

JAN 3 2017

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SUPREME COURT
WESTERN DISTRICT

No. 126427, M.D. Misc. Docket 2016

RECEIVED

JAN 3 2017

**IN RE RICHARD LEE OLDS, ON HIS OWN BEHALF AND ON
BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS
APPEALING FROM OR AWAITING RESENTENCING PURSUANT
TO *MILLER V. ALABAMA* AND *MONTGOMERY V. LOUISIANA***

**REPLY TO COMMONWEALTH'S ANSWER TO APPLICATION OF
RICHARD LEE OLDS AND SIMILARLY SITUATED INDIVIDUALS
FOR EXERCISE OF EXTRAORDINARY JURISDICTION OR
KING'S BENCH POWER**

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

1. Respondent's Discussion Of The Scope Of *Commonwealth v. Batts* Is Misleading And Inconsistent With Its Earlier Claims Before The Trial Court, And Misstates Petitioners' Position.

In Respondent's answer to Petitioners' Application for Extraordinary Jurisdiction, it notes that "(n)othing in *Batts* calls into question the right of a state to impose *life with parole* on a juvenile defendant convicted of murder of the second degree." Thus, Respondent subtly misstates the issue this Court is being asked to resolve.

Petitioners do not claim that the state has *no right* to impose life with parole on a juvenile defendant convicted of second degree murder¹. Rather, Petitioners' Application argues only that *Batts* does not *require* a life maximum sentence for every juvenile convicted of second degree murder whose conviction became final before *Miller v. Alabama*, 567 U.S. ---, 132 S. Ct. 2455 (2012).

Respondent claimed a very different interpretation of *Batts* in Petitioner Olds's sentencing before the Honorable David Cashman. In the Commonwealth's Sentencing Memorandum (attached as Exhibit A), the Commonwealth wrote: Pursuant to *Commonwealth v. Batts, supra*, upon resentencing a trial court *must* impose a "mandatory maximum sentence of

¹ Petitioner Olds's case does not involve a sentence of life with parole. The sentence imposed by the lower court was 20 years to life imprisonment.

life imprisonment as required by Section 1102 (a), accompanied by a minimum sentence determined by the common pleas court upon resentencing. *Batts*, 620 Pa. at 134, 66 A.3d at 297.” Exhibit A at pp. 16-17 (emphasis added). The Commonwealth further argued that “petitioner is not entitled to any form of relief other than a sentence with life as the maximum sentence.” Exhibit A at p. 20. The trial court agreed with the Commonwealth², and imposed a life maximum sentence even after noting that “to say that [Olds’s] case is compelling would be an understatement.” N.T. 45, 11/21/16.

Respondent explicitly misrepresented *Batts* before the lower court, and has done the same in its Answer regarding Petitioners’ Application For Exercise Of Extraordinary Jurisdiction Or King’s Bench Power. Petitioners simply ask that this Court provide guidance for the resentencings of juveniles who did not kill or intend to kill and whose convictions became final before *Miller v. Alabama*. Respondent is simply incorrect in its assertion that *Batts* requires a life sentence in Mr. Olds’ case and those of others similarly situated. Such cases were ‘not implicated’ in *Batts*; this

² The Commonwealth notes in its Answer that the Honorable David R. Cashman might have “inferred” what the maximum sentence should be. The trial court did no such thing. Rather, Judge Cashman twice declared a lesser maximum than life “illegal.” N.T. 27-28, 11/21/16.

Court should grant this Petition to resolve this outstanding sentencing issue across the Commonwealth.

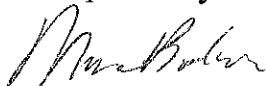
2. Respondent Misperceives Petitioners' Argument Regarding Eligibility For Bail Or Appeal Bond.

Respondent argues, and Petitioners agree, that the Pennsylvania sentencing scheme, with the exception of life without parole, requires a minimum and a maximum sentence. Respondent further states, however, that Petitioner Olds' "(f)ull sentence is life imprisonment." Answer, pp. 8-9. Such a statement makes no sense in the post-*Miller* sentencing world; until 2016 there were no legal sentences with a minimum sentence of a number of years and a maximum sentence of life imprisonment. If Respondent means that Petitioner Olds could conceivably serve the rest of his life in prison, it is correct. However, in the same Answer Respondent argues that the intimation "that the Pennsylvania Board of Parole cannot be trusted to do its job in a fair and equitable fashion is offensive and without support," and that the "Commonwealth has continuously indicated in [Olds'] case that it would support parole by the Parole Board, should petitioner request it." Answer, pp. 6-7.

Thus, it is highly incongruous for Respondent to argue that Petitioner Olds is ineligible for bail because his "full sentence" is life imprisonment, but argue at the same time that he is very likely to be paroled. Respondent's

logic would preclude a 14 year old juvenile facing a second degree murder charge as a non-killing accomplice from being eligible for bail. Article 1, Section 14 did not contemplate the developments that have led to juvenile sentences with a number of years as a minimum and life as a maximum; to apply that Section to preclude bail would be counter to the intention of the 1998 amendment, and would also violate Article 1, Section 13 of the Pennsylvania Constitution and the 8th Amendment to the United States Constitution.

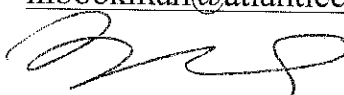
Respectfully Submitted,



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DEPT. OF COURT RECORDS
CRIMINAL DIVISION
ALLEGHENY COUNTY PA

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA CRIMINAL DIVISION

V.

CP-02-CR- 0006857-1979
CP-02-CR- 0007090-1979

RICHARD LEE OLDS

COMMONWEALTH'S POST
CONVICTION RELIEF ACT PETITION
RESENTENCING MEMORANDUM

Code _____

The Honorable David R. Cashman
Administrative Judge—Criminal Division

Filed on behalf of the
Commonwealth of Pennsylvania

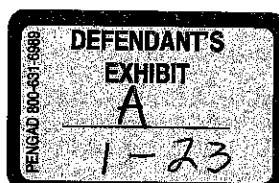
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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
COMMONWEALTH OF PENNSYLVANIA

V.
RICHARD LEE OLDS

CP-02-CR- 0006857-1979
CP-02-CR- 0007090-1979

**COMMONWEALTH'S
POST CONVICTION RELIEF ACT PETITION
RESENTENCING MEMORANDUM**

AND NOW, to wit, this 14th day of November, 2016, comes the Commonwealth of Pennsylvania by its attorneys, STEPHEN A. ZAPPALA, JR., District Attorney, and, RONALD M. WABBY, JR., Deputy District Attorney, and in answer to the above-captioned Post-Conviction petition, respectfully shows:

PROCEDURAL HISTORY

Petitioner, Richard Lee Olds, was charged by Criminal Information filed in the Court of Common Pleas of Allegheny County. At CP-02-CR- 0006857-1979, petitioner was charged with one (1) count of Criminal Homicide¹. At CP-02-CR- 0007090-1979, petitioner was charged with one (1) count of Robbery² and Criminal Conspiracy³.

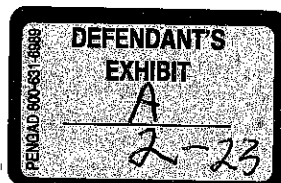
On March 28, 1980, petitioner and his codefendant, Roderick Todd Allen, appeared before the Honorable Samuel Strauss⁴. James M. Skorupa, Esquire represented petitioner.

¹ 18 Pa.C.S.A. §2501

² 18 Pa.C.S.A. §3701

³ 18 Pa.C.S.A. §901

⁴ Numerals in parentheses preceded by the letters "TT" refer to pages of the March 28, 1980 trial transcript.



Assistant District Attorney Kim W. Riester, Esquire represented the Commonwealth. On April 2, 1980, the jury found petitioner guilty of Second Degree Murder, Robbery, and Criminal Conspiracy.

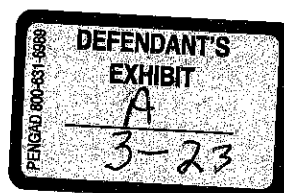
On July 8, 1980, petitioner, through Attorney Skorupa, filed a Motion for New Trial and/or Arrest of Judgement Nunc Pro Tunc. On September 26, 1980, petitioner, through Attorney Skorupa, filed a Brief in Support of Motion for New Trial and/or Arrest of Judgement. On March 25, 1981, Judge Straus denied the motion with an Opinion and Order of Court.

On April 28, 1981, petitioner appeared before Judge Straus for sentencing. Attorney Skorupa represented petitioner. Assistant District Attorney Riester represented the Commonwealth. At CP-02-CR- 0006857-1979, Count 1, Second Degree Murder, petitioner was sentenced to life imprisonment. No further penalty was imposed at the remaining counts.

On May 21, 1981, petitioner, through John A. Halley, Esquire, filed a Notice of Appeal.

On June 10, 1982, petitioner, through Attorney Halley, filed a Brief for Appellant in the Superior Court of Pennsylvania, which was docketed at **No. 641 Pittsburgh 1981**. On appeal, petitioner raised the following claims:

1. Whether the evidence was sufficient as a matter of law to support the trial court's failure to grant a appellant's demurrer?
2. Whether appellant is entitled to a new trial to benefit from the decision in Commonwealth v. Waters, requiring the jury to be instructed that the death must have been caused in the furtherance of the underlying felony in order to hold appellant liable for that death?
3. Whether the trial judge's communication with the jury, absent the presence of counsel, constituted reversible error?



On April 4, 1983, the Commonwealth, through Assistant District Attorney Kamal Mericli, Esquire, filed a Brief for Appellee. On November 25, 1983, the Superior Court affirmed the judgment of the Court of Common Pleas of Allegheny County. On December 12, 1983, petitioner, through Attorney Halley, filed an Application for Reargument. On February 3, 1984, the Superior Court denied reargument.

On March 5, 1984, petitioner, through Attorney Halley, filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was docketed at **No. 63 W.D.**

Allocatur Docket 1984. In the petition, petitioner raised the following claims:

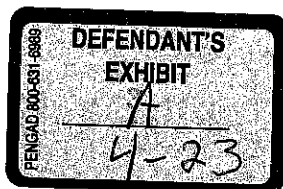
Whether the trial court erred in failing to grant petitioner's demurrer at the close of the Commonwealth case on the basis of the insufficient evidence presented by the Commonwealth, as a matter of law, to support the conspiracy and homicide conviction?

Whether the petitioner is entitled to a new trial so that the jury can be instructed that they must find that the killing of the victim, Thomas Beiter, be in furtherance of the underlying felony (i.e. robbery of the pedestrian, Beiter) as is now required under Commonwealth v. Waters?

Whether the communications between the trial court and the jury outside the presence of counsel constitutes reversible error?

On March 19, 1984, the Commonwealth, through Deputy District Attorney Robert L. Eberhardt, Esquire, filed a Brief in Opposition to Petition for Allowance of Appeal. On July 24, 1984, the Supreme Court denied the petition.

On August 24, 1984, petitioner filed a *pro se* petition requesting relief under the Post Conviction Hearing Act. On August 24, 1984, Lawrence W. Kustra, Esquire was appointed to represent petitioner. On November 28, 1984, the Commonwealth responded to the *pro se* petition. A hearing was scheduled for February 21, 1985. At that time counsel for



petitioner, having taken no action, requested a continuance and leave to amend the *pro se* petition, which was granted.

On March 22, 1989, Robert A. Crisanti, Esquire was appointed to represent petitioner. On May 11, 1989, petitioner, through Attorney Crisanti, filed an Amended Post Conviction Relief Act Petition. In the petition, petitioner raised the following claims:

1. Petitioner was denied his right to a fair trial and effective representation as trial counsel failed to submit a jury instruction on felony murder reflecting the holding in *Commonwealth v. Waters*.
2. Trial counsel was ineffective for failing to object to the trial court's jury instruction on felony murder.
3. Trial counsel was ineffective for failing to object to testimony regarding petitioner's prior bad acts depriving him of a fair trial.
4. Trial counsel was ineffective for failing to raise these issues in post-verdict motions.

On February 26, 1990, the Commonwealth, through Assistant District Attorney Betsy Brown, Esquire, filed a Commonwealth's Answer to Post Conviction Relief Act Petition. On March 9, 1990, the Honorable Walter R. Little issued an Opinion and Order of Court, which denied the Post Conviction Hearing Act petition.

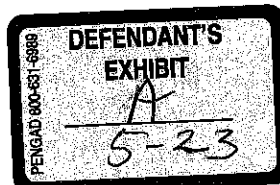
On April 9, 1990, petitioner, through Attorney Crisanti, filed a Notice of Appeal.

On August 16, 1990, petitioner, through Attorney Crisanti, filed a Brief for Appellant in the Superior Court of Pennsylvania, which was docketed at **No. 512 Pittsburgh 1990**.

On appeal, petitioner raised the following claims:

Whether appellant is entitled to a hearing under the Post-Conviction Hearing Act Because:

- A. The issues raised in appellant's Post-Conviction Hearing Act petition have not been finally litigated;

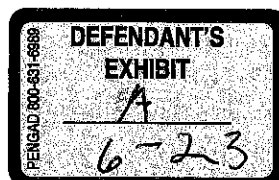


B. Appellant's trial counsel was ineffective for failing to object to the trial court's instructions and for failing to submit his own instructions on felony murder;

C. The trial court erred in not giving an instruction to the jury that a felony murder can only occur when a killing is in furtherance of a felony?

On September 19, 1990, the Commonwealth, through Assistant District Attorney Mericli, filed a Brief for Appellee. On December 10, 1990, the Superior Court reversed the judgement of the Court of Common Pleas and remanded the case for an evidentiary hearing. On December 19, 1990, the Commonwealth, through Assistant District Attorney Mericli, filed an Application for Reargument. On January 2, 1991, petitioner, through Attorney Crisanti, filed an Answer to Application for Reargument. On January 9, 1991, the Superior Court granted panel reconsideration. On January 22, 1991, petitioner, through Attorney Crisanti, filed an Application for Leave to File Post-Submission Communication. On January 23, 1991, the Superior Court reversed the judgement of the Court of Common Pleas and remanded the case for an evidentiary hearing. On January 31, 1991, the Commonwealth, through Assistant District Attorney Mericli, filed an Application for Reargument Before the Court En Banc. On February 19, 1991, petitioner, through Attorney Crisanti, filed an Answer to Application for Reargument Before the Court En Banc. On April 1, 1991, the Superior Court denied reargument.

On April 25, 1991, the Commonwealth, through Assistant District Attorney Mericli, filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was docketed at **No. 210 W.D. Allocatur Docket 1991**. In the petition, the Commonwealth raised the following claims:



1. Whether the Superior Court erred on remanding this case for an evidentiary hearing on respondent's claim that trial counsel provided ineffective assistance in failing to request a jury instruction in accordance with the principle of law, which was subsequently announced after trial in this case in this Honorable Court's later decision in *Commonwealth v. Waters*, because trial counsel cannot be found to have been ineffective for failing to anticipate a change in the law?

2. Whether Superior Court erred by misconstruing its opinion on direct appeal of this case as establishing the principle, as the "law of case," that trial counsel was legally required to request a jury instruction in accordance with the principle of law, which was subsequently announced after trial in this case in this Honorable Court's later decision in *Commonwealth v. Waters*, regardless of the fact that, if *Waters* made new law, trial counsel cannot be found to have been ineffective for failing to anticipate a change in the law?

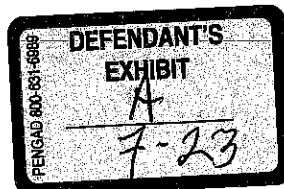
3. Whether Superior Court erred in effectively holding in this case that this Honorable Court's line of decisions holding that trial counsel cannot be found to have been ineffective in failing to anticipate a change in the law may be conveniently ignored on the basis of the principle that a prior decision of Superior Court must be followed, which is effectively to the contrary, on the grounds that it established the "law of the case?"

4. Whether Superior Court erred in refusing to treat the matter of whether *Waters* made new law as the controlling issue in this case and to address it accordingly?

5. Whether Superior Court erred in refusing to recognize that this Honorable Court's decision in *Commonwealth v. Waters* made new law, thus preventing a finding that trial counsel was ineffective in failing to seek a *Waters* type of instruction?

6. Whether Superior Court erred in not finding that the claim that trial counsel was ineffective for failing to request a *Waters* type instruction had been "finally litigated," as that term is comprehended under the Post Conviction Hearing Act?

On May 9, 1991, petitioner, through Attorney Cristanti, filed a Cross-Petition for Allowance of Appeal. In the cross-petition, petitioner raised the following claim:



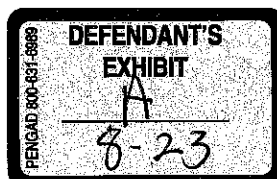
Whether the decision of this Court in Commonwealth v. Waters, 491 Pa. 85, 418 A.2d 312 (1980), made new law or instead modified the law with respect to accomplice liability for a felony-murder little, if at all?

On May 13, 1991, the Commonwealth, through Assistant District Attorney Mericli, filed a "no answer" letter. On October 17, 1991, the Supreme Court granted the Petition for Allowance of Appeal as to the Commonwealth and petitioner. The Commonwealth's case was docketed in the Supreme Court at **No. 93 W.D. Appeal Docket 1991**. Petitioner's case was docketed at **No. 94 W.D. Appeal Docket 1991**.

On November 7, 1991, petitioner, through Attorney Crisanti, filed an Application for Consolidation of Appeals Pursuant to Pa.R.A.P. 513. On November 12, 1991, the Commonwealth, through Assistant District Attorney Mericli, filed a letter consenting to petitioner's Application for Consolidation of Appeals. On December 17, 1991, the Supreme Court entered an Order consolidating the appeals.

On January 14, 1992, the Commonwealth, through Assistant District Attorney Mericli, filed a Brief for Appellant in the Supreme Court of Pennsylvania, which was docketed at **No. 93 W.D. Appeal Docket 1991** and **No. 94 W.D. Appeal Docket 1991**. On appeal, the Commonwealth raised the following claims:

1. Whether the Superior Court erred on remanding this case for an evidentiary hearing on respondent's claim that trial counsel provided ineffective assistance in failing to request a jury instruction in accordance with the principle of law, which was subsequently announced after trial in this case in this Honorable Court's later decision in *Commonwealth v. Waters*, because trial counsel cannot be found to have been ineffective for failing to anticipate a change in the law?
2. Whether Superior Court erred by misconstruing its opinion on direct appeal of this case as establishing the principle, as the "law of the case," that trial counsel was legally required to request a jury instruction in accordance with the



principle of law, which was subsequently announced after trial in this case in this Honorable Court's later decision in *Commonwealth v. Waters*, regardless of the fact that, if *Waters* made new law, trial counsel cannot be found to have been ineffective for failing to anticipate a change in the law?

3. Whether Superior Court erred in effectively holding in this case that this Honorable Court's line of decisions holding that trial counsel cannot be found to have been ineffective in failing to anticipate a change in the law may be conveniently ignored on the basis of the principle that a prior decision of Superior Court must be followed, which is effectively to the contrary, on the grounds that it established the "law of the case?"

4. Whether Superior Court erred in refusing to treat the matter of whether *Waters* made new law as the controlling issue in this case and to address it accordingly?

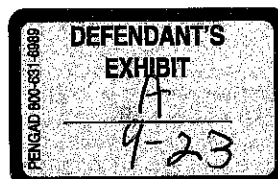
5. Whether Superior Court erred in refusing to recognize that this Honorable Court's decision in *Commonwealth v. Waters* made new law, thus preventing a finding that trial counsel was ineffective in failing to seek a *Waters* type of instruction?

On February 7, 1992, petitioner, through Attorney Crisanti, filed a Brief for Cross-Appellant.

On appeal, petitioner raised the following claim:

1. Did the decision of this Court in *Commonwealth v. Waters*, 491 Pa. 85, 418 A.2d 312 (1980), made new law or instead modified the law with respect to accomplice liability for a felony-murder little, if at all?

On February 12, 1992, petitioner, through Attorney Crisanti, filed a Brief for Appellee. On February 19, 1993, the Commonwealth, through Assistant District Attorney Mericli, filed a letter, which stated that the Commonwealth elected not to file any further briefs. On May 15, 1992, the Supreme Court reversed the Superior Court's remand of the case and affirmed the conviction.



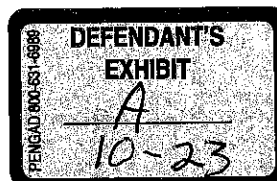
On July 13, 2010, petitioner filed a *pro se* Motion for Post Conviction Collateral Relief. In his petition, petitioner claimed he was entitled to relief pursuant to *Graham v. Florida*, 130 S.Ct. 2011 (2010), because he was fourteen (14) at the time of the crime and his sentence is unconstitutional. On July 28, 2010, the Honorable David R. Cashman issued a Notice of Intention to Dismiss. On October 15, 2010, Judge Cashman dismissed the petition.

On November 15, 2010, petitioner filed a *pro se* Notice of Appeal. On February 9, 2011, petitioner filed a *pro se* Statement of Matters Complained of on Appeal. On April 19, 2011, Judge Cashman filed his Opinion.

On May 31, 2011, petitioner filed a *pro se* Brief for Appellant in the Superior Court of Pennsylvania, which was docketed at **No. 87 WDA 2011**. On appeal, petitioner raised the following claims:

Whether Appellant is entitled to a hearing under the Post Conviction Relief Act because:

1. It is unconstitutional under both the United States and the Pennsylvania Constitutions, and a violation of International Law to sentence a juvenile to life imprisonment without the possibility of parole.
2. Whether under the recent U.S. SUPREME COURT decision in *Graham v. Florida* Appellant is entitled to a hearing under the PCRA to determine if any retroactivity exists and if Appellant is entitled to any benefit thereof.
3. Whether since the instant PCRA Petition was filed within 60 days of the Supreme Court's rendering in *Graham v. Florida*, Appellant is not time-barred by the one year statute of limitations, but is in fact allowed to proceed by application of 42 C.S. Sec. 9545(b).
4. Whether in light of *Graham v. Florida* the mandatory life sentence in Pennsylvania, as applied to juveniles, for second degree murder is unconstitutional under U.S. and Pennsylvania Constitutions when the juvenile had no culpability in the killing.



5. Whether in light of *Graham v. Florida* Appellant is entitled to a proper jury instruction.

On June 7, 2011, the Commonwealth, through Assistant District Attorney Nicole T. Wetherton, Esquire, filed a Brief for Appellee. On August 26, 2011, the Superior Court affirmed the judgment of the Court of Common Pleas of Allegheny County.

On September 18, 2011, petitioner filed a *pro se* Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was docketed at **No. 487 WAL 2011**. In the petition, petitioner raised the following claims:

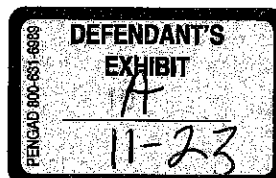
I. Whether since the instant PCRA petition was filed within 60 days of the U.S. Supreme Court's holding in *Graham v. Florida*, 130 S.Ct. 2011, 176 L.Ed. 2d 825, ___ U.S. ___ (2010). Petitioner is not time-barred, but is in fact allowed to proceed by application of 42 Pa.C.S.A. sec 9545(b)(i)(ii)(iii).

II. Whether in light of *Graham v. Florida* and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d. 1 (2005) it is unconstitutional to sentence a fourteen year old to die in prison when he, as Justice Kennedy stated in *GRAHAM*, "Did not kill, intend to kill, or foresee that life would be taken."

III. Whether the mandatory nature of the life sentence for second degree in Pennsylvania, as applied to juveniles, and the Petitioner in particular, violates Petitioner's rights under the 8th and 14th Amendments to the United States Constitution when Petitioner had no culpability in the killing.

IV. Whether in light of *Graham v. Florida* Petitioner is entitled to a proper jury instruction. Specifically, a pre-Commonwealth v. *Waters*, 491 Pa. 85, 418 A.2d 312 (1980) type jury instruction allowed the jury to convict Petitioner without being instructed that the killing must be in furtherance of the under lying felony. Thus lowering the Commonwealth's burden of proof and in effect allowing Petitioner to be convicted and sentenced to a mandatory life term for a crime less than second degree murder.

On September 27, 2011, the Commonwealth, through Assistant District Attorney Wetherton, filed a "no answer" letter. On December 20, 2011, the Supreme Court denied the petition.

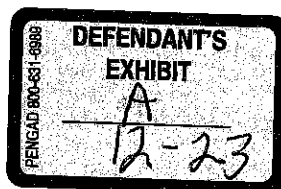


On August 20, 2012, petitioner filed a *pro se* Post-Conviction Relief Act Petition. On October 19, 2012, Judge Cashman appointed Thomas N. Farrell, Esquire to represent petitioner and stayed the petition pending the resolution of *Commonwealth v. Batts* and *Commonwealth v. Cunningham*. On October 31, 2013, the Commonwealth, through Assistant District Attorney Cory J. Schuster, Esquire, filed a Commonwealth's Amended Answer to Post Conviction Relief Act Petition. On November 6, 2013, petitioner, through Attorney Farrell, filed a Motion to Stay PCRA Proceedings. On March 11, 2014, Judge Cashman issued a Notice of Intention to Dismiss. On April 10, 2014, petitioner, through Attorney Farrell, filed a Response to Notice of Intention to Dismiss; and, in the Alternative, Motion for Leave to File Amended PCRA Petition Pursuant to Rule 905(A) of the Pennsylvania Rules of Criminal Procedure. On July 15, 2014, Judge Cashman dismissed the petition.

On August 13, 2014, petitioner, through Attorney Farrell, filed a Notice of Appeal. On September 26, 2014, petitioner, through Attorney Farrell, filed a Statement of Matters Complained of on Appeal. On February 18, 2015, Judge Cashman filed his Opinion.

On July 1, 2015, petitioner, through Attorney Farrell, filed a Brief for Appellant in the Superior Court of Pennsylvania, which was docketed at **No. 1319 WDA 2014**. On appeal, petitioner raised the following claims:

- I. Whether the PCRA Court violated Rule 905(A) of the Pennsylvania Rules of Criminal Procedure by failing to grant Appellant's motion to amend the PCRA petition?
- II. Whether the PCRA Court violated Appellant's rights under the Eighth Amendment when Appellant continues to serve a life sentence without the possibility of parole which was imposed when Appellant was a juvenile?



III. Whether Appellant's right under Article I, Section 13 of the Pennsylvania Constitution was violated and whether Pennsylvania law allows for the retroactivity of *Miller*?

IV. Whether Appellant was entitled to habeas corpus relief when Appellant continues to serve a life sentence without the possibility of parole which was imposed when Appellant was a juvenile?

On July 31, 2015, the Commonwealth, through Assistant District Attorney Amy E. Constantine, Esquire, filed a Brief for Appellee. On October 27, 2015, the Superior Court affirmed the judgment of the Court of Common Pleas of Allegheny County.

On November 25, 2015, petitioner, through Attorney Farrell, filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was docketed at **No. 462 WAL 2015**. In his petition, petitioner raised the following:

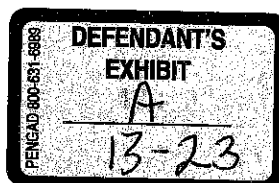
I. Whether the PCRA Court violated Rule 905(A) of the Pennsylvania Rules of Criminal Procedure by failing to grant Petitioner's motion to amend the PCRA petition?

II. Whether the PCRA Court violated Petitioner's rights under the Eighth Amendment when Petitioner continues to serve a life sentence without the possibility of parole which was imposed when Petitioner was a juvenile?

III. Whether Petitioner's right under Article I, Section 13 of the Pennsylvania Constitution was violated and whether Pennsylvania law allows for the retroactivity of *Miller*?

IV. Whether Petitioner was entitled to habeas corpus relief when Petitioner continues to serve a life sentence without the possibility of parole which was imposed when Petitioner was a juvenile?

On November 30, 2015, the Commonwealth, through Assistant District Attorney Constantine, filed a "no answer" letter. On January 28, 2016, petitioner, through Attorney Farrell, filed a Petition for Permission to File Amended Petition for Allowance of Appeal. On February 25, 2016, the Supreme Court issued an Order remanding the case to the Superior



Court of Pennsylvania for further proceedings consistent with *Montgomery v. Louisiana*, ___ U.S. ___, 136 S.Ct. 716 (2016). On April 12, 2016, the Superior Court remanded the case to the Court of Common Pleas for resentencing.

On April 14, 2016, petitioner, through Attorney Farrell, filed a Motion for Psychiatric Expert and a Petition to Permit Access to Records. On April 20, 2016 Judge Cashman issued Orders granting both motions.

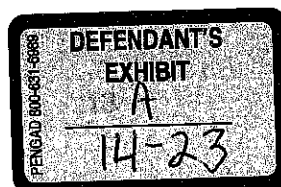
On September 13, 2016, Wendy L. Williams, Esquire entered her appearance. On September 22, 2016, Attorney Farrell filed a Motion for Leave to Withdraw Representation.

Sentencing is currently scheduled for November 21, 2016.

FACTUAL HISTORY

Kenneth Moore, an employee of the Fort Wayne Cigar Store located in the North Side of Pittsburgh, testified that on October 9, 1979, at approximately 2:30 AM, he observed the victim, Thomas Beitler, walk into the store at about the same time as petitioner and Todd Allen. (TT 229-230; 233-236). Petitioner walked to the rear of the store and Allen stayed near the entrance, while the victim went directly to the counter. (TT 234-237). After the victim made a purchase he proceeded toward the exit. (TT 241). Allen walked out immediately before the victim and petitioner followed closely behind. (TT 241-242). Mr. Moore then heard gunshots and saw the victim run back into the store with his wallet in his hand. (TT 243-244). The victim dropped the wallet and collapsed in the rear of the store. (TT 244). The victim was pronounced dead at the scene by paramedics. (TT 86).

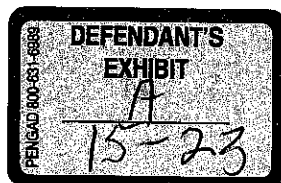
Eric Shaerer testified at trial that on the morning in question he was walking to the Fort Wayne Cigar Store to get cigarettes when he heard a gunshot. (TT 258-259). Mr. Shaerer then saw the victim walk toward Allen with his arms extended and his wallet in his



hand. (TT 266-268). He observed that Allen had a revolver in his right hand. (TT 269-270). Mr. Shaerer heard the victim say to Allen, "[h]ere, take my wallet" and then saw Allen shoot the victim twice, whereupon the victim staggered into the Cigar Store with his wallet still in his hand. (TT 271-272). Mr. Shaerer stated that the victim never touched co-defendant Allen during the robbery. (TT 276).

Claude Bonner testified that early on the morning of October 9, 1979, he picked up petitioner and co-defendant Allen on Penn Avenue and then drove them to the North Side of Pittsburgh. (TT 164, 170). Mr. Bonner stated that he drove to the Fort Wayne Cigar Store because petitioner said that he wanted something to eat. (TT 172). Upon arrival at the store, petitioner and Allen exited the car and Allen said, "I'm going to rob this store." (TT 178). Petitioner replied, "yeah, right" in his normal tone of voice and accompanied Allen into the store. (TT 179, 226-227). Bonner then heard gunshots and started to drive away. (TT 179). Petitioner then jumped in front of the car, forcing Bonner to stop while he and Allen got in. (TT 182-183). Bonner testified that once in the car Allen said to petitioner, "[y]ou made me shoot him...when I pulled out the gun you was supposed to grab the wallet." (TT 184).

At trial Pittsburgh Police Officer Joseph Stotlemeyer read the statement which co-defendant Allen gave to the interrogating officers after his arraignment for the murder of Thomas Beitler. (TT 129). Allen stated that he was downtown in the morning in question when he entered a car whose driver was later identified as Claude Bonner. (TT 135, 139). Allen said that the driver asked him if he wanted to make some money and also whether he had a pistol, to which Allen replied that he did. (TT 135). Bonner then suggested that they rob the Fort Wayne Cigar Store but Allen replied that he would rather rob a pedestrian. (TT



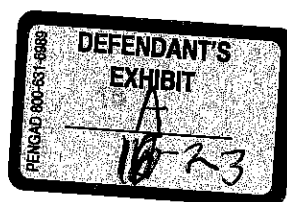
135, 139). Allen then stated he went into the store and that when he came out he shot the victim several times while in the course of attempting to steal his wallet. (TT 135-137).

Petitioner testified that late on October 8, 1979, he and co-defendant Allen entered a car driven by Claude Bonner. (TT 374-377). After driving around for some time, they ran into Todd Allen's brother, Larry, and Larry, Todd, and Bonner went into the Music Bar on Liberty Avenue. (TT 379-380). Sometime after Todd Allen and Bonner came out of the bar, Allen and petitioner asked Bonner for a ride to the North Side. (TT 383-384). During the ride to the North Side, Todd Allen was talking about making some money. (TT 408). After petitioner suggested that the trio stop and get something to eat, Bonner drove to the Fort Wayne Cigar Store. (TT 385-386). When petitioner and Allen exited the car, Allen said, "I should just rob this joint." (TT 387-388). Petitioner said "[y]eah right" and followed Allen into the store. (TT 388). Petitioner testified that when he left the store he saw the victim facing Todd Allen. (TT 395). The victim had his arms extended and Todd Allen had a gun in his hand. (TT 395-396). Petitioner started to run and then heard shots. (TT 396-398). Petitioner then flagged down Claude Bobber's car forcing him to stop. (TT 399). When Bonner started to drive away, petitioner said, "[w]hy are you leaving Todd Allen?" (TT 489). When Allen entered the car he said to petitioner, "[y]ou made me shoot him...why didn't you run over and grab the wallet?", to which petitioner replied, "no, I wasn't doing that." (TT 400, 411).

ARGUMENT

The Supreme Court of the United States has determined that the *Miller* decision is retroactive. *Montgomery v. Louisiana*, ___ U.S. ___, 136 S.Ct. 716 (2016). The Supreme Court concluded:

The Court now holds that *Miller* announced a substantive rule of constitutional law. The conclusion that *Miller* states a



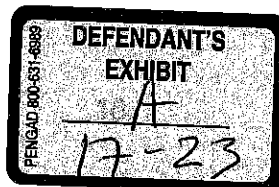
substantive rule comports with the principles that informed *Teague*. *Teague* sought to balance the important goals of finality and comity with the liberty interests of those imprisoned pursuant to rules later deemed unconstitutional. *Miller's* conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.

Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change.

Montgomery, 136 S.Ct. at 736. The ultimate form of relief was left to the states to resolve. In *Commonwealth v. Secreti*, 134 A.3d 77 (Pa.Super. 2016), the Superior Court of Pennsylvania concluded that following *Montgomery*, *supra.*, the trial courts should resentence petitioners in accordance with the Supreme Court of Pennsylvania's decision in *Commonwealth v. Batts*, 620 Pa. 115, 66 A.3d 286 (2013).

Pursuant to *Commonwealth v. Batts*, *supra.*, upon resentencing a trial court must impose a "mandatory maximum sentence of life imprisonment as required by Section 1102(a), accompanied by a minimum sentence determined by the common pleas court



upon resentencing." *Batts*, 620 Pa. at 134, 66 A.3d at 297. In determining the minimum sentence, the trial court can consider:

at a minimum it should consider a juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.

Commonwealth v. Knox, 50 A.3d 732, 745 (Pa.Super. 2012); *Commonwealth v. Batts*, 620 Pa. at 133, 66 A.3d at 297. Nothing prevents the imposition of life sentence, as long as parole is available. *Montgomery v. Louisiana*, *supra*.

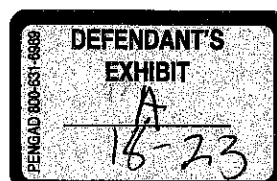
The Commonwealth submits that the sentencing court should be guided in establishing a minimum sentence by 18 Pa.C.S.A. §1102.1, which provides:

(a) First degree murder.--A person who has been convicted after June 24, 2012, of a murder of the first degree, first degree murder of an unborn child or murder of a law enforcement officer of the first degree and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows:

(1) A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 35 years to life.

(2) A person who at the time of the commission of the offense was under 15 years of age shall be sentenced to a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 25 years to life.

(b) Notice.--Reasonable notice to the defendant of the Commonwealth's intention to seek a sentence of life imprisonment without parole under subsection (a) shall be provided after conviction and before sentencing.



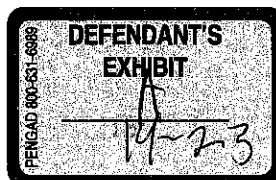
(c) Second degree murder.—A person who has been convicted after June 24, 2012, of a murder of the second degree, second degree murder of an unborn child or murder of a law enforcement officer of the second degree and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows:

(1) A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of imprisonment the minimum of which shall be at least 30 years to life.

(2) A person who at the time of the commission of the offense was under 15 years of age shall be sentenced to a term of imprisonment the minimum of which shall be at least 20 years to life.

18 Pa.C.S.A. §1102.1. Thus, the Commonwealth submits that at a minimum the sentencing court should impose a minimum sentence consistent with 18 Pa.C.S.A. §1102.1 with a maximum sentence of life imprisonment. However, the sentencing court could impose a higher minimum up to and including life. Moreover, the sentencing court could also impose a sentence on the counts where no further penalty was previously imposed, because the overall sentencing scheme has been disrupted. See *Commonwealth v. Bartug*, 732 A.2d 1287 (Pa.Super. 1999). The Supreme Court of Pennsylvania has held:

it was Goldhammer, himself, who originally appealed all the judgments of sentence imposed in the trial court. Having done so, Goldhammer voluntarily assumed the risk of all the attending repercussions, including the possibility that the Commonwealth would seek resentencing in the event appellate review resulted in disruption of the original sentencing plan, to wit, reversal of the only jail term imposed. We hold therefore, that where a defendant appeals a judgment of sentence, he accepts the risk that the Commonwealth may seek a remand for resentencing thereon if the disposition in the appellate court upsets the original sentencing scheme of the trial court.



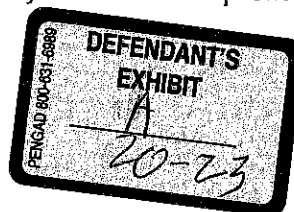
Commonwealth v. Goldhammer, 512 Pa. 587, 593, 517 A.2d 1280, 1283 (1986). Consequently, once the sentence is vacated, the trial court has all available sentencing options.

The statutory sentencing scheme has not been rendered unconstitutional, which would require something less than a maximum of life imprisonment. The Supreme Court has held:

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*. Section 1102, which mandates the imposition of a life sentence upon conviction for first-degree murder, see 18 Pa.C.S. § 1102(a), does not itself contradict *Miller*; it 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. See *Miller*, — U.S. at —, 132 S.Ct. at 2469. *Miller* neither barred imposition of a life-without-parole sentence on a juvenile categorically nor indicated that a life sentence with the possibility of parole could never be mandatorily imposed on a juvenile. See *id.* at —, 132 S.Ct. at 2469. Rather, *Miller* requires only that there be judicial consideration of the appropriate age-related factors set forth in that decision prior to the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile. See *id.* at —, 132 S.Ct. at 2467–68

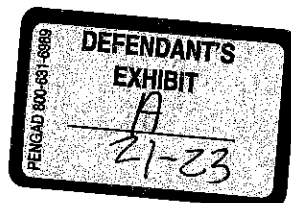
Commonwealth v. Batts, 620 Pa. at 131-132, 66 A.3d at 295-296. Thus, the possibility of both a life sentence with and without parole survived the *Miller* decision; it was simply the mandatory nature of the sentence that was rendered unconstitutional.

Furthermore, petitioner is not entitled to be sentenced as if he was convicted of Third Degree Murder, which at the time had a statutory maximum of twenty (20) years, has been rejected the Supreme Court of Pennsylvania. The Supreme Court held as follows:



In addition, Appellant's argument that he should be sentenced as if he had been convicted of the lesser offense of third-degree murder finds little support in the authorities upon which he relies, as such caselaw is simply inapplicable to the present circumstances. In *Story*, for example, this Court imposed a life sentence because the effectuation of a death sentence would violate the defendant's equal protection and due process rights. See *Story*, 497 Pa. at 281, 440 A.2d at 492 ("Because appellant was tried, convicted, and sentenced to death under an unconstitutional statute, he must be treated the same as all those persons whose death penalties have been set aside."). Notably, the life sentence imposed in *Story*, like the death penalty that was vacated, was a legislatively sanctioned punishment for first-degree murder and not a lesser offense. See *id.* at 277, 440 A.2d at 490. *Rutledge* is similarly distinguishable, as that case involved the vacation of one conviction and sentence where the defendant had been convicted of two separate crimes, one of which was determined to be a lesser-included offense. See *Rutledge*, 517 U.S. at 307, 116 S.Ct. at 1250. Here, by contrast, Appellant's conviction for first-degree murder has not been vacated; rather, we are tasked with determining an appropriate scheme for resentencing for that offense, consistent with *Miller*.

Commonwealth v. Batts, 620 Pa. at 132-133, 66 A.3d at 296-297. The Supreme Court of Pennsylvania found that cases that are entitled to relief under *Miller* are distinguishable from both *Commonwealth v. Story*, 497 Pa. 273, 282, 440 A.2d 488, 492 (1981) and *Rutledge v. United States*, 517 U.S. 292, 306, 116 S.Ct. 1241, 1250 (1996). Thus, petitioner is not entitled to any other form of relief other than a sentence with life as the maximum sentence.

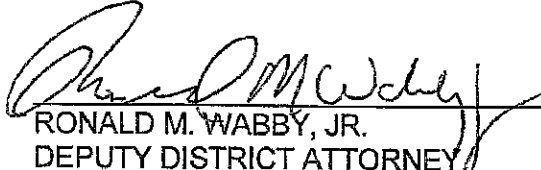


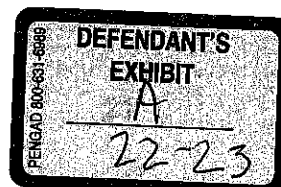
WHEREFORE, based on the foregoing, the Commonwealth respectfully requests that this court impose a sentence in accordance with *Commonwealth v. Batts* and its progeny.

Respectfully submitted,

STEPHEN A. ZAPPALA, JR.
DISTRICT ATTORNEY

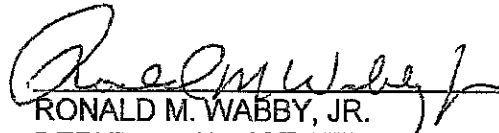
By:


RONALD M. WABBY, JR.
DEPUTY DISTRICT ATTORNEY



PROOF OF SERVICE

I, the undersigned authority, hereby certify that this 14th day of November, 2016 a true and correct copy of the within Commonwealth's Post Conviction Relief Act Petition Resentencing Memorandum was served upon persons and in the manner indicated below. The manner of service satisfies the requirements of Pa.R.Crim.P. 575.


RONALD M. WABBY, JR.
DEPUTY DISTRICT ATTORNEY
PA. I.D. NO. 81166

Office of the District Attorney
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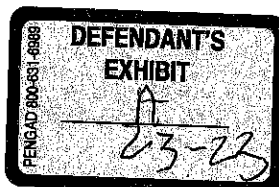
Service by first class mail addressed as follows:

Wendy L. Williams, Esquire
437 Grant Street, Suite 417
Pittsburgh, PA 15219
412-434-5757

Service by leaving a copy at the office of:

Criminal Court Administrator
535 Allegheny County Courthouse
Pittsburgh, PA 15219
(412) 350-5952

cc: The Honorable David R. Cashman
Administrative Judge—Criminal Division
308 Allegheny County Courthouse

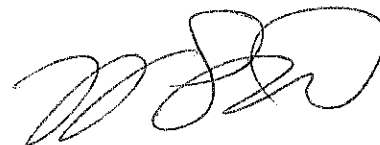


CERTIFICATE OF SERVICE

Wendy L. Williams and Marc Bookman, counsel for Defendant Ricky Lee Olds hereby certifies that a true and correct copy of the within Reply to Commonwealth's Answer was served in the manner indicated, this 3 day of January, 2017 upon the following:

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Wendy L. Williams



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