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February 25, 2016

Clerk
Salem Superior Court
56 Federal Street
Salem, Massachusetts 01970

Re: Commonwealth v. Chism,

Dear Clerk,

Please find enclosed for filing the "COMMONWEALTH'S SENTENCING MEMORANDUM," attached CD, and a certificate of service.

Sincerely,

David F. O'Sullivan
Assistant District Attorney

DFO:fhs
Encl.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS **SUPERIOR COURT DEPARTMENT**
ESCR2013-1446-001
ESCR2013-1447-002
ESCR2014-0109-001

COMMONWEALTH

v.

PHILIP CHISM

COMMONWEALTH'S SENTENCING MEMORANDUM

Summary and Recommendation

In light of the brutal facts of the defendant's aggravated rape, armed robbery and first degree murder of Colleen Ritzer, and with due regard to the goals of punishment, deterrence, public protection, the possibility of rehabilitation, and to the defendant's age and characteristics, the Commonwealth submits the following sentences are consonant with justice:

- For the murder of Colleen Ritzer by deliberate premeditation and extreme atrocity or cruelty (ESCR2013-1446-001), life in prison with parole eligibility after 25 years;
- For the aggravated rape by natural sexual intercourse of Colleen Ritzer (ESCR2014-0109-001), life in prison with parole eligibility after 25 years, to be served from and after the sentence in no. ESCR2013-1446-001; [1]
- For the armed robbery of Colleen Ritzer (ESCR2013-1447-002), life in prison with parole eligibility after 25 years, to be served concurrently with the sentence in no. ESCR2014-0109-001.

[1] If adopted, the Commonwealth's recommendation would mean that the defendant will have a parole hearing in year 25 of his sentence for murder at which point he could possibly be paroled to his subsequent sentences for aggravated rape and armed robbery, from which he could be paroled to freedom. See 120 CMR 200.08(3) (c) ("A sentence for a crime committed on or after January 1, 1988 which is ordered to run consecutive to a life sentence shall not be aggregated with a the life sentence for purposes of calculating parole eligibility on the consecutive sentence."). This would render the defendant potentially releasable 50 years from the date of his incarceration, at age 64.

Statement of the Case

On November 21, 2013, a Grand Jury indicted the defendant for the October 22, 2013 murder of Ritzer (G.L. c. 265, § 1) (ESCR2013-1446-001). Also that date, the Grand Jury returned indictments charging the defendant as a youthful offender (G.L. c. 119, § 54) with aggravated rape by unnatural sexual intercourse (to wit: penetrating genital opening with tree branch) (G.L. c. 265, § 22(a)) and with armed robbery of Ritzer's underwear[2] (G.L. c. 265, § 17)(ESCR2013-1447-001-002). On January 24, 2014, a Grand Jury indicted the defendant as a youthful offender for aggravated rape by natural sexual intercourse (G.L. c. 265, § 22(a)) (ESCR2014-0109-001).

The defendant was tried before a jury from November 16, 2015 through December 15, 2015 (Lowy, J, presiding). The jury acquitted him of aggravated rape by unnatural sexual intercourse (to wit: penetrating genital opening with tree branch) (ESCR2013-1447-001), and convicted him of the remaining charges. The Commonwealth moves for sentencing.

I. GENERAL PRINCIPLES

"A judge has considerable latitude within the framework of the applicable statute to determine the appropriate individualized sentence." Commonwealth v. Goodwin, 414 Mass. 88, 92 (1993). Accord Commonwealth v. Donohue, 452 Mass. 256, 264 (2008) ("'A sentencing judge is given great discretion in determining a proper sentence.'"); Commonwealth v. White, 436 Mass. 340, 343 (2002) ("When imposing a sentence, judges are permitted considerable latitude."). "That sentence should reflect the judge's careful assessment of several goals: punishment, deterrence, protection of the public, and rehabilitation." Goodwin, 414 Mass. at 92.

[2] This indictment originally alleged the defendant also robbed Ritzer of her credit card and IPhone. Prior to submission to the jury, it was amended to allege only the taking of the victim's underwear.

"In exercising this discretion to determine a just sentence, a judge must weigh various, often competing, considerations, including, but not limited to, the severity of the crime, the circumstances of the crime, the role of the defendant in the crime, the need for general deterrence (deterring others from committing comparable crimes) and specific deterrence (deterring the defendant from committing future crimes), the defendant's prior criminal record, the protection of the victim, the defendant's risk of recidivism, and the extent to which a particular sentence will increase or diminish the risk of recidivism." Commonwealth v. Rodriguez, 461 Mass. 256, 259 (2012), citing Commonwealth v. Donohue, 452 Mass. 256, 264 (2008). "Therefore, to impose a just sentence, a judge requires not only sound judgment but also information concerning the crimes of which the defendant stands convicted, the defendant's criminal and personal history, and the impact of the crimes on the victims." Id.

"[P]erhaps most importantly, 'the trial judge may consider the nature of the offense[s] and the circumstances surrounding the commission of the crime[s]'" Commonwealth v. Derouin, 31 Mass. App. Ct. 968, 970 (1992), quoting Commonwealth v. Coleman, 390 Mass. 797, 805 (1984). A judge also "may consider many factors which would not be relevant at trial including hearsay information about the defendant's character, behavior, and background." Goodwin, 414 Mass. at 92. "To ensure the proper administration of justice, judges [] attempt to get 'the fullest possible picture of the defendant.'" White, 436 Mass. at 343, quoting Commonwealth v. Settipane, 5 Mass. App. Ct. 648, 654 (1977).

"Consistent with these principles, Massachusetts decisions have recognized the relevance at sentencing of reliable evidence of the defendant's prior misconduct." Goodwin, 414 Mass. at 92, citing cases.[3] "A defendant cannot be punished for uncharged conduct, because such

[3] See e.g., Commonwealth v. Coleman, 390 Mass. 797, 805 (1984) (indictments or other evidence of similar criminal conduct); Commonwealth v. Franks, 372 Mass. 866, 867 (1977) (seven untried indictments for sex-related

information is not 'tested by the indictment and trial process. Punishment is appropriate only for conduct of which the defendant has been charged and convicted.'" Commonwealth v. Stuckich, 450 Mass. 449, 461-462 (2008), quoting Commonwealth v. Henriquez, 56 Mass. App. Ct. 775, 779 (2002), S.C., 440 Mass. 1015 (2003), further citation omitted. "However, if the uncharged conduct is relevant and the report of it 'sufficiently reliable,' the conduct may be considered at sentencing." Stuckich, 450 Mass. at 462. "That is, the uncharged conduct may be considered as bearing on 'the defendant's character and his amenability to rehabilitation.'" Id., quoting Goodwin, 414 Mass. at 93. See Commonwealth vs. Wallace, 76 Mass. App. Ct. 411, 419 (2010). Where a sentencing judge considers uncharged or untried conduct, it is imperative that he demonstrate that he did so only for a proper purpose. Stuckich, 450 Mass. at 462. See Commonwealth v. Henriquez, 440 Mass. 1015, 1016 (2003) ("Ambiguity as to whether a defendant has been improperly sentenced as punishment for other offenses creates a sufficient concern about the appearance of justice that resentencing is required.").

II. SUMMARY OF FACTS PERTINENT TO SENTENCING

A. The crimes of conviction: the aggravated rape, armed robbery, and murder of Colleen Ritzer[4]

1. A normal school day

In October of 2013, Colleen Ritzer was in her second year of teaching math at Danvers High School ("DHS"). She had wanted to be a teacher since she was in pre-school. When she got older, she excelled in math and decided this would be her subject. Just twenty-four years old, Ritzer still lived at home in Andover with her parents, Peg and Tom Ritzer. She was their eldest

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offenses); Commonwealth v. Coull, 20 Mass. App. Ct. 955, 958 (1985) (prior sexual abuse charge which had been dismissed).

[4] Drawn from the trial testimony and exhibits. The trial transcript is not yet complete; the Commonwealth has submitted a disk containing the video-recorded portions of the trial.

child; a brother was away at college, a sister was a senior in high school. A creature of habit, Ritzer would arrive home every day by 3:30 P.M. at the latest, discuss her day with her mother, then sit on the couch and plan the next day's lesson, before having dinner with her family.

On the morning of October 22, Ritzer arrived at DHS before 7:00 A.M., carrying with her a black tote bag and a lunch bag. It was "dress like your friend day" at DHS, and Ritzer wore a purple shirt and black pants to match her friend and fellow math teacher at DHS, Sara Giaquinta.

The defendant, a freshman at DHS who had recently moved from Tennessee, also arrived that morning sometime after 7:00 A.M. He was fourteen years and nine months old. He was carrying a black and yellow backpack and two smaller drawstring satchels, one silver and one red. Since beginning school, the defendant had made a couple of friends and excelled on the freshman soccer team.

Pamela Foss, the defendant's Honors World History teacher, knew the defendant as a quiet but cordial student. He had recently asked to move from the regular history class into honors class because he wanted more of a challenge. He was an average student who missed some homework assignments. That day, there was a quiz on Louis VIII and Machiavelli. The defendant did very well on the quiz. Foss noticed nothing unusual about the defendant's appearance or behavior.

The defendant was in Ritzer's math class. There was no evidence of any prior hostility whatsoever between him and Ritzer. That day, math class fell at the last period of the school day, which ended at 1:55 P.M.. Surveillance video showed the defendant enter Ritzer's second floor classroom slightly after 1:00 P.M.. He was wearing a red sweatshirt, wore the black and yellow backpack on his back, and was carrying the red drawstring backpack. Gilberto Perez was also in the class. Perez would hang out with the defendant in the cafeteria, gym, and classes, and

had been in the defendant's second period Robotics class that day. He had noticed no major changes in the defendant's behavior or demeanor that day, except he was "maybe" a little more quiet.

Math class proceeded normally and without incident. After class, there was a so-called "bubble" period between 1:55 and 2:30 P.M. in which students could study or see teachers for extra help. The defendant stayed in Ritzer's class for this period.[5] Autumn Ciani, a freshman, also went to Ritzer's classroom for this period. Ciani did not seek math help, but rather apparently wanted only to visit with Ritzer, one of her favorite teachers. When Ciani arrived, she drew on the board, as the defendant and Ritzer spoke. The defendant was saying where he was from and Ritzer asked him if he missed Tennessee. Ritzer was "really nice about it," as Ciani testified. The defendant appeared to become annoyed and answered Ritzer's questions tersely, in a low mumbly tone.

Ritzer stepped out to speak to Giaquinta in the hallway outside the classroom. When she did this, the defendant went to the board near the classroom door, and was drawing with Ciani. They talked about drawing and the defendant told Ciani she was good at it. She thanked him. He wrote her name in what he said was Chinese on the Board; Ciani told him this was cool. He seemed fine to Ciani and did not mumble.

In the hallway, Ritzer and Giaquinta spoke. They discussed a meeting Giaquinta had just had. At some point, Giaquinta asked Ritzer whether Ritzer needed to get back to her classroom. Ritzer said the female student in her classroom was just drawing on the board, and that she did not know why the male student was there. They spoke briefly about shampoo, and a student

[5] Evidence was conflicting as to whether Ritzer had asked the defendant to stay after class that day. Several witnesses testified that Ritzer asked the defendant to stay because he was doodling and not doing his math work in class. As set forth below however, Giaquinta, who spoke to the victim outside her classroom during this period, testified that Ritzer had said she did not know why the defendant had stayed after class.

having had lice. Giaquinta's car had not been working, and Ritzer asked Giaquinta whether she needed a ride home that day. Giaquinta said she did not, and Ritzer went back into her classroom. Giaquinta left.

Ritzer returned to her classroom and told Ciani and the defendant that she would have to be leaving soon. She sat back down at her desk, and the defendant sat in a desk near Ritzer. When Ciani started to leave, Ritzer stood at the door with her and they spoke. Ciani said that it "stinks" that Ciani would not have Ritzer's class the next day and that she would not get to see Ritzer. Ciani told Ritzer that she was a great teacher and a great person. Ciani noticed the defendant looked annoyed and angry when she said this. Ciani left the classroom, leaving the defendant and Ritzer alone. There were few students in the academic wing of the school at this time of day.

2. The bathroom

Video surveillance shows that Ritzer then made her way from the classroom to the second floor girls' bathroom. The defendant emerged from the classroom seconds after Ritzer. He had changed from the red sweatshirt he had been wearing that day into a light blue hooded sweatshirt. He briefly scanned the hallway and checked his left pocket while looking in Ritzer's direction. He re-entered the classroom for about two seconds, pulled on the hood of his sweatshirt, and then re-emerged and began to follow Ritzer toward the bathroom. He pulled on white gloves as he walked. He paused briefly, as if listening, before entering the bathroom. He was armed with a box cutter.

Evidence as to what occurred in the bathroom over the next eleven minutes emerges from the autopsy performed by Dr. Anna McDonald, biological evidence collected from Ritzer's body, and other circumstantial evidence and reasonable inferences. The defendant, an athlete

who was physically larger than Ritzer, quickly overpowered her in the bathroom. The autopsy revealed "abundant" petechiae, or pinpoint hemorrhages, on Ritzer' face and around and in her eyes and mouth, showing that the defendant had asphyxiated her.

The defendant raped Ritzer with his penis. Two sperms cells were recovered from the vaginal swab taken at Ritzer's autopsy. A partial Y-STR profile of the sperm cells was generated, and the DNA was shown to be consistent with that of the defendant.[6]

He also repeatedly stabbed and sliced Ritzer's neck with the box cutter. Dr. McDonald opined that it is impossible to determine definitively how many times the defendant applied the box cutter blade to Ritzer's neck because of the catastrophic nature of her injuries. It is clear that portions of the neck were penetrated or slashed again and again in the same or overlapping locations. The autopsy revealed 16 separate discernable neck wounds: 12 stab wounds and 4 incise wounds (Ex. 133). Numerous of these individual injuries breached major structures and would have been fatal in and of themselves. Wounds that did not touch major structures nonetheless would have caused pain. Three of the wounds breached Ritzer's internal jugular vein. A large gaping V shaped wound, labeled "D" on the autopsy diagram, had irregular edges and appeared to be a conglomerate of numerous individual incise wounds, which required multiple applications of the blade in the same area. This wound cut through veins and Ritzer's carotid artery, and her trachea, which was made of cartilage and would require more force to cut through than skin or muscle. The track of wound "D" ultimately stops only at the back of Ritzer's neck. The box cutter blade nicked her vertebrae.

Dr. McDonald opined that Ritzer died of sharp force injuries to the neck and asphyxia by strangulation. She reached the hybrid conclusion because the sharp force injuries and asphyxia

[6] The partial Y-STR profile matched the defendant's DNA at eight loci. He could not be excluded from that partial DNA profile, though over 99 percent of the African American, Asian, Caucasian, and Hispanic populations were excluded.

were each lethal in its own right, and she could not precisely sequence the events. She testified, however, that one could draw the conclusion that the asphyxia was inflicted first, because of the difficulty of inflicting strangulation on a neck in the condition in which Ritzer's neck was ultimately found. Also, as the prosecutor argued in closing, it is inferable that the defendant raped Ritzer before inflicting the gravest injuries to her neck. ("Does it makes sense, ladies and gentlemen, that a teenage boy raped a young woman with that gaping neck wound?").

Eleven minutes into the attack, the defendant was interrupted when a female student, Danielle Bedard, briefly walked into the bathroom. She saw a person's naked buttocks, with skin tone darker than her own.[7] The person was leaning toward the bathroom sink, and she could not see the person's upper body. Likely due to a half-wall that blocked her view, Bedard did not see Ritzer or any blood, nor did she hear anything. She believed she had simply walked in on another student changing, and immediately walked out. She went to another part of the building and did homework.

3. The defendant attempts to hide his crimes

Shortly after being interrupted by Bedard, after eleven minutes alone with Ritzer in the bathroom, the defendant exited. He was still wearing the blue sweatshirt he entered the bathroom wearing, and was now carrying Ritzer's black pants over his arm. He was also inferably carrying her underwear, which was later found in his possession. Blood was on his right hand, though no other obvious blood was then seen on his clothing in the video. He walked quickly down the south hallway and down stairwell three to the first floor, where he exited the building.

[7] Bedard is white. The defendant is biracial.

A student's mother waiting in her car saw the defendant next to the building, crouched in the bushes. He was changing or pulling up his pants and looking around as if to check if someone was looking at him. He then walked up the sidewalk toward the school's middle doors, now wearing a white T-Shirt and no longer carrying clothes. He entered the middle doorway to the academic wing. He ran down the first floor hallway to the stairway one. He ascended this stairway to the second floor, and walked quickly down the hallway, ducking into one classroom, and then entering Ritzer's classroom. He quickly emerged, with his red sweatshirt over his head and carrying Ritzer's black tote bag and lunch bag and his black backpack. He walked down stairwell one carrying these items. In an alcove at the bottom of these stairs, recycling bins are stored. He then came back up the stairwell, no longer carrying these items and now wearing a black balaclava facemask and putting on his red sweatshirt. He ran down the second floor hallway. Before reaching the area of the bathroom where Ritzer was, he paused, turned around and walked in the opposite direction.

He had seen his friend Ramci Escorcia on the second floor landing. The defendant and Escorcia were supposed to meet that day to practice soccer before the formal soccer practice began at 4:00 P.M., as they did twice a week. Escorcia had waited for the defendant at the soccer field and, when he did not arrive, went looking for him. Escorcia called to the defendant by his soccer nickname, "Caco." As if to lead Escorcia away from the bathroom, the defendant walked away from him, turning to address him. Escorcia asked what he was doing. The defendant said he had lost something and could not find it. The defendant was sweating and seemed scared. He told Escorcia to go to the soccer field and that he would meet Escorcia there. Escorcia asked him what he had lost and if he could help. The defendant said it was nothing and again told Escorcia to go to the field. He then began to jog away from Escorcia.

Escorcia followed the defendant down stairwell one, and saw the defendant by the recycling bins. The defendant was pulling one of the bins toward the first floor elevator bank near the middle staircase. Escorcia asked the defendant again what he was doing; the defendant said nothing and told Escorcia again to go to the field. Escorcia did so. The defendant never arrived there.

He rolled the bin into the first floor elevators near the middle staircase, took the elevator to the second floor, and rolled the bin into the bathroom. Over the next several minutes, he deposited Ritzer in the bin, closed the top, and rolled it out of the bathroom, into the elevator, and out of the school. Appearing calm and undisturbed, he rolled the bin past a person who was on his cellphone. He was seen by a student attempting to take the recycling bin up a rocky, steep incline into the woods behind the school. Failing this, he ultimately rolled the bin into another section of the woods, near the entrance to the rail trail.

4. In the woods

He spent the next 25 minutes in the woods. What occurred there emerges from the autopsy, forensic evidence and crime scene photographs. He removed Ritzer from the bin. At some point, he had removed her pants and underwear, leaving her naked from the waist down. He positioned her on the ground, on her back, in the frame of a fallen section of fence. He pushed up her purple shirt and her undershirt and pushed down her bra, exposing her naked breasts. He spread her legs.[8] He spread the incriminatory items around the area. He discarded the bin some distance away, on its side in the bramble and, about the area, he scattered his black backpack, two white gloves, two black socks, and a folded note reading, "I hate you all." (See

[8] Though the defendant was acquitted of penetrating Ritzer with the tree branch, this was almost certainly not based on any finding that the defendant had not inflicted the penetration. Rather, it was likely based on the jury's determination that Ritzer was not alive at the time of the penetration, an issue vigorously litigated at trial. In view of the acquittal, the Commonwealth does not rely on the unnatural rape in support of its recommendation. See Commonwealth v. D'Amour, 428 Mass. 725, 746-747 (1999).

Ex. 71). Though some of the sharp force injuries were clearly inflicted in the bathroom, given their number and depth, and the limited amount of blood on the defendant when he emerged from the bathroom, it is inferable that he did additional cutting to Ritzer's neck in the woods. Before leaving the woods, he covered Ritzer with leaves and other forest debris. He emerged from the woods barefoot, the front of his jeans stained with blood.

The defendant then returned to the high school. He collected some additional belongings from his locker. In a boys' bathroom, he changed out of his bloody pants into shorts. He briefly re-entered the second floor girls' bathroom. He then exited the school and re-entered the woods for 12 minutes.

He then returned to the school and traveled around to various places on the school grounds. At one point in front of the school, he encountered Kevin Hebert, a student who the defendant knew from church activities. According to Hebert, their relationship had been building toward a close friendship. Hebert saw the defendant approaching from a distance, looking down. They spoke and the defendant seemed like his normal self. They spoke about going to the church youth group that Sunday night. The defendant said he could go because he would not have too much homework, and he explained that he had not responded to Hebert's earlier text message because he did not have any minutes left on his cell phone.

After this encounter, the defendant strolled through the field house and school, at one point clearly chewing on a snack, before leaving the building at around 4:30 P.M.

5. The defendant's flight and arrest

After his mother reported him missing that evening, a search for the defendant began. Notices that he was missing were posted on Facebook, and area residents received a reverse 911 call.

Meanwhile, the defendant walked to the area of Endicott Street in Danvers. In addition to Ritzer's underwear, he had stolen her IPhone and wallet. He destroyed and discarded both his cell phone and Ritzer's in the area of the Hollywood Hits movie theater. He used Ritzer's credit card to buy food for himself at Wendy's and a ticket to the movie "Gravity" at the Liberty Tree Mall. He went to BJs Wholesale Club, where he was captured on surveillance sipping a drink near the entryway. He entered the store and shoplifted a hunting knife before leaving. He entered a Danvers Mobile Station and a Gulf Station on Route 1 in Danvers; he walked in each, looked around briefly, and left. Surveillance footage shows him to be calm and undisturbed as he engaged in these activities.

After midnight, he was found walking on Route 1 north by Topsfield Police Officers Neal Hovey and Joe DeBernardo. He was wearing a light blue hooded sweatshirt, shorts, socks pulled up over his calves, sneakers, a balaclava around his neck, and a red nylon satchel on his back. He was walking along the tree line in a narrow area of Route 1 generally unsafe for pedestrians, and the officers stopped as part of their community caretaking function.

The defendant did not make eye contact with the officers. They asked him where he was going (he replied "nowhere"); where he was coming from (he replied "Tennessee"); and whether he had identification (he did not). Asked where he lived, he gave no address. A patfrisk revealed, in one of his pockets, a rock, and, in the other, two Massachusetts driver's licenses, credit cards, and an insurance card, all in the name of Colleen Ritzer. This name meant nothing to the Topsfield officers at that point. Asked where he had obtained the cards, he said he had gotten them at "Stop and Shop"; asked again, he said he gotten them from "her car." Asked what was in the red satchel, he said "survival gear."

When the defendant gave his name, the officers believed they had recovered the teenager reported missing from Danvers. They were elated. They put him unrestrained in the cruiser to keep him warm, confirmed with dispatch that he was the missing student, and transported him to the Topsfield Police Station. There, before inventorying the satchel, Off. Hovey asked the defendant whether there was anything in it that was dangerous. The defendant said yes. Officer Hovey opened the bag and discovered Wendy's and movie theatre receipts, a Nike shirt size large, two rolls of tape, water bottles, a white towel, a flashlight, a can of foot powder spray, and the hunting knife in its sheath. Also in the bag were Ritzer's belongings: keys, a wallet, a soft zippered case, and women's bluish greenish underwear. Folded inside Ritzer's wallet was the box cutter, the blade still protruding and covered in blood. Asked whose blood it was, the defendant said, "It's the girl's." He was read his Miranda rights and signed the form. Officer DeBernardo asked whether he knew where the girl was; the defendant replied, "buried in the woods." Asked if they could help her if they got to her, the defendant replied, "No."

His sweatshirt and sneakers had apparent blood on them, and were taken from him. At one point, he asked if he could have his sneakers back or if he would have to remain shoeless. He also asked for something to eat and drink. The Topsfield officers said no to these requests. He was transported to the Danvers Police Station and ultimately arrested for Ritzer's murder.

6. Discovery of Ritzer's body

Meanwhile, after she did not arrive home after school, Ritzer's family began a search for her that grew increasingly frantic as the hours passed. The search was joined by Ritzer's work colleagues and friends, and ultimately the Danvers and State Police and canine units. Review of the school video system ultimately led law enforcement to the woods near the rail trail. At 3:00 A.M., a forensic scientist searching the woods saw a toe with pink nail polish protruding from

some leaves. A paramedic was called into the woods. He uncovered Ritzer's head and torso; dirt and debris were in her eyes and airway. He checked her heartbeat and pronounced her dead.

B. The mental health defense

The defense did not contest that the defendant committed the acts, but rather asserted that he lacked criminal responsibility. (See defense opening: "Philip Chism killed Colleen Ritzer and did unspeakable things to her body" and closing: "Philip Chism, a kind, smart 14 year old, committed these terrible acts when he was in the throes of a serious mental illness.")[9] The defense presented its criminal responsibility defense through Drs. Richard Dudley, Anthony Jackson, and Yael Dvir.

1. Dr. Richard Dudley

Dr. Dudley, a psychiatrist,[10] was retained by the defense to evaluate the defendant's criminal responsibility. He reviewed documents and medical records, conducted interviews, reviewed case materials, and interviewed the defendant seven times in 2015.[11] Dr. Dudley opined that, at the time of the crimes, the defendant suffered from a mental disease or defect -- psychotic disorder not otherwise specified ("NOS"). This diagnosis, he testified, is used when a person has a sufficient number of symptoms to fall in the category of psychotic disorders, but there is insufficient information to diagnose a specific disorder.[12] Dr. Dudley concluded that, on the date of the offense, as a result of this mental disease or defect, the defendant lacked

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[9] As to the unnatural rape with the tree branch, the defense asserted that Ritzer was dead at the time of the penetration, and thus could not be convicted of rape, which requires a live victim.

[10] Though Board certified in general psychiatry, Dr. Dudley is not Board certified in child, adolescent or forensic psychiatry, though he had performed forensic evaluations. He had testified almost exclusively for the defense.

[11] The interviews were in March, April, May, September, and December of 2015.

[12] Dr. Dudley used a descriptor from the DSM-IV that is no longer used in the current version of the manual released in 2013, the DSM-V, which instead uses the term "schizophrenia spectrum disorder."

substantial capacity to conform his conduct to the law. Dr. Dudley *did not* opine that the defendant was not aware of the wrongfulness of his conduct.

In his interviews with the defendant, Dr. Dudley noted that he had a flat affect, mumbled to himself at times, and at times exhibited what Dr. Dudley termed disorganized and delusional thinking, including a claimed belief that he was not human and had super powers. Dr. Dudley opined that the school surveillance video was consistent with his opinion and reflective of disorganized thought, as it showed the defendant wandering aimlessly around the school covered in blood.[13]

In forming his opinion, Dr. Dudley relied principally on the defendant's own report of command auditory hallucinations beginning at age 10. These alleged auditory hallucinations were the "central feature" of the doctor's diagnosis. Of his 11-page report, 8 to9 pages are dedicated to the defendant's statements concerning this alleged symptom. Dr. Dudley admitted that the defendant's accounts of the onset of these voices, and his descriptions of their origins, were "all over the place." Though his report did not address the possibility of malingering, Dr. Dudley claimed to have considered this possibility, and opined that the defendant was not malingering. He did not, however, order psychometric testing for malingering. Though he reviewed the testing ordered by the Commonwealth experts strongly indicative of malingering, this did not change his opinion.

He opined that it was difficult to determine whether the defendant's condition was the result of trauma or early onset schizophrenia. The defendant denied abuse or neglect of any kind to Dr. Dudley and others, and there was no evidence that the defendant was abused or neglected. Dr. Dudley opined that the defendant nonetheless exhibited "trauma related symptoms,"

[13] Dr. Dudley did not visit the school and trace the defendant's path through it, as did the jury and the Commonwealth's expert, Dr. Robert Kinscherff. Nor did he review surveillance footage of the defendant's interactions with Escorcia or Hebert, or the video footage from BJ's, the movie theatre, or the gas stations.

including anxiety, agitation, avoidance, and nightmares. He opined that the defendant's move from Tennesee to Danvers, where he had lesser community supports, and the challenge of building new relationships there, resulted in the defendant withdrawing and relying more on manga (Japanese animations, comic books and graphic novels). The move to Danvers triggered his deterioration.

Dr. Dudley relied in part on a family history of psychotic symptoms in the defendant's maternal grandmother and aunt. He admitted, however, that no psychometric testing supported his opinion that the defendant was psychotic in October of 2013, and that some of the symptoms on which he relied were normal adolescent behaviors. He did not review the results of a screening test, the Youth Self Help Report Screening Tool, administered in the days after the defendant's arrest, that found no indications of psychosis. He opined that the defendant was undergoing a "psychotic process," but the intensity of his symptoms ebbed and flowed. He claimed that at their most recent meetings the defendant expressed remorse that the fact that his illness had gone untreated had caused "difficulties" for the victim's family.

Asked whether he had considered the sexual aspects of the crime, Dr. Dudley said that he had. He testified that the sexual aspects of the crime "left [him] with some questions," as these was not accounted for by the defendant's psychosis.

2. Dr. Anthony Jackson

While the defendant was awaiting trial, Dr. Jackson, a psychiatrist, treated him in-patient at the Worcester Recovery Center ("WRC") for approximately 2½ weeks. The defendant arrived at WRC on October 15, 2015, a week after jury selection began. He did not evaluate the defendant's mental status at the time of the crime, two years before.

At the end of his stay at WRC, on November 3, 2015, Dr. Jackson diagnosed the defendant as being in an acute depressive state and in a "brief transient psychotic episode." The latter diagnosis, he testified, applies to people who, in response to stress, become acutely disorganized in their thoughts and processes and unable to deal with these stressors. He prescribed Risperdal, and antipsychotic medication that aids people in organizing their thinking. After taking this medication, the defendant became more conversant and engaged.

Dr. Jackson understood that the defendant had endorsed symptoms that suggested malingering, and acknowledged that psychometric testing performed that fall had showed a likelihood of malingering. He testified that he avoided going into depth with the defendant concerning areas already covered by other doctors, and did not focus on the court proceedings that were underway. He admitted that it was not irrational to feel stress when standing trial for murder. He testified that the defendant's behavior at discharge was not consistent with schizophrenia. Though he had recommended the defendant remain on Risperdal, the defendant had once refused his medication before returning to court.

3. Dr. Yael Dvir

Dr. Dvir, a child and adolescent psychiatrist, testified generally regarding psychosis in children and adolescents. She had never met the defendant and offered no opinion on his mental health. She testified that people who are eventually diagnosed with schizophrenia often exhibit deterioration in social functioning, isolation, irritability, unusual behaviors and/or delusional thinking in their late teens to their early twenties. In many cases where schizophrenia is diagnosed in adults, the person had been diagnosed as a youth with Psychotic Disorder NOS. Early onset schizophrenia, i.e. onset after age 13 and before age 18, is very rare. Negative symptoms include social withdrawal and can mimic normal adolescent behavior. Positive symptoms include hallucinations, delusions, and bizarre and disorganized thinking and speech,

particularly, so-called "word salad," or use of words that do not convey a meaning or are not coherently attached to one another.[14] Such symptoms would normally be noticed by teachers and adults in the person's life. Important for assessment are interviews with family and those in regular contact with the youth, a full medical workup, psychological testing, and a family history. Youths might have the condition for years before an acute episode, which would involve bizarre and out of control behavior and the youth not making sense. A person might mask an acute episode by leaving the room or putting in ear phones, etc.[15]

C. Commonwealth rebuttal

Three witnesses testified in rebuttal: Drs. Kelly Casey, Nancy Hebben, and Robert Kinscherff.

1. Dr. Kelly Casey

Dr. Casey, a forensic psychologist, administered a Rorschach Inkblot test to the defendant in September 2015, a month before the trial was set to begin. During the test, the defendant was open, cooperative and pleasant, and was not acting or speaking in a bizarre or disorganized manner. He did not appear to be reacting to any internal stimuli. His results indicated that he was experiencing stress, anxiety, and likely depression, and that he had difficulty modulating emotions and reading people, more so than the average 16 year old. The results also showed that he had a fantasy life to which he would sometimes retreat in times of stress, but that he understood the difference between fantasy and reality. His results in this regard were typical of other teenagers.

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[14] There was no evidence that the defendant utilized such bizarre disorganized speech to anyone.

[15] There was evidence that the defendant would often wear earbuds, though this was normal for students at DHS, who are permitted to use earbuds in school.

2. Dr. Nancy Hebben

A neruopsychologist, Dr. Hebben was hired by Dr. Kinscherff to conduct psychometric tests on the defendant relative to a diagnosis and the possibility of malingering. For purposes of assessing "convergent validity," or common results among multiple testing instruments, Dr. Hebben administered several tests on August 8, 2015, when the defendant was 16½ years old.

On the MMPI-A (Minnesota Multiphasic Personality Inventory – Adolescent), developed specifically for adolescents as young as age 14, the defendant's results suggested he was "faking bad" or attempting to falsely demonstrate that he was mentally ill. The results of the BASC-2 (Behavioral Assessment System for Children -2nd Edition) similarly suggested malingering. On the SIRS (Structured Interview of Reported Symptoms) test,[16] among possible results of definite malingering, probable malingering, honest, or indeterminate, the defendant had only one score in the honest range, most were indeterminate, and one score was one point away from definite malingering. On the M-FAST (Miller Forensic Assessment of Symptoms Test),[17] his score also indicated that he was feigning mental illness.

Dr. Hebben did additional testing, but could not rely on the results because of the evidence that the defendant's answers were unreliable. Dr. Hebben opined that the defendant's history and presentation, and the aggregate testing results, were "highly suggestive" of a malingered mental illness.

3. Dr. Robert Kinscherff

Dr. Kinscherff, a forensic psychologist normally utilized by the defense, evaluated the defendant for purposes of determining his criminal responsibility on the date of offense. Before

[16] This test was designed for those over 18 but validated to age 14 for purposes of obtaining convergent validity among multiple testing instruments.

[17] This test was normed for persons as young as age 17, but was utilized here for convergent validity.

making this assessment Dr. Kinscherff, *inter alia*, conducted 13 hours of interviews with the defendant; reviewed records and conducted interviews to create a detailed developmental and medical history of the defendant; took into account research on adolescent brain maturation; performed certain psychometric tests; hired Drs. Hebben and Casey to perform additional testing; reviewed the reports of other experts; examined all surveillance video; visited DHS and traced the defendant's path there and in the woods; and examined all case materials, crime scene photographs, and physical evidence in the case.

He opined that the defendant was not suffering from a mental disease or defect on the date of offence. Though he may have been experiencing distress or emotional impairment, this did not deprive him of the ability to understand right from wrong or to conform his conduct to the law.

In his 13 hours of interviews with the defendant, the defendant was reserved and at times guarded, terminating some of the interviews. He was distracted at times, but was readily brought back and focused easily. At no time was he incoherent or difficult to follow; he never appeared impaired. He could become animated when discussing topics he preferred to discuss.

Dr. Kinscherff noted that psychosis at the reported age of ten was exceedingly rare, and would have been noticed by adults after a few weeks or months at most. Red flags in assessing reports of alleged auditory hallucinations include variances in the reports of the age, the cause of onset, and the description of the voices, all of which were present here.

Significant to his opinion were Dr. Hebben's testing results showing likely malingering as well as Dr. Casey's opinion that the defendant could distinguish fantasy from reality. Also significant were the defendant's widely varying performance on intellectual tests in March 2014 and June of 2015, indicative of an attempt to manipulate the results.

Dr. Kinscherff considered multiple possible differential diagnoses -- including brief reactive psychosis, schizoid personality disorder, schizotypal disorder, schizophrenia, schizoaffective disorder, and dissociative disorders.[18] He ruled out all of these.[19]

The DHS video depicting the defendant's movements was significant, as it showed planning and forethought, and purposeful, goal directed activity. His preparations included bringing the box cutter to school, using gloves to minimize blood on his hands or prevent fingerprints, and scanning the hallway before the attack. His efforts to obscure his identity -- by using the hood and mask, changing clothing, and later attempting to hide Ritzer's body and other incriminating items -- showed he appreciated the wrongfulness of his conduct. Bedard's interruption and his prompt departure from the bathroom, and Escorcia's description of his demeanor, further showed his understanding and concern about detection.

The damage to Ritzer's head, face and neck were significant evidence of "overkill" -- or damage to a victim beyond that necessary to render her unconscious or dead. This, and the sexual posing of Ritzer's body, showed the defendant's high emotional arousal and his desire to humiliate Ritzer and express complete power, domination and control over her. The posing was not indicative of psychosis; it is not uncommon for the perpetrator of a sexual homicide to pose his victim. Stealing her underwear and other belongings suggested the retention of a "trophy" or "souvenir" to memorialize the events.

His use of Ritzer's credit card was possibly reflective of poor post-event planning, which is not uncommon; ambivalence; or increasing confidence and grandiosity for having escaped

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[18] In a screening test for dissociative experiences, the defendant scored double what adolescents who actually have dissociative disorders do. A person with such results would have extreme shifts in behavior and affect not in evidence here.

[19] Dr. Kinscherff reviewed the records related to the defendant's maternal aunt and grandmother, both of whom had overall diagnoses of schizoaffective disorder, which is different from schizophrenia, and involves, *inter alia*, a flattening of mood and an inability to engage in goal directed behavior not in evidence here.

detection. His behavior at BJ's showed he was not disorganized in action or thought. If acutely psychotic, it would have been unusual for the defendant to have gone unnoticed.

D. Additional facts pertinent to sentencing

On June 2, 2014, while awaiting trial, the defendant is alleged to have attacked a female Department of Youth Services ("DYS") staff member in a bathroom with a pencil. On July 14, 2014, a Suffolk County Grand Jury indicted him as a youthful offender for attempted murder, assault with intent to commit murder; assault and battery with a dangerous weapon (to wit: a pencil); assault and battery with a dangerous weapon (to wit: a cinder block wall); and kidnapping (14YO0028DO). These alleged events are described in some detail in the Youthful Offender Probation Pre-Sentence Report requested by the defense and submitted to the Court, at pages 24- 25. The defendant awaits trial on these matters.[20]

III. ARGUMENT

A. FOR THE MURDER OF COLLEEN RITZER, A LIFE SENTENCE WITH PAROLE ELIGIBILITY AFTER 25 YEARS IS APPROPRIATE

1. Legal framework and applicable sentencing scheme

In June of 2012, the United States Supreme Court held that, in light of advances in scientific research on adolescent brain development and the ways that development impacts a juvenile's personality and behavior, the Eighth Amendment's prohibition on "cruel and unusual" punishments forbids a sentencing scheme, like that in effect in Massachusetts at the time, that mandates life in prison without possibility of parole for juvenile homicide offenders. Miller v. Alabama, 132 S.Ct. 2455, 2463-2475 (2012). "Such a scheme prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants

[20] Consideration of this matter must be confined to the issue of the defendant's amenability to rehabilitation.

facing the most serious penalties." Id. at 2460, quoting Graham v. Florida, 130 S.Ct. 2011, 2026–2027 (2010). Miller did not bar all juvenile life without parole sentences; rather it held that an individualized hearing must be held prior to the imposition of such a sentence so a juvenile defendant might present mitigating evidence that shows his actions were not "evidence of irretrievabl[e] deprav[ity]" Id. at 2469, 2475.

Two months after the issuance of that opinion, on August 12, 2012, the Massachusetts Legislature enacted "An Act Relative To Sentencing And Improving Law Enforcement Tools," the so-called "Crime Bill," which included amendments to the parole eligibility statutes. See G. L. c. 127, § 133A, as amended through St. 2012, c. 192, §§ 37-39 and G. L. c. 279, § 24, as amended through St. 2012, c. 192, § 46. Under these new provisions, for any offender convicted of a crime carrying a life sentence, except first degree murder, a sentencing judge may impose a life sentence and set parole eligibility between fifteen and twenty five years. Id.[21] The Crime Bill applies to crimes committed on or after its effective date: August 12, 2012.

Four months later (and two months after the defendant's crimes), on December 24, 2013, the Supreme Judicial Court issued Commonwealth v. Diatchenko, 466 Mass. 655, 671 (2013) S.C., 471 Mass. 12 (2015), holding that that Article 26[22], unlike the Eighth Amendment, bars even discretionary imposition of life without parole on a juvenile murderer. Id. at 658-569 ("We further conclude that the discretionary imposition of [a life without parole] sentence on juvenile homicide offenders [] violates art. 26 because it is an unconstitutionally disproportionate

[21] G. L. c. 127, § 133A, as amended through St. 2012 c. 192, s. 37 ("Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth . . . .except prisoners serving a life sentence for murder in the first degree . . . shall be eligible for parole at the expiration of the minimum term fixed by the court under section 24 of chapter 279."); G. L. c. 279, § 24, as amended through St. 2012, c. 192, § 46 ("In the case of a sentence to life imprisonment, except in the case of a sentence for murder in the first degree . . . the court shall fix a minimum term which shall be not less than 15 years nor more than 25 years.").

[22] Article 26 of the Massachusetts Declaration of Rights states, in part: "No magistrate or court of law, shall . . . inflict cruel or unusual punishments."

punishment when viewed in the context of the unique characteristics of juvenile offenders.") The Court held that the prohibition was a new substantive constitutional rule that applied retroactively. Id. at 466 Mass. at 661-667. The Court found the relevant statutes severable. Id. at 673-674 Thus, the sentence of life imprisonment imposed under G. L. c. 265, § 2, remained "in full force and effect," but the exceptions to parole eligibility normally applicable to first degree murderers did not apply. Id. Based on the parole eligibility provision in effect for non-first degree murder life sentences at the time of Diatchenko's crime, granting eligibility after 15 years, Diatchenko, having served 31, was eligible to be considered for parole immediately. Id.

In Commonwealth v. Brown, 466 Mass. 676, 680-689 (2013), decided the same day as Diatchenko, the Court noted that, in light of the changes recently wrought by the Crime Bill, a juvenile convicted of murder may be sentenced to a life sentence with parole eligibility to be set by the judge between fifteen and twenty-five years. Id. Thus, until the sentencing scheme was amended, sentencing judges thus effectively would be required to apply the same discretionary parole eligibility range to juveniles convicted and sentenced to life in prison for a variety of crimes, including first and second degree murder, which could give rise to disparate sentences. Id. at 690. "Consequently, we emphasize that the application of severability principles in sentencing juveniles like Brown [and Diatchenko] is a temporary remedy -- one that we hope the Legislature will soon address by creating a new, constitutional sentencing scheme for juveniles convicted of homicide crimes." Id. at 691. The Brown Court left to Legislature the creation of a new sentencing scheme, noting that such a scheme must honor "spirit" of the holdings in Brown and Diatchenko "and avoid imposing on juvenile defendants any term so lengthy that it could be seen as the functional equivalent of a life-without-parole sentence." Id. at 691 & n. 11.[23]

[23] The Court cited several cases from other jurisdictions ruling that lengthy term of years sentences -- all with parole eligibility dates longer than that proposed by the Commonwealth here -- were the functional equivalent of life

On July 25, 2014, the Legislature enacted "An Act Relative to Juvenile Life Sentences for First Degree Murder," St. 2014 c. 189, which adopted a new sentencing scheme. Under it, juvenile offenders convicted of first degree murder shall be sentenced to life with the possibility of parole, with parole eligibility after a discretionary term of years fixed by the court, dependent on the theory under which the defendant was convicted: for first degree murder with extreme atrocity or cruelty, not less than 30 years; with deliberate premeditation, not less than 25 years nor more than 30 years; and for felony murder, not less than 20 years nor more than 30 years. See G.L. c. 265, § 2, as amended through St. 2014 c. 189, § 5 and G.L. c. 279, § 24 as amended through St. 2014 c. 189, § 6. Because this Act was enacted after the defendant committed his crimes, and increased the potential penalties, application to his case is barred as an ex post facto law. See Brown, 466 Mass at 689 & n. 10.

Thus, the timing of the defendant's murder of Ritzer -- after the effective date of the Crime Bill and before "An Act Relative to Juvenile Life Sentences for First Degree Murder" -- is, for the defendant, fortuitous: he may be sentenced for the murder (and for the other crimes of conviction) to life in prison with a parole eligibility set in the discretionary range contemplated in the Crime Bill, between 15 and 25 years.

2. Factors to be considered in murder sentencing

Though the Supreme Judicial Court has not yet delineated factors guiding sentencing of a juvenile first degree murderer under the Crime Bill, it provided some relevant guidance in

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without parole sentences for purposes of Miller. Commonwealth v. Brown, 466 Mass. 676, 691, & n. 11 (2013), citing People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (sentence of 110 years to life for attempted murder did not provide juvenile defendant with a realistic opportunity to obtain release through demonstration of growth and maturity, thus violating Eighth Amendment's prohibition against life without parole sentences for non-homicide offenses in Graham); State v. Ragland, 836 N.W.2d 107, 111, 121-122 (Iowa 2013) (sentence of life with parole eligibility only after 60 years was functional equivalent of life without parole); State v. Null, 836 N.W.2d 41, 45, 71 (Iowa 2013) (mandatory 75 year sentence resulting from aggregation of two mandatory sentences that permitted parole eligibility only after 52½ years for juvenile was "such a lengthy sentence" that it was "sufficient to trigger [Miller]-type protections").

Commonwealth v. Costa, 472 Mass. 139, 140 (2015). There, in 1986, Costa, then a juvenile, along with an adult defendant, fatally shot two people; Costa was convicted of both murders on a joint venture theory and sentenced to two consecutive life without parole sentences. Id. at 141-142, 146. When imposed, the consecutive sentences "had little practical impact" given the then-mandatory life without parole sentence for murder. Id. The Court ruled that, as a consequence of Miller and Diatchenko, the defendant was entitled to a resentencing hearing to determine whether the sentences should run concurrently. Id. The Court "address[ed] the factors to be considered at such a hearing." Id. at 147. In addition to the "variety of factors" normally considered, the Court identified "three additional factors that a judge conducting such a resentencing should consider." Id.

First, the so-called "Miller factors," i.e. those identified by the Supreme Court in Miller as those to consider in making the individualized determination whether a juvenile murderer should receive life without parole:

> (1) the defendant's 'chronological age and its hallmark features -- among them, immaturity, impetuosity, and failure to appreciate risks and consequences';
>
> (2) 'the family and home environment that surrounds' the defendant;
>
> (3) 'the circumstances of the homicide offense, including the extent of [the defendant's] participation in the conduct and the way familial and peer pressures may have affected him' or her;
>
> (4) whether the defendant 'might have been charged and convicted of a lesser offense if not for incompetencies associated with youth -- for example, [the defendant's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the defendant's] incapacity to assist his [or her] own attorneys'; and
>
> (5) 'the possibility of rehabilitation.'

Id. at 147-148, quoting Miller, 132 S. Ct. at 2468 (brackets in original).

Second, in view of the "current scientific research on adolescent brain development" that underlies the decisions in Miller and Diatchenko, "the judge appropriately may consider evidence concerning the defendant's then-extant psychological characteristics in the process of assessing the Miller factors." Id. at 148, emphasis supplied.

Third, "information concerning the defendant's postsentencing conduct, whether favorable or unfavorable, and whether offered by the defendant or by the Commonwealth, properly may be presented and considered at the resentencing hearing." Id at 149.

The Commonwealth submits these (excepting post-sentencing conduct) are appropriate considerations in sentencing this defendant for murder, with the following caveat. The Costa case did not involve a criminal responsibility defense, but rather one challenging the Commonwealth's evidence of identity. See Commonwealth vs. DiBenedetto, and three companion cases, 427 Mass. 414, 416 (1998) ("The major question for the jury was whether the defendants were two of the murderers."). Thus, the need for developing a record as to the Miller factors, and the defendant's "then-extant psychological characteristics," was essential there. Here, the defendant's mental state at the time of the crimes was litigated at length, and the jury rejected a criminal responsibility defense. This Court should give due consideration to the evidence adduced at trial on this point, and the jury's determination that the defendant was criminally responsible.

3. **The proposed sentence for murder is just**

Here, the jury found that the defendant deliberately premeditated the killing of Ritzer, that is, he decided to kill her after a period of reflection. This determination was amply supported by the facts showing clear planning and forethought. He brought the box cutter, gloves and balaclava to school, and stayed after class with these items. He scanned the hallway,

donned gloves, and followed Ritzer into the bathroom, ambushing her at a point when she was particularly vulnerable and unsuspecting.

Further, the jury's finding that the murder was committed with extreme atrocity or cruelty was amply supported, if not inescapable. The manner of the killing far surpassed "the cruelty inherent in any killing." Commonwealth v. Sok, 439 Mass. 428, 431(2003). Virtually all the familiar Cunneen factors[24] are in evidence here. That Ritzer experienced great fear and pain as the defendant choked and began to slit her throat is unquestionable. He was not merely indifferent to, but apparently took pleasure in her suffering and humiliation. Not content with the horrors he inflicted in the bathroom, he moved her to the woods where he continued his degradation of her, posing her, exposing her breasts, spreading her legs, and cutting more at her neck. The choking was alone enough to kill her. The sharp force injuries he inflicted to her neck were catastrophic, far in excess of that required to cause her death. "That the crimes were heinous would not alone support a conclusion that they were the product of an insane mind." Commonwealth v. LaPlante, 416 Mass. 433, 443-444 (1993). Indeed, heinousness was the defendant's apparent *goal.* It was his *objective* to humiliate and brutalize Ritzer. Her suffering was the evident *purpose* of his actions, rather than a mere byproduct of them.

Consideration of the Miller factors does not aid the defendant. The case is striking for the complete absence of factors often present in juvenile homicides that might mitigate or explain his acts. Though he was 14 and nine months at the time, the crime did not reflect characteristic immaturity and impulsiveness, but rather planning and preparation. He was not

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[24] Our Courts have "delineated a number of factors which a jury can consider in deciding whether a murder was committed with extreme atrocity or cruelty. These include indifference to or taking pleasure in the victim's suffering, consciousness and degree of suffering of the victim, extent of physical injuries, number of blows, manner and force with which delivered, instrument employed, and disproportion between the means needed to cause death and those employed." Commonwealth v. Sok, 439 Mass. 428, 431(2003), citing Commonwealth v. Cunneen, 389 Mass. 216 (1983). "A conviction under this theory of murder may be supported by a showing of any one or more of the Cunneen factors." Id.

reckless and indifferent, but purposefully cruel. His judgment was not compromised by substances, or by the influence of peers; no one else but the defendant was involved in the planning and execution of these crimes. Nor were his acts influenced by a personal history of physical or sexual abuse or neglect. Though chaotic and disorganized, the defendant's household was ultimately loving and supportive. There is no suggestion the defendant, but for his youth and inexperience with police and prosecutors, would have been charged or convicted of a lesser crime. No view of the facts warrants lesser charges. The defendant fully cooperated with his own mental health expert, Dr. Dudley, consenting to be interviewed numerous times by him. In rendering his opinion that the defendant was malingering mental illness, and was in control of and understood the wrongfulness of his actions, Dr. Kinscherff duly considered "current scientific research on adolescent brain development," a topic on which he is a recognized expert.

Apart from his chronological age at the time of the offense, the case is devoid of any sign that rehabilitation is likely, or that the defendant may at some point in the near future no longer pose a threat to the public. Rather than attempting to immediately forget the horror of his crimes against Ritzer, the defendant kept souvenirs to memorialize and recount them. Seven months after murdering Ritzer, while awaiting trial, he is alleged to have committed a similar attack, on another young female victim, under similar circumstances.[25] The argument that medication controls his violence should be considered in light of the fact that the defendant has refused his medication in an inferable effort to manipulate the trial process.

Finally, though inapplicable here, the new statutory scheme, providing for minimum parole eligibility of 30 years for murder by extreme atrocity or cruelty and 25 years for deliberate

[25] Again, consideration of these allegations must be confined to the issue of the defendant's amenability to rehabilitation.

premeditation, underscores the appropriateness of 25 year parole eligibility date proposed by the Commonwealth.

B. FOR THE AGGRAVATED RAPE AND ARMED ROBBERY OF RITZER, CONCURRENT LIFE SENTENCES WITH PAROLE ELIGIBILITY AFTER 25 YEARS , TO BE SERVED ON AND AFTER THE SENTENCE FOR MURDER, ARE APPROPRIATE

1. Youthful Offender sentencing scheme

"[E]vident from the Legislature's over-all approach to the sentencing of youthful offenders [is] that it intended to give the sentencing judge wide latitude in fashioning a sentence that best serves the needs of the community and the youthful offender." Commonwealth v. Lucret, 58 Mass. App. Ct. 624, 629 (2003), citing G.L. c 119, § 58. The Court has three options: (1) "a sentence provided by law" for the offense; (2) "a combination sentence" which shall be a commitment to DYS until the age of twenty-one, combined with an adult sentence to a house of correction or state prison as is provided by law for the offense; or (3) a commitment to DYS until the defendant reaches the age of twenty-one. G.L. c 119, § 58. "In making such determination the court shall conduct a sentencing recommendation hearing to determine the sentence by which the present and long-term public safety would be best protected." Id. The statute further "directs the judge to consider, but not be limited to, a comprehensive list of factors relevant to selecting an appropriate disposition" Lucret, 58 Mass. App. Ct. at 629:

> At such hearing, the court shall consider, but not be limited to, the following factors: the nature, circumstances and seriousness of the offense; victim impact statement; a report by a probation officer concerning the history of the youthful offender; the youthful offender's court and delinquency records; the success or lack of success of any past treatment or delinquency dispositions regarding the youthful offender delinquency records; the nature of services available through the juvenile justice system; the youthful offender's age and maturity; and the likelihood of avoiding future criminal conduct. In addition, the court may consider any other factors it deems relevant to disposition.

G.L. c 119, § 58.[26]

"'[T]he essence of the crime of rape, whether aggravated or unaggravated, is sexual intercourse with another compelled by force and against the victim's will or compelled by threat of bodily injury.'" Commonwealth v. McCourt, 438 Mass. 486, 494-96 (2003), quoting Commonwealth v. Guisti, 434 Mass. 245, 248 (2001), further citations omitted. See G.L. c. 265 § 22 (a).[27] "[R]ape is "a crime involving not simply sex but 'violence and domination calculated to humiliate, injure and degrade.'" Id. quoting Commonwealth v. McCourt, 54 Mass. App. Ct. 673, 681 (2002), further citations omitted. "The Legislature's clear purpose in creating the offense of aggravated rape was to protect victims of violent sex offenders, by punishing more severely perpetrators [] who inflict serious bodily injury on a victim, in addition to the bodily harm from the act of rape itself . . . " Id. "The Legislature, by enacting G.L. c. 265, § 22 (a), intended that rapists who inflict serious bodily injury . . . against their victims, will be dealt with severely." Id. at 496. An aggravated rapist may be punished "by imprisonment in the state prison for life or for any term of years." G.L. c. 265, § 22 (a).

"'The essence of robbery is the exertion of force, actual or constructive, against another in order to take personal property of any value whatsoever, with the intention of stealing it, from the protection which the person of that other affords." Commonwealth v. Cruzado, 73 Mass. App. Ct. 803, 806 (2009), citation omitted. See G.L. c. 265, § 17. "The purpose of the [armed robbery] statute is to make robbery while possessed of a dangerous weapon a more serious offense because such robbery 'would naturally lead to resistance and conflict' in which use of the dangerous weapon may be expected to follow." Commonwealth v. Tarrant, 367 Mass. 411,

[26] As noted, the defendant is further entitled, and here requested, "a pre-sentence investigation report" by the probation department. G.L. c 119, § 58.

[27] The Commonwealth proceeded solely on a theory of serious bodily injury. G.L. c. 265, § 22 (a) (aggravated rape may also be committed by joint enterprise or during the commission or attempted of certain enumerated offenses).

414-15 (1975), citing Commonwealth v. Mowry, 11 Allen 20, 22 (1865). An armed robber likewise may be sentenced to "life or for any term of years." G.L. c. 265, § 17.

2. **Constitutional considerations in imposing consecutive sentences**

In Graham v. Florida, 560 U.S. 48, 75 (2010), the Court held that the Eighth Amendment prohibits imposition of life in prison without parole on juvenile offenders convicted of nonhomicide crimes who were under eighteen years of age when the crimes were committed. As noted above, the Supreme Judicial Court in Brown suggested in dicta that a sentence that is the "functional equivalent of a sentence of life without parole" may violate art. 26. 466 Mass. at 691, n.11.[28] In a footnote, the Costa Court cited cases from other jurisdictions addressing the question of whether a term of years sentence might constitute a *de facto* sentence of life without parole.[29]

These decisions do not squarely or cogently address the issue here: serial crimes committed against a victim apart from murder, and the need to address the goals of sentencing as to these wholly separate crimes. "Although punishment may be cruel and unusual not only in manner but also in length, 'a heavy burden is on the sentenced defendant to establish that the punishment is disproportionate to the offense for which he was convicted.'" Commonwealth v. Alvarez, 413 Mass. 224, 233 (1992), quoting Commonwealth v. O'Neal, 369 Mass. 242, 248 (1975) (Tauro, C.J., concurring). "It must be so disproportionate to the crime that it 'shocks the conscience and offends fundamental notions of human dignity.'" Id., citation omitted. "Firmly

[28] See also Costa, 472 Mass. at 146 (noting that "[o]ur conclusion that resentencing is proper in this case [] does not rest on a constitutional determination that a sentence of life with parole eligibility in thirty years is the functional equivalent of life without the possibility of parole."; "The constitutionality of [the current sentencing] scheme is not before us.").

[29] Costa, 472 Mass. at 146 & n. 3, citing Casiano v. Commissioner of Correction, 317 Conn. 52 (2015) (concluding that "the imposition of a fifty-year sentence without the possibility of parole is subject to the sentencing procedures set forth in Miller"); State v. Null, 836 N.W.2d 41, 71 (Iowa 2013) (determining 52 ½ -year sentence was "sufficient to trigger Miller-type protections"); Bear Cloud v. State, 334 P.3d 132, 136, 142 (Wyo. 2014) (sentence of 45 years until parole eligibility sufficient to constitute functional equivalent of life without possibility of parole).

rooted in common law is the principle that the selection of either concurrent or consecutive sentences rests within the discretion of sentencing judges." Lucret, 58 Mass. App. Ct. 624 at 628, quoting Campbell, Law of Sentencing § 9:12 (2d ed.1991). See Commonwealth v. Lykus, 406 Mass. 135, 145 (1989). "So long as statutory limits are not violated, at the original sentencing, a judge can order that sentences be served either concurrently or consecutively, subject, of course, to considerations of due process and double jeopardy." Id., citing Lykus, 406 Mass. at 145; Morey v. Commonwealth, 108 Mass. 433, 434 (1871).

Consecutive sentencing for aggravated rape and armed robbery here is not disproportionate, and does not violate Art. 26. In no sense did the aggravated rape or armed robbery "merge" with the killing of the victim.[30] These crimes involved different acts, carried intents wholly separate from that required for murder, and inflicted pain, suffering and humiliation in their own right. If Art. 26 mandates concurrent sentences, no aspect of the sentence would meaningfully address the sexual violation and robbery the victim endured at the defendant's hands. It would provide no deterrent for a defendant not to sexually violate and rob a victim in addition to killing her. It would permit the defendant to avoid any real accountability for these additional grave crimes, solely because of his chronological age and without regard to the depravity of the acts and their effect on the victim, her family, and the community.

The defendant contends that any sentence in which he must first be paroled to a second sentence violates Diatchenko, because if he is never paroled from his first sentence, he may never receive a parole hearing that may result in his release. Of course, that a defendant must first meet the parole standard before being released is a feature of any life with parole sentence.

[30] This is not a case where the aggravated rape or armed robbery were the predicates to a felony murder conviction. In such a case, the intent to commit the life felony would substitute for malice, and the predicate offence(s) would essentially fold into the murder, and be vacated as duplicative. See Commonwealth v. Gunter, 427 Mass. 259, 275-276 (1998).

Diatchenko requires only a "meaningful opportunity" for parole, not release. Given the grave concerns about public protection and the likelihood of rehabilitation here, an interim chance for the defendant to demonstrate maturity and reformation in year 25 would be beneficial to him, the Parole Board, and the community in marking the defendant's progress or (or lack thereof) toward meeting the parole standard. The decision to grant parole is made at the sole discretion of the Board, Greenman v. Massachusetts Parole Board, 405 Mass. 384, 385-387 (1989), governed by the standard set out in G.L. 127, § 130: "No prisoner shall be granted a parole permit merely as a reward for good conduct but only if the parole board is of the opinion that there is a reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." The proposed sentence grants the defendant the requisite opportunity to convince the Board he meets this standard at an appropriate time.

CONCLUSION

For these reasons, the recommended sentences should be imposed.

Respectfully submitted,

For the Commonwealth:
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February 24, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2016 copies of the "COMMONWEALTH'S SENTENCING MEMORANDUM," and attached CD, in the case of Commonwealth v. Chism were delivered by email and in hand to:

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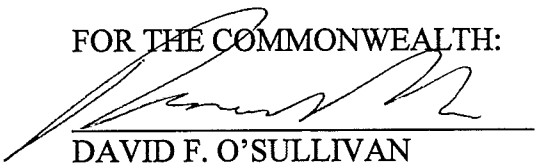
FOR THE COMMONWEALTH:



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