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Filed in Supreme Court

DEC 10 2015

IN THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA Respondent	:	
Vs.	:	No. 1764 EDA 2014
QU'EED BATTS,	:	
Petitioner	:	

PETITION FOR ALLOWANCE OF APPEAL

Appeal from the Order of the Superior Court entered on 11/10/2015, denying the application for reconsideration/reargument of the decision of the Superior Court at No. 1764 EDA 2014 dated 9/4/2015 which affirmed the judgment of sentence from the Northampton County Court of Common Pleas (Criminal Division), at No. CP-48--CR-1215-2006 dated 5/2/2014.

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Suggested answer: Yes.

c. In *Batts II*, this Court held that a juvenile with a pre-Miller mandatory LWOP sentence could not receive LWOP on resentencing. Did the lower courts err in concluding otherwise?

Suggested answer: Yes.

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Overview

In June of 2012, the U.S. Supreme Court issued its decision in *Miller v. Alabama*. *Miller* outlawed mandatory life without parole sentences for juveniles (LWOP) and invalidated the sentencing schemes of 29 jurisdictions, including Pennsylvania. Petitioner Qu'eed Batts' challenge to the constitutionality of his mandatory LWOP sentence was under review by the Pennsylvania Supreme Court when *Miller* was issued.

The Pennsylvania Supreme Court consequently remanded the case to the Northampton County Court of Common Pleas for resentencing. On May 2, 2014, the Honorable Michael J. Koury Jr. resentenced the Petitioner to a term of life in prison without the possibility of parole.[1] By split decision dated September 4, 2015, the Superior Court denied the Petitioner's appeal.[2] The Superior Court denied the Petitioner's application for re-argument on November 10, 2015.[3]

The issues raised in this petition are novel and evolving. The possibility of a discretionary juvenile LWOP sentence did not exist before *Miller*, and there are unanswered questions about the burden of proof and the procedural due process required. The Superior Court declined to address these issues, deferring the matter to this Court in recognition of its

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[1] A copy of this transcript is attached as Appendix "A." A copy of Judge Koury's 1925(a) statement is attached as Appendix "B."
[2] Attached as Appendix "C."
[3] Attached as Appendix "D."

supervisory authority under the Pennsylvania Constitution. A definitive resolution of these matters is of substantial concern to both the lower courts and the public. The Court should therefore grant this petition for *allocatur*.

A. Questions Presented

a. In *Miller v. Alabama*, the U.S. Supreme Court outlawed mandatory life without parole for juveniles (LWOP), and instructed that the discretionary imposition of this sentence should be "uncommon" and reserved for the "rare juvenile offender whose crime reflects irreparable corruption."

   i. There is currently no procedural mechanism to ensure that juvenile LWOP will be "uncommon" in Pennsylvania. Should this Court exercise its authority under the Pennsylvania Constitution to promulgate procedural safeguards including (a) a presumption against juvenile LWOP (b) a requirement for competent expert testimony and (c) a "beyond a reasonable doubt" standard of proof?

      Suggested answer: Yes.

   ii. The lower court reviewed the Petitioner's sentence under the customary abuse of discretion standard. Should the Court reverse the lower court's application of this highly deferential standard in light of *Miller*?

      Suggested answer: Yes.

b. In *Miller*, the U.S. Supreme Court stated that the basis for its individualized sentencing requirement was *Graham's* comparison of juvenile LWOP to the death penalty. The Petitioner received objectively less procedural due process than an adult facing capital punishment. Should the Court address the constitutionality of the Petitioner's resentencing proceeding?

   Suggested answer: Yes.

c. In *Batts II*, this Court held that a juvenile with a pre-*Miller* mandatory LWOP sentence could not receive LWOP on resentencing. Did the lower courts err in concluding otherwise?

Suggested answer: Yes.

B. Statement of the Case

Petitioner Qu'eed Batts was 14 years and 10 months old on February 7, 2006. He had no criminal record and was a recent initiate into the notorious "Bloods" gang. His direct superior in the "Bloods" was Vernon Bradley, age 22. Bradley had a fearsome reputation and two teardrops tattooed on his face, signifying that he had killed two people.

That evening, Batts was riding in a car with Bradley and other teenaged members of the "Bloods." The car stopped when the group spotted two men, C.J. Edwards and Corey Hilario. Batts did not know either man.

Bradley said that he was going to kill them. He turned and asked, "Who's going to put in work?" Nobody responded. Bradley asked a second time, "Who's going to put in work?" Still nobody responded. Bradley then passed a gun and a mask to Batts and said, "Blood, I just brought you home. You can't put work in for me?"

Batts understood this to mean that Bradley wanted Edwards killed. He further understood that Bradley would kill him if he disobeyed this order. Donning the mask and a glove, Batts walked toward 713 Spring Garden Street in Easton, Pa. His mind was unclear as he walked down the street.

Batts shot Edwards twice in the head at close range, killing him instantly. He shot Hilario once in the back as Hilario fled for the house. Batts had never fired a gun before. The entire incident lasted no more than 30 seconds.

The police arrested Batts three days later in Phillipsburg, New Jersey, the neighboring town where he had until recently been involved with the high school football team. Batts gave his uncounseled confession to the police after less than two hours of interrogation. He was unaware that his actions during this span could condemn him to die in prison without the possibility of a parole.

At his trial, Batts testified that Bradley had ordered him to commit the crimes. A "Bloods" member does not refuse his superior. The jury rejected Batts' defense of duress, however, and found him guilty of first-degree murder.[4] The trial judge imposed a then-mandatory term of life imprisonment without the possibility of parole (LWOP).

The Superior Court affirmed the verdict and sentence. The Pennsylvania Supreme Court granted *allocatur* but withheld a ruling pending the outcome of cases then under review by the United States Supreme Court.

[4] Vernon Bradley plead guilty to two counts of criminal solicitation and received 20 to 40 years in jail.

Beginning with its seminal 2005 decision in *Roper v. Simmons*,[5] which banned the death penalty for juveniles, the U.S. Supreme Court issued a trio of decisions that would alter the face of its Eighth Amendment jurisprudence. The foundation of these decisions was the Court's application of a categorical reduction in juvenile culpability for even the most serious crimes. The Court based this bright-line rule in large part on scientific research confirming the neurological and psychological distinctions between adults and persons under the age of 18.

In its 2010 decision in *Graham v. Florida*, the Supreme Court affirmed its commitment to the emerging science on adolescent behavior and the consequent diminution in culpability by outlawing LWOP for non-homicide juvenile offenses.[6] Finally, in its landmark 2012 decision, *Miller v. Alabama*, the Court struck down the sentencing schemes of 29 jurisdictions that mandated LWOP for juveniles convicted of first-degree murder, including Pennsylvania.[7]

In March of 2013, the Pennsylvania Supreme Court remanded the Petitioner's case to the Northampton County Court of Common Pleas for an individualized resentencing. The matter was assigned to the Honorable Michael J. Koury Jr. for disposition due to the retirement of the trial judge.

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[5] 543 U.S. 551 (2005).
[6] *See* 560 U.S. 48 (2010).
[7] *See* 132 S.Ct. 2455 (2012).

Judge Koury presided over a contentious resentencing hearing on May 1, 2014. He handed down his sentence the next day: LWOP for Batts. Before issuing his decision, Judge Koury reviewed the record and the sentencing factors he had taken into account. At the conclusion of his remarks, which span 68 pages, Judge Koury solemnly intoned, "May God have mercy on your soul."

The Petitioner submitted post-sentence motions, a timely notice of appeal, and a lengthy appellate brief supported by numerous citations to the record and case law. Nevertheless, by split decision dated September 4, 2015, the Superior Court panel declined to review the appeal on its merits. The majority held that the Petitioner had forfeited his ability to challenge Judge Koury's application of *Miller* by failing to include a statement of reasons under Rule 2119(f).

In his dissenting and concurring opinion, Judge Fitzgerald identified three reasons why the majority's finding of waiver was improper: (1) a murder sentence is not subject to the discretionary review process (2) the standards for sentencing a juvenile to LWOP do not arise under the Sentencing Code and (3) the extraordinary legal question presented merited a review despite the procedural defect.

The Petitioner sought re-argument on this basis. The Petitioner also requested re-argument with respect to (a) the majority's misapprehension of

its challenge to the competency of the Commonwealth's expert testimony as a challenge to its weight (b) the panel's failure to recognize the facial invalidity of the proceeding and adopt the death penalty standards of proof and review and (c) the panel's conclusion that Batts was subject to LWOP on remand under *Batts II*. The application for re-argument was denied on November 10, 2015.

The Petitioner is seeking *allocatur* for the following reasons: (1) no Pennsylvania court has decided if a juvenile facing LWOP is entitled to the same constitutional protection as an adult facing capital punishment (2) only the Pennsylvania Supreme Court can promulgate the procedural safeguards needed to ensure that juvenile LWOP will be "uncommon" (3) the Superior Court has refused to review this appeal on its merits and (4) a definitive resolution of these matters is of substantial public importance.

In addition, the issues presented in this petition may implicate the constitutionality of 18 Pa.C.S. § 1102.1, the new legislation passed by the General Assembly after the Supreme Court's decision in *Miller*.

C. Statement of Reasons for Allowance of Appeal

a. Only this Court can promulgate the procedural safeguards needed to ensure that discretionary juvenile LWOP sentences will be "uncommon" in Pennsylvania.

    i. This record illustrates the need for procedural mechanisms to offset the danger that the cold-blooded nature of a

crime will overpower mitigating arguments based on youth.

Before the Supreme Court's decision in *Miller v. Alabama*, a Pennsylvania juvenile convicted of first-degree murder was subject to an automatic LWOP sentence. *Miller* bans mandatory LWOP for juveniles and instructs that the discretionary imposition of this "harshest possible penalty" should be "uncommon" and reserved for the "rare juvenile offender whose crime reflects irreparable corruption."[8]

The basis for this directive is the Supreme Court's repeated declaration that "juvenile offenders cannot with reliability be classified among the worst offenders."[9] In *Roper v. Simmons*, the Court's concern over this distinction was so acute that it imposed a categorical ban on juvenile capital punishment.[10]

In *Graham v. Florida*, the Court held that it was unconstitutional for a judge to sentence a non-homicide juvenile offender to LWOP based on a subjective determination that the juvenile was "irredeemably depraved."[11] In *Miller*, the Court articulated a "foundational principle": "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[12]

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[8] *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012).
[9] *See Roper v. Simmons*, 543 U.S. 551, 569 (2005).
[10] *See Id.* at 569-573.
[11] *See Graham v. Florida,* 560 U.S. 48, 76 (2010).
[12] 132 S.Ct. at 2466.

Thus, under *Roper*, *Graham*, and *Miller*, any sentence predicated on a finding that a juvenile is "irreparably corrupt" must be viewed with suspicion. Judge Koury made that exact finding in this case:

> "Mr. Batts, I have concluded that your crimes do not reflect unfortunate yet transient immaturity."[13]

The Petitioner contends that the U.S. Supreme Court's mistrust of the finding that any juvenile is incapable of rehabilitation requires the adoption of at least three procedural safeguards: (1) a presumption against juvenile LWOP (2) competent expert testimony on the juvenile's lack of capacity for rehabilitation and (3) a "beyond a reasonable doubt" burden of proof. The Petitioner is asking this Court to promulgate these safeguards pursuant to its authority under Article 5 § 10 of the Pennsylvania Constitution.

Absent such precautions, there will be no shield against the constitutionally-impermissible danger described in *Roper*: "that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course[] . . . ."[14]

The reality of this hazard was on display throughout Judge Koury's decision:

- P. 44: "Mr. Batts executed a cold-blooded murder and attempted murder of two defenseless boys he did not know for the purpose of gaining acceptance and perhaps a promotion in the Bloods gang."

[13] Tr. 5/02/2014 at p. 66.
[14] *Roper*, 543 U.S. at 573.

- P. 45: "Mr. Batts own description of the events was inconsistent with his assertion that he acted out of fear. If Mr. Batts had carried out the execution only because he feared he would be killed one would have expected him to report high levels of anxiety and revulsion at the prospect of killing another human being, but Mr. Batts reported no conflicting emotion. On the contrary, he said he did not think much at all about the task at hand but simply did what was expected of him. He said that Clarence Edwards was looking up into his face when he pulled the trigger and yet felt nothing. That description does not sound like a person who dreaded killing another human being and only did so because he feared being killed himself. It sounds like a person who wanted to prove to his fellow gang members that he was capable of committing cold-blooded murder."

- P. 48: "When he walked up the steps to the front porch with a gun in his hand he was not acting on impulse or lack of appreciation of what might happen next. He knew exactly what he was going to do. He made a calculated decision to shoot two defenseless boys at close range. He shot one boy in the back as he was running away. He shot the other boy twice in the head as he lay helpless on the porch and looking directly up into his face. This was not a crime that resulted from youthful impulsivity, a mistake in judgment or an inability to foresee the consequences of his action. Mr. Batts intended to kill and he did kill. Whether he did so to earn [a] promotion or only to meet the gang's expectations, his intent was to prove to his fellow criminals that he was willing to commit a cold-blooded murder."

- P. 57: "You executed a cold-blooded murder and attempted murder of two defenseless boys you did not know for the purpose of advancing your personal interest in the Bloods gang. It was a premeditated act. It was brutal, unprovoked and senseless."

- P. 66: "On the evening of February 7, 2006, you committed a calculated, callous and cold-blooded murder. You made yourself

the judge, jury, and executioner of Clarence Edwards and, if not for the grace of God, you would have also killed Corey Hilario."

- P. 67: "I left the courthouse and, on my way home, I drove past 713 Spring Garden Street. I parked in front of the house. I then imagined the events that occurred on the evening of February 7, 2006. As I sat in front of 713 Spring Garden Street I imagined Qu'eed Batts wearing a mask and one glove, walking up the stairs and then shooting Corey Hilario in the back and Clarence Edwards twice in the head while Qu'eed Batts looked at Clarence's face. I imagined Dolores Howell later coming outside and seeing her grandson dying on the porch with two gunshots in his head. But there was no need for me to imagine this because this, in fact, happened on February 7, 2006."

It is difficult to imagine a judge exhibiting a more single-minded focus on the details of the homicide. All mitigating arguments based on youth were pushed aside because, in Judge Koury's view,

> "[T]he Court does not believe that your young age significantly diminishes your culpability because your crimes were not the product of recklessness, poor judgment, lack of foresight, susceptibility to peer pressure or weak impulse control. Your crimes were deliberate and premeditated acts."[15]

This conclusion contravenes the Supreme Court's recognition of categorically diminished juvenile culpability. Judge Koury allowed his obsession with the facts of this undeniably brutal homicide to override his obligation to apply the Supreme Court's bright-line reduction of juvenile culpability. By treating this constitutional mandate as a matter of discretion, Judge Koury violated the Petitioner's right to be sentenced as a child, not as

[15] Tr. 5/02/2014 at p. 61.

an adult. This scenario will be repeated unless and until this Court imposes procedural mechanisms to prevent it.

ii. This record illustrates the need for a competent expert opinion on a juvenile's lack of capacity for rehabilitation.

The unifying theme in *Roper*, *Graham*, and *Miller* is the difficulty in reliably distinguishing between the typical immature juvenile and the rare juvenile with an "irretrievably depraved character." This finding is necessary to justify a LWOP sentence, however. As the U.S. Supreme Court observed in *Graham*,

> "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable."[16]

The Court's recurring doubt about the validity of classifying any juvenile as irredeemable—even when done by a trained psychiatrist with diagnostic expertise—underscores the need for a competent expert opinion on this subject. There was no such expert opinion in this case.

Of the four mental health experts who evaluated the Petitioner after the Pennsylvania Supreme Court's remand, only Dr. Michals, the Commonwealth's expert, opined that he is not amenable to long-term rehabilitation. Every other expert, including the independent examiner

[16] *Graham*, 560 U.S. at 72-73.

assigned by Judge Koury, concluded that Batts was amenable to rehabilitation.[17]

Therefore, Dr. Michals was the only expert capable of providing objective support for Judge Koury's LWOP sentence. Dr. Michals' report and testimony exhibited glaring deficiencies, however.

- In his written report, he failed to offer an opinion on the outcome of the re-sentencing or on Batts' amenability to rehabilitation within the adult criminal justice system.
- His dismissive assessment of the scientific research into adolescent behavior was contrary to the governing U.S. Supreme Court precedent.
- His testimony about Batts' capacity for change was equivocal and betrayed a confirmation bias.
- His statement, "We are who we are," was diametrically opposed to U.S. Supreme Court's view of the inherent capacity of juveniles to change.

An expert opinion that rejects the scientific underpinning of the applicable U.S. Supreme Court precedent is incompetent to sustain a juvenile LWOP sentence. Consequently, Judge Koury lacked a valid expert opinion to help him differentiate (a) the juvenile offender whose crime reflects unfortunate yet transient immaturity from (b) the rare juvenile offender whose crime reflects irreparable corruption.[18]

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[17] See Appellant's Brief on appeal to the Superior Court at pp. 55-64, attached as Appendix "E."

[18] *Miller*, 132 S.Ct. at 2469.

Judge Koury therefore had to have relied on his own subjective determination that Batts is incorrigible. This kind of subjective finding violates the Eighth Amendment as interpreted by the U.S. Supreme Court in *Graham*.[19]

iii. The only possible burden of proof for a juvenile LWOP sentence is "beyond a reasonable doubt."

In *Commonwealth v. Meals*, this Court stated that the function of the standard of proof is to instruct the factfinder on the level of confidence society believes he (or she) should have in the correctness of his (or her) conclusion.[20] The most stringent standard—beyond a reasonable doubt—is applicable in criminal trials because of the gravity of the private interest at stake. Application of this standard reflects a societal judgment that the public should bear virtually the entire risk of error given the severe loss that occurs when an individual is erroneously convicted of a crime.[21]

In contrast, the preponderance-of-the-evidence standard is applicable in a civil dispute over money. Application of this standard reflects a societal belief that the parties should share the risk of error given the public's minimal interest in the outcome.[22]

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[19] *See* 560 U.S. at 76-77.
[20] *See Commonwealth v. Meals*, 912 A.2d 213, 318 (Pa. 2006).
[21] *Id.*
[22] *Id.*

The gravity of the private interest at stake here is unquestionably grave. In *Graham*, the U.S. Supreme Court compared LWOP to the death penalty because it "alters the offender's life by a forfeiture that is irrevocable."[23] The Court in *Graham* further noted that LWOP is particularly harsh for a juvenile offender because they will serve on average more years and a greater percentage of their lives in prison than an adult offender would.[24]

Thereafter, in *Miller*, the U.S. Supreme Court referred to juvenile LWOP as the "harshest possible penalty."[25] The Court cautioned that the discretionary imposition of this sentence should be "uncommon" in light of the "great difficulty" even trained professionals experience when attempting to distinguish the typical juvenile offender from the rare incorrigible juvenile.[26]

Under this authority, there can be no greater loss of liberty for a juvenile than a LWOP sentence. Consequently, only the highest standard of proof will preserve the Eighth Amendment principle of proportionality. Any other standard would trivialize the gravity of the private interest at stake.

A review of Pennsylvania's capital sentencing procedure bolsters this conclusion. Before the death penalty may be imposed, the legislature

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[23] *Graham*, 560 U.S. at 69.
[24] *Id.* at 69-70.
[25] *Miller*, 132 S.Ct. at 2469.
[26] *Id.*

requires unanimous agreement by a judge or jury that either (a) the Commonwealth established at least one aggravating factor beyond a reasonable doubt, and the defendant failed to establish any mitigating factors beyond a preponderance of the evidence or (b) one or more aggravating factors outweigh any mitigating circumstances.[27]

LWOP is equivalent to the death penalty for a juvenile according to the U.S. Supreme Court's decisions in *Graham* and *Miller*. Judge Koury acknowledged this reality in his concluding statement to the Petitioner: "May God have mercy on your soul." It follows that any standard below that of the death penalty standard would violate the Petitioner's rights under the Eighth Amendment and Article I Section 13 of the Pennsylvania Constitution.

Application of the "beyond a reasonable doubt" standard may have caused a different outcome in this case. Judge Koury's equivocal findings concerning the Petitioner's lack of capacity for rehabilitation are illustrative:

- Pp. 51-52: "nothing in [Batts'] past approached the level of brutality exhibited in the crimes he committed in this case. To that extent, his crimes were out of character for him."

- P. 54: "Although evaluators agree that Mr. Batts has demonstrated some capacity for change in recent years, the Court cannot be confident that significant change will occur without years of therapy."

- P. 54: "Although Mr. Batts initially expressed no remorse for his crimes, he now appears to have done so."

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[27] *See* 42 Pa.C.S. § 9711(c)(1)(i)-(iv).

- P. 59-60: "Although you may ultimately prove amenable to treatment, the experts have indicated that any rehabilitation will require years of psychotherapy. Thus, this factor weighs in favor of an extended period of incarceration."

- Pp. 60-61: "Because of these conditions you developed a heightened need for the support of a caring family and, as a result, you were later attracted to the apparent cohesion of life in a criminal street gang. Although these factors do not diminish your culpability, they do suggest you might benefit from psychotherapy or other forms of rehabilitation.

- P. 62: "Although you were never employed prior to your arrest because of your young age, you have held two jobs in prison and have pursued some vocational training. You have taken courses on leadership and violence prevention. You have maintained a close relationship with your family and attempted to be a positive role model for your younger brother, advising him to do well in school, listen to his parents, and avoid the mistakes that cost you your freedom. Thus, these factors weigh in your favor for assessing your capacity for change.

Collectively, these statements cast doubt on the validity of Judge Koury's conclusion that Batts is "irreparably corrupt." Had Judge Koury been required to make this finding "beyond a reasonable doubt," he may have reached a different conclusion. The risk of error in this regard should tip heavily in favor of the Petitioner in recognition of the gravity of his liberty interest. Any other conclusion would be contrary to this Court's statements

about the purpose of the standard of proof and the societal judgment it entails about the proper allocation of the risk of error.[28]

The Superior Court declined to address the Petitioner's argument about the need for a heightened standard of review, deferring the matter to this Court and to the General Assembly.[29] The statute passed by the legislature after *Miller* does not establish a burden of proof.[30] Therefore, this Court must determine the proper burden of proof for a juvenile LWOP sentencing proceeding.

In addition, the Superior Court applied the abuse of discretion standard to the Petitioner's challenge to Judge Koury's sentence.[31] It also resolved the bulk of this appeal on technical grounds. In so doing, the Superior Court deprived the Petitioner of a review on the merits and the trial courts of much-needed guidance on this novel and evolving issue.

At present, there are no procedural safeguards to ensure that the discretionary imposition of juvenile LWOP in Pennsylvania is "uncommon." There is no established burden of proof. There is no mechanism to shield a juvenile convicted of first-degree murder from a sentencer's undue focus on the brutality of the crime at the expense of legitimate mitigating arguments

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[28] *See Meals*, 912 A.2d at 318.
[29] *See* Op. 9/04/2015 at pp. 18-19.
[30] *See* 18 Pa.C.S. § 1102.1.
[31] *Id.*

based on youth. There is no guidance on the quality of expert opinion evidence required to support a LWOP sentence.

These unresolved issues implicate the constitutionality of the Petitioner's LWOP sentence. Only this Court can resolve them by virtue of its authority under the Pennsylvania Constitution. The matter is of undeniable importance given Pennsylvania's status as the state with the highest number of juvenile inmates serving LWOP.[32]

b. The Petitioner's resentencing proceeding was unconstitutional because it provided him with less procedural due process than an adult facing the death penalty.

As noted above, the Petitioner contends that the burden of proof for a juvenile LWOP proceeding must be the same as the standard applied during a capital proceeding. The grounds for this assertion are (a) *Miller's* conclusion that individualized sentencing is required by *Graham's* comparison of juvenile LWOP to the death penalty (b) the gravity of the liberty interest at stake and (c) the "beyond a reasonable doubt" burden of proof established by the legislature for capital proceedings.

The capital sentencing procedure in Pennsylvania is governed by 42 Pa.C.S. § 9711. Under § 9711, an adult facing capital punishment is entitled to: (a) the right to be sentenced by a jury (b) a default sentence of life imprisonment (c) a "beyond a reasonable doubt" standard for the

[32] *See Commonwealth v. Knox*, 50 A.3d 732, 744 n. 16 (Pa. Super. Ct. 2012).

Commonwealth, and a "beyond a preponderance of the evidence" standard for the defendant (d) a verdict of death must be unanimous and (e) automatic review of a death sentence by the Pennsylvania Supreme Court.[33]

The Petitioner received demonstrably less due process during his resentencing. His case was assigned to Judge Koury without an opportunity to have a jury decide if he should receive LWOP. The burden of proof was uncertain, with the Commonwealth denying that it had any burden whatever.[34] The lower courts even adopted a presumption that Judge Koury properly sentenced the Petitioner to LWOP through their application of the abuse of discretion standard of review.

These occurrences cannot be reconciled with the procedure outlined in § 9711. Thus, there is a disparity between the due process afforded a juvenile facing LWOP and an adult facing capital punishment. This Court can and should correct this gap through the exercise of its supervisory authority under Article 5 § 10 of the Pennsylvania Constitution.

Specifically, the procedure for a juvenile LWOP sentence should be amended to include (a) the right to be sentenced by a jury (b) a burden of proof weighted in favor of the possibility of parole (c) the requirement for a

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[33] *See* § 9711(a) – (h).
[34] *See* Tr. 5/01/2014 at pp. 38-40.

unanimous verdict for a LWOP sentence and (d) automatic review of all LWOP sentences by the Pennsylvania Supreme Court.

c. Under this Court's decision in *Batts II*, the Petitioner was not subject to a LWOP sentence on resentencing.

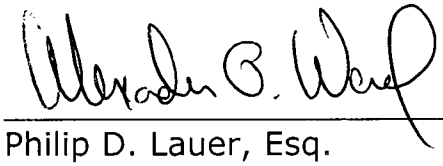
In *Batts II*, this Court stated:

> "We recognize the difference in treatment accorded to those subject to non-final judgments of sentence for murder as of Miller's issuance and those convicted on or after the date of the High Court's decision. As to the former, it is our determination here that they are subject to a mandatory maximum sentence of life imprisonment as required by Section 1102(a), accompanied by a minimum sentence determined by the trial court upon resentencing."[35]

This passage holds that, on re-sentencing, a juvenile subject to a pre-*Miller* judgment of sentence for murder cannot be re-sentenced to LWOP. Thus, the only issue before Judge Koury was the appropriate minimum sentence under *Miller*. The lower courts erred in concluding otherwise, and this Court should grant allocatur to correct this mistake. Otherwise, the Petitioner will languish in prison without the possibility of parole based on the lower courts' erroneous interpretation of this passage.

[35] *Commonwealth v. Batts*, 66 A.3d 286, 297 (Pa. 2013).

Respectfully submitted,



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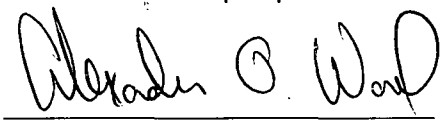
CERTIFICATE OF COMPLIANCE

I do hereby certify that this petition for allowance of appeal does not exceed 9,000 words (exclusive of pages containing table of contents, table of citations and the appendum containing opinions) based on the word count of the word processing system used for its preparation.



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Counsel for the Petitioner

Date: 12/10/2015

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two copies the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 2187:

Service by first class mail addressed as follows:

Office of District Attorney
Attention Rebecca Kulik, Esq.
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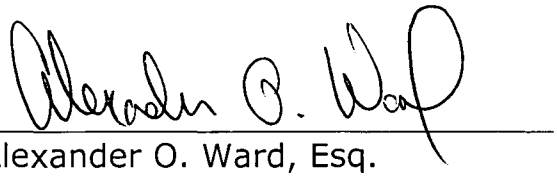

Dated: December 10, 2015

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