Received 6/8/2018 5:31:54 PM Superior Court Western District

Filed 6/8/2018 5:31:00 PM Superior Court Western District
1891 WDA 2016

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

1891 WDA 2016

COMMONWEALTH OF PENNSYLVANIA,
Appellee
v.
AVIS LEE
Appellant

REPLY BRIEF FOR APPELLANT

Appeal from the Order of Dismissal entered on November 17, 2016 by the Honorable Kevin G. Sasinoski in the Criminal Division of the Court of Common Pleas of Allegheny County, Pennsylvania, at CC No. 198005128

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SUMMARY OF THE ARGUMENT

In its brief in support of the PCRA court's dismissal of Appellant Avis Lee's PCRA petition, the Commonwealth fails to address Ms. Lee's argument in support of her appeal. The Commonwealth asserts that *Miller v. Alabama,* 567 U.S. 460 (2012) merely held that mandatory life without parole cannot be imposed on individuals who were younger than 18 at the time of their offense. Ms. Lee was 18 years old at the time of the events leading to her felony-murder conviction, thus, according to the Commonwealth, she is categorically excluded from *Miller*'s holding.

This argument ignores that the terms "right" and "holding" have different meanings, that the U.S. Supreme Court explicitly recognized that *Miller* did not merely hold that mandatory life without parole is unconstitutional for those younger than 18 at the time of their offense of conviction, and that the substantive right established in *Miller* is that life without parole is disproportionate when imposed on individuals whose offenses reflect "unfortunate yet transient immaturity." *Miller,* 567 U.S. at 479; *Montgomery v. Louisiana,* 136 S.Ct. 718, 734 (2016).

The cases cited by the Commonwealth in support of its argument are distinguishable or inapposite.

The Commonwealth also attempts, but fails, to rebut Ms. Lee's argument that social and neuroscience are clear that the characteristics of youth identified in *Miller* as being constitutionally-significant for sentencing purposes apply with equal force to 18-year-olds such as Ms. Lee.

In the second section of its brief, the Commonwealth attempts to argue that Ms. Lee's offense does not reflect unfortunate yet transient immaturity. It argues that Ms. Lee misstates the holdings of *Enmund v. Florida,* 458 U.S. 782 (1982) and *Graham v. Florida,* 560 U.S. 48 (2010) and they cannot serve as a basis for overturning Ms. Lee's sentence.

The Commonwealth misconstrues Ms. Lee's arguments with respect to *Enmund* and *Graham* and engages in speculative distortions of the facts of Ms. Lee's case in an apparent attempt to imply that Ms. Lee's actions indicate a greater degree of culpability than her felony-murder conviction supports. The Commonwealth also misrepresents Ms. Lee's arguments with respect to the effect

of Ms. Lee's experiences of severe and pervasive abuse and trauma and the manner in which her characteristics of youth influenced her decision-making and actions leading up to and on the night of her offense.

Finally, the Commonwealth omits the substance of the material Ms. Lee proffered she would present at an evidentiary hearing. Ms. Lee complied with her obligations under the rules to certify what she and her witnesses would testify to at a hearing, and the substance of such testimony is unambiguously relevant under *Miller* and *Montgomery*.

ARGUMENT

I. THE COMMONWEALTH FAILS TO ADDRESS THE SUBSTANCE OF MS. LEE'S ARGUMENT THAT A "RIGHT" IS DISTINCT FROM A "HOLDING"

a. The Commonwealth does not address the distinction between a "right" and a "holding" and ignores Ms. Lee's argument that the right established in *Miller* prohibits imposition of life without parole on someone whose offense reflected the transient immaturity of youth

The Commonwealth argues that Ms. Lee's PCRA petition cannot meet the newly-established constitutional right exception to the PCRA's timeliness exception because she was 18 years old at the time of her offense. Substituted Brief for Appellee, 13. Ms. Lee's petition asserted the right established in *Miller v. Alabama,* 567 U.S. 460 (2012). According to the Commonwealth, Ms. Lee's petition is not timely because "*Miller*'s holding was simply (and explicitly) that 'mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'.' That's it[.]" Substituted Brief for Appellee, 14 (citing *Miller,* 132 S.Ct. at 2460).

The Commonwealth further asserts that Ms. Lee argues that

"this Court must ***extend***" *Miller*'s holding. Substituted Brief for Appellee, 13-14 (emphasis added). It argues that Ms. Lee "[w]ith little real elaboration," asks this Court to "conveniently tailor and apply *Miller*'s categorical holding to the 'facts' of her background, her characteristics and the like" and that Ms. Lee "has overstated *Miller*'s holding." Substituted Brief for Appellee, 14.

Contrary to the Commonwealth's assertions, Ms. Lee recognized *Miller*'s holding that mandatory life without parole for those under the age of 18 at the time of the offense violates the Eighth Amendment and does not argue for an extension of *Miller*. *See* Substituted Brief for Appellant, 11, 15, 24. The Commonwealth ignores, however, Ms. Lee's actual argument: that the U.S. Supreme Court itself recognized that its narrow holding does not constitute the entirety of the right established in *Miller*, that a "right" is broader than a "holding," and that the substantive right established in *Miller* is that life without parole is unconstitutional when imposed on offenders whose crimes reflect the transient immaturity of youth. *See* Substituted Brief for Appellant, 14-43; *Montgomery v. Louisiana,* 136 S.Ct. 718, 734 (2016). The

recognition of that newly established substantive right is the sole issue Ms. Lee's PCRA petition raises.

Miller did not "simply" hold that mandatory life without parole for those who were younger than 18 at the time of their offense is unconstitutional. In *Montgomery,* the U.S. Supreme Court recognized that *Miller* did not merely forbid mandatory life-without-parole sentences for those younger than 18 at the time of the offense. Rather, it established a categorical bar to life-without-parole sentences for "a child whose crime reflects unfortunate yet transient immaturity," regardless of whether the sentence was mandatory or discretionary. *Montgomery,* 136 S.Ct. at 734 (internal citations and quotations omitted).

Montgomery made clear that *Miller*'s prohibition on mandatory life-without-parole sentences for those under 18 and its requirement that courts consider mitigating evidence is a "procedural requirement necessary to implement a substantive guarantee." *Montgomery,* 136 S.Ct. at 734. *Miller's* narrow holding prohibiting "mandatory life without parole for those under the age of 18 at the time of their crimes," *Miller,* 567 U.S. at 465, which

the Commonwealth argues is synonymous with the right established in *Miller,* is a prophylactic rule meant to protect the substantive right. The "substantive guarantee", or right, established in *Miller* is not synonymous with the procedural rule it established. Instead, the "substantive guarantee" is that life-without-parole sentences violate the Eighth Amendment for those whose crimes reflect the transient immaturity of youth. *See Montgomery,* 136 S.Ct. at 734.

The Commonwealth also argues that the "well-settled rationale of *Miller*" does not support Ms. Lee's argument that an individual's characteristics of youth determine whether a mandatory life without parole sentence is unconstitutional. Substituted Brief for Appellee, 18. Yet, the *Miller* Court explicitly states that "the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate." *Miller,* 567 U.S. at 473.

For this reason, the two cases that the Commonwealth cites are inapposite to rebut Ms. Lee's argument. The Commonwealth cites *Commonwealth v. Lesko,* 15 A.3d 345 (Pa. 2011) for the

proposition that *Roper* and *Graham* established "strictly chronological, hard lines" delineating age 18 as the cut-off for those who could benefit from those rulings. Substituted Brief for Appellee, 20-21. Next the Commonwealth cites *Commonwealth v. Chambers,* 35 A.3d 34 (Pa. Super. 2011), for the proposition that the "rationale" and "holding" of a case are distinct for purposes of the PCRA's newly-established constitutional right timeliness exception. Substituted Brief for Appellee, 21. Neither case, however, undermines Ms. Lee's argument that the right established in *Miller* is broader than the narrow holding identified by the Commonwealth as constituting the entirety of the right.

In *Lesko*, the Pennsylvania Supreme Court's peripheral footnote relied upon by the Commonwealth here only stated that it "was worth noting" that *Graham* and *Roper* established bright line rules, but did not address the question presented here of whether the right recognized in *Miller* and *Montgomery* can be so neatly cabined. *Lesko,* 15 A.3d at 408 fn 31.

Similarly, *Chambers* also involved *Graham*, in which the Superior Court upheld the denial of a PCRA petition seeking to

extend the right recognized in *Graham* from non-homicide to homicide convictions. *Chambers,* 35 A.3d at 43. In rejecting that attempted "extension," the *Chambers* court distinguished between the "rationale" and the "holding" of a case. *See Chambers,* 35 A.3d at 42. Here, in contrast to *Graham*, the Supreme Court's decisions in *Miller* and *Montgomery* require the recognition of a substantive right not to be sentenced to mandatory life without parole for crimes that reflect the transitory immaturity of youth. The narrow holding of *Miller* is that nobody under 18 years old can be subject to a mandatory sentence of life without parole, but its rationale and *explicit* language requires the recognition of a right for any youth to be able to challenge a mandatory life without parole sentence if the Court finds that his or her crime reflected the transitory immaturity of youth, irrespective of the youth's chronological age. *See Miller,* 567 U.S. at 479, *Montgomery,* 136 S.Ct. at 734. Therefore, unlike *Graham* and *Roper*, petitioner here does not seek an extension of a categorical bar, but only the recognition of a right to an individual determination of whether certain characteristics of

youth apply to the crime committed. In any event, the panel decision in *Chambers* is not binding on this Court.

The Commonwealth also relies on *Roper* to support its argument that *Miller* enacted a categorical bar to those who were 18 years old at the time of their offense asserting that the right established in *Miller* can apply to them. Substituted Brief for Appellee, 19, 21-24. Again, as with *Graham*, *Roper* is fundamentally different than the present case. Both *Roper* and *Graham* dealt solely with the issue of barring a certain penalty for a certain class of offenders. *See Roper,* 543 U.S. at 568 ("the death penalty is reserved for a narrow category of crimes and offenders"); *Graham,* 560 U.S. at 61 (applying "categorical approach" to examine "a particular type of sentence as it applies to an entire class of offenders"). The Commonwealth asserts without citation that *Miller* was "clear that a line [with respect to age] was necessary." Substituted Brief for Appellee, 18.[1] *Miller*, by

[1]Later in its brief, the Commonwealth edited a citation in a block quotation from *Poole v. Attorney General of Pennsylvania,* 2013 WL 5814079 (E.D. Pa. 2013), replacing a citation to *Roper* with an ellipsis so that it appears that a quote regarding the age of 18 functioning as a cut-off is attributed to *Miller*, rather than to *Roper*. Substituted Brief for Appellee, 34

contrast, neither prohibited nor allowed a particular sentence for any category of prisoners, but simply required individualized decision-making that ensures that the factors of youth and the nature of the crime are taken into account by the sentencing court. Therefore, defendants younger than 18-years-old could still be given life without parole, and some who are older than 18-years-old must be precluded from such a sentence. While such an individualized determination must be accorded an individual younger than 18-years-old, an individual older than 18 can also be afforded the same right upon a showing that the characteristics of youth that diminish culpability were involved in his or her crime. The right established in *Miller* is thus broader than the narrow, procedural holding identified by the Commonwealth and is distinct from the rights established in both *Roper* and *Graham*. The procedural holding is based on chronological age, but the broader substantive right is not.

b. The Commonwealth's arguments with respect to social and neuroscience on adolescent development does not support its position

The Commonwealth's argument regarding the social and

neuroscience that is relevant to the issues of adolescent development, maturity, and criminal culpability conveniently ignores ample discussion and citation to the more recent, authoritative and un-contradicted studies contained in the briefs of Ms. Lee and the Amicus Curiae submitted in support of Ms. Lee.

While the Commonwealth argues that certain citations included in Petitioner's PCRA "are consistent with the designation of age 18" as the dividing line separating an adolescent from an adult, the references are in fact *inclusive* of 18-year-olds. Substituted Brief for Appellee, 27-29; Substituted Brief for Appellant, 31-33. The inclusion of these, as well as other references ignored by the Commonwealth, in Ms. Lee's PCRA was merely to indicate that the U.S. Supreme Court, which had relied on an Amicus that cited to these same materials, had relied on social and neuroscience that explicitly applied to 18-year-olds such as Ms. Lee was at the time of the offense. *See* Reproduced Record (hereafter "R."), 12a-13a.

Nothing in the Commonwealth's brief addresses, let alone refutes, the research cited in Ms. Lee's brief or the Amicus Curiae

brief. *See* Substituted Brief for Appellant, 33; Amicus Curiae Brief of Juvenile Law Center, et al., 6-10; *see also*, *Cruz v. U.S.*, 3:11-cv-00787-JCH (D. Conn. March 29, 2018) (cogently summarizing expert scientific evidence as to the immaturity of 18-year-olds). It is beyond dispute that 18-year-olds possess the same relevant factors of youth that the U.S. Supreme Court found relevant in the proportionality analysis of *Miller*.

Additionally, the Commonwealth alleges the existence of disparate brain development between males and females, and that this purported disparity illustrates the impracticality of a non-categorical rule that considers the mitigating characteristics of youth. Substituted Brief for Appellee, 29-30. The sparse citations presented by the Commonwealth in support of this claim are unconvincing, as they do not remotely address the developmental factors identified by the Court in *Miller*.

Regardless of these obscure references of dubious probative value from readily distinguishable cases from another jurisdiction, the neuroscience submitted to the U.S. Supreme Court in multiple amicus briefs spanning several cases did not consider any such

distinction to be relevant to the issues before the Court. The U.S. Supreme Court does not even mention, let alone rely upon, purported distinctions between male and female brain development. In short, this consideration is a non-factor in determining whether Ms. Lee properly asserted the right established in *Miller*. The Commonwealth does not indicate how these citations are relevant to the diminished culpability analysis of *Miller*. If, however, the Commonwealth wants to argue that Ms. Lee had a heightened culpability on account of her gender it can attempt to produce such evidence at a hearing before a fact finder.

Finally, the Commonwealth mischaracterizes Ms. Lee's argument regarding the relevance of *Moore v. Texas,* 137 S.Ct. 1039 (2017). Brief for Appellee, 32-33. *Moore* is referenced in Ms. Lee's Substituted Brief for the proposition that the Court must look to the relevant field of scientific expertise when considering the definition of intellectual disability, which is a proposition that has an obvious analog in the U.S. Supreme Court's jurisprudence pertaining to youth and diminished culpability. Substituted Brief for Appellant, 34-38.

Contrary to the Commonwealth's argument, Ms. Lee does not assert that *Moore* requires this Court to "apply the Juvenile Act's definition of a 'child.'" Instead, Ms. Lee argued via analogy: "Similar to the unconstitutional standards at issue in *Moore*, other areas of Pennsylvania law recognize 18-year-olds as children." Substituted Brief for Appellant, 36. The analogy is precise. Texas used a definition of intellectual definition that was more in keeping with scientific medical expertise on the subject in other areas of its law, thus lending support to the U.S. Supreme Court's finding the un-scientific standard used in administering the death penalty to be unconstitutional. Pennsylvania, similarly, utilizes a definition of "child" that encompasses individuals 18 years and older, including up to age 21, in other areas of its law. As the science cited by Ms. Lee and in the Amicus Curiae Brief attest to, these statutory determinations are more in keeping with the relevant field of scientific expertise.

As to the Commonwealth's argument that this disjunction in the definition of who qualifies as a juvenile is justified by the distinct purposes of the statutes in question, such an argument is

foreclosed by *Miller*, which recognized that the "distinctive (and transitory) mental traits and environmental vulnerabilities" of children are not "crime-specific," but apply with equal force to homicide and non-homicide offenses. *Miller*, 567 U.S. at 473. *Ipso facto*, statutory distinctions that treat 18-year-old adolescents as children for certain purposes but as adults for purposes of criminal punishment are "crime-specific" determinations of status that must give way to common sense, social and neuroscience under the Eighth Amendment's proportionality analysis.

II. THE COMMONWEALTH'S ARGUMENTS THAT MS. LEE'S OFFENSE DOES NOT REFLECT THE TRANSIENT IMMATURITY OF YOUTH IS UNPERSUASIVE AND HIGHLIGHTS THE NEED FOR AN EVIDENTIARY HEARING

a. The Commonwealth misconstrues Ms. Lee's arguments with respect to *Enmund* and *Graham* and the facts of Ms. Lee's case

The Commonwealth argues that Ms. Lee's citations to *Enmund v. Florida*, 458 U.S. 782 (1982) and *Graham v. Florida,* 560 U.S. 48 (2010) do not provide support for Ms. Lee's claim. As an initial matter, Ms. Lee has waived her second and third claims for relief. Substituted Brief for Appellant, 4 fn. 1. With respect to *Enmund,*

the Commonwealth argues that Ms. Lee misstates its holding and that the case is inapposite because it deals with the death penalty, rather than life without parole sentences. Substituted Brief for Appellee, 44-45. The Commonwealth likewise asserts that Ms. Lee misstates the holding of *Graham* and that it is distinguishable in that it dealt with those under the age of 18 and nonhomicide offenses. Substituted Brief for Appellee, 45, 37.

The Commonwealth recognizes that *Enmund* prohibited imposition of the death penalty for those who aid and abet a felony during which a murder occurs but who do not themselves "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund,* 458 U.S. at 797. The Commonwealth emphasizes the phrase "or that lethal force will be employed." Substituted Brief for Appellee, 44. With respect to *Graham,* the Commonwealth argues that the U.S. Supreme Court excluded those who "foresee that life will be taken" from those who are categorically less culpable, which, according to the Commonwealth, includes Ms. Lee. The Commonwealth then engages in unsupported speculation regarding Ms. Lee's intent on

the night her brother shot and killed Robert Walker.

The Commonwealth's tendentious reading of the case law misapprehends the relevance of *Enmund* and *Graham* when assessing the degree of Ms. Lee's culpability for Eighth Amendment proportionality purposes. Further, its speculative distortions of the case record, which appear to be an attempt to graft a heightened *mens rea* into her felony-murder conviction, only serve to underscore the mismatch between Ms. Lee's culpability and her continued, permanent incarceration 38 years later.

First, The Commonwealth asserts that Ms. Lee's actions in approaching her brother, who she knew was carrying a firearm, about committing a robbery did not "evince a lack of foresight that death could result from her actions" but instead "demonstrate consent to, and *in all likelihood*, the solicitation of the potential use of lethal force." Substituted Brief for Appellee, 45 (emphasis added). The Commonwealth appears to argue that the fact that Ms. Lee knew she was participating in an armed robbery means that she necessarily foresaw that her brother would kill the victim. The U.S. Supreme Court rejected this line of reasoning in *Enmund*,

which was decided less than three years after Ms. Lee's offense, largely because "only about one-half of one percent of robberies resulted in homicide." *Enmund,* 458 U.S. at 799. The Commonwealth does not—and in fact, cannot—cite to any evidence that Ms. Lee foresaw that her brother would take a life, or that she consented to the use of lethal force.

Next, the Commonwealth claims that Ms. Lee was "not surprised by the use of lethal force" and remained near the scene of the shooting "presumably to make sure that the victim was dead." Substituted Brief for Appellee, 46. The assertion that Ms. Lee was not "surprised" by the shooting and intended to ensure that the victim was dead is proffered with no citation to the record or other evidence—because no such citation or other evidence exists. Rather, the Commonwealth has decided to insert a maliciously contrived, speculative figment into its brief without even the pretense of support in the record.

There is no other evidence from which to infer that Ms. Lee intended that Robert Walker die that night or foresaw that her brother would shoot someone. The only evidence against Ms. Lee

and her co-defendants were statements they gave to police officers. In none of the statements did any defendant indicate any intent to kill, to use lethal force, or foresight that lethal force would be used. Rather, the Commonwealth's own recitation of the factual history establishes that Ms. Lee only intended to aid in a robbery and lethal force was used only after the victim, Mr. Walker, "swung around and attempted a karate blow" at Ms. Lee's brother, who then fired his gun. Substituted Brief for Appellee, 4.

Tragically, Mr. Walker lost his life as a result. However, to the extent that the Commonwealth is attempting to argue that Ms. Lee's actions evinced a *mens rea* that supports a degree of guilt greater than the offense with which she was charged and convicted, this argument must fail. At trial, the Commonwealth fails to note, the prosecution did not seek a first-degree murder conviction for any of the three defendants, including Ms. Lee's brother, conceding that the evidence did not show that any defendant intended to kill. Transcript of Trial (hereafter "TT"),

289.[2] The Commonwealth may not now—38 years after the offense in an appellate brief—assert speculative inferences to support a greater degree of culpability for Ms. Lee.

Ms. Lee's arguments with respect *Enmund* and *Graham* are that the intent of an individual is crucial in assessing her criminal culpability for sentencing purposes. In the context of felony-murder, where the offender's intent is not actual, but imputed through the intent of another, "this artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment." *Miller,* 567 U.S. at 491 (Breyer, J. concurring). Ms. Lee's intent and participation in the offense for which she was convicted, while not dispositive, are relevant factors in determining whether Ms. Lee's offense reflected the transient immaturity of youth. *See Miller*, 567 U.S. at 477. *Miller* itself noted that a sentencer should have been permitted to consider the mitigating effect of Petitioner Jackson's felony-murder conviction and

[2] In charging the jury, the court instructed: "We are concerned in this case with two degrees of murder, murder of the second degree and murder of the third degree... The Commonwealth has admitted that it cannot prove or does not feel that there is evidence to support a claim that this was what the law calls murder of the first degree, an intentional killing." TT, 289.

participation in the offense. *Id.* at 478. The Court noted that Jackson knew that his friends had a gun, but that he did not kill and the state did not allege that he intended to kill at trial. *Id.* That the "personal responsibility and moral guilt," *Enmund,* 458 U.S. at 801, of a person who does not kill, intend to kill, or attempt to kill is less than someone who intends to kill cannot be seriously disputed.

b. The Commonwealth ignores and mischaracterizes materially relevant assertions of mitigating evidence that support Ms. Lee's claim that her offense reflected the transient immaturity of youth

The Commonwealth argues that Ms. Lee's offense does not reflect the transient immaturity of youth. Substituted Brief for Appellee, 36. Thus, in effect, the Commonwealth contends that Ms. Lee is an individual "whose crimes reflect permanent incorrigibility." *Montgomery,* 736 S.Ct. at 734. In support of this argument, the Commonwealth claims that Ms. Lee

> provides nothing beyond her own claims of a traumatic upbringing that inexplicitly [sic] resulted in her committing murder due to 'transient yet unfortunate immaturity.' She does not demonstrate, or provide any basis from which she could prove, her possession of the hallmark features of youth discussed in *Miller* less than 3 months before she turned 19.

Substituted Brief for Appellee, 40. The Commonwealth claims that Ms. Lee's assertions of childhood and adolescent trauma and abuse are merely "citations to her Reproduced Record which, upon review, is actually her most recent PCRA Petition which does not contain any actual substantiation." *Id.* The Commonwealth characterizes Ms. Lee as providing "unsupported arguments" and her assertions as "boilerplate allegations." *Id.* (quoting *Commonwealth v. Natividad,* 938 A.2d 310, 322-23 (Pa. 2007). Furthermore, the Commonwealth claims that Ms. Lee asserts that her childhood experiences and characteristics of youth are directly related to her offense of conviction "[w]ithout elaboration." Substituted Brief for Appellee, 39.

Far from "unsupported arguments" and "boilerplate allegations," Ms. Lee provides copious details of the severe and pervasive abuse, trauma, and characteristics of youth that were specifically enumerated in *Miller* and have a direct bearing on determining whether her offense reflected transient yet unfortunate immaturity. Substituted Brief for Appellant, 43-68. Due to the mandatory nature of Ms. Lee's life without parole

sentence, she was precluded from developing this evidence prior to *Montgomery* and due to the PCRA court's denial of an evidentiary hearing, she was precluded from developing an evidentiary record in the lower court. Ms. Lee complied with her obligations under the PCRA to articulate the factual basis for her legal claim and make proffer of the evidence that would be generated in support thereof at an evidentiary hearing; for the Commonwealth to infer otherwise is disingenuous. This Court can simply review the PCRA submitted in this matter and Appellant's Brief to verify this. *See* R. at 18a-26a; Substituted Brief for Appellant, 44-64.

The question before this Court is whether Ms. Lee properly asserted the right established in *Miller*, which would render PCRA petition timely and entitle her to consideration on the merits. Ms. Lee's assertions regarding her childhood and adolescent experiences, circumstances of her offense, and subsequent rehabilitation and transformation are proffered to demonstrate that she has set forth a sufficient factual basis to enable a factfinder to determine that her offense reflected the transient immaturity of youth after an evidentiary hearing. The Commonwealth's quibbling

about the fact that Ms. Lee's assertions about her own life are supported only by citations to Ms. Lee's PCRA is spurious.

c. The Commonwealth's claims that Ms. Lee misrepresents the facts of her case are belied by its own citations to the record and highlight the need for an evidentiary hearing

The Commonwealth asserts that Ms. Lee presents an "alternative version of the facts" relating to her criminal offense. Substituted Brief for Appellee, 40. The Commonwealth further asserts that Ms. Lee "wholly misrepresented the record" and attempts to "re-litigate the facts." *Id.* at 42, 43. However, the portions of the record cited by the Commonwealth do not support this representation of Ms. Lee's characterization of the circumstances of her offense. In fact, as already discussed, it is the Commonwealth that relies on exaggerations and unsupported inferences to portray Ms. Lee's actions in a more sinister light.

The Commonwealth takes issue with Ms. Lee's assertions that Ms. Lee approached her brother requesting to use his gun to commit a robbery, that her brother was the ultimate decision-maker regarding whether, where, and how a robbery would be attempted, and that her brother instructed Ms. Lee to act as a

lookout. Substituted Brief for Appellee, 40-41; Substituted Brief for Appellant, 54-55.

The portions of the trial transcripts cited by the Commonwealth support Ms. Lee's assertion that she initially approached her brother and that her brother suggested where the robbery would occur. Substituted Brief for Appellee, 42. The recitation of facts set forth in the Commonwealth's Factual History portion of the brief, which was taken from the court's opinion presenting the facts in the light most favorable to the Commonwealth, reflect that "Lee was designated to serve as the look-out." Substituted Brief for Appellee, 4. The Commonwealth's attempt to characterize Ms. Lee's waiting at the scene for about 12 minutes before boarding a bus and alerting the driver that Mr. Walker was lying on the ground and appeared to be dead also does not meaningfully differ from Ms. Lee's assertion that after the shooting she boarded a bus and told the bus driver that a man was injured. Substituted Brief for Appellee, 43; Substituted Brief for Appellant, 9.

Ms. Lee does not contest her conviction in her PCRA. What the

Commonwealth apparently takes issue with is Ms. Lee's characterization of the circumstances surrounding her offense, but the alleged "alternative version of the facts" that the Commonwealth accuses Ms. Lee of presenting is in fact the same version of events presented by the Commonwealth.

Moreover, the Commonwealth misrepresents the witness certificates presented by Ms. Lee to the Court of Common Pleas. The Commonwealth asserts that these witness certificates do not identify the substance of the witness testimony that would be presented at an evidentiary hearing. Substituted Brief for Appellee, 48. The Commonwealth supports this assertion by selectively quoting from Ms. Lee's witness certificates, claiming that the certificates make only broad reference to the witness testimony such as "how they are relevant to Ms. Lee's case" and the witness's "findings, assessment, and recommendations...and all documents obtained or created in the process of completing this assessment." *Id.* (citing R. at 114a, 164a, 180a; R. at 180a).

The Commonwealth notably omits, through insertion of an ellipsis rather than a full quotation of the witness certificate, the

substance of the witness's testimony. In the witness certificate for Maria Lynn Guido, a forensic social worker with experience advocating for children and adolescents involved in the court system, which was partially quoted by the Commonwealth, the full quotation of the witness certificate reads:

> 6. At an evidentiary hearing Ms. Guido will testify on issues raised by Ms. [Lee's] PCRA petition, including but not limited to the following:
>
> > a. Her findings assessments, and recommendations regarding the impact of Ms. Lee's childhood and adolescent physical, psychological, and sexual abuse, including all documents obtained or created in the process of completing this assessment;
> >
> > b. Her findings assessments, and recommendations regarding the impact on Ms. Lee of witnessing the violent abuse of members of her family, including all documents obtained or created in the process of completing this assessment;
> >
> > c. Her findings, assessments, and recommendations on how Ms. Lee was impacted by living in extreme poverty including all documents obtained or created in the process of completing this assessment;
> >
> > d. Her findings, assessments, and recommendations on how Ms. Lee's experience of trauma and abuse, as well as her substance abuse, influenced her decision-making during the acts giving rise to her criminal conviction, including all documents obtained or created in the process of completing this assessment;

> e. Her findings assessments, and recommendations on whether Ms. Lee is a peaceful and rehabilitated person capable of safe release from prison, including all documents obtained or created in the process of completing this assessment.

R. at 180a.

This witness certificate provides copious detail of the substance of Ms. Guido's testimony. It is difficult to conceive of how the Commonwealth could represent to this Court that this witness certificate does not indicate the substance of Ms. Guido's testimony at a hearing. Other witness certificates are similar in their representation of the substance of witness testimony, as this Court can see from reviewing the relevant portions of the Reproduced Record, which contain certificates for Avis Lee, Dr. Beatriz Luna, Dr. Rachel A. Fusco, and Maria Lynn Guido. *See* R. at 113a-186a.

The Commonwealth's inclusion of this misleading argument in support of its contention that Ms. Lee was properly denied an evidentiary hearing is misplaced, not only for its failure to accurately characterize the witness certificates, but also for the remedy countenanced by the provision requiring witness

certificates. 42 Pa.C.S. § 9545(d)(1) makes clear that "[f]ailure to substantially comply with the requirements of this paragraph" does not result in denial of an evidentiary hearing, but merely "shall render the proposed witness's testimony inadmissible." 42 Pa.C.S. § 9545(d)(1).

Even if some of the witness certificates submitted in support of Ms. Lee's PCRA were deficient—which, as the above citations demonstrate, they were not—Ms. Lee's testimony alone suffices to raise a genuine issue of material fact to demonstrate that her offense reflected the transient immaturity of youth and entitle her to an evidentiary hearing. *See Commonwealth v. Roney*, 79 A.3d 595, 604 (Pa. 2013). Although the Commonwealth attempts throughout its brief to cast doubt on Ms. Lee's childhood and adolescent experiences of abuse and trauma, assessing the weight and credibility of this testimony is undoubtedly the province of the factfinder.

Ms. Lee's request of an evidentiary hearing is far from the "discovery tool" or "fishing expedition" to support a "speculative claim" asserted by the Commonwealth. Substituted Brief for

Appellee, 48-49. Ms. Lee seeks no discovery from the Commonwealth and has several witnesses, including expert witnesses, prepared to testify on her behalf. That the Commonwealth continues to assert in 2018—after decades of U.S. Supreme Court decisions, lower court decisions, and state court decisions recognizing the impact that childhood and adolescent trauma and abuse has on a person—that Ms. Lee's claim that her experiences of pervasive childhood and adolescent physical and sexual abuse and trauma affected her at the age of 18 constitutes a "speculative claim" is disappointing and indefensible.

As indicated in the filings in the Court of Common Pleas and in this Court, an evidentiary hearing will demonstrate that Ms. Lee possessed the characteristics of youth that render her life-without-parole sentence unconstitutional pursuant to *Miller* and *Montgomery*.

CONCLUSION

For the reasons articulated above, Appellant is seeking reversal of the Court of Common Pleas' dismissal Appellant's PCRA

petition and remand for purposes of conducting an evidentiary hearing.

Respectfully submitted,

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*Motion for *pro hac vice* admission forthcoming

Certificate of Compliance

I hereby certify that the foregoing Reply Brief for Appellant consists of 5,839 words, excluding the title page, table of contents, and table of citations, and thus complies with the requirement of Pennsylvania Rule of Appellate Procedure 2135 that reply briefs shall not exceed 7,000 words.

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Dated: June 8, 2018

Certificate of Service

I hereby certify that on this 8th day of June, 2018 this Reply Brief for Appellant was E-filed to the following:

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