IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

2114 EDA 2015

COMMONWEALTH OF PENNSYLVANIA

V.

ANTHONY ROMANELLI, APPELLANT

BRIEF OF APPELLANT

On Appeal from the May 29, 2015 Judgment of Sentence in the Court of Common Pleas, Philadelphia County, Docket CP-51-CR-0300422-2005.

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May, 2016

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I. STATEMENT OF JURISDICTION

This Court's jurisdiction to hear an appeal from an order from the judgement of sentence of Philadelphia County Court of Common Pleas is established by Section 2 of the Judiciary Act of 1976, P.L. 586, No. 142, § 2, 42 Pa.C.S.A. § 742.

II. SCOPE AND STANDARD OF REVIEW

The issue presented here concerns the constitutionality of the life without parole sentence imposed upon Anthony Romanelli. Issues concerning the constitutionality of a criminal statute are questions of law and this Court's review is plenary.

Alternatively, at issue is whether the trial court abused its authority in resentencing Mr. Romanelli to a life without parole sentence. While such consideration in this Court typically would have been under an abuse of discretion standard, the standard of appellate review of a juvenile given a life without parole sentence is currently before the Pennsylvania Supreme Court in *Commonwealth v. Batts*, ___ A.3d ___, *appeal docketed*, No. 45 MAP 2016 (Pa. April 19, 2016).

The scope of review is the entire record.

II. STATEMENT OF THE QUESTIONS INVOLVED

1. Is it unconstitutional to sentence a juvenile convicted of second degree murder to life imprisonment without the possibility of parole?

(Suggested answer: Yes)

2. Absent a finding that a juvenile is permanently incorrigible, is it unconstitutional to sentence a juvenile to life imprisonment without the possibility of parole?

(Suggested answer: Yes)

3. Under the circumstances of this case, was it unconstitutional to sentence Anthony Romanelli to life imprisonment without the possibility of parole?

(Suggested answer: Yes)

IV. STATEMENT OF THE CASE

Anthony Romanelli was found guilty of second degree murder on November 30, 2006 at CP-51-CR-0300422-2005 in the Philadelphia Court of Common Pleas. An appeal to this Court was timely filed and on March 1, 2010, this Court affirmed in an unpublished memorandum and order at No. 613 EDA 2007. A timely petition for allowance of appeal to the Pennsylvania Supreme Court was filed. On June 27, 2013, the Pennsylvania Supreme Court vacated the judgment of sentence and remanded to the trial court for reconsideration of sentence based upon *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013). *See Commonwealth v. Romanelli*, 69 A.3d 240 (Pa. 2013).

This matter came back for resentencing before the Honorable Sheila Woods-Skipper of the Philadelphia Court of Common Pleas on May 29, 2015 (N.T. 5/29/15).[1] The defense introduced an expert report from Dr. Jillian Blair and Erin Fennell (N.T. 5/29/15, 66:22-24; 68:18-20). The defense also introduced a packet of certificates earned by Anthony Romanelli while in prison (N.T. 5/29/15, 67:7-9). Anthony Romanelli testified that he was sorry for his role in the crime that lead to Ms. Lindgren's death, even though he was not the one who did the actual killing (N.T.

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[1] "5/29/15" refers to the notes of testimony from the resentencing hearing on May 29, 2015.

5/29/15, 31:1-32:10). He testified about his progress and accomplishments while in prison: he was part of the team that established a re-entry program for people when they leave the prisons and became president of the Hope for Change Program (N.T. 5/29/15, 34:9-36:8). This program donated money to hospitals and schools (N.T. 5/29/15, 35:6-11). They also donated money to a program that trains dogs for disabled veterans (N.T. 5/29/15, 35:12-19). Mr. Romanelli was pursuing a degree in business from Adams State University in Colorado (N.T. 5/29/15, 36:11-16).

In sentencing Mr. Romanelli, Judge Woods-Skipper found that the crime was particularly heinous (N.T. 5/29/15, 61:13-19). Judge Woods-Skipper determined that "because of this offense that the defendant remained a threat . . .for public safety" (N.T. 5/29/15, 61:20-22). Although Mr. Romanelli was a juvenile (17 years, 10 months) at the time of the offense and was not convicted of being the actual killer in this offense, Judge Woods-Skipper felt that Anthony Romanelli was as culpable as his co-defendant (N.T. 5/29/15, 62:9-14). Judge Woods-Skipper acknowledged how Anthony Romanelli had changed since the time of the crime, stating "I certainly have seen and I look at Mr. Romanelli today and I know that these years later you are certainly different. You certainly have matured. Age does do that to us." (N.T. 5/29/15, 63:2-5). In spite of Mr. Romanelli's demonstrated maturation, Judge Woods-Skipper found that "[I]n terms of the events of this case and my fear for public safety

and for protection of the public, I do think that the same [life without parole] sentence is warranted" (N.T. 5/29/15, 63:5-8).

Counsel petitioned for reconsideration of sentence on June 4, 2015.[2] That motion was denied on June 22, 2015.[3] An appeal to this Court was timely filed on July 9, 2015. Judge Woods-Skipper on July 21, 2015, requested that counsel file a Statement of Errors within 21 days, by August 10, 2015.[4] The Statement of Errors Complained Of On Appeal was timely filed on August 7, 2015.[5] Judge Woods-Skipper filed her written Rule 1925 (a) opinion on November 15, 2015.[6]

After the appeal was filed in this Court, the United States Supreme Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016). Counsel petitioned this Court to remand the matter for the trial court to reconsider its sentence in light of *Montgomery*. This Court denied the motion to remand "without prejudice to

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[2] A copy of the Petition for Reconsideration of Sentence is attached hereto as Exhibit "B."

[3] A copy of Judge Woods-Skipper's order denying reconsideration is attached hereto as Exhibit "C."

[4] A copy of Judge Woods-Skipper's order is attached hereto as Exhibit "D."

[5] A copy of the Statement of Errors Complained of on Appeal is attached hereto as Exhibit "E."

[6] A copy of Judge Woods-Skipper's written Rule 1925 (a) opinion is attached hereto as Exhibit "A."

Appellant's right to raise the issues in the motion in Appellant's brief."[7]

[7] A copy of this Court's order of April 27, 2016 is attached hereto as Exhibit "G."

V. STATEMENT OF REASONS FOR ALLOWANCE OF APPEAL FROM DISCRETIONARY ASPECTS OF SENTENCE

Anthony Romanelli is challenging the constitutionality of—and the legal basis for—the life without parole sentence he received. The challenge is to the legality of (and not the discretionary aspects of) the life sentence: a life without parole sentence is barred based upon *Miller* and *Montgomery*. Moreover, a juvenile convicted of second degree murder can never receive a life without parole sentence. For these reasons, no Pa. R.A.P. 2119(f) ("*Tuladziecki*") statement is required. *Commonwealth v. Shaw*, 744 A.2d 739, 742 (Pa. 2000) (when issue raised on appeal involves the legality of the sentence, and not its discretionary aspects, a *Tuladziecki* statement is not required). Thus, Mr. Romanelli raises a claim that clearly implicates the legality, rather than the discretionary aspect, of his sentence. Nevertheless, because the stakes here are so high, in an abundance of caution, Mr. Romanelli includes in his brief a *Tuladziecki* statement.

Mr. Romanelli was convicted by a jury of second degree murder. The trial judge originally sentenced him to life without parole, but that sentence was vacated by the Pennsylvania Supreme Court based upon *Batts* and *Miller*. He was again sentenced to life without parole at the new sentencing hearing. However, completely apart from the legal issues demonstrating that life without parole is never permitted

for a juvenile convicted of second degree murder, Judge Woods-Skipper specifically found that he had matured and grown, thereby demonstrating that he was not "irreparably corrupt." He had accomplished much while incarcerated, including founding and serving as the president of a prison organization that helps to fund re-entry services, schools and assistance for veterans. He was enrolled in college.

This Court should grant allowance of appeal to address each of these sentencing claims because each presents a substantial question that the sentence imposed was illegal and/or improper.

VI. SUMMARY OF ARGUMENT

Anthony Romanelli was convicted of second degree murder for a homicide that took place when he was 17 years old. While he initially received a mandatory life without parole sentence under Pennsylvania law, that sentence was vacated following the United States Supreme Court's decision in *Miller v. Alabama,* 132 S. Ct. 2455 (2012), which held such mandatory sentences are cruel and unusual when imposed on juveniles. *Miller* followed in the footsteps of *Roper v. Simmons,* 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), two earlier juvenile sentencing cases which recognized that children are different for the purposes of Eighth Amendment analysis, and that their distinctive developmental attributes make them categorically less blameworthy for their criminal conduct than adults. *Graham*, in particular, held that youth who do not kill or intend to kill are categorically ineligible to receive a life without parole sentence. 560 U.S. at 69.

The United States Supreme Court's rulings in these seminal cases offer clear instructions for state and federal courts charged with sentencing children, drastically limiting courts' discretion to impose life without parole on youth. In reiterating the relevance of the developmental differences between youth and adults to sentencing, the Court also declared its expectation that these sentences would be "uncommon." *Miller*, 132 S. Ct. at 2469. After Mr. Romanelli was re-sentenced to life without

parole, the U.S. Supreme Court in *Montgomery* clarified that the Court's decision in *Miller* "did bar life without parole . . . for all but the rarest of juvenile offenders, *those whose crimes reflect permanent incorrigibility*." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (emphasis added).

The Court's holdings in *Miller* and *Montgomery* not only establish juveniles' reduced culpability as a class; these cases also establish a presumption in favor of immaturity and against the imposition of life without parole. The fact of the homicide—a heinous crime under any circumstances—does not weaken these presumptions as the Court has been clear that a sentencer cannot allow the nature of the offense to override the primary obligation to ensure that sentences imposed on juveniles be proportionate under the Eighth Amendment. The Court's death penalty jurisprudence is particularly instructive here, as it has equated juvenile life without parole cases with its doctrinal analysis in death penalty cases. *See Miller*, 132 S. Ct. at 2466. In order to avoid the arbitrary imposition of the death penalty, the Court has required that sentencers consider only objective factors that separate the truly brutal and wanton murder from the terrible loss that is suffered in every homicide. For children convicted of homicide, the presumptions noted above in favor of immaturity and against life without parole must be afforded great weight lest the sentencer's focus on the loss of life in each case renders *Miller* meaningless.

Importantly, Mr. Romanelli was convicted of second-degree, not first-degree murder, and there was therefore no finding that he killed or intended to kill the victim in this case. Moreover, there was no finding by Judge Woods-Skipper that Mr. Romanelli was "irreparably corrupt," a prerequisite to the constitutional imposition of juvenile life without parole sentences. In fact, Judge Woods-Skipper found the exact opposite: that he had matured and grown; he was not "irreparably corrupt." Accordingly, Mr. Romanelli's life without parole sentence must be vacated.

V. ARGUMENT

A. *Miller* and *Montgomery* Establish A Presumption Against Imposing Life Without Parole Sentences On Juveniles

Together, the United States Supreme Court's decisions in *Miller* and *Montgomery* establish a strong presumption against juvenile life without parole sentences. Because Judge Woods-Skipper explicitly rejected the presumption established by *Miller* – and because Anthony Romanelli was sentenced prior to the decision in *Montgomery* which held that a juvenile life without parole sentence can only be imposed in the exceptionally rare circumstance where the juvenile is "irreparably corrupt"– his life without parole sentence must be vacated.

1. *Miller* Establishes A Presumption Against Imposing Life Without Parole Sentences On Juveniles

Miller establishes a presumption against imposing life without parole sentences on juveniles. The Court declared that "given all we have said in *Roper*, *Graham*, and [*Miller*] about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.*" *Miller*, 132 S. Ct. at 2469 (emphasis added). *Miller* further noted that the "juvenile offender whose crime reflects irreparable corruption" will be "rare." *Id.* (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68). As the Supreme Court of South Dakota noted: "it is possible to sentence a *homicide* juvenile

offender to a life sentence after individualized sentencing has taken place, but the [United States Supreme] Court thought *such sentences would be the exception, not the rule.*" *State v. Springer*, 856 N.W.2d 460, 465 n.5 (S.D. 2014) (second emphasis added).

Though *Miller* allows for the imposition of discretionary juvenile life without parole sentences, *Miller* also condemns the sentence for juveniles except in the rarest of circumstances. This mandate is consistent with the Supreme Court's prior rulings in *Graham* and *Roper*. As the Supreme Court found, "[i]t is difficult *even for expert psychologists* to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 573) (emphasis added). If expert psychologists cannot determine which juveniles may be "irreparably corrupt," how can sentencing judges and juries accurately make such assessments? *See also* Brief for American Psychological Association et al. as *Amici Curiae* Supporting Petitioners at 25, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), (Nos. 10-9646, 10-9647) ("[T]here is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character; and there is thus no reliable way to conclude that a juvenile – even one convicted of an extremely serious offense – should be sentenced to life in prison, without any opportunity to demonstrate change

or reform."). Therefore, *Miller* establishes, at a minimum, a presumption against juvenile life without parole sentences.

Three state supreme courts have held that *Miller* dictates this presumption against juvenile life without parole.[8] The Connecticut Supreme Court found:

> [I]n *Miller*, the court expressed its confidence that, once the sentencing authority considers the mitigating factors of the offender's youth and its attendant circumstances,

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[8] Massachusetts has gone further, banning juvenile life without parole sentences altogether. Relying on United States Supreme Court precedent, the Massachusetts Supreme Judicial Court held that even the discretionary imposition of juvenile life without parole sentences violates the state constitution. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 284-85 (Mass 2013). The Court held:

> Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an "irretrievably depraved character," can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender. Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved. Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted.

Id. at 283-84 (footnote and citations omitted).

> "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *This language suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances.*

State v. Riley, 110 A.3d 1205, 1214 (Conn. 2015) (emphasis added), *cert. denied*, 136 S. Ct. 1361 (2016). Similarly, the Missouri Supreme Court held that the state bears the burden of demonstrating, beyond a reasonable doubt, that life without parole is an appropriate sentence. *See State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (*en banc*) ("[A] juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances."). The Iowa Supreme Court also found that *Miller* established a presumption against juvenile life without parole:

> [T]he court must start with the Supreme Court's pronouncement that sentencing a juvenile to life in prison without the possibility of parole should be rare and uncommon. Thus, *the presumption for any sentencing judge is that the judge should sentence juveniles to life in prison with the possibility of parole for murder* unless the other factors require a different sentence.

State v. Seats, 865 N.W.2d 545, 555 (Iowa 2015) (emphasis added) (citations omitted).

The trial court, however, did not give Anthony Romanelli the benefit of a presumption against juvenile life without parole. *See* Opinion of Woods-Skipper, J. at 6 (rejecting a presumption against juvenile life without parole and noting that "the *Miller* court was clear that the sentencing court could impose such a [life without parole] sentence provided that the proper process was followed.") (Opinion of Woods-Skipper, J. attached hereto as Exhibit "A"). Notably, the Pennsylvania Supreme Court recently granted review in *Commonwealth v. Batts*, ___ A.3d ___, *appeal docketed*, No. 45 MAP 2016 (Pa. April 19, 2016)[9] specifically to address whether there should be a presumption against juvenile life without parole, based upon *Miller*. Accordingly, Anthony Romanelli's sentence must be vacated and the matter remanded for resentencing.

2. *Montgomery* Clarifies And Strengthens *Miller*'s Presumption Against Imposing Life Without Parole Sentences On Juveniles

On January 25, 2016—after Anthony Romanelli was resentenced to life without parole—the United States Supreme Court in *Montgomery* established a new standard that must be considered before sentencing a juvenile offender to life without parole. *Montgomery* clarified that the Court's 2012 decision in *Miller* "did bar life without parole . . . for all but the rarest of juvenile offenders, *those whose crimes*

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[9] The Pennsylvania Supreme Court's order granting allowance of appeal in *Commonwealth v. Batts* is attached hereto as Exhibit "F."

reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734 (emphasis added). The Court in *Montgomery* further clarified "that *Miller* drew a line between children whose crimes reflect transient immaturity and *those rare children whose crimes reflect irreparable corruption*," *id.* (emphasis added), noting that a life without parole sentence only "could be a proportionate sentence for the latter kind of juvenile offender." *Id.*

This new *Montgomery* standard clearly establishes that a life without parole sentence for a youth whose crime demonstrates "transient immaturity" is unconstitutional. *Id.* Instead, under the Eighth Amendment, a juvenile offender can only receive a life without parole sentence if the juvenile displays "permanent incorrigibility" or "irreparable corruption." *Id.* This new standard established by *Montgomery* is broader than that established by *Miller*. Justice Scalia recognized this as his dissent in *Montgomery* demonstrates. Justice Scalia noted that *Montgomery*'s new standard "makes imposition of that severe sanction [of life without parole sentence permitted under *Miller*] a practical impossibility." *Id.* at 744 (Scalia, J., dissenting). This Court in *Commonwealth v. Bonner*, __A.3d__, (No. 176 WDA 2015, 2016 WL 703605) (Pa. Super. 2016) recognized as much. *See Bonner*, at *4, n.19 ("Although *Montgomery* arguably expands *Miller* . . . such expansion is not relevant to the disposition of the case *sub judice*.") (citation omitted).

Though *Montgomery* was decided earlier this year, at least one state supreme court has already recognized that *Montgomery* establishes a new standard in juvenile sentencing cases. The Georgia Supreme Court noted that "[t]he *Montgomery* majority explains . . . that by *uncommon*, *Miller* meant *exceptionally rare*, and that determining whether a juvenile falls into that exclusive realm turns not on the sentencing court's consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a specific determination that he is *irreparably corrupt*." *Veal v. State*, 784 S.E.2d 403, 411 (Ga. 2016). The Georgia Supreme Court continued that "[t]he Supreme Court has now made it clear that life without parole sentences may be constitutionally imposed only on the worst-of-the-worst juvenile murderers, much like the Supreme Court has long directed that the death penalty may be imposed only on the worst-of-the-worst adult murderers." *Id.* at 412.

At the time of Anthony Romanelli's sentencing, the trial court and counsel did not have the benefit of this new, more restrictive *Montgomery* standard. Instead, the trial court found that "the Supreme Court was clear that imposition of a sentence of life without parole was not foreclosed, only that such a sentence cannot be imposed upon a person under the age of eighteen without following a process which considers the offenders youth and attendant characteristics before imposing such a penalty."

Opinion of Woods-Skipper, J. at 3. Notably, this is precisely the approach that the Georgia Supreme Court held was unconstitutional in light of *Montgomery*. *See Veal*, 784 S.E.2d. at 411 ("The *Montgomery* majority's characterization of *Miller* also undermines this Court's cases indicating that trial courts have significant discretion in deciding whether juvenile murderers should serve life sentences with or without the possibility of parole."). In *Veal*, the Georgia Supreme Court held that merely considering a defendant's age and associate characteristics is not sufficient:

> In this case, the trial court appears generally to have considered Appellant's age and perhaps some of its associated characteristics, along with the overall brutality of the crimes for which he was convicted, in sentencing him to serve life without parole for the murder of [the victim] – a crime for which Appellant may have been convicted only as an aider-and-abetter. *The trial court did not, however, make any sort of distinct determination on the record that Appellant is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment* as interpreted in *Miller* as refined by *Montgomery*.

Id. at 412 (emphasis added). Similarly, because the trial court merely considered Mr. Romanelli's age and age-related characteristics – and made no finding that he was irreparably corrupt or permanently incorrigible – his life without parole sentence must be vacated. It was precisely because of the impact of *Montgomery* that counsel petitioned this Court to remand the instant matter to reconsider the sentence in light

of *Montgomery*. This Court denied that remand request without prejudice on April 27, 2016 and determined that the remand issue would be considered with the instant appeal.[10]

In this case, there is ample evidence on the record that Judge Woods-Skipper specifically determined that Mr. Romanelli was not "irreparably corrupt." Mr. Romanelli apologized for his role in the offense, and stated that "[t]he only way I can truly show how terribly sorry I am [is] to spend the rest of my life trying to become a better person" (N.T. 5/29/15, 32:8-10). He noted that in 2001 he was part of a team that started the Hope for Change Program, an inmate organization "to promote social awareness, growth, and development, and positive change for anybody who is looking to change themselves as a person and become better" (N.T. 5/29/15, 34:14-17). The organization offers education courses, tutoring and a reentry program (N.T. 5/29/15, 34:18-22). Mr. Romanelli served as president of that organization, and, according to Mr. Romanelli, they "donate money to the Children's Hospital in Pittsburgh and Philadelphia for vaccinations. We donate money to Public Schools in Pittsburgh and Philadelphia for school supplies for children" (N.T. 5/29/15, 35:6-11). They also connected with a program called Wags for Warriors and paid adoption fees

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[10] A copy of this Court's April 27, 2016 order is attached hereto as Exhibit "G."

for dogs for servicemen and women (N.T. 5/29/15, 35:12-19). The judge acknowledged Mr. Romanelli's progress, stating "I look at Mr. Romanelli today and I know that these years later you are certainly different. You certainly have matured. Age does that to us." (N.T. 5/29/15, 63:2-5). Because *Montgomery* finds that it is unconstitutional to impose juvenile life without parole upon a juvenile who is not irreparably corrupt, and because Judge Woods-Skipper specifically found that Mr. Romanelli had matured and was not "irreparably corrupt," his sentence must be vacated and the matter remanded for resentencing.

A. Because Appellant Did Not Kill Or Intend To Kill, His Life Without Parole Sentence Is Inconsistent With Adolescent Development And Neuroscience Research And Unconstitutional Pursuant To *Miller, Graham*, And *Montgomery* And The Pennsylvania Constitution

Pursuant to *Graham*, *Miller*, and *Montgomery*, juveniles convicted of felony murder, such as Mr. Romanelli, 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. Thus, pursuant to *Graham*, juveniles who neither kill nor intend to kill cannot be sentenced to life without parole. Moreover, pursuant to *Miller* and *Montgomery*, only the most serious

juvenile offenders should receive life without parole. Accordingly, juveniles convicted of felony murder can never receive this harshest possible sentence.

1. Intent To Kill Cannot Be Inferred When A Juvenile Is Convicted Of Felony Murder

A felony murder conviction requires simply that an offender participate in a felony and that someone was killed in the course of the felony; the offender need not have actually committed the killing or even have intended that anyone would die. It requires only the intent to commit or be an accomplice to the underlying felony. *See* 18 Pa.C.S.A. § 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.A. § 2502(a) ("A criminal homicide constitutes murder of the *first* degree when it is committed by an *intentional* killing.") (emphasis added). Felony murder is justified by a "transferred intent" theory, where the intent to kill is inferred based on the defendant's participation in the underlying felony because the defendant, "*as held to a standard of a reasonable man*, knew or should have known that death might result from the felony." *Commonwealth v. Legg*, 414 A.2d 1152, 1154 (1980) (emphasis added).

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. v. North Carolina*, 564 U.S. 261, 274 (2011) (noting that the common law has long recognized that the "reasonable person" standard does not apply to children).[11] 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. 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.

132 S. Ct. at 2476 (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. Specifically, the United States Supreme Court has observed that adolescents "often lack the experience,

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[11] 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, 788 (1982).

perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B.*, 564 U.S. at 272 (internal quotation omitted). In the 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*, 560 U.S. at 72 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). The 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.*

2. Any Life Without Parole Sentence For A Juvenile Convicted Of Felony Murder Is Unconstitutional Pursuant To *Graham*, *Miller* and *Montgomery*

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. 560 U.S. at 69. The Court further "recognized that defendants *who do not kill, intend to kill, or foresee that life will be taken* are categorically less deserving of the most serious forms of punishment than are murderers." *Id.* (emphasis added). Because in Pennsylvania a conviction of felony murder includes no finding of fact that a defendant killed, intended to kill, or foresaw

that a life would be taken, sentencing a juvenile convicted of felony murder to life without parole is unconstitutional under *Graham.*

Miller, too, dictates that life without parole is an inappropriate sentence for Anthony Romanelli. As the United States Supreme Court cautioned, "given all we have said in *Roper*, *Graham*, and [*Miller*] about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon*," *Miller*, 132 S. Ct. at 2469 (emphasis added). Therefore, to the extent juvenile life without parole sentences are ever appropriate, *Miller* necessitates they be imposed only in the most extreme circumstances. Under *Miller*, a juvenile convicted of felony murder who was not found by the fact finder to have killed or intended to kill 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.") (internal citation omitted).[12]

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[12] Although acknowledging that the Constitution sometimes allows the imposition of the harshest available sentence (for adults, the death penalty) when

(continued...)

Since, specifically, an accomplice is less culpable than a shooter, and, more generally, a person who did not kill or intend to kill is less culpable than an intentional killer, the Court's reasoning implies that a juvenile convicted of felony murder would never be categorized as one of the "uncommon" most serious, most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See also Montgomery*, 136 S. Ct. at 736 (emphasizing "*Miller*'s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders").

3. Life Without Parole Sentences For Juveniles Convicted Of Felony Murder Violates The Pennsylvania Constitution

Even were this Court to find that life without parole sentences for juveniles convicted of felony murder do not violate the United States Constitution, Article I, Section 13 of the Pennsylvania Constitution should be interpreted more broadly than

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[12](...continued)
adult felony murder defendants are "actively involved" in the crime and display a "reckless disregard for human life," *see Tison v. Arizona,* 481 U.S. 137, 157, 158 (1987), Justice Breyer draws a different line for juveniles. Justice Breyer urges, that "even juveniles who meet the *Tison* standard of 'reckless disregard' may not be eligible for life without parole." *Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring). To face a life without parole sentence, a juvenile must have either killed or intended to kill, *id.*; recklessness is not sufficient. As the jury found Anthony Romanelli guilty of second degree murder, it did not find that he killed or that he had an intent to kill.

the Eighth Amendment of the U.S. Constitution.[13] This Court should find that life without parole sentences are always unconstitutional for juveniles convicted of second degree (felony) murder under the Pennsylvania Constitution.

The Pennsylvania Supreme Court in *Batts* considered the separate Pennsylvania Constitutional protections in this context and rejected that the Pennsylvania Constitution was violated by imposition of a juvenile life without parole sentence. *Commonwealth v. Batts*, 66 A.3d 286, 299 (2013). Two facts, however, distinguish *Batts* from the present case. First, *Batts* involved a first degree murder conviction and the instant case involves a felony murder conviction. As discussed above, that is a material difference. Second, *Batts* noted "that there has been no concomitant movement in this Court or in the Pennsylvania Legislature away from considering murder to be a particularly heinous offense, even when committed by a juvenile." *Id.* at 299. While that observation may be true of a juvenile convicted of first degree murder, that is not true for a juvenile convicted of second degree murder. After *Miller*

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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*, 454 A.2d 937, 967 (Pa. 1982), *overruled on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003), the courts have not examined the issue in the context of life without parole sentences imposed on juveniles convicted of felony murder offenders. Significantly, *Zettlemoyer* was also decided before *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991), which established the method to determine whether the Pennsylvania Constitution is broader than the U.S. Constitution.

was decided the Pennsylvania Legislature specifically barred imposition of life without parole for juveniles convicted of second degree murder after June 24, 2012. *See* 18 Pa.C.S.A. § 1102.1(c). Hence, Anthony Romanelli is serving a life without parole sentence for a second degree homicide that occurred when he was a juvenile – a sentence that is no longer available for juveniles convicted of this offense in the Commonwealth.

In considering whether a protection under the Pennsylvania Constitution is greater than under the United States Constitution, this Court may consider: the text of the Pennsylvania Constitution; the provision's history, including case law; related case law from other states; and policy considerations unique to Pennsylvania. *See Edmunds*, 586 A.2d at 895.

a. Text Of The Pennsylvania Constitution

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."

b. Historical Context

The independent analysis of whether a punishment is cruel (as opposed to unusual) includes whether it has a legitimate penological justification. *See Graham*, 560 U.S. at 71 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."). Here, Mr. Romanelli's sentence is cruel, because the traditional penological justifications for severe sentences, including retribution, deterrence, incapacitation and rehabilitation, do not justify imposing the harshest sentences on juveniles. *Graham*, 560 U.S. at 71; *see also Miller*, 132 S. Ct. at 2465. The Pennsylvania Supreme Court recognized this rationale long before *Graham* and *Miller* were decided. In 1959, the Pennsylvania Supreme Court held that the age of a juvenile convicted of murder was an "important factor in determining the appropriateness of the penalty," and required the sentencing court to consider the defendant's "understanding and judgment." *Commonwealth v. Green*, 151 A.2d 241, 246, 247 (Pa. 1959).

The history of juvenile life without parole sentences in Pennsylvania also supports a holding that the sentence is unconstitutional under the Pennsylvania Constitution. The Pennsylvania Supreme Court has acknowledged that Pennsylvania's prohibition against cruel punishment "is not a static concept" and courts must draw its meaning from "the evolving standards of decency that mark the

progress of a maturing society." *Zettlemoyer*, 454 A.2d at 967-68 (internal quotations omitted). Courts may typically look to the legislature to "respond to the consensus of the people of this Commonwealth," *Id.* at 968 (quoting *Commonwealth v. Story*, 440 A.2d 488, 500 (Pa. 1981) (Larsen, J., dissenting)).

Pennsylvania statutory law consistently recognizes that children lack the same judgment, maturity and responsibility as adults. *See, e.g.*, 23 Pa.C.S.A. § 5101 (the ability to sue and be sued and form binding contracts attaches at age 18); 18 Pa.C.S.A. §§ 6308(a), 6305 (a person cannot legally purchase alcohol until age 21 and cannot legally purchase tobacco products until age 18); 10 P.S. § 305(c)(1) (no person under the age of 18 in Pennsylvania may play bingo unless accompanied by an adult); 18 Pa.C.S.A. § 6311 (a person under age 18 cannot get a tattoo or body piercing without parental consent); 72 P.S. § 3761-309(a)(1) (a person under age 18 cannot buy a lottery ticket); 71 P.S. § 720.60(a) (no one under age 18 may make a wager at a racetrack); 23 Pa.C.S.A. § 1304(a) (youth under the age of 18 cannot get married in Pennsylvania without parental consent or, if under 16, judicial authorization). Most notably, as discussed below, the legislature specifically barred imposition of life without parole for juveniles convicted of second degree murder. *See* 18 Pa.C.S.A. § 1102.1(c).

c. Policy Considerations

Importantly, when Pennsylvania's legislature re-examined juvenile sentencing laws post-*Miller*, the legislature eliminated life without parole as a sentencing option for juveniles who, like Mr. Romanelli, were convicted of second degree murder. *See* 18 Pa.C.S.A. § 1102.1(c). This new legislation reflects the holding of the U.S. Supreme Court in *Graham v. Florida* that life without parole is always unconstitutional for children who do not kill or intend to kill. *Graham*, 560 U.S. at 69 ("when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability"). Although this legislation applies only prospectively, it demonstrates the legislature's understanding that life without parole is an inappropriate sentence for a juvenile convicted of second degree murder.

Other policy considerations support broadly interpreting the Pennsylvania's prohibition against cruel punishments. As previously discussed, the felony murder doctrine is inconsistent with the United States Supreme Court's recent cases involving juveniles. *Roper*, *Graham*, and *Miller* all preclude ascribing the same level of anticipation or foreseeability to a juvenile who takes part in a felony as the law ascribes to an adult. Felony murder statutes that rely on assumptions about what a

"reasonable person" would foresee must therefore provide separate juvenile standards that account for the children's distinct developmental characteristics.

d. Case Law From Other States

In light of *Miller*, *Graham* and *Montgomery*, a number of states are beginning to reexamine extreme sentencing of juveniles. Relying on United States Supreme Court precedent, the Massachusetts Supreme Court held that even the discretionary imposition of juvenile life without parole sentences violates the state constitution. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 284-85 (Mass. 2013).

Moreover, in addition to Pennsylvania, other states have eliminated juvenile life without parole as a sentencing option for juveniles convicted of felony murder. *See, e.g.*, N.C. Gen. Stat. Ann. § 15A-1340.19B(a)(1) ("If the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole."); Fla. Stat. Ann. § 775.082 (providing for sentence review after 15 years for a juvenile "who did not actually kill, intend to kill, or attempt to kill the victim").

In light of the text of the Pennsylvania Constitution, the Commonwealth's historic recognition of the special status of juveniles, Pennsylvania's policies, and case law from other states, juvenile life without parole sentences for juveniles

convicted of second degree homicide are unconstitutionally "cruel" under the Pennsylvania Constitution.

C. Re-Sentencing Anthony Romanelli To Life Without Parole Was Unconstitutionally Arbitrary And Capricious

Because *Miller* and *Graham* explicitly view life without parole "for juveniles as akin to the death penalty," *Miller*, 132 S. Ct. at 2466, this Court must look to death penalty jurisprudence to determine the constitutionally of Mr. Romanelli's juvenile life without parole sentence. United States Supreme Court precedent establishes that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion).

In *Godfrey*, the state of Georgia permitted the imposition of the death penalty when there was a finding that the homicide was "outrageously or wantonly vile, horrible and inhuman." *Id.* at 428. The U.S. Supreme Court held that this finding was insufficient to warrant the death penalty because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrific and inhuman." *Id.* at 428-29. *See also Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988) (holding Oklahoma's aggravating factor that a murder is "especially heinous, atrocious, or cruel" to be overbroad because "an ordinary person could

honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'") (internal citations omitted). Because every murder could be considered "outrageously or wantonly vile, horrific and inhuman," *see Godfrey*, 446 U.S. at 428-29, or "especially heinous, atrocious, or cruel," *see Cartwright*, 486 U.S. at 364, the Supreme Court requires more specific criteria in order to ensure that the harshest available sentence is only imposed in the most egregious and extreme cases.

The facts of *Godfrey* are significant. The defendant, Godfrey, had previously threatened his wife with a knife, after which his wife left the home and filed for divorce. *Godfrey*, 446 U.S. at 424. When his wife refused to reconcile, the defendant:

> got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.

Id. at 425. He later informed police that he had "been thinking about [the crime] for eight years" and that he would "do it again." *Id.* at 426.

By several key objective measures – including the level of planning, degree of premeditation, number of victims, and history of violence – Godfrey's actions are

more "vile" than those of Mr. Romanelli. Importantly, Mr. Romanelli was not convicted of first degree murder, and there was therefore no finding that he personally killed or intended to kill. The fact that the sentencing judge considered the offense particularly heinous was not sufficient to impose the harshest available sentence. *See Cartwright*, 486 U.S. at 363 (noting that *Godfrey* "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty").

The Pennsylvania Supreme Court has noted that, in death penalty cases, "[i]t is the responsibility of the courts to 'channel the sentencer's discretion by clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Commonwealth v. Nelson*, 523 A.2d 728, 737 (Pa. 1987) (quoting *Godfrey,* 446 U.S. at 428). Similarly, in juvenile life without parole cases, the appellate courts must provide specific and detailed guidance to ensure that juvenile life without parole sentences are not imposed arbitrarily and capriciously based on the subjective assessment of the sentencer. In fact, the Pennsylvania Supreme Court recently granted allowance of appeal in *Commonwealth v. Batts*, ___ A.3d ___, *appeal docketed*, No. 45 MAP 2016 (Pa. April 19, 2016) allowance of appeal granted April 19, 2016, to specifically

consider whether there is an appropriate mechanism in place in Pennsylvania to appropriately narrow the cases for which juvenile life without parole could be imposed. Significantly, as discussed above, the United States Supreme Court has provided one narrowing principle – a requirement of a finding that the juvenile is "irreparably corrupt." *See Montgomery*, 136 S. Ct. at 734.

The United States Supreme Court has found that "'[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" *Godfrey,* 446 U.S. at 433 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion)). This same standard must apply in juvenile life without parole cases. Because there were no objective criteria for demonstrating either that Mr. Romanelli's participation in the offense was more severe or egregious than any other homicide offense or demonstrating his irreparable corruption, Mr. Romanelli and the community cannot be confident that the imposition of the harshest available penalty was based on "reason rather than caprice or emotion." *See id.* Therefore, this Court must vacate Mr. Romanelli's life without parole sentence.

D. The Imposition of Life Without Parole On Anthony Romanelli Is Inconsistent With *Miller v. Alabama*

Though the Court must impose standards to ensure that juvenile life without parole sentences are not imposed arbitrarily and capriciously, these standards cannot merely mirror the Commonwealth's death penalty jurisprudence. *Miller* imposes the additional requirement that the sentencer "take into account how children are different, *and how those differences counsel against irrevocably sentencing them to a lifetime in prison*." 132 S. Ct. at 2469 (emphasis added). The sentencing court must not allow the nature of the homicide offense to overpower mitigating evidence based on the juvenile offender's young age and development. Indeed, in light of the established research on adolescent development that has been accepted by the Supreme Court, the sentencing court must presume that a juvenile offender is immature, impulsive, and an unsophisticated decision-maker, and these characteristics counsel against imposing the harshest available punishment.

A. In Determining A Proportionate Sentence For A Juvenile Homicide Offender, The Fact of The Homicide Must Not Overpower Evidence Of Mitigation Based On Youth

United States Supreme Court jurisprudence requires sentencers to separate the crime from the culpability of the offender. In the context of the juvenile death penalty, the Supreme Court found that "[a]n unacceptable likelihood exists that the brutality

or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper*, 543 U.S. at 573. This same "unacceptable likelihood" exists in juvenile life without parole cases; if the violent nature of the crime is permitted to overpower evidence of mitigation based on the juvenile's youth, juvenile life without parole will not be "uncommon," *see Miller*, 132 S. Ct. at 2469, since every homicide is a violent offense. Therefore, even were this Court to establish objective criteria reserving juvenile life without parole for the "worst of the worst" offenses and offenders, as required by Supreme Court death penalty jurisprudence, the sentencer must still look beyond the facts of the offense and consider how the youth's age and development *counsel against* a life without parole sentence. *See id.* Juvenile life without parole, if imposed at all, should only be imposed in exceptional cases in which both the circumstances of the offense *and* the particular characteristics of the juvenile offender suggest "irreparable corruption."

In Mr. Romanelli's case, the sentencing court attached too much weight to the nature of the offense and resulting harm to the victims and the community. The trial court noted that "truly, this is one of the most heinous crimes that have [sic] come before me. And I guess the heinous nature of it is what has impacted not only the

victim's family and family members, it has offended the community's sense of safety that one cannot be safe in their own home" (N.T. 5/29/15, 61:14-19). Although Mr. Romanelli was not convicted of being the actual killer in this case, the trial court emphasized his culpability "based on the conspiracy theory" (N.T. 5/29/15, 62:9-14). Because the sentencing court assigned too much weight to the crime itself, and too little weight to the mitigating attributes of youth, Mr. Romanelli's sentence should be vacated. The sentencing court impermissibly allowed the "brutality or cold-blooded nature" of the homicide to "overpower mitigating arguments based on youth." *See Roper*, 543 U.S. at 573.

B. Miller Establishes A Presumption Of Immaturity For All Juvenile Offenders

Miller, together with *Roper*, *Graham*, and *Montgomery*, establish that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464. *Miller* emphasized that "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Id.* (citation and quotation marks omitted). *Miller* noted that these findings about children's distinct attributes are not crime-specific. *Id.* at 2465. "Those features are evident *in the same way, and to the same degree*," no matter the crime, even in homicide offenses. *Id.* (emphasis added).

Given the Supreme Court's jurisprudence establishing that juveniles are developmentally different and less mature than adults, a sentencer must presume that a juvenile homicide offender lacks the maturity, impulse-control and decision-making skills of an adult. Indeed, it would be the unusual juvenile whose participation in criminal conduct is not closely correlated with his immaturity, impulsiveness, and underdeveloped decision-making skills. Therefore, absent expert testimony establishing that a particular juvenile's maturity and sophistication were more advanced than a typically-developing juvenile, a sentencer must presume that the juvenile offender lacks adult maturity, impulse control, and critical decision-making skills, and treat this lack of maturity as a factor counseling against the imposition of a life without parole sentence.

However, instead of presuming that Mr. Romanelli was a typical adolescent, the sentencing court attached great weight to the fact that he was an older adolescent. The sentencing court stated, "I think maybe one of the most compelling issues is the fact that Mr. Romanelli was two months' shy of his eighteenth birthday" (N.T. 5/29/15, 62:17-20). In other words, instead of benefiting from a presumption of immaturity, Mr. Romanelli's sentencing judge presumed that he was more similar to an adult than he was to a typical 17-year-old. Because Mr. Romanelli did not benefit from a presumption of immaturity, his sentence should be vacated.

CONCLUSION

For the reasons stated above, Anthony Romanelli requests that this Honorable Court vacate the judgment of sentence and remand for a new sentencing hearing for which a life without parole sentence would be barred.

Respectfully submitted,
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DATED: May 27, 2016