IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL DIVISION
vs.	:	
JOSEPH LIGON	:	CP-51-CR-0311332-1953
	:	CP-51-CR-0311352-1953
KEMPIS SONGSTER	:	CP-51-CR-1102961-1987
KEVIN VAN CLIFF	:	CP-51-CR-0207921-1973
THEODORE BURNS	:	CP-51-CR-1229872-1991
SHARVONNE ROBBINS	:	CP-51-CR-0400013-1992
TAMIKA BELL	:	CP-51-CR-1003691-1995
ALPHONSO LEAPHART	:	CP-51-CR-0634051-1981

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En Banc Panel Decision

I. Procedural History

On June 25, 2012, the United States Supreme Court issued its landmark decision in *Miller v. Alabama*, in which it held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 132 S. Ct. 2455, 2469 (2012) (internal citation omitted). Though the Court did not preclude a sentencing court from sentencing a juvenile to life without parole, the Court did require the sentencing court to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469. However, the Court did not address the question of whether the holding in *Miller* would apply retroactively to inmates who

had committed murder as juveniles and were already serving life sentences without the possibility of parole. In response, on October 25, 2012, the Governor of this Commonwealth signed into law a new sentencing scheme, 18 Pa.C.S.A. § 1102.1(a)(2), for persons under 18 years of age, convicted of murder. Specifically, the statute provided:

> [A] juvenile offender under the age of fifteen years at the time of the offense may receive "a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 25 years to life." An offender at least fifteen but under the age of eighteen years, may receive, "a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 35 years to life. The statute then lists multiple individualized factors that the court should consider in making its determination, including, but not limited to: the nature and circumstances of the offense; the defendant's age, mental capacity, maturity, culpability, and degree of criminal sophistication; and the success or failure of any prior rehabilitative attempts.

Commonwealth v. Batts, 66 A.3d 286, 300 (Pa. 2013) (M. Baer, concurring) (citations omitted) (*Batts I*). In addition, the legislature stated that the new sentencing scheme applied only to juveniles convicted of murder on and after the date *Miller* was issued (June 25, 2012). *Id.*

Subsequently, on January 25, 2016, the Supreme Court decided *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016). The Court held that *Miller* announced a substantive rule of constitutional law and, therefore, applies retroactively to juvenile offenders already serving mandatory life without parole sentences. *Id.* The Court ruled that such offenders "must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736. The Court also stated:

> Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing

> them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Montgomery v. Louisiana, 136 S. Ct. at 736, as revised (Jan. 27, 2016) (internal citations omitted).

The Court of Common Pleas of Philadelphia adopted General Court Regulation No. 1 ("GCR No. 1") of 2016, which established the procedure to be used to provide Juvenile Lifers Sentenced Without the Possibility of Parole ("JLSWOP") the opportunity to show that their crimes did not reflect irreparable corruption and that they should be considered for release on parole. The regulation noted:

> Moreover, in light of the fact that cases eligible for this [JLWSOP] Program span decades and involved numerous trial judges who have retired, have been reassigned, and are otherwise unavailable, extraordinary circumstances exist which, in accordance with Pa. R. Crim. P. 700 (A), justify the assignment of these cases as provided herein, to enable the Court to efficiently and expeditiously dispose of these cases.

GCR No. 1. In addition, the regulation established an *en banc* three judge panel ("the panel") of Common Pleas Judges to hear and decide all JLSWOP questions of law. "Decisions rendered by the *en banc* panel shall be binding on all trial courts of the First Judicial District and as such shall be considered the law of the case." *Id.*

On October 28, 2016, the following Questions of Law were filed by the above-named Defendants:[1]

1. Whether it is unconstitutional to ever impose 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 or whether such a maximum sentence of life may be imposed mandatorily, under *Graham v. Florida, Miller v. Alabama, Montgomery v. Louisiana, Commonwealth v. Batts,* and *Songster v. Beard.*

[1] Defendants Kevin Van Cliff and Alphonso Leaphart have been resentenced and are no longer participants in this matter.

2. Whether this court may constitutionally impose any sentence other than 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 following *Miller*.
3. Whether since 18 Pa. C.S.A. § 1102.1 explicitly does not apply retroactively to those convicted on or before June 24, 2012, the court may use §1102.1 as a guide for re-sentencing or whether instead each defendant must be afforded an individualized sentencing hearing with the judge having complete discretion to set a minimum sentence.
4. Whether there is a presumption against reimposition of a life without parole sentence at resentencing under *Miller v. Alabama* and *Montgomery v. Louisiana*, establishing that such sentences should be rare and uncommon, and further whether these cases also establish a presumption of immaturity and reduced culpability.
5. Whether 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.
6. Whether the defendant has a right to have a jury determine if he or she is permanently incorrigible, irreparably corrupt or irretrievably depraved prior to the imposition of a sentence of life without parole.
7. Whether expert testimony is required to establish that the defendant's crime reflects permanent incorrigibility, irreparable corruption or irretrievable depravity.
8. Whether Pa.R.Crim.P. Rule 573 governs the disclosure of any expert testimony.
9. Whether, in accordance with *Graham, Miller,* and *Montgomery*, affording defendants a "meaningful opportunity" for release if life is not imposed means release before defendant reaches, or is approaching, his/her life expectancy, and whether *defacto* life sentences are constitutionally barred.
10. Whether there are constitutional limits on victim impact testimony.
11. Whether the Court must provide funds to the defendant for a mitigator sufficiently before the time of sentencing so that counsel can adequately and effectively prepare his or her client at sentencing.
12. Whether the Court must provide funds to the defendant for expert witnesses to assist the defense sufficiently before the time of sentencing so that counsel can adequately and effectively prepare his or her client at sentencing.
13. Whether, if the Commonwealth is seeking imposition of life without parole, the Commonwealth must provide notice of such intent at the conclusion of the JLSWOP status hearing at which the date for resentencing is set, and whether such notice must set forth the specific basis for concluding that the defendant is permanently incorrigible, irreparably corrupt or irretrievably depraved.
14. Whether the parties must disclose thirty days prior to the resentencing hearing any evidence or witnesses the parties intend to introduce at sentencing, and whether, 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 the challenge.
15. Whether *Dawson v. Delaware* 503 U.S. 159, 112 S.Ct 1093 (1992), governs the admissibility at the resentencing hearing of any evidence of gang membership.

On November 28, 2016, the Commonwealth submitted its Questions of Law in which it raised the following question:

> 1. The Commonwealth concedes and stipulates for purposes of resentencing that the instant defendants are not "permanently incorrigible, irreparably corrupt or irretrievably depraved." The issue is whether each defendant has standing to litigate defense issues 1, 4, 5, 6, 7, 9 and 13.

Defendants and the Commonwealth submitted Briefs in Support of their Questions of Law on January 6, 2017, and Reply Briefs on February 10, 2017. Oral arguments were scheduled and held March 6, 2017. This panel's decision followed. Before addressing the instant Questions of Law, this panel first notes that it was created specifically: (1) to consider questions of law that may apply to a substantial number of juvenile lifer cases pending before the court; (2) to the extent possible, the court will provide guidance to the bar of the First Judicial District's (FJD) interpretation of current applicable law and controlling precedent; and (3) to enable judges of the FJD to render consistent decisions on questions of law that may apply to a substantial number of juvenile lifer cases pending before the court.

Therefore, notwithstanding the Commonwealth's argument that the Defendants lack standing to litigate questions 1, 4, 5, 6, 7, 9 and 13, this Court will address those questions that may apply to a substantial number of juvenile lifer cases pending before the court and may also provide guidance to the bar. However, we recognize that some of the questions raised by these Defendants will need to be resolved on a case-by-case basis. Accordingly, this panel decides that the positions advanced by the Defendants in Questions 1 through 12, and 14 through 15 are without merit; and agrees that the Defendants' Question 13 has merit, for the reasons set forth below.

II. Discussion

1. Whether it is unconstitutional to ever impose 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 or whether such a maximum sentence of life may be imposed mandatorily, under *Graham v. Florida,*[2] *Miller v. Alabama,*[3] *Montgomery v. Louisiana,*[4] *Commonwealth v. Batts,*[5] and *Songster v. Beard.*[6]

The panel notes that Defendants' Brief states this question differently than in the original Questions of Law. (*See* Defendants' Brief at 3 "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* (2010), *Miller* (2012), *Montgomery* (2016), *Batts I* (2013), *Garnett v. Wetzel* (2016), *Songster v. Beard,* (2016)").[7] This panel does not find that this was the holding of the aforementioned cases.

In addition, the Commonwealth asserts that because it is not seeking life without possibility of parole for the above-named defendants and has stipulated that the defendants are not "permanently incorrigible, irreparably corrupt, or irretrievably depraved," the Defendants lack standing. As previously stated, the panel's purpose is to consider questions of law that may apply to a substantial number of juvenile lifer cases pending before the court. To the extent that the instant Defendants lack standing to raise this question of law, its resolution may possibly apply to a substantial number of juvenile lifer cases pending before the court. There are more than 300 juvenile lifer cases pending in Philadelphia. Therefore, awaiting the Commonwealth's decision as to whether to seek life without of parole is not a reason to delay answering this

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[2] 560 U.S. 48 (2011).
[3] 567 U.S. 460 (2012).
[4] 136 S.Ct. 718 (2016).
[5] 66 A.3d 286 (Pa. 2013).
[6] 35 F.Supp.3d 657 (2016).
[7] *Songster v. Beard* is not controlling precedent for this Court. However, that court also did not hold that the imposition of a maximum sentence life imprisonment for an offense committed by a person who was under 18 years of age at the time of the crime was unconstitutional.

question. This question will be of interest in all cases where the Commonwealth chooses to pursue life without parole. For that reason, it is necessary and appropriate for the panel to answer this question.

Defendants assert that it is unconstitutional to impose a sentence of life imprisonment for an offense committed by a person who was under age 18 at the time of the offense. In support of their position the Defendants cite the following: "Pennsylvania Supreme Court specifically held that *Miller*'s requirement of proportionality applied to both the minimum and maximum sentences." Defendants' Brief at 3. The Defendants go on to quote *Batts I* where it states "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." 66 A.3d at 296. However, this was not the holding of *Batts I.* The next sentences in the paragraph, which the Defendants neglected to include, are dispositive.

> In terms of the actual constitutional command, however, *Miller's* binding holding is specifically couched more narrowly. ("We ... hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.") (emphasis added). The High Court thus left unanswered the question of whether a life sentence with the possibility of parole offends the evolving standards it is discerning.
> Significantly, in the arena of evolving federal constitutional standards, we have expressed a reluctance to "go further than what is affirmatively commanded by the High Court" without "a common law history or a policy directive from our Legislature." ... Moreover, barring application of the entire statutory scheme as applied to juveniles convicted of first-degree murder, based solely on the policy discussion in *Miller* (short of its affirmative holding), would contradict the "strong presumption that legislative enactments do not violate the constitution." (presumption that the General Assembly does not intend to violate the federal or state constitutions when it enacts legislation).

Id. (internal citations omitted). The Court's argument suggests a hesitation by the Pennsylvania Supreme Court to go beyond the narrow holding of *Miller*, i.e., merely that the Eighth Amendment forbids a sentencing scheme that mandates a sentence of life in prison without the possibility of parole for juvenile offenders. *Miller,* 132 S.Ct. at 2469.

Further, the Court in *Miller* did not preclude the possibility that a juvenile could be sentenced to a maximum sentence of life. "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentence follow a certain process—considering an offender's youth and attendant characteristics before imposing a particular penalty. *Id.* at 2471. This statement also indicates that the Court sees a distinction between juveniles punished under *Miller* and juveniles punished under *Roper* or *Graham*; and does not bar a possible life sentence. It merely requires that the sentence follow a process that now considers the offender's youth "before imposing a particular penalty." *Id.; see also Montgomery*, 136 S.Ct. at 743 (The Court states "[t]hose prisoners who have shown an inability to reform will continue to serve life sentences"). Thus, the Pennsylvania and U.S. Supreme Courts refrained from precluding states from sentencing juvenile offenders to life sentences when warranted. However, such a sentence will be imposed only in the rarest cases. As our Supreme Court has stated above, evolving standards may result in a different resolution in the future, but that is not the law as it stands today.

En Banc Answer: *Graham, Miller, Montgomery,* and *Batts I,* do not hold that it is unconstitutional to ever impose a maximum sentence of life imprisonment for an offense committed by a person under 18 at the time of the offense, nor that such a maximum sentence of life may not be imposed mandatorily.

2. **Whether this Court may constitutionally impose any sentence other than 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 18, 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 following *Miller*.**

We note that the Supreme Court's intention in *Montgomery* was not to disturb the finality of state convictions. *See Montgomery* 136 S.Ct. at 736 ("Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions"). The Defendants' convictions for first and second-degree murder are final and resentencing does not require litigation of their convictions.

Defendants assert: (1) that *Miller* invalidated the only existing sentencing scheme in Pennsylvania for juveniles convicted of first or second-degree murder prior to 2012, and (2) that applying severance principles does not result in a valid legislatively enacted penalty for these Defendants, except for the sentencing scheme for lesser included offenses. This issue was addressed by the Pennsylvania Supreme Court in *Batts I* where the Appellants argued:

> Substantively, Appellant asserts that the statutory scheme providing for a mandatory sentence of life-without-parole upon conviction of first-degree murder is unconstitutional in its entirety in light of *Miller*. Hence, Appellant contends that this Court should look to other statutes existing at the time that the offense was committed in order to determine the appropriate sentence that may be imposed consistent with the Eighth Amendment. This existing constitutional sentence, Appellant argues, should be based on the most severe lesser included offense, namely, third-degree murder, with a maximum term of forty years' imprisonment.

Batts, 66 A.3d at 294 (internal citations omitted). The Pennsylvania Supreme Court rejected Appellant's assertion that *Miller* invalidated Section 1102. The Court stated:

> Appellant's argument that the entire statutory sentencing scheme for first-degree murder has been rendered unconstitutional as applied to juvenile offenders is not buttressed by either the language of the relevant statutory provisions or the holding in *Miller*. Section 1102,

> which mandates the imposition of a life sentence upon conviction for first-degree murder, see 18 Pa.C.S. § 1102(a), does not itself contradict *Miller*; it is only when that mandate becomes a sentence of life-without-parole as applied to a juvenile offender—which occurs as a result of the interaction between Section 1102, the Parole Code, see 61 Pa.C.S. § 6137(a) (1), and the Juvenile Act, see 42 Pa.C.S. § 6302—that *Miller's* proscription squarely is triggered. *Miller* neither barred imposition of a life-without-parole sentence on a juvenile categorically nor indicated that a life sentence with the possibility of parole could never be mandatorily imposed on a juvenile. Rather, *Miller* requires only that there be judicial consideration of the appropriate age-related factors set forth in that decision prior to the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile.

Id. at 296. In the instant brief, Defendants also contends that "to the extent that part of discussion in *Batts I* may appear to be contrary, that case has been overruled by *Wolfe* and *Hopkins.*" Defendants' Brief at 6. The Defendants cites *Commonwealth v. Wolfe* [8] and *Commonwealth v. Hopkins*[9] for the proposition that "when the statute at issue is unconstitutional, and if the unconstitutional portions cannot be severed in accordance with the Statutory Construction Act, 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 a correction." Defendants' Brief at 5. This panel disagrees with the proposition that the unconstitutional portions of the relevant statute cannot be severed. According to *Hopkins:*

> Generally speaking, *"unless otherwise specified the individual provisions of all statutes are presumptively severable."* Section 1925 provides that the provisions of a statute shall be severable, but that this presumption is rebutted when either (1) the valid provisions of the statute are so essentially and inseparably connected with the void provisions that it cannot be presumed the legislature would have enacted the remaining valid provisions without the voided ones; or (2) the remaining valid provisions standing alone are incomplete and incapable of being executed in accord with the intent of the General Assembly.

[8] 140 A.3d 651 (Pa. 2016).
[9] 117 A.3d 247 (Pa. 2015).

Id. at 257. (internal citations omitted) (emphasis added). Based on *Miller* and *Montgomery,* the invalid portion of the original statute was the provision mandating a life sentence without the possibility of parole. *See* 18 Pa.C.S.A. § 1102(a)(1) (providing "a person who has been convicted of a murder of the first-degree ... shall be sentenced to death or a term of life imprisonment ... [ ]"), *superseded, relative to juvenile offenders, by* 18 Pa.C.S.A. § 1102.1; 61 Pa.C.S.A. § 6137(a)(1) (stating that the Board of Probation and Parole cannot release on parole any inmate serving life imprisonment) as cited in *Commonwealth v. Batts*, 125 A.3d 33, 36 (Pa. Super. 2015) *(Batts II).* Such a provision would not be so essential or inseparably connected to the valid provision of the statute that it cannot be presumed the legislature would have enacted the valid provisions without the voided one. Evidence of this fact can be found in the current version 18 Pa.C.S.A. § 1102.1, where the only legislative change was to remove the "death or a term of life imprisonment" and replaced it with a minimum and maximum sentence range. Moreover, the remaining provisions standing alone are not incomplete nor are they incapable of being executed in accord with the intent of the legislature.

Wolfe and *Hopkins* can be distinguished from *Batts I.* In *Batts I,* the Court held that the statute could be severed. *Batts*, 66 3.Ad at 295–96. In *Wolfe* and *Hopkins* the Court found the unconstitutional provisions could not be severed. In *Wolfe,* the Court held "Unconstitutional terms of statute requiring imposition of ten-year minimum sentence for involuntary deviate sexual intercourse (IDSI), which specifically stated that its provisions were not an element of the crime and that factual matters were to be resolved by sentencing court by preponderance of evidence, could not be severed from remainder of statute," 140 A.3d at 661.

In *Hopkins,* the Court found that the provision of a statute requiring imposition of mandatory minimum sentence if certain controlled substance crimes occurred within 1,000 feet

of, *inter alia*, a school was unconstitutional under *Alleyne v. United States*, 133 S.Ct. 2151 (2013), which held that, under the Sixth Amendment, a jury must find beyond a reasonable doubt any facts that increase a mandatory minimum sentence, and the General Assembly was clear that the mandatory minimum sentencing provisions were not intended to constitute an element of a crime. U.S.C.A. Const.Amend. 6; 18 Pa.C.S.A. § 6317.

The statutes in the *Wolfe* and *Hopkins* were not severable, unlike in *Batts I* where the Pennsylvania Supreme Court found 18 Pa.C.S.A. § 1102, is severable. Accordingly, this panel finds, that the entire sentencing scheme has not been invalidated.

En Banc Answer: According to our Supreme Court in *Batts I* the unconstitutional provision of the sentencing scheme can be severed. Therefore third-degree murder is not the only statutorily lawful sentence in Pennsylvania for such persons under 18, convicted of first or second-degree murder following *Miller*.

3. Whether since 18 Pa. C.S.A. § 1102.1 explicitly does not apply retroactively to those convicted on or before June 24, 2012, the Court may use §1102.1 as a guide for re-sentencing or whether instead each defendant must be afforded an individualized sentencing hearing with the judge having complete discretion to set a minimum sentence.

We agree with the Defendants that 18 Pa. C.S.A. § 1102.1 is not binding on this court for purposes of resentencing. However, that does not preclude our courts from using it as a guide for resentencing. It should first be noted that the Defendants do not include any citations to support the proposition that the Court may not use a valid statute as guidance for resentencing. The Defendants also cite *Songster v. Beard*, 201 F.Supp.3d 639 (ED. Pa., 2016), *appeal dismissed* (Oct. 26, 2016), and *Garnett v. Wetzel,* __ F.Supp.3d __, 2016 WL 4379244 at *1 (ED. Pa., 2016), for the proposition that "[i]f this Court rejects defendants' argument that Third-Degree Murder is the appropriate lesser included offense for resentencing 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." Defendants' Brief at 8. This does not accurately reflect the court's statement in either case. In both cases, the court said "If parole is unavailable, the resentencing court's only option *may* be a flat sentence imposed after conducting a constitutionally mandated sentencing hearing." *Songster*, 201 F.Supp.3d at 643; *Garnett*, 2016 WL 4379244 at *4 (emphasis added). The court went on to add, in both cases, "It is not our role to interpret Pennsylvania law in these circumstances. We do not attempt to usurp the authority of the state court to impose the sentence it deems appropriate so long as it adheres to the constitutionally mandated requirements as set forth in *Miller* and *Montgomery.*" *Songster*, 201 F.Supp.3d at 643; *Garnett*, 2016 WL 4379244 at *4.

Moreover, in his concurring opinion in *Batts I,* Justice Baer noted:

> I write separately to note my belief that, for purposes of uniformity in sentencing, it would be appropriate for trial courts engaging in the task of resentencing under this circumstance to seek guidance in determining a defendant's sentence and setting a minimum term from the General Assembly's timely recent enactment in response to the U.S. Supreme Court's decision in *Miller*.

Batts, 66 A.3d at 300 (M. Baer, concurring). In addition, pursuant to 42 §9721(b) "[t]he court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing." 42 Pa.C.S.A. § 9721. This suggests that the legislature intended for the sentencing judge to have broad access to statutory guidance in reaching a decision on sentencing.

<u>*En Banc* Answer</u>: The fact that 18 Pa. C.S.A. § 1102.1 explicitly does not apply retroactively to those convicted on or before June 24, 2012, does not preclude

the Court from using §1102.1 as a guide for re-sentencing as it considers the factors set forth in *Miller.*

4. Whether there is a presumption against reimposition of a life without parole sentence at resentencing under *Miller v. Alabama* and *Montgomery v. Louisiana*, establishing that such sentences should be rare and uncommon, and further whether these cases also establish a presumption of immaturity and reduced culpability.

Defendants point to specific language in *Miller* and *Montgomery* for the proposition that those cases have created a presumption against a sentence of life without possibility of parole. For example, Defendants' brief states:

> 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 rare and uncommon." Miller, 132 S, Ct. at 2469 (emphasis added)...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.

Defendants' Brief at 9. We agree that the Court in *Miller* and *Montgomery* anticipates that a sentence of life without parole will be "rare" and "uncommon." However, the Court did not take the additional step of creating a presumption against such a sentence. Therefore this Court does not find such a presumption. In fact, in holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," the Court explicitly stated that it did not intend to create a categorical bar on life without parole for juveniles. *See Miller,* 132 S.Ct. at 2469 ("Because that holding is sufficient to decide these cases, we do not consider [petitioners] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger").

Accordingly, the panel rejects the Defendants' claim that a presumption against a sentence of life without parole for juvenile offenders was created by *Miller* and *Montgomery.* The Court's holding that a sentence of life without parole will be rare and uncommon is sufficient to underscore its reasoning without the need for a presumption. Our decision is in accord with our Supreme Court's "reluctance to 'go further than what is affirmatively commanded by the High Court' without 'a common law history or a policy directive from our Legislature,'" as previously stated. *Batts*, 66 A.3d at 296.

En Banc Answer: *Miller* and *Montgomery* do not create a presumption against a life without parole sentence. However, consistent with the holding in *Miller*, the sentence of life without parole will only be applied in the rarest, most uncommon, cases.

5. Whether 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 proceedings before the Court are sentencings, not trials, required as a result of the U.S. Supreme Court's decision in *Montgomery.* Neither *Miller* nor *Montgomery* required prosecutors to prove beyond a reasonable doubt that the defendant's crime reflects permanent incorrigibility, irreparable corruption, or irretrievable depravity. The resentencing hearing is intended to afford the defendant an opportunity to present evidence which "gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S.Ct. at 735. As further stated "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736–37.

Therefore, in those cases where the Commonwealth seeks life without parole, the Commonwealth must present evidence to establish the defendant was so irretrievably depraved that rehabilitation is impossible. *See Id.* at 733 ("[*Miller*] recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of 'children's diminished culpability and heightened capacity for change,' *Miller* made clear that 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon'").

En Banc Answer: At sentencing, there is no requirement that the Commonwealth establish beyond a reasonable doubt that the defendant is permanently incorrigible, irreparably corrupt or irretrievably depraved before receiving a sentence of life without parole. However, in cases where the Commonwealth seeks life without parole, the Commonwealth must establish that the defendant is that "rare juvenile offender" as described in *Miller* and *Montgomery* above.

6. Whether the defendant has a right to have a jury determine if he or she is permanently incorrigible, irreparably corrupt or irretrievably depraved prior to the imposition of a sentence of life without parole.[10]

Again, the Defendants do not cite any language in *Miller* or *Montgomery* that states that, at a resentencing, a jury is required to determine if a defendant is permanently incorrigible, irreparably corrupt, or irretrievably depraved prior to the imposition of a sentence of life without parole. As previously stated, the Supreme Court's intention was not to place an unnecessary burden on States in correcting Eighth Amendment violations on juvenile lifers. *See Montgomery,* 136 A.3d at 735 ("When a new substantive rule of constitutional law is established, the Court is careful to limit the scope of any attendant procedural requirement to avoid intruding

[10] Since this question could impact a substantial number or juvenile lifer cases pending before the Court, notwithstanding the Commonwealth's claim that the defendants' lack standing to raise this question, this Court will address this question of law.

more than necessary upon States' sovereign administration of their criminal justice system); *Ford v. Wainwright,* 477 U.S. 399, 416–17 (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences"). Sentencing after a defendant's conviction in Pennsylvania is the responsibility of the judge not the jury. The same holds true for resentencing.

Defendants' reliance on *Appendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), is not dispositive of this question. In *Apprendi*, the Court held "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. There was no increase in the statutory maximum for juvenile lifers after *Miller* or *Montgomery.* The maximum that these Defendants could receive before the Supreme Court decisions was life without parole; and the maximum sentence is still life. However, after *Miller* and *Montgomery,* the Court has now made it possible for juvenile lifers to have "hope for some years of life outside of prison walls." *Montgomery,* 136 S.Ct. at 737. Thus, the penalty is reduced, after *Miller* and *Montgomery,* by eliminating a mandatory life without parole sentence and directing a period of life outside of prison walls, except in the rarest cases. Even in the rarest of cases, the sentence is not increased, it remains the same, but only after consideration of the factors enunciated in *Miller* and *Montgomery.*

In addition, in *Alleyne,* the Court held that "facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." 133 S. Ct. at 2158. In juvenile lifer cases, the *Miller* Court held that mandatory minimum sentences of life without possibility of parole were unconstitutional for juveniles,

which is the opposite of the issue addressed by the Court in *Alleyne*. In addition, the Court recognized that not all facts that influences a judge's discretion must be submitted to a jury:

> In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, *e.g., Dillon v. United States,* 560 U.S. ——, ——, 130 S.Ct. 2683, 2692, 177 L.Ed.2d 271 (2010) ("[W]ithin established limits[,] ... the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted)); *Apprendi,* 530 U.S., at 481, 120 S.Ct. 2348 ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute").

Id. at 2163. Thus, *Apprendi* and *Alleyne* do not apply in these cases. Moreover, *Miller* and *Montgomery* do not require a jury determination that the defendant was permanently incorrigible, irreparably corrupt, or irretrievably depraved prior to the imposition of a sentence of life without parole. *Miller* requires that there be a judicial consideration of the appropriate age-related factors. It is recognized in Pennsylvania that sentencing is a judicial function and not a function for the jury, except at sentencing in capital cases. These are not capital cases.

En Banc Answer: A jury is not required to determine whether a defendant is permanently incorrigible, irreparably corrupt or irretrievably depraved prior to the imposition of a sentence of life without parole.

7. Whether expert testimony is required to establish that the defendant's crime reflects permanent incorrigibility, irreparable corruption or irretrievable depravity.

The Defendants' brief states "[c]iting *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)." Defendants' Brief at 18. Defendants point to this statement by the Supreme Court as support for its assertion that expert testimony is required for these juvenile lifer cases. *See* Defendants' Brief p. 18 ("For this reason, expert evidence is critical to a competent understanding of whether a particular offender's conduct can be found to so deviate from normative behavior as to reflect permanent incorrigibility, irreparable corruption, or irretrievable depravity").

This panel finds that the quote from *Miller* does not establish that expert testimony is required to determine whether a particular offender's conduct can be found to so deviate from normative behavior as to reflect permanent incorrigibility, irreparable corruption, or irretrievable depravity. Rather, the U.S. Supreme Court's statement summarizes the type of evidence it considered in arriving at the conclusion that children are constitutionally different from adults. The Courts' conclusion is at the core of its ultimate holding and therefore binding as juvenile lifers are resentenced. Moreover, the Pennsylvania Supreme Court has held that "the admission of expert testimony is a matter addressed to the discretion of the trial court." *Commonwealth v. Delbridge*, 855 A.2d 27, 46 (Pa. 2003). Expert testimony may be introduced at a resentencing hearing by either party, but is not mandated by *Miller* or *Montgomery.*

In addition, Defendants' contend that "Life without possibility of 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." Defendants' Brief at 20. As previously stated, neither *Miller* nor

Montgomery require proof beyond a reasonable doubt. Whether expert testimony is necessary will be determined on a case-by-case basis.

En Banc Answer: While expert testimony may be introduced at resentencing by either party, if necessary, expert testimony is not required to establish that the defendant's crime reflects permanent incorrigibility, irreparable corruption or irretrievable depravity.

8. Whether Pa.R.Crim.P. Rule 573 governs the disclosure of any expert testimony.

The Defendants filed petitions under the Post-Conviction Relief Act ("PCRA"), seeking relief as a result of the *Miller* and *Montgomery* decisions. The resentencing hearings are post-conviction proceedings. These cases are not pretrial proceedings governed by Pa.R.Crim.P. Rule 573. Requests for discovery will be determined by the Court in its' discretion. In these cases, pursuant to GCR No. 1, the "Exhibit A – JLWSOP Conference Order," specifically schedules the date when "Parties shall identify and submit *Curriculum Vitae* and any corresponding reports from all experts thirty (30) days prior to the resentencing hearing." So in the event that expert testimony is expected to be introduced by either party, the Conference Order will address disclosure.

En Banc Answer: PCRA Rules and GCR No. 1 regulate the disclosure of evidence.

9. Whether, in accordance with *Graham, Miller,* and *Montgomery*, affording defendants a "meaningful opportunity" for release if life without parole is not imposed means release before defendant reaches, or is approaching, his/her life expectancy, and whether *defacto* life sentences are constitutionally barred.

Defendants' brief on this questions begins by stating that *Miller* and *Montgomery* 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. *See Miller,* 132 S.Ct. 2433 (2012); *Montgomery,* 135 S.Ct. 733–35 (2016)." Defendants' Brief at 21. This panel first notes that neither *Miller* nor *Montgomery* addressed the question of

whether sentencing a juvenile to a lengthy term of years violates the Eighth Amendment. Further, the cases cited by the Defendants do not "constitutionally bar" lengthy sentences. For example, in *State v. Null*, the Iowa Supreme Court, in holding that *Miller* applied to an aggregate minimum sentence of 52.5 years, did not find such sentences to be unconstitutional.[11] 836 N.W.2d 41, 74 (Iowa 2013). It remanded the case and required that the sentencing court apply the factors set forth in *Miller*. "Instead, we conclude [our state constitution] requires that a district court recognize and apply the core teachings of *Roper*, *Graham*, and *Miller* in making sentencing decisions for long prison terms involving juveniles." *Id.* at 74.

Similarly, in *Bear Cloud v. State*, found that a lengthy aggregate minimum sentence of 45 years does not provide "a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*." 334 P.3d 132, 142 (Wyo. 2014). The Wyoming Supreme Court, however, also did not hold that such sentences were constitutionally barred. It required sentencing courts within its jurisdiction to follow a process that considers the factors set forth in *Miller*. "The United States Supreme Court's Eighth Amendment jurisprudence requires that a process be followed before we make the judgment that juvenile 'offenders never will be fit to reenter society.' That process must be applied to the entire sentencing package, when the sentence is life without parole, or when

[11] "Because of our disposition of this case, it would be premature at this time to consider issues that need not be decided today. For instance, we do not consider whether the sentence in this case would be cruel and unusual under a gross proportionality or any other type of proportionality analysis. Any proportionality question will be considered only after the district court applies the principles of *Miller* to *Null's* sentence. Further, we do not decide whether mandatory minimum sentences for adults may be automatically imposed upon juveniles without consideration of the diminished culpability of juvenile defendants. Similarly, like in *Miller*, we do not decide whether lengthy sentences of fifty years in prison or more are categorically banned. We simply conclude that under article I, section 17 of the Iowa Constitution, this case must be remanded to the district court for resentencing in light of the requirement of *Miller* that the district court consider all that was said in *Roper* and its progeny about the distinctive qualities of youth. We emphasize that the sole issue on remand is whether *Null* may be required to serve 52.5 years in prison before he is eligible for parole consideration." *Id. at* 76.

aggregate sentences result in the functional equivalent of life without parole." *Bear Cloud*, 334 P.3d at 144 (internal citations omitted).

On the other hand, these cases recognize the split among courts across the nation on this question. Some courts follow the Iowa and Wyoming courts and extend *Miller* to lengthy sentences. Other courts have chosen to view *Miller* and *Montgomery* narrowly and hold that those cases only apply to life without possibility of parole:

> We also recognize that some courts have held *Miller* does not apply where the lengthy sentence is the result of aggregate sentences. See, e.g., *Bunch v. Smith*, 685 F.3d 546, 550–51 (6th Cir.2012) (holding *Miller* does not apply to an eighty-nine-year sentence resulting from consecutive fixed-term sentences for multiple nonhomicide offenses), cert. denied, 569 U.S. ——, 133 S.Ct. 1996, 185 L.Ed.2d 865 (2013); *Walle v. State*, 99 So.3d 967, 972–73 (Fla.Dist.Ct.App.2012) (holding *Miller* does not apply where the defendant received a ninety-two-year aggregate sentence). Cf. *Henry v. State*, 82 So.3d 1084, 1089 (Fla.Dist.Ct.App.2012) (holding *Graham* does not apply to an aggregate term-of-years sentence totaling ninety years).

State v. Null, 836 N.W.2d at 73. In addition, in a recent case, the New Jersey Supreme Court found that "*Miller* applies with equal strength to a sentence that is the practical equivalent of life without parole. Defendants who serve lengthy term-of-years sentences that amount to life without parole should be no worse off than defendants whose sentences carry that formal designation. The label alone cannot control; we decline to elevate form over substance." *State v. Zuber*, 152 A.3d 197, 212 (2017) (internal citations omitted). That court also noted the split in court decisions on this issue:

> Some State courts have reached the same conclusion. See, e.g., *People v. Caballero*, 55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291, 295 (2012); *Casiano v. Comm'r of Corr.*, 317 Conn. 52, 115 A.3d 1031, 1044 (2015), cert. denied, —— U.S. ——, 136 S.Ct. 1364, 194 L.Ed.2d 376 (2016); *Henry v. State*, 175 So.3d 675, 680 (Fla. 2015); *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013); *Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014); see also *Moore v. Biter*, 725 F.3d 1184, 1191–92 (9th Cir. 2013).

> Others have not. See, e.g., *Adams v. State*, 288 Ga. 695, 707 S.E.2d 359, 365 (2011); State v. Brown, 118 So.3d 332, 332 (La. 2013); *Vasquez v. Commonwealth*, 291 Va. 232, 781 S.E.2d 920, 926, cert. denied, —— U.S. ——, 137 S.Ct. 568, 196 L.Ed.2d 448 (2016); see also *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012), cert. denied, —— U.S. ——, 133 S. Ct. 1996, 185 L.Ed. 2d 865 (2013).

Id. at 212.

However our Supreme Court has stated its intention to take a narrow view of *Miller*. *See Batts*, 66 A.3d at 295. At this time, we are constrained to adopt a narrow view of *Miller* unless and until our appellate courts, or the legislature, directs otherwise. Therefore, since *Graham, Miller*, and *Montgomery* only applied to sentences of life without possibility of parole, Defendants' assertions that a *defacto* life sentence without parole is constitutionally barred, is without merit.

<u>*En Banc* Answer</u>: Lengthy sentences are not constitutionally barred; the Court will determine the sentence to be imposed after consideration of the factors in *Miller*.

10. Whether there are constitutional limits on victim impact testimony.

Defendants Brief asserts that "[t]he Constitutional limits on victim impact testimony for a juvenile resentencing should be the same as those applicable to the penalty phase in capital cases." Defendants' Brief at 26. This Court agrees with our Superior Court when it noted that cases involving juveniles facing life without possibility of parole are different from adults facing the death penalty. *Commonwealth v. Batts*, 125 A.3d 33, 44–45 (Pa. Super. 2015) *reargument denied* (Nov. 10, 2015) *appeal granted in part*, 135 A.3d 176 (Pa. 2016) ("Specifically, Appellant contends a juvenile facing a sentence of life imprisonment without parole is entitled to the same due process as an adult facing the death penalty... We conclude Appellant's argument lacks merit. We cannot discern any constitutional due process basis or statutory grounds to provide juveniles facing life imprisonment without parole with the same procedural due process

protections as adults facing the death penalty."). Moreover "admission of evidence, including victim impact evidence, rests within the sound discretion of the trial court …." *Commonwealth v. Bryant*, 67 A.3d 716, 726 (Pa. 2013).[12] Therefore, the Defendants' claim is without merit.

En Banc Answer: There is no requirement that victim impact testimony for a juvenile resentencing have the same constitutional limitations as those applicable to the penalty phase in capital cases. Victim impact evidence is admissible at resentencing, subject to the judge's discretion. Any challenges to the admissibility of such evidence will be evaluated on a case-by-case basis.

11. Whether the Court must provide funds to the defendant for a mitigator sufficiently before the time of sentencing so that counsel can adequately and effectively prepare his or her client at sentencing. 12. Whether the Court must provide funds to the defendant for expert witnesses to assist the defense sufficiently before the time of sentencing so that counsel can adequately and effectively prepare his or her client at sentencing.

It should first be noted that "the decision to appoint an expert witness is within the sound discretion of the trial court and will not be disturbed except for a clear abuse of that discretion." *United States ex rel Dessus v. Pennsylvania,* 316 F.Supp. 411 (E.D. Pa. 1970), *aff'd*, 452 F.2d 557 (3d Cir. 1971), *cert. denied*, 409 U.S. 853 (1972); *Commonwealth v. Gelormo*, 475 A.2d 765 (Pa. Super. 1984). In addition, there is no obligation on the part of the court to pay for the services of an expert. *Commonwealth v. Williams*, 561 A.2d 714, 718 (Pa. 1989) (*citing Commonwealth v. Box*, 391 A.2d 1316 (Pa. 1978)); *Commonwealth v. Rochester*, 451 A.2d 690 (Pa. Super. 1982); *Commonwealth. v. Carter*, 643 A.2d 61, 73 (Pa. 1994).

Further "[A] defendant does not have an absolute right to a court-appointed investigator, and appointment of an investigator is vested in the trial court's discretion." *Commonwealth v.*

[12] This is also consistent with § 9711. Sentencing procedure for murder of the first-degree. "(2) In the sentencing hearing, evidence concerning the victim and the impact that the death of the victim has had on the family of the victim is admissible. Additionally, evidence may be presented as to any other matter that the Court deems relevant and admissible on the question of the sentence to be imposed." 42 Pa.C.S.A. § 9711.

Wholaver, 989 A.2d 883, 895 (Pa. 2010) (internal citations omitted). In *Wholaver*, a capital case, our Supreme Court "perceive[d] no abuse of discretion" by the trial court where it afforded the defendant a private investigator for 40 hours, where the defendant "did not specify his investigative needs to the trial court." *Id.* at 895. Based on *Wholaver,* it is clear that it is within the sound discretion of the courts to grant defendants' request for funds for mitigators and/or expert witnesses to assist them in preparing for resentencing. Some of the Defendants in this matter have filed motions for funds for mitigators, which have been reviewed by the court. In *Commonwealth v. Reid,* our Supreme Court stated:

> The provision of public funds to hire experts to assist in the defense against criminal charges is a decision vested in the sound discretion of the court and a denial thereof will not be reversed absent an abuse of that discretion. At the trial stage, "an accused is entitled to the assistance of experts necessary to prepare a defense." This court has never decided that such an appointment is required in a PCRA proceeding. We must review the PCRA court's exercise of its discretion in the context of the request, that an expert's testimony is necessary to establish his entitlement to relief under 42 Pa.C.S. § 9543(a)(2)(vi), the provision of the PCRA which deals with claims of innocence based on after-discovered evidence.

99 A.3d 470, 505 (Pa. 2014) (internal citations omitted). The Court has and will review requests for mitigators and experts on a case-by-case basis.[13]

<u>En Banc</u> <u>Answer</u>: There is no requirement that the Court provide funds for a mitigator or expert witnesses in connection with these resentencing. The Court has and will continue to decide requests for funds on a case-by-case basis.

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[13] Finally, to the extent that Defendants rely on 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,* this Court has already established that juvenile lifer cases are different from death penalty cases and there is no "constitutional due process basis or statutory ground to provide juveniles facing life imprisonment without parole with the same procedural due process protections as adults facing the death penalty." *Batts*, 125 A.3d at 45. As such Defendants' question of law is without merit.

13. Whether, if the Commonwealth is seeking imposition of life without parole, the Commonwealth must provide notice of such intent at the conclusion of the JLSWOP status hearing at which the date for resentencing is set, and whether such notice must set for the specific basis for concluding that the defendant is permanently incorrigible, irreparably corrupt, or irretrievably depraved.

The Commonwealth asserts that because it is not seeking life without possibility of parole for any of the above-named Defendants, they lack standing to raise this question of law. However, because this question may apply to a number of juvenile lifer cases pending before the Court and will provide guidance to the bar of the FJD's interpretation of current applicable law and controlling precedent, the Court will address this question. Additionally, the Commonwealth contends that because Defendants are relying on Pa.R.Crim.P. 802 (notice of aggravating circumstances), which applies to "cases in which [a] death sentence is authorized" it has "nothing to do with *Miller*." Commonwealth's Brief at 13.

We agree Pa.R.Crim.P. 802 is not applicable to these resentencings. However, the Comment for Rule 802 states its purpose is "intended to give the defendant sufficient time and information to prepare for the sentencing hearing." Pa.R.Crim.P. 802. Fairness dictates that juvenile lifers should also be given notice in order to adequately prepare when the Commonwealth intends to seek a sentence of life without parole. To require the Commonwealth to provide notice is appropriate. *Miller* noted the similarity of a juvenile life without possibility of parole sentence to a death sentence when it said "*Graham* also likened life-without-parole sentences for juveniles and the death penalty. That decision recognized that life-without-parole sentences 'share some characteristics with death sentences that are shared by no other sentences.'" 132 S.Ct. at 2459. Therefore this Court agrees with the Defendants that if the Commonwealth is seeking imposition of life without parole, the Commonwealth must provide

notice of such intent at the conclusion of the JLSWOP status hearing and before the Court schedules the date for the resentencing hearing. Further, the Commonwealth shall state its intention to seek life without parole in the Concise Statement required by GCR No. 1, paragraph 1 (a) and (b).

En Banc Answer: If the Commonwealth is seeking a sentence of life without parole, it shall provide notice of such intent at the conclusion of the JLSWOP status hearing and in its Concise Statement.

14. Whether the parties must disclose thirty days prior to the resentencing hearing any evidence or witnesses the parties intend to introduce at sentencing, and whether, 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 the challenge.

This is not a question of law but rather a request for guidance as to the procedure the Court intends to follow in these juvenile lifer cases. Defendants did not cite to any authority for their proposition that the parties must disclose any evidence or witnesses that they intend to introduce 30 days prior to sentencing; nor for their assertion that 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 the challenge. Pursuant to GCR No. 1, in the JLWSOP Conference Order, the Court schedules a date for when all relevant resentencing information must be filed.

With respect to the Defendants' question concerning challenges to admissibility of evidence, the fact that a judge has been exposed to information that is later determined to be inadmissible does not preclude the judge from being fair and impartial. Our Supreme Court has stated "we note that it is well-settled that [e]ven if prejudicial information was considered by the trial court, a judge, as fact finder, is presumed to disregard inadmissible evidence and consider only competent evidence." *Commonwealth v. Fears,* 836 A.2d 52, 71 n. 19 (Pa. 2003) *cert.*

denied, 545 U.S. 1141 (2005) (internal citation omitted); *Commonwealth. v. Kearney*, 92 A.3d 51, 61 (Pa. Super. 2014).

Nonetheless, if the judge believes he or she cannot be impartial the remedy is recusal. *See Id.* at 60 ("however, this standard requires that the judge recuse himself not only when he doubts his own ability to preside impartially, but whenever he 'believes his impartiality can be reasonably questioned'"); *Commonwealth v. Lemanski*, 529 A.2d 1085, 1088–89 (Pa. 1987) (quoting *Commonwealth v. Goodman*, A.2d 652, 654 (Pa. Super. 1973)); *See also Commonwealth v. Abu–Jamal*, 720 A.2d 79, 89 (Pa. 1998) *reargument denied* (Oct. 29, 1998); *Commonwealth v. Benchoff*, 700 A.2d 1289, 1294–95 (Pa. Super. 1997) (*citing In the Interest of McFall*, 617 A.2d 707, 712 (Pa. 1992)); *Commonwealth. v. Williams*, 69 A.3d 735, 749 (Pa. Super. 2013). This approach is less burdensome and is in line with *Montgomery's* intention not place an onerous burden on States. *See Montgomery* 136 S.Ct. at 736. Defendants' claim is without merit.

En Banc Answer: The procedure for the disclosure of documents, witnesses etc. will continue to be set forth in the JSLWOP Conference Order issued when the resentencing hearing is scheduled. The resentencing judge will determine the admissibility of evidence.

15. Whether *Dawson v. Delaware*, 503 U.S. 159 (1992), governs the admissibility at the resentencing hearing of any evidence of gang membership.

Defendants' Brief at 34 states "[o]n 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." The Defendants lacks standing to raise this question. This is such a fact-specific question and the Defendants has provided no facts, but again appears to be asking this panel to make a general rule on a matter that is fact-specific and should be resolved on a case-by-case basis. As such, there is no concrete issue here for the panel to address.

Instead, the Defendants are inviting this panel to provide an advisory or abstract opinion. As the Commonwealth notes where it cites *Markham v. Wolfe*, 136 A.3d 134, 140 (Pa. 2016):

> In Pennsylvania, a party to litigation must establish as a threshold matter that he or she has standing to bring an action. *Stilp v. Commonwealth,* 596 Pa. 62, 940 A.2d 1227, 1233 (2007). …In our Court's landmark decision on standing, we explained that a person who is not adversely impacted by the matter he or she is litigating does not enjoy standing to initiate the court's dispute resolution machinery. *William Penn Parking Garage v. City of Pittsburgh,* 464 Pa. 168, 346 A.2d 269, 280–81 (1975) (plurality). This is consistent with our jurisprudential approach that eschews advisory or abstract opinions, but, rather, requires the resolution of real and concrete issues. As we explained in *In re Hickson,* 821 A.2d at 1243, the party to the legal action must be "aggrieved."
>
> In determining whether a party is aggrieved, courts consider whether the litigant has a substantial, direct, and immediate interest in the matter. To have a substantial interest, the concern in the outcome of the challenge must surpass "the common interest of all citizens in procuring obedience to the law." *Id.* An interest is direct if it is an interest that mandates demonstration that the matter "caused harm to the party's interest." *Id.* Finally, the concern is immediate "if that causal connection is not remote or speculative." *City of Philadelphia,* 838 A.2d at 577. The "keystone to standing in these terms is that the person must be negatively impacted in some real and direct fashion." *Pittsburgh Palisades Park, LLC v. Commonwealth,* 585 Pa. 196, 888 A.2d 655, 660 (2005).

Commonwealth Brief at 2.

Even if this Court were to rely on the Defendants' offering of *Delaware v. Dawson*, 503 U.S. 159, 160 (1992) for the proposition that "…'[t]he 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 juvenile resentencing." Defendants' Brief at 34. This claim is meritless. There is nothing in *Graham* or *Miller* that require such a finding or limit the type of evidence a court can consider in re-sentencing a defendant. Even assuming, *arguendo*, that the Defendant's assertion was true

this panel has no facts in the instant cases, or any other juvenile lifer cases, upon which to determine the relevance of any evidence of gang membership in the instant cases. The Defendants have no standing to raise this question.

En Banc Answer: Defendants lack standing and the assertion that *Dawson v. Delaware*, 503 U.S. 159 (1992), governs the admissibility at the resentencing hearing of any evidence of gang evidence is without merit.

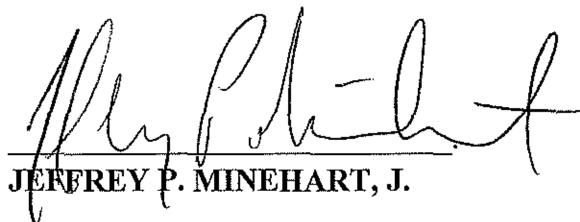
III. Conclusion

The foregoing decision of the *En Banc* Panel is issued pursuant to General Court Regulation No. 1 (2016) for the purposes set forth therein.

BY THE COURT OF COMMON PLEAS, *EN BANC* PANEL:

KATHRYN S. LEWIS, S.J.

BARBARA A. MCDERMOTT, J.



JEFFREY P. MINEHART, J.

DATE:

April 13, 2017