IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA

V.

JOSEPH LIGON	**CP-51-CR-0301152-1953**
KEMPIS SONGSTER	**CP-51-CR-1102961-1987**
KEVIN VAN CLIFF	**CP-51-CR-0207921-1973**
THEODORE BURNS	**CP-51-CR-1229872-1991**
SHARVONNE ROBBINS	**CP-51-CR-0400013-1992**
TAMIKA BELL	**CP-51-CR-1003691-1995**
ALPHONSO LEAPHART	**CP-51-CR-0634051-1981**

COMMONWEALTH'S BRIEF IN SUPPORT OF QUESTIONS OF LAW PURSUANT TO GENERAL COURT REGULATION #1 OF 2016

Miller v. Alabama, 132 S. Ct. 2455 (2012), *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), preclude an automatic sentence of life without parole for juvenile offenders. *Montgomery* explained that where (unlike here) *Miller* is applicable, it functions in the same manner as *Atkins v. Virginia*, 536 U.S. 304 (2002), which requires a hearing for an offender to establish membership in a protected class. In *Atkins* the protected class is immune to the death penalty, while under *Miller* the protected class is immune to life without parole. Thus, where the prosecution seeks a life without parole sentence for a juvenile offender, *Miller* requires "a procedure through which [the offender] can show that he belongs to [the] protected class," i.e., a hearing in which juvenile offenders are "given the opportunity to show their crime did not reflect irreparable corruption[.]" *Montgomery*, 136 S. Ct. at 735-736. If in the hearing the defendant "show[s] that he belongs to the protected class," life without parole is prohibited, whereas if he is the "rare" kind of offender "whose crime reflects permanent incorrigibility," life without parole is allowed.

In these cases, however, the Commonwealth is not seeking life without possibility of parole,

and none of the instant defendants is subject to that sentence. No *Miller* hearing is necessary and no *Miller* issue is present. Absent a *Miller* hearing a juvenile life without parole sentence is absolutely precluded.

Consequently, none of the instant defendants has *standing* to litigate most of the sentencing issues they purport to raise. They may not pursue issues in which they have no direct and immediate interest, in this Court or any court. By insisting on litigating issues with no bearing on their own cases, the instant defendants only delay their own parole process.[1]

A party must establish "as a threshold matter ... standing to bring [the] action" he seeks to litigate. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). "[A] person who is not adversely impacted by the matter he or she is litigating does not enjoy standing to initiate the court's dispute resolution machinery." *Id*. "Stated another way, a controversy is worthy of judicial review only if the individual initiating the legal action has been aggrieved. ... unless one has a legally sufficient interest in a matter, that is, is aggrieved, the courts cannot be assured that there is a legitimate controversy." *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 659-660 (Pa. 2005), *citing In re Hickson,* 821 A.2d 1238, 1243 (Pa. 2003); *City of Philadelphia v. Commonwealth of Pennsylvania,* 838 A.2d 566, 577 (Pa. 2003) (internal quotation marks omitted).

To be "aggrieved" a party "must have a substantial interest in the subject matter of the litigation that must be *direct* and *immediate*, rather than remote." *Commonwealth v. Janssen Pharmaceutica, Inc.*, 8 A.3d 267, 277 (Pa. 2010) (emphasis added). A "direct" interest "requires a showing that the matter complained of caused harm to the party's interest, i.e., a connection between the harm and the violation of the law." *In re Admin. Order No. 1-MD-2003*, 936 A.2d 1, 7-8 (Pa. 2007) (citation omitted). An interest is "immediate" if "the causal connection is not remote or speculative." *Id*.

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[1] The Commonwealth is prepared to proceed to sentencing forthwith in each of these cases. In 6 out of the 7 cases, resentencing will necessarily result in immediate parole eligibility (and could do so in the 7th as well depending on the minimum term imposed). It is the defendants who are delaying resentencing. As shown below, they are doing so pointlessly.

Thus, in *Commonwealth v. Wildermuth*, 501 A.2d 258, 260 (Pa. Super. 1985), the Court held that the offender had no standing to challenge a sentencing statute on the ground that it failed to afford the prosecution a right to appeal, because "one who is unharmed by a particular feature of a statute will not be heard to complain of its alleged unconstitutionality." In *Commonwealth v. Gonzales*, 48 Pa. D. & C.3d 386, 391–92, 17 Phila. Co. Rptr. 560, 1988 WL 156668, at *3 (Pa. Com. Pl. 1988), *aff'd,* 559 A.2d 962 (Pa. Super. 1989) (table), this Court (the Honorable John W. Herron) similarly refused to consider a defendant's challenge to a sentencing statute, ruling that he was without standing to do so "based on hypothetical facts."

Here, since none of the instant defendants is subject to a life without parole sentence, none of them may raise, for example, "whether there is a presumption against reimposition of a life without parole sentence" (issue 4); whether the prosecution must prove certain things beyond a reasonable doubt to allow "a sentence of life without parole" (issue 5); whether a jury determination is necessary "prior to the imposition of a sentence of life without parole" (issue 6); whether expert testimony is necessary to find "permanent incorrigibility," which under *Miller* and *Batts* is necessary to impose life without parole (issue 7).

In the instant cases, upon resentencing, each of these defendants *will* be eligible for parole. Therefore, there is no issue as to whether the sentence will permit a "meaningful opportunity for release" – i.e., parole – since that opportunity will be established by imposition of the sentence (issue 9).

Even more pointless and futile is the putative question of notice, at pretrial status hearings, of prosecution intent to seek a sentence of life without parole (issue 13). These defendants are not in pretrial status; and even if they were, the notice claim would still be irrelevant, since the Commonwealth is not seeking life without parole.

Nor can defendants have standing to raise *frivolous* claims. Issue 1 contests imposition of a *maximum* life term; this is required by 18 Pa.C.S. § 1102 (sentence for first or second degree murder is life imprisonment). Standing, however, requires a connection between the complained-of harm

and "violation of the law." *In re Admin. Order No. 1-MD-2003*, 936 A.2d at 7-9. In *Commonwealth v. Batts*, the Pennsylvania Supreme Court *specifically rejected* the identical claim the defendant wish to raise again here, *i.e.*, that offenders who were under 18 at the time of the offense cannot lawfully be sentenced to a *maximum* life term in which parole is *available*. The Court explained that 18 Pa.C.S. § 1102(a), imposing a life sentence for first degree murder, "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." 66 A.3d at 295-296. The Supreme Court held that life *with* the possibility of parole was not the issue in *Miller*, which concerned only life "*without possibility of parole* for juvenile offenders" (original emphasis), and that § 1102 is strongly presumed to be, and remains, constitutional:

> We recognize, as a policy matter, that *Miller* 's rationale—emphasizing characteristics attending youth—militates in favor of individualized sentencing for those under the age of eighteen both in terms of minimum and maximum sentences. In terms of the actual constitutional command, however, *Miller* 's binding holding is specifically couched more narrowly. *See id.* at ——, 132 S.Ct. at 2469 ("We ... hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison *without possibility of parole* for juvenile offenders.") (emphasis added). The High Court thus left unanswered the question of whether a life sentence with the possibility of parole offends the evolving standards it is discerning.
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> Significantly, in the arena of evolving federal constitutional standards, we have expressed a 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." *Commonwealth v. Sanchez,* 614 Pa. 1, ——, 36 A.3d 24, 66 (Pa.2011), *cert. denied,* —— U.S. ——, 133 S.Ct. 122, 184 L.Ed.2d 58 (2012). Moreover, barring application of the entire statutory scheme as applied to juveniles convicted of first-degree murder, based solely on the policy discussion in *Miller* (short of its affirmative holding), would contradict the "strong presumption that legislative enactments do not violate the constitution." *Commonwealth v. Chase,* 599 Pa. 80, 89, 960 A.2d 108, 112 (2008); *see also* 1 Pa.C.S. § 1922(3) (presumption that the General Assembly does not intend to violate the federal or state constitutions when it enacts legislation).
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> *Batts*, 66 A.3d at 295 (original emphasis).

Thus, *the Supreme Court held* in *Batts* that *Miller* does not bar a juvenile life sentence as a *maximum* term. Since this Court obviously cannot overrule or reverse the Supreme Court of

Pennsylvania, even if the defendants otherwise had theoretical standing to complain of the Supreme Court's holding, the complaint is completely frivolous. A frivolous claim "presents no debatable question," *Commonwealth v. Gains*, 556 A.2d 870, 874 (Pa. Super. 1989), and cannot be pursued. No one has standing to raise a frivolous claim.

Also frivolous is defendants' issue 2, contending that, although convicted of first or second degree murder, they must be sentenced to third degree murder. Once again, in *Batts* the Pennsylvania Supreme Court specifically rejected this same defense argument – that, as a result of *Miller*, Pennsylvania's entire statutory scheme for penalizing first degree murder was unconstitutional in its entirety, such that juvenile offenders would have to be resentenced as if they had been convicted of third degree murder. *Id*. at 294, 295 ("Appellant asserts that the statutory [sentencing] scheme ... is unconstitutional in its entirety in light of *Miller*. Hence, Appellant contends that this Court should look to other statutes ... to determine the appropriate sentence that may be imposed ... We find the Commonwealth's construction of the applicable statutes to be the best supported. 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*").

Again, since this Court cannot overrule the Supreme Court, such claims are frivolous, and are simply barred.

The remaining claims, even if not frivolous, do not warrant briefing. 18 Pa.C.S. § 1102.1, for example, obviously is not retroactive to offenses that occurred before its effective date, and therefore no mandatory minimum sentence applies (issue 3). This is not even in issue.

The remaining issues are fact-specific matters the defendants attempt to raise without reference to any specific facts. "[D]isclosure of any expert reports" (issue 8) is a garden-variety discovery matter. The vague defense query regarding possible "constitutional limits on victim impact testimony" (issue 10) raises a hypothetical question that cannot be addressed absent an actual offer of proof; moreover, the Supreme Court recently held that relevant victim impact evidence is

admissible at sentencing. *Commonwealth v. Ali*, No. 84 MAP 2015, 2016 WL 7008039, at *8 (Pa. Nov. 22, 2016) (where the crime is logically connected to a community impact suffered by specific individuals, such evidence is relevant at sentencing "whether the evidence is called victim impact or not") (internal quotation marks omitted).

Likewise, "[w]hether the Court must provide funds" requested by the defense (issues 11 and 12) is another garden-variety discretionary matter that depends on specific circumstances. *Commonwealth v. Wholaver*, 989 A.2d 883, 894 (Pa. 2010) ("Appointment of expert witnesses and the provision of public funds to hire them to assist in the defense against criminal charges are decisions within the trial court's sound discretion"). The claim that evidence or witnesses must be disclosed prior to sentencing (issue 14) is another discretionary discovery question, and the notion that any dispute thereof requires assignment of "a judge other than the sentencing judge" is clearly unsupported and frivolous. Finally, asking whether *Dawson v. Delaware*, 503 U.S. 159 (1992) "governs" admissibility of "evidence of gang membership" is frivolous. The issue in *Dawson* was whether Dawson's membership in the Aryan Brotherhood was admissible "in a capital sentencing proceeding" where it had "no relevance to the issues being decided[.]" *Id.* at 160. None of the instant cases is capital, and "relevance to the issues being decided" depends on the situation. *See Commonwealth v. Batts*, 125 A.3d 33, 42 (Pa. Super. 2015), *appeal granted in part,* 135 A.3d 176 (Pa. 2016) (juvenile murder offender resentenced to life without parole argued that "the trial court improperly rejected several mitigating factors, including ... gang affiliation").

All of the defense claims should be dismissed.

Respectfully Submitted,

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PROOF OF SERVICE

The undersigned certifies that the attached brief was served on the following by (inter alia) first class mail on January 6, 2017.

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