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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

79 MAP 2009

COMMONWEALTH OF PENNSYLVANIA,
Appellee
v.
QU'EED BATTS,
Appellant

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT

Appeal from the order of the Superior Court (No. 766 EDA 2008) dated April 7, 2009, affirming the judgment of sentence of Court of Common Pleas of Northampton County (No. 1215-2006) dated October 22, 2007

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I. ARGUMENT

The United States Supreme Court in *Miller v. Alabama*, 567 U.S.___, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012) held that mandatory life without parole sentences imposed on juvenile offenders violate the Eighth Amendment because they, "by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."132 S. Ct. at 2467. Because Pennsylvania law mandates a sentence of life imprisonment without parole for juveniles convicted of first or second degree murder, *Miller* invalidated the entire Pennsylvania sentencing scheme for juveniles convicted of these offenses.

This Court has now been presented with two competing models to correct that scheme invalidated by *Miller*. Appellant Batts – noting that this is not the first time a sentencing scheme has been invalidated – asks this Court to look to prior precedent to determine the appropriate scheme for resentencing. When death penalty statutes were declared unconstitutional, this Court vacated the death sentence and imposed the next most severe sentence constitutionally available under Pennsylvania law: life imprisonment. This case requires the same result; the Court should impose the next most severe sentence constitutionally available under Pennsylvania statutes: the sentence for third degree murder.

Though the Commonwealth agrees that Appellant must be resentenced, the Commonwealth suggests an alternative model that, as described in Part I.B., would require this Court to revise or invalidate numerous statutes and itself create new standards to guide sentencing and resentencing. Appellant's approach is consistent with Pennsylvania law and precedent; the Commonwealth's approach requires the impermissible creation of several new 'statutory' provisions. Accordingly, this Court should reverse Appellant's life without parole

sentence and remand for resentencing on the constitutionally intact scheme for all lesser included offenses.

A. Appellant's Approach Is Consistent With Pennsylvania Law And Precedent

As described in Appellant's Supplemental Brief, Appellant's resentencing model is consistent with this Court's precedent. When previously faced with unconstitutional sentencing schemes, this Court has imposed the next most severe legislatively-adopted sentence rather than fashion a new sentence that was never considered by the legislature. *Amicus* Pennsylvania District Attorneys Association's attempt to distinguish the precedent cited by Appellant, *see* Pennsylvania District Attorneys Association (PDAA) Supplemental Amicus Brief at 12, n.7, fails.

Though *Amicus* PDAA correctly notes that *Miller* does not declare all juvenile life without parole sentences unconstitutional – instead striking down *mandatory* life without parole sentences imposed on juvenile offenders – the Pennsylvania cases cited by Appellant in his Supplemental Brief similarly did not categorically outlaw the death penalty, but instead outlawed certain statutory schemes under which the death penalty was imposed.

For example, in *Commonwealth v. Bradley*, 449 Pa. 19 (1972), this Court was presented with a sentencing statute that unconstitutionally imposed an otherwise constitutional death sentence. The statute at issue[1] was unconstitutional pursuant to *Furman v. Georgia*, 408 U.S. 238 (1972), which invalidated statutes such as Pennsylvania's that had "no standards [to] govern the selection of the penalty [of death or imprisonment]" and left the decision "to the uncontrolled discretion of judges or juries." 408 U.S. at 253 (Douglas, J., concurring). In *Bradley*, this Court found that "the imposition of the death penalty *under statutes such as the one pursuant to which*

[1] Act of June 24, 1939, P. L. 872, § 701, as amended, 18 P.S. § 4701.

the death penalty was imposed upon appellant is violative of the Eighth and Fourteenth Amendments. Accordingly, appellant's sentence of death may not now be imposed." 449 Pa. at 24 (emphasis added). This Court, appropriately, did not attempt to rewrite the death penalty statute in order to create a constitutional sentencing scheme; instead it imposed the next most severe sentence available: life imprisonment. *Id*.

Similarly, and even more analogously to this case, in *Commonwealth v. Story,* 497 Pa. 273 (1981), the defendant was sentenced to death pursuant to a death penalty scheme in which the "the Legislature *mandated* the imposition of the penalty of death where a murder of the first degree was accompanied by any one of nine aggravating circumstances and none of three mitigating circumstanced existed." 497 Pa. at 275 (emphasis added). That scheme had been declared unconstitutional by this Court in *Commonwealth v. Moody,* 476 Pa. 223 (1977). *Id.* at 275-76. At Story's retrial (because his conviction had been improperly obtained), "the prosecution originally planned to seek a sentence of life imprisonment, *the sole remaining constitutional punishment for murder of the first degree in light of* Moody." *Story*, 497 Pa. at 276 (emphasis added).[2] The Court ultimately held that, "because the death penalty had been unconstitutionally entered, the sentence of death must be vacated and a sentence of life imprisonment imposed." *Id*. at 282. Though the death penalty remained theoretically a valid sentencing option had the legislature adopted a constitutional statute, the Court again did not attempt to devise a new, constitutional sentencing scheme in lieu of legislative action. Instead, the Court found that the only available sentence was the next most severe sentence statutorily available at the time of the offense.

[2] The prosecution ultimately abandoned this approach and instead decided to seek the death penalty under a legislatively-enacted scheme adopted after the defendant committed the offense. *Story,* 497 Pa. at 275.

Just as *Bradley* and *Story* permitted the imposition of death sentences with corrected statutes, *Miller* theoretically permits the imposition of juvenile life without parole with corrected statutes. This Court has recognized, however, that it is the duty of the legislature, not the Court, to correct the unconstitutional statutes. In *Story*, this Court noted, "On every occasion where the conviction has been found to be valid, an appellant facing a death sentence imposed pursuant to an unconstitutional death penalty statute has received a sentence of life imprisonment." 497 Pa. at 279-80. A similar result is required here: Appellant is facing a life without parole sentence imposed pursuant to an unconstitutional sentencing statute and therefore should receive the next-most-severe legislatively available, constitutional sentence, a sentence for third degree murder.[3] As this Court's precedent shows, the role of the Court is to adjudicate the cases before it and not to act as a superlegislature.

B. The Commonwealth's Approach Is Inconsistent With Pennsylvania Law And Precedent

Whereas Appellant's approach is in line with this Court's precedent and does not ask this Court to legislate from the bench, the Commonwealth's approach asks this court to invalidate and/or revise no fewer than three statutes and create a new sentencing scheme itself.

[3] Under this precedent, even if this Court disagrees with Appellant's analysis that life with parole is not a valid sentencing option, life without parole is no longer an available sentence. Just as when this Court found existing death penalty statutes unconstitutional, it resentenced defendants to life imprisonment (not death or life imprisonment), the Court should similarly resentence these defendants to the most severe available sentence. Under Appellant's rationale, the next most severe penalty is the penalty for third degree murder; under the Commonwealth's analysis, the next most severe available penalty is life with parole. However, a *mandatory* life with parole sentence for juveniles – even if a permissible sentence – would still violate *Miller*'s insistence that "a sentencer have the ability to consider the 'mitigating qualities of youth.'"*Miller*, 132 S. Ct. at 2467.

1. The Commonwealth Asks This Court To Create A New Sentence Of Life With Parole

In Pennsylvania, a "life *with* parole" sentence simply does not exist. The first degree murder sentencing statute at issue here states that "A person who has been convicted of a murder in the first degree . . . shall be sentenced to death or a term of life imprisonment." 18 Pa. C. S. A. § 1102(a)(1). "It is black letter law that a court must construe the words of a statute according to their plain meaning." *Commonwealth v. Yount*, 615 A.2d 1316, 1329 (Pa. Super. Ct. 1992). *See also* 1 Pa. C. S. A. § 1903. The plain language of the first degree murder sentencing statute suggests that, just as "death" means "death" and not "death with the possibility of parole," "life imprisonment" means "life imprisonment" and not "life imprisonment with the possibility of parole."[4] Creating a life *with* parole statute would contradict the plain language of 18 Pa. C. S. A. § 1102.

Commonwealth v. Yount, 419 Pa. Super. 613, 615 A.2d 1316 (Pa. Super. 1992) considered an analogous statute and came to the same conclusion. In *Yount*, the appellant argued that his life sentence for murder was illegal because it failed to impose a minimum term specifying when he would be parole eligible. In rejecting the appellant's claim, the Superior Court looked to the plain language of a previous, but analogous, sentencing statute. The first degree murder statute in place at the time of appellant's conviction, similar to the current statute, provided that a person convicted of first degree murder "shall be sentenced to . . . undergo imprisonment for life." *Young*, 419 Pa. Super. Ct. at 621. The court found a trial court had no discretion to impose a different minimum sentence because the first degree murder statute "by its express terms, mandates life imprisonment." *Id*. The court continued:

[4] The legislature did not, for example, suggest a sentence of "not more than" life even though the legislature structured the third degree murder statute as a term sentence fixed by the court at "not more than" 40 years. 18 Pa. C. S. A. § 1102(d).

> Under the clear wording of [18 Pa. C. S. A. § 1102 and the previous sentencing statute], the sentencing court may not sentence a first degree murderer to a lesser term. We . . . conclude that the absence of the magic words "not less than" or "at least" does not render appellant's [life] sentence something other than a mandatory minimum.

Id. at 623. *See also Castle* v. *Pennsylvania Board of Probation and Parole*, 123 Pa. Cmwlth. 570, 575-76, 554 A.2d 625 (Pa. Cmwlth. Ct. 1989) ("[S]ection 1102(b) states that the sentence of life imprisonment *shall* be imposed for the offense of second degree murder. A sentencing court *may not* sentence a second degree murderer to a lesser term.") (emphasis in original). In other words, a trial court – based only on 18 Pa. C. S. A. § 1102 – lacks discretion to impose a minimum sentence that would make a defendant eligible for parole.

Since "life means life" pursuant to the plain language of 18 Pa. C. S. A. § 1102, simply striking the language in 61 Pa. C. S. A. § 6137(a)(1) that deprives the parole board of jurisdiction over juveniles sentenced to life, as the Commonwealth suggests, does not cure the unconstitutional sentencing scheme. The provision in the parole power statute exempting "an inmate condemned to death or serving life imprisonment" from the parole board's jurisdiction, *see* 61 Pa. C. S. A. § 6137(a)(1), merely affirms, rather than establishes, that "life means life." Just as it would be absurd to assume that, absent 61 Pa. C. S. A. § 6137(a)(1), inmates sentenced to death would be eligible for parole, it is similarly absurd to assume that, absent this statute, inmates sentenced to life imprisonment would be eligible for parole. See *Commonwealth v. Zdrale*, 530 Pa. 313, 318 (Pa. 1992) ("Under the Statutory Construction Act, the legislature must be presumed not to have intended a result that is absurd or unreasonable."); *see also* 1 Pa. C. S. A. § 1922(1). This language of the parole power statute ensures that it is consistent with the plain language of 18 Pa. C. S. A. § 1102 that "life means life" and "death means death," and individuals sentenced to either penalty are not eligible for early release.

Since both 18 Pa. C. S. A. § 1102 and 61 Pa. C. S. A. § 6137 independently (and consistently) establish that "life imprisonment" in Pennsylvania means life without parole, creating a life *with* parole sentencing scheme would require this Court to invalidate and *then revise* portions of both of these statutes.

2. The Commonwealth Asks The Court To Create A New Scheme To Determine When A Juvenile Offender Sentenced To Life With Parole Would Become Eligible For Parole

Even if the Court could permissibly fashion a new "life *with* parole" sentence for juvenile offenders, the Court would have to do more than invalidate and revise 18 Pa. C. S. A. § 1102 and 61 Pa. C. S. A. § 6137; this Court would also have to create a new minimum sentence to specify when a juvenile convicted of murder would be eligible for parole. Establishing a minimum sentence for a juvenile sentenced to life imprisonment would drastically alter Pennsylvania law which consistently views life sentences as sentences with both a minimum and maximum term of life imprisonment. *See Commonwealth v. Manning*, 495 Pa. 652, 662, 435 A.2d 1207 (Pa. 1981); *Commonwealth v. Lewis*, 718 A.2d 1262, 1265 (Pa. Super. Ct. 1998), *allowance of appeal denied*, 558 Pa. 629, 737 A.2d 1224 (1999); *Commonwealth v. Yount*, 419 Pa. Super. 613, 615 A.2d 1316 (Pa. Super. 1992); *Castle v. Commonwealth, Pennsylvania Board of Probation & Parole*, 123 Pa. Commw. 570, 554 A.2d 625, 628-629 (Pa. Commw. 1989). Therefore, there is scant case law to guide this Court as to an appropriate minimum sentence.[5]

To the extent that the legislature has given guidance regarding the appropriate minimum sentence (in the context of term-of-years sentences), the legislature has determined that "[t]he

[5] To the extent the Court has previously addressed the question of the appropriate minimum sentence if no minimum is specified, this Court has held that, if a sentencing court – *not the legislature* – fails to state a minimum (where the legislature has only applied a maximum), the implied minimum is one day and the defendant is therefore immediately eligible for parole. *See Commonwealth v. Ulbrick*, 462 Pa. 257, 258-59 (1975).

court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed." 42 Pa. C. S. A. § 9756(b)(1). Because, absent divine intervention and guidance, it is impossible to calculate "half of a lifetime," any minimum sentence imposed by this Court – or lower courts – would violate § 9756(b)(1). Accordingly, the Commonwealth's approach would require this Court to invalidate the legislature's statutory framework that outlines appropriate minimum sentences. Neither the PDAA *Amicus* brief nor Appellee's brief provides any guidance or legal basis for trial court's to come up with the appropriate minimum sentence they have determined to be required after *Miller*.

3. The Commonwealth Asks This Court To Create A New Sentencing Scheme In Which Juveniles Convicted of First Degree Murder Receive Either Life Without Parole Or Life With Parole

Currently, the only option for a juvenile offender convicted of first degree murder is life without parole. The Commonwealth now asks not only that a new sentence – life *with* parole – be created, but that the sentencer have the option of imposing either this new sentence or the life without parole sentence that was invalidated pursuant to *Miller*. Even assuming that the Commonwealth is correct and the Court can create a new "life with parole" statute by amending 61 Pa. C. S. A. § 6137(a)(1) to allow the parole board to have jurisdiction over any juvenile offender sentenced to "life," this revision would simply require that all juvenile offenders receive mandatory "life with parole" sentences. Under the Commonwealth's analysis, in which 18 Pa. C. S. A. § 1102 need not be amended, the statute would still require that "A person who has been convicted of a murder in the first degree . . . shall be sentenced to death or a term of life imprisonment." 18 Pa. C. S. A. § 1102(a)(1). Revising 61 Pa. C. S. A. § 6137(a)(1) as the Commonwealth proposes would categorically redefine "life" for juvenile offenders to mean "life with the possibility of parole." The Commonwealth fails to explain how, absent additional

statutory revisions, the term "life imprisonment" in 18 Pa. C. S. A. § 1102(a)(1) can simultaneously be defined as life with parole *and* life without parole.[6]

Additionally, the Commonwealth's proposal that juvenile offenders receive either life with or life without parole would require this Court to create sentencing guidelines such that a lower court would be able to determine when a life without parole statute could be constitutionally imposed.[7] Creating this sentencing framework falls within the powers of the legislative, not judicial, branch – especially since any new mitigation-based sentencing hearing could involve significant expenditures of public resources for the additional court time and expert fees required. *See, e.g.*, 42 Pa. C. S. A. § 9711 (outlining the sentencing procedures for first degree murder where the death penalty is a possible sentence). In the death penalty context, the legislature specified who should determine the appropriate sentence, what factors the sentencer should consider, what evidence is admissible, and what findings are necessary to impose the severe sentence of death. *See id*. If the legislature wishes to impose life without parole on juvenile offenders in the wake of *Miller*, they, not the courts, must outline the structure of the sentencing hearing, as well as the relevant factors and findings the sentencer should consider when deciding whether to impose a life without parole sentence on a juvenile.

In short, the Commonwealth's approach requires this Court to invalidate three statutes and create new law in its place. The Commonwealth invites this Court to do the job of the

[6] Either the plain language controls and "life means life," or Appellee's proposed revision to 61 Pa. C. S. A. § 6137 controls (overriding the plain meaning) and "life" for juveniles includes the possibility of parole.

[7] As described in Part I.A., when the Court has previously struck unconstitutional death penalty statutes, it has resentenced the defendants to the next-most-severe permissible sentence. The Court did not create a new sentencing scheme in which the defendant could either receive the death penalty or life imprisonment. Appellants disagree with the Commonwealth that life without parole remains an available sentencing option now that the sentencing scheme has been invalidated by *Miller*.

legislature. However, this Court historically has resisted the urge to act in the place of the legislature to remedy unconstitutional sentences, looking instead to existing, available lesser-included sentences. The Court should adopt this same restrained approach in this case.[8]

II. CONCLUSION

This Honorable Court should hold Qu'eed Batts' life without parole sentence unconstitutional, vacate the sentence, and remand the instant matter for resentencing for third degree murder and any nonmerged offenses.

Respectfully submitted,

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[8] Failure to exercise such restraint would run afoul of the separation of powers doctrine. *See Commonwealth v. Wright*, 508 Pa. 25, 40 (1985), affirmed *sub nom*, *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986) ("It is the province of the legislature to determine the punishment imposable for criminal conduct."). Separation of powers is a "foundational principle of our Constitution [that] forbids one branch of government from exercising the functions exclusively committed to another branch. *Mohamed v. DOT, BMV*, 40 A.3d 1186, 1191 (Pa. 2012) (citing *Jubelirer v. Rendell*, 598 Pa. 16, 953 A.2d 514, 529 (Pa. 2008)).

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