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**IN THE**
**SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

**45 MAP 2016**

**COMMONWEALTH OF PENNSYLVANIA**
**Appellee**

**V.**

**QU'EED BATTS**

# BRIEF FOR AMICUS CURIAE THE PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEE THE COMMONWEALTH OF PENNSYLVANIA

**Appeal from the September 4, 2015 decision of the Superior Court at 1764 EDA 2014, affirming the May 2, 2014 resentencing order on the October 22, 2007 judgments of sentence of The Court of Common Pleas of Northampton County at CP-48-CR-0001215-2006.**

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## **COUNTER STATEMENT OF QUESTIONS PRESENTED**

Must this Court enact multifaceted procedures mirroring the statutory capital punishment process in order to meet the constitutional requirements of *Miller v. Alabama* and *Montgomery v. Louisiana*?

(Not raised in the Superior Court)

## INTEREST OF AMICUS CURIAE

The Pennsylvania District Attorneys Association is the only organization representing the interests of all District Attorneys and their assistants in the Commonwealth of Pennsylvania. This Court's construction of the United States Constitution with regard to criminal sentencing, especially in cases of first degree murder, is of special interest to District Attorneys throughout Pennsylvania.

## STATEMENT OF THE CASE

Defendant and his amici argue that *Miller v. Alabama* and *Montgomery v. Louisiana* require this Court to create death-penalty-like processes to superintend trial judges. But the General Assembly has already provided legislative guidance that was further explained and reinforced by this Court in *Commonwealth v.Batts*. There is no reason to believe trial judges are unable to understand or apply the law, which only requires the court to decide whether the offender is in the broad protected class defined by *Miller*. No need exists to step in before the existing legislation has even had time to operate, or to draft elaborate processes that would actually hinder what *Miller* requires. Pennsylvania trial judges can be relied upon to properly apply *Miller* and *Montgomery*.

On February 7, 2006, defendant Qu'eed Batts, then two months short of his 15th birthday, drove in a vehicle with three accomplices to the 700 block of Spring Garden street in Easton, Pennsylvania. He was armed with a handgun and wore a mask. He walked up the front steps of 713 Spring Garden Street and, from the porch, fired into the head of Clarence Edwards; and into the back of Corey Hilario. He seriously wounded Mr. Hilario, and killed Mr. Edwards. Defendant got back into the vehicle and fled.

Police arrested defendant and, after being warned of his rights, he confessed to the double shooting and murder. He expressed no remorse. He explained that he attacked two strangers, killing one and attempting to kill the other, to earn a promotion in his criminal gang, the "Bloods."

Because of defendant's age the Honorable William F. Moran held a decertification hearing. On February 21, 2007 the court determined that defendant was not amenable to rehabilitative treatment as a juvenile offender. On July 31, 2007, a jury found defendant guilty of murder of the first degree, attempted murder, and aggravated assault. On October 22, 2007, the court sentenced him to life imprisonment for the murder of Mr. Edwards and a separate term of six to twenty years for the attempted murder of Mr. Hilario.

During defendant's direct appeal the United States Supreme Court decided *Miller v. Alabama*, 132 S. Ct. 2455 (2012). The *Miller* Court held that an offender who was under 18 when he committed a murder must be afforded individualized consideration, for the court to take into account the "mitigating qualities of youth" and "how children are different." Noting that sentences of life without parole will be "uncommon" because of "the great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption," the Court also specified that it would not "foreclose a sentencer's ability to make that judgment." Juvenile life without parole sentences could continue to be imposed, but only in rare cases outside the broad category of immature youth. 132 S. Ct. at 2467, 2469 (internal quotation marks omitted).

Deciding if a juvenile offender is in the broad protected class and so ineligible for life without parole is a matter of "discretion at post-trial sentencing" that calls for "individualized consideration." *Miller*, 132. S. Ct. at 2475. The General Assembly

therefore promptly amended the Crimes Code to require consideration of factors relevant to compliance with *Miller*. 18 Pa.C.S. § 1102.1(d):

> (1) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. A victim impact statement may include comment on the sentence of the defendant.
> (2) The impact of the offense on the community.
> (3) The threat to the safety of the public or any individual posed by the defendant.
> (4) The nature and circumstances of the offense committed by the defendant.
> (5) The degree of the defendant's culpability.
> (6) Guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing.
> (7) Age-related characteristics of the defendant, including:
> (i) Age.
> (ii) Mental capacity.
> (iii) Maturity.
> (iv) The degree of criminal sophistication exhibited by the defendant.
> (v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.
> (vi) Probation or institutional reports.
> (vii) Other relevant factors.

In *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013), this Court approved the Superior Court's analysis in *Commonwealth v. Knox*, 50 A.3d 732, 745 (Pa. 2012), concerning the essential factors a trial court must consider in resentencing under *Miller*: age at the time of offense; the offender's "diminished culpability and capacity for change"; circumstances of the crime; extent of participation in the crime; "family, home and neighborhood environment"; "emotional maturity and development"; possible effects of family or peer pressure; past exposure to violence; drug and alcohol history; ability to deal with the police and capacity to assist counsel; mental

health history; and "potential for rehabilitation." *Batts*, 66 A.3d at 297. While the new statute did not apply in this case (the murder was committed before the effective date), Justice Baer's concurring opinion indicated that a court conducting resentencing under *Miller* would be wise to consider the legislature's policy determinations as a matter of discretion. 66 A.3d at 300.

This Court in *Batts* rejected claims that, as a result of *Miller*, juvenile life without parole sentences must be categorically banned; or that Pennsylvania's statutory scheme for imposing life sentences for murder had been voided, such that juvenile first degree murderers must be resentenced to third degree murder. *Id*. at 294, 295 ("Appellant's argument that the entire statutory sentencing scheme for first-degree murder has been rendered unconstitutional as applied to juvenile offenders is not buttressed by either the language of the relevant statutory provisions or the holding in *Miller*"); *see also Commonwealth v. Cunningham*, 81 A.3d 1, 2-3 (Pa. 2013) (discussing relevance of *Batts* and *Miller* as to offender similarly convicted of second degree murder). This Court also held it would not go beyond the holding of *Miller* in order to find additional restrictions on juvenile sentencing, expressing "reluctance" to "go further than what is affirmatively commanded by the High Court" without "a common law history or a policy directive from our Legislature," and heeding the "strong presumption" that legislative enactments are constitutional. *Batts*, 66 A.3d at 295.

On May 2, 2014, after hearing further evidence, including testimony from two expert witnesses, the Honorable Michael J. Koury resentenced defendant to life

without parole. The Superior Court affirmed on September 4, 2015.

While defendant's petition for allowance of appeal from that decision was pending, the United States Supreme Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Montgomery* held that *Miller* was a "substantive" decision and so fully retroactive.[1] This is so, the Court explained, because *Miller* "rendered life without parole an unconstitutional penalty for a class of defendants," i.e., "juvenile offenders whose crimes reflect the transient immaturity of youth." While it "did not bar a punishment for all juvenile offenders," it did so for "all but the rarest ... whose crimes reflect permanent incorrigibility." *Id.* at 734 (internal quotation marks omitted).

The *Montgomery* Court further explained that *Miller* is to be understood in light of *Atkins v. Virginia*, 536 U.S. 304 (2002), which requires a hearing for an offender to establish membership in a protected class (there, intellectual disability). "The procedure *Miller* prescribes is no different." *Miller*, like *Atkins*, requires "a procedure through which [the offender] can show that he belongs to a protected class," i.e., a hearing in which offenders are "given the opportunity to show their crime did not reflect irreparable corruption[.]" *Montgomery*, 136 S. Ct. at 735-736. Like *Atkins*, *Miller* does not impose any "formal factfinding requirement"; rather, affording an *Atkins*-type hearing "gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence" for juvenile murderers "whose crimes reflect

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[1] *See Teague v. Lane*, 489 U.S. 288 (1989) (plurality) (holding that new "substantive" constitutional rulings are retroactive following the conclusion of direct appeal).

transient immaturity." *Id*. at 735.

In subsequently granting allowance of appeal in this case, this Court denied review of defendant's claim that it should reconsider its holding that *Miller* had not eliminated first and second degree murder, or categorically barred life without parole, for juvenile murder offenders. It accepted, however, review of his claims that the trial court and the Superior Court failed to follow *Miller*; "there is no procedural mechanism" to implement *Miller*; and that this Court must create and impose a process equivalent to "adult ... capital punishment," with "a presumption against juvenile LWOP," a "requirement for expert testimony," and a "'beyond a reasonable doubt' standard of proof."

As discussed below, the General Assembly should be given the first opportunity to consider revising what it has already enacted in the event courts prove to be unable to follow existing law. But since it is far too soon to predict such need, the policy arguments raised by defendant and his amici are solutions in search of problem. Contrary to their view, *Miller* and *Montgomery* do not require capital sentencing, but only require a court to decide if a juvenile offender is in the broad protected class immune to life without parole. Trial judges may be trusted to understand and apply the law, and should retain the independence to do so.

## SUMMARY OF ARGUMENT

*Miller* and *Montgomery* require a trial level decision that, while factually complex, is straightforward: whether the offender is in the broad protected class immune to life without parole. Because the class is very broadly defined – it includes all but the "irretrievably depraved" – most juveniles are in it, and juvenile life without parole will be rare, as *Miller* intends. The General Assembly (18 Pa.C.S. § 1102.1), this Court (*Commonwealth v. Batts*), and *Montgomery* (explaining the "substantive character" of *Miller*), adequately guide trail court discretion.

Defendant and his amici nevertheless insist that far more intrusive and comprehensive supervision of trial judges is needed. But this attack on the constitutionality of § 1102.1 has no basis. There is no reason to suppose trial judges will not act within the law, or that the Superior Court cannot adjudicate an alleged abuse of discretion under the proper standard. Further, this Court has consistently declined to step in to supplant acts of the General Assembly that have not even had a chance to operate. There is no need to cast a preemptive vote of no-confidence in trial judges and the Superior Court, let alone by re-writing § 1102.1 into a new version of § 9711. That would be an inherently legislative undertaking.

Defendant's legislative plan for substituting a complex capital sentencing process for § 1102.1 would actually work against *Miller*. That case creates a subset derived from persons convicted of first degree murder, and defines a broad category of juvenile offenders immune to life without parole. Presuming an offender is necessarily in the protected class would motivate defendants to withhold information

*Miller* demands concerning their "capacity for change" or "emotional maturity." Likewise, since the majority of juvenile offenders will clearly be in the broadly-defined protected class, requiring expert testimony in every case would waste judicial resources.

Nothing is served by revoking judicial independence of trial judges on the unfounded claim that *Miller* is too much for them. Trial courts already have guidance, from the legislature and this Court, to comply with *Miller*, and their decisions are subject to Superior Court review. Because there is nothing broken for them to fix, defendant's legislative policy prescriptions should be deferred or declined.

## ARGUMENT

### 1. Under *Miller* and *Montgomery* the sole decision is whether the offender is in the protected class.

Under *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), a juvenile offender "whose crime reflects permanent incorrigibility" is in a protected class, immune to life without parole. That penalty is allowed only for the "rare" juvenile offender "whose crime reflects permanent incorrigibility." *Miller*,132 S. Ct. at 2469. A juvenile offender must therefore be afforded a hearing, "no different" from that in *Atkins v. Virginia*, 536 U.S. 304 (2002), to "show that he belongs to the protected class," and that "[the] crime did not reflect irreparable corruption[.]" *Miller* "did not require trial courts to make a finding of fact" on incorrigibility, but "the substantive character" of its holding remains: for the typical juvenile offender "whose crime reflects transient immaturity," life without parole "is disproportionate under the Eighth Amendment." *Montgomery*, 136 S. Ct. at 735-736.[2]

The decision for the trial court under *Miller*, therefore, while not simple – it demands fact-sensitive, individualized consideration – is straightforward. If the defendant is not the "rare" offender "whose crime reflects permanent incorrigibility"

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[2] *Miller* extended prior decisions predicated on the unique characteristics of juvenile offenders. *Roper v. Simmons,* 543 U.S. 551 (2005), barred the death penalty for juvenile offenders. *Graham v. Florida,* 560 U.S. 48 (2010), held that such offenders could not be sentenced to life without parole for non-homicides. In *Miller* the Court cited *Roper* and *Graham* for the proposition that juveniles differ from adults in terms of impulsivity, susceptibility to environmental influences, and capacity for rehabilitation. change. *Roper* at 570; *Graham* at 68; *Miller* at 2464.

but "show[s] that he belongs to the protected class," life without parole is prohibited. That, and nothing more, is what *Miller* and the Eighth Amendment require the trial court to decide.[3]

Because deciding a juvenile offender is in the protected class is a matter for "discretion at post-trial sentencing," *Miller*, 132. S. Ct. at 2475; *Batts*, 66 A.3d at 291 (quoting *Miller*), the General Assembly promptly enacted factors to guide trial court discretion in 18 Pa.C.S. § 1102.1(d). Later this Court in *Commonwealth v. Batts*, 66 A.3d 286, 297 (Pa. 2013), clarified considerations essential to compliance with *Miller*; those factors are also found in the statute. This Court also noted that the new statute is open-ended, allowing the trial court "to consider any other factors that it deems relevant." 66 A.3d at 293. *See also Landrum v. State*, No. SC15-1071, 2016 WL 3191099 (Fla. June 9, 2016) (slip opinion) (holding *Miller* and *Montgomery* fully satisfied by similar statute).

Defendant and his amici nevertheless say this Court "must" create far more detailed instructions to trial courts, supplying what the legislature allegedly omitted from § 1102.1, by establishing "guidelines" (defendant's brief, 30) that fully replicate the adult capital sentencing process of 42 Pa.C.S. § 9711. This "must" include such

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[3] *E.g., People v. Holman*, 2016 IL App (5th) 100587-B, ¶¶ 32-39, 2016 WL 868413, at *9-11 (slip opinion) (holding consideration of the factors outlined in *Miller* sufficient: "the *Montgomery* Court stated that the purpose of *Miller's* procedural component is to separate those rare juvenile defendants who are incorrigible – and may therefore be sentenced to life in prison without parole – from those juvenile defendants whose crimes reflect their transient immaturity – who may not receive such a sentence. ... we find that the procedure followed here was adequate to serve this purpose") (citation omitted).

steps as announcing a formal "presumption" against juvenile life without parole, establishing requirements for expert testimony, and imposing a "beyond a reasonable doubt" standard of proof.

Defendant's claim that § 1102.1 is inadequate is an explicit attack on its constitutionality (defendant's brief, 57-58). But legislative enactments are strongly presumed to be constitutional. *Commonwealth v. McMullen*, 961 A.2d 842, 846 (Pa. 2008). This Court has refused to rush to fill alleged gaps in acts of the General Assembly, especially ones not yet reasonably tested. *Commonwealth v. Hale*, 128 A.3d 781, 785-86 (Pa. 2015) (finding that *Miller* illustrates the "substantial policy considerations" involved in deciding juvenile culpability and that "such matters are generally reserved ... to the General Assembly"); *Batts*, 66 A.3d at 296 (refusing to scrap entire statutory sentencing scheme in light of *Miller*, citing the "strong presumption that legislative enactments do not violate the constitution"); *Parker v. Children's Hospital of Philadelphia*, 394 A.2d 932, 940 (Pa. 1978) ("deference to a coequal branch of government requires that we accord a reasonable period of time to test the effectiveness of legislation"); *see Commonwealth v. Hopkins*, 117 A.3d 247, 262 (Pa. 2015) (Supreme Court "may not supply omissions in a statute"; collecting cases). *Montgomery* explained that *Miller* is a substantive matter. 136 S. Ct. at 734 ("*Miller* announced a substantive rule"). Such matters are inherently legislative.

Even assuming trial courts might have some unspecified difficulty with *Miller* and *Montgomery*, it is too soon to guess what it might be. There are few cases yet in which the new § 1102.1 factors even had controlling effect – here they were

considered only as policy guidance, because defendant committed the murder before the effective date of the statute. By comparison, this Court allowed for almost a decade of total legislative inaction on *Atkins* (*Montgomery* explains *Miller* is "no different" from *Atkins*, 132 S. Ct. at 735) before introducing procedural adjustments. *Commonwealth v. Sanchez*, 36 A.3d 24, 52 (Pa. 2011) (noting nine years had passed since *Atkins* with no legislation). Here the legislature *has* acted; and *Montgomery*, which explains the substantive nature of *Miller*, was decided only a few months ago.

The defense arguments identify no reason to expect Pennsylvania trial judges to be unable or unwilling to comply with the requirements of *Miller*, § 1102.1, *Batts*, and *Montgomery*. There is no concrete problem to solve. *Commonwealth v. Bell*, 516 A.2d 1172, 1177 (Pa. 1986) ("a challenge to a statute may not be raised in the abstract but must find its basis in an injury to the party seeking to have the enactment declared constitutionally infirm"). Under *Miller* and *Montgomery* juvenile life sentences will necessarily be rare. Few even exist at present, let alone in cases that call into question the ability of judges to comply with *Montgomery* and *Miller*.

This is not such a case. The trial court and the Superior Court did not have the benefit of *Montgomery* at the time they ruled, yet did nothing inconsistent with that decision and fully complied with *Miller*. The record shows the parties argued, and the trial court considered, *Miller*, *Batts, Knox* and the § 1102.1 factors; that defendant (now age 25) persisted in gang activity in prison; that he incurred a series of disciplinary measures for misconduct in prison; and that a psychiatrist who examined him testified he is incapable of rehabilitation (N.T. 5/1/14, passim; 5/2/14, 6). That

the defendant received a life without parole sentence is something *Miller* and *Montgomery* specifically allow. *Miller*, 132 S. Ct. 2469 (refusing to "foreclose a sentencer's ability to make that judgment"); *Montgomery*, 136 S. Ct. at 736 (holding that in some cases this may be "a just and proportionate punishment"). Defendant's concern that "the brutality or cold-blooded nature" of the crime might "overpower mitigating arguments" (defendant's brief, 19) also misunderstands that, under *Miller*, the brutality of the crime is clearly significant. The question is whether the "crime" reflects transient immaturity. *Montgomery*, 136 S. Ct. at 734, *quoting Miller*, 132 S. Ct. at 2469, *quoting Roper*, 543 U.S. at 573. Certainly the crime is not the sole consideration, but neither can it be ignored. Balancing such factors is quintessentially a matter of discretion

Contrary to defense speculation that trial judges will not follow the law, this Court has repeatedly reaffirmed "confidence in our trial judges," *Commonwealth v. Christine*, 125 A.3d 394, 400 (Pa. 2015), and has recognized them as "honorable, fair and competent," *Commonwealth v. White*, 734 A.2d 374, 426 (Pa. 1999) (citation omitted), relying on trial court discretion in a wide variety of contexts.[4] Trial judges

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[4] *E.g.*, *Commonwealth v. Christine, id.* (judges may be relied on to exclude biased or inflammatory evidence); *Commonwealth v. Parker*, 919 A.2d 943, 950 (Pa. 2007) (discretion to allow display of gun during opening statements); *Commonwealth v. Bowden*, 838 A.2d 740, 761-62 (Pa. 2003) (reliance on trial judge discretion in imposition of contempt sanction) (collecting cases); *Commonwealth v. Hawkins*, 701 A.2d 492, 511 (Pa. 1997) (instructing the jury); *Commonwealth v. Jones*, 688 A.2d 491, 514 (Pa. 1995) (evaluating comments by prosecutor);*Commonwealth v. Pierce*, 645 A.2d 189, 197-198 (Pa. 1994) (whether to allow jury view of crime scene); *Commonwealth ex rel. Walton v. Aytch*, 352 A.2d 4, 10 (Pa. 1976) (discretion in deciding mistrial motion).

are capable of exercising independent judgment within the bounds of the law without step-by-step instructions. Imposing them would be a vote of no-confidence not only in the trial bench, but also in the Superior Court.

This Court should not preempt the General Assembly for the sake of an unfounded assumption that trial courts cannot understand and apply *Miller* and *Montgomery*. Courts are presumably doing so already. As shown below, the various defense arguments, demanding that this Court step in to craft a top-to-bottom rewritten statute to replace § 1102.1, are without merit. Their plan is unworkable, and actually conflicts with *Miller*.

## 2. The policy recommendations of defendant and his amici should be deferred or declined.

Even viewed in the abstract (as they must be), the defense policy prescriptions would be problematic, and would actually interfere with what *Miller* requires.

### A. There is no basis for imposing capital sentencing procedures.

Other than stating factors to consider in deciding if the offender is within the protected class, *Miller* and *Montgomery* require no more, not even a specific factual finding on incorrigibility. *Montgomery*, 136 S. Ct. at 735 ("this finding is not required"); *Batts*, 66 A.3d at 297 (stating factors to be considered), *citing Knox,* 50 A.3d at 745, *citing Miller,* 132 S.Ct. at 2455; *see People v. Gutierrez*, 324 P.3d 245, 268-269 268-69 (Ca. App. 4th Dist. Div.1 2014) (citing, inter alia, *Batts*, *Miller* and *Montgomery*) (same factors). Yet defendant says this Court must impose "at least the same" process "afforded an adult facing capital punishment" whenever a juvenile might be subject to life without parole. Otherwise, he says, sentencing proceedings

will be "unconstitutional" (defendant's brief, 57-58).

Arguing that what *Miller* requires is "unconstitutional" absent conditions *Miller* never mentions is, of course, hyperbole. Juvenile life without parole, like the death penalty, is an extremely severe punishment, as is fitting for first degree murder. But the analogy to capital sentencing is otherwise flawed. *Miller* asks only whether the defendant is in the protected class, and so exempt from that penalty.

Capital sentencing decides the sentence; the death penalty is unavailable on conviction and remains so unless aggravating circumstances are proven to a jury beyond a reasonable doubt. *See Gregg v. Georgia*, 428 U.S. 153, 196-197 (1976). The process selects, from the category of all first degree murder offenders, those who may be subject to the higher penalty of death. Under *Miller*, which does not require a jury, the starting point is also the category of all first degree murder offenders; but that category is already subject to life without parole, as the ordinary penalty for that crime. That category has a subset of potentially exempt juvenile offenders. It is for the juvenile offender to "show that he belongs to [that] protected class." *Montgomery*, 136 S. Ct. at 735. No one is in it by default. Although the class is very broadly defined, some exceptional juvenile offenders are *not* included.

*Montgomery* therefore *rejected* analogy to capital cases, because while they "may have had some effect on the likelihood that capital punishment would be imposed," unlike *Miller* they do not "render[] a certain penalty" unconstitutional "for a category of offenders." 136 S. Ct. at 736. Thus, defendant's heavy reliance (defendant's brief, 30-33) on one capital case, *Godfrey v. Georgia*, 446 U.S. 420

(1980) (plurality), is misplaced. The plurality there merely found that the aggravating circumstance did not sufficiently distinguish ordinary murder. Under *Miller*, ordinary murder may be subject to life without parole at the outset, but a juvenile offender is exempted if he shows he is in the protected class.[5]

A death-penalty-like process would not materially advance the *Miller* inquiry. For example, under § 9711 death is mandatory for an offender with aggravating but no mitigating circumstances. *Commonwealth v. Ballard*, 80 A.3d 380, 409 (Pa. 2013). Yet mandatory punishment for juveniles is what *Miller* eliminated. The statute defines numerous aggravating circumstances, none of which addresses what *Miller* requires the court to decide. In order to replace § 1102.1 with a new version of § 9711, the latter would have to be extensively modified and rewritten to address these and other problems. That is not a job for courts. *See Commonwealth v. Hopkins*, 117 A.3d at 262 (defective provisions could not be severed because rewriting the balance of the statute is not a judicial function). Designing a top-to-bottom process which must be both like, and yet unlike, § 9711 would be an inherently legislative undertaking. *Commonwealth v. DeHart*, 516 A.2d 656, 671 (Pa. 1986) (holding that § 9711 is "clearly an appropriate exercise of the legislative function"); *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 959 (Pa. 1982) (rejecting invitation to revise § 9711

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[5] Likewise, and contrary to the defense claim (defendant's brief, 58), in deciding *Miller* and *Montgomery* the United States Supreme Court did not contradict its own decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013). *Alleyne* concerns facts that effectively create an aggravated crime with an increased penalty. *Hopkins*, 117 A.3d at 256-257. Life without parole is the penalty already attached to first degree murder, but a juvenile offender may show that he is in the protected class exempt from that penalty.

because "we may not act as judges as we might as legislators").

*DeHart* held that the capital sentencing process is a legislative matter, even though it has procedural elements. *See also Commonwealth v. Childs*, No. 19 EAP 2015, 2016 WL 3909090, at *7 (Pa. July 19, 2016) (holding legislature had created "a procedural statute"). Thus, quite apart from the question of need, defendant's own argument calling for a capital-type sentencing process puts the matter squarely in the legislative realm.

The result of such legislation would be pointless complication that could only obscure the straightforward question raised by *Miller*.[6] The complexity of capital sentencing makes it a black hole for judicial resources. Under § 9711 there have been some 1,719 decisions by this Court (including 48 in the Superior Court, which in theory hears no capital cases) on myriad aspects of its application, arising from only about 300 capital cases. While *Miller* cases will necessarily be few they will persist for decades, and over time complex procedures can be expected to generate litigation

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[6] The amicus brief of the association of criminal defense lawyers asks this Court to go even further, overrule *Batts*, and hold that *Miller* abolished first degree murder for juvenile offenders. While an amicus has no standing to raise issues (and this Court dismissed this claim in granting allocatur), this argument was thoroughly refuted in *Batts*. As shown there, 18 Pa.C.S. § 1102(a), imposing a maximum life term, "does not itself contradict *Miller*" because it does not bar parole. "[I]t is only when that mandate becomes a sentence of life-without-parole as applied to a juvenile offender – which occurs as a result of the interaction between Section 1102, the Parole Code, *see* 61 Pa.C.S. § 6137(a)(1), and the Juvenile Act, *see* 42 Pa.C.S. § 6302 – that *Miller's* proscription squarely is triggered." 66 A.3d at 295-296. Hence, there is nothing to "sever" (amicus brief of association of criminal defense lawyers, i). The statute barring parole, 61 Pa.C.S. § 6137(a)(1), is not facially unconstitutional, but only as applied to the protected class. Likewise, under *Miller* there are no statutes to "rewrite" (*id.*) – except, that is, for *defendant's* demand for judicial legislation to replace § 1102.1 with a rewritten version of § 9711.

out of proportion to their number. Yet this would not accomplish what *Miller* requires. Following *Miller* does that.

**B. *Miller* should not be misread to require inappropriate modes of review, types of evidence, or burdens of proof.**

Defendant and his amici demand new law by misreading *Miller* to require creating a de novo standard of appellate review; a formal presumption against juvenile life without parole; an expert testimony requirement; and a "beyond a reasonable doubt" burden on the Commonwealth to prove the defendant is outside the protected class of juvenile offenders. But *Miller* requires none of these things, and they afford no benefit.

De novo review is appropriate to pure questions of law, while an abuse of discretion standard is correct for fact-bound decisions that involve credibility, as here. *In Re Doe*, 33 A.3d 615, 624-625 (Pa. 2011). Hence, under *Miller* the question for appeal is whether the trial court applied the correct legal standard and whether it abused its discretion under that standard. Defendant says that is "insufficient," but cannot say why; he only reiterates that offenders outside the protected class must be "rare" and "uncommon" (defendant's brief, 40). That is already true by definition – the protected class *as defined* includes all but the "rare" offender "whose crime reflects permanent incorrigibility." *Miller*,132 S. Ct. at 2469. De novo review is not needed for trial judges to know this definition; and a de novo standard could be abused to raise arguments withheld below. Appellate courts should not be relegated to serve as second-chance trial courts.

Decreeing a "presumption" and a "beyond a reasonable doubt" burden conflicts

with *Miller*. *Montgomery* explained that under *Miller*, like *Atkins*, the burden is on the offender, who "receives a procedure through which *he can show* that he belongs to the protected class,"136 S. Ct. at 735 (emphasis added). But a presumption is "the full equivalent of express proof until it is successfully rebutted." *Commonwealth v. Iacobino*, 178 A. 823, 825 (Pa. 1935). An offender *presumed* to belong to the class need do nothing, which contradicts *Miller*. Since the essential information is uniquely in the defendant's control, placing the sole burden on the Commonwealth – let alone a "beyond a reasonable doubt" burden – would be an incentive to withhold it. *See Commonwealth v. Reilly*, 549 A.2d 503, 512 (Pa. 1988) (rejecting claim that burden of proving insanity defense should be on the Commonwealth; preponderance burden on the defense "permits the party who has control over the evidence reflecting upon this question to come forward with the evidence"); *Commonwealth v. Sohmer*, 546 A.2d 601, 607 (Pa. 1988) (deciding sanity of the offender at sentencing does not require assignment of a burden of proof to either the prosecution or the defense).[7]

*Miller* requires consideration of the offender's "diminished culpability and capacity for change"; circumstances of the crime; extent of participation; "family, home and neighborhood environment"; "emotional maturity and development";

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[7] While the defense briefs never say so explicitly, they would impose a mandatory presumption, not a permissive or merely inferential one. *Commonwealth v. Kelly*, 724 A.2d 909, 911 (Pa. 1999) (mandatory presumption "tells the trier that he or she *must* find the elemental fact upon proof of the basic fact," unless opponent can rebut it) (original emphasis); *Commonwealth v. Shaffer*, 288 A.2d 727, 735-736 (Pa. 1972) (presumption "force[s] the trier of fact to reach a given conclusion, once the facts constituting its hypothesis are established, absent contrary evidence"). The Commonwealth would have the burden to disprove the presumption yet would have no access to the most important evidence.

family or peer pressure; past exposure to violence; drug and alcohol history; ability to deal with the police and capacity to assist counsel; mental health history; and "potential for rehabilitation." *Batts*, 66 A.3d at 297. Most of this information is exclusively in the defendant's hands. A court could not understand his "capacity for change" or "emotional maturity" without his active cooperation. That is precisely why it is for the *offender* to "show that he belongs to the protected class." *Montgomery*, 136 S. Ct. at 735. The defense demand for a mandatory presumption would *circumvent* the *Miller* inquiry.

There is no need to stack the deck. Only killers possessed of "irreparable corruption" can be eligible for life without parole, and they will necessarily be few. In this sense *Miller* has already imposed a kind of presumption by its extremely broad definition of the protected class. Going beyond this serves no purpose.

The need for expert testimony is ordinarily for the discretion of the trial court. *Commonwealth v. Delbridge*, 855 A.2d 27, 46 (Pa. 2003); *Commonwealth v. Williams*, 84 A.3d 680, 697 (Pa. 2014) (Saylor, J., with Todd, J., dissenting) ("Appellant does not need to have a 'right' to present expert testimony to benefit from an exercise of the trial court's discretion in permitting such evidence"). Such testimony may be needed in some cases. But since offenders in the protected class are the rule, expert testimony may be unnecessary in most cases. Requiring it in all cases would pointlessly increase the already severe budgetary, time, and resource burdens on trial courts.

None of the policy proposals advanced by the defense advances what *Miller*

requires, and this Court should be reluctant to preempt the legislature by rewriting § 1102.1. This is all the more true because the apparent object of the defense proposals is not to ensure juvenile life without parole is rare – something the law already does – but to make it a practical impossibility.

Why? Despite immunizing the great majority of juvenile murder offenders, the United States Supreme Court refused to "foreclose a sentencer's ability" to impose life without parole on killers "whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734; *Miller*, 132 S. Ct. 2469. That qualification is reasonable. For Pennsylvania to forfeit its ability deal proportionately with rare juvenile murderers of "irretrievable depravity," *Montgomery*, 136 S. Ct. at 733, by conflating them with those "whose crimes reflect transient immaturity," *id*. at 735, would only endanger future victims to no purpose. As the United State Supreme Court recognized, no one can benefit from affording the possibility of parole to murderers who are irretrievably depraved.

**C. *Miller* does not warrant expansion.**

The unstated assumption underlying the policy arguments of defendant and his amici is that this Court should go far beyond what *Miller* requires. That assumption is questionable.

Given *Miller's* own, key rationale – that killers under 18 are prone to "impetuous and ill-considered actions," *Roper*, 543 U.S. at 569 – retaining availability of the harshest punishment in exceptional cases is warranted. Innocent lives may be saved because even impulsive actors may be deterred by severe

consequences. Pennsylvania law, moreover, has long treated murder as a special category of violence that cannot be wholly excused or mitigated by youth. *E.g.*, *Commonwealth v. Williams*, 522 A.2d 1058, 1063 (Pa. 1987) ("[T]here is no constitutional guarantee of special treatment for juvenile offenders"); *Commonwealth v. Pyle*, 342 A.2d 101, 104 (Pa. 1975) ("Where murder is charged, treatment as a 'youthful offender' still does not arise as a matter of right"). In *Batts*, while recognizing the "trend of the United States Supreme Court towards viewing juveniles as a category as less culpable than adults," this Court found that "there has been no concomitant movement in this Court or in the Pennsylvania Legislature away from considering murder to be a particularly heinous offense, even when committed by a juvenile." *Batts*, 66 A.3d at 299.

Another central premise of *Miller* appears increasingly uncertain. There is no real neurological basis for asserting that offenders under the age of 18 are less responsible for, or less able to control, their criminal conduct. *See* Patterson, *Criminal law, neuroscience, and voluntary acts* (Journal of Law and the Biosciences, May 4, 2016), 3 ("all behavior is caused ... if causation is an excuse, then no one is guilty of anything"), 4 ("Neuroscience is potentially quite useful in making judgments about criminal responsibility" but "the science is not quite sufficiently developed to do more than provide a promise for the future"); Epstein, *The Myth of the Teen Brain* (Scientific American, June 1 2007) ("I have not been able to find even a single study that establishes a *causal* relation between the properties of the brain being examined and the problems we see in teens") (original emphasis); Morse, *Brain Overclaim*

*Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio St. J. Crim. L. 397, 409 (2006) (Noting that while *Roper* is supportable by "common sense and behavioral science evidence that adolescents differ from adults," the "neuroscience evidence in no way independently confirms that adolescents are less responsible").

Two states have reacted to *Miller* by construing their own constitutions to bar life without parole for juvenile murderers, but five others (including Pennsylvania in *Batts*) declined to do so.[8] The General Assembly continues to support imposing juvenile life without parole in rare cases, and has acted to guide trial court discretion, in § 1102.1. That determination is entitled to deference. *See Commonwealth v. Zettlemoyer*, 454 A.2d at 960, *quoting Furman v. Georgia*, 408 U.S. 238, 383 (1972) ("[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people").

Trial judges are presumed capable and willing to follow the law. They have

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[8] *Bun v. State,* 769 S.E.2d 381, 383-384 (Ga. 2015); *Conley v. State,* 972 N.E.2d 864, 879-880 (Ind. 2012); *State v. Houston,* 353 P.3d 55, 76-77 (Utah 2015); *State v. Usry,* 2016 WL 1092654, *5 (N.J. Super. Ct. App. Div., Mar. 22, 2016) (unreported) ("[D]efendants' argument that the New Jersey Constitution requires a categorical ban on life-without-parole sentences for juvenile homicide offenders is rejected"). The Supreme Court of Massachusetts explained that it "often" affords criminal defendants "greater protections ... than are available under corresponding provisions of the Federal Constitution," even to the extent of banning the death penalty under its constitution. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 283, 284 (Mass. 2013). This is not so of Pennsylvania. The Iowa Supreme Court 4-3 decision specified no textual basis in its constitution, and seemed to indicate that the question turned on sheer judicial preference. *State v. Sweet*, 879 N.W.2d 811, ¶ 8 (Iowa 2016). This too is contrary to Pennsylvania jurisprudence, which considers the constitutionally-expressed will of the people the ultimate source of law. *See In re Bruno*, 101 A.3d 635, 659 (Pa. 2014) (constitutional language "must be interpreted in its popular sense, as understood by the people when they voted on its adoption"); *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (same).

sufficient direction, from *Miller*, *Batts*, § 1102.1, and *Montgomery*, to sift through disputed facts and credibility issues and decide whether a juvenile murder offender is in the broad protected class immune to life without parole. The decisions of the United States Supreme Court do not require Pennsylvania to go beyond this. Absent concrete problems that have yet to actually appear and perhaps never will, this Court should not override legislative policy determinations of the General Assembly.

## CONCLUSION

For the foregoing reasons, the amicus for the Commonwealth respectfully requests this Court to affirm the judgments of sentence.

Respectfully submitted,

/s/

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