QUESTION PRESENTED

Whether a habeas petitioner's Federal constitutional claim of denial of due process in the admission against him of gruesome photographic evidence has been "adjudicated on the merits" for purposes of 28 U.S.C. §2254(d) where the State court decision affirming the trial judge's admission of such evidence in the exercise of her discretion never addressed the petitioner's claim of denial of Federal due process in its admission.

LIST OF ALL PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit affirming the denial of the petitioner's petition for a writ of habeas corpus appears at Appendix A to this petition and is reported as Lyons v. Brady, 666 F.3d 51 (1st Cir. 2012). The opinion of the United States District Court for the District of Massachusetts denying the petition for a writ of habeas corpus appears at Appendix B to this petition and is reported as Lyons v. Brady, 587 F. Supp. 2d 327 (D. Mass. 2008).

The opinion of the Supreme Judicial Court of Massachusetts affirming the petitioner's conviction of murder in the second degree is reported as Commonwealth v. Lyons, 444 Mass. 289, 828 N.E.2d 1 (2005), and appears at Appendix C to this petition. The opinion of the Appeals Court of Massachusetts affirming the reduction of the petitioner's conviction to manslaughter is unreported, is cited as Commonwealth v. Lyons, 61 Mass. App. Ct. 1103, 807 N.E.2d 862 (2004), and appears at Appendix D to this petition.

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit sought to be reviewed was entered on January 17, 2012, and appears at Appendix A to this petition. This petition is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "....No State shall ... deprive any person of life, liberty, or property, without due process of law...."

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination

of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

At the trial of this indictment, both the prosecution and defense agreed that the petitioner committed the acts which caused the death of his two-week old son, Jacob (1/13). Both parties agreed that the child's death resulted from injuries sustained while he was being shaken by the petitioner shortly after noon on June 28, 1998 (Id., and 1/119). On the day of Jacob's death, the petitioner was caring for his newborn son while his wife was at her sister's bridal shower (3/150). While bathing his son in an upstairs bathroom, the baby slipped from his hands and fell several inches; hitting his head on the tub and swallowing a couple of mouthfuls of water (2/169).[1/]

Several minutes later, after Mr. Lyons had prepared a bottle of formula, he noticed that his son seemed to be ill; his breathing was stressed and his eyes were not focused (3/247).[2/] Seeing his son in such obvious

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[1/]The medical records introduced at trial revealed a small left frontal contusion on the child's face (Add. 65). The autopsy report corroborated this finding (Add. 67).

[2/]Five years earlier Mr. Lyons and his wife Kathy had lost a son who died of acute myocarditis (Tr. 2/38-39). Mrs. Lyons' family had a history of heart disease (3/142). The prosecutor indicated at a sidebar conference that the

distress, he began to panic: "I thought 'Oh God, please don't let this happen to us again'" (3/247). He picked up the child and started to shake him (3/247); "I was yelling and screaming 'Jacob, Jacob'" (3/249). It was during this time that he inflicted the injuries that ultimately proved fatal. After unsuccessfully trying to contact his wife at the bridal shower, he called 911 for assistance (3/249-250).

The prosecution's theory was that the petitioner shook the child because he was angry after having had an argument with his wife shortly before she left to attend the party (1/142-144). Nevertheless, it was undisputed that by the time the petitioner spoke with emergency personnel in the early afternoon of June 28, 1998, his son Jacob had already sustained the injuries which ultimately proved fatal.

At the outset of the trial, prior to empanelment of the jury, the trial judge was made aware that cause of death was not a disputed issue. The following exchange took place between defense counsel and the trial judge in the course of the hearing regarding the defendant's objection to a CD-Rom which contained an computer generated depiction of the shaking of a child:

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child may have died from a respiratory infection (2/39).

> DEFENSE COUNSEL: The first point I make in the motion, your Honor, is that the proposed demonstrations do not need the fact-finder in the resolution of any disputed fact. The cause of death is not disputed. The subdural hematoma, subarachnoid hemorrhaging or retinal hemorrhaging is not disputed here.
> This, therefore, presents an area where, there are no disputed facts, the probative value is minimal and the prejudicial value is great given the weight that jurors tend to put on visual evidence. In the case of Commonwealth versus Natwarny (sic)[3/], the courts have noted that it would invite - not only would it be prejudicial, but it would also invite diversionary evidence as to what is a subjective illustration of a baby being shaken….
> Given the fact that there is no disputed fact as to the cause of death, this doesn't illustrate anything that would aid the jurors in resolving a disputed fact, which is a calculation we use generally for photographs.
>
> THE COURT: When you say there is no disputed fact, am I hearing that the defendant is conceding that he shook the baby?
>
> DEFENSE COUNSEL: Yes your honor.
>
> (1/119-121).

During the course of this same discussion, the prosecutor agreed that neither the cause of death nor the manner in which the injuries were inflicted would be an issue at trial (1/123-124).

One of the prosecutor's expert witnesses then testified that he had reviewed Jacob Lyons' entire record, including the autopsy report, cat scans, eye test results, emergency room records, and the autopsy photographs, and

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[3/] Commonwealth v. Nadworny, 396 Mass. 342 (1985).

in addition had consulted with the child's treating physicians (2/109-110). Based on this review, he testified that in his opinion, the child had died of shaken baby syndrome. Id.

The prosecution's case in chief lasted for three days. Four doctors testified on behalf of the prosecution, so there were numerous opportunities for the prosecution to offer the photographs. As a result, at numerous intervals in the course of the trial the admissibility of the autopsy photographs was revisited by the court.

Two emergency room doctors who treated Jacob on the day of his death testified as to the child's symptoms upon his admission to the emergency room (2/64-73, 2/156-183). Dr. Robert Reece also testified. He is a pediatrician who is an expert in the field of child abuse and shaken baby syndrome. His testimony built upon the reports of the attending physicians. Dr. Reece explained the constellation of symptoms attending shaken baby syndrome, as well as their medical significance. He explained the cause and significance of bleeding on a baby's brain, which is found in babies who are shaken (2/91-92). He particularly described the blood clotting in Jacob's brain and the injury to his back (2/112-113), and concluded his testimony without the photographs ever being shown to the jury

(2/51-147).

Dr. Richard Evans then testified in detail as to the medical examiner's findings (3/28-64), and also gave his opinion that the child had died from shaken baby syndrome (3/57). In all medically significant respects, his testimony echoed the expert testimony of Dr. Reece. Like Dr. Reece, Dr. Evans did not use the photographs to illustrate his testimony regarding Jacob's injuries (3/28-64). After he had testified as to his findings and medical opinion, the prosecution approached sidebar and requested permission to show the photos to the jury (3/64). The defense repeated its objections and was overruled (3/65-66).

After the first photograph was described, the trial judge instructed the jury:

> Now these photographs are not pleasant. And in fact they are said to be gruesome. Your verdict must not be in any way influenced by the fact that these photographs are gruesome.
>
> It's most important for you to understand, this defendant, Michael Lyons, is entitled to a verdict based solely on the evidence and not one based on pity on the alleged victim.
>
> I want you to view these exhibits as they may draw attention to a clinical medical status or to the nature and extent of the alleged victims in a case.
>
> (3/69-71).

In this case however, neither the *nature* nor the

extent of the fatal injuries were contested issues.

One significant misunderstanding that developed in the course of the litigation concerned the final photograph admitted into evidence which showed the back of the baby's head after the skin had been removed (Add. 62). In its opinion, the SJC stated that this photograph, "showing no injury to the back of the victim's head, was relevant to contradict the defendant's testimony that the victim hit his head in the bathtub." Commonwealth v. Lyons, 444 Mass. 289, 298 (2005). The genesis of this misunderstanding can be traced to the interrogation of the petitioner on the night of his son's death. He told Trooper Wendy Wakefield that he had been giving Jacob a bath when the child slipped and bumped his head. At the trial, the trooper admitted that she *assumed* that the child would have bumped the back of his head (2/59-60). The prosecution was apparently laboring under the same assumption, despite the fact that the medical records indicated that the child had a "left frontal contusion" (Add. 65-67). The prosecutor never mentioned this medical finding at any point in the trial. He specifically asked Dr. Reece whether there were injuries to the back of the child's head, to which the doctor replied in the negative (2/114). At a sidebar conference the prosecutor raised the issue again: "[Defense counsel] has raised in his

cross examination on some of these witnesses questions about where the baby's head injuries occurred about the baby being dropped in the tub and the *injuries to the back of his head* (2/145) (emphasis added). To the contrary, the only cross-examination by defense counsel that touched on this issue was during the testimony of Trooper Wakefield, where she admitted that it was her *assumption* that the baby would have hit the back of his head when he slipped (2/59-60). Defense counsel never tried to suggest that there were injuries to the back of the head. In fact, he stipulated that there was no bruise, contusion or injury of any kind on the back of his son's head (2/145-146).

Defense counsel certainly highlighted this point in the course of the trial, both through his cross-examination of Trooper Wakefield and in his closing argument:

> There was a cat scan, a subdural hemorrhage with a left frontal contusion. What does that mean? The child had a bruise here. The next page, 114, next to examination, about half way through the paragraph, the left side of the face is profusely swollen and red extending to the mid cheek, to the mid-forehead above the left eye [referring to the medical records of New England Medical Center].
>
> Now from your common knowledge and experience from children and yourself, teenagers, the child fell. The child didn't hit the back of his head. The child hit here. There's a contusion, from here down to here. That's exactly what Michael tried to tell them.

(4/113-114).

With respect to the issue purported to be raised by the photograph to the back of the child's head, the defense clearly and repeatedly stipulated that there was no injury to the back of the child's head (2/144-146). In fact, it was the Commonwealth's own expert witness, Dr. Reece, who testified that children "usually don't fall backward, they fall forward" (2/113).

After the instruction, the prosecution asked Dr. Evans to repeat his testimony, which was itself a repetition of Dr. Reece's testimony, this time using the photographs to illustrate it.

The jury ultimately returned a guilty verdict of second degree murder on July 13, 2001. The defendant filed a motion to reduce the verdict which was allowed by the trial judge on January 24, 2002 (Add. 5). In her decision allowing the motion, she wrote that a trial court has the discretion to reduce a verdict to rectify a disproportionate verdict and to ameliorate injustice (Add. 5). She concluded:

> I cannot exclude the possibility that the jury were not unduly affected by the image of this huge, lumbering man shaking so tiny and vulnerable a baby.
>
> This was a tragic case of an overwhelmed father and husband who, alone and unaccustomed to the difficult task of caring for a newborn infant, reacted to a stressful situation with lamentable

> panic and confusion. The defendant was not a vicious man, but, rather, one who succumbed to the frailty of human condition and committed a momentary act of extraordinarily poor judgment. I am also entitled to give weight to the defendant's being a steady worker with no prior criminal record, who has enjoyed the loving support of the victim's mother, Kathy, throughout her ordeal.
>
> After lengthy and soul-searching deliberation, I have determined that justice will be more nearly achieved by reducing the verdict from murder in the second degree to involuntary manslaughter.

(Add. 10-11).

In short, the one judge who was in the best position to assess all of the evidence, raised the spectre of a jury that was "unduly affected" by the stark contrast between the defendant and the image of a tiny, vulnerable baby depicted in the autopsy photographs.

Both Massachusetts state appellate courts reviewed this case. There were two appeals filed, one by the prosecutor, objecting to the reduction of the verdict by the trial judge. The second was by the defendant, objecting to various rulings of the trial judge. The prosecutor's appeal cast a large shadow over the petitioner's claims, and diverted both state appellate courts' attention from a considered assessment of the defendant's appeal. In the intermediate appellate court, the petitioner's appeal was never even considered; it was dismissed with his assent when the court affirmed the

trial court's reduction of the verdict. The Supreme Judicial Court's decision to grant appellate review of the intermediate appellate court's decision reflected a single-minded concern with the the reduction of the verdict. The Supreme Judicial Court issued long and thoughtful majority and dissenting opinions in this case. Both opinions are dominated by a consideration of the reduction of the verdict. As in the Appeals Court, the prosecution's appeal continued to cast a shadow over the petitioner's assigned errors when they were considered by the Supreme Judicial Court; the federal issue raised in the petitioner's state court appeal was never even mentioned.

The petitioner filed a petition for habeas corpus on the federal issue that was not addressed by the state appellate courts in the United States District Court for the District of Massachusetts under 28 U.S.C. §2254. The District Court denied the petition, but granted a certificate of appealability with respect to the issue. The petitioner's appeal to the United States Court of Appeals for the First Circuit followed.

The treatment of the petitioner's federal due process claims should allay any concern that the Harrington decision is incompatible with granting relief in the present case. In contrast to Harrington, in the case at

bar an explanation *did* accompany the state's court decision. A review of that state court decision, the explanation which accompanied that decision, and the state court precedents upon which that explanation relied, reveals that the petitioner's right to the due process of law as guaranteed by the Fourteenth Amendment was never considered or adjudicated by the appellate courts of the Commonwealth of Massachusetts. For that reason, the precise issue resolved by the Court in Harrington, is not implicated in the instant appeal. The petitioner is entitled to *de novo* review of his claim that he was denied due process by virtue of the erroneous admission of irrelevant and unfairly prejudicial evidence in his trial.

REASONS FOR GRANTING THE PETITION

NO AEDPA DEFERENCE SHOULD BE ACCORDED THE MASSACHUSETTS SUPREME JUDICIAL COURT'S AFFIRMANCE OF THE TRIAL JUDGE'S EXERCISE OF DISCRETION TO ADMIT IN EVIDENCE AGAINST THE PETITIONER GRUESOME PHOTOGRAPHS OF A SCALPED AND SKINNED DEAD BABY, WHERE THE STATE COURT NEVER ADDRESSED THE PETITIONER'S CLAIM THAT THE ADMISSION OF THE GRUESOME PHOTOGRAPHS HAD DEPRIVED HIM OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The baby who was the victim in this case died of shaken baby syndrome. This was not in dispute. The issue for the jury was not whether the baby had been fatally shaken. The issue was the petitioner's state of mind in shaking the baby.

Therefore the autopsy photograph of the dead baby's head, scalped, with the skin peeled away, and two other photographs of the baby's skinned back, which the Commonwealth placed before the jury over the petitioner's vehement objections, had no valid evidentiary significance at all. But, as the trial judge explicitly acknowledged, they were certainly gruesome. They were so pointless and gruesome as to shock the conscience, Rochin v. California, 342 U.S. 165, 172 (1952), and thereby massively violate the petitioner's right to a fair trial and due process under the Fourteenth Amendment to the United States Constitution.

The petitioner accompanied his claim to the Massachusetts Supreme Judicial Court (SJC) of evidentiary error in the admission of the autopsy photographs with a claim of Federal due process violation in their admission. The SJC held that there was no abuse of discretion in the admission of the photographs, Commonwealth v. Lyons, 444 Mass. 289, 298, 828 N.E.2d 1, 9 (2005), and that the petitioner's "allegations of error" were meritless. 444 Mass. at 290, 828 N.E.2d at 9. The SJC simply ignored the petitioner's Federal due process claim. On the appropriate standard of review, the petitioner's petition for habeas corpus should have been granted.

The Antiterrorism and Effective Death Penalty Act

(AEDPA) requires a Federal court, in reviewing on habeas the decision of the State court to which the petitioner made his Federal constitutional claim, to give deference to the State court if the "claim ... was adjudicated on the merits in [the] State court proceedings...." 28 U.S.C. §2254(d). The First Circuit follows the rule that if the State court did not address a petitioner's Federal constitutional claim, the Federal habeas court's review of that claim is not deferential, but rather is de novo. Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001).

Therefore the District Judge in this case ruled correctly that "[i]n light of the fact that the SJC did not determine whether the petitioner's due process rights were violated by the admission of the photographs, this Court makes a de novo determination with respect to the petitioner's claim." Lyons v. Brady, 587 F. Supp. 2d 327, 332 (D. Mass. 2008).

However, the First Circuit did apply the "highly deferential" AEDPA standard of review of the SJC's decision of the petitioner's case, Lyons v. Brady, 666 F.3d 51, 54 (1st Cir. 2012), quoting Butler v. O'Brien, 663 F.3d 514, 517-518 (1st Cir. 2011), notwithstanding the SJC's omission of any mention of the petitioner's Federal constitutional claim, on the basis of this passage from Harrington v. Richter, 131 S.Ct. 770, 784-785 (2011):

> When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. [Citation and parenthetical case summary omitted].

See Lyons v. Brady, 666 F.3d at 54.

The First Circuit overlooked the language of Harrington v. Richter that immediately follows the above-quoted passage: "The presumption [that the state court adjudicated the claim on the merits] may be overcome when there is reason to think some other explanation for the state court's decision is more likely." Harrington v. Richter, 131 S.Ct. at 785 (emphasis added). Here the "other explanation" for the SJC's decision is obvious. The SJC disposed of the defendant's challenge to the gruesome autopsy photographs by applying the familiar Massachusetts evidentiary principle that a trial judge's discretion to admit autopsy photographs is virtually unlimited, see, e.g., Commonwealth v. Pena, 455 Mass. 1, 12, 913 N.E.2d 815, 825 (2009), and simply ignored the petitioner's Federal due process claim.

The First Circuit assumed that the petitioner's Federal due process claim was subsumed within the "allegations of error" that the SJC held to be without merit. Lyons v. Brady, 666 F.3d at 54. However, this

assumption was unfounded. A claim of violation of Federal due process is quite distinct from a claim of evidentiary error, as is demonstrated by the seminal case of Chambers v. Mississippi, 410 U.S. 284 (1973).

In Chambers, the petitioner was convicted in a Mississippi trial court of murder by reason of the shooting of a police officer during a melee in a bar and pool hall. Id. at 285-286. His first defense was that he had not shot the officer. Id. at 288-289. His second defense was that one McDonald had done so. Id. at 289.

"Chambers endeavored to show the jury that McDonald had repeatedly confessed to the crime." Id. at 289. "In large measure, he was thwarted in his attempt to present this portion of his defense by the strict application of certain Mississippi rules of evidence. Chambers assert[ed] in this Court, as he did unsuccessfully in his motion for new trial and on appeal to the State Supreme Court, that the application of these evidentiary rules rendered his trial fundamentally unfair and deprived him of due process of law." Id. at 289-290. As in this case, the State Supreme Court failed to address the constitutional issue of the petitioner's asserted denial of due process. Id. at 290 n.3.

This Court carefully examined the evidentiary rulings in Chambers' case. Id. at 290. One, involving the

application of Mississippi's "voucher" rule resting on the presumption that a party who calls a witness "vouches for his credibility," it held to be error. See id. at 295-298. The Court did "not decide, however, whether this error alone would occasion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses.... Each [witness] would have testified to ... statements purportedly made by McDonald ... naming himself as the murderer. The State Supreme Court approved the exclusion of this evidence on the ground that it was hearsay." Id. at 298.

The Court closely reviewed the application of the rule against hearsay underlying the challenged exclusionary rulings, and determined that the pertinent exception to the hearsay rule, for declarations against the penal interest of the declarant, did not exist under the laws of most States, including Mississippi. See id. at 298-299. Nonetheless, it held that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id. at 302. It concluded that the exclusionary rulings grounded on the hearsay rule, coupled with the application of the

voucher rule, "denied [Chambers] a trial in accord with traditional and fundamental standards of due process." Id.

So too in this case, the admission of the gruesome photographs of the scalped and skinned dead baby may not have been error under the Massachusetts law of evidence, but it most certainly worked to deprive the petitioner of "a trial in accord with traditional and fundamental standards of due process." Chambers at 302. The SJC's failure to address the petitioner's due process claim should deprive its decision approving the admission of the gruesome photographs of any AEDPA deference.

CONCLUSION

The issue presented on this petition for certiorari is the same as that as to which this Court has granted certiorari in Williams v. Cavazos, 646 F.3d 626 (9th Cir. 2011), cert. granted, 132 S.Ct. 1088 (2012). Certiorari should be granted in this case also.

Respectfully submitted,

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April, 2012.

strained to abandon that decision by *Heller*, which implicates the Supreme Court's earlier due process precedents. Complications may result, in relation to prior convictions of others based on *Chamberlain*, but this often occurs with new Supreme Court doctrine and the problems will be resolved if and as they are presented.

The judgments of conviction of Small and Rehlander are *reversed*.

Michael LYONS, Petitioner, Appellant,

v.

Bernard BRADY, Superintendent, Old Colony Correctional Center, Respondent, Appellee.

No. 09-1059.

United States Court of Appeals, First Circuit.

Heard Oct. 3, 2011.

Decided Jan. 17, 2012.

Background: Following affirmance of his state-court conviction for second-degree murder, petitioner sought federal habeas relief. The United States District Court for the District of Massachusetts, Nathaniel M. Gorton, J., 587 F.Supp.2d 327, entered an order denying petition, and petitioner appealed.

Holding: The Court of Appeals, Thompson, Circuit Judge, held that petitioner was not entitled to relief on his due process claim.

Affirmed.

1. Habeas Corpus ⇐842

Review of the district court's denial of federal habeas relief is de novo. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇐450.1

A state court's decision may be objectively reasonable, and, thus, not merit federal habeas relief, even if the habeas court, exercising its independent judgment, would have reached a different conclusion. 28 U.S.C.A. § 2254.

3. Habeas Corpus ⇐452

It is a fundamental principle of the law of federal habeas corpus in non-death-penalty cases that no habeas claim is stated as to state-court criminal convictions unless the alleged errors are violations of the Constitution, laws, or treaties of the United States. 28 U.S.C.A. § 2254.

4. Habeas Corpus ⇐490(1)

State appellate court's determination that gruesome autopsy photographs of infant victim were admissible in second-degree murder prosecution was not an unreasonable application of clearly established federal law, and, thus, petitioner was not entitled to federal habeas relief on his due process claim; photographs were relevant and probative to critical issue of amount of force used to shake victim, and any potential unfair prejudice to petitioner was mitigated by trial court's limiting instruction. U.S.C.A. Const. Amend. 14; 28 U.S.C.A. § 2254.

5. Constitutional Law ⇐4650

Habeas Corpus ⇐489.1

An erroneous evidentiary ruling that results in a fundamentally unfair trial may constitute a due process violation and thus provide a basis for federal habeas relief; however, to give rise to habeas relief, the state court's application of state law must be so arbitrary or capricious as to consti-

tute an independent due process violation. U.S.C.A. Const.Amend. 14.

Paul J. McManus, for appellant.

Eva M. Badway, Assistant Attorney General, with whom Martha Coakley, Attorney General, was on brief, for appellee.

Before LYNCH, Chief Judge, HOWARD and THOMPSON, Circuit Judges.

THOMPSON, Circuit Judge.

A Massachusetts jury convicted petitioner Michael Lyons ("Lyons") of second-degree murder in the death of his two week old son. Lyons timely filed a motion seeking to reduce the verdict to involuntary manslaughter, which the trial court granted and the Massachusetts Appeals Court ("MAC") affirmed. However, on appeal to the Supreme Judicial Court ("SJC"), the court vacated the reduction and reinstated Lyons's original conviction for second-degree murder. Thereafter, Lyons sought a writ of habeas corpus in federal district court claiming a violation of his constitutional rights under the Fourteenth Amendment—specifically, that the admission of autopsy photographs had deprived him of a fair trial. The district court dismissed the petition and Lyons appealed to this court. Before us, Lyons challenges the dismissal of his habeas petition. Bound by the strictures of the standard of review set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), we affirm.

I. BACKGROUND

A. Facts

We review the facts as described by the SJC "supplemented with other record facts consistent with the SJC's findings." *Yeboah–Sefah v. Ficco*, 556 F.3d 53, 62 (1st Cir.2009) (internal quotation marks and citation omitted).

On the afternoon of June 28, 1998, Lyons's two week old infant son was rushed to Good Samaritan Hospital and then "med flighted" to New England Medical Center in Boston—he died there as a result of "severe cerebral edema and subdural hematomas due to shaking." *Commonwealth v. Lyons*, 444 Mass. 289, 828 N.E.2d 1, 4 (2005). Lyons, who was approximately five feet eight inches tall and weighed between 275 and 300 pounds, admitted to police that he had shaken the baby. *Id.* Lyons described how he had placed his hands underneath the baby's armpits and shaken his son. *Id.* Apparently, he did so with enough force to shake a 215 pound man. *Id.*

At trial, three autopsy photographs were introduced over Lyons's objection. *Id.* at 8. The trial court instructed the jurors that the pictures were being introduced for the limited purpose of "draw[ing] attention to a clinical medical status or to the nature and extent [ ] of the alleged victim[ ] in [this] case." There were bruises on both sides of the baby's upper back muscles just below his neck, and his body showed all the tell tale signs of shaken baby syndrome, which "essentially destroyed his brain." *Id.* at 4. Due to the severity of the child's injuries, he would have lost consciousness and become unresponsive "nearly instantaneously or within a very few seconds." *Id.* While Lyons admitted to shaking his son, he claimed that he did so out of panic, in an attempt to revive the baby, after finding the baby non-responsive.[1] *Id.* The crux of Lyons's defense was that he had acted without legal malice and

1. Five years earlier, Lyons and his wife had suffered the loss of another infant son due to natural causes.

was therefore guilty of involuntary manslaughter, not second-degree murder.[2] *Id.*

B. Procedural History

On July 13, 2001, a state court jury found Lyons guilty of murder in the second degree for the death of his infant son. Lyons appealed and filed a motion pursuant to Mass. R.Crim. P. 25(b)(2), seeking a reduction of the verdict from second-degree murder to involuntary manslaughter. The Commonwealth opposed the motion. In its Memorandum of Decision and Order, the trial court discussed the "fine line distinguishing murder based on the third prong of malice from . . . involuntary manslaughter." After "[c]onsidering all the circumstances of the case at bar, [the court was] satisfied that the degree of risk of physical harm manifested by [Lyons's] actions was more consistent with wilful and wanton conduct than with third-prong malice." Therefore, "[a]fter lengthy and soul-searching deliberation, [the court] determined that justice [would] be more nearly achieved by reducing the verdict from murder in the second degree to involuntary manslaughter" and granted Lyons's motion. The MAC affirmed the order reducing the verdict, concluding that the trial justice had acted within her discretion. *See Commonwealth v. Lyons*, 61 Mass. App.Ct. 1103, 807 N.E.2d 862 (Mass.App. Ct.2004). Subsequently, the Commonwealth filed an application for leave to obtain further appellate review, which the SJC granted. *Lyons*, 828 N.E.2d at 4.

In a 4–3 decision, a divided SJC found that the trial justice abused her discretion in reducing Lyons's verdict from second-degree murder to involuntary manslaughter and reinstated the conviction. *Id.* Lyons sought rehearing but was denied. Thereafter, Lyons filed a petition in federal court for a writ of habeas corpus under 28 U.S.C. § 2254. He claimed that the admission of the autopsy photographs violated his right to due process as guaranteed by the Fourteenth Amendment. The petition was denied. Lyons appealed and filed a motion for a certificate of appealability ("COA"), which the district court granted on June 25, 2009.[3]

II. DISCUSSION

A. Standard of Review

[1] Our review of the district court's denial of habeas relief is de novo. *See Shuman v. Spencer*, 636 F.3d 24, 30 (1st Cir.2011).

Pursuant to AEDPA, "our standard of review of the SJC's decision depends on whether that court 'adjudicated on the merits' [Lyons's due process] claim." *Healy v. Spencer*, 453 F.3d 21, 25 (1st Cir.2006) (quoting 28 U.S.C. § 2254(d)); *see also Fortini v. Murphy*, 257 F.3d 39, 47 (1st Cir.2001) ("AEDPA's strict stan-

2. Under Massachusetts law, the element of malice necessary for a conviction of murder in the second degree can be satisfied by one of three different prongs. *See Commonwealth v. LaCava*, 438 Mass. 708, 783 N.E.2d 812, 820 n. 9 (2003). Lyons was convicted based on the third prong. Under "third prong malice," the malice element is satisfied by "proof of circumstances in which a reasonably prudent person would have known, according to common experience, that there was a plain and strong likelihood that death would follow the contemplated act." *LaCava*, 783 N.E.2d at 820 n. 9; *see also Commonwealth v. Vizcarrondo*, 427 Mass. 392, 693 N.E.2d 677, 680 n. 3 (1998).

3. We expanded the COA in an order dated June 24, 2011 for the purpose of allowing the parties to brief three additional issues. Two of those issues centered around the Commonwealth's failure to file the full state court trial transcript with the district court. While we thank the parties for their thorough submissions, ultimately we need not address this issue on appeal as it has no bearing on our final determination.

dard of review only applies to a 'claim that was adjudicated on the merits in state court proceedings.' "). If it did, we

> ha[ve] no power to afford relief unless [Lyons can] show either that the [SJC's] decision affirming the conviction 'was contrary to, or involved an unreasonable application of,' clearly established federal law as reflected in the holdings of th[e] [United States Supreme] Court's cases, or that it 'was based on an unreasonable determination of the facts' in light of the state court record.[4]

Cavazos v. Smith, — U.S. —, 132 S.Ct. 2, 6, — L.Ed.2d — (2011) (per curiam) (quoting 28 U.S.C. § 2254(d)(1) and (2)); *see also Harrington v. Richter*, — U.S. —, 131 S.Ct. 770, 785, 178 L.Ed.2d 624 (2011). On the other hand, "[i]f it did not, we review de novo." *Healy*, 453 F.3d at 25. Both parties agree that Lyons included the constitutional argument in his brief to the SJC. And even though the SJC did not elaborate on its reasoning for rejecting Lyons's due process claim, the SJC nevertheless addressed the claim when it concluded "that there [was] no merit in [Lyons's] allegations of error." *Lyons*, 828 N.E.2d at 4. Consequently, our review is deferential.[5] *See Harrington*, 131 S.Ct. at 784–85 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."). Thus, the question we must answer is whether the SJC's decision "involved an unreasonable application of[ ] clearly established Federal law." 28 U.S.C. § 2254(d)(1). Without a doubt,

> [t]his is a highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt, and that the defendant seeking habeas show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Butler v. O'Brien, 663 F.3d 514, 517–18 (1st Cir.2011) (internal quotation marks and citations omitted).

[2] This standard "does not demand infallibility: a state court's decision may be objectively reasonable even if the federal habeas court, exercising its independent judgment, would have reached a different conclusion." *Rashad v. Walsh*, 300 F.3d 27, 35 (1st Cir.2002). Consequently, a determination that the SJC's conclusion was "unreasonable" requires "something greater than incorrect or erroneous." *Shuman*, 636 F.3d at 30. Moreover, "[i]f it is a close question whether the state decision is in error, then the state decision cannot be an unreasonable application." *Healy*, 453 F.3d at 26. Finally, even if we conclude that the SJC's conclusion was "unreasonable, habeas relief remains unavailable unless [Lyons] can also show that the error had a substantial and injurious effect or influence in determining the jury's verdict." *Shuman*, 636 F.3d at 30.

B. Constitutional Claim

Before getting into the merits of Lyons's claim, we must first address a preliminary matter.

4. For purposes of this appeal, we are concerned only with whether the SJC's decision involved an unreasonable application of clearly established federal law.

5. In their opening briefs to this court, both parties, operating under the mistaken belief that the SJC had not discussed Lyons's due process claim, failed to analyze the constitutional claim under the deferential standard required by AEDPA.

[3] The Commonwealth asserts that we should affirm the district court's denial of habeas relief "[b]ecause the SJC analyzed [Lyons's] evidentiary claim pursuant to Massachusetts state law" and "[e]rrors of state law do not provide a basis for federal habeas corpus relief." To be sure, "[i]t is a fundamental principle of the law of federal habeas corpus in non-death-penalty cases that no habeas claim is stated as to state court criminal convictions unless the alleged errors are violations of the Constitution, laws, or treaties of the United States." *Kater v. Maloney*, 459 F.3d 56, 61 (1st Cir.2006) (citing *Estelle v. McGuire*, 502 U.S. 62, 67, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)). Undeniably, "if nothing other than questions of compliance with state law were at issue," *id.*, then we would agree with the Commonwealth.[6] However, that is not the case. As previously stated, the Commonwealth concedes that Lyons "properly raised the federal nature of his claim in his brief to the SJC," and as discussed *supra*, the SJC did consider Lyons's constitutional claim. *See supra*, Part II.A. Moreover, "[t]he habeas petition here is framed in terms of [a] violation[ ] of federal law," *Kater*, 459 F.3d at 61, specifically, a violation of Lyons's Fourteenth Amendment due process right to a fair trial.[7] Accordingly, Lyons's constitutional claim is properly before us and entitled to due consideration.

[4] According to Lyons, the SJC unreasonably applied clearly established federal law when it found no error in the introduction of the autopsy photographs into evidence.[8] Lyons argues that his son's manner of death was not in dispute; rather, the sole issue at trial was Lyons's intent, or mens rea, when he acted. By admitting the gruesome and allegedly highly inflammatory autopsy photographs, which Lyons argues are in no way probative of intent, the trial court, he urges, so infected the proceeding with unfairness that it deprived him "of due process and his constitutionally guaranteed right to a fair trial."

[5] An erroneous evidentiary ruling that results in a fundamentally unfair trial may constitute a due process violation and thus provide a basis for habeas relief. *See Coningford v. Rhode Island*, 640 F.3d 478, 484 (1st Cir.2011). However, to give rise to habeas relief, "the state court's applica-

6. The issue before us is not, as Lyons suggests, whether the trial court abused its discretion in admitting the autopsy photos at trial. Similarly, the issue before us is not, as Lyons claims, whether the SJC was correct in concluding that the admission of the photographs was proper. Again, AEDPA limits our review solely to the issue of whether the SJC's decision affirming the trial court's admission of the autopsy photographs "involved an unreasonable application of[ ] clearly established Federal law." 28 U.S.C. § 2254(d)(1).

7. In other words, this is not a case where the petitioner's "vague and unfocused references to fairness were insufficient to draw the state court's attention away from the state-law raiment in which the petitioner cloaked his claim and instead alert it to a possible federal constitutional claim." *Coningford v. Rhode Island*, 640 F.3d 478, 483 (1st Cir.2011).

8. In support of his claim that the introduction of the autopsy photographs was wrong and denied him his constitutional right to a fair trial, Lyons relies on *Spears v. Mullin*, 343 F.3d 1215 (10th Cir.2003), but his reliance is misplaced. *Spears* is both factually and legally inapposite. *See id.* at 1226–28 (photographs showing victim's mutilated body at crime scene were *not relevant* at *sentencing* to inquiry of whether murder was especially heinous, atrocious, or cruel where inquiry required proof of conscious physical suffering and victim had lost consciousness before wounds were inflicted). Moreover, even if *Spears* were factually and legally similar, AEDPA requires that the relevant legal rule be clearly established in a Supreme Court holding rather than in dictum or in a holding of a lower federal court. *See* 28 U.S.C. § 2254(d)(1).

tion of state law must be 'so arbitrary or capricious as to constitute an independent due process ... violation.'" *Id.* (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990)). "To be a constitutional violation, a state evidentiary error must so infuse the trial with inflammatory prejudice that it renders a fair trial impossible." *Petrillo v. O'Neill*, 428 F.3d 41, 44 n. 2 (1st Cir.2005); *see also Kater*, 459 F.3d at 64 (in habeas context, relevant inquiry on appeal regarding evidentiary claim of error is "whether any error rendered the trial so fundamentally unfair that it violated the Due Process Clause"). For habeas purposes, we then review the state court's determination regarding the constitutional claim under the AEDPA standards.

For starters, Lyons has failed to bring to our attention any clearly established Supreme Court precedent holding that the admission of autopsy photographs violates due process rights. As such, "the broader fair-trial principle is the beacon by which we must steer." *Coningford*, 640 F.3d at 485. Moreover, "[t]he Supreme Court has defined the category of infractions that violate fundamental fairness very narrowly."[9] *Kater*, 459 F.3d at 61 (internal quotation marks and citation omitted).

In affirming the trial court's admission of the photographs, the SJC stated,

> The judge admitted the photographs only after the Commonwealth had laid a foundation indicating that the photographs were relevant to establishing the severity of the [baby]'s injuries. [Lyons] argues that this was an abuse of discretion because the nature, extent, and cause of the fatal injuries were not issues before the jury. While we agree with [Lyons] that the photographs were disturbing, we do not agree that they lacked relevance. A critical issue in the case was the amount of force used to shake the [baby]. As the nature of the injuries supported an inference concerning the amount of force used to inflict the injuries, the photographs were relevant to that issue. Additionally, the final photograph admitted, showing no injury to the back of the [baby]'s head, was relevant to contradict [Lyons's] testimony that the [baby] hit his head in the bathtub.[10] Furthermore, the judge appropriately mitigated any potential prejudice by cautioning the jury not to be affected by the nature of the photographs and by instructing them that the photographs were to be used only to draw attention to a clinical medical status or the nature and extent of the [baby]'s injuries.

Lyons, 828 N.E.2d at 9. Though Lyons may disagree with the ruling, the SJC did weigh any unfair prejudice to Lyons against the probative value of admitting the photos. Ultimately, the SJC determined that while the photos were "disturbing," they were nonetheless relevant and

9. Some examples include *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (use of suspect's post-*Miranda* silence against him); *Blackledge v. Perry*, 417 U.S. 21, 27, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) (vindictive prosecution); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) ("the suppression by the prosecution of evidence favorable to an accused upon request ... where the evidence is material either to guilt or to punishment"); *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (failure to appoint counsel in certain criminal cases).

10. On the day of the baby's death, Lyons was home alone with his eleven year old son and the baby. According to Lyons, while he was giving the baby a bath, the baby slipped and bumped his head on the bathtub. Following the incident, Lyons claimed the baby seemed to be in distress—which led Lyons to panic and shake the baby.

probative to the "critical" issue of the amount of force used to shake the baby, as well as Lyons's credibility.

Further, the SJC deemed the trial court's limiting instruction to the jury sufficient to mitigate any potential unfair prejudice to Lyons. In so ruling and in finding that there was no merit to any of Lyons's claims, the SJC implicitly determined that Lyons's trial was not so infused with inflammatory prejudice as to render it constitutionally unfair. This "was well within the universe of plausible evidentiary rulings." *Coningford*, 640 F.3d at 485. Given this court's highly deferential standard for evaluating state-court rulings under AEDPA, we cannot say that the SJC's conclusion that the admission of the autopsy photographs was proper was so arbitrary or capricious as to be "an unreasonable application of[ ] clearly established Federal law." 28 U.S.C. § 2254(d)(1).

III. CONCLUSION

For the reasons stated, the district court's dismissal of the habeas petition is affirmed.

UNITED STATES of America, Appellee,

v.

Luis Enrique SANTIAGO-PÉREZ, Defendant, Appellant.

No. 10-1776.

United States Court of Appeals, First Circuit.

Heard Sept. 12, 2011.

Decided Jan. 19, 2012.

Background: Defendant was convicted in the United States District Court for the District of Puerto Rico, Daniel R. Domínguez, J., of attempting to possess with intent to distribute 500 grams or more of controlled substance, and he appealed.

Holding: The Court of Appeals, Howard, Circuit Judge, held that district court did not abuse its discretion in admitting evidence of amount of money that defendant and his companions were carrying when entering Tortola.

Affirmed.

1. Criminal Law ⇐1153.1

Court of Appeals reviews district court's evidentiary ruling for abuse of discretion.

2. Controlled Substances ⇐69

District court did not abuse its discretion in admitting evidence of amount of money that defendant and his companions were carrying when entering Tortola, despite defendant's contention that $5,000 that he was carrying was insufficient to purchase kilogram of cocaine he was accused of attempting to acquire, where evidence indicated that defendant's companions were carrying his money for him, that customs officer ultimately allowed them to collectively retain about $14,000, that bulk kilogram of cocaine cost between $6,000 and $10,000 in Virgin Islands, and that defendant mailed package containing cocaine from Virgin Islands two days later. Fed.Rules Evid.Rules 401, 403, 28 U.S.C.A.

Lawrence A. Vogelman, with whom Nixon, Raiche, Vogelman, Barry, Slawsky & Simoneau, P.A. was on brief, for appellant.

APPENDIX B

tion provision. *See Local 285, Serv. Employees Int'l Union*, 64 F.3d at 739 (citing *John Wiley & Sons*, 376 U.S. at 557, 84 S.Ct. 909) (in turn, noting that a court's judgment that the subject matter is arbitrable sends the case back to the arbitrator).

Second, the court notes that Defendant has raised a concern about the "slippery slope" of arbitration, *i.e.*, that a denial of its motion will encourage a future employee to seek arbitration regarding his discharge *"merely by claiming that he was not a probationary employee!"* (Def. Brief at 13 (emphasis and exclamation point in the original).) The court, however, is not persuaded that Plaintiff is interested in pursuing frivolous claims for discharged employees who are clearly within their probationary periods. That said, the court is also not implying that Defendant acted in bad faith; it is clear that Defendant discharged Palmer under a reasonable belief that he was a probationary employee. For all the reasons stated, however, the court believes that the underlying dispute needs to be submitted to arbitration.

IV. *Conclusion*

For the foregoing reasons, the court recommends that Plaintiff's motion for summary judgment be ALLOWED, and that Defendant's cross motion for summary judgment be DENIED.[4]

DATED: September 18, 2008.

Michael LYONS, Petitioner,

v.

Bernard BRADY, Respondent.

Civil Action No. 06–10968–NMG.

United States District Court,
D. Massachusetts.

Nov. 21, 2008.

Background: Following affirmance of his conviction of second-degree murder by jury verdict, 444 Mass. 289, 828 N.E.2d 1, petitioner sought writ of habeas corpus. United States Magistrate Judge Joyce London Alexander filed report and recommendation that petition be denied. Petitioner filed objections.

Holdings: Adopting report and recommendation, the District Court, Gorton, J., held that:

4. The parties are advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these findings and recommendations must file a written objection with the Clerk of this Court **within ten (10) days** of the party's receipt of this Report and Recommendation. The written objection must specifically identify the portion of the proposed findings or recommendations to which objection is made and the basis for such objection. The parties are further advised that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court order entered pursuant to this Report and Recommendation. *See Keating v. Secretary of Health & Human Services*, 848 F.2d 271, 275 (1st Cir.1988); *United States v. Valencia–Copete*, 792 F.2d 4, 6 (1st Cir.1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir.1983); *United States v. Vega*, 678 F.2d 376, 378–379 (1st Cir.1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 604 (1st Cir.1980). *See also Thomas v. Arn*, 474 U.S. 140, 154–55, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). A party may respond to another party's objections within ten (10) days after being served with a copy thereof.

(1) autopsy photographs were relevant to disputed issues under Massachusetts law, and

(2) admission of photographs did not violate due process, as any prejudice was counterbalanced by their relevance.

Petition denied.

1. **Habeas Corpus** ⇐766

On petition for habeas corpus, any issues not addressed by state court are subject to de novo review. 28 U.S.C.A. § 2254.

2. **Constitutional Law** ⇐4654

Relevance of evidence can counterbalance its prejudicial or inflammatory effect such that its admission is not fundamentally unfair in violation of due process. U.S.C.A. Const.Amend. 5.

3. **Criminal Law** ⇐438(6)

Under Massachusetts law, autopsy photographs of infant who was admittedly shaken to death by defendant were relevant in Massachusetts second-degree murder prosecution to determining amount of force used, an issue which went to defendant's intent, and to rebut defendant's claim that infant initially hit his head on bathtub with sufficient force to stop breathing and that defendant shook the baby to revive him.

4. **Habeas Corpus** ⇐775(1)

De novo standard of review applied to habeas claim that admission of autopsy photographs in murder prosecution was fundamentally unfair in violation of due process, where constitutional issue had not been addressed by state courts. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254.

5. **Constitutional Law** ⇐4671
Criminal Law ⇐438(7)

Admission of gruesome autopsy photographs of infant in Massachusetts second-degree murder prosecution in which defendant admitted shaking baby was not so fundamentally unfair as to violate due process; any prejudice resulting from their admission was counterbalanced by their relevance to issues going to intent and to defendant's defense and by limiting instruction given jury. U.S.C.A. Const. Amend. 14.

Eva M. Badway, Attorney General's Office, Boston, MA, for Respondent.

Paul J. McManus, Committee for Public Counsel Services, Boston, MA, for Petitioner.

MEMORANDUM & ORDER

GORTON, District Judge.

The petitioner, Michael Lyons ("Lyons"), seeks federal habeas corpus relief from his conviction for murder in the second degree. He alleges that his right to due process was violated by the admission of autopsy photographs of the victim at trial.

1. *Background*

A. Factual Background

On July 13, 2001, Lyons was found guilty in Plymouth Superior Court of shaking his two-week-old son, Jacob, to death. Lyons admitted to the fatal shaking at trial where the only contested issue was his intent in doing so. Defense counsel argued that Lyons did not intend to harm his son but rather acted out of panic. Lyons testified that he had lost his grip while bathing Jacob, causing the baby to bump his head. That, in turn, caused the baby's breathing to become stressed and his eyes unfocused. Lyons had previously lost an infant son to an untimely death caused by myocarditis and claimed he feared that Jacob would suffer the same

fate. Lyons, therefore, shook the baby allegedly to try to revive him.

The prosecution's theory at trial was that Lyons acted out of anger after arguing with his wife a few hours before the shaking incident. In support of that theory, the prosecution sought to introduce three photographs taken from the baby's autopsy, one showing his head with the skin peeled back, another with the top of his skull removed and another with his back muscles exposed after removal of the skin. The photographs were admitted, over defense counsel's vehement objection, with a limiting instruction that they could be used only as they "may draw attention to a clinical medical status or to the nature and extent of the alleged victim's injuries".

B. Procedural History

After being convicted of second degree murder, Lyons filed a motion pursuant to Mass. R.Crim. P. 25(b)(2) seeking entry of a finding of guilty of a lesser included offense. The trial judge allowed that motion and entered a verdict of guilty of involuntary manslaughter. The Massachusetts Appeals Court affirmed the trial judge's order but the Supreme Judicial Court ("the SJC") vacated it and affirmed the original verdict.

In June, 2006, Lyons filed a petition for habeas corpus pursuant to the Antiterrorism and Effective Death Penalty Act ("the AEDPA"), 28 U.S.C. § 2254(d). Lyons contends that his continued incarceration by the respondent, Bernard Brady ("Brady"), the Superintendent of Old Colony Correctional Center, is unconstitutional because the admission of the autopsy photographs at his trial violated his right to due process under the Fourteenth Amendment. In his view, the photographs were unconstitutionally inflammatory and prejudicial to the defendant. To support that conclusion, Lyons relies on the Tenth Circuit Court of Appeals decision, *Spears v. Mullin*, which held that gruesome, post-mortem photographs admitted during a sentencing proceeding (following the petitioner's first degree murder conviction) were so inflammatory as to "fatally infect[ ] the trial and deprive[the defendants] of their constitutional rights to a fundamentally fair sentencing proceeding". 343 F.3d 1215, 1229 (10th Cir.2003), *cert. denied sub nom. Powell v. Mullin*, 541 U.S. 909, 124 S.Ct. 1615, 158 L.Ed.2d 255 (2004).

Lyons argues that the effect of the photographs was particularly damaging in light of the fine distinction the jury was asked to draw in considering whether Lyons was guilty of murder under a third-prong malice theory (requiring proof of a "plain and strong likelihood of death"), *Commonwealth v. Starling*, 382 Mass. 423, 416 N.E.2d 929, 931 (1981) (citation omitted), or of involuntary manslaughter (requiring proof of a battery that "endangers human life"), *Commonwealth v. Catalina*, 407 Mass. 779, 556 N.E.2d 973, 978 (1990).

The respondent opposes Lyons's petition, claiming that it is supported by no Supreme Court precedent as required under the AEDPA. In addition, respondent 1) argues that the petitioner has failed to demonstrate that his trial was so fundamentally unfair as to violate the Due Process Clause of the Fourteenth Amendment and 2) finds *Spears* to be inapposite here because in that case the photographs were not admitted at the trial but rather at the sentencing and as such their effect was especially shocking and prejudicial.

C. The Report and Recommendation

This case was referred to United States Magistrate Judge Joyce London Alexander who issued a Report and Recommendation ("R & R") in May, 2008, recommending that Lyons's petition be denied. In reaching that conclusion, the Magistrate Judge

applied the standard of review set out in the AEDPA, which provides for the grant of a writ of habeas corpus where the state court decision at issue is

> contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1).

The Magistrate Judge concurred with the finding of the SJC that the photographs were relevant to show the amount of force used to shake the baby, as indicative of Lyons's intent at the time of the incident, and to rebut Lyons's claim that the baby hit his head on the bathtub. After citing to numerous cases from other circuits, the Magistrate Judge concluded that, because the photographs had substantial probative value, their admission did not render Lyons's trial fundamentally unfair. Moreover, the Magistrate Judge recognized that murder under a third-prong malice theory and involuntary manslaughter are, indeed, substantially similar but declined to afford that fact any weight, noting that the remedy for any resulting injustice lies with the Massachusetts legislature and not with the courts.

D. The Petitioner's Objections to the R & R

Lyons objects to the findings in the R & R. He asserts that the Magistrate Judge should have applied a *de novo* standard of review rather than the standard invoked by AEDPA. He also disagrees with the Magistrate Judge's conclusion that the amount of force used to shake the baby was a contested issue in the case because Lyons had admitted at trial to shaking the baby, so there was no question as to how the baby's injuries were caused. Moreover, Lyons finds that the admission of the photographs was unnecessary because the prosecution produced a witness who testified about the baby's injuries, merely describing them without referring to the photographs.

2. *Legal Analysis*

A. Legal Standard

[1] In a habeas corpus petition, any issues addressed by a state court are subject to the standard set forth in the AEDPA, 28 U.S.C. § 2254(d), and those not addressed by a state court are subject to *de novo* review. *Fortini v. Murphy*, 257 F.3d 39, 47 (1st Cir.2001).

This Court has held that "[e]videntiary rulings in state criminal trials violate due process only if they render those trials fundamentally unfair". *Sheffield v. Curran*, 645 F.Supp. 859, 861 (D.Mass.1986). That means a petitioner must demonstrate that an alleged evidentiary error "so infuse[d] the trial with inflammatory prejudice that it render[ed] a fair trial impossible". *Petrillo v. O'Neill*, 428 F.3d 41, 44 n. 2 (1st Cir.2005); *see also Romano v. Oklahoma*, 512 U.S. 1, 12, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). That is a "high hurdle". *DiBenedetto v. Hall*, 176 F.Supp.2d 45, 54–55 (D.Mass.2000) (citing cases); *see also Dowling v. United States*, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) (noting that the Supreme Court has "defined the category of infractions that violate fundamental fairness [guaranteed by the Due Process Clause] very narrowly"); *Fortini*, 257 F.3d at 47 (noting that "not every ad hoc mistake in applying state evidence rules, even in a murder case, should be called a violation of due process; otherwise every significant state court error in excluding evidence offered by the defendant would be a basis for undoing the conviction").

[2] The Constitution does not prohibit all gruesome evidence from being admitted into a trial. *See, e.g., United States v. Sampson*, 335 F.Supp.2d 166, 181, 183

(D.Mass.2004) (admitting autopsy photographs as evidence of the nature of the victims' wounds, which was probative of the defendant's intent, even while "cognizant ... of due process concerns"). The First Circuit Court of Appeals has not specifically addressed the question of how to determine when the admission of evidence unconstitutionally infuses a trial with inflammatory prejudice. Other Courts of Appeals, however, have suggested that, for such a determination, the relevance of evidence can counterbalance its prejudicial or inflammatory effect. *See* Report and Recommendation on Pet. for Writ of Habeas Corpus at 9–10 (citing cases). This Court agrees with that analysis.

B. Application

This Court also finds that, in light of the probative value of the three autopsy photographs, their admission did not so infuse petitioner's trial with inflammatory prejudice as to render it fundamentally unfair.

1. Relevance

[3] First, the Court considers the photographs' relevance. The SJC determined that the photographs had significant probative value. *Commonwealth v. Lyons*, 444 Mass. 289, 828 N.E.2d 1, 9 (2005). The Court will, therefore, apply the deferential AEDPA standard to that issue and consider whether the SJC's decision regarding the relevance of the evidence was "contrary to, or involved an unreasonable application of" Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). Lyons points to no such precedent, nor can he. Therefore, this Court accepts the SJC's opinion that the photographs were relevant at Lyons's trial.

The United States Supreme Court has held that "it is universally recognized" that evidence is relevant if it has

> any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

New Jersey v. T.L.O., 469 U.S. 325, 345, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (citation omitted). The SJC concluded that the photographs were relevant to determine the amount of force used to shake the baby and to rebut Lyons's claim that the baby hit his head on the bathtub. *Lyons*, 828 N.E.2d at 9.

Lyons argues that the amount of force was not at issue in the case because he had admitted to shaking the baby and that only his intent at the time was contested. Thus, he implies that the photographs should have been deemed irrelevant because they pertained only to an inconsequential fact.

The amount of force Lyons used to shake the baby, however, could be probative of his intent, which was the most consequential question of fact before the jury. Presumably a lesser degree of force would "endanger human life", as required to satisfy the mens rea of involuntary manslaughter, than that which would cause "a plain and strong likelihood of death", as required to satisfy the mens rea of murder on a third-prong malice theory.

The degree of force used can, reputedly, be ascertained from the severity of injuries the baby suffered, which was evident only from the autopsy pictures. As the SJC noted, the photographs "allowed the Commonwealth to explain the significance of the autopsy findings". *Lyons*, 828 N.E.2d at 9. Moreover, the amount of force was, contrary to Lyons's assertion, contested at trial, i.e. Lyons testified that he shook his son for ten to fifteen minutes, whereas a prosecution witness, a clinical professor of pediatrics, testified that, at most, the shaking lasted twenty seconds.

In addition, whether the baby hit his head on the bathtub with sufficient force to

cause his breathing to become stressed and his eyes to become unfocused was an important issue in the case. If the incident did not occur as Lyons alleged, his claim that he shook the baby only to revive him would fail. The autopsy photographs assisted the jury in deciding that fact and thus were relevant to issue of Lyons's guilt or innocence. Therefore, this Court will affirm the SJC's determination that the photographs were relevant to assist the jury in making findings on contested and consequential issues of fact.

2. Unconstitutional Prejudice

[4] Next, the Court considers whether the admission of the autopsy photographs was unconstitutional. In light of the fact that the SJC did not determine whether the petitioner's due process rights were violated by the admission of the photographs, this Court makes a *de novo* determination with respect to the petitioner's claim. *See Fortini*, 257 F.3d at 47. Thus, the Magistrate Judge erred in applying the AEDPA standard to that issue.

[5] Because the autopsy photographs were relevant at trial, the Court finds that their admission was not so prejudicial as to rise to level of a constitutional violation. The jury saw only those photographs which were necessary to determine Lyons's intent at the time of the shaking incident. The only external trauma visible on the baby was a small scratch on his forehead; the more significant injuries were visible only in the autopsy photographs. No full body photographs of the baby showing his condition at the time of his death were shown to the jury. Thus, there was no extraneous prejudicial effect. Moreover, the photographs were admitted into evidence with an unequivocal limiting instruction that mitigated any potential prejudice.

Lyons's reliance on *Spears v. Mullin* is misplaced. In that case, the Tenth Circuit Court of Appeals determined that photographs showing the victim's mutilated body at the crime scene were not relevant to the inquiry before the jury at sentencing, which was whether the defendant's murder was especially heinous, atrocious or cruel. *Spears*, 343 F.3d at 1227–28. That inquiry required proof of conscious physical suffering. *Id.* at 1226. The Court of Appeals explained that the photographs were not relevant to *conscious* physical suffering because the victim had died or lost consciousness *before* the wounds were inflicted. *Id.* at 1227. In light of their irrelevance, the photographs were deemed "unduly prejudicial". *Id.* at 1228. In contrast, the photographs introduced in Lyons's trial were relevant to an inquiry before the jury and the ruling in *Spears* is, therefore, inapposite.

Lyons also argues that, because the distinction between murder on a third-prong malice theory and involuntary manslaughter is so negligible, a modicum of prejudice might sway the jury. That argument is irrelevant to the instant constitutional inquiry. As discussed above, any prejudice resulting from the admission of the photographs was counterbalanced by their relevance and was further addressed by the trial judge's instruction to the jury. That conclusion is not affected by what crimes the jury had to consider. Therefore, this Court finds that Lyons has suffered no cognizable constitutional injury and his petition for writ of habeas corpus will be dismissed.[1]

1. The Court confines its holding to the federal constitutional inquiry properly before it but, nonetheless, expresses its concurrence with the dissenting opinion of the SJC that the trial judge did not abuse her discretion in reducing the verdict to involuntary manslaughter because she was in the best position to make such a decision pursuant to Mass. R.Crim. P. 25(b)(2). *See Lyons*, 828 N.E.2d at 11 (Cordy, J., dissenting).

ORDER

In accordance with the foregoing, the Report and Recommendation (Docket No. 14) is accepted and adopted.

So ordered.

LYNDON PROPERTY INSURANCE COMPANY

v.

FOUNDERS INSURANCE COMPANY, LTD.

Civil Action No. 08-11359-RGS.

United States District Court,
D. Massachusetts.

Nov. 24, 2008.

Background: Ceding insurer brought suit against reinsurer to enforce arbitrators' order that reinsurer post $20 million in prejudgment security pending arbitration. Reinsurer moved to dismiss for lack of jurisdiction.

Holding: The District Court, Stearns, J., held that issue of appropriate judicial forum in which to seek enforcement of arbitrator's prejudgment order was question for arbitrators, not court.

Motion to dismiss granted.

1. **Contracts** ⇐175(1)

In interpreting disputed provisions, presumption in commercial contracts is that the parties were trying to accomplish something rational.

2. **Alternative Dispute Resolution** ⇐113

Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.

3. **Alternative Dispute Resolution** ⇐200, 354

Federal policy favoring arbitration confines the role of the federal court in arbitration disputes to issues of arbitrability and the confirmatory, and largely ministerial, approval of an award.

4. **Alternative Dispute Resolution** ⇐210

Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

5. **Alternative Dispute Resolution** ⇐198

Interpretation of conflicting choice-of-forum provisions in arbitration agreement with respect to enforcement of arbitrators' prejudgment order was procedural issue for arbitrators, not court, and thus court would not determine whether it was appropriate judicial forum under conflicting provisions in which to seek confirmation of arbitrators' prejudgment order requiring one of parties to post security.

Euripides D. Dalmanieras, John A. Shope, Foley Hoag LLP, Boston, MA, T. Michael Leo, Hall Burr & Forman LLP, Maibeth J. Porter, Maynard, Cooper & Gale, P.C., Birmingham, AL, for Lyndon Property Insurance Company.

Bruce M. Friedman, Gerald A. Greenberger, Rubin, Fiorella & Friedman LLP, New York, NY, Mitchell S. King, Prince, Lobel, Glovsky & Tye LLP, Boston, MA, for Founders Insurance Company, Ltd.

MEMORANDUM AND ORDER ON FOUNDERS INSURANCE COMPANY'S MOTION TO DISMISS

STEARNS, District Judge.

Founders Insurance Company, Ltd. (Founders) entered a Reinsurance Agree-

APPENDIX C

COMMONWEALTH *vs.* MICHAEL J. LYONS.

Plymouth. February 8, 2005. - May 20, 2005.

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ.

Practice, Criminal, Verdict, Instructions to jury, Lesser included offense. *Homicide. Malice. Evidence,* Relevancy and materiality, Photograph, Death certificate.

This court concluded that a Superior Court judge abused her discretion in granting a criminal defendant's motion pursuant to Mass. R. Crim. P. 25 (b) (2), seeking reduction of a verdict of murder in the second degree to involuntary manslaughter, where the weight of the evidence introduced at trial, which demonstrated that the defendant shook the victim, a two week old infant, with a degree of force hard enough to shake a grown man and that the defendant knew that such an action would cause the child harm, clearly supported a verdict of murder in the second degree based on third prong malice, and where the reasons advanced by the judge in reaching her decision (including the lack of any evidence that the defendant had inflicted prior abuse on the victim or any of his other children, and the brief duration of his culpable conduct) did not provide an adequate basis for reducing the verdict. [291-297] CORDY, J., dissenting, with whom MARSHALL, C.J., and COWIN, J., joined.

The judge at a murder trial did not abuse her discretion in admitting in evidence autopsy photographs of the victim, where the photographs were relevant to establishing the severity of the victim's injuries and the amount of force used to inflict them, a critical issue in the case. [297-299]

The criminal defendant at a murder trial failed to demonstrate that the judge erred in her instructions to the jury on the third prong of malice. [299]

At a criminal trial where the defendant was charged with the murder of his infant son, the judge's refusal to admit in evidence the death certificate of the defendant's older son, offered by the defendant to demonstrate that the older son had died of natural causes, was well within the judge's discretion, where there was no insinuation at trial that the defendant had anything to do with the older son's death, where the judge offered to instruct the jury that there was no issue regarding the older son's cause of death, and where permitting inquiry into such a wholly unrelated matter presented a risk of confusing the jury. [299-300]

INDICTMENT found and returned in the Superior Court Department on September 11, 1998.

The case was tried before *Linda E. Giles*, J., and a motion

seeking reduction of the verdict, filed on July 31, 2001, was heard by her.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Robert C. Thompson, Assistant District Attorney, for the Commonwealth.

Paul J. McManus, Committee for Public Counsel Services, for the defendant.

IRELAND, J. After a jury convicted the defendant of murder in the second degree for the shaking death of his two week old son, he filed a motion pursuant to Mass. R. Crim. P. 25 (b) (2), 378 Mass. 896 (1979), seeking reduction of the verdict. The trial judge reduced the verdict to involuntary manslaughter, which the Appeals Court upheld on appeal. *Commonwealth* v. *Lyons*, 61 Mass. App. Ct. 1103 (2004). The Commonwealth appeals from the judge's order reducing the verdict. The defendant appeals from his conviction and now asks this court to order a new trial, raising a number of errors, but waives them if we should uphold the judge's reduction of the verdict from murder to involuntary manslaughter. We granted the Commonwealth's application for further appellate review. Because we conclude that the judge abused her discretion in reducing the verdict to manslaughter and that there is no merit in the defendant's allegations of error, we affirm the conviction of murder in the second degree and vacate the order reducing the degree of guilt.

Facts.

On the afternoon of June 28, 1998, the victim, a two week old infant boy, was rushed to Good Samaritan Hospital and was then "med flighted" to New England Medical Center in Boston, where he died as a result of "severe cerebral edema and subdural hematomas due to shaking." The victim had bruises on his upper back muscles just below the neck on both sides. His body showed all the signs of shaken baby syndrome, which "essentially destroyed his brain."[1] The defendant, an approximately five foot, eight inch tall man weighing between 275 and 300 pounds, admitted to holding the victim's body with his hands

[1]There was bleeding on the surface of the victim's brain and inside the brain itself. The victim's brain was soft and swollen. Additionally, there was injury to the nerves in the victim's brain.

underneath the victim's armpits and shaking him with enough force to shake a 215 pound man.[2] Given the severity of the victim's injuries, he would have lost consciousness and become unresponsive "[n]early instantaneously or within a very few seconds." The defendant admitted shaking the victim, but claimed that he did so in a panic to revive him. The crux of his defense was that he had acted without legal malice.

Discussion.

1. *The Commonwealth's appeal.* "Pursuant to rule 25 (b) (2), a trial judge has the authority to reduce a verdict, despite the presence of evidence sufficient to support the jury's original verdict." *Commonwealth* v. *Rolon*, 438 Mass. 808, 820 (2003), citing *Commonwealth* v. *Woodward*, 427 Mass. 659, 666-667 (1998), and cases cited. This authority is similar to our power to review capital cases under G. L. c. 278, § 33E, and a trial judge's decision on a rule 25 (b) (2) motion "should be guided by the same considerations." *Commonwealth* v. *Gaulden*, 383 Mass. 543, 555 (1981). The purpose of such postconviction powers is "to ensure that the result in every criminal case is consonant with justice." *Commonwealth* v. *Woodward*, *supra* at 666. In exercising this power, the judge is required "to consider the whole case broadly to determine whether there was any miscarriage of justice" (quotations omitted). *Commonwealth* v. *Jones*, 366 Mass. 805, 807 (1975), and cases cited. As we have previously cautioned, "judge[s] should use this power sparingly," *id.* at 667, and not sit as a "second jury." *Commonwealth* v. *Keough*, 385 Mass. 314, 321 (1982). However, we will disturb a judge's order reducing a verdict only where the judge abused his discretion or committed an error of law. *Commonwealth* v. *Woodward*, *supra* at 668, quoting *Commonwealth* v. *Millyan*, 399 Mass. 171, 188 (1987).

A judge's discretion to reduce a verdict is appropriately exercised where the weight of the evidence in the case points to a lesser crime even though it is technically sufficient to support

[2]Although the defendant claimed that the shaking went on for five to fifteen minutes, an expert on shaken baby syndrome testified that there was no way a perpetrator could sustain the type of necessary vigorous shaking for longer than twenty seconds at most. To inflict such injury, typically, the shaking would have to go on from three to twenty seconds.

the jury's verdict. *Commonwealth* v. *Rolon*, *supra* at 821. Accordingly, to justify a reduction in the verdict, there must be some weakness in the critical evidence, see *Commonwealth* v. *Ghee*, 414 Mass. 313, 322 (1993) (verdict reduction appropriate where evidence of premeditation "slim"); *Commonwealth* v. *Millyan*, *supra* at 188-189 (verdict reduction appropriate where evidence of intoxication undermined theory of deliberate premeditation); *Commonwealth* v. *Gaulden*, *supra* at 557-558 (verdict reduction appropriate where evidence showed victim was first aggressor and defendant's conduct likely was influenced by alcohol); *Commonwealth* v. *Jones*, *supra* at 808 (verdict reduction appropriate where evidence of intoxication and sudden combat negated malice element), or some weakness in the evidence coupled with trial error. See *Commonwealth* v. *Woodward*, *supra* at 671 (although evidence suggested defendant did not act with malice, jury not instructed on manslaughter); *Commonwealth* v. *Millyan*, *supra* (although there was evidence of intoxication, jury not instructed on issue of impairment due to intoxication). However, a judge is not justified in reducing "to a lesser verdict that would be inconsistent with the weight of the evidence," nor in basing reduction "solely on factors irrelevant to the level of the offense proved." *Commonwealth* v. *Rolon*, *supra* at 822, and cases cited.

Therefore, we look to determine whether there was some weakness in the evidence that the defendant committed murder in the second degree, or evidence suggesting that he more likely committed involuntary manslaughter. If, as we conclude, the weight of the evidence is entirely consistent with murder in the second degree based on third prong malice, it was an abuse of discretion to reduce the verdict.

Here, the judge provided a written memorandum of decision outlining her reasons for reducing the verdict to involuntary manslaughter. See *Commonwealth* v. *Gaulden*, *supra* at 556 (judge should state reasons for reducing verdict). Those reasons were a lack of any evidence that the defendant had inflicted prior abuse or injuries on any of his children, especially the victim; the defendant's culpable conduct consisted of one violent shaking lasting "only a few seconds," while under the sway of

painful memories of his other son's death[3]; the defendant was not a vicious man but one who succumbed to the frailty of the human condition and committed a momentary act of "extraordinarily poor judgment"; and the defendant was a steady worker with no prior criminal record. These reasons do not provide an adequate basis for reducing the verdict from murder in the second degree to involuntary manslaughter. Moreover, the judge outlined the evidence that would tend to comport more with murder than manslaughter, but failed to mention how the evidence supporting manslaughter made a manslaughter verdict more consonant with justice.

A fine line distinguishes murder in the second degree based on third prong malice from the lesser included offense of involuntary manslaughter. See *Commonwealth* v. *Skinner*, 408 Mass. 88, 93 (1990), and cases cited. "Without malice, an unlawful killing can be no more than manslaughter." *Commonwealth* v. *Judge*, 420 Mass. 433, 437 (1995), and cases cited. "The difference between the elements of the third prong of malice and . . . involuntary manslaughter lies in the degree of risk of physical harm that a reasonable person would recognize was created by particular conduct, based on what the defendant knew. The risk for the purposes of third prong malice is that there was a plain and strong likelihood of death. . . . The risk that will satisfy the standard for . . . involuntary manslaughter 'involves a high degree of likelihood that substantial harm will result to another.' " *Commonwealth* v. *Sires*, 413 Mass. 292, 303-304 n.14 (1992), quoting *Commonwealth* v. *Welansky*, 316 Mass. 383, 399 (1944). In this case, the jury received instructions on both murder in the second degree based on third prong malice and involuntary manslaughter. As the jury convicted the defendant of murder in the second degree, they must have found that in the circumstances known to the defendant, a reasonably prudent person would have known that, according to common experience, there was a plain and strong likelihood that the victim's death would follow the defendant's actions.

The judge's emphasis on the lack of evidence that the

[3]The defendant had a son, Andrew, who died of natural causes when he was approximately one year old. The defendant found the child dead in his crib.

defendant had previously abused or injured any of his other children was misplaced — that the defendant ostensibly did not abuse the other children is irrelevant to the nature of the risk posed by his abuse of the victim.[4] The judge also relied on the fact that the defendant had not abused the victim previously. The victim was only fourteen days old when he was killed, and this was the first time that the defendant had been alone with the victim. Thus, we do not find solace, as did the judge, in the fact that the defendant did not previously abuse the victim.

That the episode was brief does not create a weakness in the evidence of third prong malice. Although even evidence of repeated blows does not necessarily require a finding of malice, *Commonwealth* v. *Vizcarrondo*, 427 Mass. 392, 397-398 (1998), *S.C.*, 431 Mass. 360 (2000), evidence of a single blow to a young child may be sufficient to support a jury's finding of malice. *Commonwealth* v. *Starling*, 382 Mass. 423, 426 (1981). This case is unlike the *Woodward* case, where the victim lived for five days after the injury was inflicted, the defendant denied shaking the victim, both the medical evidence and the cause of injury were controverted, and of particular importance, the jury had not even been given the option of convicting on the lesser included offense of manslaughter (an error which, by itself, would have required a new trial). See *Commonwealth* v. *Woodward*, *supra* at 660, 670-671. Here, the defendant admits that he shook the victim hard enough to shake a 215 pound man and that he knew that shaking a child could cause harm. There was a plain and strong likelihood of death in a 300 pound man shaking a two week old, seven and one-half pound infant with that degree of force. Additionally, unlike *Commonwealth* v. *Woodward*, *supra*, there is no concern that the jury's finding of third prong malice has been tainted by any error in instruction — this jury was given the option of convicting the defendant of the lesser included offense of manslaughter, and was properly instructed on the difference between murder and manslaughter.

Furthermore, the judge's conclusion that the culpable conduct consisted only of one violent shaking that lasted only a few seconds misstates the evidence. The judge stated that it "*was*

[4]There was in fact evidence that the defendant was overly forceful with his older children.

clear" that the victim "was shaken violently for approximately three to five seconds" and then referred to the shaking as lasting "only a few seconds." The only testimony regarding how long the shaking occurred was from the defendant and an expert on shaken baby syndrome. The defendant claimed that he shook the victim for five to fifteen minutes. However, the expert testified that it would be physically impossible for anyone to sustain that forceful a shaking for more than twenty seconds. Rather, the expert stated that such vigorous shaking would likely occur from three to twenty seconds. As the expert could not pinpoint the exact time of shaking, it was error for the judge simply to pick the lower amount of time suggested by the expert, particularly when the defendant testified that the shaking occurred for much longer. Thus, the evidence readily supports the conclusion that this shaking continued for a period of time closer to twenty seconds. Coupled with the expert testimony that the victim would have lost consciousness "[n]early instantaneously," the evidence suggests that the shaking of the victim continued well past the point in time when his injury was manifest — the forceful shaking of an infant who is already so severely injured is conduct that raises a plain and strong likelihood of death.

Additionally, the judge noted that the defendant's culpable conduct may have resulted from painful memories of the death of another son. See note 3, *supra*. The judge could find this only by crediting the defendant's testimony. While a "judge is not foreclosed from considering the defendant's testimony . . . and, if he believes it, relying on it," *Commonwealth* v. *Keough*, 385 Mass. 314, 321 (1982), it is not clear from the judge's memorandum that she did in fact believe the defendant's testimony. The judge noted that the defendant gave "several conflicting and implausible accounts" of what occurred.[5] At the trial, the defendant maintained that he shook the victim because the victim appeared to be in distress after hitting his head in the tub when the defendant was giving him a bath. Specifically, the defendant claimed that the victim was having difficulty breathing and his eyes were either dilated or half open. However, the uncontroverted medical testimony establishes that such a fall

[5]The judge did not specify what she found implausible.

would not produce the symptoms described by the defendant. Additionally, there was no sign of injury to the back of the victim's head. Indeed, the only external injury found on the victim was an abrasion on his forehead without bruising. Finally, there was no evidence, other than the defendant's testimony, that he in fact gave the victim a bath; rather, the police officer who responded to the scene testified that the bathtub was dry. Where there is uncontroverted testimony discrediting the defendant's account and the judge acknowledges that the defendant gave "implausible" accounts, we conclude that the judge could not rely on the defendant's testimony as a ground to reduce the verdict. See *Commonwealth* v. *Millyan*, 399 Mass. 171, 189 (1987).

The judge's reliance on her finding that the defendant was not a vicious man but one who succumbed to the frailty of the human condition and committed a momentary act of "extraordinarily poor judgment" was irrelevant to the consideration of third prong malice. The only consideration was what the defendant knew the circumstances to be, and it is uncontroverted that the defendant knew he was vigorously shaking the victim. Based on the defendant's knowledge, there was a plain and strong likelihood that the victim would die from the shaking.

The other factors relied on by the judge — the defendant's being a steady worker with no prior criminal record who enjoyed the support of his wife, the victim's mother — are insufficient to justify reduction of the verdict. Although a defendant's personal circumstances may be considered in conjunction with evidence that points to a lesser degree of guilt, personal circumstances alone do not justify reduction of a verdict. *Commonwealth* v. *Rolon*, 438 Mass. 808, 825 (2003), and cases cited.

The judge also noted that the jury may have been unduly affected by the image of a 300 pound adult man shaking a vulnerable seven pound baby. We disagree. Both the defendant's size and the victim's age and size were relevant to show that the victim was especially frail and susceptible to death at the hands of an adult. Moreover, the size of both could properly suggest that the injuries inflicted by the defendant, when viewed in light

of the victim's tender age and size, were life threatening in an objective sense, which is relevant to the third prong malice issue. See *Commonwealth* v. *Vizcarrondo*, 431 Mass. 360, 363 (2000). The vast discrepancy in size and strength is what makes it evident that the defendant's conduct posed a plain and strong likelihood of death. That it tended to prove the Commonwealth's case does not make it prejudicial, or provide a basis for reducing the jury's verdict.

As there was no error of law or substantial risk of a miscarriage of justice in the jury's verdict, the judge abused her discretion in reducing the verdict to involuntary manslaughter where the weight of the evidence clearly supported a verdict of murder in the second degree.

2. *The defendant's appeal.* Because we reverse the judge's order reducing the verdict to involuntary manslaughter and reinstate the verdict of murder in the second degree, we address the defendant's appeal from his conviction. The defendant argues that the judge erred by (1) admitting three photographs depicting the victim after surgical alteration of his body where the cause of death was not a contested issue at trial; (2) failing to instruct the jury that malice requires proof that the defendant was aware of the life-endangering risk posed by his conduct; and (3) sustaining the prosecution's objection to the introduction of the death certificate of the defendant's son Andrew. We disagree.

a. *Admission of autopsy photographs.* At trial, the Commonwealth introduced three autopsy photographs of the victim over the defendant's objections. The defendant now argues that the judge abused her discretion in admitting the photographs where the cause of death was not contested and the photographs did not depict the victim's injuries.[6] We disagree.

As we have previously stated, "whether the inflammatory quality of a photograph outweighs its probative value and precludes its admission is determined in the sound discretion of the trial judge." *Commonwealth* v. *DeSouza*, 428 Mass. 667,

[6]The first picture showed the victim's skull after the skin had been peeled back and the top of the skull had been removed. The next picture showed the back of the victim after the skin had been peeled back to expose the trapezia muscles. The final picture depicted the back of the victim's head.

670 (1999), and cases cited. Generally, this is true even where the defendant agrees to stipulate to the facts that the photograph tends to prove. *Commonwealth* v. *Nadworny*, 396 Mass. 342, 367 (1985), cert. denied, 477 U.S. 904 (1986). However, if apt to be inflammatory or otherwise prejudicial, autopsy photographs showing the body as altered during the autopsy should be admitted only if relevant to the resolution of a contested issue. *Commonwealth* v. *Bastarache*, 382 Mass. 86, 106 (1980).

The judge admitted the photographs only after the Commonwealth had laid a foundation indicating that the photographs were relevant to establishing the severity of the victim's injuries. The defendant argues that this was an abuse of discretion because the nature, extent, and cause of the fatal injuries were not issues before the jury. While we agree with the defendant that the photographs were disturbing, we do not agree that they lacked relevance. A critical issue in the case was the amount of force used to shake the victim. As the nature of the injuries supported an inference concerning the amount of force used to inflict the injuries, the photographs were relevant to that issue. Additionally, the final photograph admitted, showing no injury to the back of the victim's head, was relevant to contradict the defendant's testimony that the victim hit his head in the bathtub. Furthermore, the judge appropriately mitigated any potential prejudice by cautioning the jury not to be affected by the nature of the photographs, and by instructing them that the photographs were to be used only to draw attention to a clinical medical status or the nature and extent of the victim's injuries.

"In order to find an abuse of discretion, 'it is necessary to decide that no conscientious judge, acting intelligently, could honestly have taken the view expressed by [her].' " *Commonwealth* v. *Jaime*, 433 Mass. 575, 579 (2001), quoting *Commonwealth* v. *Medeiros*, 395 Mass. 336, 351 (1985). This is a heavy burden that the defendant has failed to meet in this case. The judge's decision to admit three autopsy photographs in this case was not an abuse of discretion, but instead a reasonable ruling that allowed the Commonwealth to explain the significance of the autopsy findings. *Commonwealth* v. *Boateng*, 438 Mass. 498, 507 (2003). See *Commonwealth* v. *Urrea*, 443 Mass. 530, 545 (2005), and cases cited (no abuse of discretion admit-

ting photograph depicting victim with suturing across chest and intubation tube in place where relevant to issue of extreme atrocity or cruelty).

b. *Third prong malice instruction.* The defendant argues that the judge erred in failing to instruct that subjective awareness of the risk of death is required for a murder conviction. This argument is without merit, as a murder conviction based on third prong malice requires only that "in the circumstances known to the defendant, a reasonably prudent person would have known that, according to common experience, there was a plain and strong likelihood that death would follow the contemplated act." *Commonwealth* v. *Woodward*, 427 Mass. 659, 669 n.14 (1998), quoting *Commonwealth* v. *Sneed*, 413 Mass. 387, 388 n.1 (1992). Thus, it is not required that the defendant subjectively know that his actions would create a substantial risk of death. It is enough that based on what the defendant knew, a reasonable person would objectively realize the risk of death. We have repeatedly rejected similar arguments, see, e.g., *Commonwealth* v. *Riley*, 433 Mass. 266, 273 (2001) (rejecting claim that third prong malice did not sufficiently require morally culpable state of mind); *Commonwealth* v. *Starling*, 382 Mass. 423, 427-429 (1981) (rejecting argument that third prong malice should require actual subjective foresight by defendant), and affirmed that the primary distinction between third prong malice and involuntary manslaughter is the degree of risk that was apparent from the defendant's conduct. See, e.g., *Commonwealth* v. *Azar*, 435 Mass. 675, 681-684 (2002); *Commonwealth* v. *Vizcarrondo*, 427 Mass. 392, 394-397 (1998); *Commonwealth* v. *Sanna*, 424 Mass. 92, 105 (1997); *Commonwealth* v. *Sires*, 413 Mass. 292, 303-304 n.14 (1992).

c. *Exclusion of death certificate.* Last, the defendant argues that the judge erred in excluding the death certificate of the defendant's other son, Andrew. At trial, the defendant attempted to admit the death certificate, which stated the cause of death as myocarditis. The judge sustained the Commonwealth's objection, finding it a collateral issue, but offered to instruct the jury

that Andrew's death was not an issue in the case.[7] The defendant, however, argues that the offered limiting instruction was not an acceptable alternative and could not compensate for the lack of extrinsic evidence that Andrew died of natural causes.

"Where there is a risk of confusing the jury, the judge must weigh the probative value of any proffered evidence against such danger." *Commonwealth* v. *Ellis*, 432 Mass. 746, 758 (2000), citing *Commonwealth* v. *Rosa*, 422 Mass. 18, 25 (1996). Here, the judge did not abuse her discretion. Contrary to the defendant's claim, there was no insinuation that the defendant had anything to do with Andrew's death. Rather, the jury heard uncontroverted testimony that Andrew's cause of death was myocarditis, and the judge offered to instruct the jury that there was no issue regarding his cause of death. The prosecutor's comments regarding Andrew's death were proper and did not, as the defendant alleges, "impl[y] that dark forces may have been at work in Andrew's death." As the defendant relied on the memory of Andrew's death as ostensibly causing him to panic and shake the victim, it was proper and necessary for the prosecutor to comment on this defense. However, at no time did the prosecutor imply or state that Andrew died from anything other than natural causes.

"[W]e give broad discretion to trial judges who have valid concerns about trying a case within a case." *Commonwealth* v. *Ellis*, *supra* at 758-759, citing *Commonwealth* v. *Franklin*, 366 Mass. 284, 289 (1974). By permitting inquiry into the wholly unrelated matter of the cause of Andrew's death, the judge risked distracting the jury. Accordingly, the judge's refusal to admit the death certificate was well within her discretion.

Conclusion.

Because we conclude that the judge abused her discretion in reducing the verdict to involuntary manslaughter where the weight of the evidence clearly supported murder in the second degree, and the defendant's claims of error lack merit, we vacate

[7]The Commonwealth's objection was based on the fact that the medical examiner had recently reviewed the case and determined that Andrew did not die from myocarditis. At the time of trial the medical examiner's office was not able to determine a definitive cause of death other than natural causes.

the order reducing the verdict and affirm the conviction of murder in the second degree.

So ordered.

Cordy, J. (dissenting, with whom Marshall, C.J., and Cowin, J., join). "In a noncapital case such as this, we do not conduct an independent analysis when a trial judge reduces a verdict to a lesser offense." *Commonwealth* v. *Woodward*, 427 Mass. 659, 668 (1998) (*Woodward*). The judge "has the advantage of face to face evaluation of the witnesses and the evidence at trial" and is thus "in a far better position than we are to make the judgment required by [Mass. R. Crim. P. 25 (b) (2), 378 Mass. 896 (1979)]." *Commonwealth* v. *Cobb*, 399 Mass. 191, 192 (1987). Consequently, our consideration of a judge's decision to reduce a verdict is limited to "whether the judge abused his discretion or committed an error of law." *Commonwealth* v. *Gaulden*, 383 Mass. 543, 557 (1981). The court concludes that the judge abused her discretion in reducing the verdict from murder in the second degree to involuntary manslaughter. In my view, it reaches this conclusion by simply substituting its judgment for that of the judge who saw and heard the evidence. While we might not have decided the matter as the trial judge did, that is not a proper application of the deferential standard that we profess to apply to such decisions. Because I perceive nothing other than a conscientious judge acting to ensure that justice was more nearly achieved by intelligently and honestly assessing both the weight of the evidence on a determinative element of the crime, and whether the verdict was disproportionate, I respectfully dissent.

As we noted in *Woodward*, *supra* at 670, quoting *Commonwealth* v. *Sires*, 413 Mass. 292, 303-304 n.14 (1992), the difference between the elements of third prong malice (murder in the second degree) and manslaughter "lies in the degree of risk of physical harm that a reasonable person would recognize was created by particular conduct, based on what the defendant knew. The risk for the purposes of the third prong of malice is that there was a plain and strong likelihood of death. . . . The

risk that will satisfy the standard for . . . involuntary manslaughter 'involves a high degree of likelihood that substantial harm will result to another.' " This is a very fine line, and the judge weighed the evidence with that in mind. She found that its weight was more consistent with wilful and wanton conduct (involuntary manslaughter) than with third prong malice. She did so by considering all the evidence, taken together, including that of the Commonwealth's experts and of the defendant, which she was fully entitled to do. *Commonwealth* v. *Keough*, 385 Mass. 314, 321 (1982) (defendant's testimony can be considered, and if believed, relied on by judge in reducing verdict). See *Woodward*, *supra* at 668-669.[1] She found that the defendant's conduct likely consisted of a single shaking lasting a few seconds, possibly "under the sway of the painful memories" of the death of another of his children.[2] She also considered her knowledge of other murder and manslaughter verdicts in the Commonwealth involving fatal batteries on children, and the familiar pattern of repeated prior injuries or caretaker abuse found in those cases but not in this one.[3]

In the end, she concluded that "[t]his was a tragic case of an overwhelmed father and husband who, alone and unaccustomed

[1]The court finds that the judge could not rely on Lyons's testimony as a ground to reduce the verdict because uncontroverted testimony at trial discredited Lyons's account of the events of June 28, 1998, and because the judge acknowledged Lyons's "implausible" accounts to the police and paramedics. *Ante* at 295-296. Nothing in our case law, however, suggests that a judge is not permitted to credit some, but not all, of a defendant's testimony, in deciding on a motion under Mass. R. Crim. P. 25 (b) (2), 378 Mass. 896 (1979), just as any factfinder is entitled to do when evaluating the testimony of any other witness.

[2]The court cites *Commonwealth* v. *Starling*, 382 Mass. 423, 426 (1981), for the proposition that "evidence of a single blow to a young child may be sufficient to support a jury's finding of malice." *Ante* at 294. The victim's death in that case, however, was caused not by shaking, but rather by "one or more 'very severe' blows to the chest or abdomen with a blunt instrument such as a fist, a foot, or a board." *Commonwealth* v. *Starling*, *supra* at 425.

[3]In *Commonwealth* v. *Woodward*, 427 Mass. 659, 670 (1998) (*Woodward*), we held that the judge did not abuse his discretion in concluding that the jury verdict of murder in the second degree was not proportionate with convictions in similar cases, where there was no evidence of repeated caretaker abuse in that case. Here, similarly, the judge reasonably relied on "the lack of any evidence that the defendant had inflicted any prior abuse or injuries on any of his children, especially [the victim]."

to the difficult task of caring for a newborn infant, reacted to a stressful situation with lamentable panic and confusion," and that the defendant "succumbed to the frailty of the human condition, see *Commonwealth* v. *Bearse*, 358 Mass. 481, 487 (1970), and committed a momentary act of 'extraordinarily poor judgment,' *Commonwealth* v. *Kinney*, 361 Mass. 709, 713 (1972); *Commonwealth* v. *Baker*, 346 Mass. 107, 118 (1963)." All of these conclusions find support in the evidence, and not just in the defendant's testimony. And all bear on the weight of the case on the question of malice.

The court weighs the evidence differently from the trial judge, concluding that it "clearly supported a verdict of murder in the second degree." *Ante* at 297. This is not our role. While there is little doubt that the evidence supported the jury's verdict of murder in the second degree, that is neither the test nor the standard under rule 25 (b) (2). See *Woodward*, *supra* at 666 ("the responsibility [under rule 25 (b) (2)] may be exercised by the trial judge, even if the evidence warrants the jury's verdict"); *Commonwealth* v. *Gaulden*, *supra* at 555 (rule 25 [b] [2] "empower[s] a judge . . . to 'order the entry of a finding of guilty of any offense included in the offense charged in the indictment,' without regard to the fact that the evidence warranted the jury's verdict of guilty of the greater offense"). In our constrained assessment of a verdict reduction under that rule, we are not to reweigh the evidence and second guess the trial judge's assessment of it. "Rule 25 (b) (2) places the matter in the hands of the judge who heard the witnesses, and we should not undertake to substitute our judgment for [hers]." *Id.* at 557.

We have consistently followed this admonition until now. Since 1979, when the Legislature amended G. L. c. 278, § 11 (now embodied in rule 25 [b] [2]), to grant trial judges the power to enter a finding of guilty of any lesser included offense in criminal cases, appellate courts have reversed verdict reductions on only three occasions.[4] On each occasion, the judge was

[4]The power to reduce verdicts is sparingly exercised by trial judges. In the past twenty-six years, the Commonwealth has appealed from such reductions in only thirteen cases: *Commonwealth* v. *Rolon*, 438 Mass. 808 (2003) (order

reversed because the reason for reducing the verdict was not germane to the weight of the evidence on the charged offense. See *Commonwealth* v. *Rolon*, 438 Mass. 808, 822-825 (2003) (reversing order reducing verdict from felony-murder in first degree to murder in second degree where judge invoked irrelevant theory of provocation and improperly rejected doctrine of joint venture); *Commonwealth* v. *Sabetti*, 411 Mass. 770, 780-781 (1992) (reversing order reducing verdict from trafficking in cocaine to possession of cocaine with intent to distribute where judge found that defendant did not know that he possessed over twenty-eight grams of cocaine, fact irrelevant to crime for which he was convicted); *Commonwealth* v. *Burr*, 33 Mass. App. Ct. 637, 639-643 (1992) (reversing order reducing verdicts from trafficking in cocaine to possession of cocaine with intent to distribute based on trial judge's apparent disagreement with harshness of mandatory minimum sentence required by trafficking conviction, and where weight of cocaine was undisputed at trial). This is not such a case. On no occasion has an appellate court decided to reweigh evidence that it never heard in the first instance, and to reverse a judge's

reducing verdict from felony-murder in first degree to murder in second degree reversed); *Woodward*, *supra* (order reducing verdict from murder in the second degree to involuntary manslaughter affirmed); *Commonwealth* v. *Ghee*, 414 Mass. 313 (1993) (order reducing verdict from murder in first degree to murder in second degree affirmed); *Commonwealth* v. *Sabetti*, 411 Mass. 770 (1992) (order reducing verdict from trafficking in cocaine to possession with intent to distribute reversed); *Commonwealth* v. *Aguiar*, 400 Mass. 508 (1987) (issue of verdict reduction not decided where defendant's conviction of murder in first degree reversed on other grounds); *Commonwealth* v. *Cobb*, 399 Mass. 191 (1987) (order reducing verdict from murder in second degree to manslaughter affirmed); *Commonwealth* v. *Millyan*, 399 Mass. 171 (1987) (order reducing verdict from murder in first degree to murder in second degree affirmed); *Commonwealth* v. *Keough*, *supra* (order reducing verdict from murder in second degree to manslaughter affirmed); *Commonwealth* v. *Gaulden*, 383 Mass. 543 (1981) (order reducing verdict from murder in second degree to manslaughter affirmed); *Commonwealth* v. *Lamar L.*, 61 Mass. App. Ct. 1121 (2004) (order reducing verdicts of youthful offender to findings of delinquency affirmed); *Commonwealth* v. *Burr*, 33 Mass. App. Ct. 637 (1992) (order reducing verdict from trafficking in cocaine to possession with intent to distribute reversed); *Commonwealth* v. *Greaves*, 27 Mass. App. Ct. 590 (1989) (order reducing verdict from murder in second degree to manslaughter affirmed); *Commonwealth* v. *Zitano*, 23 Mass. App. Ct. 403 (1987) (order reducing verdict from murder in second degree to manslaughter affirmed).

carefully articulated decision on that basis.[5]

The court notes that the authority given trial judges by rule 25 (b) (2) is "similar to our power to review capital cases under G. L. c. 278, § 33E, and a trial judge's decision on [such a motion] 'should be guided by the same considerations.' " *Ante* at 291, quoting *Commonwealth* v. *Gaulden*, *supra* at 555. While this is a fair enough statement of the law, the court seems to have forgotten an observation made a long time ago: "[U]nder § 33E review, this court has proceeded . . . with the disadvantage of not seeing and hearing the witnesses. . . . A trial judge does not have that disadvantage" (citation omitted). *Commonwealth* v. *Gaulden*, *supra* at 554. Even with that disadvantage, the court, in *Commonwealth* v. *Kinney*, 361 Mass. 709, 713 (1972), saw its way clear to reduce two convictions of murder in the second degree (where the weapon used was a handgun) to involuntary manslaughter, when it concluded that the weight of the evidence was "that [the defendant] was confused and frightened rather than enraged." It is hard to say that the judge here was not "guided by the same considerations," having the further advantage of actually seeing and hearing the witnesses.

Although the evidence was sufficient to warrant the jury's verdict as a matter of law, *Commonwealth* v. *Gaulden*, *supra* at 553-555, there was no abuse of discretion in the judge's decision that justice would be more nearly achieved if the verdict was reduced from murder in the second degree to involuntary manslaughter.

[5]The appellate courts have affirmed verdict reductions on nine occasions, without disturbing the judges' assessment of the weight of the evidence. In *Commonwealth* v. *Aguiar*, *supra*, this court considered but did not decide the verdict reduction issue, as the conviction was reversed on other grounds. See note 4, *supra*.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

03-P-823

COMMONWEALTH

vs.

MICHAEL J. LYONS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant, Michael Lyons, was convicted of murder in the second degree for the shaking death of his infant son. The Commonwealth tried the case exclusively on the theory that the defendant committed murder by acts that satisfied the third prong of malice. The judge allowed the defendant's motion under Mass.R.Crim.P. 25(b)(2), 378 Mass. 896 (1979), and reduced the verdict from murder in the second degree to manslaughter. The Commonwealth appeals, claiming that the judge abused her discretion. We conclude that the judge acted within her discretion when she reduced the verdict to manslaughter.[1]

To ensure that the result in every criminal case is consonant with justice, a trial judge may reduce a verdict under rule 25(b)(2) even where the evidence is sufficient to support the

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[1] The defendant filed a cross appeal but has stated in his brief and affirmed at oral argument that in the event we affirmed the judge's decision he would waive his appeal from the conviction. Accordingly, we do not consider the issues raised in the defendant's cross appeal.

jury's original verdict. G. L. c. 278, § 11. Commonwealth v. Woodward, 427 Mass. 659, 666-667 (1998). Commonwealth v. Rolon, 438 Mass. 808, 820 (2003). A judge should use the power sparingly and not sit as a "second jury." Id. at 820-821. We will not disturb a judge's order reducing a verdict unless the judge abused her discretion or committed an error of law. Commonwealth v. Woodward, 437 Mass. at 668. Commonwealth v. Rolon, 438 Mass. at 821.

"A judge's discretion to reduce a verdict pursuant to rule 25(b)(2) is appropriately exercised where the weight of the evidence in the case, although technically sufficient to support the jury's verdict, points to a lesser crime." Ibid. "Where the weight of the evidence suggests that the defendant did not act with malice, a murder verdict may appropriately be reduced to manslaughter." Ibid. See Commonwealth v. Gaulden, 383 Mass. 543, 557 (1981); Commonwealth v Keogh, 385 Mass. 314, 320-321 (1982); Commonwealth v. Cobb, 399 Mass. 191, 192 (1987); Commonwealth v. Woodward, 427 Mass. at 669-671; Commonwealth v. Greaves, 27 Mass. App. Ct. 590, 594 (1989).

To determine whether the judge acted within her discretion we consider whether there was some weakness in the evidence that Lyons committed murder in the second degree, or evidence suggesting that he more likely committed manslaughter. Commonwealth v. Rolon, 438 Mass. at 822. In her written

memorandum outlining her reasons for reducing the verdict to manslaughter, Commonwealth v. Gaulden, 383 Mass. at 556, the judge recognized the fine line distinguishing murder based on the third prong of malice from the lesser included offense of involuntary manslaughter. Commonwealth v. Woodward, 427 Mass. at 669-670. She evaluated where, on this fine line, the evidence tended to point and concluded that "the risk of physical harm manifested by the defendant's actions was more consistent with wilful and wanton conduct than with third prong malice." A. 30. In support of this conclusion, the judge observed "the lack of any evidence that the defendant had inflicted any prior abuse or injuries on any of his children, especially [the infant]" and the likelihood that "his culpable conduct . . . consisted of one violent shaking that may have lasted only a few seconds,[2] possibly while under the sway of the painful memories of [his other child's] death." A. 30.

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[2] The Commonwealth contends that the judge's finding that the shaking lasted only three to five seconds was clearly erroneous. The judge's finding was supported by the record and is not, therefore, clearly erroneous. The defendant testified that he shook the infant for ten to fifteen minutes. The Commonwealth's expert testified that the defendant's time estimate was physically impossible, and that the shaking likely lasted approximately "three to ten to fifteen seconds," with twenty seconds being the longest amount of time such vigorous shaking could be sustained. T. 2/91, 117. The judge was, of course, free to credit the Commonwealth's expert. The judge's findings of fact based on credibility assessments "will not be disturbed unless there is no support in the record." Commonwealth v. Millyan, 399 Mass. 171, 189-190 (1987).

These reasons provide an adequate basis for reducing the verdict to manslaughter. Contrast Commonwealth v. Rolon, 438 Mass. at 823-825 (judge abused his discretion in reducing verdict from felony-murder to murder in the second degree on grounds of provocation resulting in heat of passion where provocation was not relevant to felony-murder and on grounds that inappropriately minimized the defendant's role in a joint venture).

The judge also indicated that she could not exclude the possibility that the jury were "unduly affected by the image of this huge, lumbering man, shaking so tiny and vulnerable a baby." A. 30. She considered other personal factors as well, such as the fact that the defendant was a steady worker with no criminal record who enjoyed the support of his wife throughout the trial. Although personal circumstances alone will not justify the reduction of a verdict, they may be considered in conjunction with the evidence that points to a lesser degree of guilt. Commonwealth v. Rolon, 438 Mass. at 825. There was no error.

Order reducing verdict from murder in the second degree to manslaughter affirmed. The defendant's appeal is dismissed.

By the Court (Cypher, Grasso, & Kafker, JJ.),

Ashley Ahearn
Clerk

Entered: May 6, 2004