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IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 660 EDA 2015

COMMONWEALTH OF PENNSYLVANIA
Appellee

V.

MICHAEL FELDER

COMMONWEALTH'S BRIEF AS APPELLEE

Defendant's appeal from the October 24, 2014 resentencing proceeding in the Court Of Common Pleas Of Philadelphia County, Trial Division, Criminal Section, at CP-51-CR-0014896-2009, for first degree murder and related offenses.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is defendant's assertion that his minimum term of 50 years is the functional equivalent of life without parole factually unfounded and legally unsupported?

(Not preserved in the trial court).

2. Did defendant waive any appellate claim that the sentencing court abused its discretion?

(Waived on appeal).[1]

[1] Defendant's "statement of the questions involved" (defendant's brief, 4) does not include any discretionary sentencing issue; it is mentioned here solely because his brief includes a statement of reasons for allowance of appeal under Pa.R.A.P. 2119(f).

COUNTER-STATEMENT OF THE CASE

Defendant was not sentenced to life without parole. He was sentenced to a minimum of 50 years for his first degree murder of Jarrett Green. That is not "functionally equivalent" to life; his claim that this is true "de facto" raises a factual assertion that he never tried to prove. There is also no legal authority for his argument that this term of years categorically denies parole and so is subject to *Miller v. Alabama*, which was not violated here. Defendant's arguments boil down to abuse of discretion, but he waived that by not mentioning it in his statement of questions presented or in his argument, and filing a petition under Pa.R.A.P. 2119(f) that is empty of content. No relief is due.

1. The murder

Malcolm Green, age 19, and his older brother Jarrett Green, age 22, played basketball in a two-on-two game against defendant Michael Felder and Andrew Williams on September 3, 2009. Defendant was 17. He became angry at his opponents during the game and began acting with inappropriate aggression and deriding them as "bitches." He then stopped playing and retrieved a .380 caliber semiautomatic handgun from his bag. He struck Malcolm Green in the head with the gun, opening a gash that bled heavily, and then fired four shots at Jarrett Green, hitting him twice and killing him (N.T. 2/28/12 through 3/5/12, passim).

Defendant was tried by a jury before the Honorable Shelly Robbins-New on charges of murder and related offenses for killing Jarrett Green, and aggravated assault and related offenses for striking Malcolm Green with the gun. The jury found

him guilty of murder of the first degree, possession of an instrument of crime, and two violations of the uniform firearms act as to Jarrett Green at CP-51-CR-0014896-2009, and aggravated assault and recklessly endangering another person as to Malcolm Green at CP-51-CR-0014895-2009, on March 7, 2012.

The court imposed the then-mandatory sentence of life imprisonment for first degree murder, with concurrent terms of 2 to 4 years for the two firearms offenses and 1 to 2 years for possession of an instrument of crime on the former bill; and on the latter, 3 to 6 years for aggravated assault and 1 to 2 years for recklessly endangering another person.

2. The *Miller* decision

During appeal, on June 25, 2012, the United States Supreme Court held in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that mandatory life sentences were impermissible for murder offenders who were under 18 at the time of the crime. Relying on earlier decisions such as *Graham v. Florida,* 560 U.S. 48, 79 (2010) (holding that juveniles sentenced for non-homicide offenses must have a "meaningful opportunity to obtain release"), the Court explained that such an offender must instead be afforded "individualized sentencing" recognizing the "mitigating qualities of youth" and "tak[ing] into account how children are different." While sentences of life without parole would thus be "uncommon," the Court declined to "foreclose a sentencer's ability to make that judgment," and held that life without parole sentences could continue to be imposed in cases of "the rare juvenile offender whose crime reflects irreparable corruption." 132 S. Ct. at 2467, 2469.

On March 26, 2013, in *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013), the Pennsylvania Supreme Court held that *Miller* required resentencing in such cases, but rejected claims that broader relief (such as by wholly abolishing juvenile life without parole, or holding that juvenile murderers could only be sentenced for third degree murder) should be afforded under the state constitution. Approving this Court's analysis in *Commonwealth v. Knox*, 50 A.3d 732, 745 (Pa. Super. 2012), *Batts* held that, in considering whether to sentence a juvenile to life without parole for first degree murder, the court should consider various factors including age; circumstances of the crime; emotional maturity; peer pressure; drug and alcohol history; mental health history; and potential for rehabilitation. *Batts*, 66 A.3d at 297. In this case, the trial court and the Commonwealth agreed that defendant should be resentenced as required by *Miller* and *Batts*, and this Court remanded for that purpose on June 27, 2014.

3. Resentencing pursuant to *Miller*

At the resentencing proceeding of October 24, 2014, the Commonwealth did not request a life without parole sentence. It did argue, however, that defendant's school and mental health treatment records demonstrated an entrenched tendency to violence and inability to rehabilitate. From an early age defendant was diagnosed with oppositional deviance disorder and conduct disorder, characterized by chronic anger, vindictiveness, and violent aggression. His conduct in school included an assault on school personnel, attempts to injure others, threats, destruction of property, and harassment. He was repeatedly suspended and once had to be expelled. He had been

arrested three times as a juvenile but all adjudications were deferred. In addition, a photograph of eyewitness Andrew Williams that had been provided to defendant in discovery was posted on Facebook, with vituperative commentary identifying the witness as (among other, more vile appellations) a "rat." Defendant's demeanor at resentencing in 2014 also contrasted to that in 2012 (when he was unaware of *Miller*), at which time he had been unapologetic and without remorse (N.T. 10/24/14, 24-38).

The trial court considered the factors noted in *Batts* and decided not to impose life without parole. It explained it was imposing 50 years to life because on appeal only the murder sentence had been vacated, which prevented restructuring the low sentences for the other offenses, such as defendant's 3 to 6 year term for aggravated assault on victim Malcolm Green (N.T. 10/24/14, 52-54).

Defendant did not argue at that proceeding that a 50-year minimum term was effectively a life term. He did not produce, or offer to produce, expert testimony, actuarial tables, or any evidence of any kind, that his normal life span would end before he could obtain parole. Though he subsequently filed a post sentence motion asserting that 50 years was "the functional equivalent of a life sentence," he cited as the sole basis for this claim an assertion that at age 67 he would be a "senior citizen" (post sentence motion, ¶2). The balance of the motion, after briefly alleging an abuse of discretion, consisted of legal arguments, all of which assumed he had been sentenced to life without parole.

Defendant appeals.

SUMMARY OF ARGUMENT

Defendant argues that, due to his life expectancy, his minimum term of 50 years for first degree murder is a "de facto" life term. This is an allegation of fact, for which there are no facts. Defendant's life expectancy is anyone's guess. In the trial court he did not offer any evidence about his life expectancy, or claim that it rendered his sentence an actual denial of opportunity for parole. Contrary to his claim, the internet sources he now cites in hindsight do not say that average life expectancy (in reality around 80 years) gives him no practical chance for parole.

There is no authority for defendant's claim that this Court should make new law to declare a 50-year minimum the *de jure* equivalent of life without parole. Such line drawing is an inherently legislative function. The handful of state supreme courts in other jurisdictions that have ventured to draw such a line have reached no consensus, and some say that 60 or 80 years is permissible.

There is no challenge to the discretionary aspects of sentence, since defendant omitted any such claim from his statement of questions presented, and offers no argument on that topic in his brief.

The judgments of sentence should be affirmed.

ARGUMENT

I. Defendant was not sentenced to life without parole.

Defendant argues that a 50-year minimum term is a "de facto" life sentence, and so subject to *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). But those cases concern actual life without parole sentences. He, in contrast, relies on a supposed fact – that his particular "life expectancy" effectively prevents parole – that he never proved or attempted to prove. There is no authority for his related clam that this Court should make new law to declare a 50-year minimum term the equivalent of a life-without-parole sentence.

1. Defendant's "de facto" claim is an unproven fact claim.

Under *Miller* juvenile life without parole is allowed only for the "rare" juvenile offender "whose crime reflects permanent incorrigibility." *Miller*,132 S. Ct. at 2469. *Montgomery* held that *Miller* is retroactive on collateral review,[2] and reiterated that, for the typical juvenile offender, "whose crime reflects transient immaturity," life without parole "is disproportionate under the Eighth Amendment." *Montgomery*, 136 S. Ct. at 735-736. *Miller* and *Montgomery* thus concern juvenile life *without* the

[2] *Miller* extended prior decisions concerning the unique characteristics of juvenile offenders. *Roper v. Simmons,* 543 U.S. 551 (2005), barred the death penalty for juvenile offenders. *Graham v. Florida,* 560 U.S. 48 (2010), held that such offenders could not be sentenced to life without parole for non-homicides. In *Miller* the Court cited *Roper* and *Graham* for the proposition that because juveniles differ from adults, especially in their capacity for rehabilitation, they should usually be immune to life without parole sentences. *Roper* at 570; *Graham* at 68; *Miller* at 2464. As explained in *Montgomery*, *Miller* applies retroactively because it is "no different" from *Atkins v. Virginia*, 536 U.S. 304 (2002). That is, a juvenile offender must be allowed to "show that he belongs to the protected class" immune to life without parole, in that "[the] crime did not reflect irreparable corruption[.]"

possibility of parole, not *with* the possibility of parole. The latter kind of sentence, which defendant received, is the type of penalty those decisions (except in exceptional cases) require. "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham*, 560 U.S. at 82.

While defendant nevertheless characterizes his 50-year minimum term as a "de facto" life term, this is mere rhetoric: saying so does not make it so. Missing from his "de facto" argument are facts.

"[B]ased on average life expectancy," defendant argues (for the first time), "the federal government has recognized that a fifty year minimum sentence ... constitutes a life sentence" (defendant's brief, 17). But that is simply not true.

Defendant's assertion about the "federal government" rests solely on a U.S. Sentencing Commission publication which explains that it "reports" a sentence of 470 months as a "proxy" for an actual life sentence; in other words, as a statistical contrivance. *Quarterly Data Report*, appendix A, p. 7 ("In cases where the court imposes a sentence of life imprisonment, a numeric value is necessary to include these cases in any sentence length analysis. Accordingly, life sentences are reported as 470 months"); *Life Sentences In The Federal System*, 10.[3] The judicial branch of

[3] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf. While footnote 52 in the latter publication states that the figure of 470 months is "consistent with the average life expectancy of federal criminal offenders," nothing published by the federal government actually says what "average life expectancy" is. It is likely no such estimate is possible. First, life sentences – including both real and "proxy" ones (continued...)

the federal government has recognized that a term of 480 months is *not* a life sentence. *United States v. Walton*, 537 F. App'x 430, 437, 2013 WL 3855550 (5th Cir. 2013) (unpublished), *cert. denied* 134 S. Ct. 712 (2013) (rejecting "novel" claim that *Graham* and *Miller* apply to a 480 month term).[4]

Other parts of the federal government also disagree with defendant. The Internal Revenue Service, for example, expects someone of defendant's age to live to 83. The Center for Disease Control / National Center for Health Statistics expects residents of the United States to live beyond age 78. The CIA says average life expectancy is age 79. And the Social Security Administration (an agency concerned with life expectancy because it determines the cost of future federal benefits it will distribute) says someone born in 1992, like defendant, should live to age 82.[5]

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[3](...continued)
– are only 1.1% of all federal sentences (*id*., p. 10), a small sample size that would make statistical analysis unreliable. Second, the federal government generally does not allow prisoners to die in the federal system, but removes aging prisoners by compassionate release and other programs. Ultimately, there appears to be no rational basis at all for deeming 470 months a "proxy" for a life sentence, except perhaps as an arbitrary way of inflating the burdens on the federal system for budgetary or other bureaucratic purposes.

[4] The seventh circuit decision defendant cites, *United States v. Nelson*, 491 F.3d 344, 349-350 (7th Cir. 2007), merely notes that an *actual* life sentence must be classified under the highest federal sentencing guideline range. *Id.* at 349 ("a straightforward interpretation of the Guidelines requires a finding that the applicable guideline range for a mandatory minimum sentence of life *is* life, which can only be found at offense level 43") (original emphasis). *Nelson* does not hold, or even suggest, that 50 years is considered life by "the federal government."

[5]
IRS life expectancy calculator
[http://www.free-online-calculator-use.com/calculate-life-expectancy.html];

(continued...)

Defendant will be eligible for parole long before that, at age 67 (which was the life expectancy around World War II, circa 1940).

Defendant's actual life expectancy, moreover, cannot be guessed on this record. The above federal government life expectancy figures are averages; he never offered any facts to support a specific estimate of his own life expectancy, which, for all the record shows, might be above average.

Defendant's other "factual" source is not associated with the federal government (or any government), but is the unverifiable online pronouncement of something called "The Campaign For The Fair Sentencing Of Youth," apparently based in Michigan. It asserts that Michigan inmates live only to age 50. But the internet is not evidence, and defendant cites no Michigan court (or any other) that has treated that assertion as if it were true.[6]

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[5](...continued)
Internal Revenue Service: Supplement to Publication 590, Table 1, Single Life Expectancy Table
[http://personal.fidelity.com/products/retirement/inheritedira/lifeexptable.html]

U.S. life expectancy now 78.8 years (10/8/14)
[http://www.medicalnewstoday.com/articles/283625.php]

CIA world factbook
[https://www.cia.gov/library/publications/the-world-factbook/rankorder/2102rank.html]

Social Security Administration longevity calculator
[https://www.ssa.gov/cgi-bin/longevity.cgi]

[6] The average life expectancy in Michigan, over 78, is the same as Pennsylvania, at least according to an equally unverifiable internet source that purports to measure such things: http://www.worldlifeexpectancy.com/usa/michigan-life-expectancy

Defendant's assertion – that, based on his supposed life expectancy, his sentence is a "de facto" one of life without parole – is an assertion of fact. But there are no facts: he offered no evidence in the trial court about his life expectancy, and never even mentioned to the court that there might be any factual support, even from the internet, for his argument. He only vaguely asserted, in a post-sentence motion filed after evidentiary proceedings were closed, that he would be a "senior citizen" when eligible for parole. That is insufficient to allow him to allege that his sentence is "de facto" life without parole. Consequently, all of his legal arguments that assume this nonexistent factual proposition are invalid.

2. This Court should not make new law to equate a 50-year minimum for first degree murder with life without parole.

The *Miller* line of cases deals with "meaningful opportunity to obtain release," *Graham*, 560 U.S. at 79, not the subsequent length of parole. It is theoretically possible for a minimum sentence to be so long as to deny the opportunity in practice, but only if it makes parole impossible "before the end of the [maximum] term." *Graham*, *id.* at 82. In *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014), for example, the Supreme Court of Indiana found that a minimum term of 150 years did so, and reduced it to 80 years: the Court did not consider 80 years a life sentence. Nebraska held under *Miller* and *Montgomery* that a 60-year sentence is not equivalent to life without parole. *State v. Cardeilhac*, 876 N.W.2d 876, 886 (Neb. 2016). Such decisions undermine defendant's view that a 50-year term clearly denies the possibility of parole, and must be deemed life without parole as a matter of law.

Casiano v. Commissioner of Correction, 115 A.3d 1031 (Conn. 2015)

nevertheless declared that a 50-year term was equivalent to life without parole; *State v. Null*, 836 N.W.2d 41 (Iowa 2013) did so as to minimum term of 52.5 years; and *Bear Cloud v. State*, 334 P.3d 132, 136 (Wyo. 2014) did so as to an aggregate 45-year term, albeit after the state legislature limited minimum terms to 25 years.[7] But these decisions are outliers. As noted, the *Brown* court rejected 80 years as a supposed life sentence; *Cardeilhac* said the same as to 60; and the federal court in *Bunch v. Smith*, 685 F.3d 546, 551(6th Cir. 2012), held that an 89-year minimum sentence challenged under *Graham* was not contrary to clearly established federal law. A Florida intermediate appellate court rejected a claim that 50 years equals life in *Thomas v. State*, 78 So. 3d 644, 646 (Dist. Ct. App. 2011). There is no consensus in other jurisdictions, and there is no authority supporting defendant's argument that 50 years must be deemed a life term as a matter of law.

Miller and *Montgomery* draw no line at which a term of years could amount to life. It is not clear where such a line should be. Defendant of course says 50 years since he has that sentence, yet courts have ruled that minimums of 60 and 80 years

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[7] *Thomas v. Pennsylvania*, 2012 WL 6678686, at *1 (E.D. Pa. Dec. 21, 2012), ruled that a minimum of 65 years amounted to a life sentence (defendant's brief, 16 n.8) in a non-homicide case under *Graham*. But that is the unpublished decision of a trial-level federal court where relief was uncontested, and defendant's minimum term is not 65 years. Decisions from other states, also unpublished, implicitly disagree with *Thomas*. *Ellmaker v. State*, 2014 WL 3843076, at *9 (Kan. Ct. App. 2014) (unpublished), *review denied* (July 24, 2015) (rejecting claim that a 50-year minimum term is life, because the offender "actually has a chance for release from prison at the end of the term"); *People v. Lucero*, 2013 COA 53, ¶ 1, 2013 WL 1459477, at *1 (Colo. App.) (unpublished), *state certiorari granted*, *Lucero v. People*, No. 13SC624, 2014 WL 7331018, at *1 (Colo., Dec. 22, 2014) (84-year minimum term for non-homicide does not equal life).

do not qualify. 18 Pa.C.S. § 1102.1 specifies that a 17-year-old first degree murder offender must be sentenced to at least 35 years, with no limit on a higher minimum, yet the minimum here is only 15 years above that floor. If 50 years were disallowed, could the trial court replace it with 49, or 48? Deciding such policy questions is an inherently legislative task. *Commonwealth v. Hale*, 128 A.3d 781, 785-86 (Pa. 2015) (finding that *Miller* illustrates the "substantial policy considerations" involved in deciding juvenile culpability and that "such matters are generally reserved ... to the General Assembly"); *Commonwealth v. Hopkins*, 117 A.3d 247, 262 (Pa. 2015) (courts "may not supply omissions in a statute"; collecting cases).

Section 1102.1 did not control here because defendant committed the murder before its effective date, but his argument would constitutionally invalidate that statute, because it allows non-life minimum terms of more than 50 years. Such an argument fails, however, unless the statute is "clearly palpably and plainly" unconstitutional. *Commonwealth v. Hopkins*, 117 A.3d at 255; *see Commonwealth v. Batts*, 66 A.3d 286, 296 (Pa. 2013) (*Batts II*), (refusing to extend *Miller* to invalidate statutory sentencing scheme, citing the "strong presumption that legislative enactments do not violate the constitution"). Here, precisely because defendant offered no facts to support his claim that 50 years is categorically impermissible as a matter of constitutional law, that high bar is insurmountable. This Court should not make new law designating a 50-year minimum term a *de jure* life-without-parole sentence.

The remainder of defendant's brief (pages 18 through 36), to the extent it is not

moot, raises claims previously decided against him. His various arguments under *Miller* and *Montgomery* assume a nonexistent life without parole sentence. Those decisions do not apply to other kinds of sentences. He also asks this Court to go far beyond those cases and declare, for example, that juvenile murder offenders cannot be sentenced for first or second degree murder at all, but only third degree murder (*id.*, 31). The Supreme Court specifically rejected those arguments in *Batts II*, and this Court recently rejected them again in *Commonwealth v. Batts*, 125 A.3d 33, 42-43 (Pa. Super. 2015), *appeal granted in part*, 135 A.3d 176 (Pa. 2016) (*Batts III*). The Supreme Court granted allocatur in *Batts III* to decide if additional procedures are required to impose a juvenile life without parole sentence; there is no such issue here because, again, there is no such sentence. Hence, no relief is due.

II. Defendant did not preserve an abuse of discretion claim.

Defendant has filed a statement seeking permission to appeal the discretionary aspects of sentence under Pa.R.A.P. 2119(f). But that document is the one and only mention of such a claim. The arguments in his brief do not address this issue, which also does not appear in his "statement of the questions involved." For these reasons, any discretionary sentencing claim is waived. *E.g., Thomas v. Elash*, 781 A.2d 170, 176–77 (Pa. Super. 2001) (while preserved in post-trial motions, claims were waived on appeal by failure to include them in the statement of questions presented, as well as by failure to provide any supporting argument); *Commonwealth v. Charleston*, 94 A.3d 1012, 1021-1022 (Pa. Super. 2014) (issues waived where supporting argument undeveloped); Pa.R.A.P. 2116(b) (appellant challenging discretionary aspects of sentence "shall include" issue in statement of questions presented; failure to comply "shall constitute a waiver of all issues relating to the discretionary aspects of sentence").

Even had the claim not been waived, it could not be accepted for review because defendant's statement under Rule 2119(f) presents no basis for doing so. Rather than explain how sentencing norms supposedly were not followed, it argues that no request for review is necessary in light of the supposed "de facto life sentence" (defendant's brief, 10). Because defendant did not preserve or argue any discretionary sentencing claim, nor even ask for review of the trial court's discretion in selecting the sentence it actually imposed, review of the discretionary aspects of sentence should be denied.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Court to affirm the judgments of sentence.

Respectfully submitted,

/s/

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