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127 WM 2016

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Commonwealth of Pennsylvania,
Respondent
v.
No. 127 WM 2016
Ricky Lee Olds a/k/a
Richard Lee Olds,
Petitioner

Commonwealth's Response to Application For Exercise Of Extraordinary Jurisdiction or King's Bench Power

AND NOW, comes the Commonwealth of Pennsylvania by its attorneys, STEPHEN A. ZAPPALA, JR., DISTRICT ATTORNEY OF ALLEGHENY COUNTY and Michael W. Streily, Deputy District Attorney and in response to the captioned Application submits the following:

1. Petitioner seeks to have this Court assume jurisdiction over his case as well as hundreds of other cases. The number of other cases varies from 500 to "at least 175." Petitioner's Application at p. 4. Petitioner provides no concrete evidence of the size of this alleged class except to assert that the number 175 "is based upon data, records and information made available by the Pennsylvania Department of Corrections, publicly available records, and data collected and reviewed by Juvenile Law Center." Petitioner's Application at p. 4; fn.#3. Without an internet website address or reference to a specific Official Publication of a Commonwealth

Agency, this attorney has no way of checking the size of this alleged class or verifying the accuracy of Petitioner's estimation.

2. Petitioner seeks to have 3 issues accepted for King's Bench Review. It is noted that Petitioner has not yet filed his Statement of Errors (Pa.R.A.P. 1925(b)) in the Court of Common Pleas so preservation of these issues in the trial court cannot be addressed at this time.

3. As to the issue of how to sentence juvenile defendants convicted of Murder of the 2nd degree "who did not kill or intend to kill" (Petition at p.3) it is noted that Petitioner avoids confronting the actual holding in *Miller v. Alabama,* 132 S.Ct. 2455 (2012) as it relates to his own sentence of 20 years to life and distorts the issue confronting this Court in *Commonwealth v. Batts,* 66 A.3d 286 (Pa. 2013). Petitioner was not sentenced to life without parole. Having served 37 years, petitioner is eligible for immediate parole. Contrary to his assertion, the concurring Justices in *Miller* offer nothing that would call his sentence into question:

> Justice Breyer, joined by Justice Sotomayor, filed a joining concurrence, opining that "[t]he only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who kill or intend to kill," differentiating such offenders from those who were convicted of murder as a result of participation in a felony. *Id.* at ——, 132 S.Ct. at 2476 (Breyer, J., concurring) (citing **292 *Graham,* 560 U.S. at ——, 130 S.Ct. at 2027). This distinction, Justice Breyer reasoned, stems from the "fallacious" application of the theory of transferred intent—which is based on "the idea that

> one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate"—to a juvenile who did not kill or intend to kill, notwithstanding the fact that "the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively." *Id.*

Commonwealth v. Batts, 66 A.3d 286, 291-292 (2013).

In *Batts,* the defendant was challenging a sentence of life without parole imposed on his conviction of first degree murder. It was not the degree of murder that was the issue. The issue was the actual sentence which precluded any chance of obtaining parole. To disregard the holding in *Batts* because the present case involves a conviction of murder of the second degree would be nonsensical. This Court's comment in *Batts* concerning the issue **not** being raised by Batts must be read in its entirety in order to understand that the Court in *Batts* did not mean to say that its decision was irrelevant to cases of murder of the second degree:

> As reflected above, given the developing jurisprudence, our focus in this appeal has shifted from broadly questioning the constitutionality of a life-without-parole sentence imposed on a juvenile offender to a narrow issue concerning the appropriate remedy for the Eighth Amendment violation that, under *Miller,* occurred when Appellant was mandatorily sentenced to life imprisonment without the possibility of parole upon his conviction for first-degree murder. Further, despite the broad framing of the questions at hand, Appellant has confined his arguments to the context of first-degree murder; hence, the issues identified by Justice Breyer in his *Miller* concurrence, *see Miller,* —— U.S. at ——, 132 S.Ct. at 2476 (Breyer, J.,

> concurring) (discussing additional constitutional concerns connected with the imposition of life-without-parole sentences on juveniles convicted of murder as a result of participation in a felony who have neither killed nor intended to kill), are not implicated in the present matter.

Commonwealth v. Batts, Id., 66 A.3d at 293-294. Nothing in *Batts* calls into question the right of a state to impose ***<u>life with parole</u>*** on a juvenile defendant convicted of murder of the second degree. Chief Justice Saylor's reference to Justice Breyer was strictly in the context of whether a juvenile defendant convicted of murder of the second degree could be sentenced to ***<u>life without parole</u>***-an issue not involved herein or therein. Justice Breyer's comments in *Miller* were not questioning a state's right to impose ***<u>life with parole</u>*** on a juvenile convicted of second degree murder.

4. As to the issue of how to resentence juveniles whose convictions became final before *Miller,* petitioner wants this Court to pretend that the date of June 24, 2012 put forth in 18 Pa.C.S. §1102.1 precludes Courts from engaging in the type of analysis Courts normally conduct when trying to answer a legal issue such as the one involved herein-i.e., how do the Courts of this Commonwealth sentence juveniles convicted of murder so that all are treated equally and with the same due process? The Legislature has mandated that for said convictions occurring after June 24, 2012, the sentencing ranges for Murder of the 2nd degree

“shall be at least 20 years to life” or “at least 30 years to life,” depending on the age of the defendant at the time of the commission of the offense. In *Commonwealth v. Batts,* 66 A.3d 286, 297 (Pa. 2013) this Court held:

> We recognize the difference in treatment accorded to those subject to non-final judgments of sentence for murder as of *Miller’s* issuance and those convicted on or after the date of the High Court’s decision. As to the former, it is our determination here that they are subject to a mandatory maximum sentence of life imprisonment as required by Section 1102(a), accompanied by a minimum sentence determined by the common pleas court upon resentencing. Defendants in the latter category are subject to high mandatory minimum sentences and the possibility of life without parole, upon evaluation by the sentencing court of criteria along the lines of those identified in *Miller.* (…)

It is clear that the minimum sentences become flexible because of the timing of the commission and conviction (sometimes lines simply need drawn), but the maximum sentence remains the same for pre and post June 24, 2012 defendants, insuring equal protection and due process for all defendants convicted of murder. A maximum sentence of life imprisonment is just what this Court and the Legislature determined was appropriate when it comes to the maximum sentence to be imposed in these types of cases:

> We find the Commonwealth's construction of the applicable statutes to be the best supported. Appellant's argument that the entire statutory sentencing scheme for first-degree murder has been rendered unconstitutional as applied to juvenile offenders is not buttressed by either the language of the relevant statutory provisions or the holding in *Miller.* 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. *See Miller,* —— U.S. at ——, 132 S.Ct. at 2469. *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. *See id.* at ——, 132 S.Ct. at 2469. 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. *See id.* at ——, 132 S.Ct. at 2467–68.

Batts, Id., 66 A.3d at 295-296.

The federal district court decision in *Songster v. Beard,* 2016 WL 4379233 (August 17, 2016) has no precedential value in Pennsylvania. *Commonwealth v. Lambert,* 765 A.2d 306 (Pa. 2000). Further, the intimation of District Court Judge Savage that the Pennsylvania Board of Parole cannot be trusted to do its job in a fair and equitable fashion is offensive and without support. It is certainly not grounded in the decision of either *Miller* or *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016).

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham,* 500 U.S., at ___, 130 S.Ct., at 2030 ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated

maturity and rehabilitation").

The Commonwealth of Pennsylvania is "not required to guarantee eventual freedom." *Id.* There is nothing in this record to allow an inference that petitioner will not have his parole application treated in a fair, equitable, and expedited manner. Imposing such a life sentence as the maximum sentence, and relying on the Parole Board to decide parole eligibility, does not run afoul of *Miller v. Alabama*:

> *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. (…)

Commonwealth v. Batts, supra, 66 A.3d at 296.

If the Honorable David R. Cashman, Administrative Judge, was incorrect when inferring what the maximum sentence should be, given the foregoing, then a routine appeal to Superior Court is an appropriate vehicle to litigate the issue. Petitioner can apply for parole during that time. The Commonwealth has continuously indicated in this case that it would support parole by the Parole Board, should petitioner request it.

5. As to the issue of bail pending appeal, that can easily be resolved by this Court ruling on the Petition for Bond at 126 WM 2016 and issuing an Order that contains some substantive discussion of the issue.

Article 1, Section 14 of the Pennsylvania Constitution provides in relevant part: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment…." The fact that petitioner is eligible to seek parole despite serving a life sentence does not render the constitutional provision inapplicable. Parole and appeal bonds are different. The language is clear and unambiguous.

As noted by the Superior Court in *Commonwealth v. Basinger,* 982 A.2d 121, 127 (Pa. Super. 2009):

> Where the sentence is one of total confinement as specified in section 9721(a)(4), the court is compelled to state a maximum sentence, which is, in effect, the full sentence to be served, and a minimum sentence, which specifies the date on which the defendant, once jailed, is eligible for parole. *See Gundy v. Commonwealth, Pa. Bd. of Prob. and Parole,* 82 Pa.Cmwlth. 618, 478 A.2d 139, 141 (1984). The Sentencing Code mandates this maximum/minimum configuration, and specifies that the minimum sentence imposed "shall not exceed one-half of the maximum sentence imposed." *See* 42 Pa.C.S. § 9756(a), (b)(1).

Since petitioner has been resentenced to 20 years to Life Imprisonment/Incarceration he has no right to a bond on appeal. His full

sentence is life imprisonment. The minimum sentence of 20 years is the minimum term of years he is required to serve before he is eligible for parole. Having served 37 years, he can apply for parole now.

WHEREFORE, there is no compelling reason to grant King's Bench jurisdiction in this case. Having said that, if this Court determines that expedited litigation is necessary and that treatment of the issues by Superior Court will not add anything of value to the litigation process, the Commonwealth respectfully defers to that decision and requests that the case be briefed, argued, and decided with the utmost dispatch.

Respectfully submitted,

STEPEHN A. ZAPPALA, JR.
DISTRICT ATTORNEY

/s/ Michael W. Streily .
Michael W. Streily
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PROOF OF SERVICE

I, the undersigned authority hereby certify that I am this day serving the within Response upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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Dated: December 22, 2016

/s/ Michael W. Streily .
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