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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA: EAL 2018

VS. : NO.

MICHAEL FELDER, :
Petitioner

PETITION FOR ALLOWANCE OF APPEAL FROM THE SUPERIOR TO THE SUPREME COURT

Petition To Allow An Appeal From The December 20, 2017 Judgment Of The Superior Court Of Pennsylvania (660 EDA 2015) Affirming The October 24, 2014 Judgment Of Sentence Of The Philadelphia Court of Common Pleas at CP-51-CR-0014896-2009 That Had Imposed A 50 Year to Life Sentence Upon A Juvenile.

Bradley S. Bridge, Esq.
PA Attorney ID No. 39678
Karl Baker, Esq.
Defender Association of Philadelphia
1441 Sansom Street
Philadelphia, PA 19102
Telephone (215) 568-3190

Marsha L. Levick, Esq.
Deputy Director/Chief Counsel
PA Attorney ID No. 22535
Juvenile Law Center
1315 Walnut Street, 4th floor
Philadelphia, PA 19107
Telephone (215) 625-0551

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA: EAL 2018

VS. : NO.

MICHAEL FELDER, :
Petitioner

PETITION FOR ALLOWANCE OF APPEAL FROM
THE SUPERIOR TO THE SUPREME COURT

TO THE HONORABLE, THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT:

Michael Felder, through Bradley S. Bridge, Assistant Defender, Karl Baker, Assistant Defender, Chief, Appeals Division, Keir Bradford-Grey, Defender, and co-counsel, Marsha Levick, Deputy Director, Juvenile Law Center, requests the allowance of an appeal in the captioned matter and respectfully represents:

1. This is a Petition for Allowance of Appeal from the unpublished Memorandum Superior Court decision of December 20, 2017, in which a panel of that Court affirmed the 50 year to life *de facto* life sentence imposed on a juvenile. However, that panel refused to consider whether a sentence of 50 years to life constituted a *de facto* life sentence such that Michael Felder would be unlikely to live long enough to be considered for parole. Instead of considering the cited life span studies of prisoners, the Superior Court panel declared that Mr. Felder's sentence was

"obviously" not a life sentence and it "clearly" did not exceed his life expectancy. As this is a critically important issue to all juveniles in Pennsylvania found guilty of either first or second degree murder, and all juvenile lifers such as Michael Felder requiring resentencing, this Court is critically needed to resolve this constitutional question and provide guidance to the appellate and trial courts. The Superior Court's Opinion is attached hereto as Exhibit A. The trial judge's opinion is attached hereto as Exhibit B.

2. The question presented by the instant Petition For Allowance Of Appeal is:

Does not a sentence of 50 years to life imposed upon a juvenile constitute a *de facto* life sentence requiring the sentencing court, as mandated by this Court in Commonwealth v. Batts, 163 A.3d 410 (Pa. 2017)("Batts II"), first find permanent incorrigibility, irreparable corruption or irretrievable depravity beyond a reasonable doubt?

3. The facts giving rise to the instant Petition For Allowance of Appeal:

Michael Felder, was found guilty of first degree murder on March 7, 2012, and was sentenced to mandatory life imprisonment without the possibility of parole. He timely appealed and on June 27, 2014, the Superior Court remanded for sentencing, holding that, based the decisions that had come down after sentencing, Miller v.

Alabama, 132 S.Ct. 2455 (2012) and Commonwealth v. Batts, 66 A.3d 286 (Pa. 2013)("Batts I"), Michael Felder had been given an unconstitutional life without parole sentence. Resentencing occurred on October 24, 2014. The defense initially argued 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 while in prison that he had grown and demonstrated rehabilitation. He obtained his GED (N.T. 10/24/14, 11). He had participated in programing; in fact his violence prevention counselor said that he had demonstrated that he was willing to challenge the 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). The sentencing judge, having explained that in determining the sentence she considered the decisions in Miller and Batts I, then resentenced Michael Felder to 50 years to life (N.T. 10/24/14, 56-57).

Defense counsel petitioned the court to reconsider that sentence. Among the objections raised was 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 that such a sentence should be "rare" or "uncommon." The post-

sentence motion was denied by operation of law. Counsel timely appealed to the Superior Court.

Ten months after the appeal was filed in the Superior 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 never had the opportunity to comply with Montgomery's constitutional requirements.

In the Superior Court Michael Felder contended that his 50 year to life sentence was a *de facto* life sentence. Numerous cases from around the country were cited as holding that particular lengthy sentences constituted *de facto* life and, hence, offended Miller and Montgomery. In addition, studies regarding prisoner life expectancy were cited demonstrating that it was unlikely that Michael Felder would live to see the possibility of parole when he was sixty-seven years old. The Superior Court, in an unreported Memorandum Decision, concluded that it was "unconvinced that we are required to treat Felder's 50-year minimum as a life sentence" because such a sentence "does not obviously extend to the life expectancy of the juvenile" and it "does not clearly exceed life expectancy." Commonwealth v. Felder, ___ A.3d ___ (Pa. Super, December 20, 2017), slip decision at 4, 8 (emphasis supplied). Michael Felder now seeks review in this Court.

4. Reasons for granting this Allowance Of Appeal.

Michael Felder received a 50 year to life sentence. The sentencing court did not have the benefit of this Court's decision in Batts II or Montgomery because those decisions came down after sentencing. The issue presented here is whether a sentence of 50 years to life is a *de facto* life sentence. This is a particularly important question not just for Michael Felder but for all juveniles who in the future will be charged with first or second degree murder[1] and for all juvenile lifers, like Michael Felder, being resentenced. The question here is:

Does not a sentence of 50 years to life imposed upon a juvenile constitute a *de facto* life sentence requiring that the sentencing court, as mandated by this Court in Commonwealth v. Batts II, 163 A.3d 410 (Pa. 2017), first find permanent incorrigibility, irreparable corruption or irretrievable depravity beyond a reasonable doubt?

What constitutes a *de facto* life sentence such that this Court's Batts II holding applies and requires the sentencing court prior to imposition of such a sentence to find beyond a reasonable doubt that the defendant is "'the rarest of juvenile offenders' whose crimes reflect 'permanent incorrigibility,' 'irreparable corruption' and 'irretrievable depravity?'" *Id.* at 416. The Superior Court's unreported Memorandum Decision does not provide any guidance to appellate or trial courts on that issue,

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[1]Under current Pennsylvania law, any juvenile convicted after June 24, 2012, of either first or second degree murder must receive a sentence with a mandatory minimum of any number of years and a maximum term of life. 18 Pa.C.S.A. § 1102.1

leaving it up to this Court to do so.

The resentencing court here made no finding that Michael Felder was permanently incorrigibility, irreparably corrupt or irretrievably depraved because sentencing was in 2014, before the decisions in Montgomery (2016) and Batts II (2017) mandated such factual findings. U.S.CONST., Amend. VIII, XIV. The Superior Court, by not examining the factual basis to conclude that a 50 year to life sentence constituted *de facto* life, did not compel the resentencing court to meet the Batts II standard.

While what constitutes a *de facto* life sentence is a question of first impression (still) in Pennsylvania, numerous states have examined this issue. In the Superior Court counsel cited 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) where the Supreme Court of Connecticut agreed with the defendant 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 Iowa Supreme Court in State v. Null, 836 N.W. 2d 41 (Iowa, 2013), also cited to the Superior Court, held that a 52½ year sentence was the functional equivalent of life imprisonment, triggering the protections established by Miller. In Bear Cloud v. State, 334 P.3d 132, 144

(Wyoming 2014) the Wyoming Court held that an aggregate sentence of 45 years was a *de facto* life sentence. It, too, was cited to the Superior Court.

The Superior Court's unreported Memorandum Decision relegated discussion of those three critical cases to a single footnote. Commonwealth v. Felder, slip decision at 5, n. 4. The Superior Court felt free to ignore Null, claiming that Null was decided under the Iowa Constitution. However, Null held that Miller and the federal constitution's 8th amendment mandated that it remand the sentence. See Null, *supra* at 76.[2]

The Superior Court panel distinguished Bear Cloud because it cited a federal sentencing statistical report "without commentary." Commonwealth v. Felder, slip decision at 5, n. 4. The Superior Court did not discuss the remand in Bear Cloud of the 45 year sentence meted out there based on the finding that it was a *de facto* life sentence. Thus, the Superior Court ignored the fact that the court in Bear Cloud analyzed competing *de facto* life decisions in well over a dozen different state courts in reaching its conclusion.

Most significantly, in that same single footnote the Superior Court included Casiano but did not even attempt to distinguish it even though counsel had relied

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[2]Null did declare, in a holding irrelevant to the issue here, that the Iowa state constitution may govern whether a sentence was concurrent or consecutive. See Null, *supra* at 77.

heavily on Casiano. Casiano has been cited and relied upon by numerous state courts in analyzing whether a case constitutes a *de facto* life sentence.

Though it ignored case law, the Superior Court did provide two possible explanations as to why Michael Felder's 50 year to life was not a *de facto* life sentence. First, correctly but irrelevantly, the Superior Court noted that Miller did not take a direct "stand on claims of *de facto* life sentences. As such, Miller does not directly apply." *Id.* at 8. Michael Felder never claimed that Miller decided this issue. Instead his claim was that a court cannot avoid the mandate of Miller by giving a life without parole sentence in another form.[3] A 100 year to life sentence given to a juvenile must comport with Miller no matter what the label. Second, in what amounts to putting the rabbit in the hat and then, abracadabra, pulling it out, the Superior Court claims that Michael Felder's sentence is "obviously" not a life sentence. *Id.* at 8. Further the Superior Court declared that his sentence "does not clearly exceed life expectancy." *Id.* at 8. The Superior Court gave no basis for these assertions. The terms "obvious" and "clear" are most frequently used when the proposed proposition is neither.

The Superior Court ignored studies included in Michael Felder's brief which

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[3]It would be improper to elevate form over substance. Bd of Cty Comm'rs v. Umbehr, 518 U.S. 668, 679 (1996).

established that his sentence was, in fact, a life sentence. One study from Michigan, cited by Casiano and quoted by counsel, determined that juvenile lifers have an average life expectancy of 50.6 years. A 50 year minimum sentence would be a life sentence in such a circumstance. A second study from New York, also cited by Casiano and quoted by counsel, found that on average among all prisoners including for those released there is a two year decline in life expectancy for each year of incarceration. Of course, juveniles who are not subject to release are a special case, and the study notes that "[t]he risk was highest upon release from prison and declined over time." Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. J. OF PUB. HEALTH 523 (2013)(abstract). However, the law review article which is cited in Casiano places this study in its appropriate context when it states:

> A person suffers a two-year decline in life expectancy for every year locked away in prison. Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. J. OF PUB. HEALTH 523, 526 (2013). The high levels of violence and communicable diseases, poor diets, and shoddy health care all contribute to a significant reduction in life expectancy behind bars. *See* United States v. Taveras, 436 F. Supp. 2d 493, 500 (E.D.N.Y. 2006) (finding "persistent problems in United States penitentiaries of prisoner rape, gang violence, the use of excessive force by officers, [and] contagious diseases" that lead to a lower life expectancy in prisons in the United States), *aff'd in part, vacated in part sub nom.* United States v. Pepin, 514 F.3d 193 (2d Cir. 2008); JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT 11 (2006).

> Entering prison at a young age is particularly dangerous. Youth incarcerated in adult prisons are five times more likely to be victims of sexual or physical assault than are adults. GIBBONS & KATZENBACH, *supra* note 142, at 11; Deborah LaBelle, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited Dec. 12, 2013).

N. Straley, "*Miller*'s Promise: Re–Evaluating Extreme Criminal Sentences for Children," 89 Wn. L.Rev. 963, 986 n. 142 (2014) (*cited in* Casiano v. Comm'r of Correction, 317 Conn. 52, 78, 115 A.3d 1031, 1046 (2015)). Michael Felder would first be eligible for parole at age 67. The impact of his fifty years in prison would make it highly improbable that he would survive to that age.

Not only do studies suggest that a 50 year minimum sentence constitutes a *de facto* life sentence, but numerous cases from around the country so hold. A number of favorable decisions were cited by counsel on appeal but, in fairness, it should be noted that there are some contrary decisions, albeit smaller in number. More recent decisions demonstrate that lengthy term of year sentences constitute *de facto* life. For example, there is a recent case from New Jersey:

> The term-of-years sentences in these appeals—a minimum of 55 years' imprisonment for Zuber and 68 years and 3 months for Comer—are not officially "life without parole." But we find that the lengthy term-of-years sentences imposed on the juveniles in these cases are sufficient to trigger the protections of *Miller* under the Federal and State

> Constitutions. *See* Casiano, *supra*, 115 A.3d at 1044 (50–year sentence without possibility of parole is subject to Miller); Null, *supra*, 836 *N.W.*2d at 71 (minimum sentence of 52.5 years' imprisonment invokes Miller). Defendants' potential release after five or six decades of incarceration, when they would be in their seventies and eighties, implicates the principles of Graham and Miller.

State v. Zuber, 227 N.J. 422, 448, 152 A.3d 197, 212–13 (2017), cert. denied, 138 S. Ct. 152, 199 L. Ed. 2d 38 (2017).

Pennsylvania law regarding *de facto* life sentences is an important issue. It arises in every single case post-Miller involving a juvenile convicted of first or second degree murder. If tomorrow a judge sentences a juvenile to 100 years to life, what legal doctrine would preclude it? The Superior Court provided no insight into that question. Yet it also arises in every single case pre-Miller where a juvenile originally sentenced to life without parole comes back for a new resentencing hearing. This Court's guidance is needed. The Superior Court got it wrong when it ignored the law from other states and several studies. This Court needs to provide the right answer and direction to the lower appellate courts as well as the trial courts in this Commonwealth – guidance the Superior Court abdicated when it issued an unreported Memorandum Decision.

CONCLUSION

For the reasons stated above, Michael Felder requests that this Honorable Court grant review of his 50 year to life sentence, find that it must be treated as a *de facto* life sentence, and remand for a new sentencing hearing or, alternatively, remand for an evidentiary hearing on the question of what constitutes a *de facto* life sentence.

Respectfully submitted,

/S/

Bradley S. Bridge, Esq.
PA Attorney ID No. 39678
Defender Association of Philadelphia
1441 Sansom Street
Philadelphia, PA 19102

Marsha L. Levick, Esq.
Director/Chief Counsel
PA Attorney ID No. 22535
Juvenile Law Center
1315 Walnut Street, 4th floor
Philadelphia, PA 19107

CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/S/

KARL BAKER, Assistant Defender
Attorney Registration No. 23106

EXHIBIT "A"

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MICHAEL FELDER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 660 EDA 2015

Appeal from the Judgment of Sentence October 24, 2014
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0014896-2009

BEFORE: OTT, J., RANSOM, J., and FITZGERALD, J.*

MEMORANDUM BY OTT, J.: **FILED DECEMBER 20, 2017**

Michael Felder appeals from the judgment of sentence imposed on October 24, 2014, in the Court of Common Pleas of Philadelphia County on the charge of first-degree murder. Felder, a juvenile at the time of the crime, was tried and convicted by a jury in 2012. He was originally sentenced to a mandatory term of life imprisonment without the possibility of parole. That sentence was vacated pursuant to ***Miller v. Alabama***, 132 S.Ct. 2455 (2012) and ***Commonwealth v. Batts***, 66 A.3d 286 (Pa. 2013). On October 24, 2014, following a re-sentencing hearing, Felder was sentenced to a term of 50 years' to life incarceration. Felder has filed this timely appeal in which he claims he received a *de facto* life sentence and, therefore, his new sentence

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* Former Justice specially assigned to the Superior Court.

is also unconstitutional. Following a thorough review of the submissions by the parties, relevant law, and the certified record, we affirm.

We briefly recount the underlying facts of this matter. On September 3, 2009, Felder and another young man played a two-on-two basketball game against brothers Jarrett and Malcolm Green, on the outdoor courts at the Shepard Recreational Center in Philadelphia, Pennsylvania. The game was still young when Felder became upset and retrieved a .380 semiautomatic handgun from his gym bag. Felder shot Jarrett Green in the stomach and leg, killing him. He also shot and wounded Malcolm Green. Felder was apprehended on September 27, 2009. He was tried and convicted by a jury of first-degree murder regarding Jarrett Green and aggravated assault regarding Malcolm Green.

As noted above, Felder's initial sentence for first-degree murder, life imprisonment without the possibility of parole, was vacated as unconstitutional. In the judgment order that vacated Felder's judgment of sentence, this Court instructed the trial court to consider a list of factors found in ***Commonwealth v. Batts***, ***supra***, 66 A.3d at 297.[1] On October 24, 2014,

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[1] This list of factors was first announced in ***Commonwealth v. Knox***, 50 A.3d 732, 745 (Pa. Super. 2012). ***Knox*** noted that, in ***Miller***, the United States Supreme Court did not provide a specific list of factors to be considered upon sentencing juveniles under relevant convictions. ***Knox*** provided a non-exclusive list of factors it distilled from ***Miller***.

following a hearing, Felder was re-sentenced to a term of 50 years' to life imprisonment.[2] Felder now raises four issues in this appeal. They are:

> 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?
>
> 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?
>
> 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?
>
> 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?

Felder's Brief at 4.

Initially, we note that Felder's claims are a challenge to the legality of his sentence. "Issues relating to the legality of a sentence are questions of law. Our standard of review over such questions is *de novo* and our scope of review is plenary." ***Commonwealth v. Furness***, 153 A.3d 397, 405 (Pa. Super. 2016) (citation omitted).

Felder's first three arguments are related, if not identical, and we will address them together. All of these arguments rest upon the same foundation

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[2] The trial court did not re-sentence Felder on any charge other than first-degree murder.

– that a 50-year minimum sentence is a *de facto* life sentence. As such, it would be immaterial that Felder would be eligible for parole after 50 years. Prevailing law forbids juveniles from life sentences without parole, except in extraordinary circumstances. Failing proof of those circumstances, Felder claims his sentence is just as unconstitutional as the sentence struck down in ***Miller***.[3]

Without commentary, the trial court rejected Felder's claim of unconstitutionality. While cogent analysis of legal issues by the trial court is

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[3] Following Miller, Pennsylvania enacted a new sentencing statute for juveniles convicted of first-degree murder. We quote that portion applicable to juveniles between the ages of 15 and 18, which would have been applicable to Felder.

> **a) First degree murder.--** A person who has been convicted after June 24, 2012, of a murder of the first degree, first degree murder of an unborn child or murder of a law enforcement officer of the first degree and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows:
>
> > (1) A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 35 years to life.

18 Pa.C.S. § 1102.1(a)(1).

However, because Felder was not convicted after June 24, 2012 (***Miller*** was decided on June 25, 2012), this statute does not apply instantly. Our review of the certified record leads us to believe that the sentencing judge, while not bound by the new law, was guided by it and subsequent case law applying this statute.

always beneficial, we are not unduly hampered in our review. Our review of the certified record and Felder's argument leaves us unconvinced that we are required to treat Felder's 50-year minimum sentence as a life sentence.

In his post-sentence motion, filed October 29, 2014, Felder cites ***United States v. Nelson***, 492 F.3d 344, 349-50 (7th Cir. 2007) and the U.S. Sentencing Commission Preliminary Quarterly Data Report (Report),[4] for the proposition that federal law defines a life sentence as 470 months. ***Nelson*** does not arrive at the 470-month figure independently; it merely cites an earlier version of the Sentencing Commission data. Our reading of the Report leads us to a different conclusion.

Appendix A of the Report lists variables involved in sentencing. One of those variables is "sentence length". ***See*** Report, Appendix A, p. 8. In relevant part, the Report states:

> 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, a length consistent with the average life expectancy of federal criminal offenders given the average age of offenders. Also, sentences of greater than 470 months are also

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[4] This Report is from 2012. It may be viewed at: http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/USSC_2012_3rd_Quarter_Report.pdf. In his brief, Felder also cites case law from Wyoming, Iowa and Connecticut in support of his claim. ***See, Bear Cloud v. State***, 334 P.3d 132 (Wyo. 2014); ***State v. Null***, 836 N.W.2d 41 (Iowa 2013); ***Casciano v. Commissioner of Correction***, 115 A.3d 1031 (Conn. 2015). ***Bear Cloud*** cited a similar federal sentencing statistical report without commentary. ***Null*** was decided under an analysis of the Iowa Constitution. ***Null***, 836 N.W. 2d at 70-71.

> reported as 470 months for some analyses. The footnote in the relevant tables and figures indicates when this occurs.

Report, Appendix A, p. 8.

While the Report does indicate that the average life sentence is 470 months, slightly more than 39 years, it also acknowledges that there are other sentences greater than 470 months and that those sentences, however much longer, have simply been designated as being 470 months long. Also, the 470-month "definition" is specifically dependent upon the average age of the federal offender. There is nothing in this "definition" to indicate the average age. Accordingly, the 470-month expression of a life sentence is a number without context.[5] Without context, we cannot begin a proper constitutional analysis as to the meaning of a 470-month life sentence. In addition to being a statistic out of context, we also note that neither the 7th Circuit decision nor a preliminary statistical report is binding upon this Court.

There are other jurisdictions, also not binding upon this Court, which have been presented with similar claims and found lengthy sentences were not unconstitutional. In ***Tennessee v. Merritt***, 2013 WL 6505145 (Tenn. Crim. App. 2013) (unpublished), the court of criminal appeals determined a

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[5] We do not know the age of the offenders when sentenced, nor how old they are at the expiration of the life sentence, presumably that being the expiration of their life. If the average federal "lifer" dies at age 75, then, as applied to Felder, his "life sentence" might be considered to be 684 months. (Felder was 17.5 when arrested and incarcerated. Rounding that age up to 18, his life sentence would be 57 years, or 685 months.) If the average federal offender is 30 years old when incarcerated (Nelson, from ***U.S. v. Nelson***, ***supra***, was 30 years old), then the 470-month "life sentence" terminates, on the average, at 69 years of age. These two hypothetical examples demonstrate a wide disparity in results.

225 year minimum sentence was constitutional, but was, nonetheless, excessive. In ***New Jersey v. James***, 2012 WL 3870349 (N.J. Super. Ct. App. Div. 2012) (unpublished), a 268-year minimum sentence was not unconstitutional as it was a product of a discretionary sentencing scheme.

All of these cases are informative, yet none provides a clear resolution to our matter. The fact that there is such a great disparity in approach and interpretation of the dictates of ***Miller***, if nothing else, demonstrates the difficulty of the problem. Herein, Felder received a significant sentence and will be almost 68 years old when he becomes eligible for parole. However, it cannot be overlooked that Felder committed a particularly senseless crime and had a significant history of anti-social and violent behavior for his young age. ***See*** N.T. Sentencing, 10/24/2014.

Our Supreme Court, in ***Commonwealth v. Batts***, 66 A.3d 115, 137 (Pa. 2013), found the Pennsylvania Constitution at Art. 1, § 13, provides no greater protection regarding cruel and unusual punishment than does the United States Constitution at the 8th Amendment. With that in mind, ***Miller*** held that a *mandatory* sentencing scheme, one, which, by definition, does not take into account the individualized needs and circumstances of a juvenile, that automatically provides for a life sentence without parole, is unconstitutional., However, ***Miller*** did not deem all juvenile life sentences without parole unconstitutional. ***Miller*** did not address a situation, such as is before us, wherein a juvenile defendant was given a significant sentence upon the discretion of the trial court; a significant sentence that arguably

approaches, but which does not obviously extend to the life expectancy of the juvenile.

Here, Felder's sentence was not the product of a mandatory sentencing scheme. His sentence, while significant, was the result of an individualized and discretionary sentencing hearing, at which the trial judge considered the 12 factors distilled from ***Miller*** and ***Batts***. ***See***, N.T. Re-Sentencing, 10/24/2015, at 51-52.[6] Also, ***Miller*** takes no stand on claims of *de facto* life sentences. As such, ***Miller*** does not directly apply. Additionally, as discussed, Felder's claim of a *de facto* life sentence is based upon flawed grounds. Accordingly, under the Pennsylvania and United States Constitutions, as interpreted in ***Miller v. Alabama***, ***supra***, and ***Commonwealth v. Batts***, ***supra***, we conclude that when a juvenile convicted of homicide has been subjected to a discretionary sentence that may approach, but does not clearly exceed life expectancy, that sentence does not run afoul of ***Miller***[7] and

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[6] The 12 factors are: age of defendant at the time of the crime; evidence of diminished capacity; evidence of capacity for change; extent of participation in the crime; family, home and neighborhood environment; extent of familial or peer pressure; past exposure to violence; drug and alcohol history; ability to deal with the police; capacity to assist attorney; mental health history; and potential for rehabilitation. The trial judge also considered the ***Miller*** and ***Batts*** cases, and her own "very lengthy contemporaneous notes taken during both the trial of this case and during the original sentencing proceeding." ***Id.*** at 51.

[7] Nonetheless, while that sentence may be constitutional, it does not mean the sentence is automatically proper. While a claim of a manifestly excessive sentence does not rise to the level of cruel and unusual punishment, a manifestly excessive sentence may still be challenged. ***See***, ***Commonwealth v. Best***, 120 A.2d 329, 348-49 (Pa. Super. 2015) (claim of manifestly

therefore does not violate the Federal Constitution, 8th Amendment, or Pennsylvania Constitution, Art. 1, Sec. 13, prohibitions against cruel and unusual punishment.[8]

Because Felder's sentence is not a *de facto* life sentence without parole and does not violate either the United States or Pennsylvania Constitutions, Felder is not entitled to relief on any of his first three issues.

Felder's final issue is a claim that when ***Miller*** invalidated Pennsylvania's mandatory sentencing for first and second-degree murder as applied to juveniles, the only statutory sentencing scheme left in place was for third-

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excessive sentence constituting too severe a punishment raises a substantial question appropriate for appellate review).

[8] On June 12, 2017, the United States Supreme Court issued a Per Curiam opinion in ***Virginia v. LeBlanc***, 582 U.S. _____ (2017) (Justice Ginsberg concurring). The issue was similar to the instant matter. In ***LeBlanc***, a 16-year-old defendant had been sentenced to life imprisonment for rape. After ***Graham v. Florida***, 560 U.S. 48 (2010) was decided, he petitioned for resentencing. Virginia denied his request and the U.S. Supreme Court affirmed, citing Virginia's geriatric release program in which, relevant to LeBlanc, a 60 year old defendant who has served at least 10 years of a sentence can request conditional release from the Parole Board. This possibility of release was sufficient to meet the ***Graham*** requirement for providing "the meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation required by the Eighth Amendment." ***LeBlanc*** at *2-3. (We have only a copy of the slip opinion. Page numbers refer to that printing.) Accordingly, it was not constitutionally infirm to require LeBlanc to serve 44 years of his sentence prior to the possibility of parole. The U.S. Supreme Court's decision in ***LeBlanc***, supports our determination that Felder's sentence is not unconstitutional.

degree murder. Accordingly, Felder claims he is entitled to be resentenced pursuant to that law.[9] We disagree.

This issue has been presented to and decided by our Supreme Court in ***Commonwealth v. Batts***, ***supra***. Therein, our Supreme Court considered and rejected this argument. ***See Batts***, 66 A.3d at 293-96. Felder claims the Supreme Court's reasoning fails in light of ***Montgomery v. Louisiana***, 136 S.Ct. 718 (2016), but provides no substantive argument or analysis to support that bald statement. Because this crucial aspect of his argument has not been developed, the issue is waived. ***See Commonwealth v. Spotz***, 18 A.3d 244, 282 (Pa. 2011) (failure to develop argument waives claim: appellate court "will not attempt to divine an argument on Appellant's behalf"). Accordingly, we are bound by our Supreme Court's determination in ***Batts***, ***supra***, that a sentencing court is not limited, in this situation, to the punishment available for third-degree murder.

Judgment of sentence affirmed.

Judge Ransom joins this memorandum.

Justice Fitzgerald concurs in the result.

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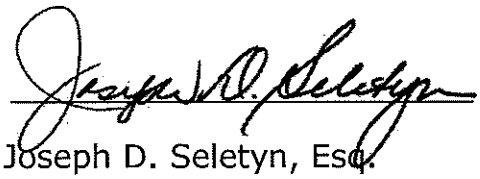
[9] "Notwithstanding section 1103, a person who has been convicted of murder of the third degree ... shall be sentenced to a term which shall be fixed by the court at not more than 40 years." 18 Pa.C.S. § 1103(d). Accordingly, if Felder was subject to sentencing for third-degree murder, the maximum sentence of 40 years' incarceration would represent ten years less than his current minimum 50 year term of incarceration.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/20/2017

EXHIBIT "B"

IN THE COURT OF COMMON PLEA OF PHILADELPHIA COUNTY

CRIMINAL TRIAL DIVISION

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

FILED
FEB 18 2016
Criminal Appeals Unit
First Judicial District of PA

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.

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[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,

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[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.