SJC-12382

COMMONWEALTH vs. RAYMOND CONCEPCION.

Suffolk. December 4, 2020. - March 16, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.

Homicide. Constitutional Law, Sentence, Grand jury, Retroactivity of judicial holding. Retroactivity of Judicial Holding. Jurisdiction, Superior Court, Juvenile Court. Superior Court, Jurisdiction. Juvenile Court, Jurisdiction. Malice. Intent. Duress. Practice, Criminal, Sentence, Retroactivity of judicial holding, Grand jury proceedings, Transcript of testimony before grand jury, Instructions to jury, Capital case.

Indictments found and returned in the Superior Court Department on December 4, 2012.

A motion for transcription of instructions to the grand jury was heard by Jeffrey A. Locke, J., and the cases were tried before him.

Elizabeth A. Billowitz for the defendant.

Cailin M. Campbell, Assistant District Attorney, for the Commonwealth.

Katherine E. Burdick for Juvenile Law Center, amicus curiae, submitted a brief.

J. Leon Smith, Jr., for Citizens for Juvenile Justice & another, amici curiae, submitted a brief.

LOWY, J. On March 16, 2016, a jury convicted the defendant, Raymond Concepcion, of murder in the first degree, G. L. c. 265, § 1, for killing the victim, Nicholas Martinez.[1] At the time of the offense, the defendant was fifteen years old and had a history of trauma, mental health issues, and impaired cognitive abilities. The judge sentenced the defendant to life with the possibility of parole after twenty years.[2,3] The defendant appealed.

On appeal, the defendant does not contest that he killed the victim. Instead, he argues that his youth and mental impairments were unlawfully ignored during his indictment, trial, and sentencing. Specifically, the defendant argues (1) that our decision in Commonwealth v. Walczak, 463 Mass. 808, 810 (2012), which requires prosecutors to instruct the grand jury on mitigating circumstances and defenses when seeking an indictment of a juvenile, applies retroactively to his case; (2) that both his sentence and G. L. c. 119, § 74 -- the statute mandating that juveniles charged with murder in the first or second degree

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[1] The defendant was also convicted of unlawful firearm possession under G. L. c. 269, § 10 (a).

[2] The judge also sentenced the defendant to from four to five years in State prison on the firearm conviction, to be served concurrently with the murder sentence.

[3] The legal basis of the defendant's sentence is discussed infra.

committed when they were between fourteen and eighteen years old be tried in the Superior Court, not the Juvenile Court -- are unconstitutional; and (3) that several of the jury instructions were erroneous. Additionally, the defendant asks us to exercise our authority under G. L. c. 278, § 33E, to reduce the murder verdict. Although we reject the defendant's other arguments, in the circumstances of this case we do exercise our authority under G. L. c. 278, § 33E, and reduce the verdict to murder in the second degree.[4]

Background. 1. Facts. We summarize the facts the jury could have found, reserving certain details for discussion.

Although the defendant did not know the victim, both had been members of the Mission Hill gang in Boston at different points in time. In September 2011, the victim left Massachusetts -- and apparently the gang -- returning to Boston in June 2012.[5] Sometime around May 2012, the defendant joined the gang. The defendant was approximately fifteen years old at the time. He claims that, despite just recently having joined, he already wanted to leave the gang by the fall of 2012.

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[4] We acknowledge the amicus briefs submitted by the Juvenile Law Center and by Citizen for Juvenile Justice and the youth advocacy division of the Committee for Public Counsel Services.

[5] Further evidence was not before the jury, but it appears that the victim left Massachusetts after he implicated a fellow member of the gang and returned in order to testify in grand jury proceedings.

On October 17, 2012, fellow Mission Hill gang member Derrick Hunt told the defendant to retrieve a gun the defendant had purchased two months earlier.[6] Hunt then told the defendant to get into a Nissan Maxima with two other members of the gang, Jaquan Hill and Shakeem Johnson. Other members told the defendant that shooting the victim was the only way that the defendant could leave the gang. The defendant believed that if he tried to leave the gang on his own accord, both he and his family would be harmed or killed.

Hill and Johnson proceeded to drive the defendant around Boston. They found the victim -- who was driving in his car -- and followed him for about twenty minutes. Although the defendant knew Johnson, he had not previously known Hill. Hill was five feet, eight inches tall and weighed 245 pounds, while Johnson was over six feet tall and weighed 300 pounds.[7] The defendant was approximately five feet, seven inches tall and weighed 130 pounds. Hill and Johnson told the defendant that he had no choice but to follow their orders. Those orders issued while the three were stopped near a traffic light on Southampton

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[6] The defendant was only able to recall that the person who told him to retrieve the gun was called either "R" or "Fish." Hunt was later identified as Fish. What happened to Hunt is unclear from the record.

[7] Additionally, Hill was nineteen years old and Johnson twenty-one years old at the time.

Street. Hill told the defendant to get out of the car. Hill then pointed to the victim's car, which was stopped at the traffic light, and told the defendant to "get him."

The defendant got out of the Maxima and, gun in hand, approached the victim's car. From behind the driver's side of the victim's car, the defendant fired two rounds through the driver's side rear window at the victim. The defendant then readjusted his position and fired two to three more shots, this time straight through the driver's side window. The victim's car then accelerated and crashed into another vehicle. Three bullets in all struck the victim, who was later pronounced dead.

After shooting the victim, the defendant returned to the Maxima. Hill, Johnson, and the defendant fled the scene in the vehicle. A nearby police detective heard the gunshots. The detective saw the defendant reenter the Maxima and promptly followed the vehicle, activating his cruiser's lights and siren. A brief pursuit ensued, in which other officers joined and which ended when heavy traffic stopped the Maxima. Police arrested Hill, Johnson, and the defendant. Initially denying involvement, the defendant soon confessed to having shot the victim.

2. Procedural history. On December 4, 2012, a Suffolk County grand jury indicted the defendant on charges of murder, in violation of G. L. c. 265, § 1, and carrying a firearm

without a license, in violation of G. L. c. 269, § 10 (a). Hill and Johnson were also indicted as joint venturers. Soon after, the defendant filed a motion for transcription of the instructions to the grand jury, which was denied. The defendant's case was later severed from Hill and Johnson's cases.

At trial, the defendant did not contest that he shot the victim. Rather, he argued that his age, previous trauma, and multiple mental impairments precluded him from forming the requisite intent. To this end, a clinician who worked with the defendant while he was in a Department of Youth Services (DYS) detention center awaiting trial testified that the defendant acted at times like someone who was eight or nine years old, rather than someone who was fifteen years old. Specifically, the clinician noted that the defendant would go through cycles where he threw "temper tantrums" and then started to cry uncontrollably before staff would have to soothe him. The clinician further testified that the defendant was a "follower" and that "other kids would tell him to do certain things and he would do them."

The defendant's mother testified that the defendant had previously witnessed a series of traumatic incidents. When the defendant was around eight years old, he watched his father get shot five times in one incident and survive. The defendant

later witnessed a violent robbery of a store while playing outside. Further, the defendant saw his uncle accidently shoot himself in the leg while cleaning a pistol. Finally, the defendant witnessed a police officer shoot his brother, who also survived the episode.

As an expert witness for the defense, a psychologist who had examined the defendant over the course of ten hours and performed several psychological tests testified that the defendant functioned at the level of someone who was nine or ten years old and that he lacked age-level adaptive skills. According to the psychologist, the defendant had an intelligence quotient of sixty-six, a limited capacity for abstraction or problem-solving, and a limited capacity to form intent. The psychologist further testified that the defendant had global developmental delay of moderate severity and submitted a report detailing how the defendant suffered from posttraumatic stress disorder and a persistent depressive disorder. Boston Children's Hospital and DYS records also referenced a history of traumatic brain injury and documented concerns about the defendant's cognitive delay.[8] As a consequence of these conditions combined with the defendant previously having

[8] The defendant appears to have suffered brain trauma when as a child he fell off a roof and lay unconscious for between fifteen minutes and one hour.

witnessed multiple people being shot, the psychologist testified that the defendant lacked the ability to understand the full meaning of killing someone.

The psychologist's testimony was disputed by the Commonwealth's expert, a psychiatrist who had examined the defendant for little more than one hour sometime before the trial. The psychiatrist testified that the defendant's cognitive ability was "in the average range" and that he had "adequate day to day street savvy to go about his circumstances." As a result, the psychiatrist believed that the defendant had no psychological, cognitive, or emotion conditions that would have impaired his ability to form intent.[9]

On March 16, 2016, the jury found the defendant guilty of murder in the first degree based on extreme atrocity or cruelty and guilty of unlawful firearm possession. The judge sentenced the defendant to life with the possibility of parole after twenty years on the murder conviction and from four to five years in State prison on the firearm conviction, to be served concurrently with the murder sentence. The defendant filed a timely notice of appeal.

Discussion. 1. Grand jury proceeding. Days after the defendant was indicted, we decided Walczak, holding that when

[9] The Commonwealth concedes on appeal that the defendant "had documented intellectual limitations."

the Commonwealth seeks to indict a juvenile for murder and presents to the grand jury "substantial evidence of mitigating circumstances or defenses (other than lack of criminal responsibility)," the prosecutor must "instruct the grand jury on the elements of murder and on the significance of the mitigating circumstances and defenses." Walczak, 463 Mass. at 810. Soon after his indictment, the defendant filed a motion for transcription of the grand jury instructions, arguing that Walczak's rule applied retroactively to his case and that the grand jury instructions were necessary for him to put forward that argument. The judge denied the motion. The defendant now argues that Walczak should apply retroactively to his case.

Despite the defendant's argument otherwise, the issue of retroactivity does not fully arise here.[10] The evidence of

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[10] We have repeatedly noted, albeit in passing, that Walczak applies only prospectively. See Commonwealth v. Fernandes, 483 Mass. 1, 40 (2019) (Gants, C.J., dissenting); Commonwealth v. Grassie, 476 Mass. 202, 219 (2017); Walczak, 463 Mass. at 810. Nevertheless, whether Walczak applies retroactively may be more complicated than it first appears.

As a baseline, the "Federal Constitution requires Federal and State courts to retroactively apply new Federal constitutional rules of criminal procedure to direct appeals from convictions." Commonwealth v. Martin, 484 Mass. 634, 645 (2020), citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987). Equally clear is that States court may exercise discretion when deciding whether to apply new rules premised on the common law, State statutes, or their supervisory authority retroactively to direct appeals. See Commonwealth v. Dagley, 442 Mass. 713, 721 n.10 (2004), cert. denied, 544 U.S. 930 (2005); Commonwealth v.

mitigating circumstances that Walczak requires be introduced to the grand jury must "support indictments other than murder." Id. at 835 (Lenk, J., concurring) (citing reasonable provocation and sudden combat as examples). For the application of Walczak to have made a difference, then, an instruction to the grand jury on a manslaughter offense would have had to have been proper. See id. 822 (Lenk, J., concurring) (noting that

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D'Agostino, 421 Mass. 281, 284 n.3 (1995); Commonwealth v. Waters, 400 Mass. 1006, 1007 (1987). We have exercised this discretion numerous times. See, e.g., Martin, supra (declining to retroactively apply new felony-murder rule); Commonwealth v. Muller, 477 Mass. 415, 431 (2017) (retroactively disavowing inference-of-sanity instruction).

When new rules are premised solely on the Massachusetts Declaration of Rights, however, our case law is less clear. Although we have noted that "this court has consistently referenced with implicit approval the principle that a new criminal rule [based on the Declaration of Rights] applies to 'those cases still pending on direct review'" (citation omitted), Commonwealth v. Augustine, 467 Mass. 230, 257 n.41 (2014), S.C., 470 Mass. 837 (2015), this statement is merely descriptive. We have not explicitly held that the Declaration of Rights mandates retroactive application of such rules. Cf. Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 664 (2013) (Diatchenko I), S.C., 471 Mass. 12 (2015); Commonwealth v. Sylvain, 466 Mass. 422, 436 (2013), S.C., 473 Mass. 832 (2016); Commonwealth v. Figueroa, 413 Mass. 193, 201-202 (1992).

Walczak is not an ideal vehicle for resolving this issue. Whether Justice Lenk's concurrence -- which provided the crucial vote for the holding -- was premised on the Declaration of Rights is unclear. See Walczak, 463 Mass. at 824-825, 830-831 (Lenk, J., concurring). Regardless, because we do not reach the issue of retroactivity here, we need not dissect either the opinion or our cases further.

voluntary manslaughter charges may proceed in Juvenile Court whereas murder charges must proceed in Superior Court).

As discussed infra, an instruction on involuntary manslaughter was not warranted at trial. What was unwarranted as an instruction for the petit jury here was likewise unwarranted for the grand jury. See Commonwealth v. Geagan, 339 Mass. 487, 499, cert. denied, 361 U.S. 895 (1959) ("If any thing improper shall be given in evidence before the grand jury, the error may be corrected subsequently upon the trial before the petit jury" [citation omitted]). See also Commonwealth v. Fernandes, 483 Mass. 1, 22 (2019) (Cypher, J., concurring in part and dissenting in part) ("This court has held consistently that any perceived error at the grand jury stage can be cured by the petit jury at trial"). Cf. Commonwealth v. McLeod, 394 Mass. 727, 733, cert. denied sub nom. Aiello v. Massachusetts, 474 U.S. 919 (1985) (unprejudiced petit jury cure grand jury bias). Thus, even if Walczak applied retroactively, its rule would not have altered the proceedings.

2. Constitutionality of G. L. c. 119, § 74. General Laws c. 119, § 74, directs that "[t]he 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 [eighteen] who is charged with committing murder in the first or second degree." Because G. L. c. 119, § 74, mandates that

juveniles indicted for murder must be tried in the Superior Court -- where, if convicted, they must be sentenced to life in prison, albeit with the possibility of parole -- the defendant argues that the statute violates art. 26 of the Massachusetts Declaration of Rights and the Eighth Amendment to the United States Constitution as well as due process. We disagree.

General Laws c. 119, § 74, is a jurisdictional statute; it proscribes no punishments, requiring only that a juvenile charged with murder must be tried in the Superior Court. See generally Commonwealth v. Soto, 476 Mass. 436, 438-440 (2017) (discussing G. L. c. 119, § 74). 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). A juvenile convicted of murder in the first degree does face a mandatory sentence of life with the possibility of parole. See G. L. c. 265, § 2 (b). Yet as explained infra, that sentence does not violate either art. 26 or the Eighth Amendment; only sentences of life without the possibility of parole have been held to be unconstitutional for juveniles. See, e.g., Diatchenko v. District Attorney for the

Suffolk Dist., 466 Mass. 655, 671 (2013) (Diatchenko I), S.C., 471 Mass. 12 (2015) (discretionary life without parole for juveniles unconstitutional under art. 26). Cf. Miller, supra at 479 (mandatory life without parole for juveniles violates Eighth Amendment). Consequently, if there is no disproportionality violation in the underlying punishment, then there is no violation in G. L. c. 119, § 74.

The defendant also claims that we should subject G. L. c. 119, § 74, to strict scrutiny because it implicates a fundamental right. The defendant defines this right as the right to have a judge consider a defendant's status as a juvenile before he or she is tried in the Superior Court. To this end, the defendant emphasizes that he is not claiming that juveniles have a fundamental right to access to the Juvenile Court. Yet in instances where a juvenile is charged with murder in the first or second degree, that is exactly what this argument implies. If a defendant charged with murder did not have the right to be tried in the Juvenile Court, why would the same defendant have the right to ask a judge to consider trying him or her there? Thus, absent a claim of right to access the

Juvenile Court, automatic jurisdiction alone cannot be the basis for arguing that G. L. c. 119, § 74, is unconstitutional.[11]

We have previously rejected an analogous claim in an equal protection challenge to G. L. c. 119, § 74. See Commonwealth v. Freeman, 472 Mass. 503, 506-507 (2015). The defendants there argued that access to the Juvenile Court implicated "important" rights, although not fundamental ones. Id. at 506. Although we noted that "[t]he differences between being tried in the Superior Court and in the Juvenile Court are considerable," id., quoting Walczak, 463 Mass. at 827 (Lenk, J., concurring), we reaffirmed our long-standing position not to apply "strict scrutiny to statutes that implicate such interests." Freeman, supra. See Commonwealth v. Wayne W., 414 Mass. 218, 223 (1993) ("Had it wanted, the Legislature could have lawfully chosen to

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[11] Because jurisdiction under G. L. c. 119, § 74, is mandatory, the heavy reliance by one of the amici, the Juvenile Law Center, on Kent v. United States, 383 U.S. 541 (1966), and the Mathews v. Eldridge, 424 U.S. 319 (1976), line of cases is misplaced. The statute in Kent provided the juvenile court with discretion to waive jurisdiction on a case-by-case basis, which the Supreme Court allowed so long as the court provided a pretransfer hearing. Kent, supra at 561. In short, Kent involved a statutory right to access the juvenile court, the denial of which required individual adjudication subject to the requirements of procedural due process that the Court later further explicated in the Mathews decision. See Kent, supra at 557 ("The net, therefore, is that petitioner -- then a boy of [sixteen] -- was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the 'exclusive' jurisdiction of the Juvenile Court"). General Laws c. 119, § 74, however, provides no such right and thus does not implicate procedural due process.

abolish Juvenile Court jurisdiction over certain violent crimes without infringing on a juvenile's constitutional rights"). Nothing presented by the defendant causes us to rethink this position.

Without a fundamental right being implicated, G. L. c. 119, § 74, need only survive rational basis review. See Freeman, 472 Mass. at 508. In Freeman, we held that concerns about "unavoidable complexities and attendant need for staff and services implicated in implementing the act" provided a rational basis for not applying the protections afforded to seventeen year old juveniles under G. L. c. 119, § 74, retroactively to defendants convicted before the law's passage (citation omitted). Id. at 509. Analogous considerations provide a rational basis for the statute's assignment of jurisdiction. Murder trials are resource intensive. Consolidating jurisdiction in the Superior Court maximizes judicial economy by avoiding duplicative costs that would occur if murder trials were also held in other courts. Cf. Dickerson v. Attorney Gen., 396 Mass. 740, 744 (1986) (this court's familiarity with capital cases provided rational basis for restricting review of denial

of postconviction motions of capital defendants to it). Consequently, we uphold G. L. c. 119, § 74.[12]

3. Constitutionality of sentence. The defendant maintains that the combination of his youth and intellectual disability renders his sentence of life with the possibility of parole after twenty years disproportional to his conviction, violating both art. 26 and the Eighth Amendment. Specifically, the defendant contends that the mandatory nature of the life sentence renders the punishment unconstitutional. We again disagree.

Because art. 26 affords defendants greater protections than the Eighth Amendment does, we begin our analysis there. See Diatchenko I, 466 Mass. at 668-669. "The touchstone of art. 26's proscription against cruel or unusual punishment . . . [is] proportionality." Commonwealth v. Perez, 477 Mass. 677, 683 (2017). "The essence of proportionality is that 'punishment for

[12] The Juvenile Law Center claims that G. L. c. 119, § 74, creates an unconstitutional irrebuttable presumption that a juvenile is as morally culpable as an adult charged with the same offense. The differences in punishments for murder in the first degree for juveniles compared to adults belie this claim. A life sentence without the possibility of parole is imposed on an adult convicted of murder in the first degree, but the possibility of parole must be available for a juvenile convicted of the crime because we have recognized that the latter has "diminished culpability." See Diatchenko I, 466 Mass. at 670, quoting Miller, 567 U.S. at 471.

crime should be graduated and proportioned to both the offender and the offense.'" Id., quoting Miller, 567 U.S. at 469.

"To reach the level of cruel [or] unusual, the punishment must be so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity" (quotation and citation omitted). Commonwealth v. LaPlante, 482 Mass. 399, 403 (2019). To determine whether a sentence is disproportionate requires (1) an "inquiry into the nature of the offense and the offender in light of the degree of harm to society," (2) "a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth," and (3) "a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions" (quotation and citation omitted). Cepulonis v. Commonwealth, 384 Mass. 495, 497-498 (1981). "The burden is on a defendant to prove such disproportion . . . ." Id. at 497.

Life sentences for juveniles have been the subject of considerable analysis in our cases since Diatchenko I. There, we held that imposing a sentence of life without the possibility of parole on a juvenile convicted of murder in the first degree violated art. 26. Diatchenko I, 466 Mass. at 658. We have since left open the question whether mandatory life sentences with the possibility of parole for juveniles may someday violate

art. 26, committing to revisit the issue only once the law and science in the area have settled. See Commonwealth v. Watt, 484 Mass. 742, 754 (2020) (discussing cases where issue was left open). In the meantime, we repeatedly have held that mandatory life sentences with the possibility of parole after a term of years are proportional for juveniles convicted of murder in either the first or second degree. See id. (upholding mandatory life sentence with possibility of parole after fifteen years for juvenile convicted of murder in first degree); Commonwealth v. Lugo, 482 Mass. 94, 100 (2019) (upholding mandatory life sentence with possibility of parole after fifteen years for juvenile convicted of murder in second degree); Commonwealth v. Okoro, 471 Mass. 51, 62 (2015) (same).[13]

The defendant's sentence -- life with the possibility of parole after twenty years -- is itself a product of post-Diatchenko I developments in our case law. After we invalidated the sentencing scheme at issue in Diatchenko I, we limited the maximum sentence allowable for juveniles convicted of homicide crimes committed after August 2, 2012, to the sentence imposed for murder in the second degree: a mandatory life sentence with

[13] These decisions are consistent with Miller, 567 U.S. at 470, which only struck down mandatory life sentences imposed on juveniles without the possibility of parole.

parole eligibility set between fifteen and twenty-five years.[14] See Commonwealth v. Brown, 466 Mass. 676, 689-690 (2013), S.C., 474 Mass. 576 (2016). Having shot the victim on October 17, 2012, the defendant was sentenced under Brown's framework.[15]

Nothing in Brown suggested that sentencing a juvenile convicted of murder in the first degree to a mandatory life sentence with the possibility of parole at twenty years would violate art. 26. Cf. Brown, 466 Mass. at 686 ("neither Miller nor [Diatchenko I] precludes mandatory sentencing for juveniles in all circumstances"). Nor does the parole eligibility period stray from what other jurisdictions impose on juveniles convicted of the crime. See, e.g., Ark. Code Ann. § 5-10-102(c)(2) (juvenile convicted of murder in first degree and sentenced to life "is eligible for parole after serving a minimum of twenty-five [25] years' imprisonment"); Ariz. Rev. Stat. § 13-751(A)(2) (juvenile convicted of murder in first degree and sentenced to life "shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age

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[14] August 2, 2012, was the effective date of the parole statute, G. L. c. 127, § 133A, as amended through St. 2012, c. 192, §§ 37-39.

[15] Since Diatchenko I and Brown, the Legislature has amended the sentencing statute. See G. L. c. 279, § 24, as amended through St. 2014, c. 189, § 6.

and thirty-five years if the murdered person was under fifteen years of age or was an unborn child").[16] The question thus becomes whether a period of twenty years of incarceration before parole eligibility is proportioned "to both the offender and the offense" in this case. Diatchenko I, 466 Mass. at 669, quoting Miller, 567 U.S. at 469. We hold that it is.

Although the defendant's age and mental impairments are factors that weigh in his favor, they do not alone tip the scales toward disproportionality. See Okoro, 471 Mass. at 53, 62 (upholding life sentence with parole after fifteen years for "borderline deficient" defendant who was fifteen years old). We must also consider the gravity of the offense. Cepulonis, 384 Mass. at 497. Even juveniles convicted of nonhomicide offenses may be sentenced to terms with parole eligibility exceeding fifteen years in "extraordinary circumstances." Perez, 477 Mass. at 685-686. Murder in the first degree based on extreme atrocity or cruelty is among the most serious crimes punishable in the Commonwealth. For this reason, we have observed that art. 26 allows for "some period in excess of fifteen years before parole eligibility for a juvenile offender convicted of

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[16] As another of the amici, Citizens for Juvenile Justice, observes, many other States have reformed their sentencing laws to provide judges with discretion when sentencing juveniles convicted of murder in the first degree. Unless the law or science changes, however, providing this discretion is a task we leave to the Legislature.

murder in the first degree."[17] LaPlante, 482 Mass. at 405. See Diatchenko I, 466 Mass. at 672 ("It plainly is within the purview of the Legislature to treat juveniles who commit murder in the first degree more harshly than juveniles who commit other types of crimes, including murder in the second degree").

Twenty years does not fall outside this period. The sentence imposed on the defendant would not in itself prevent him from having a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[18] Diatchenko I, 466 Mass. at 674, quoting Graham v. Florida, 560 U.S. 48, 75 (2010). The period is not "so lengthy that it could be seen as the functional equivalent of a sentence of life without parole." Brown, 466 Mass. at 691 n.11. Compare LaPlante, 482 Mass. at 405-406 (upholding aggregate term of forty-five years as proportional punishment for juvenile defendant convicted of

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[17] The sentencing judge echoed this sentiment, remarking that parole eligibility after fifteen years would be the same sentence the defendant would have received if he had been convicted of murder in the second degree.

[18] Both the Commonwealth and the defendant acknowledge the difficulties that the defendant may face with the parole board. It bears stressing that the board should "evaluate the circumstances surrounding the commission of the crime, including the age of the offender, together with all relevant information pertaining to the offender's character and actions during the intervening years since conviction." Diatchenko I, 466 Mass. at 674. "Circumstances surrounding the commission of the crime" here include the defendant's cognitive abilities, history of trauma, and mental health issues.

three counts of murder in first degree), with Brown, supra (noting that "sentence of life with parole eligibility only after sixty years" and "mandatory seventy-five-year sentence resulting from aggregation of two mandatory sentences that permitted parole eligibility only after fifty-two and one-half years for juvenile" were unconstitutional). We therefore conclude that the defendant's sentence is constitutional.[19]

4. Jury instructions. "When reviewing jury instructions, we evaluate the instruction as a whole, looking for the interpretation a reasonable juror would place on the judge's words" (quotation and citation omitted). Commonwealth v. Odgren, 483 Mass. 41, 46 (2019). "We do not consider words from the instructions in bits and pieces or in isolation from one another" (citation omitted). Id.

The defendant points to four alleged errors in the jury instructions: (1) that the jury were improperly instructed that they could infer malice from the use of a weapon, (2) that the jury should have been instructed that a finding of extreme atrocity or cruelty requires specific intent, (3) that the jury

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[19] The defendant also argues that he was entitled to an individualized, youth-specific hearing under Miller prior to sentencing. Such a hearing is mandated only where the defendant's sentence is presumptively disproportional. Cf. Perez, 477 Mass. at 686. Because we find the defendant's sentence to be proportional, it follows that he was not entitled to a Miller hearing. See Watt, 484 Mass. at 753-754.

should have been instructed on involuntary manslaughter, (4) that the jury should have been instructed on duress as a defense to murder. Because the defendant preserved the first three of these issues, we review each in turn for prejudicial error. Id. The defendant did not, however, preserve the fourth issue, concerning duress.[20] We therefore consider, for that issue, whether there was error and, if so, whether it created a substantial likelihood of a miscarriage of justice. See Commonwealth v. Randolph, 438 Mass. 290, 294 (2002).

a. Malice. In the context of murder in the first degree on the theory of extreme atrocity or cruelty, malice is defined as "an intent to cause death, to cause grievous bodily harm, or to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would follow." Commonwealth v. Castillo, 485 Mass. 852, 858 (2020), quoting Commonwealth v. Szlachta, 463 Mass. 37, 45 (2012).

The judge instructed the jury here:

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

[20] At trial, the defendant explicitly advised the court that he did not intend to pursue a duress defense.

The defendant argues that this instruction allowed the jury to infer guilt from the use of a weapon and thus undermined his defense, which was premised on his juvenile and disabled status rendering him unable to form the requisite mens rea.[21]

Generally, juries may "infer malice from the use of a dangerous weapon." Odgren, 483 Mass. at 47, quoting Commonwealth v. Keown, 478 Mass. 232, 250 (2017), cert. denied, 138 S. Ct. 1038 (2018). The inference, however, "must be presented as permissive." Odgren, supra. These principles have been "frequently cited with approval in our cases, including those where there is evidence of intoxication or mental impairment on the part of the defendant." Id., quoting Commonwealth v. Miller, 457 Mass. 69, 74 (2010). We have also extended application of these principles to juveniles. Odgren, supra at 48-49.

The trial judge's description of the law in his instruction was accurate, and the inference was permissive. A similar case to this one, Odgren, 483 Mass. 41, controls. In Odgren, a juvenile with several mental health diagnoses was convicted of murder in the first degree. Id. at 42, 44. The defendant argued that the jury could not infer malice or intent from his actions because doing so presupposed his sanity and ascribed to

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[21] The defendant does not dispute that a firearm is a dangerous weapon.

him an adult's ability to reason. Id. at 47. We rejected this argument, declining to exempt juveniles and those with mental impairments from the application of our normal jury instructions. See id. at 47-49. We see no reason to revisit that conclusion, particularly in such an analogous case. The judge's instructions on malice were not erroneous.

b. Specific intent. Although the defendant acknowledges that the instructions reflected current law, he argues that the jury should have been instructed that a finding of extreme atrocity or cruelty requires specific intent. We reject this argument.

"To convict a defendant of murder in the first degree on a theory of extreme atrocity or cruelty, the Commonwealth must prove that the defendant committed an unlawful killing with malice aforethought and with extreme atrocity or cruelty." Szlachta, 463 Mass. at 45, citing G. L. c. 265, § 1, and G. L. c. 277, § 39. The "proof of malice aforethought is the only requisite mental intent for a conviction of murder in the first degree based on murder committed with extreme atrocity or cruelty." Castillo, 485 Mass. at 865, quoting Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983). We have repeatedly (and recently) declined to require the jury to find that the defendant had the specific intent to commit an extremely atrocious or cruel murder. See, e.g., Castillo, supra;

Commonwealth v. Judge, 420 Mass. 433, 442 (1995); Commonwealth v. Sinnott, 399 Mass. 863, 879 (1987).

Against this case law, the defendant contends that the unique circumstances of his case required a specific intent instruction in order to ensure fairness of the verdict. The law already addresses this concern. Specifically, we have held that where a defendant presents evidence of a mental impairment, a jury may consider this fact when assessing extreme atrocity or cruelty. Szlachta, 463 Mass. at 48-49, quoting Commonwealth v. Oliveira, 445 Mass. 837, 848-849 (2006) ("while reduced mental capacity is relevant to the jury's exercise of their broad discretion as a reflection of the community's conscience, there is no greater mens rea required for murder by extreme atrocity or cruelty than there is for murder in the second degree, and the crime does not require that the defendant be aware that his acts were extremely cruel or atrocious"). The judge accordingly instructed the jurors here, informing them that they could "consider any credible evidence again about the existence of a mental, intellectual or emotional impairment in determining whether the defendant acted with extreme atrocity or cruelty." We discern no error.

c. Involuntary manslaughter. Next, the defendant argues that the judge erred in declining to instruct the jury on involuntary manslaughter. In considering this issue, we view

the facts in the light most favorable to the defendant. Commonwealth v. Tavares, 471 Mass. 430, 437 (2015). "[W]here a defendant is charged with murder, an instruction on involuntary manslaughter is appropriate if any reasonable view of the evidence would [permit] the jury to find 'wanton and reckless' conduct rather than actions from which a 'plain and strong likelihood' of death would follow" (quotation and citation omitted). Id. at 438. Despite the defendant stressing that the combination of his disability, youth, and history of trauma impaired his ability to appreciate the risks associated with shooting someone multiple times at close range with a firearm, these factors alone do not demand an instruction on involuntary manslaughter.

"Malice is what distinguishes murder from manslaughter." Commonwealth v. Pagan, 471 Mass. 537, 546, cert. denied, 577 U.S. 1013 (2015), quoting Commonwealth v. Vizcarrondo, 427 Mass. 392, 396 (1998), S.C., 431 Mass. 360 (2000) and 447 Mass. 1017 (2006). "The distinction means that a verdict of manslaughter is possible only in the absence of malice." Pagan, supra. Yet the absence of malice does not necessitate the presence of an involuntary manslaughter instruction. For instance, "[e]ven if a mental impairment negates malice . . . a defendant would not be entitled to an instruction on involuntary manslaughter" (emphasis in original). Id. at 548. This is so because mental

impairment, otherwise "often characterized as diminished capacity," Commonwealth v. Newton N., 478 Mass. 747, 752 (2018), "goes to the question of criminal responsibility and not to the issue of involuntary manslaughter." Pagan, supra, quoting Commonwealth v. Garabedian, 399 Mass. 304, 316 (1987).

Therefore, "[b]efore an instruction on involuntary manslaughter may be given, the defendant would be required to adduce evidence of the 'traditional elements' of involuntary manslaughter that the jury might believe." Pagan, 471 Mass. at 548, quoting Commonwealth v. Sires, 413 Mass. 292, 302-303 (1992). "A judge need not provide an involuntary manslaughter charge if it is clear that the risk to the victim was nothing less than a 'plain and strong likelihood that death would follow.'" Commonwealth v. Diaz, 431 Mass. 822, 831 (2000), quoting Commonwealth v. Souza, 428 Mass. 478, 493 (1998). See Pagan, supra at 548 n.20 ("Cases of involuntary manslaughter require proof of intentional wanton or reckless conduct, resulting in an unintentional killing, and not proof of intentional conduct bearing on a specific intent to kill or a specific intent to injure").

The evidence here does not support an instruction on involuntary manslaughter. The defendant shot a firearm at the victim multiple times, firing an initial pair of rounds before changing his position and continuing to shoot. Such actions are

"simply not compatible with the 'high degree of likelihood that substantial harm will result to another person' associated with wanton and reckless conduct." Pagan, 471 Mass. at 547. See Watt, 484 Mass. at 752 ("Firing a [firearm] multiple times, directed toward specific individuals, provides a sufficient basis to conclude that the defendant understood the likely deadly consequences of his actions").

Even if the defendant did not fully apprehend that death would result, nothing in the evidence suggests he did not understand that grievously serious injuries would result from shooting the victim multiple times.[22] Cf. Sires, 413 Mass. at 303 (despite intoxication, "the defendant knew facts that a reasonably prudent person would have known, according to common experience, created a plain and strong likelihood that death would follow the act of shooting"). Denial of the defendant's request for an involuntary manslaughter instruction was proper.[23]

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[22] On this point, even the defense's psychologist testified that while the defendant's mental impairments and prior trauma gave him a "very different way of thinking about what it means to hurt someone," his ability to understand the consequences of shooting someone was "[n]ot nil."

[23] The jury also declined to convict the defendant of murder in the second degree, "the malice element of which comes closest to involuntary manslaughter." Commonwealth v. Tolan, 453 Mass. 634, 650 (2009). Indeed, in finding the defendant guilty of murder in the first degree, the jury found, as the judge properly instructed, "that the defendant either intended to kill [the victim], or intended to cause him grievous bodily harm, or

d. Duress. Finally, the defendant maintains that the judge erred by not instructing the jury on the defense of duress. In particular, the defendant contends that he believed gang members would kill him and his family if he did not shoot the victim. Acknowledging that duress is not a defense to murder in Massachusetts, the defendant nevertheless maintains that because he was unable to resist coercive pressure due to his disability and past trauma, the defense should be available in his case.

The defendant is correct: duress is not a defense to murder. Commonwealth v. Vasquez, 462 Mass. 827, 835 (2012). The defendant is incorrect, however, in contending that this prohibition "rests on the premise that the defendant is making a reasoned choice between courses of action." Although we have noted that allowing the defense for murders could incentivize gangs to press members to carry out killings under the threat of harm, this was of secondary importance in why we barred juries from considering the defense. See id. at 833-834. Primary among our concerns was one long embodied in the common law: that "[w]hen the defendant commits murder under duress, the resulting harm -- i.e., the death of an innocent person -- is at

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intended to do an act which in the circumstances known to the defendant a reasonable person would have known created a plain and strong likelihood that death would result." "These findings negate the possibility of involuntary manslaughter." Id.

least as great as the threatened harm -- i.e., the death of the defendant" (citation omitted). Id. at 833. The moral math of trading the defendant's life for the victim's does not add up to a valid defense that the jury may consider.[24] We decline the defendant's invitation to revisit the issue.

5. Relief pursuant to G. L. c. 278, § 33E. "Our power under G. L. c. 278, § 33E, directs us to consider a defendant's entire case, taking into account a broad range of factors, when determining whether a conviction of murder in the first degree was a miscarriage of justice that warrants a reduction in the degree of guilt." Commonwealth v. Berry, 466 Mass. 763, 770 (2014). "Our duty is not to sit as a second jury but, rather, to consider whether the verdict returned is consonant with justice" (quotations and citation omitted). Commonwealth v. Dowds, 483 Mass. 498, 512 (2019). "After such consideration, we '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

[24] Whether the defendant is able to resist coercive pressure does not alter this equation when it comes to presenting duress as a defense to the jury. See Commonwealth v. Jackson, 471 Mass. 262, 267 (2015), cert. denied, 136 S. Ct. 1158 (2016) (juveniles charged with intentional murder cannot assert duress defense). However, these factors are relevant to our considerations under G. L. c. 278, § 33E. See Vasquez, 462 Mass. at 835.

trial or (b) direct the entry of a verdict of a lesser degree of guilt.'" Id., quoting G. L. c. 278, § 33E.

Here, the jury concluded that the defendant was criminally responsible for murdering the victim. We do not alter that conclusion. See Commonwealth v. Brown, 449 Mass. 747, 773 (2007) ("our task is not to determine whether the verdicts are those we would have returned, but whether they are consonant with justice"). Given the facts of the crime, "there is no question of reducing the verdict below murder; the question that presents itself is the less drastic one whether there is ground for reducing from first to second degree murder." Berry, 466 Mass. at 772, quoting Commonwealth v. Cadwell, 374 Mass. 308, 316 (1978). We determine that there is.

A confluence of factors lead us to this conclusion. 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.

Mental illness alone is generally insufficient to support a verdict reduction under G. L. c. 278, § 33E. See, e.g., Commonwealth v. Whitaker, 460 Mass. 409, 421 (2011); Commonwealth v. Zagrodny, 443 Mass. 93, 108 (2004). If the defendant had decided to shoot the victim free from external influence, the analysis here would be different. But the defendant was not free from such influence. 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. "The crime was abhorrent. But it is in just such cases that we must be on guard against too passiona[te] a reaction, which in the long run will not promote due enforcement of the criminal law." Cadwell, 374 Mass. at 319. Punishing the defendant for murder in the first degree overlooks both his unique vulnerabilities and the precarious situation in which he found himself.

Furthermore, although we cannot say that the defendant's actions were "driven by [his] mental condition" alone, Commonwealth v. Colleran, 452 Mass. 417, 434 (2008), we do note the incongruous fate of those who physically and figuratively drove him to the crime. Cf. Commonwealth v. Tejeda, 481 Mass. 794, 796-797 (2019) ("a judge may consider a disparate sentence of a coventurer, tried separately and subsequently, who was

convicted of the same crime where, at the time of sentencing, it is reasonably apparent that the defendant was less culpable than or equally culpable to his or her yet untried coventurer"). The adult gang members Hill and Johnson, along with other members of the gang, exerted pressure on the defendant that he was particularly ill suited to resist due to the combination of his age, cognitive impairments, and mental illnesses. Hill and Johnson, however, received sentences of from twelve to fourteen years for being coventurers, while the defendant faces life in prison.

Although not a defense that the jury may consider, "in exceptional and rare circumstances of duress, justice may warrant reduction of a defendant's guilt in our review under G. L. c. 278, § 33E." Vasquez, 462 Mass. at 835. Cf. Commonwealth v. Brown, 477 Mass. 805, 824 (2017), cert. denied, 139 S. Ct. 54 (2018) ("The authority granted us under G. L. c. 278, § 33E, includes the discretion to reduce a conviction of felony-murder in the first degree in circumstances where the jury do not have that option"). The case before us is such an exceptional and rare one. In light of the circumstances, then, a verdict of murder in the second degree is more consonant with justice than is a verdict of murder in the first degree. See G. L. c. 278, § 33E.

Conclusion. The verdict of murder in the first degree and the sentence imposed are vacated and set aside. The matter is remanded to the Superior Court, where a verdict of guilty of murder in the second degree is to be entered and the defendant is to be sentenced accordingly.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
SUCR 2012-11110

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COMMONWEALTH OF MASSACHUSETTS

-vs- JURY TRIAL
DAY TEN

RAYMOND CONCEPCION

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TRANSCRIPT OF PROCEEDINGS

BEFORE: LOCKE, J.

March 11, 2016
Boston, Massachusetts

APPEARANCES:

JENNIFER HICKMAN, Esquire, Assistant District Attorney, and MATTHEW SEARS, Esquire, Assistant District Attorney, for the Commonwealth.

JOHN H. CUNHA, JR., Esquire, for the Defendant

Mary Wrighton
Court Reporter

BY MR. Cunha:

Q Yes. What grade, was he in the Twenty-first Century school, so-called name, when you left Dominican Republic?

A He was in fourth grade.

Q When he started or when he left?

A When he started.

Q And when he left that school, what grade was he in?

A Sixth.

Q Was it a particular kind of school?

A No.

Q Was it a bilingual school?

A Oh, yes. The Twenty-first was a bilingual school.

Q And what were the two languages?

A English and Spanish.

Q Did he speak any -- what kind of student was he?

A He always had problems with his classes.

Q In what respect, ma'am? Can you tell this jury how he had problems?

A He would get very distracted in class.

Q Okay. How were his grades?

A His grades weren't that good because he didn't learn really well in class.
Q Alright. With respect, had you referred him to any, to a psychologist when he was in the Dominican Republic?
A Yes, they had one at the school
Q And for what purpose was -- was he seen by the psychologist?
A Yes.
Q For what purpose, ma'am?
A Because he was so distracted in class, she wanted to know what was going on because he wasn't able to assimilate his classes.
Q What do you mean assimilate, you mean he wasn't learning much?
A I mean he always thought less than somebody of his age would.
Q What do you mean by thought less?
A I mean that his mentality was, if he was a seven-year-old child, it was like he had the mentality of a four or a five year old.
Q Okay. Now, after coming here -- well, while in the Dominican Republic was your son, did your son experience or witness violent acts?

A A taxicab driver.
Q Okay. Before this incident, before October 17, 2012, did you know where Mission Hill was?
A No.
Q Do you have any family that lives there?
A No.
Q Do you know anybody that lives there?
A No.
Q Now, do you remember the schools that Raymond went to here in Boston?
A I remember Kelly.
Q If I would suggest Curley rather than Kelly?
A I don't know how to pronounce it.
Q Okay. How long did he go to that first school?
A For like a year. Yeah, a year.
Q And did you move at some point?
A Yes.
Q And did he go then to another school?
A To Brighton.
Q I'm not talking about Brighton High School. I'm talking about Washington Irving. I'm going to suggest to you the Washington Irving School. Do you remember that?

A Oh, yes.
Q Briefly?
A Yes.
Q And then he went to Brighton High School?
A Uh-huh.
Q How is he doing in school here?
A Bad, bad.
Q Is it fair to say he failed almost every one of his courses?
MS. HICKMAN: Objection, Your Honor.
THE COURT: Sustained. Rephrase.
BY MR. CUNHA:
Q Are you aware of the grades that he received?
A Since the incident now, yes.
Q And you've got the records as his mother?
A Yes.
Q How did he do in school for his grades?
A Bad.
Q Did he fail almost every one of his subjects?
MS. HICKMAN: Objection, Your Honor.
THE COURT: Sustained.
BY MR. CUNHA:

Q Let me show you this and see if it refreshes your recollection. Does that help your memory? Yes?

A Yes.

Q Did he fail almost every one of his subjects?

MS. HICKMAN: Again, objection.

MR. CUNHA: Judge, I move to introduce the records.

THE COURT: Is there an objection to the records?

MS. HICKMAN: No, Your Honor. May I see what you're turning in? Your Honor, there is an objection. May we approach side bar, Your Honor?

(Whereupon, the following discussion occurred at side bar:)

MS. HICKMAN: Your Honor, she says that she can't read English so she can't authenticate it. It says her son –

THE COURT: Yes, I know she hasn't authenticated them. The question is whether you object to the admission of these and I think you said no.

MS. HICKMAN: No, but then, I thought he was just turning that in, Your Honor.

THE COURT: Okay. What is it that you intend to offer?

MR. CUNHA: These are the complete records from the Boston public school system which I gave to Ms. Hickman and then to Dr. Kelly.

THE COURT: Okay. So you intend to, or you're seeking to offer the entirety of the records.

MR. CUNHA: If I wasn't clear, that's what I did offer, Your Honor.

THE COURT: Okay. Counsel, is there an objection? Let me just see what form they come in.

MR. CUNHA: Just for your information, Judge, what I showed her was this. She knows what an F is.

THE COURT: This is entitled Aspen School Student, whatever that is, but I take it, it's part and parcel of other records.

MS. CUNHA: Yes. That's how we received it from the Boston public schools.

MS. HICKMAN: No objection.

(Whereupon, the discussion at side bar was concluded.)

THE COURT: Jurors, without objection, these items are received as Exhibit 107.

(Exhibit No. 107, being school records, as described above, were marked and admitted into evidence.)

THE COURT: Ms. Hickman, can you activate that?

MR. CUNHA: Thank you.

THE COURT: Mr. Cunha.

BY MR. CUNHA:

Q Okay. It's fair to say you don't read English?

A No.

Q But you know what a grade is? An F or a B plus or a D or a C? You know that that's a grade, correct?

A Yes.

Q Okay. Does this page reflect -- do you see that right there?

A Yes.

Q Is that the first school he went to, the

Curley?
A Yes.
Q And that Irving Middle, is that the second school he went to?
A Yes.
Q And then Brighton High School, correct?
A Yes.
Q Which includes some of the time that he was in DYS, correct?
A Yes.
Q Are these the grades that you understood he earned while at Brighton High School, Curley Middle -- Curley K to 8, and the Irving Middle?
A Yes.
Q Was Raymond, where were you living at the time of this incident?
A In Boston.
Q Was it on Cummings Highway?
A On Cummings Highway.
Q What kind of residence was it?
A A shelter.
Q Did Raymond live with you?
A Yes.
Q Was he going to Brighton High School from

VOLUME: X
PAGES: 1-253
EXHIBITS: 112
FOR I.D.: None

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT
NO. SUCR2012-11110

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COMMONWEALTH OF MASSACHUSETTS *
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-v- *
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RAYMOND MATEO CONCEPCION *
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TRANSCRIPT OF THE PROCEEDINGS

BEFORE: HONORABLE JEFFREY A. LOCKE
Suffolk Superior Courthouse
Boston, Massachusetts
Monday, March 14, 2016

Jennifer Hickman, Assistant District Attorney and
Matthew Sears, Assistant District Attorney
On behalf of the Commonwealth.

John H. Cunha, Attorney at Law and
T. Michael McDonald, Attorney at Law
On behalf of the Defendant.

NANCY M. KING, CVR
OFFICIAL COURT REPORTER
SUFFOLK SUPERIOR COURT

Q As the least important?
A It provided some validation, but ...
Q Now with respect to, and I'm going to ask you in answering these questions, to assume that on October 17, 2012, Raymond Concepcion shot Nicholas Martinez. I'm asking you to make that assumption. Did you form an opinion about his ability to form a specific intent to kill on October 17, 2012?
A I did.
Q And what was that opinion?
A My opinion was that he had only a limited ability to form intent.
Q And based on what?
A Based first on his cognitive level of functioning that really was less than the way an adolescent would think. So his assumptions about what he was doing and what was happening were assumptions that were pretty much like a nine- or ten-year-old, in other words without the full ability to understand the full meaning of killing someone.
Q And again, making the same assumption that he shot Mr. Martinez, did you form an opinion of what Raymond Concepcion actually knew about the relevant circumstances at the time he shot him?

Stated otherwise, his ability to foresee the consequences of his actions?

A That ability was again limited both by his intellectual capacity, but also I believe by his prior trauma, and having evidenced repeated violent trauma, and actually having people survive that trauma gave him a very different way of thinking about what it means to hurt someone seriously kill them.

Q So what was the opinion, or did you form an opinion, what was the opinion?

A I did. Again, my opinion is that his ability to understand the circumstances was limited. Not nil, but there was some limitation

Q Okay. With respect to both of these questions about the ability to form a specific intent, and the ability to otherwise understand the consequences of his action, did you form an opinion of how he – of his abilities with respect to that range you would expect of a fifteen-year-old? In other words, how did he compare to his fifteen-year-old – at the time of the action, how did he compare to his fifteen-year-old peers with respect, first, to the ability to form a specific intent?

A He had much less capacity than a fifteen-year-old, the average, if you can call someone an average fifteen-year-old. He was really limited intellectually, and he was really limited psychologically.
Q Would that apply as well to the ability to foresee the consequences of his actions?
A Yes. He really had a limited ability to understand the full consequences of his actions.
Q Now again, assuming that Raymond Concepcion shot Mr. Martinez on October 17, 2012, did you form an opinion on how he would know or understand the circumstances of what he did on that date?
A Yes.
Q And what was that, what is your opinion?
A That again he would have a limited understanding of his situation and the consequences. And I think that was evident throughout my interview of him. I think it's supported by the testing, and particularly the collaterals at the Metro Detention Center based on the kinds of questions he was asking and the way in which he perceived the consequences.
Q And so your opinion is that he was, again?
A He was limited.

hallucinations. It can.
Q Fair to say that during the course of the interview he stays pretty even-keeled until he's told about the victim dying?
A I think he's really very guarded and shut down until he's surprised that the victim has died.
Q Couldn't some of that be the fact that he's sitting in Boston Police Homicide being interviewed about an incident?
A That certainly is a contributing factor, but I don't know that that explains all of his behavior.
Q But fair to say that's a stressful situation, being arrested within six minutes of a shooting?
A Absolutely.
Q And that could explain some of the behavior on that videotape is the fact that he is in custody, he was brought in in handcuffs in the back of a cruiser, and he is being investigated or being interviewed by homicide detectives?
A Some of his behavior is, that certainly makes sense, and I'm sure he felt it was threatening, or I'm making that assumption, and therefore his response was to shut down. But his surprise at the fact that the victim actually died I thought

was quite unusual.
Q Have you watched a lot of police interviews for homicide suspects?
A Maybe fifteen, twenty. Probably more, just off the top of my head.
Q Of interviews?
A Yes.
Q And again, much of what your experience you're testifying to isn't reflected in your curriculum vitae, isn't indicated where you testified and by whom?
A That's usually not in a CV, but if you'd like to know something about – I not only testified but I actually have been to Quantico several times to actually train FBI agents in –
Q Being able to determine if someone is lying?
A – in interrogation and understanding from interview lying. I do training around child and adult victims and long-term –
Q Isn't it fair to say that in that room when being told that the person actually died is that the defendant is basically caught; right? He's in custody, he's been told that the result is going to be a murder. Isn't that some of the reaction that someone might have with that knowledge?

(Pause.)

Q You had mentioned the behavior check list, the YBC?

A Yes.

Q Is that yet another self-reporting test that's administered?

A It certainly is.

Q In regards to the adolescent brain that you discussed on direct, you had kind of described the formal operations as the distinction between different age groups; is that fair to say?

A Yes.

Q Is it fair to say that based on your opinion in this case that the issue that prevents Mr. Concepcion as to understanding his actions that day is based on his IQ and his intellectual disability?

A I believe it was based on his intellectual capacity as well as his response, his traumatic coping mechanisms, that the two came together.

Q So it's not the fact that he might be impulsive or something else consistent with an adolescent brain, it's dealing more specifically to him being, his intellectual capacity and his response to traumatic events?