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	: COURT OF COMMON PLEAS
COMMONWEALTH OF PENNSYLVANIA	: CRIMINAL TRIAL DIVISION
	:
	: CP-51-CR-03011332-1953
VS.	: CP-51-CR-03011352-1953
JOSEPH LIGON	: CHARGES: MURDER

COMMONWEALTH OF PENNSYLVANIA	:
	:
VS.	: CP-51-CR-1102961-1987
KEMPIS SONGSTER	: CHARGES: MURDER

COMMONWEALTH OF PENNSYLVANIA	:
	:
VS.	: CP-51-CR-0207921-1973
KEVIN VAN CLIFF	: CHARGES: MURDER

COMMONWEALTH OF PENNSYLVANIA	:
	:
VS.	: CP-51-CR-1229872-1991
THEODORE BURNS	: CHARGES: MURDER

COMMONWEALTH OF PENNSYLVANIA	:
	:
VS.	: CP-51-CR-0400013-1992
SHARVONNE ROBBINS	: CHARGES: MURDER

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
VS.	:	CP-51-CR-1003691-1995
TAMIKA BELL	:	CHARGES: MURDER

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
VS.	:	CP-51-CR-0634051-1981
ALPHONSO LEAPHART	:	CHARGES: MURDER

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
VS.	:	CP-51-CR-0915321-1969
JOHN F. NOLE	:	CHARGES: MURDER

DEFENDANTS' BRIEF IN SUPPORT OF THE QUESTIONS OF LAW TO BE RESOLVED PRIOR TO RE-SENTENCING PURSUANT TO GENERAL COURT REGULATION #1 OF 2016

Pursuant to General Court Regulation #1 (2016), defendants Joseph Ligon, Sharvonne Robbins, Tamika Bell, and John F. Nole, by Bradley S. Bridge, Shonda Williams, Karl Baker, and Keir Bradford-Grey, Defender Association of Philadelphia, and Marsha Levick, Juvenile Law Center; Kempis Songster, by Douglas Fox, Cozen O'Connor; Kevin Van Cliff, by Seth J. Zuckerman, Michael Savino and Paul Zola[1], Cozen O'Connor; Alphonso Leaphart, by Peter Goldberger; and Theodore Burns, by Melissa R. Gibson and Mary Christine Slavik (*pro hac vice*), Akin Gump Strauss Hauer

[1] These attorneys are from Cozen O'Connor's New York office. Their *pro hac vice* motion is currently pending.

and Feld LLP, hereby present the following brief in support of the questions of law for resolution by an *en banc* panel of this court.

1. Imposition of a Maximum Sentence of Life Imprisonment for an Offense Committed by a Person Who Was under 18 Years of Age at the Time of the Offense Is Unconstitutional Under *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 132 S. Ct. 2455 (2012), *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013) (*Batts I*), *Garnett v. Wetzel*, ___F.Supp.3d___, 2016 WL 4379244 (E.D.Pa., 2016) and *Songster v. Beard*, ___F.Supp.3d___, 2016 WL 4379233 (E.D. Pa. 2016).

The first issue is whether a juvenile who had previously received a sentence of life without parole must, upon resentencing, receive a term of years sentence with the maximum term set at life. A new sentence with a maximum term of life would be unconstitutional.

The Pennsylvania Supreme Court in *Batts I* specifically held that *Miller's* requirement of proportionality applied to both the minimum and maximum sentences. "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." *Commonwealth v. Batts*, at 296. To impose life as the maximum term in every case would violate the constitutional mandate of proportionality. *Songster v. Beard*, ___F.Supp.3d ___, 2016 WL 4379233 at *3 (E.D. Pa., 2016); *Garnett v. Wetzel*, ___F.Supp.3d___, 2016 WL 4379244 at *3 (E.D. Pa. 2016).

A sentence with a maximum term of life would also violate the requirement that a juvenile must have a meaningful opportunity for release based upon demonstrated maturity. *Graham, supra.* at 75. Placing the authority to determine an individual's eligibility for release in the State Parole Board would be an abdication of the judicial

responsibility of sentencing. *Songster v. Beard*, ___F.Supp.3d ___, 2016 WL 4379233 at *3 (E.D. Pa., 2016); *Garnett v. Wetzel*, ___F.Supp.3d___, 2016 WL 4379244 at *3 (E.D. Pa. 2016). The State Parole Board has never considered cases before where the juvenile was originally sentenced to life without parole and now, based upon legal developments, the juvenile now could be released. There is uncertainty as to how the Parole Board will deal with parole in these situations and for that reason it would be an abdication of a judge's sentencing responsibility to simply transfer the release decision to the Parole Board.

The District Attorney's Office has maintained that there must be a life maximum imposed on each individual, effectively a mandatory maximum life sentence for every juvenile lifer facing re-sentencing. The United States Supreme Court in *Miller* invalidated imposition of mandatory life without parole sentences for juveniles because such a sentence would not take into account the unique characteristics of each juvenile defendant, including youth-related characteristics reflecting a juvenile's ability to grow, mature and develop. Instead, the Court required an individualized sentencing hearing for each individual that would take these other key attributes of youth into account. Substituting a mandatory maximum life sentence for a mandatory life without parole sentence does not cure the Court's requirement that youth be properly considered in each case. Individualized judgment is called for in setting a maximum term just as much as it is required in setting a minimum. Hence, in addition to *Batts I, Miller* would likewise bar imposition of sentences which always have a maximum term of life.

2. Following Miller, a **Resentencing Court Can Only Impose a Sentence for Third Degree Murder, Which Is the Only Statutorily Lawful Sentence in Pennsylvania in a Case of First Degree Murder Committed by a Person under 18 Years of Age or, for Such Persons Convicted of Second Degree Murder, a Sentence for Third Degree Murder or for the Felony Associated with the Second Degree Murder Conviction.**

Miller invalidated the only existing sentencing scheme in Pennsylvania for juveniles convicted of first or second degree murder prior to 2012. Applying severance principles does not result in a valid legislatively enacted penalty for these defendants except the sentencing scheme for lesser included offenses. Accordingly, that is the applicable and constitutional punishment for this class of defendants.

It has long been the law in this Commonwealth that no sentence can be imposed in any criminal case unless authorized by statute. *Commonwealth ex rel. Varronne v. Cunningham*, 365 Pa. 68, 71, 73 A.2d 705, 706 (1950). Indeed, the very definition of an illegal sentence is a punishment that lacks statutory authorization. *Commonwealth v. Randal*, 837 A.2d 1211, 1214 (Pa.Super. 2003). The Pennsylvania Supreme Court recently reaffirmed this precept, making clear that it follows from the same principle that when the statute at issue is unconstitutional, and if the invalid portions cannot be severed in accordance with the Statutory Construction Act, then the Court cannot create a substitute provision but must simply strike the invalid law and leave it to the Legislature to provide a replacement or correction, if any. *Commonwealth v. Wolfe*, 140 A.3d 651, 661-63 (Pa. 2016); *Commonwealth v. Hopkins*, 117 A.3d 247, 261 (Pa. 2015). Applying this fundamental rule, which is also mandated by the Due Process Clause of the Fourteenth Amendment, *see United States v. Batchelder*, 442 U.S. 114, 123 (1979), there is no lawful sentence that can be imposed on the defendants in these cases for their

convictions of first or second degree murder, but only sentences for other or lesser-included offenses.

To the extent that part of the discussion in *Batts I* may appear to be to the contrary (*see* 66 A. 3d at 294-96, without citing the governing principle and precedent), that case has been overruled on this point by *Wolfe* and *Hopkins*. *Batts I* also pre-dates the U.S. Supreme Court's decision in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016), and is premised on a reading of *Miller v. Alabama*, 567 U.S. ___ 132 S.Ct. 2455 (2012), that has since been repudiated. *See Commonwealth v. Hicks*, 2016 PA Super 257, 2016 WL 6820552 (Pa. Super., 2016). While this Court is surely bound by precedent of the Pennsylvania Supreme Court, even if that precedent appears to have been wrongly decided and even where (as here) reconsideration of that precedent is currently pending after a subsequent allowance of appeal, *Commonwealth v. Randolph*, 718 A.2d 1242, 1245 (Pa. 1998); *Commonwealth v. Tilghman*, 673 A.2d 898, 903 (Pa. 1996); *Marks v. Nationwide Ins. Co.*, 762 A.2d 1098, 1101 (Pa.Super. 2000), that obligation cannot survive subsequent and intervening precedent of the state and federal Supreme Courts, which is also binding.

Applying the principles of *Wolfe* and *Hopkins*, no constitutional statute exists under which these defendants can be sentenced for first or second degree murder. The life sentence maximum is invalid unless a minimum term can be applied to render them parole-eligible. But a minimum, by law, must not exceed half the maximum, 42 Pa.C.S. § 9756(b), which is mathematically impossible in the case of a life sentence. For this reason, striking the parole-ineligibility provision (61 Pa.C.S. § 6137(a)(1)) as unconstitutional is not an available remedy, as doing so would leave in place no

constitutional sentencing scheme that is capable of implementation and execution without resorting to judicial legislation. *Hopkins*, 117 A.3d at 252-53, discussing 1 Pa.C.S. § 1925.

Accordingly, for those juvenile defendants convicted of first degree murder, the next most severe available sentence would be that for Third Degree Murder (plus any non-merged counts). *See Commonwealth v. Hickson*, 586 A.2d 393 (Pa.Super. 1990) (Third Degree Murder is lesser included offense of First Degree Murder). As for those defendants with unconstitutional sentences for Second Degree Murder, the most severe lawful sentence would ordinarily be that for the associated felony. *See* id. § 2502(b), (d) (¶3); *Commonwealth v. Tarver*, 426 A.2d 569 (Pa. 1981); *Commonwealth v. Fortune*, 451 A.2d 729, 731 (Pa.Super. 1982) (related felony is constituent element of "Murder-2"). These defendants must be resentenced accordingly.

3. Because 18 Pa. C.S.A. § 1102.1 Does Not Apply Retroactively to Those Convicted on or Before June 24, 2012, the Court May Not Use § 1102.1 as a Guide for Re-Sentencing.

Following the United States Supreme Court's decision in *Miller v. Alabama*, the Pennsylvania Legislature enacted 18 Pa.C.S. § 1102.1 to provide a new sentencing scheme for juveniles convicted of first or second degree murder after June 24, 2012. Despite being well aware that hundreds of juveniles were possibly serving unconstitutional sentences for murder convictions obtained prior to June 24, 2012, the General Assembly explicitly chose not to afford these juveniles any relief. (*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); 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*, ___F.Supp.3d___, 2016 WL 4379244 (E.D.Pa. 2016) at *3 ("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*, ___F.Supp.3d___, 2016 WL 4379233 (E.D. Pa., 2016) at *3 (recognizing same). This Court cannot undo the General Assembly's decision that Section 1102.1 does not apply retroactively. *Wolfe*, 140 A.3d at 662-63.

The Pennsylvania Supreme Court has recognized that—beyond severance, which is not available here—courts are powerless to supply a sentencing scheme when the legislatively-drafted one fails. *Hopkins*, 117 A.3d at 261-62; *accord Wolfe*, supra. The same is true of parole—the General Assembly, and not the court, "has the power to modify the law governing parole of persons sentenced to life imprisonment." *Commonwealth v. Clark*, 710 A.2d 31, 37 (1998). Therefore, if this Court rejects defendants' argument that Third Degree Murder is the appropriate lesser included offense for re- sentencing purposes, no statutory provisions control resentencing. The Court would then be left with no alternative other than to impose a flat sentence of time served. *See Songster v. Beard*, ___F.Supp.3d ___, 2016 WL 4379233 at *4 (E.D. Pa., 2016); *Garnett v. Wetzel*, ___F.Supp.3d___, 2016 WL 4379244 at *4 (E.D. Pa. 2016).

4. Because *Miller v. Alabama* and *Montgomery v. Louisiana* Require That Juvenile Life Without Parole Sentences Should Be Rare and Uncommon, These Cases Also Establish a Presumption Against Reimposition of Life Without Parole at Resentencing, as Well as Presumptions of Immaturity and Reduced Culpability.

Read together, the United States Supreme Court's decisions in *Miller v. Alabama* and *Montgomery v. Louisiana* establish a presumption against juvenile life without parole

sentences. The Court declared in *Miller* that "given all we have said in *Roper*, *Graham*, and [*Miller*] about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon*." *Miller*, 132 S. Ct. at 2469 (emphasis added); s*ee also Commonwealth v. Batts*, 66 A.3d at 291 (noting that *Miller* "stated that the occasion for [juvenile life without parole] would be 'uncommon' and, in any event, must first 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'"). *Miller* further noted that the "juvenile offender whose crime reflects irreparable corruption" will be "rare" and "uncommon." *Miller*, 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68).[2] And in *Montgomery*, the Court recognized a presumption against life without parole because of a child's inherent immaturity and reduced culpability, which ensures that only the rare and uncommon juvenile whose crime reflects irreparable corruption is sentenced to life without parole and which simultaneously recognizes the differences present in a child.

The U.S. Supreme Court's sentencing cases establish that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464. *Miller* emphasized that "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Id*. (citation and quotation marks omitted). *Miller* noted that these findings about children's

[2] *See also id.* at 2458 (a juvenile's "actions are less likely to be 'evidence of irretrievabl[e] deprav[ity]'") (quoting *Roper,* 543 U.S. at 570); *id.* at 2465 ("Deciding that a juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible' __ but 'incorrigibility is inconsistent with youth.'" (quoting *Graham,* 560 U.S. at 72-73)).

distinct attributes are not crime-specific. See *id*. at 2465. "Those features are evident *in the same way, and to the same degree*," no matter the crime, even in homicide offenses. *Id*. (emphasis added).

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.

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, irreparably corrupt or otherwise beyond rehabilitation. "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 the Pennsylvania Superior Court has 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. 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. 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.

To date, three state Supreme Courts have held that *Miller* dictates this presumption against juvenile life without parole; no state Supreme Court has ruled to the contrary.[3] The Connecticut Supreme Court found:

> [I]n *Miller*, the court expressed its confidence that, once the sentencing authority considers the mitigating factors of the offender's youth and its attendant circumstances, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *This language suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances.*

[3] Massachusetts has gone further, banning juvenile life without parole sentences altogether. Relying on United States Supreme Court precedent, the Massachusetts Supreme Judicial Court held that even the discretionary imposition of juvenile life without parole sentences violates the state constitution. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 284-85 (Mass 2013). The Court held:

> Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an "irretrievably depraved character," can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender. Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved. Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted.

Id. at 283-84 (footnote and citations omitted).

State v. Riley, 110 A.3d 1205, 1214 (Conn. 2015) (emphasis added), *cert. denied*, 136 S. Ct. 1361 (2016). Similarly, the Missouri Supreme Court held that the state bears the burden of demonstrating, beyond a reasonable doubt, that life without parole is an appropriate sentence. *See State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (*en banc*) ("[A] juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances.").

The Iowa Supreme Court also found that *Miller* established a presumption against juvenile life without parole:

> [T]he court must start with the Supreme Court's pronouncement that sentencing a juvenile to life in prison without the possibility of parole should be rare and uncommon. Thus, *the 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.

State v. Seats, 865 N.W.2d 545, 555 (Iowa 2015) (emphasis added) (citations omitted). Notably, since its decision in *Seats*, the Iowa Supreme Court has expanded its decision and held that juvenile life without parole sentences are *always* unconstitutional pursuant to their state constitution. The Iowa Supreme Court found:

> [T]he enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation. . . . But a district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is "irretrievably corrupt" at a time when even trained professionals with years of clinical experience

> would not attempt to make such a determination. No structural or procedural approach, including a provision of a death-penalty-type legal defense, will cure this fundamental problem.

State v. Sweet, No. 14-0455, 2016 WL 3023726, at *26-*27 (Iowa May 27, 2016).

Furthermore, at least one State Supreme Court has already recognized that *Montgomery* clarified *Miller's* standard in juvenile sentencing cases. The Georgia Supreme Court noted that "[t]he *Montgomery* majority explains . . . that by *uncommon*, *Miller* meant *exceptionally rare*, and that determining whether a juvenile falls into that exclusive realm turns not on the sentencing court's consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a specific determination that he is *irreparably corrupt*." *Veal v. State*, 784 S.E.2d 403, 411 (Ga. 2016).

The United States Supreme Court in *Montgomery* expanded its analysis of the predicate factors that must be found before a life without parole sentence could be imposed on a juvenile. *Montgomery* explained that the Court's 2012 decision in *Miller* "did bar life without parole . . . for all but the rarest of juvenile offenders, *those whose crimes reflect permanent incorrigibility*." *Montgomery*, 136 S. Ct. at 734 (emphasis added). The Court held "that *Miller* drew a line between children whose crimes reflect transient immaturity and *those rare children whose crimes reflect irreparable corruption*," *id*. (emphasis added), noting that a life without parole sentence "could [only] be a proportionate sentence for the latter kind of juvenile offender." *Id*. Thus, the Court recognized that the vast majority of juvenile offenses reflect transient immaturity as a result of a child's behavioral and neurological development. *Id.*

Most significantly, the United States Supreme Court's recent remands in several re-sentencing cases demonstrate that the determination must weigh in favor of parole eligibility as "youth is the dispositive consideration for 'all but the rarest of children.'" *Adams v. Alabama*, 136 S. Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) (quoting *Montgomery*, 136 S.Ct. at 726). When "there is no indication that, when the factfinders . . . considered petitioners' youth, they even asked the question *Miller* required them not only to answer, but to answer correctly: whether petitioners' crimes reflected "transient immaturity" or "irreparable corruption," remand is required. *Id.*; *Tatum v. Arizona*, 137 S. Ct. 11 (2016) (Sotomayor, J., concurring). As the Court has recognized the vast majority of youth are not the rare and uncommon juvenile whose crime reflects irreparable corruption, the sentencer must start the analysis with the presumption that juveniles' crimes are a reflection of their transient immaturity.

5. The Commonwealth Must Establish Beyond a Reasonable Doubt That the Defendant's Crime Reflects Permanent Incorrigibility, Irreparable Corruption or Irretrievable Depravity Before Such Defendant May Receive a Sentence of Life Without Parole.

The United States Supreme Court in *Montgomery* held that only a juvenile who was permanently incorrigible, irreparably corrupt or irretrievably depraved could receive a sentence of life imprisonment without parole. These facts must be established beyond a reasonable doubt.

Without the factfinder's determination of the existence of incorrigibility, corruption or depravity, a sentence of a term of years is all that would be permitted. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), establishes that any fact which elevates the sentence must be established by a jury and must be established beyond a reasonable

doubt. The Sixth Amendment right to a jury has been understood to entitle a criminal defendant to a jury determination beyond a reasonable doubt of each element of the crime for which he is accused. *Apprendi* 530 U.S. at 477 ("Taken together, these rights indisputably entitle a criminal defendant to a 'jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'") (citation omitted); *see also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

A sentencer must find that the juvenile's crime reflects irreparable corruption in order to sentence of juvenile to life without parole. *Miller* found "three significant gaps between juveniles and adults": (1) "Lack of maturity and an underdeveloped sense of responsibility"; (2) vulnerability to "negative influences and outside pressures," limiting "control over their own environment," resulting in "lack of ability to extricate themselves from horrific, crime-producing settings"; (3) their unformed character and traits that weigh against a finding of "irretrievable depravity." *Miller*, 132 S. Ct. at 2464 (citations omitted). The sentencer must make a finding beyond a reasonable doubt with attention to these unique attributes of youth, and separate the nature of the crime from the culpability of the offender.

As a determination of irreparable corruption is necessary in order to expose a juvenile to life without parole, it is constitutionally mandated that such a finding be beyond a reasonable doubt.

6. A Defendant Facing Resentencing Has a Right to a Jury Determination of Whether He or She Is Permanently Incorrigible, Irreparably Corrupt or Irretrievably Depraved Prior to the Imposition of a Sentence of Life Without Parole.

Montgomery v. Louisiana established that a juvenile may not be sentenced to life without parole absent individualized findings that he or she is among "the rare juvenile offender[s] who exhibit [ ] such irretrievable depravity that rehabilitation is impossible." 136 S. Ct. at 733. In creating this standard for juvenile life without parole, *Miller* and *Montgomery* set the sentencing ceiling for juveniles at a term of years absent additional findings of fact. *Apprendi v. New Jersey*, 530 U.S. at 470-71, and its progeny established that any element which increases the punishment a defendant may receive, beyond the sentence established by a determination of guilt, must be proven to a jury beyond a reasonable doubt. Because imposition of life without parole upon a juvenile requires additional, specific findings regarding permanent incorrigibility, the facts establishing such a determination must be presented to a jury and proven beyond a reasonable doubt. U.S. CONST., Amend. VI, XIV.

In *Apprendi v. New Jersey*, the U.S. Supreme Court ruled that other than a prior conviction, any finding of fact that increases a criminal defendant's maximum sentence must be proven to a jury beyond a reasonable doubt. *See also Ring v. Arizona*, 536 U.S. 584, 588 (2002). The Court reasoned that the due process clause and the Sixth Amendment's jury right, taken together, "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Id*. at 477 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)) (alteration in original). A judge may not make factual findings exposing a defendant to a sentence above the maximum sentence authorized by the jury's

verdict. *Blakely v. Washington*, 542 U.S. 296, 304 (2004) ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." (citation omitted)). See also *Hurst v. Florida*, 577 U.S. — (Jan. 12, 2016) (capital sentencing scheme that treats penalty-related jury determinations as merely advisory violates Sixth Amendment).

More recently, in *Alleyne v. United States*, 570 U.S. ___, 133 S. Ct. 2151 (2013) the Supreme Court applied *Apprendi* in the context of mandatory minimum sentences. The *Alleyne* Court explained that "[t]he touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense.*" Id.* at 2158. "[A] fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed." *Id*. at 2158. The Court concluded, "it is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment" and trigger a jury trial right. *Id*. at 2161. The Pennsylvania Supreme Court has enforced the right established in *Alleyne. See Hopkins, supra; Wolfe, supra*.

Apprendi and *Alleyne* thus require a jury finding beyond a reasonable doubt where any fact, other than prior conviction, increases either the floor or ceiling of a sentence beyond that which a court may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant. *Blakely*, 542 U.S. at 296; *Apprendi*, 530 U.S. at 466, *Ring*, 536 U.S. at 584; *Alleyne*, 133 S. Ct. at 2155.

At the point of conviction, without additional findings to determine irreparable corruption, the maximum punishment that a trial court may impose on a juvenile

convicted of first-degree murder (assuming legislative authorization) is a non-life-without-parole, term-of-years prison sentence. As the Supreme Court made clear in *Blakely*, 542 U.S. at 303, for purposes of *Apprendi*, the "'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Sentencing a juvenile to life without parole absent a finding of permanent incorrigibility violates the right to "'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 477, 490 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

Finally, juveniles exposed to life without parole are entitled to at least the same procedural due process afforded an adult facing capital punishment under the Eighth Amendment and Article I, Section 13 of the Pennsylvania Constitution. The capital sentencing procedure in Pennsylvania is governed by 42 Pa.C.S. § 9711(b) which provides for a jury trial right in sentencing.

7. Expert Testimony Is Required to Establish That the Defendant's Crime Reflects Permanent Incorrigibility, Irreparable Corruption, or Irretrievable Depravity.

Citing *Roper v. Simmons*, 125 S.Ct. 1183 (2005), and *Graham v. Florida*, 130 S.Ct. 2011 (2010), for the proposition that "children are constitutionally different from adults for the purposes of sentencing," the United States Supreme Court in *Miller* noted that the truth of the pronouncement expressed in its opinions "rested not only on common sense—on what 'every parent knows'—but on science and social science as well," 132 S.Ct. at 2464 (citations omitted). For this reason, expert evidence is critical to a competent understanding of whether a particular offender's conduct can be found to

deviate so far from normative behavior as to reflect permanent incorrigibility, irreparable corruption, or irretrievable depravity.

Such evidence is critical since, as the Court emphasized, there is "great difficulty noted in *Roper* and *Graham* of distinguishing at this early age between the 'juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller* at 2469. The Court reiterated its requirements that while sentencing courts retain the ability to make this judgment in homicide cases, they cannot do so without information as to what distinguishes the former from the latter, and expressed its belief that "sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* Expert evidence is crucial to make this determination, which perforce involves, *inter alia*, insight into the juvenile's state of mind, both intellectual and emotional, when the crime is committed, well beyond the ken of the typical judge or juror.

The substantive change announced in *Miller* requires procedural mechanisms "that enable[] a prisoner to show that he falls within the category of persons whom the law may no longer punish." *Montgomery*, 136 S.Ct. at 735. (citation omitted). To make such a showing requires expert psychological or psychiatric testimony. Thus, as *Montgomery* explains, "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." *Id*.

The question then becomes what sort of procedural mechanism suits the purpose of providing standards, protocols, or other appropriate considerations for decision making necessary to regulate "the manner of determining culpability."

As already noted, expert testimony is currently received by sentencing courts through presentence reports and other relevant materials. Evaluations of the offender's mental age, the distinctive attributes of youth—immaturity, recklessness, impetuosity recognized in *Miller*, *Graham*, and *Roper*, among others—along with environmental vulnerabilities, family circumstances and other relevant facts, can only be properly interpreted by those trained to do so before being presented to the court as a basis for sentencing. Informality is often permitted in establishing such mitigating circumstances. But to prove the facts essential to imposition of a life term, only the most reliable evidence should suffice, which in the case of "incorrigibility" means an expert in both child development and forensic psychology.Life without parole is only permitted upon proof demonstrating beyond a reasonable doubt that the juvenile is permanently incorrigible. Expert testimony of incorrigibility is the only method by which the fact finder can make that assessment.

8. Pa. R. Cr. P. 573 Governs the Disclosure of Any Expert Reports.

Regardless of the type of evidence, "the purpose of the discovery rules is to permit the parties in a criminal matter to prepare for trial." *Commonwealth. v. Shelton*, 640 A.2d 892, 895 (1994). The ability to adequately prepare is required because "[t]rial by ambush is contrary to the spirit and letter of those rules and cannot be condoned." *Id.* (citing *Commonwealth v. Moose*, 602 A.2d 1265, 1274 (1992)). The discovery procedures enumerated in Rule 573 go beyond merely requiring adequate expert disclosure and ensure that a fair proceeding occurs.

Rule 573 requires the disclosure of expert reports and opinions, and the judge can require the production of a report for a testifying witness even if one was not originally

prepared. *See* Pa. R. Cr. P. Rule 573(b)(1)(E), (b)(2)(B) & (c)(2). Given the importance of expert testimony in determining whether a juvenile is the rare and uncommon individual whose crime reflects irreparable corruption, it is imperative that counsel be adequately prepared to defend against expert testimony to the contrary. Such a defense can only be realized if the relevant expert reports and underlying evidence is disclosed with sufficient time and substance to allow for a thorough cross-examination. Allowing these resentencing hearings to fall outside of the protections for both sides under Rule 573 would result in *ad hoc* hearings with parties prevailing irrespective of the appropriate evidence that was introduced. Such a result would be untenable.

The requirements of Rule 573 governing expert reports for all sides would be appropriate here to ensure that the appropriate sentence is determined by a fair process.

9. De Facto Life Sentences, Which Deny Defendants a "Meaningful Opportunity" for Release, Are Constitutionally Barred under *Graham*, *Miller* and *Montgomery*.

Miller v. Alabama and *Montgomery v. Louisiana* create a presumption of parole eligibility and require a child to be found irreparably corrupt before receiving a life without parole sentence, even if that sentence is expressed as a lengthy term of years amounting to a *de facto* life without parole sentence.[4] *See Miller*, 132 S. Ct. 2455 (2012); *Montgomery*, 136 S. Ct. 718, 733-35 (2016). *Montgomery* vastly restricts a sentencing court's discretion to impose juvenile life without parole sentences. *See Veal v. State*, 784 S.E.2d 403, 411 (Ga. 2016) ("The *Montgomery* majority's characterization of *Miller* also undermines this Court's cases indicating that trial courts have significant discretion in

[4] John F. Nole is one of the named defendants in this matter. In his case, the Commonwealth, while purporting to not seek a life without parole sentence, made an offer to counsel of 50 years to life and indicated that they would object to the granting of parole. There can be no doubt that such a sentence would amount to life imprisonment.

deciding whether juvenile murderers should serve life sentences with or without the possibility of parole."). Because *Montgomery* mandates that a juvenile life without parole sentence must be "rare," "uncommon," and reserved only for "irreparably corrupt" young offenders, *Montgomery*, 136 S. Ct. at 733-34, a *de facto* life without parole sentence is also barred for the overwhelming majority of juvenile homicide offenders.[5]

The U.S. Supreme Court's Eighth Amendment jurisprudence establishes that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not the label of the sentence. The Supreme Court has noted that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without the possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." *Sumner v. Shuman*, 483 U.S. 66, 83 (1987). A variety of other jurisdictions have established that *de facto* life without parole sentences are unconstitutional and violate the Court's mandate in *Miller*.

The Iowa Supreme Court held that a 52½-year sentence was the functional equivalent of life imprisonment, triggering the protections established by *Miller*. *State v.*

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[5] Additionally, in the context of addressing relief through *Graham v. Florida*, 560 U.S. 48 (2010), where the U.S. Supreme Court banned life without parole sentences for juveniles convicted of non-homicide offenses, the majority of courts agree that *Graham* and *Miller*'s analysis extend to children with multiple offenses serving *de facto* life sentences. *See Henry v. State*, 175 So.3d 675 (Fla. 2015) (eight separate felony offenses running a consecutive 90-year sentence constitute a *de facto* life without parole sentence); *State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (fourteen parole-eligible life sentences and a consecutive 92 years in prison, creating a minimum of 100 years, unconstitutional under *Graham*); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (three attempted murder counts constituting a 110-years-to life sentence are *de facto* life without parole); *People v. Rainer*, 2013 COA 51, 2013 WL 1490107 (Colo. Ct. App. April 13, 2013), certiorari granted, *People v. Rainer*, No. 13SC408, 2014 WL 7330977 (Colo. Dec. 22, 2014) (aggregate 112-year sentence violated *Graham*'s prohibition of life sentences for nonhomicide offenses despite four counts).

Null, 836 N.W. 2d 41 (Iowa, 2013).[6] The Iowa Supreme Court rejected the state's argument that a juvenile's "potential future release in his or her late sixties after a half century of incarceration" was not barred by *Miller*. *Id.* at 71. *See also Bear Cloud v. State*, 334 P.3d 132, 144 (Wyoming 2014) (an aggregate sentence of 45 years was a *de facto* life sentence); *State v. Riley*, 110 A.3d 1205, 1213-14 (Conn. 2015) (aggregate 100-year sentence for a total of four offenses, including murder, was a *de facto* life sentence); *People v. Nieto*, 52 N.E.3d 442, 455 (Ill. App. Ct. 2016) (four consecutive sentences for multiple homicide and nonhomicide crimes created a *de facto* life sentence in violation of *Miller*).

The Connecticut Supreme Court found a 50-year sentence without the possibility of parole to be the functional equivalent of a life sentence and, as a result, such a sentence was unconstitutional under *Miller*. *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1035 (Conn. 2015), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (2016). The Connecticut Supreme Court evaluated the sentence by reviewing life expectancy

[6] *See also Thomas v. Pennsylvania*, 2012 WL 6678686 at *2 (E.D. Pa. 2012) (vacating a sentence in which a 15-year-old offender would not be parole-eligible until age 83 noting that "[t]his Court does not believe that the Supreme Court's analysis would change simply because a sentence is labeled a term-of-years rather than a life sentence if that term-of-years sentence does not provide a meaningful opportunity for parole in a juvenile's lifetime. This Court's concerns about juvenile culpability and inadequate penological justification apply equally in both situations, and there is no basis to distinguish sentences based on their label."); *but see Diamond v. State*, 419 S.W. 3d 435 (Tex. Crim. App. 2012) (upholding a child's consecutive 99 year and 2 year sentences without any discussion of *Graham*); *State v. Kasic*, 265 P.3d 410 (Ariz. Ct. App. 2011) (upholding an aggregate term of 139 ¾ years based on 32 felonies, including on attempted arson); *State v. Brown*, 118 So. 3d 332, 341 (La. 2013) (upholding consecutive term-of-years sentences rendering the defendant eligible for parole at 86); *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) (upholding a sentence where the earliest possibility of parole was at age 95); *State v. Cardeilhac*, 293 Neb. 200, 876 N.W. 2d 876 (2016) (juvenile defendant's sentence of imprisonment for 60 years to life was not excessive).

data, which shows that such a lengthy sentence will result in the likelihood that the individual will die in prison:

> We begin by observing that recent government statistics indicate that the average life expectancy for a male in the United States is seventy-six years. United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Vital Statistics Reports, Vol. 62, No. 7 (January 6, 2014), available at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr 62_07.pdf (last visited May 26, 2015). This means that an average male juvenile offender imprisoned between the ages of sixteen and eighteen who is sentenced to a fifty year term of imprisonment would be released from prison between the ages of sixty-six and sixty-eight, leaving eight to ten years of life outside of prison. Notably, this general statistic does not account for any reduction in life expectancy due to the impact of spending the vast majority of one's life in prison. *See, e.g.*, Campaign for the Fair Sentencing of Youth, "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences," (2012–2015) p. 2, available at http://fairsentencingofyouth.org/wp-content/uploads/2010/02/ Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited May 26, 2015) (concluding that Michigan juveniles sentenced to natural life sentences have average life expectancy of 50.6 years); N. Straley, "*Miller*'s Promise: Re–Evaluating Extreme Criminal Sentences for Children," 89 Wn. L.Rev. 963, 986 n. 142 (2014) (data from New York suggests that "[a] person suffers a two-year decline in life expectancy for every year locked away in prison"); see also *United States v. Taveras,* 436 F.Supp.2d 493, 500 (E.D.N.Y. 2006) (acknowledging that life expectancy within federal prison is "considerably shortened"), vacated in part on other grounds sub nom. *United States v. Pepin,* 514 F.3d 193 (2d Cir.2008); *State v. Null,* supra, 836 N.W.2d at 71 (acknowledging that "long-term incarceration [may present] health and safety risks that tend to decrease life expectancy as compared to the general population"). Such evidence suggests that a juvenile offender sentenced to a fifty year term of imprisonment may never experience freedom.

Casiano v. Comm'r of Correction, 115 A.3d 1031, 1046 (2015), *cert. denied sub nom. Semple v. Casiano,* 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

The federal government has used life expectancy data in recognizing that a sentence of just under 40 years is the functional equivalent of a life sentence. The United States Sentencing Commission treats a life sentence as the equivalent of 470 months (or just over 39 years), based on average life expectancy of those serving prison sentences. *See, e.g.*, *United States v. Nelson*, 491 F.3d 344, 349-50 (7th Cir. 2007); U.S. Sentencing Commission Quarterly Data Report (Through June 30, 2016) at Figure E, n.1, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_3rd_16_Final.pdf.pdf (last visited December, 2016). The average life expectancy for an adult serving a life sentence in Michigan, for example, is only 58.1 years. http://fairsentencingofyouth.org/wp-content/uplaods/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited August 3, 2016). The life expectancy for juvenile lifers is even shorter, dropping almost a decade to 50.6 years. *Id.*

Courts can only comply with *Miller* if they ensure that juvenile defendants have a meaningful opportunity for release. Necessarily, this means a meaningful opportunity to be released before he or she is approaching their life expectancy. Thus, d*e facto* life-without-parole sentences, like *de jure* sentences of the same severity, violate due process and the prohibition again cruel and unusual punishments. U.S. Const. Amend. VIII, XIV.

10. The Constitutional Limits on Victim Impact Testimony for a Juvenile Resentencing Should Be the Same As Those Applicable to the Penalty Phase in Capital Cases.

The parallels between the Supreme Court's recent juvenile sentencing cases and the Court's long-standing capital jurisprudence require that the constitutional limits on victim impact testimony that apply to capital penalty phases be extended to the juvenile resentencing hearings at issue here..

In *Payne v. Tennessee*, 501 U.S. 808 (1991) the Supreme Court explained that although the State could introduce evidence "relating to the victim and the impact of the victim's death on the victim's family," it could not introduce "victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence . . . ." *Payne*, 501 U.S. at 830 n. 2. *See also Bosse v. Oklahoma*, 580 U.S. — (Oct. 11, 2016) (per curiam) (explaining that *Payne* did not overrule holding in *Booth v. Maryland*, 482 U.S. 496 (1987), that Eighth Amendment bars sentencing authority's hearing victim's family members' characterization of and opinions about the crime, the defendant or the appropriate sentence).

The prohibition of that evidence serves a critical purpose in satisfying the Eighth Amendment's requirement for "heightened reliability" in the capital sentencing schemes, because "the formal presentation of this information . . . can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant. . . . The admission of these emotionally charged opinions … is inconsistent with the reasoned decision making we require …." *Booth*, 482 U.S. at 508-09 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

The "heightened reliability" requirement necessary in capital cases for imposition

of a death sentence is equivalent to the heightened reliability needed to establish the "irreparable corruption" before a life without parole sentence may be imposed under *Miller* and *Montgomery*. *See, e.g., Montgomery,* 136 S.Ct. at 726 ("Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'").

Pennsylvania has put reasonable limits on victim impact evidence introduced during a capital penalty phase. *Commonwealth v. Means*, 773 A.2d 143 (Pa. 2001). A juvenile sentencing should apply those same reasonable limits.

11 and 12. The Court Must Provide Funds to the Defendant for a Mitigator and Expert Witnesses to Assist the Defense Sufficiently Before the Time of Sentencing So That Counsel Can Adequately and Effectively Prepare to Represent His or Her Client at Sentencing.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the United States Supreme Court addressed the issue of whether the United States Constitution requires that an indigent defendant have access to expert witnesses necessary to prepare an effective defense. Prior to trial, the trial judge had rejected the argument that the Constitution required that the defense have access to a state-funded psychiatrist in order to present an insanity defense. *Id*. at 72. With no defense expert to opine about the defendant's sanity at the time of the crime, the defendant was convicted of first degree murder. Then, at his capital sentencing, the prosecutor presented experts to testify that the defendant was a danger to society and would likely commit future criminal acts. The defense had no expert to rebut this testimony, and was sentenced to death.

In overturning the trial court's rulings, the Supreme Court held in *Ake* that an indigent defendant must be provided with access to a psychiatrist, compensated by the state, where his sanity is a significant factor in determining guilt or at sentencing. To deny this access would violate a defendant's constitutional due process rights. *Id.* at 83-84.

Pennsylvania courts have embraced the decision in *Ake*. In *Commonwealth v. Curnette*, 871 A.2d 839 (Pa. Super. 2005), for example, the Superior Court ruled that an indigent defendant had a right to a state-reimbursed psychologist to assist at a Megan's Law hearing to determine whether the defendant was a "sexually violent predator" within the meaning of the law. Once the defendant had made a showing of the "content and relevancy" of the proposed expert testimony, constitutional due process rights required that a state-funded expert be provided to the defense. Similarly, in *Commonwealth v. Konias*, 136 A.3d 1014 (Pa. Super. 2016), the Superior Court held that an indigent defendant has a constitutional right to a state-funded expert if necessary to fairly present his or her defense.

Moreover, the Pennsylvania Supreme Court has ruled that *Ake* may apply at the sentencing phase of a case, not just at the guilt phase. *See Commonwealth v. Christy*, 656 A.2d 877 (Pa. 1995). Finally, while *Ake* has not been applied to post conviction proceedings in Pennsylvania, the PCRA court nonetheless has wide discretion to appoint a state-funded expert upon request of an indigent defendant where an appropriate showing has been made that the expert is necessary for a fair adjudication of the PCRA. *See Commonwealth v. Reid*, 99 A.3d 470, 505 (Pa. 2014).

In this case, the Commonwealth has now conceded that the defendants named above are not "permanently incorrigible," irreparably corrupt," or "irretrievably depraved," and that, accordingly, the Commonwealth is not seeking re-sentences of life without parole for any of these defendants. *See* Commonwealth's Question of Law Pursuant to General Court Regulation #1 of 2016, filed with the Court on November 28, 2016. Of course, the Commonwealth's decision to not seek a life without parole sentence would not bar a judge from imposing a life without parole sentence.[7] Moreover, the Supreme Court has already ruled in *Miller v. Alabama* and *Montgomery v. Louisiana* that juvenile offenders are inherently and constitutionally different than adults for the purpose of sentencing in that they have "diminished culpability and heightened capacity for change." *Montgomery*, 136 S.Ct. at 733. Thus, *Montgomery* requires that "before sentencing a juvenile to life without parole, the sentencing judge [must] take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Id*. (quoting *Miller*, 132 S.Ct. at 2469). Thus, there is no need at a re-sentencing of the instant defendants to call experts to establish the facts already conceded by the Commonwealth and recognized by the Supreme Court.

Nonetheless, it does not follow that experts will not be required at the re-sentencing of the above-named defendants. On the contrary, as at a capital sentencing, mitigation evidence, psychological evidence, and other expert testimony may be required to rebut "aggravation" evidence presented by the Commonwealth at the re-sentencings of the defendants. *Rompilla v. Beard*, 545 U.S. 374, 382 (2005). The Commonwealth may

[7] In fact, in the case of John F. Nole, the Commonwealth, while not explicitly seeking a life without parole sentence, has made an offer to counsel of 50 years to life and indicated that they would object to the granting of parole. There can be no doubt that such a sentence would amount to life imprisonment.

not be seeking life without parole at these re-sentencing proceedings, but the Commonwealth has not taken any other sentence off the table. Thus, the Commonwealth may still be seeking, and presenting aggravation evidence in support of, a range of serious sentences including maximum sentences of life in prison (albeit with the possibility of parole), and minimum sentences that might span thirty, forty, fifty years or more. Moreover, the Commonwealth's decision to not seek a life without parole sentence or even a *de facto* life sentence would not bind a sentencing judge.

The American Bar Association's 2003 *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, and the 2003 *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* specify that:

> The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 revision) assign to lead counsel (at Guideline 10.4(B)) the responsibility for conducting a thorough investigation relating to both guilt and penalty, regardless of any statement by the client opposing such investigation. (Guideline 10.7) To meet this responsibility, lead counsel must assemble a capital defense team consisting of no fewer than two qualified attorneys, an investigator, and a mitigation specialist – with at least one member of that team qualified by training and experience to screen for the presence of mental or psychological disorders or impairments. (Guidelines 4.1 and 10.4 C).

While these defendants' re-sentencing proceedings do not involve capital cases, they are comparable to capital cases given the severity of the potential sentences that this Court might impose, and thus impose similar duties upon counsel appointed to represent these defendants. In order to provide effective assistance of counsel to the named defendants, counsel will be required to assemble a team of experts, including mitigation

experts, who can respond to reasonably foreseeable evidence and arguments to be presented by the Commonwealth at re-sentencing. Given the underlying facts of the cases involved here, it can reasonably be assumed that the Commonwealth will present aggravation evidence in an effort to achieve serious and lengthy sentences for most, if not all, of the defendants named here. It would be foolhardy for counsel to think otherwise.

Under the circumstances, the instant defendants should be provided with funding to retain experts, including psychologists, psychiatrists, mitigation specialists, or other experts that are established to the Court's satisfaction to be required for the re-sentencings to take place in these matters. Of course, each case will differ as to the type of expert or experts required to be retained for re-sentencing in each case, and the Court may well schedule hearings to consider this issue. Nonetheless, as is obvious, any appointing and funding of experts must take place in sufficient time before re-sentencing to be effective in presenting mitigation or other relevant evidence and to adequately assist counsel in preparing for the important tasks ahead.[8]

13. If the Commonwealth Is Seeking Reimposition of Life Without Parole, the Commonwealth Must Provide Notice of Such Intent at the Conclusion of the JSLWOP Status Hearing at Which the Date for Resentencing Is Set and Must Set Forth the Specific Basis for Contending That the Defendant Is Permanently Incorrigible, Irreparably Corrupt or Irretrievably Depraved.

In *Graham v. Florida*, the United States Supreme Court observed that juvenile life without parole "share[s] some characteristics with death sentences that are shared by no

[8] This Court has already appointed a mitigation expert in Kempis Songster's case, as well as in Alphoso Leaphart's and Theodore Burns's cases, each upon written motion, and has provided for funding for the expert in a set amount. This order can and should be a guide in the remaining cases, to the extent that the other named defendants can establish the need for mitigation evidence at re-sentencing.

other sentence." 560 U.S. at 69. In *Miller v. Alabama*, the Court attributed its individualized sentencing requirement to *Graham's* comparison of juvenile life without parole to the death penalty. 132 S. Ct. at 2463. The Court explained that this comparison evoked the line of precedent prohibiting mandatory capital punishment and requiring the sentencer to consider the defendant's characteristics and the details of the offense before sentencing him to death. *Id.* at 2463-64. This Court must bridge the constitutional gap between the due process afforded a juvenile facing juvenile life without parole (or its functional equivalent) and the due process afforded an adult facing capital punishment. Proper notice is only one of the imperative procedures that protect defendants from the state's harshest punishments. Pursuant to Pa. R. Crim. P. 802:

> The attorney for the Commonwealth shall file a Notice of Aggravating Circumstances that the Commonwealth intends to submit at the sentencing hearing and contemporaneously provide the defendant with a copy of such Notice of Aggravating Circumstances. Notice shall be filed at or before the time of arraignment, unless the attorney for the Commonwealth becomes aware of the existence of an aggravating circumstance after arraignment or the time for filing is extended by the court for cause shown.

The purpose of the rule is to provide "the defendant sufficient time and information to prepare for the sentencing hearing." *Id.* A juvenile offender facing a potential death-in-prison penalty is likewise entitled to sufficient time and information to adequately prepare for a resentencing hearing. As the Commonwealth must determine whether to seek the death penalty in adult homicide cases, it will also need to determine whether to seek juvenile life without parole or its functional equivalent.

Without notice of an intent to seek life without parole and the grounds on which the Commonwealth will rely for such a sentence, a juvenile defendant will not be able to

properly prepare for a sentencing hearing. This lack of notice violates due process by denying a juvenile defendant of the ability to properly prepare a defense to the Commonwealth's required assertion that he or she is the rare and uncommon juvenile who is irreparably corrupt. *See, e.g.*, *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Cole v. Arkansas*, 333 U.S. 196 (1948).

14. The Parties Must Disclose Any Evidence or Witnesses the Parties Intend to Introduce at Sentencing Thirty Days Prior to a Resentencing Hearing, and in the Event of Any Challenge to the Admissibility of Such Evidence, a Judge Other Than the Sentencing Judge Shall Be Assigned to Rule on That Challenge.

The Supreme Court recognized that states would need to implement procedural 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.* But specific procedural safeguards are necessary to effectuate *Miller*, and proper disclosure of evidence by both sides is crucial to the effectiveness of these hearings.

Overly cautious disclosure of evidence, including that favorable to the defendant, "serve[s] to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Mutual disclosure at least thirty days before a resentencing hearing of any evidence or witnesses intended to be introduced allows both

parties to prepare to ensure a just sentence. This allows both parties to adequately review the evidence, prepare a defense or rebuttal, and determine any appropriate challenges to such evidence.

If challenges to the evidence arise, a judge other than the sentencing judge should be assigned to rule on that challenge. Particularly where the judge is the ultimate sentencer, the sentencing judge should be making such a determination based solely on admissible evidence. Every judge is susceptible to a human's inability to suddenly forget information because they have been told not to consider it. Introduction of inadmissible evidence to a trial judge could result in the swaying of the decision based on evidence outside of the record and the imposition of an unjust sentence. A just sentencing determination requires a neutral and unbiased sentencer.

15. On Resentencing, a Juvenile's Gang Membership Is Inadmissible Unless Relevant to Either the Crime He Is Being Sentenced for or to Violent or Criminal Acts He Has Committed in Prison.

In *Dawson v. Delaware*, 503 U.S. 159, 160 (1992), the United States Supreme Court held that "the First and Fourteenth Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding." This logic applies equally to a juvenile resentencing. *See generally*, *Graham v. Florida*, 130 S.Ct. 2011 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

In *Dawson*, the Court held that the defendant's membership in a white racist prison gang—the Aryan Brotherhood—could not be used as evidence at sentencing in his

capital murder prosecution when that membership was not relevant to the issues being decided in the proceeding. His membership was irrelevant if not tied to the murder of the victim and if there was no showing that the gang committed any unlawful or violent acts or endorsed such acts. Instead, the evidence proved nothing more than the defendant's "abstract beliefs" and was "employed simply because the jury would find these beliefs morally reprehensible." *Id.* at 167. That was a violation of the protection offered to beliefs and associations by the First Amendment.

The Court held, however, that a defendant's membership in a gang might be relevant to a jury's inquiry when the organization "endorses the killing of any identifiable group, for example," as that affiliation might be relevant to whether he or she will be dangerous in the future. *Id.* at 166. The Court also noted that the Aryan Brotherhood evidence was not relevant to rebutting specific mitigating evidence offered by Dawson, which the state is entitled to do. Instead, the gang membership was improperly used as evidence of "bad" character. *Id*. at 168.

Pennsylvania courts have rarely found it necessary to apply *Dawson*, but in the recent case of *Commonwealth v. Poplawski*, 130 A.3d 697 (Pa. 2015), the Pennsylvania Supreme Court cited with approval the trial court's preclusion of Poplawski's anti-Semitic and racist postings on the Internet as unrelated to the crime committed and thus a violation of *Dawson*.

Other courts have condemned evidence of gang membership connoting bad character as well. *See* e.g., *People v. Perez,* 114 Cal. App. 3d 470 (1981) ("Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion."); *United States v. Hamilton*, 723 F.3d 542 (5th Cir. 2013)

("the prejudice that comes with gang membership may be great."); *People v. Avitia*, 127 Cal. App. 4th 185 (2005) ("gang evidence is inadmissible if introduced only to 'show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense.'").

"*Graham, Roper,* and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 132 S.Ct. at 2475. Should gang membership be directly related to the crime committed, to relevant violent behavior in prison, or to rebut mitigating circumstances presented by the defense, it may be admissible. Otherwise, *Dawson v. Delaware* precludes its admissibility at a juvenile sentencing.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT

I do hereby certify on this 6TH day of , 2017, that the Brief filed in the above captioned case on this day does not exceed 14,000 words. Using the word processor used to prepare this document, the word count is 9,702 as counted by Word.

Respectfully submitted,

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