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45 MAP 2016

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 45 MAP 2016

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

QU'EED BATTS,
Appellant.

REPLY BRIEF OF APPELLANT QU'EED BATTS

Appeal from the September 4, 2015, and November 10, 2015, decisions of the Pennsylvania Superior Court docketed at 1764 EDA 2014, affirming the May 2, 2014, order of the Court of Common Pleas of Northampton County, CP-48-CR-0001215-2006, sentencing appellant to life without parole and denying reargument.

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SUMMARY OF ARGUMENT

Appellant Qu'eed Batts asks this court to address a question as yet unanswered by this Court, the United States Supreme Court, or the Pennsylvania General Assembly: what procedural protections are due to a juvenile facing a life without parole sentence, based on a homicide conviction on or before June 24, 2012.

Although the questions raised by Mr. Batts are matters of first impression, this Court is not without guidance. The United States Supreme Court has made clear that the Eighth Amendment prohibits a life without parole sentence for juvenile offenders unless their "crime reflects irreparable corruption." *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (quotation omitted). Such a sentence passes constitutional muster only in "exceptional circumstances," for "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible," and not for "the vast majority of juvenile offenders." *Montgomery v. Louisiana*, 136 S. Ct. 718, 733-36 (2016). In other words, the United States Supreme Court has exempted nearly all juveniles from even discretionary life without parole sentences. *Id.* at 734.

Despite the illegality of sentencing all but the most exceptional juveniles to life without parole, the Commonwealth's premise (and that of its *amicus*) that judges have discretion to impose such a sentence on all juveniles is incorrect. The

United States Supreme Court has spoken: states are not "free to sentence a child whose crime reflects transient immaturity to life without parole." *Id.* at 735.

Instead of addressing this point or the propriety of procedural protections that logically flow from it, the Commonwealth hides behind a sentencing statute that explicitly does not apply to juveniles like Mr. Batts who were convicted on or before June 24, 2012. The Commonwealth further assumes that the legislature can dispense with protections required by the Constitution. Compounding this error, the Commonwealth conflates decisions by this Court and the United States Supreme Court that do not address what procedural protections are required with decisions that no heightened procedure is required.

These arguments ignore the direction in *Montgomery*: lip service to youth is not enough. *Id.* at 735. To ensure the rarity of this exceptional punishment, courts must assume that any given juvenile's conduct reflects the transient immaturity that the United States Supreme Court has long held is inherent in youth, and require proof to a jury beyond a reasonable doubt before finding differently. Further, because sentencing a juvenile to life without parole is illegal unless he is irreparably corrupt, a juvenile who challenges such a sentence is entitled to *de novo* review.

Finally, this Court can and should exercise its discretion to consider the substantive legality of Mr. Batts' sentence—one imposed under an unconstitutional

statute. Mr. Batts and those juveniles like him, for whom no statutory sentencing scheme applies, face extraordinary circumstances that warrant this Court's intervention.

ARGUMENT

I. This Court Is Empowered To Impose Procedural Protections That Protect Substantive Rights

Article V, Section 10 of the Pennsylvania Constitution grants this Court authority to devise a procedure for implementing substantive law. *See Commonwealth v. Sanchez*, 36 A.3d 24, 52 (Pa. 2011). This Court's power of judicial administration includes authority to determine whether judge or jury acts as factfinder, which party bears the burden of proof, and what level of proof is required. *Id.* This Court, therefore, is empowered to grant the precise relief that Mr. Batts requests. The legislative enactment in section 1102.1 of the Crimes Code does not divest this Court of jurisdiction—both because it does not apply to Mr. Batts or the issues raised in this appeal and because it does not, and cannot, foreclose greater protections that the Eighth Amendment requires. Nor has Mr. Batts waived his challenge to the life without parole sentence.

A. Section 1102.1 Is Not Dispositive Of The Procedural Protections Required When A Juvenile Faces A Possible Life Without Parole Sentence

1. *No Statutory Sentencing Scheme Applies To Juveniles Convicted On Or Before June 24, 2012*

The Commonwealth and its *amicus* both argue that Mr. Batts has waged an attack on the constitutionality of Section 1102.1(d) of the Pennsylvania Crimes Code. (Commw. Br. at 23; PDAA Br. at 13.) Yet both acknowledge that the statute does not apply to Mr. Batts. (Commw. Br. at 46; PDAA Br. at 6.) Nor does the statute apply to other juveniles like him who were illegally sentenced to life without parole based on a conviction entered on or before June 24, 2012. 18 Pa. C.S. § 1102.1(a) (requiring specific findings be made before sentencing a juvenile "convicted after June 24, 2012" to life without parole); *see also Garnett v. Wetzel*, Civ. No. 13-3439, 2016 WL 4379244, at *3 (Aug. 17, 2016) ("The statute which applied [to juveniles convicted in Pennsylvania on or before June 24, 2012] has been declared unconstitutional. The new statute does not apply to [them.]"); *Songster v. Beard*, Civ. No. 04-5916, 2016 WL 4379233, at *3 (Aug. 17, 2016) (recognizing same). Despite being well aware that dozens of juveniles were in Mr. Batts' precise position, and that hundreds more were serving mandatory sentences of life without parole going back decades, the legislature chose not to provide statutory relief from these unconstitutional sentences. (*See* 196 PA. LEG. J. – H.R. 63, at 2025 (Oct. 16, 2012) (acknowledging that approximately 450

juveniles were serving life without parole sentences in Pennsylvania at the time Section 1102.1 was enacted).) The Commonwealth cannot now argue that Section 1102.1 limits the procedural protections that are and should be available to Mr. Batts.

2. *The Judiciary Maintains Exclusive Authority To Implement Procedural Rules*

Moreover, it is in this Court's purview—not the legislature's—to engage in procedural rulemaking. *Commonwealth v. McMullen*, 961 A.2d 842, 848 (Pa. 2008). Section 1102.1 did not, because it could not, address the questions of who bears the burden of proof, what standard of proof he must meet, what level of review should apply, and who serves as factfinder. *Id.* at 848; *Sanchez*, 36 A.3d at 53; *see also Montgomery*, 136 S. Ct. at 732 ("a procedural rule regulate[s] . . . the *manner of determining* defendant's culpability." (emphasis in original) (alterations omitted)).

This Court's decision in *Commonwealth v. DeHart*, 516 A.2d 656 (Pa. 1986) does not diminish the judiciary's authority. (*See* Commw. Br. at 23.) In *DeHart*, defendant challenged the General Assembly's pronouncement of mitigating factors as usurping this Court's judicial administration function. *Id.* at 670-71. This Court held that the legislature was authorized to determine "what specific factors relating to the nature of the crime and the character and record of the accused should be considered" when imposing punishment. *Id.* at 671.

In arguing that this Court must conduct a *de novo* review, impose a heightened standard of proof, recognize a presumption against juvenile life without parole, and require competent expert testimony, Mr. Batts does not suggest that lower courts should not consider the factors outlined in Section 1102.1. Indeed, Mr. Batts concedes that many of these factors are relevant to determining whether a juvenile is irreparably corrupt.[1] (*Compare* Batts Br. at 45-53, 54-55 (requesting review of determination on Mr. Batts' culpability and criminal sophistication) *with* 18 Pa. C.S. § 1102.1(d) (requiring findings on, *inter alia*, "the degree of defendant's culpability" and "[t]he degree of criminal sophistication exhibited by the defendant").) Rather, he argues that specific procedural safeguards—in other words, "the manner of determining defendant's culpability"—are required to mitigate the risk of imposing an unconstitutional sentence on an otherwise exempt class of juveniles. *See Montgomery*, 136 S. Ct. at 735 (distinguishing procedural and substantive requirements). *DeHart* is inapposite.

In contrast to the Pennsylvania General Assembly, the United States Supreme Court recognized that states would need to implement procedural

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[1] Mr. Batts does not concede that these factors are sufficient to determine whether a child is within the class of juveniles who may be sentenced to life without parole. Indeed, the legislature did not attempt to create an exclusive list. *See* 18 Pa. C.S. § 1102.1(d)(7)(vii) (requiring courts to consider "other" "relevant" characteristics of the defendant). For example, Section 1102.1 ignores the "possibility of rehabilitation" in the future, the individual's "failure to appreciate risks and consequences," and the effect of "familial and peer pressures," factors that the United States Supreme Court explicitly held were relevant. *Miller*, 132 S. Ct. at 2468.

protections to give effect to the substantive holdings in *Montgomery* and *Miller*. *See Montgomery*, 136 S. Ct. at 735 (recognizing that *Miller* left for the States to determine in the first instance how to implement the substantive holding). As the *Montgomery* Court explained, neither *Miller* nor *Montgomery* mandated specific procedures "to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Id.* This is precisely what Mr. Batts is asking this court to do. The United States Supreme Court's decision to leave procedural rules to the states "does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." *Id.* at 744. The absence of a statute, or the existence of one that is insufficient to protect Mr. Batts' from an illegal life without parole sentence, should not condemn Mr. Batts to die in prison.

B. Mr. Batts Does Not Seek Relief From Discretionary Aspects Of His Sentence

The Commonwealth further urges this Court to decline to decide the issues it has taken on appeal, arguing that Mr. Batts challenges the discretionary aspect of his sentence. (Commw. Br. at 42-45.) This position misunderstands Mr. Batts' argument and the holdings in *Miller* and *Montgomery*.

Under *Miller* and *Montgomery*, sentencing courts do *not* have discretion to sentence an entire class of juveniles—a class that necessarily encompasses the majority of juveniles who have committed first degree murder—to life without

parole. *Montgomery*, 136 S. Ct. at 734 ("[L]ife without parole [is] an unconstitutional penalty for a class of defendants." (internal quotations omitted)); *see also* PDAA Br. at 11-12 (conceding that the sentencing court must decide whether the juvenile is in the protected class). As the United States Supreme Court explained in *Montgomery*, imposing life without parole on juveniles whose conduct reflects only transient immaturity is an invalid sentence, "[e]ven if a court considers a child's age before sentencing." 136 S. Ct. at 734; *see also Veal v. State*, 784 S.E.2d 403, 401-12 (Ga. 2016) (holding that imposing a life without parole sentence on any juvenile outside the narrow class defined in *Montgomery* was void, not merely voidable).

Because *Miller* and *Montgomery* eliminated states' power to impose life without parole on juveniles like Mr. Batts, in the absence of explicit findings and procedural protections to determine he is outside the protected class, this Court has jurisdiction over his appeal.

II. Additional Procedural Protections Are Required Before A Court May Sentence A Juvenile To Life Without Parole

The United States Supreme Court did not decide, contrary to the Commonwealth and *amicus* arguments, that any procedure would be *sufficient* to protect juveniles' Eighth Amendment rights. (*See, e.g.*, PDAA Br. at 11.) Nor did this Court reject in *Batts I* the argument that additional procedures are required before a juvenile may be sentenced to life without parole. (*See, e.g.*, Commw. Br.

at 41-42 ("Nowhere in *Batts I* . . . did this Court direct the trial court to apply capital sentencing procedures . . . nor did this Court instruct that any heightened standard of review be created.").) Even if it had, the United States Supreme Court's subsequent decision in *Montgomery* indicates that states must adopt procedures that protect the substantive right of juveniles to be free from unconstitutional life without parole sentences. 136 S. Ct. at 735. Simply considering the defendant's youth and its attendant characteristics is not enough. *Id.* at 734 ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity."); *see also Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) (holding that, although some pre-*Miller* juvenile life without parole sentencing hearings under review "touch[ed] on the issues of youth," "none of them approach the sort of hearing envisioned by *Miller*."); *Garnett*, 2016 WL 4379244, at *3 ("[T]he sentencing court . . . cannot avoid determining whether the defendant is irreparably corrupt and permanently incorrigible.").

The transient immaturity exhibited by the vast majority of juveniles, including those guilty of grave criminal conduct, dictates their exemption from a life without parole sentence. Thus, courts must presume that a juvenile life without parole sentence is disproportionate. For such a sentence to be legal, it must be

supported by findings made by a jury beyond a reasonable doubt. Further, because of the similarities between a juvenile life without parole sentence and capital punishment, juveniles are entitled to a sentencing hearing that affords the same protections offered to adults facing a capital sentence.

A. This Court Should Recognize A Presumption Against Life Without Parole

1. *Mr. Batts Is Entitled To A Presumption Against Life Without Parole Upon Showing Juvenile Status*

The Commonwealth and its *amicus* advocate placing the burden on a child to prove that he is not among the rare group of juvenile homicide offenders whose conduct reflects irretrievable depravity. (*See* Commw. Br. at 32 (citing *Montgomery*, 136 S. Ct. at 736); PDAA Br. at 21 (citing *Montgomery*, 136 S. Ct. at 735).) Their position relies on the statements in *Montgomery* that "prisoners . . . must be given the opportunity to show their crime did not reflect irreparable corruption" and afforded a "procedure through which he can show that he belongs to the protected class." (*See id*.) The recognition in *Montgomery* that *some procedure* is required stops far short of holding that juveniles bear the burden of proving that they are not irretrievably depraved: as the Commonwealth concedes, the United States Supreme Court declined to establish specific procedures for determining when life without parole may be imposed constitutionally on a

juvenile.[2] (Commw. Br. at 31.)

Further, the reference to a procedure in *Montgomery* must be read in light of the fact that the Court addressed defendants who were afforded *no procedure* for considering the propriety of imposing life without parole—youth notwithstanding. 136 S. Ct. at 725-26 (addressing mandatory juvenile life without parole). To the extent *Montgomery* places any burden on a prisoner to prove that he is part of the protected class, it is met when he shows that he is a juvenile. The presumption that life without parole violates an offender's constitutional rights naturally flows after he has met this burden: the "attendant characteristics" of youth are the precise reason juveniles may not be sentenced to life without parole. *Miller*, 132 S. Ct. at 2460. Requiring a juvenile to prove, for instance, his impulsivity, lack of maturity, vulnerability to family and peer pressure, and capacity for rehabilitation is illogical and a waste of resources: Courts must conclude that youth are possessed of these traits. *See Miller*, 132 S. Ct. at 2464; *Graham v. Florida*, 560 U.S. 48, 68-69 (2010); *Roper v. Simmons*, 543 U.S. 551, 569 (2005). Absent evidence to the contrary, they also must conclude that any given juvenile's conduct reflects only transient immunity. *See Graham*, 560 U.S. at 68 ("'[J]uvenile offenders cannot with reliability be classified among the worst offenders.'" (quoting *Roper*, 543

[2] Regardless, a presumption of transient immaturity logically flows from the *Montgomery* direction—repeated twice—that the "vast majority of juvenile offenders" are not irreparably corrupt. (*See* Batts' Br. at 21-27.)

U.S. at 569)); *Miller*, 132 S. Ct. at 2465 ("[I]ncorrigibility is inconsistent with youth." (quotation omitted)); *see also State v. Seats*, 865 N.W.2d 545, 555 (Iowa 2015) ("[T]he presumption for any sentencing judge is that the judge should sentence juveniles to life in prison with the possibility of parole for murder unless the other factors require a different sentence."); *People v. Gutierrez*, 324 P.3d 245, 262 (Cal. 2014) ("A sentence of life without parole . . . would raise serious constitutional concerns if it were imposed pursuant to a statutory presumption in favor of such punishment.").

2. *Requiring Juveniles To Show They Are Not Irretrievably Depraved Is At Odds With United States And Pennsylvania Supreme Court Precedent*

Placing the burden on a juvenile to establish anything more than his age ignores the underlying rationale in *Miller*: that children are different from adults. As the United States Supreme Court has now repeatedly recognized, the Constitution affords additional protection to juveniles in part because "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." *Graham*, 560 U.S. at 78 (2010); *see also Miller*, 132 S. Ct. at 2468 (recognizing that juveniles "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth."); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2400–01 (2011) (discussing children's responses to interrogation). They are thus less able to give meaningful assistance to counsel,

impairing the quality of their representation. *Graham*, 560 U.S. at 78.

Nonetheless, *amicus* PDAA argues that children are in a better position than the Commonwealth to put forth evidence related to irretrievable depravity. (*See* PDAA Br. at 21.) This position not only ignores the unique obstacles facing juveniles, but it also flouts the inherent complexity of determining whether a juvenile offender is beyond rehabilitation. Even expert psychologists are unable to "'differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Graham*, 560 U.S. at 67 (quoting *Roper*, 543 U.S. at 573). It does not follow that a juvenile can bear this burden.

Further, the Commonwealth would have a juvenile prove a negative to avoid a life without parole sentence—*e.g.*, that he is not permanently incorrigible or beyond rehabilitation. (*See* Commw. Br. at 29-30; *see also* PDAA Br. at 20-23.) "It is a well-recognized principle of evidence that he who has the positive of any proposition is the party called upon to offer proof of it. It is seldom, if ever, the duty of a litigant to prove a negative until his opponent has come forward to prove the opposing positive." *Fazio v. Pittsburgh Rys. Co.*, 182 A. 696, 698 (Pa. 1936). As intermediate appellate courts have recognized, requiring a litigant to prove a negative saddles him with a "virtually impossible burden." *Commonwealth v. Buonopane*, 599 A.2d 681, 683 n. 2 (Pa. Super. Ct. 1991). The problem is only

exacerbated when a litigant's liberty hangs in the balance. *See, e.g.*, *Commonwealth v. 1997 Chevrolet*, 106 A.3d 836, 869 (Pa. Commw. Ct. 2014) ("It is problematic that a person can be [punished] because she is unable to prove a negative"). Accordingly, the burden of proving that life without parole is warranted must be on the Commonwealth.

B. A Jury Must Determine That The Commonwealth Rebutted This Presumption Beyond A Reasonable Doubt

The Commonwealth does not address what burden of proof it must meet when it seeks a life without parole sentence, relying instead on its positions that juveniles must carry a burden to prove a complex negative and that they are not entitled to capital protections. (Commw. Br. at 31-32.) But given that a life without parole sentence is illegal when imposed on a juvenile whose crime reflects only transient immunity, Sixth Amendment jurisprudence requires jury findings beyond a reasonable doubt. This is true not only because such protections are afforded to capital defendants, but also because a juvenile's irretrievable depravity would remove him from the protected class that constitutionally cannot be sentenced to life without parole.

The Commonwealth concedes that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny prohibit a judge from imposing a sentence greater than the maximum he could have imposed under state law absent additional factfinding. (Commw. Br. at 53-54.) A jury must find such facts beyond a reasonable doubt.

Apprendi, 530 U.S. at 476. The relevant maximum for *Apprendi* purposes "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (*citing Ring v. Arizona*, 536 U.S. 584, 602 (2002)) (emphasis omitted).

Apprendi protects not only capital defendants, but also precludes judicial factfinding that affects, *inter alia*, sentencing guideline range maximums, *see United States v. Booker*, 543 U.S. 220 (2005); *Blakely*, 542 U.S. 296; determinate sentencing tiers that authorize elevated sentences, *see Cunningham v. California*, 549 U.S. 270 (2007); mandatory minimum sentences, *see Alleyne v. United States*, 133 S. Ct. 2151 (2013); and maximum criminal fines, *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012). *Apprendi*'s protections apply regardless of whether the "enhanced sentence depends on finding a specified fact . . . , one of several specified facts . . . , or *any* aggravating fact." *Blakely*, 542 U.S. at 305 (emphasis in original). "When a finding of fact *alters the legally prescribed* punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne*, 133 S. Ct. at 2162 (emphasis added).

Here, the court could only sentence Mr. Batts to life without parole if his crime reflected irretrievable depravity or permanent incorrigibility. In other words,

irretrievable depravity would alter the punishment available. Regardless of whether "irretrievable depravity" is characterized as a question of fact or a conclusion of law based on weighing the multiple factors enunciated in *Miller*, the facts that support imposition of life without parole must be found by a jury beyond a reasonable doubt. *See Blakely*, 542 U.S. at 305.

Pennsylvania's "indeterminate, discretionary, statutory sentencing scheme," does not authorize the General Assembly to grant judges authority denied them in the Constitution. (*See* Commw. Br. at 40.) And appellant's position is not tantamount to removing judicial discretion: for the vast majority of juveniles, a judge constitutionally may impose a range of sentences up to, but excluding, life without parole. Similarly, for a juvenile whose crime reflects irretrievable depravity, a judge can exercise discretion to sentence him to something less than life without parole.[3] But before a life without parole sentence may be imposed, a jury must find facts supporting it.

C. Juveniles Facing A Life Without Parole Sentence Are Due The Same Process That Protects Capital Defendants

The Commonwealth opposes extending capital protections to juveniles facing life without parole sentences primarily because "death is different." (*See* Commw. Br. at 49.) But this response entirely fails to counter *Miller*, which held

[3] Beyond these constitutional limits, it is not clear what that range would be for juveniles like Mr. Batts who were convicted in Pennsylvania on or before June 24, 2012. *See infra*, § IV.

that juveniles facing life without parole require individual sentencing, in part *because* the same is required for capital sentencing. *See* 132 S. Ct. at 2467 (holding that the "correspondence" between juvenile life without parole and capital punishment "makes relevant [to juvenile life without parole] . . . our precedents, demanding individualized sentencing when imposing the death penalty.") *See also Graham*, 560 U.S. at 2046 (Thomas, J. dissenting) ("For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone.").

Amicus PDAA goes one step further in attempting to distinguish capital cases, arguing that—unlike in a capital case, where a defendant is not sentenced to death by default—the "starting point" for a juvenile homicide offender is life without parole. (PDAA Br. at 17.) The PDAA misstates the *Montgomery* Court's discussion of *Miller*, positing that *Miller* did not "render a certain penalty unconstitutional for a category of offenders." (PDAA Br. at 17 (internal quotations and alterations omitted).) *Montgomery* held the opposite: that *Miller* was a substantive decision because it *did* render a certain penalty unconstitutional for a category of offenders: "juvenile offenders whose crime reflect the transient immaturity of youth . . . the vast majority of juvenile offenders." 136 S. Ct. at 734. In fact, the Commonwealth faces a higher burden when seeking life without parole

for a juvenile than it does when seeking the death penalty for an adult. The Commonwealth can succeed at a capital sentencing hearing by proving just one of eighteen aggravating circumstances, which is only outweighed if the defendant affirmatively proves one or more mitigating circumstances. 42 Pa. C.S. § 9711(a), (d). In the life without parole context, by contrast, the Commonwealth must prove a juvenile's irreparable corruption in an individualized sentencing hearing, which *must* consider the mitigating effect of the defendant's youth. *Miller*, 132 S. Ct. at 2471; *see also supra*, § II(A), (B).

The PDAA's error highlights the flaw in its argument: life without parole cannot be the default sentence for juveniles, even those guilty of the most heinous crimes. *Id.* at 736 ("children who commit even heinous crimes are capable of change."); *see supra*, § II(A)(1). When this purported distinction falls away, so too do the justifications for treating juveniles facing life without parole sentences differently from adults facing capital punishment.

The remainder of the Commonwealth's argument sets forth a patchwork of theories, each of which assumes that States can invalidate protections afforded by the Constitution. The Commonwealth argues primarily that capital sentencing procedures do not apply because neither this Court nor the United States Supreme Court has reached this holding yet. (Commw. Br. at 47-50.) The Commonwealth also asserts that, as evidenced by Section 1102.1, the General Assembly has chosen

not to afford capital sentencing procedures to juveniles facing life without parole sentences. (*Id.* at 46-47.) Therefore, the Commonwealth argues, none is due. Finally, the Commonwealth posits that Mr. Batts got the sentence he deserved. (*Id.* at 52.) These arguments are each flawed for the same reason. *Even if* the United States Supreme Court had not left it for states to consider initially the procedural protections required before weighing in itself; *even if* Section 1102.1 applied to Mr. Batts or addressed the manner in which courts conduct juvenile life without parole sentencing, rather than setting forth non-exclusive factors for consideration; and *even if* Mr. Batts merited the sentence he received, Mr. Batts is entitled to due process. Constitutional protections are not dispensed with because the courts and legislature have not taken the action necessary to effectuate them. Indeed, that is the precise reason Mr. Batts has appealed to this Court.

III. A De Novo Standard Of Review Applies To An Appeal From A Juvenile Life Without Parole Sentence

As discussed in Mr. Batts' opening brief, appellate courts must carefully scrutinize a lower court's decision to sentence a juvenile to life without parole. (Batts Br. at 40-41.) Mr. Batts went on to explain why the sentencing court got it wrong in this case. (*Id.* at 41-57.) The Commonwealth does not address these arguments, but rather reasons circularly that, because imposition of a life without parole sentence is discretionary, the Superior Court appropriately reviewed for abuse of discretion. (Commw. Br. at 39-45.) *Amicus* PDAA similarly assumes

that Mr. Batts' appeal raises only "whether the trial court applied the correct legal standard and whether it abused its discretion under that standard." (PDAA Br. at 20.) As explained, *supra*, imposing life without parole is not discretionary when a juvenile's conduct reflects only transient immaturity. (*See* §§ I(A)(2), II(A).) Courts may only sentence a juvenile to life without parole in the rare instance that his conduct reflects permanent incorrigibility. *De novo* review of the propriety of the sentence is therefore required.

Even assuming, as the Commonwealth contends, that a statute authorized life without parole as the maximum sentence for Mr. Batts, a challenge to the court's authority to impose it is a challenge to the legality of the sentence. *Commonwealth v. Taylor*, 104 A.3d 479, 490 (Pa. 2014); *cf. State v. Sweet*, 879 N.W.2d 811 (Iowa 2016) (applying *de novo* review when juvenile appellant challenged life without parole sentence). This Court has previously recognized that its standard of review over such questions is *de novo* and its scope of review plenary. *Taylor*, 104 A.3d at 486; *Commonwealth v. Wolfe*, 106 A.3d 800, 802 (Pa. Super. Ct. 2014), *aff'd*, No. 68 MAP 2015, 2016 WL 3388530 (Pa. June 20, 2016).

IV. This Court Should Exercise Its Authority To Expand The Scope Of The Allowance Of Appeal And Declare That The Unconstitutionality Of The Sentence Prescribed By Statute In This Case Cannot Be Successfully Remedied By Severance

In his opening brief, Mr. Batts requests that this Court exercise its discretion and authority to expand the scope of the order allowing his present appeal, in order to address the substantive legality of his sentence. (Batts Br. at 62-63.) Neither the Commonwealth nor its *amicus* makes any serious effort to rebut his reasons why this Court should address the sentence-legality issue at this time, nor the merits of his argument.

Under the Pennsylvania Rules of Appellate Procedure, "[o]nly the questions set forth in the petition, or fairly comprised therein, will *ordinarily* be considered by the court in the event an appeal is allowed." Pa. R. App. P. 1115(a)(3) (emphasis added). The Rule's careful inclusion of the term "ordinarily" demonstrates that this limitation is not jurisdictional or one of power; it is only a sensible practice to regulate and enforce this Court's control over its discretionary jurisdiction. *Cf. Commonwealth v. Flanagan*, 861 A.2d 254, 254 n.1 (Pa. 2004) (Castille, J., dissenting) (dissenting from denial of reargument, noting that case had been decided on an issue outside the grant of allocatur and reviewing benefits of adhering to Rule 1115(a)(3)). That is why, in his brief, Mr. Batts offered specific grounds on which the Court should conclude that "extraordinary considerations are present here." (Batts Br. at 62.)

The Commonwealth's brief does not even acknowledge (much less address and refute) those "extraordinary considerations," (*see* Commw. Br. at 59) nor does it provide substantive argument to demonstrate any flaw in Mr. Batts' analysis on the merits that shows his present sentence (like those of hundreds of other, older "juvenile lifers" who are similarly situated) to be illegal. Instead, it merely cites *Commonwealth v. Barnes*, 924 A.2d 1202 (Pa. 2007) (*per curiam*). But *Barnes* is an example of the usual case where this Court will not allow an appellant to abandon the issue for which review was granted and attempt to advance instead a completely different argument or issue, based on a theory that contradicts the petition. The present case is in no way similar.

The reasons for recognizing the instant appeal as an "extraordinary" case under Rule 1115(a)(3) go far beyond the mere fact that Mr. Batts' sentence is illegal. For the reasons advanced in the opening brief, adopting the argument set forth in detail by *amicus curiae* Pennsylvania Association of Criminal Defense Lawyers (PACDL), appellant's sentence should be vacated and remanded for resentencing to a parolable term of no more than 40 years. (*See* Batts Br. at 62-63.)

Amicus PDAA attempts to address the appellant's argument in a footnote, but does so only by distorting Mr. Batts' position. (*See* PDAA Br. at 19 n.6.) First, the PDAA cartoons Mr. Batts' argument as claiming that "Miller abolished first

degree murder for juvenile offenders." (*See id.*) Not so. The General Assembly can correct at any time the problem it created when it chose to exclude pre-6/25/2012 convictions from the scope of Section 1102.1. But with that exclusion, Pennsylvania has made its choice for the present time. The Commonwealth cannot avoid the legal consequences of this legislative decision for those youth, like Mr. Batts, who have been serving illegal sentences for many years now. They are entitled to be resentenced immediately, and they must be resentenced lawfully.

The PDAA goes on to say, as if refuting something appellant claimed, that Section 1102.1(a) does not itself violate *Miller*, and thus "there is nothing to 'sever.'" But Section 1102.1 is not what would require severing if the statutory scheme were to be saved. As PACDL articulates, the words of Section 6137 of the Prisons and Parole Code are the target of potential severance. (*See* PACDL Br. at 10 (citing 61 Pa. C.S. § 6137(a)(1).) Section 6137(a)(1) bars parole consideration for anyone convicted of first or second degree murder, unless that sentence has been commuted. 61 Pa. C.S. § 6137(a)(1). With those words in place, life without parole is mandatory, and the statutory scheme is thus unconstitutional, as applied to the class of persons convicted of murders committed before they turned 18. That the parole statute is not "*facially* unconstitutional," is immaterial. (*See* PDAA Br. at 19 n.6 (emphasis added)).

Pennsylvania law authorizes severance to save a statute even if it is only

unconstitutional in its "application . . . to any person or circumstance." 1 Pa. C.S. § 1925. That is precisely the situation that arises here. Section 1102.1 cannot be invoked to rescue the Commonwealth, as the PDAA suggests throughout its brief, because the plain language of Section 1102.1(a) prohibits its application in older cases. (*See, e.g.*, PDAA Br. at 19 n.6.)

In the end, any severance attempt fails under the final clause of Section 1925, because the existing statutory structure for the imposition of minimum terms is mathematically impossible for any judge to apply to a life maximum. *See* 42 Pa. C.S. § 9756(b)(1) (providing that a minimum sentence is calculated as "not exceed[ing] one-half of the maximum sentence imposed"); *see also* PACDL Br. at 10-11. The PDAA, like the Commonwealth, simply ignores this final and determinative point. As a result, there is no lawful sentence available for anyone in Mr. Batts' class of pre-2012 "juvenile lifers."

The District Court for the Eastern District of Pennsylvania recently addressed two such prisoners in separate cases, further evidencing that the extraordinary implications of this lack of guidance extend far beyond Mr. Batts' case. As the Honorable Timothy J. Savage correctly reasoned when granting habeas relief to the two petitioners who had been sentenced to life without parole as juveniles pre-*Miller*, "there is *no statutory sentencing scheme* that applies to those juveniles who were convicted of first degree murder prior to June 25, 2012."

Garnett, 2016 WL 4379244, at *3 (emphasis added); *Songster v. Beard*, 2016 WL 4379233, at *3 (emphasis added). The District Court lamented the "Pennsylvania Dilemma:" an unconstitutional statute; subsequent legislation that explicitly does not apply; and a Parole Board that is powerless to act because there is no minimum sentence. *Garnett*, 2016 WL 4379244, at *3-4; *Songster*, 2016 WL 4379233, at *3-4. Without interpreting Pennsylvania law, Judge Savage opined that, given the absence of a minimum sentence, "the resentencing court's only option may be a flat sentence imposed after conducting the constitutionally mandated sentencing hearing." *Id.*

As Mr. Batts' circumstances and those recently addressed by Judge Savage demonstrate, this is no "ordinary" case. The Court should recognize the appropriateness of allowing an exception to its own procedural rule, which only "ordinarily" applies. This Court has the exclusive power and the discretion to address the issue definitively, before hundreds of Pennsylvanians in the "juvenile lifer" pipeline are given illegal sentences, each of which can and will then be appealed. There is no legislatively authorized sentencing scheme at this time for juveniles convicted of first or second degree murder on or before to June 24, 2012. The sentence imposed on Mr. Batts must be vacated and the case remanded for imposition of a lawful sentence pursuant to an applicable statute.

CONCLUSION

This Honorable Court should vacate Qu'eed Batts' life without parole sentence as unconstitutional and remand the instant matter for resentencing.

Respectfully submitted,

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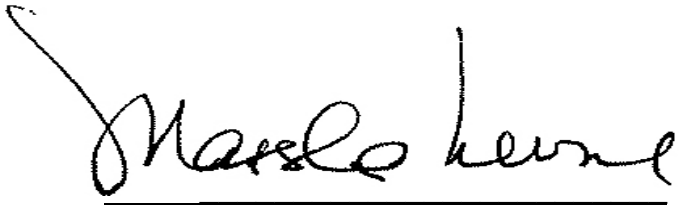
CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 2135 of the Pennsylvania Rules of Appellate Procedure. This brief contains 5,921 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.



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Dated: August 29, 2016