No.

In the Supreme Court of the United States

RAYMOND CONCEPCION,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When petitioner Raymond Concepcion was fifteen years old, two adult gang members ordered him to shoot a stranger, promising that he could leave the gang if he complied. Concepcion has an IQ of 66, and functioned at a nine- or ten-year-old level even nearly two years after the offense; in a death penalty state, he would be too disabled to lawfully execute.

Like every other fourteen- to eighteen-year-old charged with murder in Massachusetts, Concepcion was automatically tried as an adult pursuant to Mass. Gen. L. ch. 119, § 74. Unlike most states, Massachusetts does not allow a judge to consider the child's individual characteristics and determine whether Juvenile Court jurisdiction is more suitable. Adult adjudication is automatic, with no transfer hearing, opportunity for remand, or other judicial consideration of youth. If conviction follows, the judge may not choose from the range of juvenile sentences, but instead must impose a life sentence.

Accordingly, like every other fourteen- to eighteen-year-old convicted of murder in Massachusetts, Concepcion received a mandatory life sentence. There was no consideration of his youth or intellectual disability in his sentencing.

This petition presents the following questions:

1. Whether the mandatory exclusion of murder defendants between the ages of 14 and 18 from Juvenile Court precludes individualized consideration of their youth in contravention of *Miller v. Alabama*, 567 U.S. 460 (2012), which

instructs that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."

2. Whether the mandatory imposition of the maximum punishment of a life sentence on Concepcion was an unconstitutionally disproportionate punishment, where both his youth and his intellectual disability diminished his culpability.

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Raymond Concepcion respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINION BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts (App. 1a) is reported at 164 N.E.3d 842.

JURISDICTION

The final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on March 16, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 74 of Chapter 119 of the Massachusetts General Laws provides, in relevant part: "The juvenile court shall not have jurisdiction over a person who had at the time of the offense attained the age of fourteen but not yet attained the age of 18 who is charged with committing murder in the first or second degree. Complaints and indictments brought against persons for such offenses *** shall be brought in accordance with the usual course and manner of criminal proceedings." Mass. Gen. L. ch. 119, § 74.

Section 2 of Chapter 265 of the Massachusetts General Laws provides, in relevant part: "Any person who is found guilty of murder in the first degree who committed the offense on or after the person's fourteenth birthday and before the person's eighteenth birthday shall be punished by imprisonment in the state prison

for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of chapter 279." Mass. Gen. L. ch. 265, § 2(b).

Section 24 of Chapter 279 of the Massachusetts General Laws provides, in relevant part: "In the case of a sentence of life imprisonment for murder in the first degree committed by a person on or after the person's fourteenth birthday and before the person's eighteenth birthday, the court shall fix a minimum term of not less than 20 years nor more than 30 years[.]" Mass. Gen. L. ch. 279, § 24.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

STATEMENT OF THE CASE

A. Statutory Background: Massachusetts statutes automatically subject juvenile murder defendants to adult trials and mandatory life-with-parole sentences without regard to their unique characteristics.

Before 1996, Massachusetts treated all children accused of crimes with attention to their youthful characteristics, acknowledging that "a child's capacity to be culpable *** is not as fixed or as absolute as that of an adult." *Commonwealth v. Magnus M.*, 961 N.E.2d 581 (Mass. 2012). Even murder charges were adjudicated via juvenile delinquency procedures, in which the state acted in parens patriae and sought to ensure that "as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance." Mass. Gen. L. ch. c. 119, § 53. Juvenile Court judges possessed broad discretion in the disposition of cases

and transferred children to adult criminal court only in "exceptional circumstances." *A Juvenile v. Commonwealth*, 337 N.E.2d 677 (Mass. 1976).

The Youthful Offender Act of 1996 added a new category of quasi-criminal proceeding for minors over fourteen alleged to have committed certain felonies. Mass. Gen. L. ch. 119, § 52. This did not, however, "eviscerate the longstanding principle that the treatment of children who offend our laws are not criminal proceedings." *Commonwealth v. Connor C.*, 738 N.E.2d 731 (Mass. 2000). Accordingly, these cases remain in Juvenile Court, with broad judicial discretion in sentencing: ranging from commitment to the Department of Youth Services (DYS) until age 21 to sentencing as adults. Mass. Gen. L. ch. 265, § 4; c. 119, § 58 (requiring judges to consider, inter alia, the offender's "age and maturity" and personal history).

But for children aged fourteen to seventeen accused of murder, the Youthful Offender Act ended this youth-specific discretion: it transferred mandatory jurisdiction to the Superior Court. Mass. Gen. L. ch. 119, § 74. "The differences between being tried in the Superior Court and in the Juvenile Court are considerable." *Commonwealth v. Walczak*, 979 N.E.2d 732, 748 (Mass. 2012) (Lenk, J., concurring). "Juveniles charged with murder are not entitled to the benefit of a juvenile justice system that is primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders, and geared toward the correction and redemption to society of delinquent children." *Commonwealth v. Soto,* 68 N.E.3d 1133, 1136 (Mass. 2017) (internal citations omitted).

If the prosecutor decides to indict a homicide as murder instead of

manslaughter, there is no opportunity for a judge to consider the child's individual characteristics and determine whether he or she is more fairly treated as a juvenile or an adult. Superior Court jurisdiction is automatic, with no transfer hearing, opportunity for remand, or other judicial consideration of youth. If conviction follows, the judge may not choose from the range of juvenile sentences permitted by § 58, but *must* impose life with statutorily-bounded parole. Mass. Gen. L. ch. 119, § 72B; Mass. Gen. L. ch. 265, § 2; Mass. Gen. L. ch. 127, § 133A.

B. Factual Background

Petitioner Raymond Concepcion has a history of trauma and impaired cognitive abilities. He suffered a traumatic brain injury as a child in the Dominican Republic, when he fell off a roof was hospitalized with a severe concussion. App. 7a. At age eight, Concepcion witnessed and was severely traumatized by several violent but non-fatal shootings, including that of his father, uncle, and brother. App. 6a-7a. When Concepcion was twelve years old, he moved to the United States, where he attended three different public schools, failing nearly every subject. App. 39a-44a.

As a young teenager, Concepcion joined the Mission Hill gang. App. 3a. Five months later, two adult members of Mission Hill picked him up and brought him to the car of the victim, Nicholas Martinez. App. 4a-5a. Martinez also had been a member of Mission Hill but had left the gang and testified against one of its members. App. 3a. The two adults ordered Concepcion to shoot Martinez, who was unknown to him, promising Concepcion that he could leave the gang if he complied. App. 4a.

At trial, expert testimony established Concepcion's intellectual disability and mental illness. While awaiting trial, he was confined in a DYS detention center, where the mental health counselor described him as functioning like an eight- to ten-year-old; she testified that he was eager for acceptance and would blindly follow what other children told him to do. App. 6a. Psychologist Catherine Ayoub testified that Concepcion's full-scale IQ was 66, and that Concepcion lacked intellectual, psychological, and social reasoning skills. App. 7a. His thought processes were more like that of a nine- or ten-year-old than an adolescent. *Id.* Accordingly, Dr. Ayoub diagnosed Concepcion with global development delay of moderate severity, an intellectual development disorder, as well as post-traumatic stress disorder and major depression/persistent depressive disorder.[1] *Id.*

[1] Dr. Ayoub opined that Concepcion had only a limited ability to form a specific intent to kill on October 17, 2012. App. 46a. Because of his cognitive limitations and trauma history, he lacked the "full ability to understand the full meaning of killing someone." *Id.* "He had much less capacity than *** the average fifteen-year-old. He was really limited intellectually, and he was really limited psychologically." App. 48a, 51a.

Moreover, Concepcion's ability to foresee the consequences of his actions was constrained by his intellectual capacity as well as exposure to prior violent trauma. App. 47a. Dr. Ayoub found his surprise at the fact that the victim died "quite unusual." App. 49a-50a. She attributed this to witnessing several shootings in which the victims did not die: "having people survive that trauma gave him a very different way of thinking about what it means to hurt someone." App. 47a. Concepcion could not foresee consequences as well as the average fifteen-year-old. App. 48a. As to the shooting, he had "a limited understanding of his situation and the consequences." *Id.*

C. Proceedings Below

On December 4, 2012, a Suffolk County grand jury indicted Concepcion for murder, Mass. Gen. L. ch. 265, § 1, and carrying a firearm without a license, Mass. Gen. L. ch. 269, § 10(a). App. 2a. Concepcion's case was severed from his codefendants on the ground that he was unable to resist these adults' commands due to his age and cognitive limitations. App. 6a, 32a-34a. The codefendants pleaded guilty to manslaughter and were sentenced to twelve to fourteen years. App. 34a. Concepcion was afforded no such opportunity.

At trial, Concepcion did not contest that he shot the victim; his defense was that his mental impairments precluded him from forming the requisite intent. App. 6a. On March 16, 2016, he was convicted of first-degree murder, premised on extreme atrocity or cruelty. App. 2a. The judge imposed the mandatory life sentence, with the opportunity for parole after twenty years.[2] *Id.*

On direct appeal to the Massachusetts Supreme Judicial Court, Concepcion challenged both his conviction and his sentence. App. 2a. He argued, inter alia, that § 74's mandatory exclusion of all defendants charged with murder from Juvenile Court contravened *Miller's* requirement of individualized consideration of the mitigating effects of youth where children are exposed to the harshest sentences. App. 2a-3a. Concepcion also contended that his life sentence was unconstitutionally

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[2] The judge applied the 2012 version of Mass. Gen. L. ch. 279, § 24, which provided a discretionary range of 15-25 years for parole eligibility. *See Commonwealth v. Brown*, 1 N.E.3d 259 (Mass. 2013) (defendant sentenced under version of parole eligibility statute in effect on date of crime).

disproportionate because it did not consider or reflect his documented intellectual disability. App. 2a.

The SJC affirmed Concepcion's conviction on March 16, 2021. App. 3a. It rejected the challenge to the constitutionality of § 74 on the ground that that statute was merely jurisdictional in nature; because the eventual punishment included the opportunity for parole, there was no Eighth Amendment violation. App. 12a-13a.

The SJC further held that Concepcion's life sentence was not unconstitutionally disproportionate under the Eighth Amendment. App. 16a. It noted that "the defendant's age and mental impairments are factors that weigh in his favor," but concluded that the severity of the crime and the opportunity for parole after twenty years justified the sentence. App. 20a-21a.

Pursuant to Mass. Gen. L. ch. 278, § 33E, which requires review of the entire record to determine whether a lesser degree of guilt is more consonant with justice, the SJC reduced the verdict to second-degree murder. App. 3a, 32a. It cited a "confluence of factors" for this decision:

> Although the defendant was fifteen years old when he shot the victim, expert testimony presented at trial suggested that he functioned at the level of someone who was nine or ten years old. He suffered from depression and posttraumatic stress disorder, the latter of which likely stemmed from a history of witnessing family members being shot. Testimony indicated that he was easy to manipulate. In short, if ever there was someone who could be pressured into doing others' bidding, the defendant was that person. *** Members of the gang threatened both the defendant and his family. With this as background, they offered him a way out of the gang, one that led him on October 17, 2012, to get out of the car driven by Hill and Johnson and shoot the victim.

App. 32a-33a. The SJC additionally cited "the incongruous fate of those who physically and figuratively drove him to the crime": that is, the adult codefendants who received short sentences for manslaughter. App. 33a-34a. Accordingly, it remanded the case for resentencing. App. 35a.

REASONS FOR GRANTING THE PETITION

I. The Massachusetts SJC's decision upholding the constitutionality of Section 74 conflicts with *Miller v. Alabama*, 567 U.S. 460 (2012): the mandatory exclusion of murder defendants aged fourteen to eighteen from Juvenile Court violates the Eighth Amendment by precluding individualized consideration of their youth.

When Massachusetts's Youthful Offender Act was enacted in 1996, developmental differences between children and adults were not well-documented or incorporated into jurisprudence. More recently, however, this Court has relied on scientific evidence about juvenile psychology and neurology in adjudicating Eighth Amendment claims, concluding that "children are constitutionally different from adults for purposes of sentencing." *Miller,* 567 U.S. at 471. These differences result from children's "diminished culpability and greater prospects for reform":

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

Montgomery v. Louisiana, 136 S.Ct. 718, 733 (2016) (citations and internal quotation marks omitted). Consistent with a child's lesser culpability, *Miller* recognized that

"the distinctive attributes of youth diminish the penological justifications" for imposing a harsh sentence. 567 U.S. at 472. Accordingly, individualized consideration of the mitigating effects of youth is required where juveniles are exposed to the harshest sentences. *Id.* at 477-478. "[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474; *see also Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (affirming that "[y]outh matters in sentencing").

This Court's analysis focused not just on the sentences imposed, but on the processes that yielded them. *Miller* observed that most jurisdictions authorizing maximum punishments for juveniles did so through the combination of two independent statutory provisions: "One allowed the transfer of certain juvenile offenders to adult court, while another (often in a far-removed part of the code) set out the penalties for any and all individuals tried there." *Id.* at 485.[3] Thus, automatic adult trial under § 74 cannot be disentangled from the mandatory punishment that ensues: the jurisdiction predetermines the sentencing options, invariably yielding a life-with-parole sentence upon conviction. This brings the statutory scheme within the ambit of the Eighth Amendment. *See People v. Patterson,* 25 N.E.3d 526, 557 (Ill. 2014) (Theis, J., dissenting) (mandatory transfer scheme analyzed under Eighth Amendment because it "mandatorily plac[es] juveniles in criminal court based only

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

on their offenses, and thereby expos[es] them to vastly higher adult sentences and, in effect, punishing them").

Indeed, the SJC earlier recognized that § 74 implicates the requirement of youth-specific consideration per the Eighth Amendment:

> Because grand jury indictment of a juvenile for murder pursuant to [§ 74] results in the treatment of the juvenile defendant as an adult for all purposes, it evokes many of the same concerns as the sentencing at issue in *Roper*, *Graham*, and *Miller*: it ignores the fact that "the two classes differ significantly in moral culpability and capacity for change." While not eliminating the possibility that juveniles can in some instances be treated the same as adults, the animating purpose of these cases appears to be an effort to foreclose "criminal procedure laws that fail to take defendants' youthfulness into account at all."

Walczak, 979 N.E.2d at 750-751 (*quoting Graham v. Florida*, 560 U.S. 48, 76 (2010) (Lenk, J. concurring). Accordingly, *Miller* is the touchstone in analyzing the statute's constitutionality. *See id.*

The SJC's reasoning that *Miller* solely is concerned with the ultimate sentence imposed was incorrect. It stated:

> As the United States Supreme Court has noted when examining the proportionality of a juvenile's sentence under the Eighth Amendment, focusing on whether judicial discretion was available at the transfer stage overlooks the real issue: whether the underlying punishment that could be imposed once the juvenile is transferred to adult court survives constitutional scrutiny. See Miller v. Alabama, 567 U.S. 460, 487-489 (2012). *** [I]f there is no disproportionality violation in the underlying punishment, then there is no violation in G. L. c. 119, § 74.

App. 12a-13a. This misreads *Miller,* in which the States contended that a child's characteristics and circumstances were adequately considered when deciding whether to try him as an adult. This Court rejected that argument, observing that some states (like Massachusetts) use mandatory transfer systems, lodge the decision

in the hands of a prosecutor rather than a judge, and/or base transfer decisions on only partial information about the child or the circumstances of his offense. The point was that a discretionary transfer decision "cannot substitute for discretion at posttrial sentencing." Nothing in *Miller* suggests that the *absence* of discretion in determining whether to try a child as an adult is irrelevant or lacks constitutional dimension.

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

> Unlike transfer practice prior to passage of the [Youthful Offender] act, the Commonwealth's decision to seek an indictment for murder (and the grand jury's decision to return one) bypassed the Juvenile Court and any attendant protections for this defendant. The murder indictment, not unlike the mandatory sentence held unconstitutional in *Miller*, results in the identical treatment of juveniles and adults without any consideration of the defendant's status as a juvenile, and thus "remov[es] youth from the balance."

Walczak, 979 N.E.2d at 751 (Lenk, J., concurring) (quoting *Miller*, 567 U.S. at 474).[4] Here, Concepcion's youth and disability were disregarded at the moment the Commonwealth decided to indict him for murder rather than a lesser offense. No judge considered whether a child functioning at a nine- or ten-year-old level would be more properly adjudicated in Juvenile Court. Concepcion's trial was conducted identically to every adult murder defendant's, ungrounded by the principles of

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[4] *See also Patterson,* 25 N.E.3d at 569 (Theis, J., dissenting) ("Like the laws involved in *Roper, Graham,* and *Miller,* [the exclusion from juvenile jurisdiction] is mandatory and inflexible *** the statute contains no mechanism by which a judge can consider characteristics of juveniles before transferring them to criminal court, where, if convicted, they face stiffer adult penalties, enhancements, and other rules to extend their time in prison.").

rehabilitation and redemption, and blind to "the inherent differences between juvenile and adult offenders." *Soto,* 68 N.E.3d at 1136. When the jury returned the guilty verdict, the judge had no discretion to sentence him to anything less than life with parole. He did not have the option to extend Concepcion's DYS commitment for the remainder of his childhood – a setting where he had made meaningful developmental and academic gains, with the help of counselors and tutors.

Massachusetts's mandatory exclusion of murder defendants from juvenile jurisdiction is a relative rarity, reflecting an emerging national consensus against the practice. *See Miller,* 567 U.S. at 482-483. Twenty-eight states allow Juvenile Court judges the discretion to transfer a child to adult court. *See, e.g., Kevin P. v. Superior Court*, 270 Cal. Rptr. 3d 877 (2020). Of the states that provide adult trials for certain juveniles, the majority also include "reverse waiver" provisions that allow a criminal court judge to exercise discretion and return the matter to Juvenile Court.[5] As *Miller* noted, only fourteen state statutes impose mandatory adult trial with no opportunity to seek remand or transfer back to Juvenile Court. 567 U.S. at 487 n.15. It cited § 74, disapprovingly, as an example of this minority approach. *Id.*[6]

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

[6] The national trend is away from automatic treatment of juveniles as adults. Sarah A. Brown, Nat'l Conf. of St. Legislatures, *Trends in Juvenile Justice State Legislation: 2011-2015* (2015) (legislative trend is to rehabilitate youth in the juvenile justice system instead of sending them to punitive adult system); Neelum Arya, Campaign for Youth Just., *State Trends: Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System* at 33 (2011) (documenting trend in transfer

Massachusetts's outlier status becomes even starker when youth-specific discretion in sentencing also is considered. A majority of states allow for discretionary sentencing of juveniles to a term of years. Only seven states, along with Massachusetts, couple mandatory transfer of children out of the juvenile system with mandatory life sentences upon conviction. In this small minority of states, there is no individualized consideration of youth at either the inception or the conclusion of the process.

The possibility of parole cannot rescue these statutes where the process retains no discretion allowing judges to treat the children brought before them as children. Mandatory transfer and punishment schemes convert this judicial discretion into a gift of leniency available solely to the executive, the bestowment of which can serve to hide unconstitutional discrimination in prosecutors' unreviewable charging decisions.[7] The safeguards of the Eighth Amendment are not for the executive branch to choose to respect or neglect through its prosecutors and parole board; that all avenues to leniency for this severely disabled child were already foreclosed before the case had reached his jury should give this Court pause. *Miller*'s injunction that the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children" is irreconcilable with statutory schemes that tie the hands of the judicial branch to do otherwise. *Miller*, 567 U.S. at 474. This Court

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laws); *People v. Willis,* 997 N.E.2d 947, 960 (Ill. App. 2013) ("we see a nationwide trend developing to treat juvenile offenders differently than adult offenders").

[7] *See* Goff, Jackson: *"The Essence of Innocence: Consequences of Dehumanizing Black Children,"* Journal of Personality and Social Psychology, 2014, Vol. 106, No. 4 at 531-534 (perceptions of black children's' ages are routinely overestimated).

should grant certiorari to foreclose such legislative end-runs around the protections of the Constitution in Massachusetts and elsewhere.

In short, Section 74 flouts the requirement of discretionary, youth-specific consideration when life imprisonment is at stake. The failure to consider a child's attributes and background before subjecting him to adult jurisdiction and the ensuing mandatory punishment violates the Eighth Amendment. This provision – a relic of a legislative era in which the mitigating effects of youth were neither scientifically documented nor codified into law – should be struck down.

II. The SJC's affirmance of Concepcion's mandatory life sentence contravenes the Eighth Amendment's prohibition against disproportionate punishment, as both his youth and his intellectual disability diminished his culpability.

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

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

"The concept of proportionality is central to the Eighth Amendment," *Graham*, 560 U.S. at 59, and is assessed according to "'the evolving standards of decency that mark the progress of a maturing society.'" *Miller,* 567 U.S. at 469, quoting *Estelle v.*

Gamble, 429 U.S. 97, 102 (1976). In *Atkins v. Virginia,* 536 U.S. 304 (2002), this Court held that the Eighth Amendment forbids the execution of intellectually disabled persons. "Because of their disabilities in areas of reasoning, judgment, and control of their impulses *** they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306, 321.

> Mentally retarded[8] persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

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

A parallel thread of jurisprudence deems certain punishments

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

unconstitutionally disproportionate when applied to juveniles. *See Miller,* 567 U.S. at 470, and cases cited. Taken together, these two strands of jurisprudence provide that children and the intellectually disabled each have diminished culpability based on their impulsivity, poor self-control, and illogical reasoning. These groups also share vulnerability to outside pressures and criminal environments, making the most severe punishments excessive. *Atkins*, 536 U.S. at 317-321; *Montgomery*, 136 S.Ct. at 733-734.

As the Commonwealth conceded and the SJC acknowledged,[9] Concepcion falls "within the range of [intellectually disabled] offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 317. An intellectual disability diagnosis comprises (1) intellectual-functioning deficits, indicated by an IQ score approximately two standard deviations below the mean (around 70); (2) adaptive deficits, i.e. "the inability to learn basic skills and adjust behavior to changing circumstances"; and (3) the onset of these deficits while still a minor. *Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017). Based on extensive interviews, direct observation, record review, and standardized testing, the expert at trial concluded that Concepcion had significant

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[9] As the SJC noted, "The Commonwealth concedes on appeal that the defendant 'had documented intellectual limitations.'" App. 8a. Indeed, even the Commonwealth questioned the proportionality of the sentence imposed by the trial judge, citing Concepcion's age, "documented intellectual limitations," and "significant trauma," as well as the much shorter sentences for his adult codefendants. *See id.* The SJC also noted Concepcion's "cognitive impairment" and "that he functioned at the level of someone who was nine or ten years old." App. 34a, 32a.

intellectual functioning deficits; his full-scale IQ was 66. Concepcion also lacked age-level adaptive skills: he experienced failure in both academic and social settings from an early age, uncomprehendingly obeyed other children who told him what to do, and after the offense was observed to function on the level of an eight- or nine-year-old. His limitations were painfully apparent even in his police interview, in which he was unable to consistently spell his own last name or state his birthdate.

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

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

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

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

was really limited intellectually, and he was really limited psychologically." App. 48a. Both his intellectual disability and his youth provide distinct and cumulative bases for a sentence that reflects his lessened moral culpability, diminished grounds for severe punishment, and offender-based barriers to a proportional sentence.[10]

As the SJC noted, Concepcion is not faced with the death penalty, nor life without the possibility of parole. The touchstone of proportionality animating both juvenile and intellectual disability jurisprudence is not limited to capital cases, however, or even to life sentences. *See, e.g., Commonwealth v. Perez,* 80 N.E.3d 967 (Mass. 2017) (a juvenile defendant's aggregate sentence for non-murder offenses with parole eligibility exceeding that for murder must be assessed in light of the *Miller* factors).[11] *Miller* made clear that the "distinctive (and transitory) mental traits and environmental vulnerabilities" of juvenile defendants are not crime-specific. 567 U.S. at 473. Similarly, *Atkins*'s concerns about intellectually disabled defendants reach beyond death penalty cases. *See, e.g., Avalos v. State*, 616 S.W.3d 207, 208-209 (Tx. App. 2020) (holding that "the Eighth Amendment prohibits the automatic imposition of the punishment of life imprisonment without parole for an intellectually disabled person"); *People v. Coty*, 110 N.E.3d 1105, 1122 (Ill. App. 2018) (requiring *Miller*-type

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

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

hearing before imposition of discretionary life or de facto life sentence on an intellectually disabled defendant).

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

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

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

Moreover, the problem that defendants like Concepcion are categorically more likely to receive maximum punishment also inheres in life sentences. *Atkins* enumerated the possibilities contributing to the "special risk" of wrongful conviction faced by the intellectually disabled: false confessions, lesser ability to make a persuasive showing of mitigation, diminished meaningful assistance to their

counsel, being "typically poor witnesses," and that their demeanor may create an unwarranted impression of lack of remorse. *Atkins*, 536 U.S. at 320-321. These concerns are equally apposite to defendants in states that do not have the death penalty. *See Coty*, 110 N.E.3d at 1121.

The possibility of parole does not rescue the constitutionality of Concepcion's life sentence. "Parole eligibility does not guarantee a defendant's release from prison." *State v. Patrick*, No. 2019-0655, 2020 WL 7501940, at *33 (Ohio Dec. 22, 2020). The same factors that disadvantage the disabled at trial and sentencing also will make achieving parole more difficult, where the defendant's personal presentation and expression of remorse is central to the process. "A State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* 560 U.S. at 75.

> A decision whether to grant or deny parole lies with the parole board, which is a part of the executive branch of our government. It is the judiciary, however, that is primarily charged with safeguarding the constitutional guarantees of the Eighth Amendment to the United States Constitution. For that reason, we should not lightly draw distinctions among life sentences for purposes of determining whether a life sentence violates constitutional protections. *** Therefore, [the Supreme Court of Ohio] conclude[d] that the severity of a sentence of life in prison on a juvenile offender, even if parole eligibility is part of the life sentence, is analogous to a sentence of life in prison without the possibility of parole for the purposes of the Eighth Amendment.

Patrick, 2020 WL 7501940, at *36. The formalistic difference between life in prison with and without the possibility of parole does not necessarily result in different life

outcomes for juvenile offenders. Accordingly, it does not adequately protect the most vulnerable and least culpable children such as Concepcion.

The wisp of a chance at freedom after fifteen years of incarceration is a disproportionately harsh sentence for an unusually vulnerable child victimized by a violent street gang in the manner of a child soldier impressed into service. In addition to the statutory scheme preventing the possibility of judicial leniency based on these factors, the sentence itself surpassed the bounds of the Eighth Amendment. In short, a child with the cognitive function of a nine- or ten-year-old was sentenced to the most severe punishment any juvenile in Massachusetts can receive: life with the possibility of parole. Concepcion's disability did not shorten his sentence, nor was it even considered, thus violating the principle of proportionality and contravening this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 17, 2021

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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[12] The eighth day of trial (March 10, 2016) is erroneously marked Volume 9 and dated October 3. References are to corrected volume numbers with March 10, 2016 as Volume 8; March 11, 2016 as Volume 9; March 14, 2016 at Volume 10; etc.