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54 MAP 2019

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 54 MAP 2019

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE,
v.

TRISTAN STAHLEY,
APPELLANT.

BRIEF FOR APPELLEE

APPEAL FROM THE ORDER OF THE SUPERIOR COURT DATED DECEMBER 19, 2018 AT NO. 3109 EDA 2017 AFFIRMING THE ORDER DENYING PCRA PETITION BY THE HONORABLE JUDGE WILLIAM R. CARPENTER ON AUGUST 28, 2017, IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, CRIMINAL DIVISION, AT NO. CP-46-CR-5026-2013.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Whether the rule announced in *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017), is retroactively applicable to cases on collateral review, where it is a procedural, non-watershed rule?

(Answered in the negative by the PCRA court and the Pennsylvania Superior Court).

COUNTERSTATEMENT OF THE CASE

This is an appeal from the Superior Court's decision affirming the trial court's denial of defendant Tristan Stahley's petition under the Post Conviction Relief Act ("PCRA") after an evidentiary hearing. The PCRA court aptly recounted the factual and procedural history as follows:

> A brief history of this case follows. After a motion to suppress was denied, a Stipulated Non-Jury Trial was held on September 29, 2014. The trial established that on May 25, 2013, Stahley murdered Julianne Siller, who was 17-years-old. (Stipulated Bench Trial 9/29/14, p. 13). Stahley was 16 years of age at the time of the murder. *Id.* On the night of the incident, a dispatch came into the State Police of a stabbing in Palmer Park. *Id.* at 13. The two responding troopers went to Stahley's house, where they saw Stahley and his father on the ground fighting. Id. After separating the two, Stahley makes a statement that he stabbed his girlfriend because she broke up with him and that he thought she would hookup with other people. *Id.*
>
> The troopers took Stahley to Palmer Park and he directed them to the trail where the Ms. Siller was laying. *Id.* There was blood on the trail and a trail of blood into the woods of the park. *Id.* Stahley's DNA was found at the scene. There was DNA on the knife used to kill Ms. Siller. *Id.* at 13-14. The handle of the knife contained Stahley's DNA and on the blade was that of Ms. Siller. *Id.* at 14. In addition, one of the troopers found blood in the bathroom at Palmer Park, which was genetically matched to Stahley. *Id.*
>
> At the scene of the crime the troopers found Ms. Siller's jean jacket with a stab wound in it, a shirt that had blood on it,

stab wounds on Ms. Siller and the murder weapon, 10 feet from Ms. Siller's body. *Id.*

Trooper Barry Bertolet took custody of Stahley at the scene when Ms. Siller's body was found. *Id.* Trooper Bertolet went through the Miranda warnings form with Stahley while in the presence of his mother. *Id.* Stahley and his mother both signed the form, indicating they understood all of his rights. *Id.*

Stahley gave the troopers a statement. During this statement Stahley told the trooper that he was sober and that he understood what was going on. *Id.* In the statement, Stahley gave a rendition of the facts, wherein he said that he and Ms. Siller were in a relationship, but they were on again off again, and that she would always come back. *Id.* at 15. Additionally, he told the troopers that they got into a fight that night about her going out and that he stabbed her in the neck with the knife. *Id.* The trooper asked Stahley, "When did you make the decision in your mind?" and he replied, "About two seconds before I did it." *Id.*

An autopsy was performed on Ms. Siller and the cause of death was determined to be multiple stab and cutting wounds, and the manner of death was homicide. *Id.* Ms. Siller suffered over 75 stab wounds to her body, including 27 to her head and neck and 45 to her torso and shoulders. *Id.*

At the conclusion of the trial, this Court found Stahley guilty beyond a reasonable doubt of murder in the first degree. *Id.* at 19.

On December 17, 2014, a sentencing hearing was held. After considering the *Miller v. Alabama*, 132 S. Ct. 2455 (2012) factors as codified in 18 Pa.C.S.A. § 1102.1 and stating its reasons on the record, including the finding of irreparable

> corruption, this Court imposed a sentence of life imprisonment without parole. No appeal was filed.

Opinion, Dated Nov. 15, 2017 (Carpenter, J.).

Defendant filed a *pro se* PCRA petition. Appointed counsel filed an amended petition. In the petition, defendant argued that he was entitled to a new sentencing hearing under *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017)("*Batts II*"). After an evidentiary hearing and oral argument, the PCRA court denied the petition.

Defendant appealed, and the Pennsylvania Superior Court affirmed the PCRA court's rejection of the *Batts II* claim, holding that the rules announced in that case were not retroactively applicable to cases on post-conviction review:

> In Appellant's remaining claim, he contends that his 2014 discretionary sentence of life without parole ("LWOP") imposed in conformity with *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)[2] has since been rendered illegal by the Pennsylvania Supreme Court decision in *Commonwealth v. Batts*, 640 Pa. 401, 163 A.3d 410 (2017) ("*Batts II* "), which, Appellant maintains, applies retroactively to his collateral appeal. We review legality of sentencing claims "pursuant to a *de novo* standard and plenary scope of review." *Batts II*, 163 A.3d at 434-36.
>
> Initially, we note Appellant properly predicates his claim of an illegal sentence on the argument that *Batts II* presents a new rule of law that is retroactively applicable to his present

PCRA claim. With respect to the interplay between the legality of sentence and retroactivity claims, jurisprudence of this Commonwealth has stated:

> A new rule of law does not automatically render final, pre-existing sentences illegal. A finding of illegality, concerning such sentences, may be premised on such a rule only to the degree that the new rule applies retrospectively. In other words, if the rule simply does not pertain to a particular conviction or sentence, it cannot operate to render that conviction or sentence illegal. (*Accord Welch v. United States*, ––– U.S. ––––, 136 S.Ct. 1257, 1264, 194 L.Ed.2d 387 (2016) (alluding to the "general bar on retroactivity" for new constitutional rules of a procedural dimension); *214 *Montgomery*, ––– U.S. ––––, 136 S.Ct. at 730 ("[A] trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction or sentence.").

Commonwealth v. Washington, 636 Pa. 301, 142 A.3d 810, 814-815 (2016).

"[N]ew constitutional procedural rules generally pertain to future cases and matters that are pending on direct review at the time of the rule's announcement." *Id.*, at 815. Per *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality) and its progeny, "[a] new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rule of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Commonwealth v. Ross*, 140 A.3d 55, 59 (Pa.Super. 2016) (citation and quotation omitted).[3]

Batts II involved a juvenile defendant who had originally received a mandatory LWOP sentence in 2007 for first-degree murder. While defendant Batts' direct appeal was pending, the

United States Supreme Court issued its decision in *Miller*, invalidating mandatory LWOP sentences for juveniles and further indicating that discretionary LWOP sentences for juveniles should be a rarity. In *Commonwealth v. Batts*, 620 Pa. 115, 66 A.3d 286 (2013), ("*Batts I*"), the Pennsylvania Supreme Court directed that defendant Batts be resentenced in light of *Miller*. Upon resentencing, however, Batts received a discretionary LWOP sentence. This Court affirmed, and Batts appealed to the Pennsylvania Supreme Court, which granted his petition for allowance of appeal.

In reversing Batts' judgment of sentence and remanding, our Supreme Court devised a procedural scheme by which to implement *Miller*. Specifically, the scheme adopted a presumption against sentencing a juvenile to life in prison without the possibility of parole, and it imposed a burden upon the Commonwealth to prove a juvenile was incapable of rehabilitation beyond a reasonable doubt.
789Importantly, the central concepts of *Miller* informed the *Batts II* procedures:

> Under *Miller* and *Montgomery* [*v. Louisiana*, ––– U.S. ––––, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016)], a sentencing court has no discretion to sentence a juvenile offender to life without parole unless it finds that the defendant is one of the "rare" and "uncommon" children possessing the above-stated characteristics, permitting its imposition. *Montgomery*, 136 S.Ct. at 726, 734; *Miller*, 567 U.S. at 479, 132 S.Ct. 2455; *see Graham*, 560 U.S. at 73, 130 S.Ct. 2011; *215 *Roper*[*v. Simmons*], 543 U.S. [551,] 572–73, 125 S.Ct. 1183, 161 L.Ed.2d 1 [(2005)]. A sentence of life in prison without the possibility of parole for a murder committed when the defendant was a juvenile is otherwise disproportionate and unconstitutional under the Eighth Amendment. *Montgomery*, 136 S.Ct. at 734, 735.
> Thus, in the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the

> defendant will forever be incorrigible, without any hope for rehabilitation, a life-without-parole sentence imposed on a juvenile is illegal, as it is beyond the court's power to impose. *See* [*Commonwealth v.*] *Vasquez*, 560 Pa. 381, 744 A.2d [1280,] 1282 [(Pa. 2000)]; [*Commonwealth v.*] *Shiffler*, 583 Pa. 478, 879 A.2d [185] 189 [(Pa. 2005)]; *In re M.W.*, 555 Pa. 505, 725 A.2d [729,] 731 [(Pa. 1999)].

Batts II, 163 A.3d at 435-36.

Our Supreme Court went on to conclude, therefore, that "a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole." *Batts II*, 163 A.3d at 452. Supporting this conclusion were the following reflections on *Miller*:

> [A]ny suggestion of placing the burden on the juvenile offender is belied by the central premise of *Roper*, *Graham*, *Miller* and *Montgomery*—that as a matter of law, juveniles are categorically less culpable than adults. This central premise arises from "a conclusion firmly based upon the generally known results of wide human experience," which is that the vast majority of adolescents change as they age and, despite their involvement in illegal activity, do not "develop entrenched patterns of problem behavior." *Miller*, 567 U.S. at 471, 132 S.Ct. 2455 (referring to this conclusion as "common sense" and "what any parent knows") (citing *Roper*, 543 U.S. at 569–70, 125 S.Ct. 1183); *Watkins*, 173 A. at 648. *The Miller Court reiterated the High Court's longstanding conclusion that the distinctive attributes of youth generally preclude a finding that a juvenile will forever be incorrigible, especially in light of the great difficulty even professional psychologists have in making that determination during a person's youth. See Miller*, 567 U.S. at 472–73, 479–80, 132 S.Ct. 2455.

> *Miller*'s holding, "that life without parole is an excessive sentence for children whose crimes reflect transient immaturity," is a "substantive rule of constitutional law." *Montgomery*, 136 S.Ct. at 735. This, according to *Montgomery*, means that only "the rarest of juvenile offenders" are eligible to receive a sentence of life without the possibility of parole. *Id.*
>
> Only in "exceptional circumstances" will life without the possibility of parole be a proportionate sentence for a juvenile.[ ] *Id.* at 736. Thus, there can be no doubt that pursuant to established Supreme Court precedent, the ultimate fact here (that an offender is capable of rehabilitation and that the crime was the result of transient immaturity) is connected to the basic fact (that the offender is under the age of eighteen). *See Childs*, 142 A.3d at 830.
>
> The United States Supreme Court expressly left it to the States to determine how the holding in *Miller* was to be implemented in state court proceedings. *Montgomery*, 136 S.Ct. at 735.

Batts II, 163 A.3d at 452 (emphasis added).

The Court further held the Commonwealth could rebut the presumption against the imposition of LWOP punishment with proof beyond a reasonable doubt that the juvenile falls under the exception to the general rule deeming juvenile offenders rehabilitable. *Id.* at 453. On this point, again, the Court drew upon the *Miller* decision:

> The United States Supreme Court has clearly and unambiguously instructed that the decision that an offender is one of the rare and uncommon juveniles who may constitutionally receive a sentence of life without the possibility of parole must be made with near certainty. *The sentencer must determine that the offender is and "forever will*

> *be a danger to society," a finding that the High Court found to be in direct conflict with a child's inherent capacity to change. Miller*, 567 U.S. at 472, 132 S.Ct. 2455. To protect youthful offenders from erroneous decisions that foreclose their ability to ever be released from prison, the Supreme Court therefore held that a sentence of life without parole is disproportionate and illegal for a juvenile offender unless that defendant "exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S.Ct. at 733 (citing *Miller*, 567 U.S. at 479–80, 132 S.Ct. 2455) (emphasis added).
>
> Pursuant to our consideration of the attendant due process concerns and the definitive language used by the Supreme Court, we conclude that to overcome the presumption against the imposition of a sentence of life without parole for a juvenile offender, the Commonwealth must prove that the juvenile is constitutionally eligible for the sentence beyond a reasonable doubt. In an effort to satisfy this burden, the Commonwealth may present evidence relating to the factors announced in *Miller* and the factors appearing in section 1102.1(d).

Batts II, 163 A.3d at 454–55 (emphasis added).

At the time *Batts II* was decided, Appellant's judgment of sentence was final, and his present collateral appeal was pending. Under the general rule of retroactivity cited *supra*, therefore, the new constitutional procedural rule announced in *Batts II* would not apply to Appellant's matter. Acknowledging this fact, Appellant argues *Batts II* qualifies as an exception to the general rule, as it announced either a substantive rule or, in the alternative, a "watershed rule of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding." *Ross*, 140 A.3d at 59.

Differentiating substantive from procedural rules, the Pennsylvania Supreme Court has explained:

> [S]ubstantive rules are those that decriminalize conduct or prohibit punishment against a class of persons. *See Montgomery*, ––– U.S. ––––, 136 S.Ct. at 729–30. Concomitantly, the Supreme Court has made clear that "rules that regulate only the *manner of determining* the defendant's culpability are procedural." *Id.* at ––––, 136 S.Ct. at 730 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 2523, 159 L.Ed.2d 442 (2004)) (emphasis in original).
>
> As to watershed rules, to date, the Supreme Court of the United States has discerned only one, arising out of the sweeping changes to the criminal justice system brought about by the conferral of the right to counsel upon indigent defendants charged with felonies in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *See* *217 *Beard v. Banks*, 542 U.S. 406, 417, 124 S.Ct. 2504, 2513–14, 159 L.Ed.2d 494 (2004).

Washington, 142 A.3d at 813.

****

Appellant first submits that *Batts II* expresses a substantive rule, as he claims it forbids imposition of a LWOP sentence upon a defined class of individuals, namely, those whom the Commonwealth cannot prove beyond a reasonable doubt are incapable of rehabilitation. In other words, he says *Batts II* protects a class of individuals from a discretionary LWOP sentence beyond the Commonwealth's authority. Appellant's brief at 29. We disagree.

It was *Miller*, not *Batts II*, that announced the relevant substantive rule requiring retroactive application when it held sentencing a juvenile to life without parole is excessive for all

but "the rare juvenile offender whose crime reflects irreparable corruption[.]" *Id.*, at 479-480, 132 S.Ct. 2455. *See also Montgomery*, 136 S.Ct. at 734 (recognizing *Miller* issued a new substantive rule requiring retroactive application to collateral appeals). Indeed, the Pennsylvania Supreme Court specifically announced it was providing with its *Batts II* decision a procedural overlay to *Miller* in order to advance implementation of *Miller*. As such, *Batts II* did not represent an extension of *Miller* by defining an additional class of juvenile offenders capable of rehabilitation and, thus, insulated from LWOP sentencing. Instead, it only developed procedures, rooted in *Miller*'s principal considerations of juvenile sentencing, that would optimize accurate identification of rehabilitable juveniles coming under *Miller*'s protection.

This conclusion aligns with the precept in *Schriro* and its progeny that whether a new rule is substantive or procedural is largely driven by a consideration of the function of the rule at issue, we discern that the new rule in *Batts II* may fairly be said to regulate only the procedures for determining a juvenile offender's capacity for rehabilitation. As such, the rule is procedural, not substantive. *See Welch*, 136 S.Ct. at 1265-66. For these reasons, we conclude *Batts II* announced no substantive rule qualifying for retroactive application to cases pending on collateral review.

Alternatively, Appellant argues, *Batts II* created a "watershed rule of criminal procedure requiring retroactive application." Appellant's brief at 33 (emphasis omitted). "Even if *Batts II* is deemed procedural, it satisfies *Teague*'s second exception as a "watershed rule[ ] of criminal procedure[,]" Appellant posits, because the change is "necessary to prevent an impermissibly large risk" of inaccuracy in a criminal proceeding and also "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Appellant's brief at 33 (acknowledging standard expressed in *Whorton*, 549 U.S. at 418, 127 S.Ct. 1173 (internal quotations

omitted)). Appellant also claims that "[t]he requirements under *Batts II* upend juvenile homicide sentencing hearings, recognizing the distinct nature of life without parole and protecting against such a sentence for a certain class of youth." Appellant's brief at 34.

We discern no "impermissibly large risk" of inaccuracy in LWOP proceedings when *Miller* repeatedly emphasized how rare it is for a juvenile's crime to reflect incorrigibility and admonished that a LWOP sentence should be an uncommon occurrence.[4] Clearly, the aim of the *Batts II* procedural scheme is to reduce misapplications of *Miller* in juvenile sentencing, and its specific requirements regarding presumptions and burdens are well-designed toward that end.

Yet, precedent teaches that "the chance of a more accurate outcome under the new procedure normally does not justify the cost of vacating a conviction whose only flaw is that its procedures 'conformed to then-existing constitutional standards.' " *Teague*, *supra*, at 310, 109 S.Ct. 1060. In this regard, *Miller*'s standards, embracing as they did a clear repudiation of not only mandatory LWOP sentencing schemes but also the notion of commonplace discretionary LWOP sentences, did much to clarify how sentencing courts should view evidence of a juvenile's capacity to rehabilitate. While *Batts II* provides a delineation of procedures that aid in this evidentiary review, we stop short of declaring it to have altered our understanding of *Miller*'s bedrock elements informing a fair proceeding.

Indeed, in *Batts II*, our Pennsylvania Supreme Court distilled *Miller*'s essential observations—appropriate occasions for LWOP sentences will be *uncommon*; it will be the *rare* juvenile offender whose crime reflects irreparable corruption; and fundamental differences between children and adults *counsel against* LWOP sentences for juveniles—into a procedural scheme requiring sentencing courts to presume juveniles can rehabilitate and placing upon the Commonwealth the burden

> to prove otherwise beyond a reasonable doubt. To be sure, our Supreme Court acknowledged *Miller*'s pivotal role in the formulation of the *Batts II* presumption and burden of proof assignment where it noted "any suggestion of placing the burden on the juvenile offender is belied by the central premise of *Roper*, *Graham*, *Miller*, and *Montgomery*...." *Batts II*, 163 A.3d at 452.
>
> Such a scheme, therefore, represents the manifestation of *Miller*'s clear charge for mitigated sentencing with the opportunity for parole in the vast majority of juvenile cases.
>
> Rather than including *Batts II* among the ranks of *Gideon*—the only decision recognized by the United States Supreme Court as issuing a watershed procedural rule—we understand *Batts II* as announcing a new rule that nevertheless rests largely on the *Miller* precedent. As such, *Batts II* provides a most salient directive regulating the manner in which sentencing courts are to implement *Miller*'s governing considerations.
>
> We, therefore, decline to find *Batts II* established a watershed procedural rule necessitating retroactive application to collateral proceedings. Accordingly, Appellant's final challenge fails.

Commonwealth v. Stahley, 201 A.3d 200, 213–20 (Pa. Super. 2018)(footnotes omitted).

Defendant petition this Court for allowance of appeal, which this Court granted.

SUMMARY OF THE ARGUMENT

Defendant lastly insists that he is entitled to a new sentencing hearing under *Batts II*. That case, however, was decided after his judgment of sentence became final, and so its new rule is not retroactively applicable to his case.

ARGUMENT

I. DEFENDANT IS NOT ENTITLED TO A NEW SENTENCING HEARING.

Defendant insists that he is entitled to a new sentencing hearing under *Batts II*. In that case, this Court held that "to effectuate the mandate of *Miller*[1] and *Montgomery*,"[2] there is a presumption against a life-without-parole sentence for juveniles and that the Commonwealth must prove beyond a reasonable doubt that the juvenile is incapable of rehabilitation. *Id.* at 416.

Defendant, however, is not entitled to a new sentencing hearing. *Batts II* was decided after his judgment of sentence became final, and so its new rule is not retroactively applicable to his case.

A decision announcing a new rule of law handed down after the completion of direct review generally cannot be the basis for relief on collateral review. *Commonwealth v. Gillespie*, 516 A.2d 1180, 1183 (Pa. 1986).

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[1] *Miller v. Alabama,* 132 S. Ct. 2455 (2012) barred mandatory life without parole sentences for those under eighteen at the time of the murders.

[2] *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016), made *Miller* retroactively applicable to cases on collateral review.

There are two exceptions, however. *See generally Teague v. Lane*, 489 U.S. 288 (1989).

First, a new rule applies retroactively to cases on collateral review if it is substantive. A new rule is substantive if it "place[s] particular conduct of persons … beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004). Yet the more common new rule is one of procedure. Such rules do not create a punishment the law cannot impose, but merely require a certain process for imposing punishment. "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural." *Id.* at 353.

The new rule announced in *Batts II* procedural. That case held as follows:

> Pursuant to our grant of allowance of appeal, we further conclude that to effectuate the mandate of *Miller* and *Montgomery*, *procedural safeguards* are required to ensure that life-without-parole sentences are meted out only to "the rarest of juvenile offenders" whose crimes reflect "permanent incorrigibility," "irreparable corruption" and "irretrievable depravity," as required by *Miller* and *Montgomery*. Thus, as fully developed in this Opinion, we recognize a presumption against the imposition of a sentence of life without parole for a

> juvenile offender. To rebut the presumption, the Commonwealth bears the burden of proving, beyond a reasonable doubt, that the juvenile offender is incapable of rehabilitation.

Batts, 163 A.3d at 416 (emphasis added).

The key phrase is "procedural safeguards." *Id.* Those procedural safeguards regulate only the "*manner of determining*" a punishment. *Schriro*, 542 U.S. at 353. They are therefore procedural, not substantive, rules. The first exception, accordingly, does not apply. *Cf. Commonwealth v. Riggle*, 119 A.3d 1058, 1067 (Pa. Super. 2015) (holding that new rule announced in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), that jury must find a mandatory-triggering fact beyond a reasonable doubt was procedural rule).

Defendant also cannot meet the second exception. That exception is reserved for "watershed rules" of criminal procedure "implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990). As *Schriro* explained, "[t]hat a new procedural rule is fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 352 (citation and emphasis omitted). Here, the

new rule in *Batts II*, specifically identified by that court as merely imposing "procedural safeguards," is restricted to the manner in which the penalty is determined and has no bearing on the accuracy of the conviction. This "watershed" class of rules is also "extremely narrow," so much so that (apart from the guarantee of counsel in criminal proceedings) they are effectively nonexistent. *Id.* at 352 (citations and internal quotation marks omitted). *See, e.g., Whorton v. Bockting*, 549 U.S. 406, 417-418 (2007) ("in the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status") (collecting cases); *Beard v. Banks*, 542 U.S. 406, 417 (2004) ("it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception").

The Commonwealth also argued in the lower court that *Montgomery* specifically foreshadowed that individual states would make new procedural rules to implement the *Miller/Montgomery* substantive rules:

> If I may, I'd just like to address the *Batts* issue first, then circle back to the effectiveness claims.
>
> It seems to me that there is some agreement that can be found between opposing counsel and I; and that is, if this is a procedural rule, a new procedural rule, it does not apply to defendant. As I hear opposing counsel argue, she's saying it's not a procedural rule, so we don't need to worry about a

retroactively bar. Our argument is pretty simple: It is a new procedural rule.

I direct the Court to the general rule that new Rules of Criminal Procedure are generally not applicable to cases on collateral review. There are really two exceptions for that. If it's a substantive rule, it does apply to cases on collateral review. If it's a procedural rule, it does not apply, unless it is considered a watershed-type of rule. An example of that would be the right to counsel recognized in *Gideon*. Those are very rare and are almost never recognized by the U.S. Supreme Court. I don't think opposing counsel is arguing that this is a watershed procedural rule, so really it just comes down to is it a procedural rule?

If you take a look at *Miller* and *Montgomery*, you can search high and low in both of those opinions for something saying there is a presumption against the life without parole sentence. It's not going to be there. You can search high and low in *Miller* and *Montgomery* for something saying that the Commonwealth has to prove beyond a reasonable doubt that the defendant is irreparably corrupted. It's not in there.

Miss Allman cited some language in, I believe it was *Montgomery*, that says when the courts said, When we announce a substantive rule, sometimes there will be procedural riders on that rule. And they said the procedural riders to the substantive rule announced in *Miller* was that there had to be a hearing in front of a Court at which the Court considered the defendant's age and related circumstances. Then it drew a line. It said that is all that is procedurally required under *Miller*. And that's very clear from *Montgomery*. That was it.

> In *Montgomery* they said any other procedural rule-making we are going to leave to the states. That's because we have a system, a federalism system, that allows the states to regulate their own criminal justice systems. So that language that Miss Allman relies on is completely out of context. The Court in *Montgomery* directed the state courts: Here is this general substantive rule. You are free to adopt procedural rules that you see fit. And that's what the Court did in *Batts*.[3]

(N.T. 8/23/17, 15-17).

In any event, even if the new procedural rule of *Batts II* applied to defendant, his bid for resentencing would still come up short. The United States Supreme Court has "adopted the general rule that a constitutional error does not automatically require reversal of a conviction," as "the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991); *see also Commonwealth v. Story*, 383 A.2d 155, 162 (Pa. 1978) (accepting that a constitutional error may be harmless).

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[3] *See Montgomery*, 136 S.Ct. at 734-736; *see also Commonwealth v. Foust*, 180 A.3d 416, 429 (Pa. Super. 2018) ("After deciding the merits of Batts' appeal, our Supreme Court 'exercise[d its] constitutional power of judicial administration to devise a procedure for the implementation of the *Miller* and *Montgomery* decisions in Pennsylvania.'") (quoting *Batts*, 163 A.3d at 451).

Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect "'irreparable corruption.'" *Montgomery*, 136 S. Ct. at 726. The lower court was well-aware of this principle at sentencing, which defense counsel argued in closing (N.T. 12/17/14, 117-118). The lower found that the totality of the circumstances presented by this disturbing case reflected "irreparable corruption" (*id.* at 124). There was overwhelming evidence to support this conclusion. This was a horrific murder of a young woman, and defendant showed a truly ghoulish lack of remorse (N.T. 12/17/14, 124) (explaining that defendant's prison calls showed "a horribly callous attitude" towards murder, "a total lack of remorse," and were "shocking"). As such, any purported error under *Batts II* is harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the decision of the Superior Court in this case.

RESPECTFULLY SUBMITTED:

/s/ Robert M. Falin

_____

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