IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 45 MAP 2016

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

QU'EED BATTS,

Appellant.

BRIEF FOR AMICUS CURIAE PENNSYLVANIA ASS'N OF CRIMINAL DEFENSE LAWYERS

Appeal from the Order of the Superior Court dated Sept. 4, 2015, at No. 1764 EDA 2014
Affirming an Order of the Northampton County Court of Common Pleas (Koury, J.)
On Resentencing, dated May 2, 2014 at No. CP-48-CR-1215-2006.

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STATEMENT OF INTEREST OF AMICUS CURIAE PENNSYLVANIA ASS'N OF CRIMINAL DEFENSE LAWYERS

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a non-profit, professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. As *amicus curiae*, PACDL presents the perspective of experienced criminal defense attorneys, who seek to protect and ensure by rule of law those individual rights guaranteed in Pennsylvania, and work to achieve justice and dignity for the accused in all cases.

PACDL is an affiliate of the National Association of Criminal Defense Lawyers. PACDL includes as members more than 950 private criminal defense practitioners and public defenders, as well as professors of law, throughout the Commonwealth. PACDL members have a direct interest in the outcome of this appeal because of their concern that no defendant – and in particular no juvenile – receive a sentence unless it is clearly authorized by the applicable statutes, as well as pursuant to a procedure in keeping with due process.

Statement of the Question Presented by *Amicus* PACDL

The Order granting allowance of appeal states:

AND NOW, this 19th day of April, 2016, the Petition for Allowance of Appeal is **GRANTED**, **LIMITED TO** the following issues raised by Petitioner:

1. In *Miller v. Alabama*, the U.S. Supreme Court outlawed mandatory life without parole for juveniles (LWOP), and instructed that the discretionary imposition of this sentence should be "uncommon" and reserved for the "rare juvenile offender whose crime reflects irreparable corruption."

   i. There is currently no procedural mechanism to ensure that juvenile LWOP will be "uncommon" in Pennsylvania. Should this Court exercise its authority under the Pennsylvania Constitution to promulgate procedural safeguards including (a) a presumption against juvenile LWOP; (b) a requirement for competent expert testimony; and (c) a "beyond a reasonable doubt" standard of proof?

   ii. The lower court reviewed the Petitioner's sentence under the customary abuse of discretion standard. Should the Court reverse the lower court's application of this highly deferential standard in light of *Miller*?

2. In *Miller*, the U.S. Supreme Court stated that the basis for its individualized sentencing requirement was *Graham*'s comparison of juvenile LWOP to the death penalty. The Petitioner received objectively less procedural due process than an adult facing capital punishment. Should the Court address the constitutionality of the Petitioner's resentencing proceeding?

This brief presents and discusses a logically prior, non-waivable question concerning the legality of the sentence, to wit:

Should this Court now correct an error committed in its decision of the prior appeal of petitioner's sentence, where this Court exceeded its judicial authority by directing the lower courts to consider imposing on petitioner and others similarly situated a form of sentence that is not authorized by the applicable statutes of this Commonwealth?

INTRODUCTORY STATEMENT

Defendant-Petitioner Qu'eed Batts was not yet 15 years old when on February 7, 2006, he shot and killed a young man he did not even know. Batts was following orders from his superior in a street gang he had just joined. Upon conviction as an "adult" for first degree murder, Batts was sentenced in accordance with our state's statutory law as it then stood to the mandatory term of life imprisonment. The life term, by law, was not simply a maximum, but also functioned as a mandatory minimum. As a result, Batts could never be eligible for, much less granted, release on parole.

Six years later, in *Miller v. Alabama*, 567 U.S. —, 132 S.Ct. 2455 (2012), the Supreme Court held such sentences to be unconstitutional as to juvenile offenders. And earlier this year, the High Court elaborated and explained its *Miller* decision in an opinion disagreeing with this Court's analysis and confirming that *Miller* is fully retroactive. *Montgomery v. Louisiana*, 577 U.S. —, 136 S.Ct. 718 (2016). *Montgomery* overruled this Court's contrary decision in *Commonwealth v. Cunningham*, 622 Pa. 543, 81 A.3d 1 (2013). Nevertheless, on resentencing, Batts was sentenced again to serve life without parole.

SUMMARY OF ARGUMENT

The legislature of this Commonwealth has never amended the sentencing scheme for the offense of first degree murder that existed in 2006, even for homicides committed by a juvenile. The legislature fixed Pennsylvania's "*Miller* problem" prospectively in October 2012, but expressly refused in that legislation to address the issue with respect to cases originally sentenced prior to June 25, 2012, including that of Qu'eed Batts. *See* 18 Pa.C.S. § 1102.1(a) (applicable only to those "convicted after June 24, 2012").

The unconstitutional features of the current statutory scheme cannot be severed under 1 Pa.C.S. § 1925, because the provisions that would remain would be contrary to legislative intent and not capable of fulfillment without impermissible judicial elaboration or emendation. Under our state Constitution's separation of powers, the function of assigning a punishment to statutory criminal conduct is purely legislative. *Commonwealth v. Wolfe*, No. 68 MAP 2015 (Pa., June 21, 2016) (J-24-2016, at 19-20); *Commonwealth v. Hopkins*, 117 A.3d 247, 261 (Pa. 2015); *Commw. ex rel. Varronne v. Cunningham*, 365 Pa. 68, 71, 73 A.2d 705, 706 (1950). Moreover, the function of assigning a "missing" penalty cannot be exercised by the judiciary in the course of an appeal, as a matter of federal Fourteenth Amendment Due Process. See *United States v. Batchelder*, 442 U.S. 114, 123 (1979). As noted, the Legislature has

expressly refused to exercise its authority in cases such as this one, leaving the only available punishment for Batts' most serious offense one that is unconstitutional. As a result, this Court has no choice but to order that upon resentencing, Mr. Batts not be sentenced for first degree murder at all, but only for any other or lesser offense for which he may have been convicted and for which a lawful penalty is available.

This Court reached a different conclusion on this question of judicial authority and separation of powers when the present case was formerly before the Court. See *Commonwealth v. Batts*, 620 Pa. 115, 66 A.3d 286, 294-96 (2013) ("*Batts I*"). Because the reasoning of that decision does not survive *Montgomery*'s explanation of *Miller* (and because the Court in *Batts I* did not consider or address the controlling authorities presented in this brief for *amicus curiae* and is irreconcilable with both earlier and later precedent, that is, *Varronne*, *Hopkins* and *Wolfe*), the issue should be reconsidered at this time. To say that a given sentence would not be unconstitutional (were it actually to be authorized by law), is not to say that such a sentence has in fact been authorized. Yet just such a fallacy underlies the decision on this point in *Batts I*. Accordingly, that question should be reopened and reconsidered. The question discussed in this brief is necessarily prior to, and an essential foundation for, the procedural issues on which allowance of appeal was expressly granted.

Argument for *Amicus* PACDL

THE ONLY AUTHORIZED SENTENCE FOR A FIRST DEGREE MURDER COMMITTED BY A JUVENILE IN 2006 IS UNCONSTITUTIONAL, AND THAT DEFECT CANNOT BE REMEDIED BY EITHER SEVERANCE OR JUDICIAL REVISION OF THE STATUTE. AS A RESULT, APPELLANT MUST BE RESENTENCED FOR THE INCLUDED OFFENSE OF THIRD DEGREE MURDER.

The penalty assigned by statute for the offense of first degree murder in 2006, when Qu'eed Batts committed a homicide, was a term of life imprisonment. Parole from the life sentence was unavailable at any time, making life both a fixed maximum and a mandatory minimum. Imposition of this sentence was mandatory, regardless of the defendant's personal characteristics or circumstances, and without regard to the age of the perpetrator. As a result, that sentencing provision was unconstitutional as to those under 18 at the time of the offense. *Miller, supra*. Although the Eighth Amendment decision in *Miller* is retroactively applicable to those sentenced prior to the June 2012 announcement of the *Miller* decision (*Montgomery, supra*), the Pennsylvania Legislature has failed – indeed, refused – to provide for any alternative, lawful punishment. Under settled Pennsylvania law governing severance of statutes and separation of powers, this Court's pre-*Montgomery* decision in *Batts I* must be reconsidered and overruled on the narrow question regarding what would be a lawful

sentence at a resentencing hearing. Appellant Batts should be resentenced on his lesser-included conviction for murder in the third degree.

An examination of the applicable statutes establishes the framework for this *amicus* argument. On February 7, 2006, first degree murder was defined in 18 Pa.C.S. § 2501 and the penalty was sent forth in *id*. § 1102(a).[1] The latter statute stated, in pertinent part, "A person who has been convicted of a murder of the first degree shall be sentenced to death or to a term of life imprisonment in accordance with 42 Pa.C.S. § 9711 (relating to sentencing procedure for murder of the first degree)."[2] Section 9711, which explains how a jury is to decide between life and death sentences, never came into play, because there was no suggestion (or possibility) of pursuing capital punishment in this case.

At the time of the offense, as remains true today, a person sentenced in Pennsylvania to a term of years is eligible for parole after service of a judicially-selected minimum term, if the parole law so provides, but not otherwise:

> The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom

[1] No changes in that penalty had been enacted prior to October 22, 2007, when sentence was imposed, nor for that matter prior to May 2, 2014, when Batts was resentenced following a prior remand from this Court. Thus, no Ex Post Facto issue exists in this case, so far as the governing penalty is concerned. Although Batts was under 18 at the time of the crime, "the crime of murder" is outside the jurisdiction of our Juvenile Courts because it is categorically excluded from the definition of "delinquent act" in 42 Pa.C.S. § 6302.

[2] Section 1102(a) has since been amended in a couple of ways that are immaterial to this case.

> power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment .... The power to parole herein granted to the Board of Parole may not be exercised in the board's discretion at any time before, but only after, the expiration of the minimum term of imprisonment fixed by the court in its sentence or by the Pardon Board in a sentence which has been reduced by commutation ....

61 Pa.Stat. § 331.21 (1941).[3] Ordinarily, that minimum must not exceed half the maximum term imposed. 42 Pa.C.S. § 9756(b).[4] But the plain language of the parole law prevents the minimum-sentence statute from being construed to cover anyone convicted of first degree murder. *See* 1 Pa.C.S. § 1932 (statutes *in pari materia*).[5] This Court has long recognized that no minimum sentence can be imposed when a defendant is sentenced to life for first degree murder. *Commonwealth v. Manning*, 495 Pa. 652, 662, 435 A.2d 1207, 1212 & n.5 (1981). In this scheme, the "life sentence" provided by 18 Pa.C.S. § 1102

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[3] This statute was revised and recodified in 2009 at 61 Pa.C.S. § 6137(a)(1), without substantive change. In particular, the revised statute still provides that the power to parole does not extend to any prisoner "serving life imprisonment."

[4] "Minimum" and "maximum" in this context refer to the parameters of the sentence imposed in the particular case, as selected by the sentencing judge, not to the statutory maximum that might have been imposed, nor the mandatory minimum term that must by law be imposed, if any, as determined by the Legislature, but where a longer sentence within the maximum is ordinarily also available to the judge in his or her discretion.

[5] Until mid-2000, the minimum sentence law contained an express introductory exception for first degree murder cases. *See* 42 Pa.C.S. § 9756(c) (1995) ("Except in the case of murder of the first degree, the court may impose a sentence to imprisonment without the right to parole only when ...."); Act of June 22, 2000, P.L. 345, No. 41, § 4 (eff. 60 days). The deletion of that language did not have the purpose or effect of making any murderers eligible for parole.

serves not so much as a maximum as a mandatory minimum. See *Castle v. Pennsylvania Bd. of Probation and Parole*, 123 Pa.Cmw. 570, 575-76, 554 A.2d 625, 628 (1989) (explaining why person convicted of Second Degree Murder was not eligible for parole). This is the statutory sentencing structure that governed petitioner Batts' sentencing in 2006.

Under the U.S. Supreme Court's decisions in *Miller* and *Montgomery*, the sentence Mr. Batts originally received was unconstitutional, because (a) it was for life without parole; where (b) the defendant was less than 18 at the time of the crime; and (c) that sentence was mandatory upon conviction for the offense, rather than being dependent on a highly exceptional showing of "irreparable corruption." *Montgomery*, 136 S.Ct. at 736. The question presented, after *Miller* and *Montgomery*, is what sentence can lawfully now be imposed on appellant Batts on account of his conviction for committing a homicide in 2006, when he was 14 years old.

A. Any attempt to use severance to save the pre-2012 First Degree Murder sentencing statutes, as applied to juveniles, must fail.

When a sentencing scheme is found to be unconstitutional, the first question that arises is whether the offending provision(s) can be severed to save the law's constitutionality and ensure implementation of the legislative intent. *Hopkins*, 117 A.3d at 252-53, *discussing* 1 Pa.C.S. § 1925 (severability). Here,

however, there is no "provision of any statute or the application thereof to any person or circumstance," *id.*, that can be stricken from the statutory scheme and yet leave the remainder in place, because "the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *Id.* (*quoted in* 117 A.3d at 252).

Suppose, in other words, that the phrase "except convicts ... serving life imprisonment" were excised from 61 Pa.C.S. § 6137(a)(1) (and/or from the former 61 P.S. § 331.21, as it stood before 2009; *see* note 3 *ante*), as to the "person or circumstance" (to quote 1 Pa.C.S. § 1925) of defendants under 18 at the time of the crime. Assume further that this excision would eliminate the currently-existing reason for construing the minimum-sentence law, 42 Pa.C.S. § 9756(b)(1), as being inapplicable to life-sentence murder cases. This attempt at severance – which is what *Batts I* suggested – would nevertheless leave in place a statute that was "incomplete" or "incapable of being executed." That is because there is no term of years that a judge could choose as a "minimum" (that is, a period of parole ineligibility) that could be said arithmetically at the time of imposition to "not exceed one-half of the maximum sentence imposed," 42 Pa.C.S. § 9756(b)(1), as mandated by the Legislature for the selection of

minimum terms in parolable sentences.[6] There is no number of years which can comply with that requirement, as applied to a "maximum" of "life," and no court or judge – for the reasons discussed in detail in Section B of this brief – can write a different statute.[7] Consequently, severance fails as a remedy. The opinion in *Batts I* overlooks this fatal flaw in the severance analysis proposed there.

There is a second reason why the unconstitutional feature of this statutory scheme cannot be severed. The Legislature's deliberate choice in § 1102.1 to exclude pre-2012 cases from the option of imposing a differently calculated minimum term leaves a hole that only (impermissible) judicial law-making could fill. But the severance remedy for unconstitutional statutes is not available if the result would be an altered statutory regime which the Legislature expressly rejected (here, minimum terms for pre-2012 juvenile lifers). In this circumstance, "it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one." 1 Pa.C.S. § 1925.

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[6] Even a sentence of "time in"-to-life can never assuredly be said to satisfy a requirement that the minimum not exceed one half the maximum.

[7] A judge is no more authorized to select a minimum term that cannot be compared mathematically to the maximum, in light of § 9756(b), than the judge would be allowed, in the face of § 1102(a), to select a maximum term when sentencing for First Degree Murder other than life. Yet the latter realization is implicit, and foundational to the holding, in *Batts I*.

Indeed, no "presuming" is needed; the plain language of § 1102.1 speaks directly to the point and states that this result is against legislative intent.

With all respect, the portion of this Court's decision in *Batts I* that addresses severability never attempts to address these problems under § 1925 at all. Instead, the decision jumps directly to the question whether a different sort of sentence – one not authorized by any Pennsylvania statute (where the judge would choose in juvenile Murder I cases between life without parole or life with parole eligibility, and in the latter cases set a minimum term, with no legislative guidance at all) – would be constitutional if it existed. *See* 620 Pa. at 131-32, 66 A.3d at 295-96. For these reasons, as elaborated in *Hopkins*, 117 A.3d at 257-59 – a decision that was very recently "reaffirm[ed] ... in all material respects," *Wolfe*, slip op. at 16 – any attempt to save the sentencing scheme at issue here by severance is doomed to failure.

B. Upon finding the current statutory scheme unconstitutional and incapable of rescue through severance, the separation of powers doctrine demands that the Court strike, not rewrite, the offending statutes.

Only the legislature can assign a penalty to be imposed upon those who engage in prohibited conduct, thus creating a crime. *See* 18 Pa.C.S. § 107(b) (common law crimes abolished, and with that abolition all power of the courts to create crimes *or punishments*). As stated in the leading scholarly treatise of

American criminal law, "a crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.2(d), at 17 (2003) (citing this Court's *Varronne* decision, *inter alia*). For this fundamental reason grounded in black-letter law, petitioner Batts cannot lawfully be resentenced for first degree murder.

The separation of powers under Pennsylvania's Constitution would not allow the missing element of the unconstitutional sentencing scheme (a definition of what length the minimum term of parole ineligibility may be) to be supplied by judicial action, either of this Court or of a sentencing court, as the Court seemed to assume (but did not attempt to justify) in *Batts I*. As this Court held just a year ago in *Hopkins*, "It is beyond our province to, in essence, rewrite [a statute] to transform its sentencing commands … contrary to the express legislative intent to the contrary." 117 A.3d at 261.

> Because of the significant provisions found to violate the Constitution, which clearly express the intent of the legislature …, we find the remaining unoffending provisions … are incapable of being severed, and we will not judicially usurp the legislative function and rewrite [the statute] or create a substantive offense which the General Assembly clearly did not desire. Rather, we leave it to our sister branch for an appropriate statutory response to the United States Supreme Court's decision ….

Id. at 262. Accord, *Wolfe*, slip op. at 19-20 (addressing "appropriate function of the judiciary"; finding "simply beyond our constitutionally prescribed authority

and purview" to amend sentencing provision "which the Legislature has specifically mandated").[8] Accord, *United States v. Jackson*, 390 U.S. 570, 584-85 (1968) (leaving to Congress the task of devising a new procedure, after finding unconstitutional the capital sentencing provision of the federal kidnapping statute). This Court has long recognized that the option of making life-sentenced prisoners eligible for parole is within the legislative authority, not the judicial: "[T]he legislature has the power to modify the law governing parole of persons sentenced to life imprisonment. [It is] a given fact of a democratic society: the law is always subject to change by the will of the people. ... [T]he availability of parole for a person sentenced to life imprisonment is a decision subject to change by the State Legislature." *Commonwealth v. Clark*, 551 Pa. 258, 271, 710 A.2d 31, 37 (1998).

This application of the separation of powers doctrine to sentencing law was not a new idea in 2015 and 2016, when this Court decided *Hopkins* and *Wolfe*. As long ago as 1950, this Court showed the same awareness of the constitutional prohibition against judges' exercising a legislative power to fill a statutory gap under the guise of statutory construction. In *Commw. ex rel.*

[8] Nor is this a case where an *amendment* to a pre-existing statute proves to be unconstitutional. In such cases, unlike this one, the amendment can be stricken, and the legislation then reverts to the valid form it took prior to the invalid change. See *Commonwealth v. Halberg*, 374 Pa. 554, 97 A.2d 849 (1953).

Varronne, 365 Pa. 68, 73 A.2d 705, the Court confronted a criminal statute where the Legislature had prescribed in a single provision four different safety requirements having to do with the allowable weight of trucks, but set forth a penalty for only one of those violations. This Court struck three of the four convictions that had been entered against Varronne, holding that where "no common law crime is involved no penalty can be imposed by the court unless the statute itself provides such a penalty, and, being a penal statute, it is subject, of course, to the rule of strict construction." 365 Pa. at 71, 73 A.2d at 706.

The U.S. Supreme Court has enforced the same rule with respect to federal penal statutes. See *United States v. Evans*, 333 U.S. 483 (1948) (affirming dismissal of indictment, where statute prohibited certain conduct but specified no penalty). And in *United States v. Batchelder*, 442 U.S. 114, 123 (1979), the Court declared that the rule announced in *Evans* was an application of the Fourteenth Amendment prohibition on unconstitutional vagueness in criminal statutes. For these reasons, there being no valid, constitutional penalty provided in any statute of this Commonwealth for a first degree murder committed by a youth under 18 prior to 2012, as in Mr. Batts' case, the conviction for that degree of homicide must be dismissed. He is not subject to a "*Miller* resentencing" as outlined in *Batts I*, because there is no lawful penalty for that offense to be found in Pennsylvania's criminal sentencing laws.

This is not to say that prisoners in Batts' position must go free of conviction or punishment for the commission of a homicide. A conviction for first degree murder necessarily includes, as a lesser offense, a conviction for third degree murder. See *Commonwealth v. Taylor*, 583 Pa. 170, 186, 876 A.2d 916, 926 (2005). The penalty for the latter offense is quite severe, particularly for an offense committed by a juvenile, whose culpability, due to developmental immaturity, is categorically less – which is the premise, after all, of the *Miller* and *Montgomery* decisions in the first place. The available penalties for third degree murder cases are not mandatory, much less for life, and so are not unconstitutional under *Miller* and *Montgomery*. Where the sentence for the offense of conviction is vacated as unconstitutional, an appellate court has authority to require the entry of a verdict, without retrial, to reflect any valid and lesser included offense or sentence and to direct the imposition of sentence for that lesser offense on remand. *Commonwealth v. Story*, 497 Pa. 273, 275, 440 A.2d 488 (1981); *Commonwealth v. Bradley*, 449 Pa. 19, 23-24, 295 A.2d 842 (1972). The rule in federal cases is the same. *Rutledge v. United States*, 517 U.S. 292, 305-07 (1996).[9]

[9] In *Batts I*, this Court noted that the above-cited cases were distinguishable, in that they arose in a different context. 360 Pa. at 130, 66 A.2d at 296-97. While that is certainly true, the Court did not identify how, in principle, the lawful manner of resolution of the cases would be different, and there is none.

The appropriate remedy for the constitutional defect in Batts' sentence is therefore a remand for resentencing on his implicit conviction for Third Degree Murder.

C. *Batts I* should be reconsidered and overruled not only because it overlooked aspects of severance law and the separation of powers, but also because it relies on an understanding of *Miller* that was subsequently rejected by the U.S. Supreme Court in *Montgomery*.

This Court's leading post-*Miller* cases accepted arguments advanced by the Commonwealth and the District Attorney's Association to hold that the U.S. Supreme Court's *Miller* decision was essential procedural in nature and did not fundamentally upset Pennsylvania's legislative scheme for the sentencing of juveniles who committed murder. Thus, in *Batts I*, decided in March 2013, this Court gave *Miller* a narrow and essentially procedural reading to find the statute's constitutional defect readily correctible by severing a few statutory phrases. 620 Pa. at 130-32, 66 A.3d at 295-96. Similarly, *Cunningham*, 622 Pa. 543, 81 A.3d 1, held in October 2013 that the *Miller* decision was not to be applied retroactively, because it was merely "procedural and not substantive" in nature. 622 Pa. at 557, 81 A.3d at 10. The Supreme Court of the United States, however, disagreed with the essential premise of these decisions by holding in *Montgomery* that while *Miller* "has a procedural component," 136 S.Ct. at 734, that decision most fundamentally "announced a substantive rule of constitu-

tional law." *Id.* 736. On that basis, the *Miller* decision was not only held retroactive, but the retroactivity decision was held binding on the States, *id.* 727-32, thus overruling not only the rationale but also the holding of *Cunningham*. Equally important, *Montgomery* requires that the imposition on a juvenile murderer of a sentence of life without parole, even when discretionary, must be exceedingly rare, 136 S.Ct. at 726, that is, "uncommon," *id.* 734, reserved only for highly unusual cases of demonstrated "irreparable corruption," "irretrievable depravity," or "permanent incorrigibility." *Id.* 733-34. Nothing in *Batts I* did anything to ensure that result, as demonstrated quite dramatically in the resentencing of Mr. Batts himself.

For these same reasons, the law of the case doctrine does not require that this Court adhere in the present appeal to its own earlier decision in *Batts I*. Ordinarily, "upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court ...." *Commonwealth v. Starr*, 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995). But this general rule is subject to at least three "limitations" that apply when there are "exceptional circumstances[,] such as where there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed." 541 Pa. at 575-76,

664 A.2d at 1332. Accord, *Commonwealth v. Fletcher*, 604 Pa. 493, 521 & n.20, 523-24, 986 A.2d 759, 776, 778 (2009). The first and third of these exceptions apply here.

As shown under Sections A and B of this brief, the reasoning and holding in *Batts I* were clearly erroneous under prior and subsequent decisions of this Court discussing the severance of unconstitutional sentencing statutes and the related principles of separation of powers (which in turn implicate Fourteenth Amendment due process). It would surely be a manifest injustice for Qu'eed Batts and others similarly situated to have imposed on them, and then to serve for the rest of his lives, an unauthorized and unconstitutional sentence for a terrible crime he committed when still a juvenile. (This is the same fundamental principle of Pennsylvania law that underlies the rule that illegal sentence claims, virtually alone among issues that can arise in criminal cases, cannot be waived for purpose of appeal or collateral attack. See *Wolfe*, slip op. at 7, 14-15.) And as discussed in Section C of this amicus brief, there has been an intervening change in the controlling law, that is, the authoritative explication in *Montgomery* of the U.S. Supreme Court's *Miller* decision as being essentially substantive, not purely procedural, in nature, and as demanding that imposition of life without parole sentences be exceedingly rare. Intervening and controlling

authority thus undermines the rationale for this Court's prior decisions on the same and related subjects, including the decision in *Batts I*.

For these reasons, the law of the case doctrine does not require this Court to reject the suggestion of amicus PACDL that *Batts I* be overruled, but rather invites such reconsideration. In 2006, the statutory maximum for third degree murder was a term of 40 years. 18 Pa.C.S. § 1102(d).[10] At resentencing, a term of years not exceeding that maximum should be imposed in this case (as well as an appropriate minimum), along with resentencing (subject to credit for time served) on any other non-merged counts. See *Commonwealth v. Goldhammer*, 512 Pa. 587, 517 A.2d 1280 (1986).

[10] The maximum penalty for Third Degree Murder was 20 years until June 14, 1995, because until then it was classified as a felony of the first degree, rather than as having its own penalty provision. *See* Mar. 15, 1995, 1st Sp. Sess., P.L. 970, No. 5 (eff. 60 days); *compare* 18 Pa.C.S. §§ 1103(1), 2502(c) (1990) (first degree felony).

CONCLUSION

For these reasons, the important procedural questions on which the Court granted allowance of appeal in this case need not be reached, because no sentence with a maximum term of life imprisonment can lawfully be imposed on appellant Qu'eed Batts for a murder committed in 2006 when he was less than 18 years of age.

Respectfully submitted,
THE PENNSYLVANIA
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Dated: June 30, 2016

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