IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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38 EAP 2012

COMMONWEALTH OF PENNSYLVANIA,
Appellee
v.
IAN CUNNINGHAM,
Appellant

BRIEF FOR APPELLANT AND APPENDICES

Appeal from the order of the Superior Court (No. 1386 EDA 2007) dated July 27, 2009, affirming denial of PCRA relief in the Court of Common Pleas of Philadelphia County (No. CP-51-CR-0203131-2000 and CP-51-0203141-2000) dated May 8, 2007

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I. STATEMENT OF JURISDICTION

The Supreme Court of the Commonwealth of Pennsylvania has jurisdiction of this appeal from the Pennsylvania Superior Court pursuant to the provisions of the Act of July 8, 1986, P.L. 586, No. 142, 42 Pa.C.S. § 724.

II. ORDER IN QUESTION

The Order and Opinion of the Superior Court is attached as Exhibit "B." The date of the Superior Court Order and Opinion is July 27, 2009.

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This appeal involves a question of law. In examining questions of law, the scope of review is plenary. *See Phillips v. A-BEST Products Co*., 543 Pa. 124, 665 A.2d 1167, 1170 (1995); *Ertel v. Patrion News Company*, 544 Pa. 93, 674 A.2d 1038, 1041 (1996); *Commonwealth v. Morley*, 545 Pa. 420, 424, 681 A.2d 1254, 1256 (1996); *Commonwealth v. Nester*, 551 Pa. 157, 709 A.2d. 879, 881 (1998).

IV. STATEMENT OF THE QUESTIONS INVOLVED

A. Did the trial court err in imposing a life sentence without parole upon a juvenile offender convicted of second degree murder?

B. Does the holding in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that a juvenile convicted of a homicide offense cannot be sentenced to life imprisonment without parole unless there is consideration of mitigating circumstances by a judge or jury, apply retroactively to an inmate serving such sentence when the inmate has exhausted his direct appeal rights and is proceeding under the Post Conviction Relief Act?

C. As *Miller v. Alabama*, 132 S. Ct. 2455 (2012) must be given retroactive effect, is a new sentencing hearing, where the sentencer can impose a sentence for any lesser included offenses as well as all non-merged offenses the appropriate remedy under the Pennsylvania Post Conviction Relief Act for a defendant who was sentenced to a mandatory term of life imprisonment without the possibility of parole for a second degree murder committed when the defendant was under the age of eighteen?

V. STATEMENT OF THE CASE

Appellant Ian Cunningham appeals the judgment of the Superior Court affirming the denial of relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 et seq. Appellant was convicted of the crimes of Second Degree Murder, Robbery (Two Counts), Possession of Instrument of Crime (PIC), Violation of the Uniform Firearms Act (VUFA) (Two Counts) and Conspiracy for a crime he committed when he was under the age of 18. Appellant is presently serving the sentence imposed in this matter.

Appellant was found guilty of the above charges on June 12, 2002 after a jury trial presided over by the Honorable James Lineberger, and received a mandatory life without parole sentence on April 16, 2003, plus 7 1/2 to 15 years in prison. The judgment of sentence was affirmed on appeal by the Superior Court on October 25, 2004, and this Court denied a timely allocatur petition on April 5, 2005. On January 30, 2006, Appellant timely filed a *pro se* PCRA Petition and on May 16, 2006, Attorney John Cotter was appointed to represent Appellant. Counsel filed an amended and supplemental amended PCRA petition which the PCRA court dismissed without an evidentiary hearing on May 8, 2007. Appellant timely filed an appeal to Superior Court on May 15, 2007. The PCRA court did not order Appellant to file a 1925(b) Statement; therefore, none was filed by Appellant. The PCRA judge, the Honorable D. Webster Keogh, filed his opinion on November 5, 2007. A copy of the Opinion is attached as Exhibit "C." On July 27, 2009, the Superior Court affirmed the denial of PCRA relief in the lower court. *See* Opinion of the Superior Court, attached as Exhibit "B." On August 5, 2009, Appellant filed a timely Petition for Allowance of Appeal in this Court. On October 26, 2009, this Court issued an order reserving the Petition for Allowance of Appeal pending disposition of *Commonwealth v.*

Batts, 79 MAP 2009. Then, on August 6, 2012, this Court granted allocatur. A copy of this Court's order is attached hereto as Exhibit "A."

At the time of the incident, Appellant was seventeen years old. Because he was convicted of second degree murder, the trial court imposed the mandatory sentence of life without parole. Because the sentence was mandatory,, information regarding Appellant's age, his family and home environment, his level of sophistication in dealing with the criminal justice system, the circumstances of the offense, and his potential for rehabilitation were not considered in determining whether life without parole was an appropriate sentence.[1]

[1] Specifically, the pre-sentence report indicated that Appellant was the youngest of three children; that his father abandoned the family when Appellant was four years old; that Appellant was placed in three different juvenile facilities as a juvenile between May 1998 and August 1999. He returned to the family home in August 1999 and resided there until his arrest in December 1999 for the offenses of which he was convicted. At the time of sentencing, his older brother was already serving a life sentence. Appellant completed only the 9th grade. He suffered from asthma, began drinking alcohol and smoking marijuana at 14, which escalated to cocaine laced with cough syrup in August 1999 right after his release from juvenile placement. The pre-sentence report recommended Anger Management and a comprehensive mental health evaluation. (N.T. 4/16/03, 11-12). None of these mitigating factors, however, could be considered in determining whether a life without parole sentence was appropriate. Appellant's age was not at a factor in his sentence. *See* Superior Court Opinion at 9, attached as Exhibit "B."

VI. SUMMARY OF ARGUMENT

In *Miller v. Alabama*, 567 U.S.___, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012) the United States Supreme Court held that the mandatory imposition of sentences of life without the possibility of parole on juvenile offenders convicted of murder is unconstitutional. Under current Pennsylvania law, any juvenile convicted of first or second degree murder must be sentenced to life without parole. This mandatory statutory scheme is now unconstitutional pursuant to *Miller*. Moreover, pursuant to *Miller* and *Graham*, life without parole is not a constitutional sentencing option for juveniles convicted of second degree murder because, by definition, a juvenile convicted of second degree murder – which requires no finding that the juvenile killed or intended to kill – cannot be classified as among most serious juvenile offenders deserving of the most severe penalty. Appellant Ian Cunningham's sentence must be vacated and a new constitutional sentence imposed.

The holding in *Miller* applies retroactively to inmates, such as Appellant, serving mandatory life without parole sentences for crimes committed as juveniles who have exhausted direct appeal rights and are proceeding under the Post Conviction Relief Act. The Court unambiguously resolved this question when it granted relief in *Miller*'s companion case *Jackson v. Hobbs*, which was a post-conviction habeas case like the case *sub judice*. Moreover, the *Miller* Court relied on similar cases which have all been applied retroactively. *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and its progeny dictate that *Miller* applies retroactively to cases such as Appellant Cunningham's.

Because *Miller* must be applied retroactively, this Court must look to the statutes in existence at the time of the offense to determine what constitutional sentence may be imposed on juveniles convicted of homicide. In Pennsylvania, the only constitutional statutory sentence

available is the sentence for lesser included offenses. Therefore, this Court should hold that the appropriate remedy for juveniles convicted of second degree murder is to impose the statutory sentence for the lesser included offenses: in this case the underlying felonies and any unmerged offenses. Adopting this remedy is consistent with this Court's precedent as well as the United States and Pennsylvania Constitutions.

VII. ARGUMENT

A. Pennsylvania's Mandatory Life Without Parole Sentencing Scheme For Juveniles Convicted Of Second Degree Murder Is Unconstitutional Under the United States and Pennsylvania Constitutions

In *Miller v. Alabama*, 567 U.S.___, 132 S. Ct. 2455, 2469 (2012), the United States Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." Acknowledging the unique status of juveniles and reaffirming its recent holdings in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011 (2010), and *J.D.B. v. North Carolina*, 564 U.S. ___, 131 S. Ct. 2394 (2011), the Court in *Miller* held that "children are constitutionally different from adults for purposes of sentencing," i*d*. at 2464, and therefore the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id*. at 2466. This is particularly true in the context of juveniles convicted of second degree murder. Imposing a sentence under the instant unconstitutional sentencing scheme violates due process. U.S. CONST., AMEND. VI, VIII, XIV; *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 1205, 51 L.Ed.2d 393 (1977); *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

1. In Holding Mandatory Juvenile Life Sentences Without Parole Unconstitutional, *Miller* Reaffirms The Court's Recognition That Children Are Fundamentally Different Than Adults And Categorically Less Deserving Of The Harshest Forms Of Punishments

Justice Kagan, writing for the majority in *Miller*, explicitly articulated the Court's rationale for its holding: the mandatory imposition of sentences of life without parole "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' *Graham v. Florida*, 130 S. Ct. 2011, 2026–27, 2029–30 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most

serious penalties." *Miller*, 132 S. Ct. at 2460. The Court grounded its holding "not only on common sense . . . but on science and social science as well," *id*. at 2464, that both demonstrate fundamental differences between juveniles and adults. The Court reiterated its holdings in *Roper* and *Graham* that these research findings established that "children are constitutionally different from adults for purposes of sentencing." *Id*. The Court noted "that those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id.* at 2464-65 (quoting *Graham*, 130 S. Ct. at 2027, *Roper*, 543 U.S. at 570)). Importantly, the Court specifically found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." *Id.* at 2465. Accordingly, the Court emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id*.

Miller held that mandatory life without parole sentencing schemes imposed on juvenile offenders convicted of murder are unconstitutional. *See id.* at 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). The Court found that "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id*. at 2467. The Court wrote:

> Under these schemes, every juvenile will get the same sentence as every other – the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile . . . will receive the same sentence as the vast majority of adults committing similar homicide offenses – but really, as *Graham* noted, a *greater* sentence than those adults will serve.

Id. at 2467-68. Relying on *Graham*, *Roper*, and the Court's individualized sentencing decisions, the Court found "that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." *Id*. at 2468. Mandatory life without parole sentences are unconstitutional as applied to juveniles because "[b]y making youth (and all that accompanies it) irrelevant to imposition of the harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id*. at 2469.

2. Pennsylvania's Mandatory Life Without Parole Sentencing Scheme For Juvenile Offenders Convicted Of Second Degree Murder Is Unconstitutional Pursuant To *Miller*

Pennsylvania's sentencing scheme, which mandates that any juvenile offender convicted of second degree murder must be sentenced to life without the possibility of parole, is unconstitutional pursuant to *Miller*. In Pennsylvania, any person charged with murder, no matter how young, is automatically prosecuted in adult criminal court. 42 Pa. C.S. § 6302 (excluding the "crime of murder" from the definition of delinquent acts that are handled in juvenile court). Then, once convicted of second degree homicide, a judge must impose a life without the possibility of parole sentence. *See* 18 Pa.C.S. § 1102(b); 61 Pa.C.S. § 6137.

When a juvenile offender in Pennsylvania is convicted of second degree murder, the sentencer is denied any opportunity to consider factors related to the juvenile's overall level of culpability, as mandated by *Miller*.[2] *Miller* sets forth specific factors that the sentencer, at a

[2] The fact that juveniles charged with murder can be decertified from the adult system and sent back to juvenile court, *see* 42 Pa.C.S. § 6322, does not alter the mandatory nature of the sentencing scheme. *Miller* rejected the argument that the availability of a transfer hearing somehow renders discretionary an otherwise mandatory life without parole sentence. *See Miller* at 2474. The Court noted that, at the transfer stage, the decisionmaker has only partial information about the child and the circumstances of the offense. *Id*. More importantly, the question at transfer hearings differs dramatically from the issue at post-trial sentencing. *Id*. The Court clearly held that "the discretion available to a judge at the transfer stage cannot substitute

minimum, must consider: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id*. at 2468. Accordingly, Pennsylvania's mandatory sentencing scheme for second degree murder, as applied to juvenile offenders, is unconstitutional and sentences imposed pursuant to this scheme must be vacated.[3]

3. Any Life Without Parole Sentence For A Juvenile Convicted Of Second Degree (Felony) Murder Is Inconsistent With Adolescent Development And Neuroscience Research And Unconstitutional Pursuant To *Miller* And *Graham*

Pursuant to *Miller* and *Graham*, juveniles such as Appellant convicted of second degree (felony) murder are constitutionally ineligible to receive life without parole sentences. Pennsylvania's felony murder statute requires no finding that the defendant actually killed or intended to kill; instead, it creates a legal fiction in which intent to kill is inferred from the intent to commit the underlying felony. Such intent cannot be inferred when the offender is a juvenile. Pursuant to *Graham*, juveniles who neither kill nor intend to kill cannot be sentenced to life without parole, Moreover, pursuant to *Miller*, only the most serious juvenile offenders should

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for discretion at post-trial sentencing in adult court – and so cannot satisfy the Eighth Amendment." *Id*. at 2475.

[3] Since the United States Supreme Court issued *Miller*, the Pennsylvania Superior Court has already held in two cases that Pennsylvania's mandatory life without parole sentence for juveniles convicted of second degree murder is unconstitutional. *See Commonwealth v. Devon Knox*, 2012 Pa. Super. 147 (Pa. Super. Ct. July 16, 2012); *Commonwealth v. Jovon Knox*, 2012 Pa. Super. 148 (Pa. Super. Ct. July 16, 2012). In both cases, the Superior Court vacated the unconstitutional sentence and remanded for resentencing.

receive life without parole.[4] Accordingly, juveniles convicted of second degree (felony) murder can never receive this harshest possible sentence.

a. *Intent To Kill Cannot Be Inferred When A Juvenile Is Convicted Of Second Degree (Felony) Murder*

In Pennsylvania, second degree (felony) murder is a legal fiction that allows convictions for murder absent a finding that the defendant killed or had the intent to kill.[5] Instead, a felony murder conviction requires only the intent to commit or be an accomplice to the underlying felony. *See* 18 Pa.C.S. § 2502(b) ("A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.") *Cf.* 18 Pa.C.S. § 2502(a) ("A criminal homicide constitutes murder of the *first* degree when it is committed by an *intentional* killing.") (emphasis added).

A second degree murder conviction requires simply that an offender participated in a felony and that someone was killed in the course of the felony; the offender need not have actually committed the killing or intended that anyone would die. *See* 18 Pa.C.S. § 2502(b). In fact, that is precisely how the trial judge defined felony murder for the jury in this case: to be guilty of felony murder it need not be established that there is an intent to kill or even an anticipation that the killing will occur (N.T. 6/11/02, 128). Felony murder is justified by a "transferred intent" theory, where the intent to kill is inferred from an individual's intent to commit the underlying felony since a "reasonable person" would know that death is a possible

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[4] *Miller* noted that "*appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon*," 132 S. Ct. at 2469 (emphasis added). Quoting *Roper* and *Graham*, *Miller* further notes that the "juvenile offender whose crime reflects irreparable corruption" will be "rare." *Id*.

[5] Though evidence presented at trial suggested that Appellant was the actual shooter in this case, Appellant was found "not guilty" of first degree murder. The jury instead convicted him of second degree murder. Accordingly, the jury found Appellant's actions were part of the robbery and not that Appellant's actions indicated an intent to kill the victim.

result of felonious activities. *See, e.g., Commonwealth v. Legg*, 491 Pa. 78, 82 (1980) (finding it proper to infer intent to kill from an intent to commit a felony because, pursuant to a "reasonable man" standard, the person engaged in a felony "knew or should have known that death might result from the felony").

The felony murder doctrine's theory of transferred intent is inconsistent with adolescent developmental and neurological research recognized by the United States Supreme Court in *Roper, Graham, J.D.B.*, and *Miller*. *See, e.g., J.D.B.*, 131 S. Ct. at 2404 (noting that the common law has long recognized that the "reasonable person" standard does not apply to children).[6] These cases preclude ascribing the same level of anticipation or foreseeability to a juvenile who takes part in a felony – even a dangerous felony – as the law ascribes to an adult.[7] As Justice Breyer explains in his concurring opinion in *Miller*:

> At base, the theory of transferring a defendant's intent is premised 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. Yet 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 the capacity to do effectively.

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[6] Notably, even as applied to adults, the United States Supreme Court "has made clear that this artificially constructed kind of intent does not count as intent for the purposes of the Eighth Amendment." *Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring). *See also Enmund v. Florida*, 458 U.S. 782 (1982).

[7] Specifically, the United States Supreme Court has observed that adolescents "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B.*, 131 S. Ct. at 2403 (internal quotation omitted). In the criminal sentencing context, the Court has recognized that adolescents' "'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions.'" *Graham*, 130 S. Ct. at 2028 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). In particular, this Court has noted that adolescents have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsiveness." *Graham*, 130 S. Ct. at 2032. The United States Supreme Court has also recognized that juveniles are more vulnerable or susceptible to negative influences and outside pressures" than adults. *Roper*, 543 U.S. at 569. They "have less control, or less experience with control, over their own environment." *Id*.

132 S. Ct. at 2477 (Breyer, J., concurring) (internal citations omitted). Because adolescents' risk assessment and decision-making capacities differ from those of adults in ways that make it unreasonable to infer that a juvenile who decides to participate in a felony would reasonably know or foresee that death may result from that felony, their risk-taking should not be equated with malicious intent, nor should their recklessness be equated with indifference to human life.[8]

b. *Any Life Without Parole Sentence For A Juvenile Convicted Of Second Degree (Felony) Murder Is Unconstitutional Pursuant To* Miller *And* Graham

In *Graham*, the United States Supreme Court found that children "who did not kill or intend to kill" have a "twice diminished" moral culpability due to both their age and the nature of the crime. 130 S. Ct. at 2027. The Court further "recognized that defendants *who do not kill, intend to kill, or foresee that life will be taken a*re categorically less deserving of the most serious forms of punishment than are murderers." *Id*. (emphasis added). Because in Pennsylvania a conviction of second degree murder includes no finding of fact that a defendant killed, intended to kill, or foresaw that a life would be taken, s*ee* 18 Pa.C.S. § 2502(b),[9] sentencing a juvenile convicted of second degree murder to life without parole is unconstitutional under *Graham*.[10]

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[8] The U.S. Supreme Court has held that the death penalty can be imposed on an adult convicted of felony murder where the adult was a major participant in the crime and was recklessly indifferent to human life. *Tison v. Arizona*, 481 U.S. 137, 152 (1987). In *Roper* and *Graham*, however, the Court recognized that youth generally are more reckless than adults, which can result in "impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569; *Graham*, 130 S. Ct. at 2028. An adolescent's recklessness is not a manifestation of his indifference to human life so much as a reflection of his immaturity and impulsiveness.

[9] As described in Section VII.A.3.a., the theory of transferred intent cannot apply to a juvenile convicted of second degree murder.

[10] In his concurrence in *Miller*, Justice Breyer explained:

> Given *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. Quite simply, if the juvenile either kills or intends to kills the victim, he lacks "twice diminished" responsibility. But

Miller confirms that a life without parole sentence is unconstitutional for a juvenile convicted of second degree murder. *Miller* found that, "given all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon*," 132 S. Ct. at 2469 (emphasis added).[11] Therefore, to the extent juvenile life without parole sentences are ever appropriate, *Miller* necessitates they be imposed only in the most extreme circumstances.[12] Under *Miller*, a juvenile convicted of *second* degree felony murder – rather than the more serious crime of *first* degree murder – by definition, cannot be categorized as one of the most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See id*. at 2476 (Breyer, J., concurring) ("The dissent itself here would permit life without parole for 'juveniles who commit the worst types of murder,' but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.").

4. Any Life Without Parole Sentence For Juvenile Offenders Convicted Of Murder Is Unconstitutional Pursuant To The Pennsylvania Constitution

With respect to juvenile sentences, Article I, Section 13 of the Pennsylvania Constitution should be interpreted more broadly than the Eighth Amendment of the United States

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> where the juvenile neither kills nor intends to kill, both features emphasized in *Graham* as extenuating apply.

132 S. Ct. at 2475-76 (Breyer, J., concurring).

[11] Quoting *Roper* and *Graham*, *Miller* further notes that the "juvenile offender whose crime reflects irreparable corruption" will be "rare." 132 S. Ct. at 2469.

[12] Again, it is important to note that, whatever the prosecution's theory of the case, Appellant was convicted only of second degree (felony) murder, not first degree murder. Therefore, the jury found that the evidence was insufficient to convict Appellant of intentional homicide.

Constitution.[13] The Pennsylvania Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." PA. CONST. ART. I, § 13. The text of the Pennsylvania Constitution is broader than the United States Constitution; where the U.S. Constitution bars punishments that are both "cruel" and "unusual," the Pennsylvania Constitution bars punishments that are merely "cruel."[14] Indeed, it should be emphasized that Pennsylvania has a longstanding commitment to providing special protections for minors against the full weight of criminal punishment. For example, this Court has recognized the special status of adolescents, and has mandated that a court determining the voluntariness of a youth's confession must consider the youth's age, experience, comprehension, and the presence or absence of an interested adult. *Commonwealth v. Williams*, 504 Pa. 511, 521 (1984).

In light of the text of the Pennsylvania Constitution, the Commonwealth's historic recognition of the special status of juveniles, recent knowledge about adolescent development, and Pennsylvania's policies, juvenile life without parole sentences are unconstitutionally "cruel"

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[13] Although Pennsylvania courts have, in the context of the death penalty, held that Pennsylvania's ban on cruel punishments is coextensive with the Eighth Amendment, *see Commonwealth v. Zettlemoyer*, 500 Pa. 16, 72-74, 454 A.2d 937, 967 (1982), the courts have not examined the issue in the context of life without parole sentences imposed on juvenile offenders, nor have those cases considered the jurisprudence of *Roper, Graham* and *Miller* which all establish that there is a constitutional difference between defendants below age 18 and above age 18 regarding sentencing. Significantly, *Zettlemoyer* was also decided before *Commonwealth v. Edmunds*, 526 Pa. 374 (1991), which established the method to determine whether the Pennsylvania Constitution is broader than the federal Constitution.

[14] A comparison to Michigan is probative. The Michigan Constitution bars "cruel *or* unusual punishment." Mich. Const. Art. I, § 16 (emphasis added). The Michigan Supreme Court has interpreted this provision more broadly than the U.S. Constitution's ban on cruel *and* unusual punishment. *See People v. Bullock*, 440 Mich. 15, 31 n.11 (Mich. 1992) ("While the historical record is not sufficiently complete to inform us of the precise rationale behind the original adoption of the present language by the Constitutional Convention of 1850, it seems self-evident that any adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.' The set of punishments which are *either* 'cruel' *or* 'unusual' would seem necessarily broader than the set of punishments which are both 'cruel' *and* 'unusual.'") (emphasis in original).

under the Pennsylvania Constitution. Juvenile life without parole sentences are never constitutional in the Commonwealth.

B. Miller Applies Retroactively To Petitioners Who Have Exhausted Direct Appeal Rights And Are Proceeding Under The Post Conviction Relief Act

The United States Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), applies retroactively to cases on collateral review. *Miller*'s companion case, *Jackson v. Hobbs*, announced a new rule on collateral review; thus the new rule applies retroactively to all similarly situated cases, including Appellant's. Moreover, cases from both lines of precedent relied upon by the Court in *Miller* have been uniformly applied retroactively. Given the Court's application of *Miller* retroactively to cases on collateral review, further analysis under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and its progeny is not necessary. However, even considering the other elements of *Teague's* retroactivity analysis, it remains clear that *Miller* applies retroactively to cases on collateral review.

1. *Miller* Applies Retroactively Because *Miller*'s Companion Case, *Jackson v. Hobbs*, Was Decided On Collateral Review

The United States Supreme Court has already answered the question of retroactivity by applying *Miller* to cases on collateral review. In *Miller*, the Court addressed and vacated the sentences of both Evan Miller and Kuntrell Jackson. *Miller*, 132 S. Ct. 2455. However, while Miller's challenge before the Supreme Court was on direct review, Jackson's conviction, like Cunningham's, became final long before the Court's announced its new rule in *Miller*. *Id*. at 2461. Had *Miller* not applied retroactively to cases on collateral review, Jackson would have been precluded from the relief he was granted. "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all

who are similarly situated." *Teague*, 489 U.S., at 300. Justice O'Connor explained this prong of *Teague's* retroactivity analysis:

> Were we to recognize the new rule urged by petitioner in this [collateral review] case, we would have to give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated. . . . [T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment "hardly comports with the ideal of 'administration of justice with an even hand.'" (citation omitted). *See also Fuller v. Alaska*, 393 U.S. 80, 82, 89 S. Ct. 61, 62, 21 L.Ed.2d 212 (1968) (Douglas, J., dissenting) (if a rule is applied to the defendant in the case announcing the rule, it should be applied to all others similarly situated). Our refusal to allow such disparate treatment in the direct review context led us to adopt the first part of Justice Harlan's retroactivity approach in *Griffith.* "The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." 479 U.S., at 327-328, 107 S. Ct., at 716.
>
> If there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable treatment described above is "an insignificant cost for adherence to sound principles of decision-making." (citation omitted). But there is a more principled way of dealing with the problem. *We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated. . . .* We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. *We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated.*

498 U.S. at 315-316 (emphasis added).

Therefore, if a new rule is announced and applied to a defendant on collateral review, like the Court did in *Miller*, that rule is necessarily retroactive. *See also Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("The new rule becomes retroactive, not by the decisions of the lower court, or by the combined action of the Supreme Court and the lower courts, but simply by the actions of the Supreme Court."). Significantly, the retroactive effect of *Miller* was apparent even to the dissenting justices in the case. Justice Roberts, joined by Justices Scalia, Thomas and Alito

lamented that the decision would invalidate more than 2,000 sentences. *Miller*, 132 S. Ct., at 2480 (Justice Roberts wrote: "Indeed, the Court's gratuitous prediction [that life without parole sentences will be 'uncommon'] appears to be nothing more than an invitation to *overturn* life without parole sentences imposed by juries and trial judges.") (emphasis added).

2. Cases From Both Strands Of Precedent Relied Upon By The Court In *Miller* Have Been Applied Retroactively

In concluding "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders," *Miller*, 132 S. Ct. at 2469, the Court in *Miller* relied upon two strands of precedent regarding proportionate punishment. *Id.* at 2463. The first strand includes cases adopting "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* These cases include the Court's decisions banning the execution of mentally retarded individuals, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), banning the death penalty for juvenile offenders, *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d (2005), and banning life imprisonment without the possibility of parole for juvenile non-homicide offenders, *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011 (2010). *Roper v. Simmons* was retroactive when it was announced, as it was decided on collateral review. *Roper*, 543 U.S., at 559. Although *Atkins* was decided on direct appeal, because of the categorical nature of the rule announced, and the Supreme Court's prior jurisprudence regarding such categorical rules, *e.g. Penry v. Lynaugh*, 492 U.S. 302, 330, (1989), courts have uniformly applied *Atkins* retroactively to cases on collateral review. *See, e.g., In re Holladay*, 331 F.3d 1169, 1172-73 (11th Cir. 2003); *see also, e.g. Ochoa v. Simmons*, 485 F.3d 538, 540 (10th Cir. 2007); *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003). Likewise, courts have applied retroactively *Graham's* categorical bar against life imprisonment without the possibility of

parole for juvenile non-homicide offenders. *See, e.g., In re Evans*, 449 F. App'x 284 (4th Cir. 2011); *In re Sparks*, 657 F.3d 258, 260 (5th Cir. 2011) ("By the combined effect of the holding of *Graham* itself and the first *Teague* exception, *Graham* was therefore made retroactive on collateral review by the Supreme Court as a matter of logical necessity under *Tyler*.")[15]

The second line of cases are those "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death," *Miller*, 132 S. Ct., at 2464, including *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Lockett v. Ohio*, 483 U.S. 586 (1978), *Sumner v. Shuman*, 483 U.S. 66 (1987), and *Eddings v. Oklahoma*, 436 U.S. 921 (1978). This line of cases likewise has uniformly received retroactive application whenever courts have considered the issue. *Sumner* struck down a statute mandating the death penalty for an inmate convicted of murder while serving a life sentence without the possibility of parole; it was retroactive to cases on collateral review because it was decided on collateral review. *Sumner*, 483 U.S. at 68. *See also Thigpen v. Thigpen*, 541 So.2d 465, 466 (Ala. 1989) (applying *Sumner* retroactively to case on collateral review). Although *Lockett* and *Eddings* were decided on direct appeal, both cases have been applied retroactively to other inmates long after their cases became final. *See, e.g., Songer v. Wainwright*, 769 F.2d 1488 (11th Cir. 1985)

[15] *But see Lawson v. Pennsylvania*, 2010 WL 5300531 at *3, n. 8. (E.D. Pa. Dec. 21, 2010) ("[T]here is no indication that the Supreme Court has held *Graham* retroactively applicable on collateral review; furthermore, *Graham* does not extend relief to someone convicted of a homicide offense."); *Silas v. Pennsylvania*, 2011 WL 4359973 at *2 (E.D. Pa. Sept. 19, 2011) ("First, there is no indication that Graham was made retroactively applicable to cases on collateral review. Second, the rule in *Graham* does not apply to Petitioner.") (internal citations omitted). It should be noted that the Court's language in *Lawson* and *Silas* was dicta, and *Graham* applied to neither petitioner. Moreover, Petitioner in *Silas* had not raised or briefed the Court regarding the retroactivity of *Graham*; the Court raised the issue *sua sponte*.

(applying Lockett retroactively); *Harvard v. State*, 486 So.2d 537, 539 (Fla. 1986) (same); *Shuman v.Wolff*, 571 F. Supp. 213, 216 (D.C.Nev. 1983) (*Eddings* applied retroactively).

"[T]he confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eight Amendment." *Miller*, 132 S. Ct., at 2464. *Miller* articulates a new rule typical of the two lines of precedent it relies on and should receive the same retroactive application.

3. Under *Teague* And Its Progeny, *Miller* Should Be Applied Retroactively

Under the retroactivity doctrine laid out in *Teague* and its progeny, a defendant whose conviction is final, like Mr. Cunningham, may invoke a new rule in one of two situations. *Teague*, 489 U.S., 306-8, *Penry*, 492 U.S., at 330, *Commonwealth v. Blystone* 555 Pa. 565, 576 (1999) (citing *Teague*). First, the defendant may raise a claim based on the new rule if the rule "places a class of private conduct beyond the power of the State to proscribe." *Horn v. Banks*, 536 U.S. 266, 271 n. 5 (2002) (citing *Saffle v. Parks*, 494 U.S. 484, 494 (1990)). This exception includes "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S., at 330. Second, a new rule may be applied retroactively if the new rule qualifies as a watershed rule of criminal procedure and thus calls into question the "fundamental fairness and accuracy of the criminal proceeding." *Horn*, 536 U.S., at 271 n.5 (citing *Saffle v. Parks*, *supra* at 495).

More recently, the United States Supreme Court has used somewhat different language in discussing retroactivity, focusing on whether a new rule is "substantive" or "procedural" to determine its retroactivity. *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004). A new rule is "substantive" if it "alters the range of conduct or the class of persons that the law punishes." *Id*. This Court has adopted and applied the Supreme Court's distinction

between substantive and procedural rulings for the purposes of determining whether a new rule applies retroactively. *See, e.g., Commonwealth v. Hughes*, 581 Pa. 274, 306-07 (2004) ("A new rule is considered one of substance only 'if it alters the range of conduct or the class of persons that the law punishes.'" (quoting *Schriro*, 124 S. Ct. at 2523)). Generally, new substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S., at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)).

The decisions in *Atkins v. Virginia*, which barred the execution of mentally retarded individuals, and *Roper v. Simmons*, which prohibited the death penalty for juveniles, have been applied retroactively because they "prohibit[t] a certain category of punishment for a class of defendants because of their status or offense." *Horn*, 536 U.S. at 272. This court has applied this rationale in giving *Atkins* retroactive application. *Commonwealth v. Miller*, 585 Pa. 144, 152 n. 5 (2005) ("In this case, *Atkins* announced a new rule of law prohibiting a certain category of punishment for a class of defendants because of their status and consistent with *Penry*, such a rule would fall under an exception to the general rule of nonretroactivity."); *see also Commonwealth v. Porter*, 35 A.3d 4, 8 n.5 (Pa. 2012) ("An *Atkins* claim if sustained, renders a capital murderer ineligible for the death penalty. For that reason, this Court has assumed that *Atkins* applies retroactively."). Similarly, *Graham v. Florida* "bar[red] the imposition of a sentence of life imprisonment without parole on a juvenile offender" – i.e. barred a category of punishment for a class of defendants. *In re Sparks*, 657 F.3d at 262.

Applying this prong of the *Teague* doctrine, it is evident that the Court's decision in *Miller* applies retroactively to cases on collateral review. Like the rules announced in *Atkins*,

Roper and *Graham, Miller* "prohibit[s] a certain category of punishment" – mandatory life imprisonment without the possibility of parole – "for a class of defendants," – juvenile homicide offenders. *Horn*, 536 U.S. at 272.

Applying the Court's updated terminology yields the same result. The new rule announced in *Miller* is substantive, and therefore retroactive, because "it alters… the class of persons that the law punishes." *Schriro*, 542 U.S. at 352 n.4. In this case, the Court's decision altered the class of persons eligible for mandatory life without parole sentences by excluding juvenile offenders from such statutes' reach.[16] Moreover, the conclusion that the rule in *Miller* is substantive is further supported by the retroactive application given to the Court's decision in *Sumner v. Shuman*, where the Court struck a mandatory death penalty scheme. 483 U.S. 66, 68 (1987). Although the Court's decision barred only the mandatory imposition of the death sentence and allowed for its imposition after consideration of mitigating factors by the sentencer, the rule has been applied retroactively to cases on collateral review. *Id.* at 68; *see also Thigpen v. Thigpen*, 541 So.2d 465, 466 (Ala. 1989).

[16] The Commonwealth may argue that the new rule in *Miller* is a procedural rather than substantive categorical guarantee, as *Miller* bars only the imposition of mandatory life without parole and still theoretically allows for the discretionary imposition of such a sentence. Indeed, *Miller* recognized, as previously held by *Harmelin v. Michigan*, 501 U.S. 957 (1991), that in the adult context, there is no substantive right against mandatory sentencing—"a sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is mandatory." *Miller*, 132 S. Ct. at 2470. However, the Court rejected *Harmelin* in the juvenile context, writing that "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentence of juvenile offenders." *Id*. Instead, the Court likened its holding to *Roper* and *Graham*, decisions holding that "a sentencing rule permissible for adults may not be so for children." *Id*. By rejecting *Harmelin*, the Court implicitly held that mandatory life without parole is *categorically* cruel and unusual for juveniles — and thus "prohibit[ed] a certain category of punishment for a class of defendants because of their status or offense" *Penry*, 492 U.S. at 330.

The Court's decision in *Miller* applies retroactively to cases on collateral review, like Appellant Cunningham's. The United States Supreme Court rendered any contrary view on this matter baseless when they applied their decision in *Miller* to the companion case *Jackson v. Hobbs*. Moreover, *Teague* and its progeny dictate that *Miller* applies retroactively because it "prohibit[s] a certain category of punishment for a class of defendants because of their status." *Penry*, 492 U.S. at 330. As such, Appellant is entitled to benefit from the new rule announced in *Miller*.

C. Ian Cunningham Should Be Sentenced Based On The Most Severe Lesser Included Offense Of First Degree Robbery

Because *Miller* struck down the only statutory sentence which may be imposed upon juveniles convicted of second degree murder – mandatory life without the possibility of parole – Pennsylvania provides no constitutional sentence for this class of offenders. The only available constitutional sentencing option is to resentence these juvenile offenders based on the most severe lesser included offense. Therefore, juvenile offenders convicted of second degree (felony) murder should be resentenced in accordance with the sentencing scheme for the lesser included offense of the underlying first degree felony, which – for Appellant – carries a maximum term of 20 years. *See* 18 Pa.C.S. § 1101(1). Moreover, at the resentencing, the judge can also resentence on all non-merged cases. *Commonwealth v. Goldhammer*, 512 Pa. 587, 517 A.2d 1280 (1986), *cert. denied*, 480 U.S. 950, 107 S. Ct. 1613, 94 L. Ed. 2d 798 (1987).[17]

[17] Of course, any resentencing that imposed consecutive sentences for non-merged offenses would still have to provide juvenile offenders with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 130 S. Ct. at 2030.

1. Resentencing Appellant Based On The Most Severe Lesser Included Sentence Is Consistent With Precedent

Relying on the most severe lesser included sentence is consistent with this Court's approach in analogous cases. In *Commonwealth v. Story*, 497 Pa. 273, 275 (1981), Story was sentenced to death pursuant to a statute 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).[18] 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 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.

In *Commonwealth v. Bradley*, 449 Pa. 19, 23-24 (1972), this Court was presented with a sentencing statute that unconstitutionally imposed an otherwise constitutional death sentence. The statute at issue[19] was unconstitutional pursuant to *Furman v. Georgia*, 408 U.S. 238 (1972),

[18] 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.

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

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 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*. *See also Commonwealth v. Edwards*, 488 Pa. 139, 141 (1979) (same).[20]

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 sentence that is both legislatively available and constitutional: a sentence for the lesser included first degree felony.

[20] Other states have adopted a similar approach to resentencing based on a lesser included offense when a sentence is deemed unconstitutional. *See State v. Davis*, 227 S.E.2d 97 (N.C. 1976) (finding that "common sense and rudimentary justice demanded" that the maximum permissible sentence of life imprisonment be imposed upon persons convicted of first degree murder or rape committed between the date of the Supreme Court decision relating to the effect on the statute allowing imposition of death sentence resulting from United States Supreme Court decision in *Furman v. Georgia* and date of enactment of statute which rewrote death sentencing provisions); *Carey v. Garrison*, 452 F. Supp. 485 (W.D.N.C. 1978) (commuting an unconstitutional sentence down to the next harshest constitutional sentence made available by statute).

United States Supreme Court precedent is also consistent with this approach. In *Rutledge v. United States*, 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996) the defendant was found guilty of both engaging in a criminal enterprise and conspiracy. The Supreme Court found that the conspiracy was a lesser included offense of the 'engaging' statute, which required the vacation of that conviction and imposition of sentence only on the criminal enterprise conviction. The *Rutledge* Court opined that where a greater offense must be reversed, the courts may enter judgment on the lesser included offense. *Rutledge* cited numerous decisions with approval that authorized the reduction to a lesser included offense when judgment of sentence could not be imposed upon the greater offense. *Id.* at 305-307.

Finally, resentencing based on the lesser included offense is in line with United States Supreme Court precedent in *Roper, Graham* and now *Miller* that juveniles are categorically less culpable than adults who commit similar offenses. *See, e.g., Miller* at 2464 (noting that "juveniles have diminished culpability and greater prospects for reform"). In other words, juveniles who commit second degree felony murder are categorically less culpable than adults who commit second degree murder.[21] Moreover, as discussed in Section VII.A.3.a., the

[21] The notion that youthful offenders should be held to a lesser degree of culpability for the same crime committed by an adult is well established in academic literature. As one expert notes, "In the context of homicide gradations, [] criminal law arrays actors' culpability and blameworthiness along a continuum from a premeditated killer for hire at one end to the minimally responsible actor barely capable of discerning right from wrong at the other end, even though each caused the same harm. . . .Youthfulness affects the actor's abilities to reason instrumentally and freely to choose behavior, and locates an offender closer to the diminished responsibility end of the continuum than to the fully autonomous free-willed actor." Barry C. Feld, *Competence, Culpability and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 500-501 (2003). Feld further argues, "criminally responsible young offenders deserve less severe penalties than do mature offenders. Every other area of law recognizes that young people have limited judgment, are less competent decision-makers because of their immaturity, and require greater protection than do adults. Applying the same principle of diminished responsibility in the criminal law requires…shorter

"transferred intent" rationale underlying the felony murder doctrine simply does not apply to juveniles. Because it is inappropriate to presume that a juvenile who engages in a felony in which someone was killed actually anticipated that someone might be killed during the course of the felony, it is appropriate and proportionate to sentence the juvenile based on his actual actions in the felony (and any other non-merged offenses) – not any unforeseen results.[22]

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sentences for youths than for adults convicted of the same offenses." *Id.* at 498-499. *See also* David A. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (not) to Punish Minors for Major Crimes*, 82 Tex. L. Rev. 1555, 1557-58 (2004) (arguing that youths' diminished moral competence means they should be punished proportionately less severely than adults and that punishment serves neither rehabilitative nor deterrent goals for youth who tend to outgrow their deviance, and noting, "It is in part because the normative competence of juveniles is diminished that we think that juvenile crime should be conceived and punished differently than adult crime and that juveniles should be tried and sentenced differently."); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* Youth On Trial: A Developmental Perspective On Juvenile Justice 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[T]he criminal law needs to make sense as a language of moral desert, punishing only those who deserve condemnation, punishing the guilty only to the extent of their individual moral desert, and punishing the range of variously guilty offenders it apprehends in an order that reflects their relative blameworthiness."). Further, in the case of *State v. Kennedy*, 957 So.2d 757, 784, 2005-1981, n.31 (La. 2007) (reversed on other grounds), the Louisiana Supreme Court likened youth to mental retardation in terms of reduced culpability and diminished capacity. "Intellectual deficits and adaptive disorders of the former, and a lack of maturity and a fully developed sense of responsibility of the latter, tend to diminish the moral culpability of the mentally retarded and juvenile offender, with important societal consequences. Retribution 'is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity[,]' *Roper,* 543 U.S. at 571, 125 S.Ct. at 1196, or by reason of the 'diminished capacities to understand and process information' of the mentally retarded. *Atkins v. Virginia*, 536 U.S. 304, 318-319, 122 S. Ct. 2242, 2251 (2002). For the same reasons, the mentally retarded and the juvenile offender 'will be less susceptible to deterrence.' *Roper,* 543 U.S. at 571, 125 S. Ct. at 1196; *see Atkins,* 536 U.S. at 320, 122 S. Ct. at 2251 ('[I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable ... that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.')).").

[22] This approach also resolves the United States Supreme Court's concern in *Graham* and *Miller* that juveniles sentenced to life, because of their young age, serve longer sentences than adult murderers who receive the same sentence. *See, e.g., Graham v. Florida,* 130 S. Ct. at 2028 ("Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.")

2. No Other Sentencing Option Is Available To This Court[23]

Other than resentencing juveniles convicted of second degree murder to the sentence for the next most severe lesser included offense, no constitutional statutory sentencing option is available. It is axiomatic that the role of the court is not to legislate, even where legislation leaves gaps or leads to inconsistency. *See, e.g., Spectrum Arena Ltd. P'ship v. Commonwealth*, 603 Pa. 180, 197-198 (2009) ("It is not within this Court's power to alter this [legislative] scheme and the impact of any inconsistency is more properly addressed directly by the legislature."); *Pa. Human Relations Comm. v. Mars Cmty. Boys Baseball Ass'n,* 488 Pa. 102, 106 (1980) ("It is clear that 'we may not, under the rubric of statutory interpretation, add to legislation matter conspicuously absent therefrom.'") (internal citation omitted); *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968) (finding unconstitutional the capital sentencing provision of the federal kidnapping statute but left devising a new procedure to the legislature). The role of this Court is not to devise a new, alternative sentencing scheme; instead it must interpret the statutes in place to determine a constitutional sentence.

a. Life With Parole Is Not An Available Sentencing Option

In Pennsylvania, a "life *with* parole" sentence, quite simply, does not exist. The second degree murder sentencing statute at issue here states that "A person who has been convicted of a murder of the second degree . . . shall be sentenced to a term of life imprisonment." 18 Pa.C.S. § 1102(b). "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. § 1903. The plain language of the second degree murder sentencing statute, read together with 18 Pa.C.S. § 1102(a)(1), the first degree murder sentencing statute, suggests that, just as

[23] Because Appellant will not have the opportunity to submit a reply brief, this brief also addresses some of the arguments Appellant anticipates the Commonwealth may raise.

"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."[24] A life *with* parole statute would contradict the plain language of 18 Pa.C.S. § 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 analogous statute in place at the time of appellant's conviction provided that a person convicted of first degree murder "shall be sentenced to . . . undergo imprisonment for life." *Yount*, 419 Pa. Super. Ct. at 621. The court found a trial court had no discretion to impose a different minimum sentence because the murder statute "by its express terms, mandates life imprisonment." *Id*. The court continued:

> Under the clear wording of [18 Pa.C.S. § 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

[24] 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.§ 1102(d).

words, a trial court – based only on 18 Pa.C.S. § 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. § 1102, simply striking the language in 61 Pa.C.S. § 6137(a)(1) that deprives the parole board of jurisdiction over juveniles sentenced to life would not cure the unconstitutional sentencing scheme. The provision in the parole statute exempting "an inmate condemned to death or serving life imprisonment" from the parole board's jurisdiction, *see* 61 Pa.C.S. § 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. § 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. § 1922(1). This language of the parole statute ensures that it is consistent with the plain language of 18 Pa.C.S. § 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. § 1102 and 61 Pa.C.S. § 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.

b. Even If Life With Parole Were A Permissible Sentence, No Statute Exists To Determine Parole Eligibility For Juveniles Convicted Of Second Degree Murder

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. § 1102 and 61 Pa.C.S. § 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.[25]

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 court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed." 42 Pa.C.S. § 9756(b)(1). Because, absent divine intervention and

[25] 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, 258-259 (1975).

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).[26]

[26] In addition to the arguments set forth herein, Appellant submits that the imposition of any higher sentence other than that available pursuant to the sentencing provisions for the underlying felony in affect at the time Cunningham was convicted would violate Appellant's Due Process, Ex Post Facto, and Equal Protection Rights. At the time of the crimes of which Appellant was convicted, Pennsylvania provided for only one possible sentence for second degree murder – life imprisonment without parole. *See* 18 Pa. C.S. § 1102 (authorizing only life imprisonment sentence for second degree murder); 61 Pa. C.S. § 6137 (providing that parole is not available for sentences of life imprisonment). Under *Miller,* this mandatory sentence has been struck down as contrary to the Eighth Amendment. 132 S. Ct. at 2469. The Pennsylvania Code therefore does not establish a constitutional sentence for second degree murder committed by a juvenile. It would violate Appellant's ex post facto rights to inflict "punishments, where the party was not, by law, liable to any punishment" or to inflict "greater punishment, than the law annexed to the offence." *Stogner v. California*, 539 U.S. 607, 612 (2003) (quoting *Calder v. Bull*, 3 Dall. 386, 389, 1 L.Ed.648 (1798)). Here, any sentence imposed that is greater than a statutorily established, constitutional sentence would amount to a judicially created, retroactive punishment that was not "annexed to the offence" at the time these crimes occurred. The only statutorily established, constitutional sentence applicable here is the sentence attendant to the lesser included offense of robbery (or other relevant felony) at the time of these crimes. *See* 18 Pa. C.S. § 1101.

For similar reasons, imposing a judicially created sentence that is greater than any statutorily established constitutional sentence would be unfair, arbitrary, capricious, and lacking notice, all in violation of Appellant's due process rights. *Cf. Commonwealth v. Story*, 440 A.2d 488, 492 (1981). Likewise, a judicially created sentence, for example a sentence of life with parole, would violate equal protection by inviting unfair and discriminatory treatment for Appellant when compared to those who are sentenced according to constitutionally sound statutes. *Cf. id*. ("Because appellant was tried, convicted, and sentenced to death under an unconstitutional statute, he must be treated the same as all those persons whose death penalties have been set aside."). Sentencing Appellant to the lesser included offense of robbery would accord with the approach taken previously in Pennsylvania after a sentencing statute has been found unconstitutional. *See* Id. In reaching the result in *Story*, this Court refused to permit the defendant to be subjected to another capital sentencing proceeding under the then-new sentencing statute. The Court explained that such an approach would "violate equal protection and due process." *Id*.; *see also Commonwealth v. Bradley*, 449 Pa. 19 (1972) (vacating defendant's death sentence in light of *Furman v. Georgia* and imposing the next most severe statutorily authorized sentence of life imprisonment). Cunningham must be re-sentenced in accordance with these Constitutional principles.

c. No Statutory Basis Exists For A Sentencing Scheme In Which Juveniles Convicted of Second Degree Murder Receive Either Life Without Parole Or Life With Parole

Currently, the only option for a juvenile offender convicted of second degree murder is life without parole. Even if this Court could theoretically create a new "life with parole" sentence by amending 61 Pa.C.S. § 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 convicted of second degree murder receive mandatory "life with parole" sentences. Absent any amendment, 18 Pa.C.S. § 1102(b) would still require that "A person who has been convicted of a murder of the second degree . . . shall be sentenced to a term of life imprisonment." Revising 61 Pa.C.S. § 6137(a)(1) would categorically redefine "life" for juvenile offenders to mean "life with the possibility of parole." The term "life imprisonment" in 18 Pa.C.S. § 1102(b) cannot simultaneously mean both life with parole *and* life without parole.

Additionally, if juvenile offenders could receive either life with or life without parole, this Court would need to create sentencing guidelines such that a lower court would be able to determine when a life without parole statute could be constitutionally imposed.[27] 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. § 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 a the severe sentence of death. *See id.* If

[27] As argued above in Section VII.A.3., Appellant does not believe a sentence of life without parole can ever be constitutionally imposed on a juvenile offender convicted of felony murder.

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.

Historically, this Court 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.[28]

D. Appellant Is Entitled To An Individualized Resentencing Hearing Based On The Lesser Included Offense

Appellant Cunningham is entitled to a resentencing hearing in which the trial court must impose a sentence pursuant to the Commonwealth's first degree felony statute (carrying a penalty of up to 20 years). In determining an appropriate, individualized sentence, the trial court should consider the following factors, based on Justice Kagan's opinion in *Miller*, including at a minimum:

- Appellant's young age and developmental attributes, including immaturity, impetuosity, and failure to appreciate risks and consequences;
- His family and home environment;
- The circumstances of the offense, including the extent of the his participation and the way familial and peer pressures may have affected his or her behavior;

[28] 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)).

- His lack of sophistication in dealing with a criminal justice system that is designed for adults; and
- His potential for rehabilitation.

Id. at 2468.

Therefore, this Court should vacate Ian Cunningham's sentence, and remand with instructions that the trial court should resentence him for his convictions for any lesser included robbery offense as well as any nonmerged offenses, carefully considering the factors outlined above in determining the appropriate sentence.

VIII. CONCLUSION

This Honorable Court should hold Ian Cunningham's life without parole sentence unconstitutional, vacate the sentence, and remand the instant matter for resentencing for his convictions for any lesser included robbery offense and any nonmerged offenses.

Respectfully submitted,

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