IN THE

Supreme Court of Pennsylvania

No. 45 MAP 2016

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

vs.

QU'EED BATTS,

Appellant.

BRIEF FOR *AMICUS CURIAE* PENNSYLVANIA BAR ASSOCIATION IN SUPPORT OF REVERSAL

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I. Interest of *Amicus*

The Pennsylvania Bar Association (the "PBA") is a non-profit, independent, voluntary membership organization.[1] Its mission is to promote justice, respect for the rule of law, professional excellence and the betterment of the legal profession. As the largest organization of lawyers in Pennsylvania (with more than 27,000 members), the PBA is duty bound to contribute to the exchange of ideas and to participate in litigation affecting the legal profession. This Court has designated the PBA under 42 Pa.C.S. § 1728(a)(3) as the organization "most broadly representative of the members of the bar of this Commonwealth." *In re: Recognition of the Pennsylvania Bar Association as the Association representing members of the bar of this Commonwealth,* No. 198 Supreme Court Rules Docket No. 1 (June 29, 1998).

The PBA has an abiding interest in this litigation to the extent it will determine the process due and procedural burdens imposed on the parties with respect to the sorts of sentencings and resentencings that will be required under *Miller v. Alabama,* 132 S.Ct. 2455 (2012), and *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016).[2]

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[1] In accordance with Pennsylvania Rule of Appellate Procedure 531, the PBA certifies that no party's counsel authored this brief in whole or in part and no party contributed financially to the preparation and submission of this brief.

[2] The PBA's President, acting on the recommendation of the association's *Amicus Curiae* Brief Committee, has authorized the filing of this brief. In 2010, at the recommendation of its Civil and Equal Rights Committee, the PBA's House of Delegates adopted a resolution

II. Introduction

In *Miller v. Alabama,* 132 S.Ct. 2455 (2012), the U.S. Supreme Court held that the federal Eighth Amendment bars the imposition of mandatory life sentences without possibility of parole on defendants who were juveniles when they offended. In *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016), the Supreme Court held that *Miller*'s new rule applies retroactively to sentences that were final when *Miller* was decided. Thus, as things now stand under federal jurisprudence, juveniles may only receive life sentences without possibility of parole (what are known as "LWOP" sentences) if the court first undertakes an individualized consideration of a number of factors set forth in *Miller* and *Montgomery*. In sum, these cases establish "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller,* 132 S.Ct. at 2466.

These "juvenile-lifer" decisions require a significant undertaking by Pennsylvania courts in view of the fact that the Commonwealth has more juvenile LWOP inmates than any other state. Pennsylvania has hundreds of inmates sentenced to juvenile LWOP who must now be

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joining the position of the American Bar Association in supporting "the concept that juveniles should be eligible for parole at some point in their sentences and that their sentences should be less punitive than those for comparable sentences for adults…" In this brief, the PBA focuses in the procedural implementation of *Miller*'s directive.

resentenced to constitutionally permissible sentences (or, in some cases, discharged from custody).[3]

While *Miller* and *Montgomery* set forth broad constitutional rules and general guidance regarding what sentencing courts must consider, they left open important, interstitial details that courts such as this one must consider and resolve.

The Court's order granting allowance of appeal makes clear that the Court intends in this case to address some of those issues. In particular, and most important for purposes of this brief, in Paragraph (1)(i), the Court accepted review of the following issues:

> 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?

In this brief, the PBA will urge that Court to adopt a clear, rebuttable presumption against juvenile LWOP and mandate that LWOP sentences may not be imposed on juvenile offenders unless the Commonwealth demonstrates beyond a reasonable doubt that the juvenile offender "exhibits such irretrievable depravity that

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[3] Following the decision in *Miller,* the General Assembly adopted a new sentencing scheme. However, the amended statute applies only to sentences imposed on or after June 25, 2012, the date the Supreme Court handed down *Miller*.

rehabilitation is impossible and life without parole is justified." *Montgomery,* 136 S.Ct. at 733.

III. Argument

A. Miller *and* Montgomery *hold that, barring a determination that a juvenile offender is irretrievably depraved, the Eighth Amendment bars imposition of a life sentence without the possibility of parole.*

In *Montgomery,* the Supreme Court summarized and expanded on its analysis in *Miller*: "*Miller* took as its starting point the principle established in *Roper* [*v. Simmons,* 543 U.S. 551 (2005)] and *Graham* [*v. Florida,* 130 S.Ct. 2011 (2010)] that "children are constitutionally different from adults for purposes of sentencing." 136 S.Ct. at 733. Children have diminished culpability and greater potential for reform. *Id.* The Court reviewed the well-established rationales for punishment—retribution, incapacitation and rehabilitation—and concluded that each carries less force in the case of juvenile offenders. *Id.* The Court concluded that "the penological justifications for life without parole collapse in light of the distinctive attributes of youth." *Id.* at 734 (quotation omitted).

Thus, the Court described the sort of analysis a sentencing court must undertake before imposing LWOP on a juvenile offender:

> *Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel

> against irrevocably sentencing them to a lifetime in prison." *Ibid.* The Court recognized that a sentencer might encounter that rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," *Miller* made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Ibid.*

Montgomery, 136 S.Ct. at 733-34.

The Eighth Amendment, as authoritatively interpreted by the U.S. Supreme Court, assumes that juvenile offenders are ineligible for LWOP sentences unless certain, uncommon facts are proven.

B. **Miller** ***and*** **Montgomery** ***require a presumption against juvenile LWOP.***

In Pennsylvania, a rebuttable presumption is "[a] means by which a rule of substantive law is invoked to force the trier of fact to reach a given conclusion, once the facts constituting its hypothesis are established, absent contrary evidence." *Commonwealth v. Shaffer,* 288 A.2d 727, 735-736 (Pa. 1972) (citing 9 Wigmore, Evidence at § 2491 (3rd ed. 1940)). In addition to permitting an inference of the presumed fact, a presumption also shifts to the party against whom it is invoked the burden of producing evidence to disprove the presumed fact. *See Commonwealth v. DiFrancesco,* 329 A.2d 204, 207, n.3 (Pa. 1974).[4] The U.S. Supreme Court has now held that, under the Eighth Amendment,

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[4] As Mr. Batts notes in his opening brief, other states have adopted such a presumption.

juvenile offenders are ineligible for LWOP unless certain facts are proven. Thus, under federal law, there is a presumption that LWOP is not constitutionally permissible.

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, binds this Court to follow the U.S. Supreme Court's interpretation of the federal Constitution. *See, e.g., Council 13, American Federation of State, County and Municipal Employees, AFL-CIO v. Commonwealth of Pennsylvania,* 986 A.2d 63, 77 (Pa. 2009). Accordingly, this Court should conclude that, in Pennsylvania courts, there is a rebuttable presumption that juvenile offenders are *not* subject to life sentences without possibility of parole. The Commonwealth must bear the burden of overcoming that presumption.[5]

[5] In *Miller,* the American Psychological Association (the "APA") and other groups filed an *amicus curiae* brief and explained how recent research has demonstrated that brains remain immature through early adulthood. The APA brief is available online at http://www.apa.org/about/offices/ogc/amicus/miller-hobbs.pdf (last visited on June 29, 2016). Given that and other similar scientific evidence, it is worth wondering how any court could ever know that a juvenile defendant is irreparably corrupted or irretrievably depraved. *See also Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014), where this Court favorably cited the APA's position concerning the admission of expert testimony concerning the factors that bear on eyewitness testimony.

C. To demonstrate that a juvenile LWOP sentence is justified, the Commonwealth should be required to present proof beyond a reasonable doubt.

Another question the U.S. Supreme Court has left unanswered is by what standard the prosecutor must meet his burden.

The Court should adopt a "beyond-a-reasonable-doubt" standard. There is ample support for such an approach. In *Woodson v. North Carolina,* 428 U.S. 280 (1976), the Supreme Court held that the Eighth Amendment bars mandatory imposition of the death penalty; sentencing courts must consider the character and record of the particular offender and the circumstances of his offense, and the factfinder must assess both aggravating and mitigating circumstances before condemning a defendant to death. *Id.* at 304. In Pennsylvania, the Commonwealth must prove the existence of aggravating circumstances beyond a reasonable doubt. *See* 42 Pa.C.S.A. § 9711(c)(1)(iii); *Commonwealth v. Spotz,* 759 A.2d 1280, 1290 (Pa. 2000).

Miller's requirement for an individualized sentencing proceeding arose from "two strands of precedent reflecting [the U.S. Supreme Court's] concern with proportionate punishment," and one of those strands has its roots in *Woodson*'s approach to individualized

consideration of the death penalty. It is logical, then, that a hearing to give effect to *Miller*'s requirement for individualized consideration should apply the same evidentiary standard used to meet *Woodson*'s similar requirement.[6]

D. To demonstrate that a juvenile LWOP sentence is justified, the Commonwealth should be required to offer expert evidence of "irreparable corruption" or "irretrievable depravity."

In *Roper,* the Supreme Court surveyed the scientific literature and concluded that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." 543 U.S. at 573. The Court reiterated the point in *Montgomery*. *See* 136 S.Ct. at 734-36. If the determination of "irreparable corruption" is difficult for expert psychologists, it is fair to presume that it would be impossible for lay jurors untrained in psychology.

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[6] There may as well be a Sixth-Amendment question about whether a judge or a jury should make the individualized sentencing determinations. *See Ring v. Arizona,* 536 U.S. 584 (2002). Because the Court did not include that issue in its order granting Mr. Batts' petition for allowance of appeal, the PBA notes but does not further examine the question.

In Pennsylvania, a party charged with proving a fact beyond the ordinary knowledge of a lay juror must offer expert evidence in support of its burden. *See Reardon v. Meehan,* 227 A.2d 667, 670 (Pa. 1967); *Commonwealth v. Walker*, 92 A.3d at 781-82 (recognizing importance of expert testimony in light of scientific research).

Thus, the Court should require the Commonwealth to offer expert evidence in support of its burden of proving irreparable corruption.

IV. Conclusion

The PBA respectfully submits that this Court should determine that there is a rebuttable presumption against imposing life sentences without possibility of parole on juvenile offenders, that the Commonwealth must overcome that presumption by proof beyond a reasonable doubt and that the Commonwealth must offer expert evidence to meet its burden.

Respectfully submitted,

/s/ David R. Fine

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July 1, 2016

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