (2013), S.C., 471 Mass. 12 (2015) ("imposition of a sentence of life in prison without the possibility of parole on individuals who were under the age of eighteen when they committed the crime of murder in the first degree violates the prohibition against 'cruel or unusual punishments'"). James thereafter filed an application in the county court, pursuant to the gatekeeper provision of G. L. c. 278, § 33E, seeking leave to appeal the denial of his motion for a new trial. He subsequently supplemented the petition, arguing that he is not subject to the gatekeeper provision at all, since he now has been resentenced and is no longer sentenced to the most severe sentence recognized in Massachusetts, life without parole eligibility. The single justice reserved and reported that threshold procedural question, namely, "whether the postconviction case of a defendant who was tried on an indictment for murder in the first degree and was convicted of murder in the first degree, but who was a juvenile at the time of the crime and thus subject to a lesser penalty than life without the possibility of parole, is a 'capital case' as defined in § 33E." See Mass. R. Civ. P. 64 (a), as amended, 423 Mass. 1403 (1996).

Discussion. As the single justice recognized, James was "tried on an indictment for murder in the first degree and was convicted

of murder in the first degree." G. L. c. 278, § 33E. On direct appeal, this court reviewed the whole case, including both the law and the evidence, and affirmed his conviction. See Commonwealth v. Gunter, 459 Mass. 480 , 485-487, cert. denied, 565 U.S. 868 (2011); James, 427 Mass. at 318. Irrespective of the subsequent resentencing, after his direct appeal concluded, James continued to stand convicted of murder in the first degree, and remained convicted of a "capital case" for purposes of the statute. See Commonwealth v. Francis, 450 Mass. 132 , 137 (2007); Commonwealth v. Gilbert, 447 Mass. 161 , 165 (2006). In such a case, the statute plainly and expressly prohibits a subsequent appeal from "any motion" filed in the Superior Court unless authorized by a single justice "on the ground that it presents a new and substantial question." G. L. c. 278, § 33E. See

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Commonwealth v. Davis, 410 Mass. 680 , 683 (1991). [Note 1]

We recognize that, following the court's decision in Diatchenko, 466 Mass. 655 , a juvenile defendant is no longer subject to a sentence of life without the possibility of parole. We left open the question in Commonwealth v. Brown, 474 Mass. 576 , 592 n.9 (2016), whether "a juvenile convicted of murder in the first degree is entitled to plenary review under G. L. c. 278, § 33E, and is subject to the gatekeeper provision of that statute; or whether such a defendant is not entitled to plenary review but is entitled to a right of appeal from the denial of all motions for a new trial." This case does not present an occasion to decide that question, however, because this is not James's direct appeal and the single justice did not report that question. James already has had his direct appeal, received plenary review under G. L. c. 278, § 33E, [Note 2] and, following that review, continues to stand convicted of murder in the first degree.

After receiving the benefit of this "uniquely thorough review," it follows that James is thereafter afforded "a narrower opportunity for appeal of postconviction motions than other criminal defendants." He must comply with the gatekeeper provision. Dickerson v. Attorney Gen., 396 Mass. 740 , 744 (1986) ("since we have already reviewed the 'whole case' as required by G. L. c. 278, § 33E, the capital defendant justifiably is required to obtain leave of a single justice before being allowed once again

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to appear before the full court"). Plenary review (for the direct appeal) and the gatekeeper provision (for subsequent appeals) are interconnected and complementary component parts of the G. L. c. 278, § 33E, process. See Gunter, 459 Mass. at 486-487. See also Dickerson, supra at 743-744. As we have said, once plenary review has been given, "[i]nterests of judicial economy are best served by having a single justice 'screen out' postconviction motions which do not present a 'new or substantial question.'" Davis, 410 Mass. at 683, quoting Dickerson, supra at 744-745. See Leaster v. Commonwealth, 385 Mass. 547 , 549-550 (1982). See also Commonwealth v. Lanoue, 409 Mass. 1 , 8 (1990) (O'Connor, J., concurring). This is no less true for a juvenile defendant than it is for an adult defendant. [Note 3]

Conclusion. We answer the reported question as follows: the gatekeeper provision of G. L. c. 278, § 33E, applies to a juvenile defendant who, like James, has had a direct appeal, has received plenary review and, following that review, remains convicted of murder in the first degree. The case shall proceed in the county court for consideration of James's gatekeeper application, specifically whether the issues presented in his new trial motion are "new and substantial" for purposes of § 33E. See Gunter, 459 Mass. at 487-488.

So ordered.

FOOTNOTES

[Note 1] In contrast, when a verdict has been reduced from murder in the first degree after plenary review under G. L. c. 278, § 33E, the defendant no longer stands convicted of a "capital case," and therefore is not subject to the statute's gatekeeper restriction governing future appeals. See Commonwealth v. Gilbert, 447 Mass. 161 , 165 n.7 (2006); Commonwealth v. Perry, 424 Mass. 1019 , 1020 (1997); Commonwealth v. Lattimore, 400 Mass. 1001 , 1001 (1987).

[Note 2] Plenary review under the statute has been described as a "uniquely thorough review." Dickerson v. Attorney Gen., 396 Mass. 740 , 744 (1986).

"Under G. L. c. 278, § 33E, this court has extraordinary powers in reviewing capital convictions on direct appeal: we consider the whole case, both the law and the evidence, to determine whether there has been any miscarriage of justice. . . . Unlike appellate review of convictions of other crimes, our consideration of first degree murder cases is not limited to issues based on objections rendered at trial. . . . We are empowered under G. L. c. 278, § 33E, to consider questions raised by the defendant for the first time on appeal, or even to address issues not raised by the parties, but discovered as a result of our own independent review of the entire record." (Citations omitted.)

Id. See Commonwealth v. Gunter, 459 Mass. 480 , 485-487, cert. denied, 565 U.S. 868 (2011).

[Note 3] In Patrick P. v. Commonwealth, 421 Mass. 186 , 193-194 (1995), the court held that the determination of what constitutes a "capital case" for purposes of the exercise of plenary review under G. L. c. 278, § 33E, takes "into account not only the requirement of a first degree murder indictment, but also the possible severity of the punishment involved." Similarly, in Dickerson, 396 Mass. at 744, the court described plenary review as being "warranted by the infamy of the crime and the severity of its consequences." Those cases do not aid the defendant's position. They simply described who is entitled to plenary review and why. They do not suggest that plenary review and the gatekeeper provision should be decoupled in any circumstances. Indeed, once the court has conducted plenary review, so long as the defendant remains convicted of murder in the first degree, he or she continues to be a capital defendant for purposes of the gatekeeper provision of the statute, and the same rationale for the gatekeeper provision continues to apply, irrespective of any ensuing alteration of sentence.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2016-0049

Plymouth Superior Court
No. PLCR1994-95293-7

COMMONWEALTH

v.

STEVEN JAMES

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S GATEKEEPER PETITION UNDER G. L. c. 278, § 33E

The defendant, Steven James, has petitioned for leave to appeal the denial of his motion for a new trial, pursuant to the gatekeeper provision of G. L. c. 278, § 33E. After reviewing the defendant's petition and the materials related to his petition, I conclude that the defendant has failed to raise a new and substantial issue justifying further review.

In 1995, a jury convicted the defendant of murder in the first degree under the theory of extreme atrocity or cruelty. At the time of the murder, the defendant was seventeen years old and had been diagnosed with impulse control disorder. At trial, Dr. Nestor, an expert witness for the defense, testified that the defendant also suffered from intermittent explosive

disorder. Dr. Nestor further testified that given the defendant's age and mental illnesses, the defendant could not understand the consequences of his conduct or control himself.

On direct appeal, this Court affirmed the defendant's murder conviction. Commonwealth v. James, 427 Mass. 312 (1998). In 2015, the defendant filed a motion for a new trial. The motion judge issued a very detailed fifty-three page memorandum of decision denying the motion. The defendant then filed this petition, arguing that new research on juvenile brain development and changes in the Diagnostic and Statistical Manual of Mental Disorders regarding intermittent explosive disorder, as well as recent case law on juvenile sentencing and interrogation, created a new and substantial issue warranting review by the full court.

Under G. L. c. 278, § 33E, a defendant may not appeal the denial of a motion for a new trial to the full court unless the single justice determines that it "presents a new and substantial question which ought to be determined by the full court." "A defendant's claim might be 'new,' for example, if the applicable law was not sufficiently developed at the time of trial or direct appeal, such that the claim could not reasonably have been raised in those proceedings; or if evidence not previously available comes to light" (citations omitted). Commonwealth v. Gunter, 459 Mass. 480, 486 (2011). A

defendant's claim is "substantial" if it is a "meritorious issue in the sense of being worthy of consideration by an appellate court." Id. at 487.

1. Newly discovered evidence. The defendant's primary argument in his gatekeeper petition is that newly discovered evidence has created a new and substantial issue warranting appellate review. "To prevail on a motion for a new trial on the basis of newly discovered or newly available evidence, . . . [a defendant] must demonstrate that the evidence was previously unknown to him or not reasonably discoverable before trial, and . . . that the evidence 'casts real doubt on the justice of the conviction.'" Commonwealth v. DiBenedetto, 475 Mass. 429, 438 (2016), quoting Commonwealth v. Grace, 397 Mass. 303, 305 (1986).

The defendant first contends that recent developments in juvenile brain research subsequent to his original conviction warrant a new trial. He has submitted an affidavit by Dr. Frank Cataldo, a licensed psychologist, who is willing to testify on the defendant's behalf at a new trial about juvenile brain development.

Expert testimony is admissible "regarding the development of adolescent brains and how this could inform an understanding of [a] particular juvenile[] [defendant's] capacity for impulse control and reasoned decision-making" at the time of the

victim's murder. Commonwealth v. Okoro, 471 Mass. 51, 66 (2015). Accordingly, Dr. Cataldo's testimony would have been admissible at trial to assist "the jury in determining whether the defendant was able to form the intent required" for murder in the first degree. Id. The relevant question, however, is not whether Dr. Cataldo's testimony would be admissible at trial, but if it creates a new and substantial issue warranting appellate review.

Here, the jury already heard extensive testimony from Dr. Nestor that the defendant's youth played a significant role in his decision-making and impulse control. Although Dr. Cataldo's affidavit does provide new information about the juvenile brain that was not available at the time of trial, it is primarily cumulative of Dr. Nestor's testimony at trial. Cf. Commonwealth v. LeFave, 430 Mass. 169, 177 (1999). As the jury was already exposed to testimony about the effect of the defendant's age and emotional development on his decision-making, the new evidence does not raise a substantial issue meriting appellate review.

The defendant also claims that recent changes to the criteria for classifying intermittent explosive disorder (IED) constitute newly discovered evidence warranting a new trial. The Diagnostic and Statistical Manual of Mental Disorders in use at the time of the defendant's trial was DSM-IV. DSM-V, which was published in 2013, alters the criteria for diagnosing IED.

The defendant contends that the changes in DSM-V rebut testimony by the Commonwealth's expert witness, who testified that he did not believe the defendant met the criteria for IED under DSM-IV.

At the time of the defendant's trial, IED was already a recognized mental disorder. Indeed, the defense's expert witness testified that the defendant met the criteria for IED under DSM-IV. Small changes to the diagnostic criteria for IED in DSM-V which add additional support to the defendant's original diagnosis at trial do not rise to the level of newly discovered evidence. See Commonwealth v. Shuman, 445 Mass. 268, 272 (2005) ("The mere addition of further information to [a] preexisting debate does not amount to 'newly discovered evidence' for the purposes of a new trial motion"). See also LeFave, 430 Mass. at 177 (new studies did not constitute newly discovered evidence where they did not differ in kind from testimony presented at trial).

2. Changes to case law in light of Miller. In the last thirteen years, the Supreme Court has issued a number of decisions focused on Eighth Amendment violations in juvenile sentencing. See Roper v. Simmons, 543 U.S. 551, 568 (2005) (sentencing juvenile offenders to death violates Eighth Amendment); Graham v. Florida, 560 U.S. 48, 74 (2010) (imposing mandatory life sentence without possibility of parole on juveniles for non-homicide offenses violates Eighth Amendment);

Miller v. Alabama, 567 U.S. 460, 479 (2012) (imposing mandatory life sentence without possibility of parole on juvenile offenders for homicide offenses violates Eighth Amendment); Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (Miller holding applies retroactively). See also Diatchenko v. District Attorney for the Suffolk District, 466 Mass. 655, 665 (2013) (art. 26 of State constitution prohibits both mandatory and discretionary life sentences without possibility of parole for juvenile homicide offenders). Outside the context of the Eighth Amendment, the Supreme Court also recently held that a juvenile's age must be taken into consideration when determining whether a juvenile is in custody for the purposes of Miranda analysis. J.D.B. v. North Carolina, 564 U.S. 261 (2011).

The defendant repeatedly asserts that these changes to the case law create a new and substantial issue in his case. He primarily argues that the references to a "reasonable" or "ordinary" person standard in the model homicide instructions must be changed to a "similarly situated juvenile" in light of Miller. Yet, "Miller's actual holding was narrow and specifically tailored to the cases before the Court." Okoro, 471 Mass. at 57. There, the Supreme Court's focus was simply on "the prohibition against cruel and unusual punishment under the Eighth Amendment . . . as it applied to sentencing and punishment of juveniles. The Supreme Court did not discuss case

law or statutory law addressing intent, knowledge, or deliberate premeditation as elements of a crime." Commonwealth v. Brown, 474 Mass. 576, 590 n.7 (2016). Nothing in Miller or the other cases cited by the defendant alter the existing model jury instructions. See Okoro, 471 Mass. at 65, quoting Commonwealth v. Ogden, 448 Mass. 798, 804 (2007) ("Where the Legislature has determined that a youth is capable of committing certain crimes, we have noted that 'respect for the legislative process means that it is not the province of the court to sit and weigh conflicting evidence supporting or opposing a legislative enactment'"). Accordingly, these recent changes to the case law do not create a new and substantial issue in the defendant's case.

3. Grand jury instructions. The defendant also contends that a new trial is warranted because the grand jury was not properly instructed on the law or mitigating circumstances, citing Commonwealth v. Walczak, 463 Mass. 808 (2012). In Walczak, 463 Mass. at 810, a majority of the court held that grand juries should be instructed "on the elements of murder and on the significance of the mitigating circumstances and defenses," where the Commonwealth seeks to indict a juvenile for murder and there is substantial evidence of mitigating circumstances or defenses. This holding was prospective only, however, and has no application to the defendant's case. See

id. (explicitly stating that grand juries should be so instructed "[i]n future cases").

4. Motion to suppress. The defendant argues that his motion to suppress statements he made to police should have been granted. The denial of the defendant's motion to suppress was already litigated on his direct appeal, and in his habeas petition. He argues that it nonetheless constitutes a new and substantial issue in light of new juvenile brain science, the Miller line of cases, and J.D.B. v. North Carolina, 564 U.S. 261, 264 (2011), wherein the U.S. Supreme Court held that a juvenile's age "properly informs the Miranda custody analysis." J.D.B., which focused on determining whether a juvenile who did not receive Miranda warnings was in custody when he was interrogated, is inapposite. Here, the defendant received Miranda warnings, and the relevant question in the suppression hearing was not whether he was in custody, but whether police scrupulously honored his right to remain silent and whether his statement was made voluntarily.

Indeed, the judge who ruled on the motion to suppress did take the defendant's age into account when assessing the voluntariness of the defendant's confession. See James, 427 Mass. at 315. This court also independently reviewed the motion to suppress and concluded that the defendant's statements were made voluntarily, even in light of his age and inexperience.

See id. We have since held that seventeen year old juveniles must be afforded the opportunity to consult with an interested adult in order to effect a valid Miranda waiver, see Commonwealth v. Smith, 471 Mass. 161, 166-167 (2015), but this holding was prospective only. The U.S. Supreme Court's decisions in Miller and Montgomery do not alter this State common law rule. Accordingly, the defendant's renewed argument as to his motion to suppress is not substantial.

5. Transfer statute. The defendant further argues that the then-existing statute allowing for juveniles to be tried in Superior Court without a juvenile transfer hearing or judicial mitigation review was unconstitutional as applied to the defendant. As this court has previously explained, "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 juveniles and adult offenders, and geared toward 'the correction and redemption to society of delinquent children" (internal quotation marks omitted). Commonwealth v. Soto, 476 Mass. 436, 439 (2017), quoting Commonwealth v. Hanson H., 464 Mass. 807, 814 (2013). Although the defendant contends that this disparate jurisdictional treatment is unconstitutional, none of the cases he cites support this proposition.

6. Sentencing statute. The defendant's arguments that sentencing statute is void for vagueness and that he is entitled to individual resentencing were both addressed in Diatchenko v. District Attorney for the Suffolk District, 466 Mass. 655, 673-674 (2013), wherein the full court concluded that the unconstitutional portion of G. L. c. 265, § 2, was severable from the remainder of the statute and that juvenile defendants with life sentences, while now eligible to be considered for parole, were not entitled to resentencing.

7. Court room closure. The defendant's argument that he was denied his right to a public trial is similarly insubstantial. By failing to object to the court room closure at trial, the defendant has procedurally waived this claim. See Commonwealth v. LaChance, 469 Mass. 854, 857 (2014). The defendant separately argues that his trial attorney's failure to object to the court room closure constitutes ineffective assistance of counsel, but he has failed to demonstrate that he was prejudiced by the error. See id. at 856-857 (defendant who procedurally waives court room closure issue but later asserts it in collateral attack as ineffective assistance of counsel is not entitled to presumption of prejudice).

As to the remaining legal issues raised in the petition, they lack merit for the reasons stated by the motion judge's

memorandum of decision and the Commonwealth's memorandum in opposition to the defendant's petition.

For the foregoing reasons, it is ORDERED that the defendant's application for leave to appeal pursuant to G. L. c. 278, § 33E is hereby DENIED.

Scott Kafker
Associate Justice

Entered: August 28, 2018

Part IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES

Title II PROCEEDINGS IN CRIMINAL CASES

Chapter 278 TRIALS AND PROCEEDINGS BEFORE JUDGMENT

Section 33E CAPITAL CASES; REVIEW BY SUPREME JUDICIAL COURT

Section 33E. In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean: (i) a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. SUPERIOR COURT
Docket No. PLCR 1994-95293-7

COMMONWEALTH

v.

STEVEN JAMES (A JUVENILE)

AFFIDAVIT OF FRANK DICATALDO, PH.D.

I, Frank DiCataldo, Ph.D., do hereby state the following to the best of my knowledge, information and belief:

I. PURPOSE AND SCOPE OF EXPERT OPINION

1. I was retained by Rosemary Curran Scapicchio, appellate counsel for Steven James, to review case documents, mental health records and reports, and trial transcripts in the matter of Commonwealth v. Steven James, and to provide expert opinions regarding recent advances in the psychological science of adolescent development, in particular the advances in the neuroscience of adolescent brain development, and the accumulating research regarding the impact of early abuse and neglect and psychological trauma on childhood development and adjustment, the developing child/adolescent brain, and the increase risk it poses for various mental health disorders and emotional regulation and impulse control problems. Many of these recent advances in psychological science, which are generally accepted and have withstood rigorous scientific analysis reported in peer-reviewed publications, were either not known or not in evidence at the trial of Steven James in 1995.

II. METHODOLOGY AND MATERIALS REVIEWED

2. In the formulation of my expert opinion I relied on the following sources of information:

    a. Review of the following documents, records and transcripts:

        i. Defendants' Motion for a New Trial and Incorporated Memorandum of Law;

        ii. Memorandum of Decision and Transcript of Motion to Suppress Statements;

        iii. Commonwealth v. Steven James Docket Sheet, No. PLCR1994-95293;

        iv. Commonwealth v. James, 427 Mass. 312 (1998);

        v. Steven James v. John Marshall, Decision of the United States Court of Appeals, First Circuit No. 02-1352;

        vi. The Children's Hospital Report of Neuro/Psychological Examination, October 13, 1987;

        vii. Department of Social Service, Group Care Referral, undated;

        viii. Letter regarding admission of Steven James to Somerville Hospital, September 19, 1991;

        ix. Kennedy Memorial Hospital for Children, August 24, 1983;

        x. Letter from Michael Karson, Ph.D. to John S. Chown, DSS, June 18, 1989;

        xi. Somerville Hospital Patient Care Referral Form, November 6, 1991;

        xii. South Shore Mental Health Center, Background Data, undated;

        xiii. Commonwealth v. Stephen M. Direnzo, 44 Mas. App. Ct. 95 (1997)

        xiv. "Teens Plead Innocent in Rockland Beating," The Patriot Ledger, undated

        xv. Individualized Education Plan, December 14, 1983-January 1984

        xvi. Psychiatric evaluation, Mark W. Rodehaver, M.D., December 14, 1986

        xvii. Robert F. Kennedy Children's Center, reports

        xviii. Psychological test and instrument results, undated

xix. Criminal indictment, April 19, 1994

xx. Criminal record, July 25, 1996

xxi. Trial Intake Classification Report, Plymouth House of Correction,

xxii. Department of Social Service, records, 1983-1995

xxiii. "Highlights of Changes from DSM-IV-TR to DSM-5," Psychiatric News, May 17, 2013;

xxiv. Robert F. Kennedy Children's Action Corps, Termination Conference Reports, December 18, 1985;

xxv. Somerville Hospital Records, September 19, 1991-November 6, 1991;

xxvi. Intermittent Explosive Disorder, DSM-IV, pg. 609-612.

xxvii. Intermittent Explosive Disorder, DSM-5, pg. 466-469

xxviii. Commonwealth v. DiRenzo, excerpts from trial transcript

xxix. Affidavit of Appellate Counsel, Attorney Rosemary Curran Scapicchio, June 5, 2013;

xxx. Deposition of Kevin M. Flanagan, Commonwealth v. Steven James, Plymouth Superior Court, March 15, 1995;

xxxi. Medical records, Somerville and New England Medical Center, various dates

xxxii. Questionnaire for Prisoners concerning a Sentence of Life without the Possibility of Parole, The Sentencing Project, Washington, D.C., May 18, 2011;

xxxiii. South Shore Hospital, medical records, Edward Sullivan, April 1994

xxxiv. Plymouth County Correctional Facility, 1994-1995

xxxv. Trial testimony, Commonwealth v. Steven James, Plymouth Superior Court, April 4, 1995

xxxvi. Trial testimony, Martin Kelly, M.D., Commonwealth v. Steven James, Plymouth Superior Court, April 11, 1995

3. I consulted numerous research reports and publications by clinical scientists regarding adolescent development, the developing adolescent brain and the adverse impact of early abuse and neglect and psychological trauma on adolescent development, the developing brain and the risk for mental health disorders, like Intermittent Explosive Disorder, and problems with emotional regulation and impulse control due to early aversive childhood experiences and trauma.

III. QUALIFICATIONS

4. I am currently Associate Professor and Coordinator of Graduate Training in Psychology in the Department of Psychology at Roger Williams University in Bristol, Rhode Island. I have been on the faculty at Roger Williams University since 2005 and have been the Coordinator of Graduate Training in Psychology since 2013. I received my B.A. in Psychology from the College of the Holy Cross in 1984 and my Ph.D. in Clinical Psychology in 1989 from St. Louis University. I was a Post-Doctoral Fellow in Forensic Psychology at Law and Psychiatry Program at the University of Massachusetts Medical School from 1989-1990.

5. I am a member of the American Psychology-Law Society and the Society for Personality Assessment.

6. I have been a licensed psychologist in the Commonwealth of Massachusetts since 1990 and am a Designated Forensic Psychologist (DFP), a DFP Supervisor, a Certified Juvenile Court Clinician (CJCC) II, and a CJCC Mentor for the Massachusetts Department of Mental Health. I am currently Chair of the CJCC Training and Certification Committee. The Committee reviews and approves training plans and reports for candidates seeking certification to conduct court-ordered evaluations within the juvenile courts in Massachusetts. I have been Chair since August 2014.

7. I worked as a forensic psychologist at Bridgewater State Hospital (BSH) from 1990-1996, during which time I conducted hundreds of court-ordered forensic mental health evaluations of criminal defendants for competency to stand trial, criminal responsibility, aid-to-sentencing, violence risk, and civil commitment to a psychiatric facility. Many of the defendants I evaluated over the course of my tenure at BSH were diagnosed with multiple mental disorders and had experienced early abuse and neglect and psychological trauma.

8. I was the Director of Forensic Evaluations for the Massachusetts Department of Youth Services (DYS) from 1996-2009. The program evaluated over 3500 youth detained and committed to the DYS and many of the youth referred to our evaluation service were diagnosed with one or more mental disorders and had experienced early abuse and neglect and psychological trauma.

9. I have maintained a private practice in forensic mental health since 1990 and have conducted hundreds of evaluations of individuals at the request of defense and

prosecuting attorneys and the Departments of Mental Health, Correction and Youth Services. Many of the individuals I have evaluated were diagnosed with one or more mental disorders and had a history of early abuse and neglect and psychological trauma.

10. I am currently a psychological consultant at the Rhode Island Training School, MA Department of Mental Health and the MA Department of Youth Services, and the Department of Psychiatry, University of Massachusetts Medical School.

11. My related areas of research specialty are in the areas of risk assessment of juvenile offenders, the post-release adjustment of juvenile homicide perpetrators and the assessment of juveniles who have engaged in sexually abusive behavior. My publications and presentations in these areas are detailed in my curriculum vitae.

12. My teaching responsibilities include courses in the clinical assessment of adults and children and forensic psychology. I train and supervise graduate students in forensic and clinical psychology at Roger Williams University on the administration, scoring, and interpretation of psychological tests, in addition to many generally accepted and validated tests of intelligence and cognitive functioning, mental health inventories and rating forms, tests of personality and risk assessment instruments.

13. I have been qualified as an expert in forensic psychology in district, superior and juvenile courts in Suffolk, Bristol, Plymouth, Middlesex, Essex, Norfolk, Worcester, Hampden and Barnstable Counties.

IV. SUMMARY OF OPINIONS

14. Based on my review of the documentation provided to by appellate counsel, it is my expert opinion that at the time of the offense on February 21, 1994, Steven James was a 17-year-old adolescent and, as such, was vulnerable to the host of underdeveloped psychological capacities recently identified by psychological science, most of which have been identified as due to the developing brain of the still maturing adolescent. Among the major underdeveloped psychosocial capacities identified are a lower capacity for emotional regulation and management compared to adults; immature judgment and decision-making compared to adults; vulnerability to impulsive behavior and poor impulse control compared to adults; greater vulnerability to peer influence and pressure compared to adults; and a greater overall capacity for maturation, behavior change, personality development and desistance from violence compared to adults. These underdeveloped, or, more accurately, capacities still-under-development, in adolescents are widely accepted within psychological science and have been recognized by the U.S. Supreme Court in *Roper v. Simmons* (2005), *Graham v. Florida* (2008) and *Miller v. Alabama* (2013).

15. In addition to his being very much within the adolescent phase of development and subject to all the attendant limitations cited above, Steven James had a well-documented history of childhood abuse and neglect that made him vulnerable to or at risk for multiple mental disorders and problems. Steven James had a long history of multiple inpatient

psychiatric admissions and was in outpatient psychiatric treatment with medication for the treatment of his mental disorders and problems. At the time of his participation in the killing on February 21, 1994, Steven James was likely suffering from a mental impairment that substantially reduced his ability to control or inhibit his emotional reaction and behavior.

16. Steven James was the recent victim of a physical attack resulting in physical injury by a group of young males in November 1993. The experience was likely psychologically traumatic and may have impaired his perception and ability to control his emotions and behavior on the night of his arrest.

17. In my expert opinion, the new scientific evidence about the adolescent brain, in combination with Steven's mental disorders, has significant relevance to some of the language used in the trial jury instructions regarding mitigation and the degree of manslaughter or murder.

V. SUMMARY OF STEVEN JAMES' HISTORY OF PARENTAL ABANDONMENT AND EARLY ABUSE AND NEGLECT

18. Steven James was born to a mother who was 14-years-old when she became pregnant with him.[1] His mother had a history of DSS involvement prior to her giving birth to Mr. James.[2]

19. Mr. James was exposed to "a chaotic, unstable, early childhood which was significant for parental rejection and multiple living environments." [3]

20. Mr. James' biological mother surrendered custody of him to DSS because he was reportedly difficult to manage.[4]

21. As a child, Mr. James recalls having witnessed his mother being raped and also states that his mother was diagnosed with Bipolar Disorder and had multiple substance use disorders.[5]

22. Mr. James' biological father was 15-years-old at the time of his birth and briefly assumed custody of Mr. James until he was about four or five years old.[6]

23. Mr. James' biological father abandoned him, as his mother had done before, at the age of six to the custody of DSS, requesting immediate placement in a foster home. His father reportedly was no longer able to manage his poorly controlled behavior, and blamed his

[1] Report of Neuropsychological Examination, 10/6 and 10/7/1987, pg. 2
[2] Somerville Hospital, 11/6/1991, pg. 2
[3] Report of Neuropsychological Examination, 10/6 and 10/7/1987, pg. 1
[4] Robert F. Kennedy Children's Action Corps, 8/2/1985, pg. 6.
[5] Defendant's Motion for a New Trial and Incorporated Memorandum of Law, pg. 8.
[6] Department of Social Services, Group Care Referral, undated.

son for the recent break-up of his relationship with his girlfriend. He also admitted to punching Mr. James. [7]

24. Mr. James has reported that his father had a history of alcohol abuse.[8]

25. Mr. James was in the custody of DSS from the age of four or five until the age of 17, residing in a variety of foster and group homes and psychiatric hospitals and programs. [9]

26. While in DSS custody, Mr. James reports numerous instances of physical and sexual abuse.[10]

27. As a child within DSS custody, Mr. James reportedly manifested chronic problematic behavior including low self-esteem, poor emotional regulation, poor impulse control, suicidal ideation and gestures, and aggressive behavior.[11] His problematic behavior and adjustment were likely the result of his history of parental abandonment and history of neglect and abuse while in the custody of DSS.

28. Mr. James had as many as 24 different placements between the ages of four or five and 17, while he was in the custody of DSS.[12]

VI. SUMMARY OF STEVEN JAMES' HISTORY OF MENTAL DISORDERS AND THEIR TREATMENT

29. When Mr. James was in kindergarten, he was placed on Ritalin, a psychostimulant used to treat the symptoms of AD/HD. According to his foster parents, the medication made him "whiny and irritable." [13]

30. Mr. James was admitted to the Kennedy Memorial Hospital for Children in August 1983 for significant behavior problems that included poor impulse control and aggression.[14]

31. At the Kennedy Memorial Hospital for Children, Mr. James was diagnosed as suffering from cerebral dysfunction with undetermined etiology, manifested by poorly modulated behavior and low academic achievement with a probable reading disorder, dyslexia.[15]

32. Mr. James was prescribed Tofranil, a tricyclic anti-depressant, and Mellaril, a powerful tranquilizer often used in the treatment of schizophrenia and other psychotic disorders.

[7] Somerville Hospital, 11/4/1991, pg. 1
[8] Defendant's Motion for a New Trial and Incorporated Memorandum of Law, pg. 9.
[9] Somerville Hospital, 11/4/1991, pg. 1-2.
[10] Defendant's Motion for a New Trial and Incorporated Memorandum of Law, pg. 9.
[11] Department of Social Services, Group Care Referral, undated.
[12] Defendant's Motion for a New Trial and Incorporated Memorandum of Law, pg. 10-12.
[13] Kennedy Memorial Hospital for Children, 8/24/1983, pg. 2.
[14] Kennedy Memorial Hospital for Children, 8/24/1983, pg. 2
[15] Kennedy Memorial Hospital for Children, 8/24/1983, pg. 3

He reportedly required 'full restraints" to manage his out-of-control behavior, even with the medication.[16]

33. An evaluation of Mr. James in 1989 when he was 12 years old by Dr. Michael Karson, a clinical psychologist, described him as "a seriously disturbed boy" with a history of abandonment and trauma who often resorts to aggression as a means "to master the chaos in his world." [17]

34. Mr. James was admitted to Somerville Hospital in September 1991, at the age of 15 and was diagnosed with "PTSD with affective and impulse disorder." He was prescribed Lithium, a mood stabilizer often used in the treatment of Bipolar Disorder, Inderal, an anti-depressant and Benadryl, an antihistamine often used to control side-effects and to aid sleep.[18]

35. On November 20, 1991, at the age of 15, Mr. James was again diagnosed with PTSD and an Impulse Control Disorder, NOS at the South Shore Mental Health Program. He was also placed at the South Shore Educational Collaborative Residential Program.[19]

36. On February 28, 1992, a Progress Note and Updated Treatment Plan included the diagnosis of "Impulse Control Disorder (Severe and Enduring)." This diagnostic formulation appears again at his Clinical Case Conference on May 28, 1992 and on a May 28, 1992 Progress Report and Updated Treatment Plan.[20]

37. On October 13, 1992, in a Medical Management Note, Dr. Nicholson, his outpatient psychiatrist, writes, "Impulse Control Disorder, history of explosive outbursts." He also was reportedly "attending high school and doing well playing football. He was prescribed Mellaril, Lithium and Inderal. [21]

38. On January 20, 1993, Dr. Nicholson in a letter to DSS, wrote. "The Lithium and Inderal have addressed his extreme lability of mood and impulsiveness. Mellaril was started because of extreme behavioral difficulties, including kicking and punching walls and being verbally abusive and threatening to others."[22]

39. Six months later on January 27, 1993, Dr. Nicholson wrote in an affidavit that she had been treating Mr. James since July, 1992 and that he was diagnosed with an Impulse Control Disorder NOS and a Bipolar Disorder…characterized (by) verbal and physical aggressiveness, agitation, inability to calm self, poor socialization skills, disorganized thinking….even when on medication."[23]

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[16] Kennedy Memorial Hospital for Children, 8/24/1983, pg. 6 and 16.
[17] Letter from Michael Karson, Ph.D. to John S. Chown, DSS, June 18, 1989
[18] Somerville Hospital, 11/6/1991, pg. 1.
[19] South Shore Mental Health Center, Background Data, undated
[20] South Shore Mental Health Center, Background Data, undated
[21] South Shore Mental Health Center, Background data, undated
[22] South Shore Mental Health Center, Background Data, undated
[23] South Shore Mental Health Center, Background Data, undated

40. In a Medication Management Note, dated April 6, 1993, Dr. Nicholson starts Mr. James on Haldol, an anti-psychotic medication, and continues to diagnosis him with an Impulse Control Disorder and a history of explosive outbursts.[24]

41. On November 19, 1993, Dr. Nicholson writes in a Medication Note that Mr. James sustained a concussion and facial injuries when he was jumped by a group of males in Rockland. One of his assailants was later charged with a double murder in Brockton.[25]

VII. SUMMARY OF THE MENTAL HEALTH TESTIMONY AT THE TRIAL OF STEVEN JAMES

42. Kani J. Nicholson, MD, a psychiatrist at South Shore Mental Health, testified at the trial of Steven James. Mr. James had been in outpatient treatment with Dr. Nicholson for nearly two years prior to the alleged incident, beginning in August 1992.

43. Dr. Nicholson had diagnosed Mr. James with Impulse Control Disorder. In prior Medication Notes, she had specifically diagnosed him with Impulse Control Disorder Not Otherwise Specified (NOS). According to DSM-III-R (1987), the version in use during the time she was treating him in the community, states that an Impulse Control Disorder NOS are "(D)isorders of impulse control that do not meet the criteria for a specific Impulse Control Disorder."[26] The DSM-III-R states that the essential features of disorders of impulse control are:

    1. Failure to resist an impulse, drive or temptation to perform some act that is harmful to the person or others. There may or may not be conscious resistance to the impulse. The act may or may not be premeditated or planned.

    2. An increasing sense of tension or arousal before committing the act.

    3. An experience of either pleasure, gratification, or release at the time of committing the act. The act is ego-syntonic in that it is consonant with the immediate conscious wish of the individual. Immediately following the act there may or may not be genuine regret, self-reproach, or guilt.[27]

44. The DSM-IV, published in May 1994, retained the same description and definition for Impulse Disorders and specifically Impulse Control Disorder NOS.[28]

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[24] South Shore Mental Health Center, Background Data, undated

[25] South Shore Mental Health Center, Background Data, undated; "Teens Plead Innocent in Rockland Beating," *The Patriot Ledger*

[26] *Diagnostic and Statistical Manual of Mental Disorders* (*Third Edition-Revised).* (1987). American Psychiatric Association. Washington, D.C., pg. 328.

[27] *Diagnostic and Statistical Manual of Mental Disorders* (*Third Edition-Revised).* (1987). American Psychiatric Association. Washington, D.C., pg. 321.

[28] *Diagnostic and Statistical Manual of Mental Disorders* (*Fourth Edition).* (1994). American Psychiatric Association. Washington, D.C., pg. 609, 621.

45. Dr. Nicholson prescribed Lithium, Inderal, propranol and Haldol to Mr. James. These medications were prescribed to treat his symptoms of Impulse Control Disorder NOS.

46. Dr. Nicholson testified that she met with Mr. James on February 16, 1994, five days before the incident, and he seemed goal-directed and able carry out plans.

47. Paul Nestor, PhD., a forensic neuropsychologist, was retained by Mr. James to conduct an evaluation about his mental state at the time of the offense. Based on his review of available mental health record, clinical interviews with Mr. James, and psychological testing, Dr. Nestor diagnosed Mr. James with Intermittent Explosive Disorder, a specific diagnosis category within the class of Impulse Control Disorders.[29]

48. The diagnostic criteria for Intermittent Explosive Disorder as defined within DSM-III-R include:

    1. Several discrete episodes of loss of control of aggressive impulses resulting in serious acts or destruction of property

    2. The degree of aggressiveness expressed during the episodes is grossly out of proportion to any precipitating psychosocial stressors

    3. There are no sign of generalized impulsiveness or aggressiveness between the episodes

    4. The episodes of loss of control do not occur during the course of a psychotic disorder, Organic Personality Syndrome, Antisocial or Borderline Personality Disorder, Conduct Disorder, or intoxication with a psychoactive substance.[30]

49. The DSM-IV retains the diagnostic criteria in DSM-III-R, but excised criterion 3.[31]

50. Dr. Nestor testified that Mr. James could not control his behavior due to his having suffered from Intermittent Explosive Disorder.[32]

51. Martin Kelly, MD, a psychiatrist retained by the Commonwealth, conducted an examination of Mr. James and concluded that he did not suffer from a mental disease or defect that resulted in his lacking a substantial capacity to appreciate the wrongfulness of his conduct and/or conform his conduct to the requirements of the law.[33]

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[29] Defendant's Motion for a New Trial and Incorporated Memorandum of Law, pg. 31-34.
[30] *Diagnostic and Statistical Manual of Mental Disorders* (*Third Edition-Revised).* (1987). American Psychiatric Association. Washington, D.C., pg. 322.
[31] *Diagnostic and Statistical Manual of Mental Disorders* (*Fourth Edition).* (1994). American Psychiatric Association. Washington, D.C., pg. 612.
[32] Defendant's Motion for a New Trial and Incorporated Memorandum of Law, pg. 31-34.
[33]Defendant's Motion for a New Trial and Incorporated Memorandum of Law, pg. 34-37; Trial testimony, Martin Kelly, M.D., Commonwealth v. Steven James, Plymouth Superior Court, April 11, 1995.

VIII. OVERVIEW OF RECENT NEUROSCIENTIFIC ADVANCES IN THE UNDERSTANDING OF THE ADOLESCENT BRAIN

52. Recent research advances in developmental psychology have established that adolescents, as a group, differ in fundamental ways from adults. These salient differences are set forth in three areas: a) Juveniles lack a capacity for mature judgment and decision-making; b) juveniles are more vulnerable to external negative influences; c) juveniles' personality and identity are still in formation. Consistent with these generally accepted findings from developmental psychology, recent neuroscience research has demonstrated that adolescent brains are not yet fully developed in areas related to high order executive functions such as impulse control, decision-making, planning, and the calculation of risk. The neuroscience and developmental research are consonant with each other on these issues. These principals are not unique to any individuals, but universally applicable to all adolescents.

53. Brain imaging techniques has found that the human brain changes significantly over the lifespan. The prefrontal lobe of an adolescent's brain undergoes significant changes and does not full maturity until early adulthood.[34]

54. Adolescents depend on the amygdala, the area of the brain associated with aggression, affective reactivity and impulsive behavior, when confronted with highly emotionally-charged situations compared to adults. Adults utilize higher cortical areas, such as the prefrontal cortex, which is much less dependent on emotions reactions and impulsive behavior. The prefrontal cortex allows for more mature control of impulses, more accurate assessment of risk, and the more effective management of anger and aggression. These characteristics are underdeveloped in adolescents compared to adults.[35]

55. Adolescents due to their immature prefrontal cortex are less proficient in delaying emotional-laden responses and, as a result, are less likely to inhibit impulsive decisions and behavior and to consider alternative courses of action compared to adults. [36]

56. The maturation of the prefrontal cortex in the adolescent occurs through the process of "pruning" and myelination. "Pruning" involves the clearing away of seldom used or unnecessary neurons and synapses, responsible for communication within the brain, resulting in more efficient and smoother connection between the higher-order prefrontal cortex and lower-order emotional centers, like the amygdala. The end result is decreased

[34] See, e.g., Giedd, J. (2004). Structural magnetic resonance imagining of the adolescent brain. *Annuals of New York Academy of Science*, 1021, 77-85; Goldberg, E. (2009). *The New Executive Brain: The frontal lobes in a complex world.* NY: Oxford University Press; Gruber, S. and Yurgelun-Todd, D. (2006). Neurobiology and the law: A role in juvenile justice? *Ohio State University Journal of Criminal Justice*, 3, 321-340; Gur R. (2005). Brain maturation and its relevance to understanding criminal culpability of juveniles. *Current Psychiatry Reports*, 7, 292-296; Jensen, F. (2015). *The Teenage Brain: A neuroscientist's survival guide for adolescence and young adults*. NY: Harper; Steinberg, L. (2009). Adolescent development and juvenile justice. *Annual Review of Clinical Psychology*, 5, 459-485; and Steinberg, L. (2015). *Age of Opportunity: Lessons from the new science of adolescence*. Eamon Dolan/Mariner Books;

[35] See, e.g., Berkman, M. (2004). Crime, culpability, and the adolescent brain. *Science*, 305, 596-597; Gruber and Yurgelun-Todd (2006); Gur (2005); and Steinberg (2009).

[36] See, e.g., Berkman, M. (2004); Gruber and Yurgelun-Todd (2006); and Gur (2005).

emotional reactivity and impulse responses to highly-charged environmental events. Myelination involves the production of a fatty covering around neurons, comprising the white matter of the brain, which also facilitate communication between the emotional and reasoning centers of the brain. Research has demonstrated that an adolescent's brain has less "pruning" and myelination than an adult's brain.[37]

IX. JUVENILES LACK AN ADULTS' CAPACITY FOR MATURE JUDGMENT AND ABILITY TO CONTROL EMOTIONS AND BEHAVIOR

57. As a result of their immature brain development, adolescents (like Steven James at the time of the incident) are less capable of thinking ahead and contemplation as adults. The adolescent's immature brains has profound implications for their ability to make mature judgments and decisions, for resisting and neutralizing negative influences arising from their family, peer group and neighborhood contexts, and for the establishment of their enduring characters and identities. Juveniles are less able to restrain their impulses and exercise self-control. Often referred to "temperance," this ability includes the capacity to limit impulsivity.[38]

58. Juveniles are less capable than adults at thinking ahead and weighing the risks and benefits of their behavior. They tend to over-value short-term "payoffs" and gain and often neglect to consider longer-term negative consequences. As a result, their decision-making is immature compared to adults.[39]

59. From a biological perspective, an adolescent is more likely to engage in act of impulsive violence in an emotionally-charged situation than an adult would be under the exact same circumstances. They are more likely to be impulsive, more likely to misread or misinterpret social cues, and less likely to reflect, consider alternative courses of action and "veto" the impulse to act aggressively.[40]

60. As a group, juveniles are less oriented to the future and thus less capable of apprehending the consequences of their impulsive actions. They have deficient perspective-taking abilities, often neglecting to take another person's perspective into account in their own decisions and neglect the long-term consequences of their actions.[41]

X. ADOLESCENTS HAVE GREATER SUSCEPTIBILITY TO PEER INFLUENCE AND PRESSURE THAN ADULTS

[37] See, e.g., Giedd (2004); Jensen (2015) ; and Steinberg (2014).
[38] See, e.g., Brief of the American Psychological Association as Amici Curiae in Support of Petitioner in *Miller v. Alabama and Jackson v. Hobbs,* Nos. 10-9646, 10-9647 (2012).
[39] See, e.g., Scott, E. et al. (1995). Evaluating adolescent decision making in legal contexts, *Law and Human Behavior,* 19, 221- 231.
[40] See, e.g., Scott, E. and Steinberg, L. (2008). *Rethinking Juvenile Justice.* Cambridge, MA: Harvard University Press
[41] See, e.g., Brief of the American Psychological Association as Amici Curiae in Support of Petitioner in *Miller v. Alabama and Jackson v. Hobbs,* Nos. 10-9646, 10-9647 (2012).

61. Adolescents are less self-reliant, autonomous and independent than their adult counterparts. Compared to adults, adolescents are twice as likely to commit crimes in the context of a group. They are more deeply embedded within their families, peer groups and other social forces within their environment. They lack the autonomy of adults to escape or remove themselves from their life contexts. Adolescents are particularly susceptible to peer influence, peer approval, and the achievement of social status and respect conferred by the peer group. [42]

62. Compared to adults, adolescents are significantly more likely to commit crimes in the context of a group. Juvenile crime often occurs on a stage before an audience of their peers who provide the rewards of status and respect that they so desperately covet.[43]

XI. AN ADOLESCENT'S CHARACTER AND IDENTITY ARE WORKS IN PROGRESS AND ARE NOT FULLY FORMED

63. An adolescent's personality is still in formation and his identity is still developing. As the Supreme Court has recognized, "the reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[44] As adolescents mature, they are less prone to violence and their risk for violence and other high risk behavior desists. This is the very definition of what it means to be an adolescent.

64. Juvenile's participation in violence is often a transient phenomenon and phase-specific. Most adolescents will through a process developmental psychologists' call desistance will cease (desist) from future criminality in adulthood. The vast majority of adolescent offenders will cease from further criminality conduct across the life course; only a rare and exceptional minority will persist in their criminal trajectories well into adulthood.[45]

65. According to the Diagnostic and Statistical Manual for Mental Disorders-5 (DSM-5) a person cannot be diagnosed with an Antisocial Personality Disorder until age 18, precisely because childhood and adolescent conduct problems do not condemn one to lifelong problem of antisociality. In fact, most children and adolescents with conduct problems, including violent conduct, will abandon such conduct through nothing more sophisticated than normal maturation. Mental health professionals are forbidden from "diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights and suffering of others."[46]

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[42]See, e.g., Steinberg, L and Scott, E. (2003). Less Guilty by Reason of Adolescence. Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, *American Psychologist,* 58, 1009- 1012.

[43] Snyder, H.N and Sickmund, M. (1999), *Juvenile Offenders and Victims: 1999 National Report*, National Center for Juvenile Justice.

[44] *Roper v. Simmons,* 543 U.S. 551, 570 (2005)

[45] See, e.g., Mulvey, E. et al. (2004). Theory and research on desistance from antisocial activities among serious adolescent offenders. *Youth Violence and Juvenile Justice*, 2, 213-236.

[46] Diagnostic and Statistical Manual of Mental Disorders, (4th ed. Text rev 2000). American Psychiatric Association, pg. 701-706.

66. Behavioral science research has consistently indicated that it is difficult to predict adolescent desisters from persisters with any degree of reasonable reliability, highlighting the necessity of providing youth the opportunity to demonstrate change and reform as they mature. A recent study found that for scores on a test of risk of antisocial personality in adulthood, the prediction that the top 20% of scores of 13-year-old's would be diagnosed as having antisocial personality disorder in adulthood would be wrong 86% of time.[47] Some may lament that this study points to the limits of our science to predict human behavior, and though true, others may find consolation in the study's demonstration of the unbounded potential of the human spirit to overcome adversity.

XII. THE VULNERABILITY OF INDIVIDUALS WITH ABUSE AND NEGLECT AND PSYCHOLOGICAL TRAUMA TO MENTAL DISORDERS, SUCH AS INTERMITTENT EXPLOSIVE DISORDER.

67. In 1992, Dr. Nicholson diagnosed Mr. James with an Impulse Control Disorder Not Otherwise Specified. Dr. Nestor refined this diagnosis, testifying at his trial in 1995 that Mr. James met diagnostic criteria for Intermittent Explosive Disorder (IED).

68. Recent epidemiological surveys have reported a lifetime prevalence of IED as defined in DSM-IV as 5.4% for adults.[48] A similar prevalence rate has been reported for adolescents. [49]

69. Studies of adults with IED report the average age of onset in mid-adolescence.[50] Adolescent onset IED has an average age of onset of age 12.[51]

70. Family history studies have identified a higher prevalence rate of IED in the first-degree relatives of individuals with IED, indicating a moderate genetic influence in IED.[52] Recent research has identified brain abnormalities in individuals with IED.[53]

71. A history of trauma in childhood has been identified as a risk factor for IED.[54] A recent study found that exposure to childhood trauma and low parental care was predictive of IED as defined by DSM-V compared to psychiatric and normal controls.[55]

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[47] Lynam, D. et al. (2007). Longitudinal evidence that psychopathy scores in early adolescence predict adult psychopathy, *Journal of Abnormal Psychology*, 116, 155-168.
[48] Kessler, R, Coccaro, E., and Fava, M., et al. (2006). The prevalence and correlates of DSM-IV Intermittent Explosive Disorder in the National Comorbidity Survey Replication. *Archives of General Psychiatry*, 63, 669-678.
[49] McLaughlin, K., Green, J., Hwang, I., et al. (2012). Intermittent Explosive Disorder in the National Comorbidity Survey Replication Adolescent Supplement. *Archives of General Psychiatry*, 69, 1131-1139.
[50] Kessler et al. (2006).
[51] McLaughlin et al. (2012).
[52] Coccaro, E. (2010). A family history study of intermittent explosive disorder. *Journal of Psychiatric Research*, 44, 1101-1105,
[53] Coccaro, E., McCloskey, M., Fitzgerald, D. and Phan, K. (2007). Amygdala and orbitofrontal reactivity to social threat in individuals with impulsive aggression. *Biological Psychiatry*, 61, 168-178.
[54] Nickerson, A., Aderka, I., Bryant, R., and Hofmann, S. (2012). The relationship between childhood exposure to trauma and intermittent explosive disorder. *Journal of Psychiatric Research*, 197, 128-134.
[55] Fanning, J., Meyerhoff, J. Lee, R, and Coccaro, E. (2014). History of childhood maltreatment in intermittent explosive disorder and suicidal behavior. *Journal of Psychiatric Research*, 56, 10-17.; and Lee, R, Meyerhoff, J.,

72. Individuals with IED have abnormalities in a wide range of areas of functioning. Compared to controls, individuals with IED have higher levels of aggression within relationships,[56] are more likely to misattribute hostile intentions to socially ambiguous situations, [57] have higher levels of affective lability and dysregulation, [58] and more immature psychological defenses, including acting out.[59]

73. The past decade has witnessed significant research advances in the diagnosis, etiology and treatment of IED. This research was not available at the time of Mr. James' trial in 1995. The presentation of this research at his trial would have likely demonstrated that Mr. James suffered from a mental impairment that substantially impaired his ability to control his behavior at the time of his involvement in his criminal act. This scientific information was not available in 1995 but has since been published in a broad range of peer-reviewed published studies.

XIII. APPLICATION OF EXPERT OPINIONS TO HYPOTHETICAL TESTIMONY AT A TRIAL OR EVIDENTIARY HEARING

74. If there was an evidentiary hearing in connection with this appeal, or if there was a hypothetical new trial at this time, I could testify to all of this new research evidence and how it relates specifically to Steven James and this case.

75. I could also testify to all of the research evidence and scientific conclusions contained in this affidavit to explain to the jury that Steven James was not the ordinary reasonably prudent person contemplated by the law, and that the reasonableness, legality, and criminal degree of his conduct must be viewed in connection with his still-developing adolescent brain and his mental disorders.

76. In my expert opinion the new research evidence about the adolescent brain has significant relevance to some of the language used in the trial jury instructions. The unique combination of Steven's adolescent brain and his mental health history may mitigate one or more of the factors that a jury must consider when deciding the degree of culpability or the degree of murder or manslaughter.

77. For example, the application of the new research evidence regarding Steven's still-developing adolescent brain, along with his unique mental health diagnoses, appears

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and Coccaro, E. (2014). Intermittent explosive disorder and aversive parental care. *Journal of Psychiatric Research*, 220, 477-482.

[56] Murray-Close, D., Ostrov, J., Nelson, et al. (2010). Proactive, reactive, and romantic relational aggression in adulthood: Measurement, predictive validity, gender differences, and association with intermittent explosive disorder. *Journal of Psychiatric Research*, 44, 393-404.

[57] Coccaro, E. Norblett, K, and McCloskey, M. (2009). Attributional and emotional responses to socially ambiguous cues: Validation of a new assessment of social/emotional information processing in health adults and impulsive aggressive patients. *Journal of Psychiatric Research*, 43, 915-925.

[58] Fettich, K., McCloskey, M., Look, A., and Coccaro, E. (2015). Emotion regulation deficits in intermittent explosive disorder. *Aggressive Behavior*, 41, 25-33.

[59] Ibid

relevant to the jury instructions regarding manslaughter and mitigation. According to the materials I reviewed, the judge instructed that the Commonwealth needed to disprove the existence of "provocation which would likely produce in an ordinary person such a state of passion, anger, fright or nervous excitement as would eclipse his capacity for reflection or restraint…" V-193-194. Given Steven's still-developing adolescent brain and his unique mental health characteristics, he could not be considered an ordinary person. Moreover, the attendant characteristics of Steven's juvenile brain and mental health diagnoses made it more likely that any perceived provocation would incite impulsive passion, anger, and a loss of control likely to eclipse any capacity for reflection or restraint. Because of Steven's unique characteristics, he was much more likely than an ordinary person to act impulsively and passionately without reflection in situations involving provocation or sudden combat. Further clouding the manslaughter issue is the evidence that Steven was himself the victim of a violent assault shortly before the killing in this case. Based on that victimization and his particular history, as discussed in greater detail elsewhere in this affidavit, Steven James was likely suffering from a mental impairment that substantially reduced his ability to control or inhibit his emotional reaction and behavior.

78. In my expert opinion, the application of this new research evidence to Steven's unique characteristics is also relevant to his ability to act with the necessary factors stated in part of the jury instruction for intent or malice. The instructions suggested that malice may exist when "in the circumstances known to the defendant, a reasonably prudent person would have known that according to common experience, there was a plain and strong likelihood that death would follow the contemplated act." V-181. Given Steven's unique characteristics, he could not be considered a reasonably prudent person or adult. Moreover, given the unique characteristics associated with Steven's adolescent brain and Intermittent Explosive Disorder, it is unlikely that he would have contemplated (before he acted) whether there was a plain and strong likelihood that death would follow from his actions. Steven's unique characteristics and the new brain evidence raise the question of whether the prosecution could prove beyond a reasonable doubt that he acted with an intent to kill or with reflection before he acted.

79. Similarly, in my expert opinion the application of this new research evidence to Steven's unique characteristics is also relevant to the factors discussed in the jury instruction for extreme atrocity and cruelty. According to the materials provided to me, the so-called "Cuneen" factors for first-degree murder by extreme atrocity include the extent of the victim's injuries, the number of blows, the manner and force with which the blows were delivered, the instrument employed, and the disproportion between the means needed to cause death and those employed. As discussed herein, the hallmarks of the still-developing adolescent brain and Steven's unique diagnoses both involve impulsivity and a lack of control, such that it is possible for someone like Steven to act impulsively without reflection and without an intent for there to be a particular number of blows, a particular amount of force applied, or particular injuries inflicted. For example, after a bat has been swung once, the swinging of that same bat a second time could have been an impulsive and excessive action performed without any reflection, control, or thought as to the consequences or to the suffering to the victim. Given Steven's diagnoses and

adolescent brain, it is likely that any subsequent swings after the first swing were performed impulsively and with diminished control.

80. The characteristics unique to Steven because of his still-developing adolescent brain and his mental health diagnoses are also relevant to excessive force, how Steven would have perceived threats to himself or his friends, how he may have acted impulsively during a fight that he apparently did not start, and how he may have made impulsive acts during the fight without contemplation or a cooling-off period.

81. Since Steven's first trial, there have also been significant advances in the scientific understanding of the Intermittent Explosive Disorder diagnosis, etiology, clinical characteristics and treatment of individuals with Intermittent Explosive Disorder. This clinical evidence was not available at the time of Mr. James' trial and was not presented as part of his defense. This new evidence is also relevant to the facts of this case and the jury instructions. In my opinion, if this research evidence was available and included in his defense, it would have likely resulted in his being determined to have suffered from a mental impairment at the time of his violent offense that substantially impaired his ability to control and regulate his emotions and behavior.

82. Although I am not a lawyer, in my expert scientific opinion all of this new research evidence and my hypothetical testimony could provide an additional ground of defense for Steven James as to his degree of culpability. Without such expert testimony, the jury lacked critical information when they were tasked with deciding whether the prosecution proved certain factors discussed in the jury instructions so the jury could arrive at a just verdict.

XIV. CONCLUSIONS

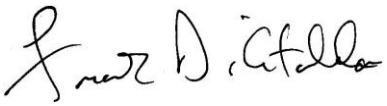
83. An extensive body of research evidence exists that adolescents, as a class, have underdeveloped psychological and emotional processes compared to adults and, as such, are not as culpable as adults for their criminal conduct. These underdeveloped psychological and emotional processes have been identified as largely due to their still developing brains. Steven James was 17-years-old and still very much an adolescent with all the attendant underdeveloped psychological and emotional processes in effect at the time of his commission of his violent offense.

84. An extensive body of scientific research has indicated that individuals with a history of abuse and neglect, as was the case for Mr. James, are at risk for a host of mental disorders, including impulse control disorders like Intermittent Explosive Disorder. There have been significant advances in the scientific understanding of the diagnosis, etiology, clinical characteristics and treatment of individuals with Intermittent Explosive Disorder. This clinical evidence was not available at the time of Mr. James' trial and was not presented as part of his defense. In my opinion, if this research evidence was available and included in his defense, it would have likely resulted in his being determined to have suffered from a mental impairment at the time of his violent offense that substantially impaired his ability to control and regulate his emotions and behavior.

85. All of this new research evidence about the adolescent brain, in combination with the new understanding of Steven's mental disorders, has significant relevance to the facts of this case and the language used in the trial jury instructions regarding mitigation and the degree of manslaughter or murder. In my opinion, if this evidence and testimony had been included as part of Steven's trial defense, it could have resulted in a jury verdict involving a lesser-degree of culpability**.**

86. My opinion is based on the current state of the science regarding adolescent development, the negative impact of childhood abuse and neglect and their functioning as a risk factor for the development of Intermittent Explosive Disorder, much of which had not known at the time of Mr. James' trial in 1995.

Sworn to under the penalties of perjury this 2nd day of September of 2015.



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Frank DiCataldo, Ph.D.