IN THE SUPERIOR COURT OF PENNSYLVANIA

---

660 EDA 2015

COMMONWEALTH OF PENNSYLVANIA

V.

MICHAEL FELDER, APPELLANT

BRIEF OF APPELLANT

Appeal from the October 24, 2014 Judgment of Sentence in the Court of Common Pleas, Philadelphia County, Docket CP-51-CR-0014896-2009.

BRADLEY S. BRIDGE
Assistant Defender
OWEN W. LARRABEE
Assistant Defender
Deputy Chief, Appeals Division
KARL BAKER
Assistant Defender
Chief, Appeals Division
KEIR BRADFORD-GREY
Defender
Defender Association of Philadelphia
1441 Sansom Street
Philadelphia, PA 19102
Telephone (215) 568-3190

MARSHA L. LEVICK
Deputy Director & Chief Counsel
EMILY C. KELLER
Supervising Attorney
Juvenile Law Center
1315 Walnut Street, 4th floor
Philadelphia, PA 19107
Telephone (215) 625-0551

August, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

I. STATEMENT OF JURISDICTION

This Court's jurisdiction to hear an appeal from an order from the judgment 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 50 year to life sentence, a *de facto* life without parole sentence, imposed upon appellant Michael Felder. Issues concerning the constitutionality of a criminal sentence are questions of law and this Court's review is plenary.

Also at issue is whether the only lawful sentence Michael Felder could have received at his resentencing hearing is a sentence pursuant to the third degree murder statute. Again, the legality of a criminal sentence presents a question of law and this Court's review is plenary.

Alternatively, at issue is whether the trial court abused its authority in resentencing Mr. Felder to a *de facto* 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 should be plenary so as to effectuate the constitutional requirement established by the United States Supreme Court in Montgomery v. Louisiana, 136 S. Ct. 718 (2016) that imposition of a life without parole sentence only be imposed on children who are permanently incorrigible, irreparably corrupt or irretrievably depraved. This standard of review issue 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.

III. STATEMENT OF THE QUESTIONS INVOLVED

1. Is it unconstitutional to sentence a juvenile to 50 to life, a *de facto* sentence of life imprisonment without the possibility of parole, without a factual basis to determine if the juvenile was permanently incorrigible, irreparably corrupt or irretrievably depraved?

(Suggested answer: Yes)

2. Absent a judicial finding that a juvenile is permanently incorrigible, irreparably corrupt or irretrievably depraved, is it unconstitutional to sentence a juvenile to 50 to life, a *de facto* sentence of life imprisonment without the possibility of parole?

(Suggested answer: Yes)

3. Under the circumstances of this case, was it unconstitutional to sentence Michael Felder to 50 years to life, a *de facto* sentence of life imprisonment without the possibility of parole?

(Suggested answer: Yes)

4. As the United States Supreme Court in Miller v. Alabama struck down the Pennsylvania first and second degree murder statutes for juveniles, was the only constitutional sentence here one for third degree murder?

(Suggested answer: Yes)

IV. STATEMENT OF THE CASE

Appellant, Michael Felder, was found guilty of first degree murder on March 7, 2012 at Docket No. CP-51-CR-0014896-2009 of the Philadelphia Court of Common Pleas. An appeal to this Court was timely filed and on June 27, 2014 in an unpublished opinion at 2148 EDA 2012 this Court agreed that Mr. Felder had been given an unconstitutional life without parole sentence. This Court remanded for resentencing.

This matter came back for resentencing on October 24, 2014 before the Honorable Shelley Robins New of the Philadelphia Court of Common Pleas. The defense initially argued that based upon the United States Supreme Court decision in Miller v. Alabama the only lawful sentence possible would be a sentence for third degree murder (N.T. 10/24/14, 5).[1] The defense maintained that the shooting here, as part of an escalating argument over a basketball game, was demonstrative of the underdeveloped juvenile brain (N.T. 10/24/14, 7). As a juvenile Michael Felder had a greater capacity than an adult to rehabilitate himself (N.T. 10/24/14, 7). Defense counsel outlined the many ways that he had proven that he had grown and demonstrated rehabilitation. While incarcerated he obtained his GED (N.T. 10/24/14,

---

[1] "N.T. 10/24/14" refers to the notes of testimony from the resentencing hearing on October 24, 2014.

11). He had participated in programing and his violence prevention programming counselor said that he had demonstrated that he was willing to challenge his thinking that had led him to trouble (N.T. 10/24/14, 10-11). He had completed a prevocational class as well as a program called Money Smart (N.T. 10/24/14, 12). His mother and cousins were present in court for the resentencing hearing (N.T. 10/24/14, 12).

The prosecutor noted that prior to his arrest in this matter, Michael Felder had missed a significant number of days of school over several years (N.T. 10/24/14, 26-29). The prosecutor also argued, over an overruled objection, that assessment testing by the Department of Corrections was unable to rule out that he had an antisocial personality disorder (N.T. 10/24/14, 31-32). The prosecutor argued that he would be likely to reoffend in the future because he had not held a job (N.T. 10/24/14, 34). The prosecutor noted that at the original sentencing hearing Michael Felder did not apologize as he had at this resentencing hearing (N.T. 10/24/14, 35). The prosecutor argued for a sentence that "reflects half of what I deem to be life;" she asked for a sentence "somewhere 50 and above" (N.T. 10/24/14, 50).

The sentencing judge explained that in determining the sentence, she considered the decisions in Miller and Batts. She declared that she had examined the Miller factors: age of the defendant, defendant's diminished capacity, evidence of defendant's capacity for change, extent of defendant's participation in the crime, his

family and neighborhood, impact of familial and peer pressure, past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history and his potential for rehabilitation (N.T. 10/24/14, 51-52). However, in her written opinion, she indicated that it was the facts of the case that motivated her to impose the sentence that she did. Opinion of Robins New, Exhibit "A", at 3-4.[2] She sentenced Michael Felder to 50 years to life (N.T. 10/24/14, 56-57).

Defense counsel petitioned the court to reconsider the sentence she had imposed.[3] Among the objections raised by counsel were: that the only lawful sentence should have been the one available for third degree murder, that the sentence meted out was essentially a life without parole sentence, that constitutionally there was a presumption against a life without parole sentence and they should be "rare" or "uncommon." Counsel also challenged the fact that there were no process or procedure established to effectuate the constitutional command that such long

---

[2] A copy of the opinion of Judge Robins New is attached hereto as Exhibit "A."

[3] A copy of the October 31, 2014 post-sentence motion is attached hereto as Exhibit "B."

sentences be uncommon or rare. The post-sentence of law was denied by operation of law.[4] Counsel timely appealed to this Court.

On March 10, 2015 Judge Robins New requested that counsel file a Statement of Errors[5] and on March 24, 2015 counsel did so.[6] The judge filed her written Pa.R.A.P. 1925 (a) opinion on February 18, 2016.[7]

The defense filed a Notice of Appeal to the Superior Court on March 6, 2015. Ten months after the appeal was filed in this Court, the United States Supreme Court decided Montgomery v. Louisiana, 136 S.Ct. 718 (2016). Given that Montgomery was decided while this case was pending on appeal, the trial judge in determining the appropriate sentence in this case never had the opportunity to comply with Montgomery's constitutional requirements.

---

[4] A copy of the March 3, 2015 notification of the denial by operation of law is attached hereto as Exhibit "C."

[5] A copy of the judge's order is attached hereto as Exhibit "D."

[6] A copy of the Statement filed by counsel is attached hereto as Exhibit "E."

[7] A copy of Judge Robins New's opinion is attached hereto as Exhibit "A."

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

Michael Felder is challenging the constitutionality of—and the legal basis for—the 50 years to life sentence he received, a *de facto* life without parole sentence. The challenge is to the legality of (and not the discretionary aspects of) his *de facto* life sentence as a life without parole sentence is barred based upon the decisions in Miller and Montgomery. For this reason, no Pa.R.A.P. 2119(f) ("Tuladziecki") statement is required. Commonwealth v. Shaw, 744 A.2d 739, 742 (Pa. 2000) (a Tuladziecki statement is not required when the issue raised on appeal involves the legality of the sentence and not its discretionary aspects). Thus, Michael Felder raises a claim that clearly implicates the legality, rather than the discretionary aspects, of his sentence. Nevertheless, because the stakes here are so high, in an abundance of caution, a Tuladziecki statement is included in this brief.

Michael Felder was convicted by a jury of first degree murder. The trial judge originally sentenced him to life without role, but that sentence was vacated by this Court based upon Batts and Miller. At the new sentencing hearing he was resentenced to 50 years to life, a *de facto* life without parole sentence. While his case was pending on appeal before this Court, the United States Supreme Court decided Montgomery v. Louisiana, which established a new standard and mandating that life

without parole is never permitted for a juvenile unless the evidence established that their crimes reflect "permanent incorrigibility," "irreparable corruption" or "irretrievable depravity." The sentencing judge never made such a finding and, in fact, Michael Felder had accomplished much while incarcerated. While incarcerated he obtained his GED. He had participated in programing. His violence prevention programming counselor said that he had demonstrated that he was willing to challenge his thinking that had led him to trouble. He had completed a prevocational class as well as a program called Money Smart. For these reasons, it was improper for the trial court to impose a *de facto* life sentence.

VI. SUMMARY OF THE ARGUMENT

At his resentencing hearing, Michael Felder was sentenced to 50 years to life. As this sentence is the functional equivalent of a life without parole sentence, the propriety of the imposition of such a sentence must be judged by the standards established by the United States and Pennsylvania Supreme Courts for imposition of life without parole sentences upon juveniles.

In Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) the U.S. Supreme Court outlawed mandatory life without parole sentences for juveniles and also instructed that its discretionary imposition should be "uncommon." In Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016)(emphasis supplied), the Court held Miller to be retroactive but went beyond Miller to "bar life without parole . . . for all but the rarest of juvenile offenders, *those whose crimes reflect permanent incorrigibility.*" Montgomery's expansion beyond Miller requires three safeguards: (1) a presumption against juvenile life without parole; (2) a "beyond a reasonable doubt" standard of proof; and (3) a requirement for competent expert testimony that a juvenile is permanently incorrigible. Otherwise, there is no shield against the impermissible danger expressed in Roper v. Simmons, 543 U.S. 551, 573 (2005),"that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course."

This record illustrates that danger. In her written opinion Judge Robins New was explicit: she indicated that, "In order for an appellate court to understand this Court's reasoning for imposing the sentence it did, one must understand the evidence adduced at trial." Opinion of Robins New, Exhibit "A", at 3. While the evidence at trial is relevant, it is hardly the most important factor. Judge Robins New did not find that Michael Felder was permanently incorrigible, irreparably corrupt or irretrievably depraved as required by Montgomery. Certainly Judge Robins New is not to blame for not making such a finding because the instant sentencing hearing occurred over a year before such findings were required by Montgomery. Therefore, the instant sentence must be vacated and the matter remanded for a new sentencing hearing.

Moreover, the sentence imposed was unconstitutional for an additional reason. After the United States Supreme Court in Miller struck down the Pennsylvania statute for the sentencing of juveniles for first and second degree murder, the only lawful intact sentencing statute in Pennsylvania was that for third degree murder, a sentencing scheme not followed by the sentencing judge below.

VII. ARGUMENT

MICHAEL FELDER, A JUVENILE, WAS GIVEN A *DE FACTO* LIFE SENTENCE WITHOUT ANY OF THE PROCEDURAL PROTECTIONS REQUIRED BY MONTGOMERY V. LOUISIANA, 136 S. Ct. 718 (2016) AND MUST, THEREFORE, BE GIVEN A NEW SENTENCING HEARING .

In 2012 Michael Felder was sentenced to a mandatory life sentence following his murder conviction. He was a juvenile at the time of the offense. He appealed and this Court remanded the matter for a new sentencing hearing because, while his case was pending on appeal, the Supreme Court in Miller v. Alabama, 132 S. Ct. 2455 (2012), held that mandatory life imprisonment was unconstitutional for juvenile offenders. At his 2014 resentencing hearing Michael Felder was given a *de facto* life sentence of 50 years to life. He appealed, and again while his case was pending on appeal, the United States Supreme Court changed the legal landscape. In Montgomery v. Louisiana, 136 S. Ct. 718 (2016) the Supreme Court determined that there was a presumption against imposition of a juvenile life sentence and a juvenile must be "permanently incorrigible" before such a sentence could be imposed. Because the trial court did not have the benefit of Montgomery when it determined what sentence to impose, the sentence does not comply with Montgomery and this Court should remand the instant matter for resentencing.

A. MICHAEL FELDER WAS GIVEN A *DE FACTO* LIFE SENTENCE.

In 2014 this Court vacated Michael Felder's mandatory life sentence and remanded the matter for resentencing. At the resentencing hearing in 2014, Michael Felder was given a sentence of 50 years to life. A determination of relevant case law demonstrates that such a sentence, imposed on a seventeen year old child, constitutes a life sentence.

The Supreme Court's 8th Amendment jurisprudence has clarified that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not how a sentence is labeled. For example, the Supreme Court took a commonsense approach in Sumner v. Shuman, 483 U.S. 66, 83 (1987), where it noted that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy."

This Court has not yet considered whether 50 years to life would be a *de facto* life sentence. Other jurisdictions, however, made such a determination. In Casiano v. Comm'r of Correction, 317 Conn. 52, 57–58, 115 A.3d 1031, 1035 (2015), *cert. denied sub nom.* Semple v. Casiano, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016) the defendant argued that imposition of a sentence of fifty years imprisonment without

the opportunity for parole was the functional equivalent of a life sentence and, as a result, his sentencing must comport with Miller. The Connecticut Supreme Court agreed:

> We begin by observing that recent government statistics indicate that the average life expectancy for a male in the United States is seventy-six years. United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Vital Statistics Reports, Vol. 62, No. 7 (January 6, 2014), available at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_07.pdf (last visited May 26, 2015). This means that an average male juvenile offender imprisoned between the ages of sixteen and eighteen who is sentenced to a fifty year term of imprisonment would be released from prison between the ages of sixty-six and sixty-eight, leaving eight to ten years of life outside of prison. Notably, this general statistic does not account for any reduction in life expectancy due to the impact of spending the vast majority of one's life in prison. See, e.g., *Campaign for the Fair Sentencing of Youth*, "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences," (2012–2015) p. 2, available at http://fairsentencingofyouth. org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited May 26, 2015) (concluding that Michigan juveniles sentenced to natural life sentences have average life expectancy of 50.6 years); N. Straley, "*Miller*'s Promise: Re–Evaluating Extreme Criminal Sentences for Children," 89 Wn. L.Rev. 963, 986 n. 142 (2014) (data from New York suggests that "[a] person suffers a two-year decline in life expectancy for every year locked away in prison"); see also *United States v. Taveras,* 436 F.Supp.2d 493, 500 (E.D.N.Y.2006) (acknowledging that life expectancy within federal prison is "considerably shortened"), vacated in part on other

> grounds sub nom. *United States v. Pepin,* 514 F.3d 193 (2d Cir.2008); *State v. Null,* supra, 836 N.W.2d at 71 (acknowledging that "long-term incarceration [may present] health and safety risks that tend to decrease life expectancy as compared to the general population"). Such evidence suggests that a juvenile offender sentenced to a fifty year term of imprisonment may never experience freedom.

Casiano v. Comm'r of Correction, 317 Conn. 52, 76–78, 115 A.3d 1031, 1046 (2015), *cert. denied sub nom.* Semple v. Casiano, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).

Similarly, the Iowa Supreme Court in State v. Null, 836 N.W. 2d 41 (Iowa, 2013) held that a 52½ year sentence was the functional equivalent of life imprisonment, triggering the protections established by Miller.[8] The Iowa Supreme

---

[8] *See also* Thomas v. Pennsylvania, 2012 WL 6678686 at *2 (E.D. Pa. 2012) (vacating a sentence in which a 15 year old offender would not be parole-eligible until age 83 noting that "[t]his Court does not believe that the Supreme Court's analysis would change simply because a sentence is labeled a term-of-years sentence rather than a life sentence if that term-of-years sentence does not provide a meaningful opportunity for parole in a juvenile's lifetime. This Court's concerns about juvenile culpability and inadequate penological justification apply equally in both situations, and there is not basis to distinguish sentences based on their label."); *but see* Diamond v. State, 419 S.W. 3d 435 (Tex.Crim.App. 2012) (upholding a child's consecutive 99 year and 2 year sentences without any discussion of Graham); State v. Kasic, 265 P.3d 410 (Ariz.Ct.App. 2011) (upholding an aggregate term of 139 3/4 years based on 32 felonies, including one attempted arson); State v. Brown, 118 So. 3d 332, 341 (La. 2013) (upholding consecutive term-of-years sentence rendering the defendant eligible for parole at 86); Bunch v. Smith, 685 F.3d 546, 551 (6th Cir., 2012) (upholding a sentence where the earliest possibility of parole was at age 95); State v. Cardeilhac, 293 Neb. 200, 876 N.W.2d 876 (2016) (juvenile defendant's sentence of imprisonment for 60 years to life for second degree murder was not excessive).

Court rejected the prosecutor's argument that a juvenile's "potential future release in his or her late sixties after a half century of incarceration" was not barred by Miller. *Id.* at 71. *See also* Bear Cloud v. State, 334 P.3d 132, 144 (Wyoming 2014) (an aggregate sentence of 45 years was the de facto equivalent of a life sentence without parole).

The federal government has recognized that a fifty year minimum sentence before one is eligible for release constitutes a life sentence. The United States Sentencing Commission defines a life sentence as 470 months (or just over 39 years), based on average life expectancy of those serving prison sentences. *See, e.g.,* United States v. Nelson, 491 F.3d 344, 349-50 (7th Cir., 2007); U.S. Sentencing Commission Preliminary Quarterly Data Report (Through June 30, 2012) at A-8, *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_3rd_Quarter_Report.pdf (last accessed February, 2014). An analysis of the juvenile lifers in Michigan determined that their life span was even shorter. The average Michigan juvenile lifer had a life expectancy of 50.6 years. http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited August 3, 2016).

Michael Felder would have to be incarcerated for at least fifty years before he would even be eligible to be considered for parole. Such a sentence amounted to a *de facto* life sentence. U.S. CONST. AMEND. XIV.

B. MICHAEL FELDER'S SENTENCING HEARING IN WHICH HE WAS GIVEN A *DE FACTO* LIFE SENTENCE, VIOLATED THE PROCEDURES MANDATED BY MONTGOMERY V. LOUISIANA.

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

Michael Felder was resentenced to a *de facto* life without parole sentence and while his appeal was pending in this Court the United States Supreme Court in Montgomery v. Louisiana, 136 S. Ct. 718 (2016) expanded its analysis of the predicate factors that must be found before a life without parole sentence could be imposed on a juvenile. Montgomery explained that the Court's 2012 Miller decision "did bar life without parole . . . for all but the rarest of juvenile offenders, *those whose crimes reflect permanent incorrigibility*." *Id.* at 734 (emphasis added). The Court held "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 "could [only] be a proportionate sentence for the latter kind of juvenile offender." *Id.*

Montgomery establishes that a life without parole sentence for a youth whose crime demonstrates "transient immaturity" is unconstitutional. *Id.* Under the Eighth Amendment, juvenile offenders can only receive a life without parole sentence if their crimes reflect "permanent incorrigibility," "irreparable corruption" or "irretrievable depravity." *Id.* at 733, 734.

Though Montgomery was decided earlier this year, at least one state supreme court has already recognized that Montgomery expanded Miller's 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.

Three state supreme courts have held that the earlier precedent established in Miller dictates this presumption against juvenile life without parole. 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, "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).[9] Notably, since its decision in Seats, the Iowa Supreme Court has expanded

---

[9] 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).

its decision and held that juvenile life without parole sentences are *always* unconstitutional pursuant to their state constitution. The Iowa Supreme Court found:

> [T]he enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation. . . . But a district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is "irretrievably corrupt" at a time when even trained professionals with years of clinical experience would not attempt to make such a determination. No structural or procedural approach, including a provision of a death-penalty-type legal defense, will cure this fundamental problem.

State v. Sweet, No. 14-0455, 2016 WL 3023726, at *26-27 (Iowa May 27, 2016).

Montgomery establishes a presumption against juvenile life without parole sentences in order to effectuate the mandate that such sentences will be "rare" and only apply to the very narrow group of juveniles who are irreparably corrupt, permanently incorrigible, or irretrievably depraved. U.S. CONST. AMEND. XIV.

In fact, a determination of irreparable corruption and the related predicate characteristics must be based on expert testimony, not a lay evaluation of the individual's character or prospects for rehabilitation. As the Supreme Court found in

Graham, "[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 v. Florida, 560 U.S. 48, 68 (2010) (quoting Roper, 543 U.S. at 573) (emphasis added). *See also* Brief for the American Psychological Association et al. as *Amici Curiae* in Support of Petitioners at 25, Miller v. Alabama, 132 S. Ct. 2455 (2012), (Nos. 10-9646, 10-9647) [hereinafter "APA Miller Amicus"] ("[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."). Notably, the difficulty in making this assessment has led at least two state supreme courts to ban juvenile life without parole entirely. *See* Diatchenko, 1 N.E.3d at 283-84; Sweet, 2016 WL 3023726, at *26-27. It is only through expert testimony that the presumption against juvenile life without parole could be overcome.

In addition, part of the reason there exists such a presumption and proof beyond a reasonable doubt is to prevent the sentencing judge from being overwhelmed by the facts of the case and impose a life without parole sentence in spite of the fact that children are redeemable. Without such protections there is no shield against the

impermissible danger expressed in Roper "that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course." Roper, 543 U.S. at 573. Unfortunately, here there is evidence that the sentencing judge, while checking off but not discussing any of the Miller factors (N.T. 10/24/14, 51-52), was really motivated by the facts of the case in imposing the instant sentence. In her written opinion Judge Robins New was explicit: she indicated that, "In order for an appellate court to understand this Court's reasoning for imposing the sentence it did, one must understand the evidence adduced at trial." Opinion of Robins New, Exhibit "A", at 3. Due process requires a presumption against juvenile life without parole. U.S. CONST. AMEND. XIV.

2. Montgomery Establishes That Life Without Parole May Only Be Imposed Upon "Irreparably Corrupt" juveniles, a factual finding not made by the court below.

The resentencing court made no finding that Michael Felder was irreparably corrupt, permanently incorrigible, or irretrievably depraved, as Montgomery requires. *Id.* at 733, 734. Although Judge Robins New voices consideration of characteristics associated with Michael's age and development, this was not enough. In Veal v. State, 784 S.E.2d. 403 (Ga. 2016) the Georgia Supreme Court held that merely considering a defendant's age and associated 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] . . . *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*.

784 S.E.2d at 412 (emphasis added). Similarly here, because the sentencing judge merely said she considered Michael Felder's age, age-related characteristics and the facts of the case, but made no finding that he was irreparably corrupt or permanently incorrigible, his *de facto* life without parole sentence must be vacated.

In fact, there is ample evidence on the record that Michael was NOT irreparably corrupt. While incarcerated he obtained his GED (N.T. 10/24/14, 11). He had participated in programing and his violence prevention programming counselor said that he had demonstrated that he was willing to challenge his beliefs and thinking that had led him to get into trouble (N.T. 10/24/14, 10-11). He had completed a prevocational class as well as a program called Money Smart (N.T. 10/24/14, 12).

Miller does not require "confidence" that rehabilitation would occur, merely the "possibility" of rehabilitation. Montgomery went further and now explicitly requires a finding of "permanent incorrigibility," "irreparable corruption" or "irretrievable depravity" before juvenile life without parole can be imposed. *Id.* at 733, 734. The sentencing judge here did not make sure findings. Of course, that judge cannot be faulted for not clairvoyantly anticipating the change in law that would be established by Montgomery a year after the instant sentencing.

C. AN "ABUSE OF DISCRETION" STANDARD IS INSUFFICIENT TO ENSURE THAT SENTENCERS COMPLY WITH MONTGOMERY.

As the Georgia Supreme Court recently recognized, Montgomery vastly restricts a sentencing court's discretion to impose juvenile life parole sentences. *See* Veal v. State, 784 S.E.2d. 403, 411 (Ga. 2016) ("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."). Because Montgomery now mandates that juvenile life without parole sentences must be "rare," "uncommon," and reserved only for "irreparably corrupt" young offenders, appellate courts must

have the ability to carefully scrutinize a sentencing court's decision to impose juvenile life without parole or, as in this case, a *de facto* life without parole sentence.

The imposition of a *de facto* life without parole sentence in this case was contrary to law. At a minimum, this sentence must be subjected to more scrutiny by this Court than an abuse of discretion standard provides. Absent such scrutiny, the imposition of juvenile life without parole will be arbitrary and capricious; different judges and different counties may balance the same factors differently yet survive a challenge on appeal because of the highly deferential nature of an abuse of discretion standard. To prevent disparities in sentencings among judges or across counties, appellate courts must scrutinize—without judicial deference—the sentencer's findings to ensure that the sentencer has properly considered how a youth's characteristics mitigate against imposing a life without parole sentence.

D. MICHAEL FELDER'S RESENTENCING PROCEEDING WAS UNCONSTITUTIONAL BECAUSE IT PROVIDED HIM WITH FEWER PROCEDURAL SAFEGUARDS THAN AN ADULT FACING CAPITAL PUNISHMENT.

In Graham v. Florida, 560 U.S. 48 (2010) the United States Supreme Court observed that juvenile life without parole "share[s] some characteristics with death

sentences that are shared by no other sentence." 560 U.S. at 69. In Miller v. Alabama, the Court attributed its individualized sentencing requirement to Graham's comparison of juvenile life without parole to the death penalty. 132 S. Ct. at 2463. *See also id.* at 2466 (describing life without parole "for juveniles as akin to the death penalty"). The Court explained that this comparison evoked the line of precedent prohibiting mandatory capital punishment and requiring the sentencer to consider the defendant's characteristics and the details of the offense before sentencing him to death. *Id.* at 2463-64.

Other procedural rights, such as the right to a jury trial for sentencing purposes, must also be available. Based upon Montgomery, before a juvenile could be sentenced to life without parole, certain factual determinations must be made: The juvenile's crime must reflect "permanent incorrigibility" or "irreparable corruption" before a life without parole sentence can be imposed. *See* Montgomery, 136 S. Ct. at 734. U.S. CONST. AMEND. XIV.

The United States Supreme Court has held that "it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment" and trigger a jury trial right. Alleyne v. United States, 133 S. Ct. 2151, 2161 (2013). Here, because the factual finding that a juvenile is permanently incorrigible or irreparably

corrupt is required before a life without parole sentence can be imposed, that factual finding mandates a jury trial right. U.S. CONST. AMEND. VI, XIV.

Moreover, Michael Felder was entitled to at least the same procedural due process afforded an adult facing capital punishment under the Eighth Amendment and Article I, Section 13 of the Pennsylvania Constitution. A review of Pennsylvania's capital sentencing provision illustrates the shortcomings in the resentencing below.

The capital sentencing procedure in Pennsylvania is governed by 42 Pa.C.S.A. § 9711, which provides in relevant part:

> (b) If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, *in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury as provided in subsection (a).*
>
> (c)(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:
>
> > (i) The aggravating circumstances specified in subsection (d) as to which there is some evidence.
> >
> > (ii) The mitigating circumstances specified in subsection (e) as to which there is some evidence.
> >
> > (iii) *Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.*

(h) Review of death sentences –

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for further proceedings as provided in paragraph (4).

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor; or

(ii) the evidence fails to support the finding of at least one aggravating factor specified in subsection (d).

(4) If the Supreme Court determines that the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g).

42 Pa.C.S.A. § 9711 (emphasis added).

In summary, the Pennsylvania General Assembly has provided extensive safeguards for an adult facing capital punishment: (a) the right to be sentenced by a jury; (b) a default sentence of life imprisonment; (c) a "beyond a reasonable doubt" standard for the Commonwealth, and a "beyond a preponderance of the evidence"

standard for the defendant; (e) a verdict of death must be unanimous; and (f) automatic review of all death sentences by this Court. *See* 42 Pa.C.S.A. § 9711(a)-(h).

The procedures utilized at the resentencing were inconsistent with the procedure outlined by 42 Pa.C.S.A. § 9711 and due process for capital sentences. U.S. CONST. AMEND. VI, XIV. This Court must bridge the constitutional gap between the due process afforded a juvenile facing juvenile life without parole and the due process afforded an adult facing capital punishment. In light of 42 Pa.C.S.A. § 9711, a juvenile life without parole proceeding must include: (a) the right to be sentenced by a jury; (b) a burden of proof assumed by against the Commonwealth; (c) the requirement for a unanimous verdict; and (d) automatic review by this Court.

E. BASED UPON MILLER, MONTGOMERY AND BATTS, THE ONLY LAWFUL SENTENCE POSSIBLE FOR A JUVENILE FOUND GUILTY OF FIRST OR SECOND DEGREE MURDER BEFORE 2012 WAS A SENTENCE FOR THIRD DEGREE MURDER.

The Pennsylvania murder sentencing statute that existed at the time of the instant homicide mandated a life without parole sentence for any juvenile found guilty of first or second degree murder. The United States Supreme Court in Miller invalidated that Pennsylvania sentencing scheme in 2012. 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 sentenced prior to June 25, 2012, including that of Michael Felder. *See* 18 Pa.C.S.A. § 1102.1(a) (applicable only to those "convicted after June 24, 2012"). Hence, there was no intact sentencing scheme in place at the time of Michael Felder's resentencing in 2014.

The unconstitutional features of the current statutory scheme (the "Miller problem") cannot be severed under 1 Pa.C.S.A. § 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); Commonwealth ex rel. Varan 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. U.S. CONST. AMEND. XIV. *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 Michael Felder's most serious offense one that is

unconstitutional. As a result, this Court has no choice but to order that upon resentencing, Michael Felder 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 issue was presented to the Pennsylvania Supreme Court in Commonwealth v. Batts, 66 A.3d 286 (Pa. 2013)("Batts I").[10] The Pennsylvania Supreme Court reached a different conclusion on this question of judicial authority and separation of powers when Batts I was before the Court. *Id.* at 294-96. 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 here and is irreconcilable with both earlier and later precedent, that is, Varan, Hopkins and Wolfe), this Court should address the issue anew. 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 Batts I decision on this point.

---

[10] This issue is presented again in Commonwealth v. Batts, ___ A.3d ___, appeal docketed, No. 45 MAP 2016 (Pa. April 19, 2016)(Batts II), as the Pennsylvania Supreme Court has granted review of the life without parole sentence meted out against Batts upon his resentencing.

Sentencing on the most severe lesser included sentence when the great offense is voided is consistent with the Pennsylvania Supreme Court's approach in analogous cases. In Commonwealth v. Story, 497 Pa. 273, 440 A.2d 488 (1981), Story was sentenced to death pursuant to a statute which mandated the imposition of the death penalty where at least one of nine specified aggravating circumstance existed and none of three specified mitigating factors existed. When this mandatory death penalty statute was struck down as unconstitutional, the Pennsylvania Supreme Court imposed life imprisonment, the next most severe punishment prescribed under Pennsylvania law. *Id.* at 282. In Commonwealth v. Bradley, 449 Pa. 19, 23-24, 295 A.2d 842, 845 (1972), the defendant was similarly sentenced to death pursuant to a statute that was subsequently deemed unconstitutional. The Pennsylvania Supreme Court vacated the death sentence and imposed the next most severe constitutionally available sentence: life imprisonment. *See also* Commonwealth v. Edwards, 488 Pa. 139, 141 (1979) (same).

There is also precedent from the United States Supreme Court. In Rutledge v. United States, 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996) the defendant was found guilty of both engaging in a criminal enterprise and conspiracy. The Supreme Court found that the conspiracy was a lesser included offense of the engaging in a criminal enterprise which required the vacation of that conviction and

imposition of sentence only on the criminal enterprise conviction. The Rutledge Court opined that where a greater offense must be reversed, the courts may enter judgment on the lesser included offense. Rutledge cited numerous decisions with approval that authorized the reduction to a lesser included offense when judgment of sentence could not be imposed upon the greater offense. *Id.* at 305-307.

Finally, resentencing based on the lesser included offense is in line with United States Supreme Court precedent in Roper, Graham, Miller and now Montgomery that juveniles are categorically less culpable than adults who commit similar offenses. *See, e.g.*, Miller at 2464 (noting that "juveniles have diminished culpability and greater prospects for reform"). In other words, juveniles who commit first degree murder are categorically less culpable than adults who commit first degree murder. Therefore, it is logical to base these juveniles' sentences on the third degree murder statute since the legislature has deemed a 40-year maximum sentence the appropriate sentence for less culpable adult murderers. This approach also resolves the United States Supreme Court's concern in Graham and Miller that juveniles sentenced to life, because of their young age, serve longer sentences than adult murderers who receive the same sentence. *See, e.g.,* Graham v. Florida, 130 S. Ct. at 2028 ("Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in

prison than an adult offender."). A 40-year maximum sentence acknowledges that, though a youth may be deserving of a harsh sentence, it should be less harsh than the sentence for an adult who commits the same serious crime.

Because the Miller Court invalidated the Pennsylvania homicide sentencing statute for juveniles convicted of first or second degree murder and because the legislature did not establish a statutory scheme to fix that, the only statutory scheme available would be that for third degree murder. U.S. CONST. AMEND. VI, XIV. Michael Felder's sentence should be vacated and remanded for a new sentencing hearing consistent with the statutory scheme for third degree murder.

VIII. CONCLUSION

This Honorable Court should vacate Michael Felder's *de facto* life without parole sentence as unconstitutional and remand the instant matter for resentencing. Alternatively, his sentence should be vacated and remanded for resentencing consistent with third degree murder.

Respectfully submitted,

/S/

BRADLEY S. BRIDGE
Assistant Defender
OWEN W. LARRABEE
Assistant Defender
Deputy Chief, Appeals Division
KARL BAKER
Assistant Defender
Chief, Appeals Division
KEIR BRADFORD-GREY
Defender
Defender Association of Philadelphia
1441 Sansom Street
Philadelphia, Pa. 19102

MARSHA LEVICK
Deputy Director and Chief Counsel
EMILY KELLER
JUVENILE LAW CENTER
The Philadelphia Building
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107

EXHIBIT "A"

IN THE COURT OF COMMON PLEA OF PHILADELPHIA COUNTY

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0014896-2009
v.	:	
MICHAEL FELDER, Appellant	:	

OPINION OF THE COURT

Appellant, Michael Felder timely appeals from this Court's judgment of sentence for the crime of First Degree Murder. From February 27, 2012 through March 7, 2012, Appellant was tried before this Court sitting with a jury. At the conclusion of trial the jury found Appellant guilty of First Degree Murder 18 Pa.C.S.A. §2502(a), Possessing an Instrument of Crime, 18 Pa.C.S.A. §907 (PIC) and Violations of the Uniform Firearms Acts, 18 Pa.C.S.A. §§6106 (VUFA 6106), 6108 (VUFA6108) at CP-51-CR-0014896-2009, and Aggravated Assault, 18 Pa.C.S.A. §2702(A) and Recklessly Endangering Another Person, 18 Pa.C.S.A. §2705 (REAP) at CP-51-CR-0014895-2009. The charges stemmed from a September 3, 2009, shooting during a pick-up basketball game at the Shepard Recreation Center near 57th Street and Haverford Avenue in Philadelphia. Jarrett Green was killed and his brother Malcolm Green was injured. Appellant was seventeen and a half years old at the time of the killing.

Following the verdict the Court sentenced Appellant to Life Imprisonment for the murder conviction, consistent with the statute in effect at that time and imposed lesser prison sentences

for the remaining convictions[1]. All sentences were deemed to run concurrently. Timely Post Sentence motions were filed and denied.

Trial in this case occurred just weeks before the United States Supreme Court heard oral argument in a constitutional challenge to a state statute imposing mandatory life imprisonment for a murder committed by a juvenile. Subsequently the United States Supreme Court decided Miller v. Alabama, ___ U.S.___, 132 S.Ct. 2455, 183 L.Ed. 2d. 407 (2012), our Pennsylvania Supreme Court decided Commonwealth v. Batts, 66 A.3d. 286 (Pa. 2013), and our legislature enacted 18 Pa.C.S.A. § 1102.1[2].

In his post-sentence motions Appellant challenged the constitutionality of the state statute imposing mandatory life imprisonment for a murder committed by a juvenile. As our sentencing scheme had yet to be held unconstitutional, this Court denied the motion[3]. A timely appeal was taken again raising this issue and challenging the sufficiency of the evidence. The United States Supreme Court then decided Miller, and our Supreme Court then decided Batts. In our 1925(a) opinion, this Court demonstrated the sufficiency of the evidence but suggested the case be remanded for resentencing consistent with the recently changed state of the law. The Superior Court vacated the sentence for murder and remanded solely for resentencing on the Murder charge only consistent with the then current state of the law.

---

[1] The Court imposed sentences of two (2) to four (4) years for VUFA 6106; two (2) to four (4) years for VUFA 6108; one (1) to two (2) years for PIC; three (3) to six (6) years for Aggravated Assault and one (1) to two (2) years for REAP.

[2] The instant sentence was consistent with the statute and above the mandatory minimum sentence mandated by the statute. However we agreed with Appellant that because of the timing of the case, we were not compelled to sentence in accordance with the statute.

[3] This Court waited for the Supreme Court's decision and allowed the motion to be denied by operation of law.

After an extensive sentencing hearing, this Court sentenced Appellant to a prison term of fifty (50) years to life for murder. The instant timely appeal followed. In response to this Court's Order pursuant to Pa.R.A.P. 1925(b), Appellant, under thirteen (13) different theories, alleged the sentence was an abuse of discretion, illegal and unconstitutional.

In order for an appellate court to this understand this Court's reasoning for imposing the sentence it did, one must understand the evidence adduced at trial.

Malcolm Green testified that on September 3, 2009 he was nineteen (19) years old and was playing one–on-one basketball with his older brother Jarrett on the playground at the Shepard Recreation Center, also known as Haddington Center in Philadelphia. The brothers then played two-on-two against Appellant and his friend. Appellant was guarding Malcolm and Appellant's friend was guarding Jarrett. Malcolm described the game as becoming more and more aggressive. He described Appellant's play as overly aggressive. After the brothers' team scored a basket and was waiting to receive the ball to continue the game, Appellant's teammate refused to give them the ball. As the brothers were waiting at the foul line to receive the ball Appellant walked off the court to his bag and obtained a gun. Appellant pointed the gun at Malcolm and struck him in the head with it, causing a gash on his forehead. As blood began pouring down his face, he heard a gunshot and saw Appellant shooting his brother. His brother fell and Appellant and his teammate fled. N.T. 2/29/12, 71-129.

Andrew Williams, Appellant's teammate in the basketball game also testified at trial. He corroborated much of Malcolm Green's testimony. He also acknowledged the overly aggressive nature of the basketball game. He saw Appellant strike Malcolm on the forehead with the gun. He further acknowledged hearing gunshots and then running. N.T. 2/28/12, 119-145.

Edwin Lieberman, M.D. performed the autopsy on the victim. Dr. Lieberman testified that the decedent received two gunshot wounds. One bullet entered the left side of the abdomen, severing his iliac artery from the aorta. The bullet was recovered from the spinal cord. The other bullet entered the left thigh and exited near the groin. It disrupted the femoral artery. Both shots were from a distance of greater than two and a half (2 ½) feet. The victim died as a result of the gunshots. N.T. 2/28/12, 84-106.

Four (4) fired cartridge casings (FCC's) were recovered at the crime scene and analyzed by Detective Louis Grandizio. They all were .380 auto caliber manufactured by Remington. All were fired from the same firearm. In addition Detective Grandizio analyzed the bullet fragment recovered by the medical examiner during the autopsy. It, too, was a .380 auto. N.T. 3/5/12, 3-17.

Kenneth McNealey also testified at trial. The Commonwealth's evidence demonstrated that approximately three (3) weeks after the killing, McNealey gave a statement to police in which he said Appellant admitted to shooting two brothers during a basketball game. Although McNealey denied making such a statement during this trial testimony, the statement itself and the circumstances surrounding the statement were presented to the jury pursuant to Commonwealth v. Brady, 507 A.2d. 66 (Pa. 1986) and Commonwealth v. Lively, 464 A.2d. 7 (Pa. 1992). N.T. 3/5/12, 26-47 (Testimony of McNealey); 3/5/12, 62-75 (Testimony of Detective Crone).

At the instant sentencing hearing the Court heard extensive argument from both sides; reviewed the extensive presentence and psychological reports; heard testimony from Appellant's mother, Stephanie Felder; was read a letter from Appellant's cousin, Tanisha Irvine; heard

testimony from Appellant; was read a letter from the two victims' mother, Alfora Green; and was presented with and reviewed Appellant's extensive school records.

Before imposing sentence the Court noted that it reviewed at length both Miller and Batts, as well as its lengthy contemporaneous notes taken both during the trial as well as the initial sentencing hearing. The Court then considered, on the record, every one of the twelve factors for a Court to consider before sentencing a juvenile for first degree murder as enumerated in Miller and Batts.

After imposing sentence this Court explained its reasoning. The Court stated:

> In fashioning the sentence, the Court notes that it also takes into consideration that there were two victims in the overall case, and that there were additional charges in this case as well.
>
> That other case was docketed at CP-51-CR-0014895-2009. Because the Court imposed the mandatory life sentence in the murder charge, the Court, at that time decid[ed] to impose relatively minimal sentences on all the other charges and I made all the sentences to run concurrently with the life sentence[4].
>
> Had the laws concerning juveniles convicted of first-degree murder changed prior to this trial, the Court would have fashioned a sentence overall for all of the crimes for which the defendant [was convicted] in the approximate length of this sentence. To not take those facts into consideration now would be to denigrate the serious nature of the crimes the defendant committed against both victims. N.T. sentencing hearing at 53-54.

In addition to his challenges legal and constitutional challenges, Appellant also challenges the discretionary aspects of the sentence. Our Supreme Court has stated that the proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. Commonwealth v. Smith, 543 Pa. 566, 673 A.2d 893,

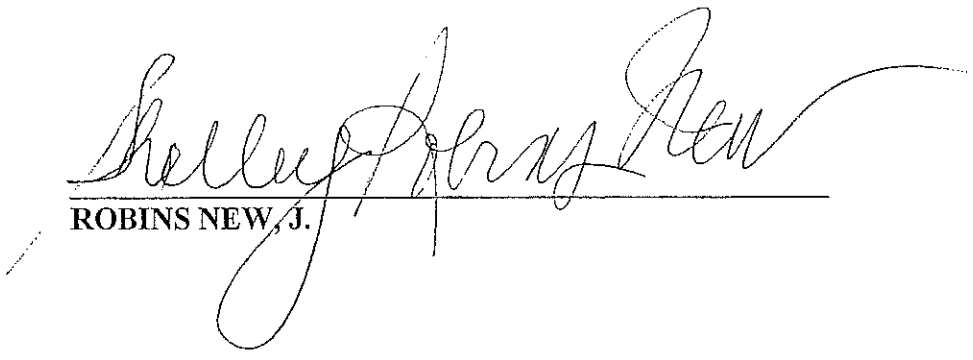
---

[4] The instant sentence also was deemed to run concurrently with the previously imposed sentences.

895 (Pa. 1996) ("Imposition of a sentence is vested in the discretion of the sentencing court and will not be disturbed absent a manifest abuse of discretion."). As stated in Smith, an abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless "the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." Id. n2. In more expansive terms, our Supreme Court subsequently stated, "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." [Citation omitted.] Commonwealth v. Walls, 926 A.2d. 957, 961 (Pa. 2007).

In summary, this Court finds the sentence imposed in this case to be legal, constitutional and a proper exercise of the court's discretion. Accordingly the judgment of sentence should be affirmed.

BY THE COURT:



ROBINS NEW, J.

EXHIBIT "B"

DEFENDER ASSOCIATION OF PHILADELPHIA
BY: Ellen T. Greenlee, Defender and
Roger Schrading, Mythri Jayaraman, Assistant Defenders

Identification No. 00001
1441 Sansom Street
Philadelphia, PA 19102
(215) 568-3190

	:	THE COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION
COMMONWEALTH OF PENNSYLVANIA	:	
VS.		: CP -51-CR-14896-2009
MICHAEL FELDER PPN: 1040683		: CHARGES: MURDER

PETITION'S POST SENTENCING MOTION TO VACATE THE SENTENCE AND RECONSIDER SENTENCE

TO THE HONORABLE SHELLEY ROBINS NEW, PRESIDING IN THE COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION FOR THE CITY AND COUNTY OF PHILADELPHIA:

Petitioner, Michael Felder, by his counsel, Roger Schrading, Assistant Defender, Mythri Jayaraman, Assistant Defender and Ellen T. Greenlee, Defender, respectfully represents the following:

1. Petitioner was resentenced on October 24, 2014 on the above captioned case to a term of 50 years to Life.
2. The sentence constitutes the functional equivalent of a life without parole sentence in that petitioner, a child of 17 ½ years at the time of his arrest,

would not be eligible for parole until he is 67 ½ years old. This requires petitioner to serve five decades in prison and he will not be eligible for release until he is a senior citizen.

3. The sentence constitutes an abuse of discretion by the Court considering all of the facts and circumstances of the case. The sentence was unreasonable and manifestly excessive.
4. The Court failed to consider the rehabilitative needs of the petitioner as required by 42 Pa.C.S.A § 9721(b).
5. The Court impermissibly relied on the Commonwealth's argument that the Petitioner had "personality disorder" without any basis in the record to support it. See Comm v. Sherdina Williams, 69 A.3d 735 (Pa. Super., 2013).
6. The Court impermissibly relied on the court-ordered presentence report of an individual other than the petitioner, as no presentence report or mental health report was prepared by the Court of Common Pleas in this case.
7. Because Miller v. Alabama 132 S. Ct. 2455, 2469 (2012) struck down the only statutory sentence which may be imposed upon juveniles convicted of first degree murder – mandatory life without the possibility of parole – Pennsylvania provided no constitutional sentence for this class of offenders. While the legislature has since crafted an alternative, for juvenile offenders convicted subsequent to Miller, this Court must look to existing statutes to determine a constitutional sentence for those found guilty before Miller. At the time of Petitioner's original sentencing, the only available constitutional sentencing option, consistent with due process, equal protection, bar on cruel and unusual punishment and the prohibition of ex post facto punishment (U.S. Const. Art. I, Sec. 9 and the 8th and 14th Amendments), is to resentence offenders based on the most severe lesser included offense. Therefore, juvenile offenders convicted of first degree murder should be resentenced in accordance with the sentencing scheme for the lesser included offense of

third degree murder, which carries a maximum term of 40 years. See 18 Pa. PA. CONS. STAT. ANN. § 1102.

8. The Court failed to consider the Pennsylvania Sentencing Guidelines in the 7th Edition §303.16(b). Petitioner has a prior record score of zero. The guidelines are 420 months (35 years) to Life minus 5 years for mitigating circumstances. While petitioner's conviction occurred on March 7, 2012, *he* should be in the same position as someone convicted after June 24th, 2012, the operative date for the guidelines. It is a violation of Due Process and Equal Protection to consider him to be in a different category because of the arbitrary date of conviction.

9. Recent United States Supreme Court precedent has established that children convicted of crimes – even serious and violent offenses – are categorically less culpable than adults and less deserving of society's harshest punishments. In Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012), the United States Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." Acknowledging the unique status of juveniles and reaffirming its recent holdings in Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. ___, 130 S. Ct. 2011 (2010), and J.D.B. v. North Carolina, 564 U.S. ___, 131 S. Ct. 2394 (2011), the Court in Miller held that "children are constitutionally different from adults for purposes of sentencing," id. at 2464, and therefore the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Id. at 2466.

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

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

Relying on Graham, Roper, and other decisions on individualized sentencing, the Court found "that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." Id. at 2468. Mandatory life without parole sentences are unconstitutional as applied to juveniles because "[b]y making youth (and all that accompanies it) irrelevant to imposition of the harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." Id. at 2469. Moreover, Graham requires that any that states must provide children (other than those sentenced to life without parole) "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 130 S. Ct. at 2030.

The Sentence imposed by the Court runs afoul of Miller's requirement of individualized sentencing and Graham's requirement that children have a meaningful opportunity for release. Under 18 Pa.C.S. § 1102.1, children 15 and older who are convicted of first degree murder face

a mandatory minimum sentence of 35 years to life. The United States Sentencing Commission defines a life sentence as 470 months (or just over 39 years), based on average life expectancy of those serving prison sentences. See, e.g., United States v. Nelson, 491 F.3d 344, 349-50 (7th Cir., 2007); U.S. Sentencing Commission Preliminary Quarterly Data Report (Through June 30, 2012) at A-8, available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_3rd_Quarter_Report.pdf. Thus, the sentence imposed by the Court is virtually equivalent to a life without parole sentence and therefore neither provides a meaningful alternative to life without parole nor complies with the requirements of Miller that sentences be tailored to a child's individual level of culpability. The Court failed to fashion an appropriate sentence based on a child's individual level of culpability and "disregards the possibility of rehabilitation even when the circumstances most suggest it." See Miller, Id. at 2468. Further, because petitioner faces the possibility of parole after the average prison life expectancy, the sentence imposed does not provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" as Graham requires. Graham, Id. at 2030 (emphasis added).

10. The sentence imposed disregards Miller's finding that "appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon." Miller, 132 S. Ct. at 2469. Miller further notes that the "juvenile offender whose crime reflects irreparable corruption" will be "rare." Id. Miller creates a presumption against imposing juvenile life without parole sentences. The sentence imposed ignores this presumption. The sentence of the functional equivalent of life without parole flies in the face of the Courts precept that such sentences should be "uncommon" or "rare." Therefore, the sentence of 50 years to

Life for a child who was 17 years old at the time of his arrest is unconstitutional pursuant to Miller and Graham.

11. The sentencing in this matter constitutes the functional equivalent of a life sentence. While Miller requires that such sentences be "rare" or "uncommon", there is no process or procedures established that guarantees that mandate. Without such guidance, imposition of a functional equivalent of a life sentence, as here, is arbitrary, cruel and unusual and violates due process and equal protection. U.S. Const., Amend. VIII , XIV.
12. This Court at sentencing misapplied and/or ignored various factors that the Supreme Court in Miller required to be considered.

WHEREFORE, for all the above reasons Petitioner respectfully requests this Court to grant said petition, and reconsider her sentence.

Respectfully submitted,

Roger Schrading

ROGER SCHRADING, Assistant Defender
And with him
Mythi Jayaraman, Assistant Defender
ELLEN T. GREENLEE, Defender
ATTORNEYS FOR PETITIONER

Date: October 29, 2014

DEFENDER ASSOCIATION OF PHILADELPHIA
BY: Ellen T. Greenlee, Defender and
Roger Schrading, Mythri Jayaraman, Assistant Defenders

Identification No. 00001
1441 Sansom Street
Philadelphia, PA 19102
(215) 568-3190

	: THE COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION
COMMONWEALTH OF PENNSYLVANIA	:
VS.	: CP -51-CR-14896-2009
MICHAEL FELDER PPN: 1040683	: CHARGES: MURDER

PRESENTENCE MEMORANDUM

Michael Felder, by his counsel., Roger Schrading and Mythri Jayaraman, Assistant Defenders, and Ellen T. Greenlee, Defender, hereby present a Presentence Memorandum in anticipation of the resentencing of Michael Felder. Petitoiner, Michael Feldet, a 17-year-old boy, committed the crime of murder. He had intellectual and developmental challenges from a very early age, nevertheless he completed High School. He did not get into a lot of trouble as an adolescent and has a limited delinquent history despite living in a violent and crime ridden neighborhood. The crime itself was out of character for Michael. While utterly senseless, the crime was situational and not particularly sophisticated. He has shown his ability to mature and rehabilitate himself while in State Custody. Therefore, counsel for the petitioner recommends the sentence of 25 years to life.

Procedural History

Michael Felder, a 17-year-old boy, was arrested and charged with murder, aggravated assault and firearm charges stemming from a September 3, 2009 shooting during a pick-up basketball game at the Shepard Recreational Center near 57th Street and Haverford Avenue in Philadelphia. Jarret Green was killed and his brother Malcolm Green was injured.

On February 27, 2012 through March 7, 2012, appellant was tried before the Honorable Shelley Robins New of the Philadelphia Court of Common Pleas, sitting with a jury. At the conclusion of the trial, the jury found Petitioner guilty of First Degree Murder of Jarret Green and weapons offenses. On a separate Docket, which is not the subject of this resentencing, Petitioner was found not guilty of Aggravated Assault (F1), but Guilty of Aggravated Assault (F2) (attempt or causing bodily injury with a deadly weapon) on Malcom Green and REAP.

On March 7, 2012 the Court Sentenced the Petitioner to a mandatory sentence of Life without parole on the Murder charge and concurrent sentences on the remaining weapons offenses. On March 15 2012, Petitioner, by counsel, filed a timely Post-Verdict Motion challenging the constitutionality of the imposition of Life without Parole on a juvenile. The motion was denied by operation of law, and a timely appeal was filed on April 26, 2012.

On June 25, 2012, the Supreme Court of the United States decided the case of Miller v. Alabama[1], holding that mandatory life imprisonment without parole for a child at the time of their crime violates the Eighth Amendment's prohibition on cruel and unusual punishments. The Court's holding stems from: (1) juvenile sentencing is different than adult sentencing because of "children's diminished culpability and heightened capacity for change" and (2) life without parole is a particularly harsh prison sentence, comparable to the sentence of death in its finality and irrevocability, making mandatory sentencing schemes too great a "risk of disproportionate punishment."[2] In response to the holding in Miller, the Commonwealth of Pennsylvania adopted new legislation applying to juveniles convicted of 1st Degree Murder on or after the date of the Miller decision.[3] The new statute provides a mandatory minimum of not less than 35 years to life for those convicted who are at least fifteen but under eighteen years of age. However, this statute does not apply to the instant case since the sentencing was prior to the decision in Miller. On March 26 of 2013, the Pennsylvania Supreme Court decided the case of Comm. v. Qu'Eed Batts,[4] which decided what should be done with those juvenile lifers whose judgment of sentence was not final at

---

[1] 132 S.Ct. 2455 (2012)
[2] Id. at 2469.
[3] 18 Pa.C.S. § 1102.1
[4] 66 A.3d 286.

the time of the decision in Miller. Thereafter, on June 27th of 2014, the Superior Court of Pennsylvania vacated the sentence in this case and remanded the case for further sentencing pursuant to Batts.

Legal Context for the Resentencing of Michael Felder

This case was a non-final judgment of sentence for murder at the time of the issuance of the Miller decision, but petitioner was sentenced before the case was decided. Thus, consistent with the holding in Batts, the petitioner is "subject to a mandatory maximum sentence of life imprisonment...accompanied by a minimum sentence determined by the common pleas court upon resentencing."[5] Thus, the sentencing court has complete discretion to fix an appropriate term of years for the minimum sentence. The only mandatory that applies to this case is the five year mandatory minimum for crimes committed with firearms. [6] The court should be guided by the holding and reasoning in Miller to fashion an appropriate minimum term of years for incarceration.[7]

The court in Miller recognizes that juvenile offenders have "diminished culpability and greater prospects for reform" and "less deserving of the most severe punishment."[8] The Court relied on its precedents in Graham v. Florida[9] (holding the sentence of life without parole unconstitutional when applied to a juvenile convicted of violating his probation by committing a home invasion robbery). The holding was grounded in "common sense" and "on what any parent knows"[10] in that teenagers make seemingly mindless and impetuous decisions. The Court noted that juveniles by their very nature lack maturity and have an underdeveloped sense of responsibility, which leads to recklessness, impulsivity, and heedless risk-taking. The Court also based its holding

---

[5] Id. at 297.

[6] Pursuant to 42 Pa.C.S. §9712.

[7] The Petitioner raises an issue that was specifically rejected in Batts at 295, 296. This issue is still on appeal and we would like to preserve it case the Supreme Court of Pennsylvania's position is overturned. This issue is as follows: Because Miller struck down the only statutory sentence which may be imposed upon juveniles convicted of first degree murder – mandatory life without the possibility of parole – Pennsylvania provided no constitutional sentence for this class of offenders. While the legislature has since crafted an alternative, constitutional sentence for juvenile offenders in response to Miller, this Court must look to existing statutes to determine a constitutional sentence.
At the time of Petitioner's sentencing, the only available constitutional sentencing option is to resentence offenders based on the most severe lesser included offense. Therefore, juvenile offenders convicted of first degree murder should be resentenced in accordance with the sentencing scheme for the lesser included offense of third degree murder, which carries a maximum term of 40 years. See 18 Pa. PA. CONS. STAT. ANN. § 1102.

[8] Miller at 2464.

[9] 130 S. Ct. 2011 (2010).

[10] Miller at 2464

on developmental and scientific research that demonstrated that juveniles possessed a greater capacity for rehabilitation, change and growth than adults. The Miller court noted:

> "...developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds' – for example, in 'parts of the brain involved in behavior control.' (Graham citation omitted). We reasoned that those findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened the child's 'moral culpability' and enhanced for prospect that, as the years go by and neurological development occurs, his " 'deficiencies will be reformed.'"[11]

Thus, the Graham Court held that the sentence was contrary to evolving standards of decency under the Eighth Amendment's cruel and unusual punishment clause, noting that a majority of states prohibited the practice and that, even among those that permitted it, the sentence was rarely imposed.

The Court in Miller also relied on Roper v. Simmons[12] (striking down any sentence of death for a juvenile) which provides guidance for the analysis. The court noted that scientific and sociological studies demonstrated that juveniles possess less maturity and less of a sense of responsibility than adults, and therefore it was cruel and unusual to subject them to extreme penalties.

The Court analyzed the traditional penological justifications for extreme punishments, such as retribution and deterrence in the context of juvenile sentencing. As far as deterrence goes, the fact of youthful immaturity, recklessness, and impetuosity make them less likely to consider potential punishment. And retribution makes no sense when a considering a juvenile is less blameworthy because of his status as a youth but receives a more severe punishment than an adult because his life is longer and therefore will suffer more years of punishment than a given adult.

The appropriate age-related factors which the trial court should take into account while fashioning an appropriate sentence were outlined by the Pennsylvania Supreme Court in Batts:

> "[A]t a minimum it should consider a juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, and extent that familial and /or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with police, his capacity to assist his attorney, his mental health history and his potential for rehabilitation."[13]

---

[11] Miller at 2464 to 2465 citing Graham at 130 S.Ct. at 2027 (quoting Roper 125 S.Ct. 1183).
[12] 125 S.Ct. 1183 (2005)
[13] Batts at 297 citing Comm. v. Knox, 50 A.3d at 745 (citing Miller 132 S.Ct. at 2455)

When weighing these factors and the legal context for this resentencing, the petitioner should be sentenced to a term of 25 years to life.

Specific Sentencing Factors of Michael Felder

Michael Felder committed a rash, and impetuous act when he pulled out a gun over a basketball dispute in September 2009. His actions resulted in the death of Jarret Green, a young man with apparently a bright future, and minor injury to Malcolm Green. He should receive a severe sanction for this intentional killing. But the sentence should be mitigated by the factors relating to youth which are outlined by the United States Supreme Court in Miller and the Pennsylvania Supreme Court in Batts. Indeed, reviewing Michael Felder's background, psycho-social history, and progress towards rehabilitation his sanction should set a 25 year minimum sentence– a lengthy term of years which will keep Mr. Felder in custody well into his 40's

Mr. Felder's Psychosocial History prepared by Candace C. Chang, Mitigtion Specialist provides the background and historical perspective of Michael's life. **(See Attached as Exhibit A)** As a boy, Michael struggled with intellectual and developmental challenges. In addition, he was virtually abandoned by his father. Despite these challenges, he managed to stick with school and receive his High School Diploma. In addition, he had very little contact with the delinquent system. His three Marijuana possession charged resulted in a brief period of supervision which he successfully completed.

Michael grew up in a crime-ridden and violent neighborhood. He suffered a stab wound during an assault by an adult and lost three friends to gun violence. The peer pressure and fear induced him to draw the weapon over a seemingly minor dispute. When the dispute escalated, he reacted impetuously and shot Jarret Green, ending his life. No doubt Michael's immaturity, low intellectual capacity, and poor coping skills all contributed to this tragic result. While chronologically, Michael was relatively close to his 18th birthday, it is clear that he was functioning at a much less mature level.

Just as the High Court in Miller reasons, Michael Felder, like most juveniles, has an increased ability to reform and rehabilitate himself. In fact, every indication from the State Correctional Facility where he is serving his sentence indicates he is "motivated for treatment" and has a

"reasonably good prognosis."[14] Indeed, Mr. Coull, of the Violence Prevention Program at SCI-Forrest notes: "He [Michael Felder] was willing to challenge his beliefs and thinking that could lead him to trouble in the future. He also provided examples of being able to utilize cognitive self-change, problem solving, and positive coping skills to aid him in better decision making."[15] Even in this relatively short period of time serving his sentence, Mr. Felder has set himself on the road to rehabilitation.

For all of these reasons, it is just to punish and sanction Mr. Felder severely for his actions. But given the legal context of this sentencing, the impetuosity of the act, and the verified promise of rehabilitation, a just sentence is 25 years to Life.

Respectfully submitted,

Roger Schading

Roger Schrading
Counsel for Michael Felder

Mythri Jayaraman/s

Mythri Jayaraman
Counsel for Michael Felder

[14] Psychosocial History, Candace C. Chang, Attached as Exhibit A. p. 5.
[15] Id. at page 5.

EXIBIT A

DEFENDER ASSOCIATION OF PHILADELPHIA

1441 Sansom Street
Philadelphia, PA 19102
(215) 568-3190

ELLEN T. GREENLEE
DEFENDER

October 9, 2014

PSYCHOSOCIAL HISTORY
Prepared by: Candace C. Chang, M.P.A.

Commonwealth v. Michael Felder
CP-51-CR-0014896-2009

The following history was completed at the request of Mythri Jayaraman and Roger Schrading, attorneys for Mr. Michael Felder. Mr. Felder is incarcerated at State Correctional Institute - Forest awaiting a sentencing hearing, scheduled for October 24, 2014. Interviews were held with Michael Felder, his mother, Stephanie Felder, and his sister, Princess Felder. The following are a list of records reviewed: School District of Philadelphia records, Pennsylvania Juvenile Case Management System records, First Judicial District of Philadelphia Court Summary, Department of Corrections records, Hospital of the University of Pennsylvania birth records, and IQ Test results from Dr. Gillian Blair.

Early Childhood History

Michael Felder was born May 16, 1992 in Philadelphia, Pennsylvania to Ms. Stephanie Felder and Mr. Michael Parker. According to birth records from the Hospital of the University of Pennsylvania, Ms. Felder was a 27 year old unmarried female at the time of birth. She had limited prenatal care at the Public Health Clinic. Her first prenatal visit was at 26 weeks. Although the onset of labor was spontaneous, there were complications and delivery was operative because Michael was in a breech position. There were no neonatal complications.

Michael is the youngest of four children. His siblings include: Stephanie Sharee Felder, Princess Felder, and John Donate Allen Felder. According to Michael, he lived in a household that included his mother, siblings and, at times, several cousins and family members through kinship care in the West Philadelphia/Cobbs Creek sections of the city. According to the family, they are all employed. Ms. Felder is reportedly a Certified Nursing Assistant, but currently works

in retail. Princess Felder is employed with a retailer and does hair in the community. Sharee is reportedly in school and works with an intellectually and mentally disabled population as a medical assistant. And John reportedly works in construction. His parents did not maintain a romantic relationship that he can remember, though he says he has always maintained contact with his father, who lived in South Philadelphia. Ms. Felder noted Michael's father moved back and forth from South Carolina over the years and permanently moved to the state when Michael was approximately 14.

When Michael was ten years old, Ms. Felder and Mr. Kennedy James entered into a romantic relationship. They married in 2007, though are now separated. Michael considers Mr. James his stepfather and says he continues to be a supportive presence in his life. Throughout his childhood and adolescence, Mr. James provided both financial and emotional support to all of the children. Michael stated that even though he had a good relationship with his stepfather, he yearned for his biological father's presence and often asked his mother to move to be closer to him.

When asked about his home situation growing up, Michael noted there were chaotic periods, especially when his mother would take in his aunt's children due to their neglect. This apparently occurred when he was very young and on-and-off throughout the years. Ms. Felder noted she provided kinship care to family friends and nieces and nephews through the Department of Human Services and admitted that such familial changes did often disrupt Michael's treatment. She said she tried her best to keep her extended family from "going into the system" and attempted to provide as much stability to everyone as possible, though perhaps her efforts were spread too thin. The family denied any involvement with DHS aside from being providers of kinship care. There is no indication of intervention, and Michael denied any history of abuse or neglect.

When Michael was 15, the Felder home was shot at, apparently due to an altercation between John Felder (Michael's brother) and another party. Ms. Felder relocated her children to another family member's home. Concerns were expressed about the neighborhood violence and Michael noted he has experienced a number of traumatic events. For example, around the time of his juvenile arrests, and just prior, he suffered a stab wound during an assault by an adult assailant and later lost three friends to gun violence.

In regards to his family, Michael said he shares a close relationship with them. Ms. Felder

added that they are supportive of each other and extended family. Additionally, she noted she tried her best to provide a stable environment for her children in spite of the violence in their Cobbs Creek/West Philadelphia neighborhood, thus the reason she and her then-husband enrolled the children in private school and attended church. In this vein, the Philadelphia Police Department's 2010 crime statistics for the 19th district alone (where Michael's family lives) included 23 reported homicides, 626 reported aggravated assaults, 493 recovered stolen motor vehicles, 488 reported robberies, 610 reported burglaries, 998 reported thefts, and 468 reported thefts from vehicles.

When Michael was 17 (2009), he was arrested and charged with Murder. According to records, Michael and his codefendant were involved in a heated dispute during a pick-up basketball game at a nearby court. Michael fatally shot the victim. He was found guilty of 1st degree Murder approximately one year later via jury trial and sentenced to Life. Since then, Michael has been incarcerated at State Correctional Institution – Forest.

For all intents and purposes, Michael's record at SCI-Forest is spotless. He was evaluated for both IQ and amenability to treatment when he first entered the state correction system and was found to be "more motivated for treatment than adults who are not being seen in a therapeutic setting." Further, he reported "a positive attitude towards the possibility of personal change, the value of therapy, and the importance of personal responsibility." He has not been sanctioned for any inappropriate or illegal behavior and he has availed himself to the various treatment programs and groups that are open to him. Michael attributed much of his attitude change to basic maturity. He remarked he is less reckless in his thinking and likes to take advantage of the positive things available to him in prison.

Mental Health History

Michael's early developmental history was described as unremarkable, reportedly reaching achievement of typical developmental tasks on time. According to Ms. Felder, Michael's emotional development was curbed. She remembered Michael's preschool years woven with extreme temper tantrums and anger and noticed his acting out behaviors coincided with the time she noticed his speech impediment when he was four. Because of this, Ms. Felder noted she sought help through Community Council Health Systems and enrolled him in their therapeutic preschool. He remained in this program for approximately 18 months.

Following his term at Community Council, Michael was enrolled in public school. He was evaluated for services by the School District of Philadelphia, and was deemed eligible for services based on Severe Emotional Disturbance and Specific Learning Disabilities. The presence of a speech/language disorder was noted in several evaluations. Recommended services included special educational placement, speech and language therapy, intensive therapeutic interventions that included family therapy and wraparound services. Psychoeducational testing over the years indicated average intellectual abilities with markedly deficient skills in reading, and a developmental language disorder.

Michael's psychiatric history began as a toddler, when he was enrolled in a partial hospitalization pre-school program at Community Council. He was diagnosed with Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, Conduct Disorder, Posttraumatic Stress Disorder, Learning Disorders, and speech/language difficulties described as a phonological disorder. Medication was never provided nor suggested as a part of any treatment plan. However, certain treatment recommendations (wraparound services, intensive family therapy, individual therapy, etc.) were either ignored, or follow through was lacking. According to reviewed records, Ms. Felder attributed the lack of treatment compliance to a failure in communications on the part of the treatment agency. However, services provided by several agencies were frequently terminated due to non-compliance and numerous missed appointments. Michael has no psychiatric hospitalizations and had no psychotropic medications prescribed.

Educational History

According to the School District of Philadelphia History Profile, Michael attended kindergarten through part of 3rd grade at Commodore Barry Elementary School. At that point, he transferred to Andrew Hamilton School. He remained at Hamilton School until the 8th grade. Ms. Felder removed Michael from public school and enrolled him in Faith Connection Christian Academy for a better education, smaller class sizes, and a more personalized approach. She added he was often bullied by his public school peers because he was in special education classes and wanted to get Michael away from that as well.

An IQ test administered by Dr. Gillian Blair dated July 15, 2010 found Michael's overall level of intellectual ability fell within the Low Average range (FSIQ= 80), placing his overall level of performance at the 9th percentile relative to others his age. Subtests that contribute to the

Verbal Comprehension Index (Similarities, Vocabulary, and Information) were uniformly low (scaled scores of 5). His verbal reasoning abilities were significantly lower than his functioning as measured by the Perceptual Reasoning Index, Working Memory Index, and Processing Speed Index which were all in the Low Average or Average range. Composite indices are given below:

Verbal Comprehension Index	72
Perceptual Reasoning Index	94
Working Memory Index	86
Processing Speed Index	86
Full Scale IQ	80

These results are generally consistent with prior evaluations. For example, an evaluation in September 2003 reported a Full Scale IQ of 92, with Reading and Math Scores of 66 and 81 respectively. An earlier evaluation, in 1998 reported his intellectual functioning within the low average range (Composite Score 84).

Juvenile Court History

It was just prior to his transfer to Faith Connection Christian Academy that Michael experienced his first two juvenile arrests in short succession (August 24, 2007 and September 6, 2007), both for possession of marijuana. In Juvenile Court, Michael was placed on Interim Probation following his arrests. Juvenile Probation Officer Rhonda Fisher noted Michael was compliant with probation, with no problems reported in the home, school or community, and that Ms. Felder was "more than capable of providing adequate supervision." The Philadelphia Youth Advocate Program who provided 15 hours of weekly service to Michael during Interim Probation also noted his behavior and school attendance were good. In the meantime, Michael was receiving services already in place through Community Council.

Unfortunately, Michael experienced a third juvenile arrest for marijuana possession on June 11, 2008. He was placed on probation and referred to Northwest Human Services for outpatient drug and alcohol therapy.

Therapeutic and Rehabilitative Efforts

Since he has been with the Department of Corrections, Michael was assessed for his therapeutic needs and administered the Beta III which resulted in a Beta IQ of 86. Further, he has taken advantage of the programming available to him. According to the Personality Assessment Inventory performed by the DOC April 18, 2012, Michael

> **appears more motivated for treatment than adults who are not being seen in a therapeutic setting. His responses suggest an acknowledgement of important problems and the perception of a need for help in dealing with these problems. He reports a positive attitude towards the possibility of personal change, the value of therapy, and the importance of personal responsibility. In addition, he reports a number of other strengths that are positive indications for a relatively smooth treatment process and a reasonably good prognosis.**

Michael's responses in the PAI "indicate that he reports having a level of stress comparable to that of normal adults, with the demands of the environment buffered by a large number of individuals to whom he can turn for support when needed. The combination of a highly developed system of social supports with a reasonably low stress environment is a favorable prognostic sign for future adjustment." In relation to this, Michael expressed he knows now he was an impulsive and immature child and teenager. Having grown up in a context where family was close and safe, but burdened with its share of disruption and economic and social struggles, Michael ultimately admitted he felt his coping and thinking skills were truly tested in every other life context (community and school).

Michael has also been involved in the Violence Prevention, Money Smart and Vocation Education programs at SCI-Forest. Comments by Mr. Coull, of the Violence Prevention program, note Michael is an "active group participant and has added insight to many group discussions and completed all required assignments. He was willing to challenge his beliefs and thinking that could lead him to trouble in the future. He also provided examples of being able to utilize cognitive self-change, problem solving, and positive coping skills to aid him in better decision making."

Conclusion

Michael Felder has faced incredible psychoeducational and emotional challenges in both

childhood and adolescence. He struggled academically through school as he also navigated his way through various therapies. Unfortunately, it seems his mother was overwhelmed with her various responsibilities and several interventions over the years were terminated.

Although he enjoys a close relationship with his family, he craved his father's full-time attention. Moreover, he resided in a violent community and lived through various traumatic events, including the loss of three friends to gun violence. Michael admitted to some marijuana use in his teens and juvenile court interventions mirrored outpatient therapies that were already in place. In the face of these struggles, Michael still managed to earn his high school diploma. Here is a young man who, through various staggering challenges, still availed himself to the education afforded him and remained out of serious legal trouble throughout most of his adolescence. Michael is sorely aware of his past immaturity and how it has affected the decisions he has made in life, but is making a concerted effort to improve himself.

Candace C. Chang/s

Candace C. Chang, M.P.A.
Mitigation Specialist
Defender Association of Philadephia

EXHIBIT "C"

Court of Common Pleas TRIAL DIVISION
Criminal Appeal / Post Trial Unit
Room 206 Criminal Justice Center
1301 Filbert St.
Philadelphia, Pa. 19107
683-7525

March 3, 2015

Defenders Association
1441 Sansom Street
Philadelphia, PA 19102

RE: Commonwealth vs. Michael Felder
CP-51-CR-0014896-2009

Enclosed please find the Order denying by operation of law the post sentence motion filed in the above captioned matter on October 31, 2014. This motion was denied pursuant to Pennsylvania Rule of Criminal Procedure Number 720.B (3).

Sincerely,

Natasha Lowe, Esquire
Supervisor
Criminal Appeal/Post Trial Unit

cc: Honorable Shelly Robins New
Edward McCann, Deputy, Trial Division,
District Attorney's Office
Office Copy
File

COVLTR.opl

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
	:	CRIMINAL TRIAL DIVISION
vs.	:	PHILADELPHIA COUNTY
	:	
	:	
Michael Felder	:	CP-51-CR-0014896-2009

ORDER

AND NOW, this 2nd day of March, 2015, the post-sentence motion filed on 10/31/14 including the supplemental motion, if any, is DENIED by operation of law pursuant to Pa. Rules of Criminal Procedure No. 720.B(3).

The defendant is advised of the following:

(1) You have the right to appeal to the appropriate appellate court within 30 days, from the date of this Order. Notice of Appeal must be filed at the Appeal Unit, Room 206 Criminal Justice Center, 1301 Filbert St, Phila., PA 19107

(2) You have the right, if indigent, to appeal in forma pauperis and to proceed with assigned counsel as provided in Rule 316;

(3) You have a qualified right to bail under Rule 4009.B.

Office of Active Criminal Records

Denied.opl

Comm. v. Michael Felder
Case NO: CP-51-CR-0014896-2009
Type of Order: Denial by Operation of Law Post Sentence Motion

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Court Order upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa. R.Crim.P. 114:

Defense Counsel & Deft: x

Defenders Association
1441 Sansom Street
Phila., PA 19102

Type of Service: ( ) Personal (X) First Class Mail Other, please specify:

District Attorney : Edward McCann, Deputy, Trial Division

1421 Arch Street

Philadelphia, PA 19102

Type of Service: ( ) Personal (X) First Class Mail Other, please specify:

Trial Judge: Honorable Shelly Robins New

Type of Service: ( ) Personal ( ) First Class Mail Other, please specify: INTER-OFFICE MAIL

Dated: March 3, 2015

EXHIBIT "D"

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0014896
v.	:	
MICHAEL FELDER	:	

ORDER

AND NOW, this 9th day of March, 2015, Appellant is hereby directed to provide this Court with a Statement of the Matters Complained of on Appeal, pursuant to Pa. R.A.P. 1925(b), no later than twenty-one (21) days from the date hereof. A failure to comply with such direction may be considered by the Appellate Court as a waiver of all objections to the Order, ruling or other matter complained of.

BY THE COURT:

ROBINS NEW, J.

EXHIBIT "E"

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0014896-2009

v. :

MICHAEL FELDER : JUDGE HON. SHELLEY ROBINS NEW

STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

TO THE HONORABLE SHELLEY ROBINS NEW, JUDGE OF THE SAID COURT:

Appellant, by his attorneys Bradley S. Bridge, Assistant Defender, Owen W. Larrabee, Assistant Defender, Deputy Chief, Appeals Division, Karl Baker, Assistant Defender, Chief, Appeals Division, and Charles A. Cunningham, Acting Defender, files the following Statement of Errors Complained Of On Appeal:

1. Counsel is this day requesting an extension of time in which to file the Statement of Errors because the transcript from Michael Felder's sentencing hearing is not yet available. While counsel complains of the following errors, counsel is hereby requesting the opportunity to amend this Statement of Errors should additional errors appear in that transcript.

2. This Honorable Court sentenced Michael Felder to a term of 50 years to life. This was error because that sentence is a *de facto* life sentence and it violates due process,

equal protection and the prohibition against cruel and unusual punishment under both the United States and Pennsylvania Constitutions to so sentence a juvenile. It is arbitrary and capricious. U.S.CONST., Amend. V, VIII, XIV; PA. CONST., Article I, Section 1, 9, 13.

3. This Honorable Court sentenced Michael Felder to a term of 50 years to life. This was error because that sentence violates the constitutional mandate articulated by the United States Supreme Court in Miller v. Alabama, 132 S.Ct. 2455 (2012) that life sentences for juveniles be "unusual" or "rare." The instant case was not one of the "unusual" or "rare" cases permitting such a sentence.

4. This Honorable Court sentenced Michael Felder to a term of 50 years to life. This was error because that sentence violates Graham v. Florida, 560 U.S. ___ (2010) and its mandate that juveniles be permitted an opportunity for release.

5. This Honorable Court sentenced Michael Felder to a term of 50 years to life. This was error because in giving that sentence this Court abused its discretion and imposed an excessive or unreasonable sentence. This Court did not appropriately consider Michael Felder's likelihood of rehabilitation as required, for example, by Miller.

6. This Honorable Court sentenced Michael Felder to a term of 50 years to life. This was error because in meting out that sentence this Court improperly relied upon the prosecutor's argument that Michael Felder had a personality disorder.

7. This Honorable Court sentenced Michael Felder to a term of 50 years to life. This was error because in giving out that sentence this Court did not have the benefit of a presentence report and improperly relied upon extraneous factors.

8. This Honorable Court sentenced Michael Felder to a term of 50 years to life. This was error because that sentence, to the extent that this Court considered the current homicide statutory minimum, was imposed based upon an unconstitutional statute: Act 204 of 2012 is unconstitutional because the original purpose of the bill was improperly changed during the legislative process in violation of Article III, Section 1 of the Pennsylvania Constitution and because it contains more than one subject in violation of Article III, Section 3 of the Pennsylvania Constitution. The statute also violates the 8th Amendment's Cruel and Unusual Punishment Clauses, Miller and Graham. The statute is unconstitutional because it violates the United States and Pennsylvania constitutional prohibitions

against ex post facto laws. These arguments were rejected by the Superior Court in Commonwealth v. Brooker, 103 A.3d 325 (Pa. Super. 2014), *allocator pending*, ___Pa. ___ (Pa. 2014), but are raised and preserved here. Moreover, to the extent that this Court considered that current unconstitutional statute, that was improper because that statute did not apply to Michael Felder because his crime occurred before the decision in Miller, the operative date in that statute.

9. This Honorable Court sentenced Michael Felder to a term of 50 years to life. This was error because that sentence was improper because it was beyond the statutory maximum. After Miller struck down the entire Pennsylvania sentencing scheme for first and second degree murder, the only constitutional sentence scheme was the sentencing scheme for third degree murder. This Court was mandated to impose a new sentence in the instant matter under the sentencing scheme for third degree murder which has a statutory maximum of forty years.

10. This Honorable Court sentenced Michael Felder to a term of 50 years to life. This was error because in imposing that sentence, this Court was required to consider and impose a sentence under the Pennsylvania sentencing guidelines. Though those guidelines did not apply by their

own terms, this Court was required to follow them lest there be created an equal protection and due process problem, contrasted those sentenced before the guidelines and those sentenced after. Those guidelines recommended imposition of a minimum sentence of 35 years.

11. This Honorable Court sentenced Michael Felder to a term of 50 years to life. This was error because in imposing that sentence this Court did not consider and give appropriate weight to the Miller sentencing factors. This sentence was additionally an abuse of discretion. The instant sentence was excessive and unreasonable.

12. This Honorable Court sentenced Michael Felder to a term of 50 years to life, which is a *de facto* life sentence. Miller established a presumption against life without parole or its functional equivalent (as was done here). This can only be overcome in an "unusual" or "rare" case with proof beyond a reasonable doubt, which was not done here.

13. This Honorable Court sentenced Michael Felder to a term of 50 years to life when the Commonwealth did not meet its burden of proof beyond a reason doubt to justify a *de facto* life sentence.

14. This Honorable Court sentenced Michael Felder to a term of 50 years to life where the Commonwealth did not overcome the presumption of immaturity under Miller.

Respectfully submitted,

/s/

BRADLEY S. BRIDGE, Assistant Defender
OWEN W. LARRABEE, Assistant Defender
Deputy Chief, Appeals Division
KARL BAKER, Assistant Defender
Chief, Appeals Division
CHARLES A. CUNNINGHAM, Acting Defender
Defender Association of Philadelphia
1441 Sansom Street
Philadelphia, PA. 19102

VERIFICATION

The facts set forth in the foregoing are true and correct to the best of the undersigned's knowledge, information and belief are verified subject to the penalties for unsworn falsification to authorities under Pennsylvania Crimes Code Section 4904 (18 Pa.C.S. Section 4904).

/s/
BRADLEY S. BRIDGE, Assistant Defender

Date: March 24, 2015

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0014896-2009

vi. :

MICHAEL FELDER : JUDGE HON. SHELLEY ROBINS NEW

PROOF OF SERVICE

Bradley S. Bridge, being duly sworn according to law, does hereby state and aver that he is counsel for the defendant in the above captioned case and that he has e-served upon:

Judge Shelley Robins New
Suite 1213, Criminal Justice Center
Philadelphia, PA. 19107

Hugh Burns, Esquire
Chief, Appeals Unit
District Attorney's Office
3 South Penn Square
Philadelphia, PA. 19107

a copy of the STATEMENT OF ERRORS COMPLAINED OF ON APPEAL being filed on behalf of Appellant in the above captioned matter.

/s/
BRADLEY S. BRIDGE
Assistant Defender

Date: March 24, 2015

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	EDA 2015
VS.	:	
MICHAEL FELDER	:	NO. 660

CERTIFICATION OF COMPLIANCE WITH RULE 2135

I do hereby certify on this 5th day of August, 2016, that the Brief For Appellant filed in the above captioned case on this day does not exceed 14,000 words. Using the word processor used to prepare this document, the word count is 7,584 as counted by WordPerfect.

Respectfully submitted,

/S/

OWEN W. LARRABEE, Assistant Defender
Deputy Chief, Appeals Division
Attorney Identification No. 19554
KARL BAKER, Assistant Defender
Chief, Appeals Division
KEIR BRADFORD-GREY, Defender