
First Judicial District of Pennsylvania

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Joseph Ligon*

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IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH :CP-51-CR-0311332-1953
V. :
:CP-51-CR-0311352-1953
JOSEPH LIGON :

COMMONWEALTH :CP-51-CR-1102961-1987
V. :
:KEMPIS SONGSTER :

COMMONWEALTH :CP-51-CR-1229872-1991
V. :
:THEODORE BURNS :

COMMONWEALTH :CP-51-CR-0400013-1992
V. :
:SHARVONNE ROBBINS :

COMMONWEALTH :CP-51-CR-1003691-1995
V. :
:TAMIKA BELL :

JUVENILE LIFERS SENTENCED WITHOUT THE
POSSIBILITY OF PAROLE PROGRAM
COURT EN BANC PANEL
THE HONORABLE KATHRYN STREETER LEWIS
THE HONORABLE BARBARA A. MCDERMOTT
THE HONORABLE JEFFREY P. MINEHART

COURTROOM 1105
THE JUSTICE JUANITA KIDD STOUT
CENTER FOR CRIMINAL JUSTICE
PHILADELPHIA, PENNSYLVANIA

MARCH 6, 2017

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Reported By:
Olga Angelos, Official Court Reporter

[1] JLSWOP EN BANC
[2] **HONORABLE KATHRYN STREETER LEWIS:**
[3] Good afternoon, we are here today for the
[4] argument before the Court En Banc Panel.
[5] Before we begin, let me offer some
[6] perspectives about why we're here today
[7] and more specifically about the En Banc
[8] Panel, its origin, and its purpose.
[9] This afternoon arguments will be
[10] presented to this panel consisting of
[11] Judge Barbara McDermott, Judge Jeffrey
[12] Minehart, and me, the Senior Judge,
[13] Kathryn S. Lewis. Pursuant to Joint Court
[14] Regulation No. 1 of 2016, we have been
[15] assigned to preside over resentencings of
[16] the defendants sentenced to life without
[17] the possibility of parole, often referred
[18] to as Juvenile Lifers. As judges who have
[19] presided over homicide cases for years,
[20] sentencing of a defendant after a
[21] conviction is not new. Applying
[22] applicable rules of procedure and law to
[23] the facts as presented in a case is not
[24] new, and determining what evidence is
[25] relevant to adduce necessary facts to

[1] JLSWOP EN BANC
[2] support the court's legal conclusions and
[3] ultimate decisions is not new.
[4] However, the decisions of the
[5] United States Supreme Court in Miller v.
[6] Alabama, decided in 2012, which was made
[7] retroactive as a substantive rule of law
[8] by the Supreme Court decision in
[9] Montgomery v. Louisiana, decided just last
[10] year in 2016, did bring about something
[11] new, not just in Philadelphia, the First
[12] Judicial District, but throughout the
[13] Commonwealth of Pennsylvania and the
[14] United States.
[15] For the First Judicial District,
[16] the United States Supreme Court's decisions
[17] resulted in the need to review and to
[18] resentence more than 320 who were
[19] convicted and sentenced to life without
[20] parole for crimes committed when they were
[21] juveniles, that is, under the age of 18.
[22] The First Judicial District appreciated
[23] not only the enormity of the task but
[24] also its significance. Therefore, after
[25] gathering information, it determined to

[1] JLSWOP EN BANC
[2] undertake its responsibility to address
[3] these cases as expeditiously as possible,
[4] and on May 23, 2016, the First Judicial
[5] District issued General Court Regulation
[6] No. 1 of 2016 which established the
[7] Juvenile Lifers Sentenced Without the
[8] Possibility of Parole Program, also known
[9] as the JLSWOP program.

[10] In the absence of any specific
[11] rules governing how the court must proceed
[12] in these cases, the General Court
[13] Regulation No. 1 established procedures
[14] and protocols to dispose of these cases in
[15] accord with the United States Supreme
[16] Court decisions. General Court Regulation
[17] No. 1 specifically cites the decisions in
[18] *Montgomery v. Louisiana*. It reads as
[19] **follows:**

[20] The Court concluded by noting that
[21] minors sentenced to life without the
[22] possibility of parole must be given the
[23] opportunity to show their crime did not
[24] reflect irreparable corruption; and, if it
[25] did not, their hope for some years of life

[1] JLSWOP EN BANC
[2] First Judicial District and be considered
[3] the law of the case. JLSWOP questions of
[4] law considered by the En Banc Panel are
[5] questions likely to be raised or of
[6] concern to a substantial number of the
[7] 300-plus cases pending before the court or
[8] a distinct category of cases. The En Banc
[9] Panel includes me as the Homicide Team
[10] Leader, Judges McDermott and Minehart, who
[11] will preside over resentencing hearings.

[12] The arguments to be presented
[13] today are the first arguments before the
[14] En Banc Panel. This proceeding was
[15] convened to consider the questions of law
[16] filed on behalf of seven named defendants
[17] on October 28, 2016 and questions of law
[18] filed on behalf of the Commonwealth on
[19] November 28, 2016.

[20] For all counsel involved in
[21] handling cases in the JLSWOP program,
[22] please be advised that it is not
[23] anticipated, nor should it be expected
[24] that every legal question will rise to the
[25] level of a JLSWOP question of law that

[1] JLSWOP EN BANC
[2] outside the prison walls must be restored,
[3] citing the *Montgomery* decision.
[4] The process of filing Post
[5] Conviction Relief Act petitions, reviewing
[6] files and records, conducting
[7] investigations, meeting with defendants,
[8] locating and contacting families of
[9] victims, negotiating resentencing offers
[10] to recommend to the court, and preparing
[11] for contested resentencing hearings is
[12] well underway. All juvenile lifers cases
[13] will be disposed of. The First Judicial
[14] District has begun scheduling the oldest
[15] cases first, where defendant convictions
[16] are final. Cases will continue to be
[17] listed in this matter until all juvenile
[18] lifers cases are disposed of.
[19] Further, the First Judicial
[20] District recognized the need for
[21] consistent decisions to the extent
[22] possible. For that reason, an En Banc
[23] Panel was established to decide all JLSWOP
[24] questions of law. En Banc Panel decisions
[25] will be binding on all trial courts of the

[1] JLSWOP EN BANC
[2] will need to be decided by the En Banc
[3] Panel. Further, every JLSWOP question of
[4] law that the En Banc Panel decides may not
[5] require oral argument before a decision is
[6] rendered. As previously mentioned,
[7] decisions of the En Banc Panel are
[8] intended to facilitate consistent
[9] decisions of JLSWOP questions of law that
[10] may be at issue in a significant number of
[11] cases or distinct category of cases and
[12] thereby provide guidance to all counsel as
[13] JLSWOP cases proceed to final disposition.
[14] Now for the arguments scheduled
[15] before us today. Counsel, we have read
[16] the questions of law, and we've read the
[17] briefs that you've submitted. You may
[18] rely on your legal briefs and use the time
[19] that you've been allotted to emphasize or
[20] expound upon your written submissions as
[21] you deem necessary. As stated in this
[22] Court's order, each side, the defendants
[23] and the Commonwealth, will have 45 minutes
[24] for argument. Counsel, at the beginning
[25] of your argument you may request to

[1] JLSWOP EN BANC
[2] reserve a portion of your allotted time
[3] for rebuttal. The court crier will advise
[4] you when you have five minutes remaining,
[5] then two minutes, before indicating that
[6] your time has elapsed.

[7] Counsel, are we ready to proceed?

[8] So the defense will proceed first.
[9] Please identify yourself for the record,
[10] and please state at the outset whether or
[11] not you are reserving any time for
[12] rebuttal.

[13] **MS. LEVICK:** Good afternoon, Your
[14] Honors, my name is Marsha Levick, and I am
[15] here along with Brad Bridge. We will be
[16] sharing the argument time this afternoon
[17] on behalf of the defendants. We will
[18] divide that time I think equally into
[19] 20-minute segments, and we would like to
[20] reserve five minutes for rebuttal.

[21] **HONORABLE KATHRYN STREETER LEWIS:**

[22] All right. Just so we're clear, will you
[23] be keeping track of your 20 minutes each?

[24] **MR. BRIDGE:** We would, Your Honor.

[25] **HONORABLE KATHRYN STREETER LEWIS:**

[1] JLSWOP EN BANC
[2] Okay. So that at the end of 40 minutes,
[3] then five minutes before the end of that
[4] time, then we will proceed as indicated.

[5] You may proceed.

[6] **MS. LEVICK:** Thank you.

[7] And, also, just to give the Court
[8] an idea of how we will be splitting the
[9] argument, I will be addressing arguments
[10] two through six, and Mr. Bridge will be
[11] addressing the balance of the arguments.

[12] **HONORABLE KATHRYN STREETER LEWIS:**

[13] Okay.

[14] **MS. LEVICK:** And we have 15 issues
[15] that we did present to the Court and that's
[16] what we have briefed, of course.

[17] Let me first start out with
[18] talking about the standing issue which has
[19] been raised both in their initial briefing
[20] by the Commonwealth and then again in
[21] their response to our brief. I think that
[22] this issue can largely be disposed of, but
[23] I want to just make a couple of key points
[24] about why we think standing should not be
[25] an issue before this En Banc proceeding.

[1] JLSWOP EN BANC
[2] First of all, much of the language
[3] about how standing is addressed by the
[4] Commonwealth is in a traditional if we
[5] were plaintiffs and whether or not we
[6] would have standing to sue. And, of course,
[7] that's not what this posture is, we are
[8] defendants in a proceeding, we did not
[9] seek to initiate the jurisdiction of this
[10] Court, but we certainly think that as
[11] defendants in this proceeding the
[12] petitioners who have been identified and
[13] who are standing in on behalf of the over
[14] 300 individuals here in Philadelphia
[15] certainly have a standing to raise the
[16] legal issues that they have presented.

[17] Secondly, the D.A. has in the past
[18] suggested or even argued that this is
[19] really a moot issue in terms of whether or
[20] not Miller proceedings require certain
[21] kinds of particular procedural
[22] requirements because they're not seeking
[23] juvenile life without parole in any of
[24] these cases. We now know that is, of
[25] course, not true. We've always known that

[1] JLSWOP EN BANC
[2] they were seeking it in the case of Andre
[3] Martin, whose counsel, Mr. Natali, is here
[4] today, but we also now know both from an
[5] article that was in the Inquirer this
[6] morning as well as from pleadings that the
[7] District Attorney's Office has filed in
[8] two federal court cases involving habeas
[9] issues that they are in a minimum now
[10] seeking juvenile life without parole on
[11] resentencing in at least three cases. We
[12] have those pleadings with us today; if the
[13] Court would like copies of those, we can
[14] hand those up.

[15] **HONORABLE KATHRYN STREETER LEWIS:**

[16] You can hand them up. They won't
[17] necessarily be necessary for today's
[18] proceeding because they're not the issues
[19] before us.

[20] **MS. LEVICK:** Okay.

[21] So that certainly does not render
[22] any considerations about what type of
[23] procedural due process is required and
[24] Miller obviously has not been mooted
[25] because they are seeking life without

[1] JLSWOP EN BANC
[2] parole in these cases. And of course even
[3] if they weren't, the District Attorney's
[4] Office could change their mind tomorrow,
[5] we will have a new District Attorney in
[6] place in the future, the policy in the
[7] District Attorney's Office could change,
[8] and, most importantly, even if the D.A.
[9] were not seeking juvenile life without
[10] parole in a particular case and offered a
[11] plea that the defendant rejected, this
[12] Court would always retain the discretion
[13] to impose juvenile life without parole in
[14] those cases.
[15] Two other points that I would make
[16] on the standing issue, one is that we
[17] also know, and this has been argued in
[18] some other courts around the country, that
[19] the imposition of a sentence, a final
[20] sentence in these resentencing cases, that
[21] might, in fact, be a de facto or a virtual
[22] life without parole sentence also
[23] implicates the Miller and Montgomery
[24] decisions. There have been, as I said,
[25] some state Supreme Court decisions in Iowa

[1] JLSWOP EN BANC
[2] and Connecticut and Florida that have
[3] recognized this. We know that at least
[4] one of the cases of the named defendants
[5] in this case, John Nole, he has received
[6] an offer of 50 to life. And one could
[7] argue that a 50 to life sentence would,
[8] in fact, be a virtual life without parole
[9] sentence, meaning that the individual
[10] would likely die in prison before the
[11] opportunity for a parole hearing.
[12] **HONORABLE KATHRYN STREETER LEWIS:**
[13] Just so we correct the record, the seven
[14] named defendants do not include Mr. Nole;
[15] however, Mr. Nole as well as a number of
[16] other defendants have requested that their
[17] resentencings not take place until after
[18] this Court's decision.
[19] **MS. LEVICK:** Yes; that's correct.
[20] And I think that Your Honor's
[21] introduction to the development and
[22] adoption of the rules was also quite
[23] helpful because in a sense by challenging
[24] the standing of our being here this
[25] afternoon to raise the issues that we've

[1] JLSWOP EN BANC
[2] raised almost appears like a direct
[3] challenge to the creation of the En Banc
[4] proceeding. And that, of course, has not
[5] been raised definitively or overtly by the
[6] District Attorney, but it seems implicit in
[7] their arguments here today.
[8] I am going to proceed to the
[9] specific other legal challenges that we
[10] have raised. As I said, I will be dealing
[11] with arguments two through six, and a
[12] couple of these are certainly I think very
[13] connected.
[14] I want to start with the argument
[15] about whether or not the only possible
[16] sentence that this Court or any of the
[17] judges of this Court can impose going
[18] forward in resentencing these individuals
[19] is limited to a third degree sentence.
[20] Now, we raised this issue before the
[21] Pennsylvania Supreme Court in Batts one.
[22] And in that case the Pennsylvania Supreme
[23] Court ruled that they did not believe that
[24] the third degree sentence was required on
[25] resentencing and, in fact, ruled that

[1] JLSWOP EN BANC
[2] the -- and Mr. Bridge is going to talk
[3] more about this in terms of whether or not
[4] you can have a maximum sentence of
[5] life -- but talked about the requirements
[6] of Miller being applicable to both the
[7] minimum and the maximum.
[8] The issue of whether or not again
[9] post Montgomery a trial court can on
[10] resentencing impose a life without parole
[11] or even a maximum life sentence, as
[12] compared to a third degree sentence is
[13] again pending before the Pennsylvania
[14] Supreme Court now in Batts two, which was
[15] appealed again after Mr. Batts was
[16] resentenced to life without parole, and
[17] the Pennsylvania Supreme Court will
[18] undoubtedly address that issue. Our
[19] argument to the Pennsylvania Supreme
[20] Court, which I would repeat here is that,
[21] contrary to the Commonwealth's position,
[22] this issue is indeed appropriate to raise
[23] again post Montgomery. When the
[24] Pennsylvania Supreme Court was addressing
[25] this question post Miller, our Supreme

[1] JLSWOP EN BANC
[2] Court, of course, viewed Miller as a
[3] procedural issue and did not consider that
[4] we needed to give Miller retroactive
[5] application. Montgomery settled that
[6] question, and, as Your Honor stated in your
[7] own remarks, Montgomery established that
[8] Miller created a new substantive rule of
[9] constitutional law. And that is not an
[10] insignificant distinction between the
[11] Court's holding in Miller and Montgomery.
[12] Why? Because if it were only procedural,
[13] the Pennsylvania Supreme Court viewed its
[14] role in a limited fashion in terms of
[15] developing process. What that process
[16] should look like if that process now has
[17] to match new substantive rights might well
[18] be different. And so we have again raised
[19] the issue of third degree sentencing
[20] before them, it is before this Court,
[21] essentially our argument is as follows.
[22] And this is what the Pennsylvania
[23] Supreme Court held recently in two cases,
[24] Wolfe and Hopkins, which the Court issued
[25] following the U.S. Supreme Court's

[1] JLSWOP EN BANC
[2] decision in Alleyne which invalidated
[3] mandatory minimum sentences under the
[4] Apprendi line of cases. And essentially
[5] the argument and what the Pennsylvania
[6] Supreme Court said in Wolfe and Hopkins is
[7] that this Court cannot create a sentencing
[8] remedy where none is written in
[9] legislation. We know that Miller and
[10] Montgomery invalidated under the Eighth
[11] Amendment the life without parole
[12] sentencing scheme in Pennsylvania for
[13] juveniles and in invalidating that
[14] sentencing scheme, it knocked out the
[15] without parole provisions, left in place a
[16] life provision, but under the whole of the
[17] Pennsylvania sentencing scheme, this
[18] Court, no court can issue a sentence
[19] without a minimum that is half of the
[20] maximum sentence. And there is no
[21] statutory framework for articulating or
[22] determining what half of a life sentence
[23] is in Pennsylvania.
[24] For this Court to create what that
[25] minimum might look like would be to

[1] JLSWOP EN BANC
[2] legislate, and what the Pennsylvania
[3] Supreme Court said again very explicitly
[4] in Wolfe and Hopkins is that if there is
[5] no statutory remedy, it's up to the
[6] legislature to fix that problem. And that
[7] will be a problem that they will have to
[8] address perhaps, but in the meantime the
[9] solution would be to impose the next
[10] harshest sentence available for
[11] individuals convicted of homicide in
[12] Pennsylvania.
[13] **HONORABLE KATHRYN STREETER LEWIS:**
[14] The authority there for that, would that
[15] also not be legislating?
[16] **MS. LEVICK:** No, because you can
[17] impose a sentence for lesser included
[18] offenses, and third degree would be a
[19] lesser included offense of first degree,
[20] and so you could choose a third degree
[21] sentence; in the felony murder cases there
[22] would be authority for imposing a sentence
[23] on the underlying felony.
[24] **HONORABLE KATHRYN STREETER LEWIS:**
[25] How about the first degree murder cases?

[1] JLSWOP EN BANC
[2] **MS. LEVICK:** Well, because you
[3] could look to third degree as potentially
[4] being a lesser included offense, then you
[5] could impose the third degree sentence.
[6] On the felony murder cases, you would have
[7] to look at each felony, whatever the
[8] underlying felony was, to determine the
[9] sentence.
[10] **HONORABLE KATHRYN STREETER LEWIS:**
[11] Would we, in essence, then be abrogating the
[12] crime that the defendant was convicted of?
[13] **MS. LEVICK:** Well, I don't believe
[14] so because it's still a conviction of
[15] homicide. The alternative would be if the
[16] Court felt that imposing a third degree
[17] sentence were to essentially undo or
[18] abrogate the first degree conviction, then
[19] I think the alternative for the Court
[20] would be to essentially impose a sentence
[21] of time served. The Court is in a bind
[22] here because the legislature explicitly
[23] chose not to make the new statute
[24] retroactive. That's not --
[25] **HONORABLE BARBARA A. MCDERMOTT:**

[1] JLSWOP EN BANC
[2] I'm sorry for interrupting, but didn't the
[3] penalty for third degree change over the
[4] course of the individuals in front of us?
[5] **MS. LEVICK:** Yes, it did, it
[6] changed in the eighties.
[7] **HONORABLE BARBARA A. MCDERMOTT:**
[8] So then don't you create other issues if
[9] you ask us to impose a sentence for
[10] third -- some people would only be
[11] responsible for I believe it used to be 10
[12] to 20 and now it's 20 to 40 and you have
[13] individuals sentenced on both of those
[14] sentencing schemes.
[15] **MS. LEVICK:** That's correct but I
[16] think that it would be fair --
[17] **HONORABLE BARBARA A. MCDERMOTT:**
[18] So they get what they get.
[19] **MS. LEVICK:** Well, I think it
[20] would be fair to impose the sentence that
[21] was constitutional at the time that they
[22] were convicted. So that will change
[23] whether or not, which side they were on
[24] when the law changed in the 1980s.
[25] I'd like to move on if I may to

[1] JLSWOP EN BANC
[2] statute that on its face is inapplicable
[3] to the resentencing issues here.
[4] The next set of issues are really
[5] somewhat connected in terms of our
[6] argument that this Court must adopt and
[7] apply a presumption against juvenile life
[8] without parole, that the burden should be
[9] on the Commonwealth to establish permanent
[10] incorrigibility, and that determination
[11] should be made before a jury, and the
[12] standard should be proved beyond a
[13] reasonable doubt. I think those arguments
[14] are all somewhat interconnected, so I'm
[15] going to address all of them collectively.
[16] The U.S. Supreme Court in Miller
[17] and Montgomery could not have been clearer
[18] that a sentence of juvenile life without
[19] parole is reserved only for those
[20] individuals whose crimes reflect permanent
[21] incorrigibility or irredeemable
[22] corruption. And in two recent decisions
[23] which were GVR decisions by the U.S.
[24] Supreme Court, that view of how limited
[25] and how rare the life without parole

[1] JLSWOP EN BANC
[2] the issue of, you know, obviously, I think
[3] this is a fairly brief argument on our
[4] part.
[5] The District Attorney has
[6] consistently taken the position that this
[7] Court should look to the new statute for
[8] guidance, and virtually all of the offers
[9] that have come out of the District
[10] Attorney's Office to date have followed
[11] the grid that was created by the
[12] legislature in the new statute. Justice
[13] Baer, in his concurrence in Batts one,
[14] suggested that would be a good guide, that
[15] was certainly not a holding of the Court
[16] that that would drive new sentencing;
[17] again, Mr. Bridge will talk about
[18] specifically what Batts held with regard
[19] to resentencing in Mr. Batts' case on
[20] direct appeal. But the new statute is not
[21] retroactive. And so again, consistent
[22] with our argument with respect to third
[23] degree, it's simply not permissible for
[24] this Court to adopt some sentencing scheme
[25] that does not apply, some new sentencing

[1] JLSWOP EN BANC
[2] sentence should be in juvenile cases has
[3] been underscored by Justice Sotomayor and
[4] Justice Kagan where they set cases back
[5] for resentencing post Montgomery,
[6] specifically recognizing that the Court
[7] had failed to make a determination that
[8] the juvenile was permanently incorrigible.
[9] So I don't think that's open to debate
[10] here. I think we know that that is a
[11] threshold finding before we can impose a
[12] life without parole sentence. If that is
[13] a threshold finding, then this is what the
[14] construct of sentencing looks like.
[15] Juveniles who are convicted of
[16] homicide are eligible certainly going
[17] forward for a life sentence under whatever
[18] the current statute is, the series of
[19] statutes -- the new grid, I'm sorry, that
[20] the Pennsylvania Legislature set up going
[21] forward, going backwards, of course, we
[22] think it's third degree. And I will say
[23] that if this Court were to agree with us
[24] that the only permissible sentencing
[25] scheme that can be applied in these cases

[1] JLSWOP EN BANC
[2] going backwards on resentencing is third
[3] degree, none of these procedural
[4] requirements apply because they would then
[5] not be Miller hearings.
[6] Assuming the possibility that you
[7] disagree and that there will be Miller
[8] hearings going forward in these
[9] resentencing cases, then this is what we
[10] think the construct is. The construct is
[11] that individuals convicted of first degree
[12] homicide are eligible for essentially life
[13] sentence with parole. The only way that
[14] those individuals can get a life without
[15] parole sentence is upon this predicate
[16] finding and threshold finding and
[17] additional finding of permanent
[18] incorrigibility. That is classic
[19] Apprendi, that is Ring, and that means
[20] that that is a finding that becomes an
[21] element of the crime that must be
[22] established by the Commonwealth beyond a
[23] reasonable doubt before a jury. Before
[24] you can elevate that sentence, the maximum
[25] sentence, which as we know in Ring the

[1] JLSWOP EN BANC
[2] retardation and to establish mental
[3] retardation I believe by a preponderance
[4] of the evidence. This is not Atkins, this
[5] is apples and oranges. What the Court was
[6] dealing with, what the U.S. Supreme Court
[7] did in Atkins and what any sentencing
[8] court dealing with Atkins cases is looking
[9] at is a scenario where everyone, every
[10] adult defendant convicted of homicide is
[11] potentially eligible for the death penalty
[12] unless they're mentally retarded. And so
[13] that is an exclusion, but everyone is
[14] presumed to be theoretically eligible and
[15] then a small number might come out from
[16] that.
[17] Montgomery and Miller is the exact
[18] opposite. No juvenile is eligible for a
[19] life without parole unless they are found
[20] to be permanently incorrigible. And
[21] that's what sets up the Apprendi, Ring
[22] scenario where it flips from being
[23] something that might be an affirmative
[24] defense to something that is a
[25] requirement, a due process requirement,

[1] JLSWOP EN BANC
[2] Court was very clear in explaining, is the
[3] sentence that the defendant could have
[4] gotten if they were just convicted of
[5] murder; and then what elevated a life
[6] sentence, a life without parole sentence
[7] in the capital cases to the death penalty
[8] in these additional aggravated factor
[9] findings, this is essentially what these
[10] cases are with this requirement that there
[11] be this explicit finding of permanent
[12] incorrigibility.
[13] So we have argued that in light of
[14] that construct that has now been created
[15] by the Pennsylvania Supreme Court, the
[16] burden must be on the Commonwealth to
[17] establish permanent incorrigibility, it
[18] must be beyond a reasonable doubt, and it
[19] must be before a jury. The Commonwealth
[20] has argued, to the extent that they have
[21] responded directly to this argument,
[22] they've said, Atkins, this is just Atkins,
[23] Atkins under Pennsylvania law certainly we
[24] know as an affirmative defense, the burden
[25] is on the defendant to raise mental

[1] JLSWOP EN BANC
[2] that must be established by the
[3] Commonwealth, and the burden must be placed
[4] on the Commonwealth to make that finding
[5] beyond a reasonable doubt.
[6] **HONORABLE BARBARA A. MCDERMOTT:**
[7] How would you distinguish Sanchez, which
[8] says in the context of PCRA's and Atkins a
[9] judge or a jury can make the
[10] determination?
[11] **MS. LEVICK:** Well, I think that in
[12] a sense it doesn't really matter because
[13] what we're focused with here is that this
[14] is a very specific determination that
[15] Montgomery has established, that this
[16] conclusion that only -- essentially every
[17] juvenile is ineligible. What the Court
[18] has said consistently in Miller and
[19] Montgomery and, of course, in Graham and
[20] Roper, is that the characteristics of
[21] youth that the Court identified to strike
[22] those harshest sentences are universally
[23] true, the Court used that language,
[24] universally true for the class of
[25] juveniles. So there's three

[1] JLSWOP EN BANC
[2] characteristics of immaturity of judgment,
[3] susceptibility to negative peer influences,
[4] and the capacity for change and
[5] rehabilitation and reformation are
[6] universally true. And then every now and
[7] then there will be this very rare and
[8] uncommon juvenile who will, in fact, have
[9] committed a crime that reflects his
[10] permanent incorrigibility or irredeemable
[11] corruption quality.

[12] **HONORABLE JEFFREY P. MINEHART:**

[13] Why can't a judge determine that, why do
[14] we need a jury, is a jury superior to a
[15] judge? I mean you have a jury of 12 people
[16] making that decision, a judge of the Court
[17] of Common Pleas can't make that decision?

[18] **MS. LEVICK:** Well, our argument is
[19] that you can't distinguish this from the
[20] Apprendi line of cases. Certainly
[21] individuals could waive that, but in terms
[22] of what the Supreme Court has held in
[23] terms of the due process requirement, it
[24] starts with a jury. Again, that could be
[25] waived, but that it is a jury

[1] JLSWOP EN BANC
[2] maximum sentence.
[3] We point out and we look at Batts
[4] one, and in Batts one the Pennsylvania
[5] Supreme Court said there must be
[6] proportionality on the minimum and maximum
[7] sentence imposed. And I think that's
[8] important because if it's always going to
[9] end up with life max as the maximum
[10] sentence, then there is no
[11] proportionality. Essentially, the
[12] Commonwealth has required, because that's
[13] their argument here, if there's always
[14] going to be a life max, then that's the
[15] mandatory. And that's exactly what Miller
[16] said and Montgomery said cannot exist.
[17] There must be proportionality, the judge
[18] must be able to reflect upon the
[19] characteristics of the juvenile before him
[20] or her, and as a result that must be
[21] manifested in the minimum and the maximum
[22] sentence.

[23] Do I convince you yet?

[24] **HONORABLE BARBARA A. MCDERMOTT:**

[25] No.

[1] JLSWOP EN BANC
[2] determination because it's considered to
[3] be an element of the crime once it
[4] enhances the sentencing.

[5] **HONORABLE JEFFREY P. MINEHART:**

[6] All right.

[7] **MS. LEVICK:** And if there are no
[8] other questions, my time is actually up
[9] anyway.

[10] Thank you.

[11] **HONORABLE BARBARA A. MCDERMOTT:**

[12] And we'll probably have more questions for
[13] some of the other arguments, so you might
[14] want to give it to Mr. Bridge.

[15] **MR. BRIDGE:** I'm ready for

[16] questions.

[17] **HONORABLE BARBARA A. MCDERMOTT:** I

[18] want your argument first. Maybe you can
[19] convince me, and then I'll have no need for
[20] questions.

[21] **MR. BRIDGE:** Well, let me start at

[22] the beginning, let's start with the first
[23] issue, which is whether a first degree
[24] murder requires a life maximum sentence,
[25] second degree murder requires a life

[1] JLSWOP EN BANC

[2] **MR. BRIDGE:** Okay.

[3] Then let me give you the following
[4] argument.

[5] I have pages seven and eight in
[6] the Batts decision, and I've highlighted
[7] what I think are my argument and the
[8] Commonwealth's argument in yellow so that
[9] you can look at it, and maybe after you
[10] look at it maybe you'll be convinced
[11] later. I'll jump to something else.

[12] So you have proportionality, which
[13] I think is an important element required
[14] under Miller to the minimum and the
[15] maximum sentences. And, therefore, since
[16] you cannot have life as a max invariably
[17] without violating Miller, that's why there
[18] cannot be life as a max. And this is not
[19] just my opinion, I think you can find that
[20] in Miller, I think you can find that in
[21] Batts, and if you look at the District
[22] Court decision in Songster, you'll find it
[23] in Songster, Songster v. Beard, which is
[24] cited in our brief also.

[25] Judge Savage specifically notes

[1] JLSWOP EN BANC
[2] that there must be an individualized
[3] proportionate sentencing. I assume even
[4] the Commonwealth agrees with that. That
[5] should be beyond argument, there must be a
[6] proportionate sentence. But he also says
[7] the following towards the end of his
[8] **decision**: If the sentencing court finds
[9] the defendant is not incorrigible and not
[10] corruptible, it must impose a maximum
[11] sentence less than life to reflect that
[12] finding; it cannot avoid determining
[13] whether the defendant is irreparably
[14] corrupt or irreparably incorrigible.
[15] So I think from Savage we find
[16] exactly the same argument as we found in
[17] Batts and we find in Miller and
[18] Montgomery, that because a juvenile is
[19] different than an adult, that finding must
[20] be made regarding the minimum and the
[21] maximum sentence because it distinguishes
[22] the juvenile from the adult.
[23] **HONORABLE KATHRYN STREETER LEWIS**:
[24] Mr. Bridge, is it your position that a
[25] maximum sentence of life can never be

[1] JLSWOP EN BANC
[2] imposed on someone who is not permanently
[3] incorrigible?
[4] **MR. BRIDGE**: Yes. The requirement
[5] of the incorrigibility, of corruption, or
[6] irreparable depravity requires a finding
[7] by the judge or the jury, depending on the
[8] argument that Ms. Levick just made, and
[9] absent such a finding there can never be a
[10] life max sentence, there never can be a
[11] life minimum sentence.
[12] **HONORABLE KATHRYN STREETER LEWIS**:
[13] Well, before we get to minimum, even if
[14] there is a minimum, it's your position for
[15] someone convicted of first or second
[16] degree murder, notwithstanding a minimum
[17] sentence, there can never be a maximum
[18] sentence of life; is that correct?
[19] **MR. BRIDGE**: That is correct,
[20] absent that incorrigibility finding.
[21] **HONORABLE KATHRYN STREETER LEWIS**:
[22] Okay.
[23] **MR. BRIDGE**: If there are no other
[24] questions regarding the first issue
[25] regarding whether there can ever be a life

[1] JLSWOP EN BANC
[2] max, I will discuss the second issue,
[3] which is whether there must be expert
[4] testimony involved in this process.
[5] In order for there to be a life
[6] sentence, there must be a finding beyond a
[7] reasonable doubt of corruption,
[8] incorrigibility or depravity, and the
[9] Pennsylvania Supreme Court noted that this
[10] is a complicated issue, the United States
[11] Supreme Court has noted that this is a
[12] complicated issue, and they've noted that
[13] it's very difficult for a judge to
[14] actually determine that, and what they need
[15] is expert testimony because it's important
[16] for the Court, the factfinder, to
[17] determine whether the act was a result of
[18] transient immaturity; in which case the
[19] person cannot get a life sentence, either
[20] a minimum or a maximum, and there's only
[21] one way to resolve that and that's by the
[22] presentation of expert testimony.
[23] **HONORABLE BARBARA A. MCDERMOTT**:
[24] So you're saying there's no circumstance
[25] in which prison records or anything else

[1] JLSWOP EN BANC
[2] would demonstrate that to us as a
[3] sentencing judge?
[4] **MR. BRIDGE**: No, there certainly
[5] isn't. In fact, that's exactly my point,
[6] you're exactly correct, Judge McDermott,
[7] certainly those records might be relevant
[8] to you in assessing them; and, therefore,
[9] it's incumbent upon the defense in order
[10] to respond to that to have expert
[11] testimony to put that in the proper
[12] context. And the issue here is not
[13] whether there could be records of prison
[14] introduced to support the prosecutor's
[15] position of irreparable corruption and the
[16] imposition of a life sentence, but whether
[17] the defense should be able to respond and
[18] rebut that by the presentation of expert
[19] testimony and it's our contention --
[20] **HONORABLE KATHRYN STREETER LEWIS**:
[21] Let me just understand that point, the
[22] purpose of an expert is to assist the
[23] finder of fact in areas that they would
[24] need the specialized expertise of an
[25] expert; would you agree with that?

[1] JLSWOP EN BANC
[2] **MR. BRIDGE:** Yes, I would.
[3] **HONORABLE KATHRYN STREETER LEWIS:**
[4] So to the extent that the information,
[5] whether it be from witnesses, records, and
[6] what have you, would be sufficient to
[7] enable the fact finder, in this case if it
[8] were a judge, to determine whether or not
[9] they think that this person should be
[10] afforded time outside the walls or whether
[11] or not they're permanently incorrigible,
[12] you're saying the only way that can be
[13] established before a resentencing judge is
[14] by virtue of an expert?
[15] **MR. BRIDGE:** That's correct. The
[16] only way that there can be a determination
[17] of permanent incorrigibility is through
[18] expert testimony because that involves
[19] something that is not traditionally the
[20] function of a judicial. Why do we have
[21] experts anyway, I mean the whole reason
[22] that experts exist is because they are
[23] beyond the ken of the average person.
[24] **HONORABLE KATHRYN STREETER LEWIS:**
[25] If making the decision is beyond the ken

[1] JLSWOP EN BANC
[2] And I would look to Justice Kennedy and
[3] Justice Kagan in Miller and Montgomery
[4] where they specifically note that, they
[5] specifically note the difficulty that in
[6] the current structure that we've set up,
[7] providing an answer to that very question.
[8] Because the issue is forward looking, not
[9] backward looking, the issue is to look to
[10] the future and see if this person is
[11] permanently incorrigible, not are they bad
[12] today, not were they bad last week or last
[13] month, but what would they be like five or
[14] ten years from now.
[15] **HONORABLE KATHRYN STREETER LEWIS:**
[16] Well, let's apply that now, and again, not
[17] when we're talking about new defendants or
[18] juveniles currently, but in many of the
[19] cases, even the cases here, you have
[20] forward looking from the time of the
[21] offense, in some cases 10, 15, 20, 30
[22] years that --
[23] **MR. BRIDGE:** On Mr. Ligon, 64
[24] years.
[25] **HONORABLE KATHRYN STREETER LEWIS:**

[1] JLSWOP EN BANC
[2] of an average person --
[3] **MR. BRIDGE:** Well, it's not a
[4] question of making the decision. Of
[5] course, Judge Lewis, you make decisions
[6] all the time, I'm not challenging your
[7] ability to make decisions.
[8] **HONORABLE KATHRYN STREETER LEWIS:**
[9] It's not the ability to make a decision
[10] when we say yes or not, but to be able to
[11] look at the facts and the information
[12] presented and reach the conclusion.
[13] If I'm understanding you correctly
[14] as it relates to these standards, that can
[15] only be done by virtue of someone who
[16] possesses some type of advanced degree.
[17] What type of expert are we talking
[18] about?
[19] **MR. BRIDGE:** A psychologist or
[20] psychiatrist.
[21] **HONORABLE KATHRYN STREETER LEWIS:**
[22] Those are the only people who could decide
[23] this in these types of cases; is that your
[24] position?
[25] **MR. BRIDGE:** That's our position.

[1] JLSWOP EN BANC
[2] And Mr. Ligon, the lead defendant, 64
[3] years.
[4] That information is not sufficient
[5] to be able to reach that determination
[6] without the presence of an expert opinion?
[7] **MR. BRIDGE:** You know, it may
[8] depend on the particular facts involved in
[9] the case.
[10] It's my contention that generally
[11] that is true, and generally a defense would
[12] have the right to have an expert present
[13] that before the Court. In certain
[14] circumstances I may be perfectly willing
[15] to waive that. I'll cite Mr. Ligon as an
[16] example. If you have 64 years of
[17] materials, that might be quite sufficient
[18] for us to come to a conclusion that he's
[19] no longer dangerous to anyone else, he is
[20] not permanently incorrigible, he's not
[21] corruptive, we know that by looking at the
[22] materials, and we've known that probably
[23] since the seventies because I've looked at
[24] those materials.
[25] So maybe in a particular

[1] JLSWOP EN BANC
[2] circumstance that might be true; but by
[3] in large we're not talking about an
[4] individual case, the whole purpose of this
[5] was to talk about broad systemic issues
[6] and that's why we to posit that an expert
[7] report with an expert is what is
[8] essentially needed in a particular case.
[9] **HONORABLE JEFFREY P. MINEHART:**
[10] Are you saying that controls, the expert
[11] report controls?
[12] **MR. BRIDGE:** No, of course not.
[13] **HONORABLE JEFFREY P. MINEHART:** So
[14] it's in the rare case, and you're going to
[15] get this, on totally incorrigible
[16] individuals; am I correct about that?
[17] **MR. BRIDGE:** That's correct; but
[18] in every case where that is an issue where
[19] the Commonwealth might be seeking life
[20] without parole, to help inform the
[21] fact finder we need to have an expert
[22] report, and that's the contention I'm
[23] making here.
[24] **HONORABLE BARBARA A. MCDERMOTT:**
[25] Well, that's premised upon your belief

[1] JLSWOP EN BANC
[2] **MR. BRIDGE:** I guess if the burden
[3] is on the Commonwealth the answer is no;
[4] if the burden is on me, then the answer
[5] might be yes.
[6] **HONORABLE BARBARA A. MCDERMOTT:**
[7] Okay. I may disagree with you there.
[8] **HONORABLE JEFFREY P. MINEHART:**
[9] The judge can still go against the expert.
[10] **MR. BRIDGE:** Of course, that's
[11] right, that's absolutely true.
[12] **HONORABLE BARBARA A. MCDERMOTT:**
[13] Then what's the point of requiring it?
[14] **MR. BRIDGE:** Because it helps to
[15] inform your judgment.
[16] **HONORABLE BARBARA A. MCDERMOTT:**
[17] Okay.
[18] **MR. BRIDGE:** And, of course, you
[19] know, the fact finder is always able to
[20] assess the expert testimony and choose to
[21] accept or reject it, but that doesn't have
[22] to question whether there has to be such
[23] evidence before the fact finder.
[24] We talked in the eighth issue
[25] about what sort of rules should govern the

[1] JLSWOP EN BANC
[2] that the Commonwealth has the burden of
[3] proof?
[4] **MR. BRIDGE:** That's correct.
[5] **HONORABLE BARBARA A. MCDERMOTT:**
[6] Okay. Just so we're clear.
[7] **MR. BRIDGE:** And actually it's
[8] broader than that because even if you
[9] rejected that argument, the question is
[10] what do we need to present that and
[11] that's why we need an expert report,
[12] although I would not concede that we lose
[13] that issue because I think actually the
[14] burden is on the Commonwealth. But if the
[15] burden were reversed and was on the
[16] defense, then it's all the more reason to
[17] have an expert and an expert report.
[18] **HONORABLE BARBARA A. MCDERMOTT:**
[19] So then taking your argument to its
[20] logical extreme, we require experts, you
[21] get an expert and your expert says he's
[22] incorrigible, that's the end of the story?
[23] You can't present an expert to me so then
[24] by the absence of an expert report, does
[25] the Commonwealth automatically win?

[1] JLSWOP EN BANC
[2] expert report, and we looked at Rule 573,
[3] which is the rule of discovery dealing
[4] with expert reports, and the Commonwealth
[5] says this is frankly a puzzling argument.
[6] I don't think it's puzzling at all, it's
[7] actually pretty simple. And the whole
[8] purpose of setting up the procedures for
[9] this En Banc Panel is we're trying to set
[10] up a procedure to deal with 300 cases that
[11] is fair to all parties, and we looked,
[12] therefore, to appropriate rules that have
[13] been set up to determine what is
[14] appropriate in such a circumstance and
[15] Rule 573 describes exactly the issue
[16] dealing with expert reports and how they
[17] have to be disclosed in discovery to
[18] opposing parties.
[19] The ninth issue deals with de
[20] facto life. Ms. Levick alluded to that in
[21] her argument earlier. Mr. Nole is one of
[22] the defendants involved in this case.
[23] **HONORABLE KATHRYN STREETER LEWIS:**
[24] In which case?
[25] **MR. BRIDGE:** This case.

[1] JLSWOP EN BANC
[2] **HONORABLE KATHRYN STREETER LEWIS:**
[3] Not true, but go ahead.
[4] **MR. BRIDGE:** He's involved in the
[5] case of the juvenile lifer challenging
[6] what might be the appropriate sentence in
[7] a particular case. And you're right that
[8] he was not one of the initial defendants,
[9] but he's included subsequently, whether
[10] you choose to accept or reject it that's
[11] up to the Court, of course.
[12] But the issue is still the same.
[13] The issue is would a 50 to life sentence
[14] be an appropriate sentence, or is that the
[15] same as a life without parole sentence.
[16] **HONORABLE BARBARA A. MCDERMOTT:**
[17] You would agree with me there's no
[18] Pennsylvania case in homicides nor any
[19] other crimes that, in fact, says that?
[20] **MR. BRIDGE:** I would agree with
[21] you.
[22] **HONORABLE BARBARA A. MCDERMOTT:**
[23] Okay. And I know some circuit courts have
[24] disagreed with that, well, most of them
[25] do --

[1] JLSWOP EN BANC
[2] do you draw that line. So a 50-year
[3] sentence for a 20-year-old is okay or a
[4] 16-year-old, or 30 years not okay for a
[5] 60-year old, I mean, it gets beyond
[6] juvenile lifers, it gets into every single
[7] crime, in essence, that we as criminal
[8] judges where the statutory maximums are
[9] lengthy.
[10] **MR. BRIDGE:** The issue is still
[11] the same when we're talking specifically
[12] about these cases; and, therefore, I would
[13] encourage the Court to focus on the cases
[14] before you rather than the cases that
[15] might be before some other court or some
[16] other time in the future.
[17] **HONORABLE BARBARA A. MCDERMOTT:**
[18] Okay.
[19] **MR. BRIDGE:** As I said, this issue
[20] is actually now in the Superior Court,
[21] it's Commonwealth v. Michael Felder, I
[22] argued it in November, so that's pending
[23] now.
[24] **HONORABLE KATHRYN STREETER LEWIS:**
[25] How do you arrive this as a de facto?

[1] JLSWOP EN BANC
[2] **MR. BRIDGE:** Well, I think
[3] actually the majority have actually
[4] accepted it, the majority of State Supreme
[5] Courts, like five or six State Supreme
[6] Courts, there's a couple federal cases
[7] that have rejected it. There's a number
[8] of courts that have accepted that issue,
[9] in fact, it's actually pending in the
[10] Superior Court right now on exactly this
[11] issue.
[12] **HONORABLE BARBARA A. MCDERMOTT:**
[13] You're asking us to make a judgment that
[14] has much greater ramifications than these
[15] cases.
[16] **MR. BRIDGE:** I'm asking you to
[17] make a judgment on these cases. I guess
[18] it depends on what you mean by these
[19] cases. These cases of the named
[20] defendants involved here or the cases from
[21] Philadelphia?
[22] **HONORABLE BARBARA A. MCDERMOTT:**
[23] I'm talking about cases statewide. Your
[24] argument is if it's a de facto life
[25] sentence, and then the question is where

[1] JLSWOP EN BANC
[2] **MR. BRIDGE:** There's a couple
[3] different ways to look at it.
[4] **HONORABLE JEFFREY P. MINEHART:**
[5] What was the sentence of the court in --
[6] **MR. BRIDGE:** 50 to life, to
[7] Michael Felder.
[8] There's a couple different ways to
[9] look at it. Now, there's been a study out
[10] of New York which says that a person
[11] incarcerated loses approximately two years
[12] of life for each year that they're
[13] incarcerated. There was a study out of
[14] Michigan which looked at the juvenile
[15] lifers in Michigan and found that they
[16] died at the age of approximately 51. So
[17] you can look at several different studies.
[18] The federal sentencing guidelines say that
[19] 470 months is their definition of what is
[20] a life sentence, a little over 39 years.
[21] So those are things that you can
[22] look to that are objective to find support
[23] for a de facto life sentence being the
[24] same as a life sentence and, therefore,
[25] requiring all protections attended to

[1] JLSWOP EN BANC
[2] that.
[3] The tenth issue we talked about
[4] was the victim impact testimony and what
[5] sort of parameters should be established
[6] around that. The suggestions we made are
[7] the same in the context of capital cases,
[8] and that is that victims can't give their
[9] opinion as to the appropriate sentence
[10] involved, opinions about the defendant and
[11] his or her character, or about the crime,
[12] instead talk about the impact on them
[13] and focused narrowly on that to avoid any
[14] constitutional problems.

[15] **HONORABLE JEFFREY P. MINEHART:**
[16] That's dealt with every day of the week,
[17] homicides, every day.

[18] **MR. BRIDGE:** Every day.

[19] **HONORABLE JEFFREY P. MINEHART:**
[20] Every day I do the sentencing --

[21] **MR. BRIDGE:** That's right, so we
[22] simply want the same rules here as they
[23] deal with there. There are no rules here,
[24] we're setting them up, or as in Butch
[25] Cassidy and the Sundance Kid, this is a

[1] JLSWOP EN BANC
[2] job well. And also note that Songster
[3] specifically noted that experts may be
[4] needed in this context.

[5] **HONORABLE BARBARA A. MCDERMOTT:**
[6] Once the Court set that up we may disagree
[7] with you whether or not it's mandatory,
[8] but hasn't anyone that's pretty much after
[9] a review sought mitigation funds received
[10] them?

[11] **MR. BRIDGE:** To the best of my
[12] knowledge you're right.

[13] **HONORABLE BARBARA A. MCDERMOTT:**
[14] Okay, I thought I was.

[15] **MR. BRIDGE:** Yes. These questions
[16] were drafted in the very beginning before
[17] we knew how this was all going to play out,
[18] and we wanted to make sure in light of the
[19] way we wanted to set up a structure that
[20] we deal with issues so there can be
[21] appropriate guidance so that all parties
[22] understand what the parameters are so that
[23] we can appropriately deal with them.

[24] The 13th issue deals with the
[25] appropriateness of Commonwealth providing

[1] JLSWOP EN BANC
[2] street fight. We want to set up rules so
[3] that we don't end up with inappropriate
[4] resolutions that require resentences down
[5] the road.

[6] **HONORABLE JEFFREY P. MINEHART:**
[7] Right.

[8] **HONORABLE BARBARA A. MCDERMOTT:** I
[9] don't think the Commonwealth disagrees
[10] with you, they just say it's within the
[11] Court's discretion.

[12] **MR. BRIDGE:** No. Actually he said
[13] that that only applies to homicide and
[14] death penalty cases and doesn't apply
[15] here.

[16] **HONORABLE BARBARA A. MCDERMOTT:**
[17] Okay.

[18] **MR. BRIDGE:** Issues 11 and 12
[19] dealing with funding of mitigators and
[20] experts, it goes back to the conversations
[21] we had earlier about the necessity for
[22] experts and expert reports. In order for
[23] the defense to adequately present their
[24] case before Your Honors, they need to have
[25] appropriate tools to be able to do that

[1] JLSWOP EN BANC
[2] notice to the defense if they were going
[3] to seek life without parole. We analogize
[4] this, in the capital context, it seems
[5] like a perfectly simple no-brainer issue
[6] that if that's what they want then they
[7] should let the defense know so that they
[8] can be able to appropriately prepare. It's
[9] a world of a difference between trying to
[10] prepare for a life without parole case and
[11] one in which the Commonwealth is only
[12] seeking a term of years.

[13] **HONORABLE KATHRYN STREETER LEWIS:**
[14] I don't necessarily have that, the second
[15] part of your question says state the
[16] specific basis. Now, we've been talking
[17] about the terminology used, are you asking
[18] for something beyond that terminology,
[19] permanently incorrigible, permanently
[20] depraved, what are you asking for, by way
[21] of specific basis?

[22] **MR. BRIDGE:** Basically, if you
[23] look to the parallel to 802. In 802 they
[24] have to notify the defense of what the
[25] appropriate aggravators they will be

[1] JLSWOP EN BANC
[2] seeking evidence of rather than simply
[3] saying permanent depravity, which is no
[4] more than saying we want to seek a death
[5] sentence, they have to provide some sort
[6] of information so that the defense can be
[7] aware in --
[8] **HONORABLE KATHRYN STREETER LEWIS:**
[9] In advance, but what are you talking
[10] about?
[11] **MR. BRIDGE:** I was going to go
[12] back to Judge McDermott's point, let's say
[13] it's prison records, if the Commonwealth
[14] has a lot of prison records that the
[15] person is bad in prison, maybe that's what
[16] they would let the defense know. So in
[17] order to establish permanent
[18] incorrigibility, we will look at the
[19] defendant's behavior since then as
[20] exemplified in the past decade's worth of
[21] prison records.
[22] **HONORABLE BARBARA A. MCDERMOTT:**
[23] So you're asking them to be more specific
[24] if we make the analogy, you could get a
[25] list of aggregates, you're saying here you

[1] JLSWOP EN BANC
[2] some sort of general emphasis on tarring
[3] the defendant.
[4] **HONORABLE BARBARA A. MCDERMOTT:**
[5] How is that any different than any other
[6] sentencing issue that a judge has to rule
[7] on whether something is relevant?
[8] **HONORABLE KATHRYN STREETER LEWIS:**
[9] We're going to permit Mr. Bridge to answer
[10] the question.
[11] **MR. BRIDGE:** Thank you very much.
[12] The issue is whether you get
[13] notice of that ahead of time so that you
[14] can be able to respond to it.
[15] **HONORABLE BARBARA A. MCDERMOTT:**
[16] Yes, but once we start going down that
[17] slope -- and I'm sorry, I meant to take 30
[18] seconds -- where does it end, I means, I
[19] could come up with five or six other
[20] issues that as a defense counsel I might
[21] want notice of ahead of time, so how do
[22] you decide, why is gang membership you
[23] think more important than other issues
[24] that you need notification of ahead of
[25] time?

[1] JLSWOP EN BANC
[2] don't want just the list, you want to know
[3] what evidence they have to support it?
[4] **MR. BRIDGE:** That's right; so that
[5] we can be able to appropriately prepare
[6] and defend against that.
[7] **HONORABLE BARBARA A. MCDERMOTT:**
[8] All right.
[9] **MR. BRIDGE:** Similar to that is
[10] the 14th issue dealing with
[11] appropriateness of letting the parties
[12] know what evidence and witnesses would be
[13] involved at sentencing so that we can
[14] narrow and focus everybody's attention on
[15] what it is that's at issue and avoid
[16] dealing with things that aren't. That's
[17] the 14th issue.
[18] The last issue deals with whether
[19] there could ever be information introduced
[20] regarding gang membership. And what I
[21] wanted to point out is that we have no
[22] particular objection to something like
[23] that coming in if it was relevant in a
[24] specific case where that was the facts
[25] involved in the case, rather than just

[1] JLSWOP EN BANC
[2] **MR. BRIDGE:** There's a lot of
[3] issues. I think that we talk specifically
[4] about issues regarding witnesses and
[5] evidence ahead of time, that's the 14th
[6] issue. The reason that gang membership is
[7] specifically pointed out is that was one
[8] of the issues in Batts, and I was actually
[9] present when Batts was resentenced in
[10] Northampton County. And the prosecutor came
[11] in on the day of resentencing and said, by
[12] the way, I'm going to introduce evidence
[13] to show gang membership while he was
[14] hanging out in prison, a complete surprise
[15] to all the parties. So the reason it's
[16] here is to make sure that such evidence is
[17] excluded when it's inappropriate and if
[18] appropriate, that we be given proper
[19] notice.
[20] **HONORABLE BARBARA A. MCDERMOTT:**
[21] Thank you.
[22] **MR. BURNS:** Good afternoon, Your
[23] Honors, may it please the Court, Hugh
[24] Burns for the Commonwealth. I guess I'll
[25] reserve five minutes.

[1] JLSWOP EN BANC
[2] The most ambitious claim here is
[3] the claim that Miller wiped out
[4] Pennsylvania's sentencing scheme for first
[5] and second degree murder on juvenile
[6] offenders and that consequently they can
[7] only be sentenced to third degree murder.
[8] What makes this claim particularly
[9] difficult for the defendants, of course,
[10] is that Miller and Montgomery don't say
[11] anything like that. Miller and Montgomery
[12] together explain what's needed to impose
[13] life without parole. Montgomery said
[14] Miller created a protected class, and in
[15] words very simply, that the defendant gets
[16] a chance to prove that he is a member of a
[17] protected class, meaning he was under 18
[18] and that he was transiently immature
[19] rather than irreparably corrupt or
[20] permanently incorrigible; and if he's in a
[21] protected class, he is immune to life
[22] without parole. He is not immune to life
[23] with parole so by implication, Miller and
[24] Montgomery themselves show us that life
[25] with parole or a maximum term of life is

[1] JLSWOP EN BANC
[2] when there's a life sentence. Obviously,
[3] that cannot be applied in a case where the
[4] offender was a juvenile offender as in
[5] Miller and Montgomery.
[6] Page 296, Appellant's argument
[7] that he should be sentenced as if he had
[8] been convicted of the lesser offense of
[9] third degree murder finds little support
[10] in the authorities upon which he relies,
[11] as such case law is simply inapplicable to
[12] the present circumstances.
[13] And on page 297, talking
[14] specifically about cases like this, cases
[15] in which the offender has to be
[16] resentenced, as a result of Miller, the
[17] Court said, It is our determination here
[18] that they are subject to a mandatory
[19] maximum sentence of life imprisonment as
[20] required by Section 1102(a), accompanied
[21] by a minimum sentence determined by the
[22] Common Pleas Court upon resentencing.
[23] Now, those are the holdings of the
[24] Supreme Court of the United States and the
[25] Supreme Court of Pennsylvania. Batts

[1] JLSWOP EN BANC
[2] not precluded but allowed, actually
[3] contemplated by the U.S. Supreme Court in
[4] those decisions.
[5] When the case came to the Supreme
[6] Court of Pennsylvania in the Batts case of
[7] 2013, the Court had this to say about this
[8] specific defense argument. They go
[9] through the arguments and they conclude,
[10] pages 295, 296 of 66 A.3d, We find the
[11] Commonwealth's construction of the
[12] applicable statutes to be the best
[13] supported. Appellant's argument that the
[14] entire statutory sentencing scheme for
[15] first degree murder has been rendered
[16] unconstitutional as applied to juvenile
[17] offenders is not buttressed by either the
[18] language of the relevant statutory
[19] provisions or the holding in Miller.
[20] Section 1102, which mandates the
[21] imposition of a life sentence upon
[22] conviction for first degree murder does
[23] not itself contradict Miller. It goes on
[24] to explain that the problem is the Parole
[25] Code, title 6137, that prevents parole

[1] JLSWOP EN BANC
[2] himself was resentenced to life without
[3] parole, and that sentence was upheld by the
[4] Superior Court in 2015. So the defendants
[5] are asking you to overrule the Supreme
[6] Court of the United States, the Supreme
[7] Court of Pennsylvania, and the Superior
[8] Court. I don't think there are any courts
[9] left above this level that you could
[10] possibly think about overruling, but in
[11] any case that would probably be
[12] inappropriate. It's best I think, instead,
[13] to simply follow what the Supreme Court
[14] held in Batts.
[15] Now, the argument is that, well,
[16] the Supreme Court is looking at this
[17] particular issue again, that being this
[18] idea that the sentencing scheme has been
[19] wiped out by Miller, that a maximum term
[20] of life is not possible, that defendants
[21] in this position have to be resentenced to
[22] third degree murder. That's actually not
[23] true. In fact, when you look at the order
[24] granting allocatur in Batts, this current
[25] iteration of Batts currently in the

[1] JLSWOP EN BANC
[2] Supreme Court, they specifically refuse to
[3] accept for review this particular issue.
[4] What they accepted for review was the
[5] question, was the question of whether or
[6] not the Court should make new procedural
[7] rules for cases of this sort.
[8] So the issue was not accepted for
[9] review by the Supreme Court. Of course,
[10] we don't know what the Supreme Court's
[11] going to do in the future, we can't
[12] predict the future, but we do know that
[13] we're bound by the holding of the Supreme
[14] Court in Batts in 2013, and we know that
[15] this particular argument that these
[16] defendants are trying to raise yet again
[17] was not accepted for review by the Supreme
[18] Court. So it would be not impossible but
[19] surprising if the Supreme Court of
[20] Pennsylvania were to revisit the issue.
[21] The claim that Batts was overruled
[22] somehow by Commonwealth v. Hopkins,
[23] Commonwealth v. Wolfe, it's a pretty
[24] surprising thing saying that the Supreme
[25] Court overruled one of its recent

[1] JLSWOP EN BANC
[2] The suggestion has been made
[3] repeatedly that Montgomery requires
[4] explicit finding as to this, that's
[5] actually not true. Here's what Montgomery
[6] said, I'm reading from Montgomery v.
[7] Louisiana, page 735. The Court said,
[8] Louisiana suggests that Miller cannot have
[9] made a constitutional distinction between
[10] children whose crimes reflect transient
[11] immaturity and those whose crimes reflect
[12] irreparable corruption because Miller did
[13] not require trial courts to make a finding
[14] of fact regarding a child's
[15] incorrigibility. That this finding is not
[16] required, however, speaks only to the
[17] degree of procedure Miller mandated in
[18] order to implement its substantive
[19] guarantee. When a new substantive rule of
[20] constitutional law is established, this
[21] Court is careful to limit the scope of any
[22] attendant procedural requirement to avoid
[23] intruding more than necessary upon the
[24] States' sovereign administration of their
[25] criminal justice systems. Fidelity to

[1] JLSWOP EN BANC
[2] decisions, and you would like to see the
[3] language from the decision overruling
[4] Batts quoted somewhere, but there is no
[5] such language and that's why it's not
[6] quoted. The Supreme Court never said it's
[7] overruling its Batts decision.
[8] And the reference to the Alleyne,
[9] Apprendi line of cases really confuses
[10] what's going on there with what's going on
[11] here. Here the starting point is an
[12] offender has committed first or second
[13] degree murder, therefore, subject to a
[14] maximum term of life imprisonment. The
[15] offender at that point, according to
[16] Montgomery and according to Miller, gets
[17] an opportunity to show that he's a member
[18] of the protected class. If he's a member
[19] of the protected class, he now becomes
[20] immune to life without parole. So the
[21] starting point is actually life without
[22] parole, and the question is then does this
[23] defendant qualify as someone who is a
[24] member of the protected class and so gets
[25] to be immune to life without parole.

[1] JLSWOP EN BANC
[2] this important principle of federalism,
[3] however, should not be construed to demean
[4] the substantive character of the federal
[5] right at issue. That Miller did not
[6] impose a formal fact finding requirement
[7] does not leave States free to sentence a
[8] child whose crime reflects transient
[9] immaturity to life without parole.
[10] So what happens is a defendant
[11] comes into court, he's convicted of first
[12] degree murder, for example, then he gets
[13] to show that he is a member of the
[14] protected class and, therefore, immune to
[15] life without parole.
[16] That's what's happening here.
[17] What's happening in the Apprendi or
[18] Alleyne situation is the defendant commits
[19] a certain crime, he's subject to a certain
[20] sentence, and the state then attempts to
[21] increase the sentence, to increase the
[22] minimum term or increase the maximum term
[23] by reference to some additional fact. You
[24] are all familiar with the handgun, use of
[25] a gun in committing a crime. The

[1] JLSWOP EN BANC
[2] defendant commits a robbery, he's subject
[3] to a 20-year maximum, no minimum; but
[4] then, if the statute applied, if it was
[5] proven at sentencing that he had done this
[6] crime with a gun, there would be a
[7] five-year mandatory minimum, so it's
[8] increasing the penalty.

[9] Here, the Miller, Montgomery
[10] process is decreasing the penalty, it has
[11] nothing to do with Alleyne, it has nothing
[12] to do with Apprendi, and it explains why
[13] in the two decisions that, according to
[14] the defense argument, overrule Batts,
[15] Hopkins and Wolfe, we don't see in those
[16] cases, either of them, any reference to
[17] Batts at all. Well, there is a reference
[18] to Batts in the opinion by Justice
[19] Dougherty, but he doesn't say that Batts
[20] was overruled, he just refers to it.

[21] So, once again, the Supreme Court
[22] of Pennsylvania decision in Batts is
[23] controlling. It determines what's supposed
[24] to be done here, and it confirms that a
[25] sentence, maximum term that is of life, is

[1] JLSWOP EN BANC
[2] not merely possible but it's required by
[3] Pennsylvania statutes.
[4] The claim that the Court when
[5] imposing sentence can't look to 1121.1 or
[6] 1120.1 rather, or 1102 actually, 1102.1,
[7] the new statutes that was created for new
[8] offenses after June of 2012, Justice Baer
[9] wrote a concurrent opinion in the Batts
[10] decision, saying that the courts should
[11] look to that statute for the purposes of
[12] guidance. That's obviously not required,
[13] but at the same time there's absolutely
[14] nothing preventing you from looking at
[15] that statute. It's obviously an expression
[16] of the legislature, also the source of the
[17] penalty legislation, the body that's
[18] entitled under the Constitution to decide
[19] what penalties go with offenses, that is
[20] their sense of where this minimum term
[21] should fall. It's totally discretionary
[22] in these cases, but there's nothing
[23] preventing you from looking at that
[24] statute for findings.

[25] The remainder of these issues that

[1] JLSWOP EN BANC
[2] have been discussed here have to do with
[3] the process for imposing a sentence of
[4] life without parole. In other words, it
[5] will be relevant to a case in which the
[6] Commonwealth was coming to the Court and
[7] saying we believe that this offender, this
[8] juvenile offender, committed the crime, we
[9] believe that this offender is permanently
[10] incorrigible, irreparably corrupt, and so
[11] we are asking for a sentence of life
[12] without parole.

[13] That's not true in any of these
[14] seven cases, and that's why we say that
[15] none of these defendants have standing to
[16] litigate these issues. It has nothing to
[17] do with whose the plaintiff, it has to do
[18] with the Supreme Court of Pennsylvania's
[19] standing rule which is articulated many
[20] times, saying that if a party wants to
[21] litigate a legal issue, they have to show
[22] that there's some connection between the
[23] supposed legal error and some harm to
[24] them. Well, in cases as these seven where
[25] the Commonwealth is not seeking a life

[1] JLSWOP EN BANC
[2] without parole sentence, then it's in vain
[3] for that party to want to litigate what
[4] procedure should apply in order to impose
[5] a life without parole sentence.

[6] **HONORABLE KATHRYN STREETER LEWIS:**

[7] So, Mr. Burns, it is incumbent upon this
[8] Court, as we discussed at the outset for
[9] the reason for establishing an En Banc
[10] Court, to try and give guidance as these
[11] some 300-plus cases proceed, not dealing
[12] with fact specifics but also just the
[13] question of, and I think you said where
[14] the Commonwealth would come to the Court
[15] and say we are seeking life without
[16] parole, so you do envision that that would,
[17] in fact, be a part of the procedure; is
[18] that correct?

[19] **MR. BURNS:** Yes, if the
[20] Commonwealth was seeking --

[21] **HONORABLE KATHRYN STREETER LEWIS:**

[22] In those instances where the Commonwealth
[23] is seeking, the Commonwealth should state
[24] at the outset that that's what it's
[25] seeking.

[1] JLSWOP EN BANC
[2] **MR. BURNS:** Yes. And I realize
[3] it's an inconvenience to the Court that it
[4] so happens that these defendants who have
[5] presented these issues happen to --
[6] **HONORABLE KATHRYN STREETER LEWIS:**
[7] Oh, we're not going to be inconvenienced,
[8] don't worry about that.
[9] But the question then still
[10] becomes whether or not some of these
[11] questions, because we're looking at
[12] guidance, not just in those cases where
[13] the Commonwealth would and you've
[14] indicated there will be instances where
[15] the Commonwealth will be seeking life
[16] without parole, what the consideration
[17] should properly be.
[18] **MR. BURNS:** Well, I'll talk about
[19] those issues regardless then.
[20] **HONORABLE KATHRYN STREETER LEWIS:**
[21] Okay.
[22] **MR. BURNS:** Miller and Montgomery
[23] very clearly, and this goes to a number of
[24] the claims that are being raised here,
[25] Miller and Montgomery put the burden on

[1] JLSWOP EN BANC
[2] tested or even addressed by the State so
[3] the Court does not confirm their accuracy.
[4] The petitioner's submissions are relevant,
[5] however, as an example of one kind of
[6] evidence that prisoners might use to
[7] demonstrate rehabilitation.
[8] So over and over again Montgomery
[9] explains that the requirement of the
[10] burden of proof is the defendant's, not
[11] the Commonwealth, not the prosecution.
[12] So, for instance, it said that there's the
[13] presumption of a non-life parole sentence,
[14] well, that can't be true because
[15] Montgomery says it's not.
[16] Certainly the class, the protected
[17] class is very broad. It's very easy for a
[18] given defendant to prove he's a member of
[19] that class, and the vast majority of cases
[20] he'll be able to do that quite easily.
[21] But still there's no presumption because
[22] the burden is placed on the defendant.
[23] Claims that this burden which the
[24] Commonwealth doesn't have is beyond a
[25] reasonable doubt burden or that there has

[1] JLSWOP EN BANC
[2] the defendant to prove that he's a member
[3] of the protected class.
[4] Quoting from Montgomery, page 735,
[5] There are instances in which a substantive
[6] change in the law must be attended by a
[7] procedure that enables a prisoner to show
[8] that he falls within the category of
[9] persons whom the law may no longer punish.
[10] When the Constitution prohibits a
[11] particular form of punishment for a class
[12] of persons, an affected prisoner receives
[13] a procedure through which he can show that
[14] he belongs to the protected class.
[15] The procedure Miller describes is
[16] no different.
[17] Page 736, the Court said, this is
[18] quoting Montgomery again, The opportunity
[19] for release will be afforded to those who
[20] demonstrate the truth of Miller's central
[21] intuition that children who commit even
[22] heinous crimes are capable of change.
[23] Also on page 736, referring to
[24] Montgomery's claims that he had been
[25] rehabilitated, These claims have not been

[1] JLSWOP EN BANC
[2] to be a jury trial, these have reasonably
[3] been rejected by the Superior Court in the
[4] Batts case in 125 A3.d 33, pages 44, 45,
[5] and in addition there's no legal basis for
[6] them. There's nothing in the law to
[7] suggest that there should be a jury
[8] determination or that there should be a
[9] beyond a reasonable doubt standard, or
[10] what the Supreme Court of the United
[11] States said in Montgomery, it's just like
[12] an Atkins proceeding. And we know there
[13] was no jury in the Atkins proceeding, so
[14] there's no beyond a reasonable doubt
[15] standard.
[16] The claims that there should be an
[17] expert, really, I mean what if the
[18] Commonwealth is conceding that the
[19] offender is not permanently incorrigible,
[20] why do you need expert testimony then?
[21] The vast majority of cases there isn't
[22] going to be a dispute, so requiring an
[23] expert to be hired and testify in every
[24] case is crazy.
[25] Discovery, discovery dispute

[1] JLSWOP EN BANC
[2] resolution, these are all things that
[3] courts do all the time, it's discretionary
[4] with the courts.
[5] The de facto life sentence, once
[6] again, in none of these cases, these seven
[7] cases, and, in fact, in none of the cases
[8] that I know of is the Commonwealth asking
[9] for a so called de facto life sentence.
[10] Certainly it's true in theory that if a
[11] Court were to impose a sentence that was
[12] so long that inevitably that defendant
[13] would die of natural causes before he had
[14] a chance for parole, yes, that would not
[15] be allowed under Miller and Montgomery
[16] But I'm not aware of any case in which the
[17] Commonwealth is seeking a sentence like
[18] that.
[19] Victim impact evidence --
[20] **HONORABLE KATHRYN STREETER LEWIS:**
[21] Before you go to victim impact, if the
[22] Commonwealth is seeking life without
[23] parole because of the standard, who has
[24] the burden of proving that?
[25] **MR. BURNS:** Again, it's the

[1] JLSWOP EN BANC
[2] United States analysis, he's just like
[3] everybody else.
[4] **HONORABLE KATHRYN STREETER LEWIS:**
[5] Will the Commonwealth be seeking to prove
[6] that he is, the affirmative, permanently
[7] incorrigible?
[8] **MR. BURNS:** The Commonwealth would
[9] be entitled to introduce evidence to the
[10] contrary to say that contrary to what this
[11] defendant claims, it is the position of
[12] the Commonwealth that this defendant is
[13] permanently incorrigible and here is the
[14] basis for making that argument.
[15] **HONORABLE KATHRYN STREETER LEWIS:**
[16] So that's yes?
[17] **MR. BURNS:** Certainly.
[18] **HONORABLE KATHRYN STREETER LEWIS:**
[19] Okay.
[20] **HONORABLE JEFFREY P. MINEHART:** My
[21] impression was the only time the experts
[22] came in is when you were seeking to find a
[23] defendant as incorrigible permanently.
[24] **MR. BURNS:** I think that will be
[25] true, and I'm not going to say that expert

[1] JLSWOP EN BANC
[2] defendant's burden of proof in such a case
[3] that he's a member of the protected class.
[4] That's the easiest thing to do in most
[5] cases, in most cases, but obviously in
[6] some cases it won't be so easy because in
[7] some cases the defendant will be
[8] incorrigible; but in all events, according
[9] to Montgomery, the burden is on the
[10] defendant.
[11] **HONORABLE KATHRYN STREETER LEWIS:**
[12] So if the Commonwealth says that it's
[13] seeking life without parole, it's up to
[14] the defendant to prove the negative, that
[15] is that he is not permanently
[16] incorrigible.
[17] **MR. BURNS:** Or to prove that he is
[18] a typical member of the protected class.
[19] In other words, that he is someone who is
[20] transiently immature, as are most,
[21] overwhelming most of the defendants in
[22] this age category. So he's not really
[23] proving a negative, he's proving that he
[24] is like most defendants in this situation,
[25] according to the Supreme Court of the

[1] JLSWOP EN BANC
[2] testimony is invariably required in those
[3] situations. As a practical matter,
[4] probably it will be in most of them, it
[5] certainly seems to be the case in the
[6] Atkins situation; but whether or not an
[7] expert is required certainly is up to the
[8] Court and certainly if a party wants to
[9] present it, it's up to the Court to decide
[10] whether or not to allow that and most
[11] likely the Court will in an overwhelming
[12] majority of such cases.
[13] Victim impact, Commonwealth v.
[14] Alleyne, the Supreme Court of Pennsylvania
[15] held in 2016 that victim impact evidence
[16] can be allowed, there's no reason to
[17] exclude it. It's part of the sentencing
[18] process. Now, does victim impact evidence
[19] necessarily go to the question of whether
[20] or not the defendant is in the protected
[21] class, that would be a matter for the
[22] judge at the hearing to decide. If it's
[23] irrelevant, it can be excluded but there
[24] may be cases in which it is relevant. If
[25] it's not relevant to that question, it may

[1] JLSWOP EN BANC
[2] be relevant to another question. In the
[3] event the Court has to decide what the
[4] minimum sentence is going to be, certainly
[5] victim impact evidence is going to be
[6] something that's relevant and admissory.
[7] The notice question, I hate to
[8] keep harping on this but these defendants
[9] already know that in most of these cases
[10] and certainly in these seven cases we're
[11] not seeking life without parole, there's
[12] nothing to give notice of. In a general
[13] sense should the defendant be given notice
[14] at some point when the Commonwealth is
[15] seeking a life without parole sentence
[16] when the defendant is being resentenced?
[17] I suppose that's acceptable, but I mean, to
[18] say more than that would be to intrude
[19] really on the discretion of the sentencing
[20] judge. And it's certainly clear in the
[21] three cases of the 96 in which the
[22] Commonwealth is going to have to be
[23] seeking a life without parole sentence in
[24] these situations, notice has been given
[25] certainly in those three.

[1] JLSWOP EN BANC
[2] Thank you.
[3] Defense reserved five minutes.
[4] **MS. LEVICK:** Thank you, Your
[5] Honor.
[6] First of all, the argument that
[7] the third degree issue was or was not
[8] before the Pennsylvania Supreme Court in
[9] Batts, it was argued before the
[10] Pennsylvania Supreme Court in Batts, it
[11] was briefed by the parties, there was a
[12] brief submitted by the Pennsylvania
[13] Criminal Defense Lawyers Association on
[14] that issue, and the Pennsylvania Supreme
[15] Court will rule on it or not, it was
[16] certainly presented to them.
[17] Mr. Burns' argument that our
[18] argument regarding third degree is somehow
[19] asking this Court to overrule Miller and
[20] Montgomery is completely incorrect. The
[21] reason why the third degree issue comes up
[22] has nothing to do with what Miller or
[23] Montgomery held explicitly, but it has to
[24] do with Pennsylvania state sentencing law.
[25] The reason why we are in this dilemma here

[1] JLSWOP EN BANC
[2] With regard to gang membership,
[3] well, I guess it's been conceded that it's
[4] a matter of relevance, and, of course, it's
[5] a matter of relevance. In fact, in the
[6] Batts case, Batts argued that the trial
[7] court should have considered evidence of
[8] his gang affiliation as mitigated
[9] evidence. Of course, membership in a
[10] gang, it was gang affiliation evidence
[11] that was actually introduced to show that
[12] Batts had not been rehabilitated. It was
[13] a critical piece of evidence in the Batts
[14] case because Batts committed the murder in
[15] order to impress other gang members, and he
[16] continued his gang affiliation even while
[17] he was in prison. So that was very, very
[18] relevant in that case, in some other cases
[19] it may not be, but it was certainly true
[20] there.
[21] I think I have covered everything
[22] that was brought up. If the Court has any
[23] further questions.
[24] Thank you, Your Honors.
[25] **HONORABLE KATHRYN STREETER LEWIS:**

[1] JLSWOP EN BANC
[2] in Pennsylvania is because our new statute
[3] was not retroactive as passed by the
[4] legislature and we have a sentencing
[5] scheme that requires this minimum be at
[6] half of the maximum and that is a problem
[7] here in Pennsylvania. So it is a problem
[8] created by the legislature, acknowledging
[9] that that problem has been created, we're
[10] certainly not asking this Court to
[11] overrule Miller or Montgomery.
[12] Mr. Burns' argument about the
[13] issues about burden of proof and
[14] presumptions is really an untenable
[15] argument in light of what the Supreme
[16] Court said in both Miller and Montgomery.
[17] And, in fact, as we have demonstrated in
[18] our briefing to this Court, there are four
[19] State Supreme Courts that have already
[20] held what we're asking this Court to hold,
[21] and which actually was not in our brief of
[22] a decision which came down in the last
[23] month, which was a decision that went the
[24] other way. So four out of five State
[25] Supreme Courts have held that Miller and

[1] JLSWOP EN BANC
[2] Montgomery establish a presumption against
[3] juvenile life without parole, create and
[4] establish a burden on the State to prove
[5] that the juvenile is not within the
[6] protected class, and that that burden must
[7] be established on proof beyond a
[8] reasonable doubt. And the reason for
[9] that, it does come directly from what the
[10] Court said. For Mr. Burns to say that
[11] Miller and Montgomery essentially set up
[12] the decrease in penalty scheme where we
[13] start with life without parole and
[14] anything that the defendant can show
[15] brings them down from that is simply not
[16] what the decisions say. The decisions say
[17] that virtually every juvenile is
[18] ineligible for life without parole because
[19] of the attributes that are uniformly
[20] ascribed to juvenile offenders.
[21] And I think as you look at these
[22] other State Supreme Court decisions from
[23] Connecticut and Georgia and Missouri and
[24] Iowa, you will see that that reasoning
[25] follows directly from this description of

[1] JLSWOP EN BANC
[2] parole, so we're not talking about having
[3] an expert in every case. On the other
[4] hand, if the burden were to be shifted to
[5] the juvenile in every case to show that
[6] they were a member of that protected
[7] class, that might raise a different
[8] question about what type of evidence would
[9] be necessary.
[10] **HONORABLE BARBARA A. MCDERMOTT:** I
[11] have a question or I guess I have a
[12] comment, and tell me if I'm wrong.
[13] If we look to Batts for guidance
[14] because that's the Pennsylvania case we
[15] have, the two of you have a difference of
[16] opinion as to what our Supreme Court is
[17] actually hearing, and I'm going to have to
[18] look further into that, but basically the
[19] way I read it is if I focus on the comment
[20] in Batts in which the Supreme Court said
[21] that -- left unanswered the question of
[22] whether Miller's holding is now with us,
[23] leaves unanswered the question of whether
[24] a life sentence with the possibility of
[25] parole offends the sensibility, and that

[1] JLSWOP EN BANC
[2] who is in the class and who is likely not
[3] to be in the class. And, of course, not
[4] that Your Honor was making this argument,
[5] but noting that essentially what the
[6] District Attorney is requesting is that
[7] the juvenile prove a negative, that they
[8] prove the negative that they are not
[9] permanently incorrigible, and there is case
[10] law that does say in situations where
[11] that's the question that is being posed,
[12] that that requires that that burden be
[13] shifted to the State in that situation.
[14] The Batts Superior Court decision,
[15] to the extent that it addressed or
[16] rejected any of these procedural due
[17] process arguments, those are all on appeal.
[18] So that it remains to be seen what the
[19] Pennsylvania Supreme Court does with those
[20] particular decisions.
[21] I want to be clear that the whole
[22] discussion about an expert, of course, is
[23] limited to cases, and I think that Mr.
[24] Burns acknowledges this, where the
[25] District Attorney is seeking life without

[1] JLSWOP EN BANC
[2] sort of takes into account the fact of the
[3] evolving science in the juvenile lack of
[4] maturation of the brain; but it seems to
[5] me that that question also says or that
[6] comment says that as it is today, not ten
[7] years from now or five years from now,
[8] that a maximum life sentence with the
[9] possibility of parole is appropriate.
[10] Tell me how I'm misinterpreting that if
[11] you can in two sentences. I mean, but
[12] isn't that what it boils down to? I think
[13] by all the procedural safeguards you're
[14] asking us to put in the burden shifting;
[15] isn't that what this is really about?
[16] **MS. LEVICK:** I think that yes and
[17] no, and the reason why I would say no is
[18] again because intervening between when
[19] Miller and Batts came down in 2013 and
[20] where we are today in 2017, Montgomery
[21] came down. And when the Pennsylvania
[22] Supreme Court was addressing the
[23] procedural issues associated with
[24] sentencing options post Miller, they
[25] viewed Miller as nothing more than a

[1] JLSWOP EN BANC
[2] procedural decision that required some
[3] sort of process. Since Montgomery came
[4] down, and the Supreme Court was clear in
[5] articulating that Miller established a new
[6] substantive rule of constitutional law,
[7] the defendants are arguing, as we've
[8] argued to the Pennsylvania Supreme Court
[9] in Batts two and we argue to you here
[10] today, even if the Pennsylvania Supreme
[11] Court which ultimately say, you know while
[12] we said we weren't going to take that
[13] issue and even though we heard argument, a
[14] briefing on it, we're not going to answer
[15] that question, we stick to our argument
[16] that Montgomery is an intervening decision
[17] that reopens that question of what is the
[18] appropriate sentencing option. Whether or
[19] not going forward -- and remember, Batts
[20] was on direct appeal, it was not a
[21] resentencing case -- whether or not going
[22] forward, a sentence of discretionary life
[23] without parole or a sentence with a max
[24] life is available may not be a question
[25] before this Court if it turns out that

[1] JLSWOP EN BANC
[2] really the only permissible sentence is
[3] third degree for all of the reasons that
[4] we've stated.
[5] **HONORABLE BARBARA A. MCDERMOTT:**
[6] Thank you.
[7] **HONORABLE KATHRYN STREETER LEWIS:**
[8] Mr. Burns, you have time for rebuttal.
[9] **MR. BURNS:** This idea that the
[10] minimum sentence has to be half maximum is
[11] simply the red herring. It was presented
[12] by the Supreme Court in Batts and, of
[13] course, what is half a life sentence?
[14] It's not answerable. So that is why the
[15] Supreme Court actually said, and there's
[16] no dilemma that the statutes apply, the
[17] Supreme Court rejected the claim that the
[18] statutory sentencing scheme went away and
[19] said it is our determination here that
[20] these defendants -- a mandatory maximum
[21] life imprisonment as required by Section
[22] 1102, that's the statute that supposedly
[23] went away, accompanied by a minimum
[24] sentence determined by the Common Pleas
[25] Court.

[1] JLSWOP EN BANC
[2] Now, again, this issue was not in
[3] for review by the Supreme Court. Counsel
[4] said, well, we briefed it in argument
[5] anyway. Well, that's nice, it's good that
[6] the Supreme Court didn't put a gag on
[7] counsel when they were, you know, arguing
[8] what they wanted to argue, but the fact
[9] remains that the order granting allocatur
[10] excludes --
[11] **HONORABLE BARBARA A. MCDERMOTT:**
[12] You're saying they're not going to address
[13] it no matter what --
[14] **MR. BURNS:** Well, the Supreme
[15] Court, according to their own rules, if
[16] they don't grant review on a question,
[17] they're not supposed to rule on it.
[18] The claim that Batts is
[19] inconsistent with Montgomery, Montgomery
[20] determined that Miller -- well, Montgomery
[21] did two things, they determined that
[22] Miller applies retroactively, Batts says
[23] nothing to the contrary. Montgomery
[24] clarified that Miller requires a procedure
[25] through which the offender can show he

[1] JLSWOP EN BANC
[2] belongs to the protected class, Batts says
[3] nothing to the contrary. Montgomery
[4] applies Miller, Batts applies Miller, the
[5] two cases are in complete agreement, and
[6] Montgomery said this. It said that it's a
[7] requirement that the offender proves
[8] protected class, quoting now, does not
[9] replace but rather gives effect to
[10] Miller's substantive holding. It's page
[11] 735. So Montgomery didn't rewrite Miller,
[12] it simply told us what Miller meant in
[13] terms of creating a protected class.
[14] Thank you, Your Honors.
[15] **HONORABLE KATHRYN STREETER LEWIS:**
[16] Thank you.
[17] (Proceeding concluded.)
[18]
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[25]

[1] JLSWOP EN BANC

[2] CERTIFICATE

[3]

[4] I hereby certify that the
[5] proceedings and evidence are contained
[6] fully and accurately in the notes taken by
[7] me on the matter of the above cause, and
[8] this copy is a correct transcript of the
[9] same.

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