

IN THE SUPREME COURT OF PENNSYLVANIA

18 EAP 2018

COMMONWEALTH OF PENNSYLVANIA

V.

MICHAEL FELDER, APPELLANT

BRIEF OF APPELLANT

Appeal from the Superior Court decision at 660 EDA 2015 of December 20, 2017 which affirmed the October 24, 2014 Judgment of Sentence in the Court of Common Pleas, Philadelphia County, Docket CP-51-CR-0014896-2009 which had imposed a Sentence of Fifty Years to Life.

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

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

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this matter pursuant to 42 Pa.C.S.A. §724(a), which provides that orders of the Superior Court may be reviewed by this Court upon allowance of appeal. On June 19, 2018, this Court granted Michael Felder's Petition for Allowance of Appeal. Pa.R.A.P. 1112(a). The issue this Court granted for review 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?

II. ORDER IN QUESTION

The December 20, 2017 order of the Superior Court affirming the October 24, 2014 judgement of sentence of the Philadelphia Court of Pleas. Commonwealth v. Felder, 181 A.3d 1252 (Pa. Super., 2017) (Table), *petition for allowance of appeal granted*, 187 A.3d 909 (Pa., 2018).

III. 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 Michael Felder. Issues concerning the constitutionality of a criminal sentence are questions of law and this Court's review is plenary.

The scope of review is the entire record. .

IV. STATEMENT OF THE QUESTIONS INVOLVED

Is not a sentence of 50 years to life a *de facto* life sentence requiring, as mandated by this Court in Commonwealth v. Batts, 163 A.3d 410 (Pa. 2017) (“Batts II”), that the sentencing court find beyond a reasonable doubt that the juvenile was permanently incorrigible, irreparably corrupt or irretrievably depraved?

V. STATEMENT OF THE CASE

Before this Court is the propriety of Michael Felder's second sentencing. At his first sentencing he was given an unconstitutional mandatory life sentence after he was found guilty of first degree murder in the Philadelphia Court of Common Pleas, CP-51-CR-0014896-2009. An appeal to the Superior Court was timely filed and on June 27, 2014, in an unpublished opinion the Superior Court (2148 EDA 2012) agreed that Mr. Felder had been given an unconstitutional mandatory life without parole sentence and remanded for resentencing.

That resentencing hearing occurred on October 24, 2014, before the Honorable Shelley Robins New of the Philadelphia Court of Common Pleas. The defense maintained that the shooting here, as part of an escalating argument over a basketball game, was demonstrative of an underdeveloped juvenile brain and that as a juvenile Michael Felder had a greater capacity than an adult to change and rehabilitate himself (N.T. 10/24/14, 7).¹ Defense counsel outlined the many ways that Michael Felder had proven during his incarceration that he had grown and demonstrated rehabilitation. He had obtained his high school diploma and participated in prison programming (N.T. 10/24/14, 11). This is significant because he was intellectually challenged

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

(N.T. 10/24/14, 9). His violence prevention counselor said that he had demonstrated that he was willing to challenge his 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). He had strong family ties as demonstrated by the fact that his mother and four cousins were present in court for the resentencing hearing (N.T. 10/24/14, 12).

The resentencing judge explained that in determining the sentence she considered the decisions in Miller and Batts² and had examined the Miller factors (N.T. 10/24/14, 51-52). However, in her written opinion, she revealed that it was the facts of the offense that were most influential. Opinion of Robins New at 3-4.³ She resentenced Michael Felder to 50 years to life (N.T. 10/24/14, 56-57).

Defense counsel petitioned the sentencing court to reconsider the sentence. Among the objections raised was that the sentence meted out was a *de facto* life without parole sentence, that such sentences must be “rare” or “uncommon” and that the United States Constitution requires a presumption against a life without parole

² Judge Robins New had considered only Batts I [Commonwealth v. Batts, 66 A.3d 286 (Pa. 2013)] because Batts II [Commonwealth v. Batts, 163 A.3d. 410 (Pa. 2017)] was not decided until several years after this resentencing hearing.

³ A copy of the opinion of Judge Robins New is attached hereto as Exhibit “B.”

sentence. The petition was denied and counsel timely appealed to the Superior Court.

Ten months after that appeal was filed the United States Supreme Court decided Montgomery v. Louisiana, 136 S.Ct. 718 (2016). Twenty-seven months after the appeal was filed this Court decided Commonwealth v. Batts, 163 A.3d. 410 (Pa. 2017) (hereinafter “Batts II”). Given that Montgomery and Batts II were decided after the trial court’s sentencing decision, the trial judge never had the opportunity to comply with their constitutional requirements.

On December 20, 2017, the Superior Court in an unreported Memorandum Decision⁴ 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).

This Court granted Allowance of Appeal on June 19, 2018.⁵

⁴ A copy of the Superior Court memorandum decision in this matter is attached hereto as Exhibit “A.”

⁵ A copy of this Court’s order granting the Allowance of Appeal is attached hereto as Exhibit “C.”

VI. SUMMARY OF THE ARGUMENT

At his resentencing hearing, Michael Felder was sentenced to 50 years to life. This sentence is the functional equivalent of a life without parole sentence. Because it was a *de facto* life sentence, that sentence must be judged by the standards established by the United States Supreme Court and this Court for imposition of life without parole sentences upon juveniles.

Starting with Roper v. Simmons, 543 U.S. 551 (2005) and continuing through Graham v. Florida, 560 U.S. 48, 68 (2010), Miller v. Alabama, 132 S.Ct. 2455 (2012), Montgomery v. Louisiana, 136 S.Ct. 718 (2016), Commonwealth v. Batts, 66 A.3d 286 (Pa. 2013) (Batts I) and Commonwealth v. Batts, 163 A.3d. 410 (Pa. 2017) (Batts II), this Court and the United States Supreme Court have made clear that because of their ability to grow, change and become rehabilitated the sentences meted out to juveniles are judged by a different standard than adults. Ultimately in Batts II, this Court held that unless the Commonwealth could establish beyond a reasonable doubt that the juvenile was permanently incorrigible, irreparably corrupt or irretrievably depraved – in other words, that the juvenile was incapable or rehabilitation – that juvenile must be accorded an opportunity for release with an opportunity for a meaningful and fulfilled life outside prison walls.

The question here is when should that opportunity for parole exist for a

juvenile who can be rehabilitated. While Pennsylvania has yet to develop any standards, cases from around the country have demonstrated that the sentence given Michael Felder, 50 years to life, is an unconstitutional *de facto* life sentence. Moreover, legislatures around the country have suggested that the line should be somewhere between 20 to 30 years.

VII. ARGUMENT

THE FIFTY YEARS TO LIFE SENTENCE IMPOSED ON MICHAEL FELDER, A JUVENILE, CONSTITUTED A *DE FACTO* LIFE SENTENCE REQUIRING THAT THE COMMONWEALTH ESTABLISH BEYOND A REASONABLE DOUBT THAT MR. FELDER IS INCAPABLE OF REHABILITATION, A FINDING ABSENT ON THIS RECORD.

In 2012 Michael Felder, a juvenile, was given an unconstitutional mandatory life sentence following his murder conviction. He appealed and the Superior Court agreed that his sentence was unconstitutional and remanded for a new sentencing hearing. In 2014 Michael Felder was resentenced to 50 years to life. Such a lengthy sentence constituted a *de facto* life sentence requiring the trial court find beyond a reasonable doubt that Michael Felder was permanently incorrigible, irreparably corrupt or irretrievably depraved. Because the trial court did not make any such factual finding beyond a reasonable doubt (and in fact could not based on Mr. Felder's demonstrated growth in prison), this Court should remand for a new sentencing hearing where a non-*de facto* life minimum sentence be imposed.

This Court in Commonwealth v. Batts, 163 A.3d 410, 452 (Pa. 2017) (hereinafter "Batts II") determined that a life without parole sentence is an excessive sentence for children whose crimes reflect transient immaturity. In order to prevent

such unconstitutional sentences, this Court established safeguards: a presumption against life without parole sentences and that to overcome that presumption the Commonwealth must prove beyond a reasonable doubt that the juvenile was permanently incorrigible, irreparably corrupt or irretrievably depraved.

Pursuant to our grant of allowance of appeal, we further conclude that to effectuate the mandate of Miller and Montgomery, procedural safeguards are required to ensure that life-without-parole sentences are meted out only to “the rarest of juvenile offenders” whose crimes reflect “permanent incorrigibility,” “irreparable corruption” and “irretrievable depravity,” as required by Miller and Montgomery. Thus, as fully developed in this Opinion, we recognize a presumption against the imposition of a sentence of life without parole for a juvenile offender. To rebut the presumption, the Commonwealth bears the burden of proving, beyond a reasonable doubt, that the juvenile offender is incapable of rehabilitation.

Commonwealth v. Batts II, *supra* at 415-416.

The United States Supreme Court’s 8th Amendment jurisprudence has demonstrated that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not how a sentence is labeled. 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.” See also Commonwealth v. Minarik, 493 Pa. 573, 580, 427 A.2d 623, 627 (1981) (declining to elevate form over substance).⁶

Such a holding makes sense. A judge at sentencing should not be able to evade the protections established by Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48, 68 (2010), Miller v. Alabama, 132 S.Ct. 2455 (2012), Montgomery v. Louisiana, 136 S.Ct. 718 (2016), Batts I and Batts II by imposing a sentence of 100 years to life and then asserting that none of those cases apply because the sentence was not labeled as a life without parole sentence.⁷

In Batts II this Court held:

⁶The Superior Court in Commonwealth v. Foust, 180 A.3d 416 (Pa. Super. 2018), *petition for allowance of appeal held pending disposition of Commonwealth v. Felder*, ___ A.3d ___ (126 WAL 2018) (Pa., 2018) recognized that the *de facto* life issue is one of first impression in Pennsylvania. The Foust Court noted: “In this case of first impression in Pennsylvania, we consider whether a term-of-years sentence which exceeds a juvenile homicide defendant's life expectancy constitutes an unlawful *de facto* sentence of life imprisonment without the possibility of parole (“LWOP”). As an initial matter, we hold that because the Supreme Court of the United States has severely limited the circumstances under which juvenile defendants may be sentenced to LWOP, a *de facto* LWOP sentence is illegal in certain circumstances when imposed upon a juvenile offender.” *Id.* at 420.

⁷See State v. Zuber, 227 N.J. 422, 152 A.3d 197, 211 (2017), *cert. denied*, ___ U.S. ___, 138 S.Ct. 152 (2017) (“It does not matter to the juvenile whether he faces formal [LWOP] or multiple term-of-years sentences that, in all likelihood, will keep him in jail for the rest of his life. We believe it does not matter for purposes of [Graham or Miller.]”)

Based on our review of the sentencing court's findings and the bases therefor, we conclude that a sentence of life in prison without the possibility of parole for Batts is disproportionate under Miller and Montgomery and thus violates the Eighth Amendment to the United States Constitution. . . . There is no question that Batts, as a fourteen-year-old murderer, must be held accountable and serve a sentence commensurate with those acts. Pursuant to the evidence presented before the sentencing court, the findings of the sentencing court regarding the possibility of rehabilitation, and the clear Supreme Court precedent that controls in this matter, however, upon resentencing Batts, the court “must provide [Batts] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” Miller, 567 U.S. at 479, 132 S.Ct. 2455 (quoting Graham, 560 U.S. at 74, 130 S.Ct. 2011).

Commonwealth v. Batts II, supra at 439.

The paradigm established by this Court in Batts II provides that if the facts at sentencing demonstrate beyond a reasonable doubt that juvenile is permanently incorrigible, irreparably corrupt or irretrievably depraved and cannot be rehabilitated, the sentencing court has the discretion to impose a life sentence. If those facts cannot be established beyond a reasonable doubt, a life sentence is barred and the juvenile must be afforded the opportunity to achieve and demonstrate maturity of judgment and self-recognition of human worth with the potential of a meaningful and fulfilled life outside prison walls. Graham, supra at 79. The question before this Court is how to determine when a term of years becomes an impermissible *de facto* life sentence.

The lower courts in Pennsylvania have struggled with this issue, providing no reasoning to support their decisions and therefore providing no guidance to the trial courts. The Superior Court's decision below is typical. Michael Felder challenged his 50 year to life sentence as a *de facto* life sentence. The Superior Court concluded 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).

In Commonwealth v. Bebout, 186 A.3d 462 (Pa. Super. 2018) the Superior Court evaluated whether a 45 year to life sentence constituted an impermissible *de facto* life sentence. The Superior Court panel affirmed the sentence by placing the burden on the defendant. It concluded "that Appellant has simply failed to meet his burden of demonstrating that the lower court sentenced him to a *de facto* LWOP sentence." *Id.* at 469. Such a burden shifting response is inconsistent with this Court's holding in Batts II.

In Commonwealth v. Foust, 180 A.3d 416 (Pa. Super. 2018), *petition for allowance of appeal held pending disposition of Commonwealth v. Felder*, ___ A.3d ___ (126 WAL 2018) (Pa., 2018) the Superior Court had to determine if a 60 year to

life sentence, composed of two consecutive 30 years to life sentences, was a *de facto* life sentence. While the Superior Court held that Miller and Montgomery banned both actual and *de facto* life sentences for youth, the Superior Court did not reach the question of whether a sentence of 60 years to life was a *de facto* life sentence. Instead the Foust Court affirmed the lengthy sentence because it only analyzed the question as to whether a 30 year to life sentence (Foust had received two consecutive 30 year to life sentences) was *de facto* life, concluded it was not, and then affirmed because consecutive sentences are permitted under Pennsylvania law.

Courts around the country have similarly grappled with this issue. 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 comply 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 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 (Wyo, 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

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 no 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); 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) (upholding a juvenile defendant's sentence of imprisonment for 60 years to life).

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).

While courts around the country have established a number of models to determine if a term of years sentence constitutes an impermissible *de facto* life sentence, the best model follows from this Court's decision in Batts II. There this Court held that if the juvenile cannot be proven beyond a reasonable doubt to be incapable of rehabilitation, the juvenile must receive a sentence where parole is an option. It follows that the burden of proof must be on the Commonwealth to establish that the minimum sentence is not *de facto* life. An examination of the models proposed by other courts demonstrates the superiority of the proposed Batts II model as it establishes the burden of proof and appropriate presumptions.⁹

The highest court in Maryland, the Court of Appeals, recently analyzed several models for assessing whether a sentence is a *de facto* life sentence. Carter v. State,

⁹ Keep in mind also that studies have suggested that an incarcerated person loses approximately two years of life from each year of incarceration. E. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003* (2013) 103 Am. J. Pub. Health 523, 526.

461 Md. 295, 192 A.3d 695 (2018). One model would utilize natural life expectancy. *Id.* at 727-728. However, that model could pose constitutional objections by considering population demographics, like race, gender and income to figure out natural life expectancy. *Id.* at 727, fn. 38.

A second model would examine other parole eligible life sentences. Unlike other states, Pennsylvania does not have parole eligible life sentences so a comparison to other life sentences does not help. *Id.* at 727-728.

A third model looked at how courts around the country had evaluated *de facto* life sentences and the lines those courts had drawn. Carter found that sentences of 50 years or slightly less were held to be improper *de facto* life sentences. *Id.* at 728-729, fn. 40. This model finds support from the language used by the Supreme Court in Graham where it was observed that Graham would not be released from his life sentence “even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.” Graham, *supra* at 79. The United States Sentencing Commission drew the line of a life sentence at 470 months (39 years, 2 months). See Bear Cloud v. State, 334 P.3d 132, 142 (Wyo., 2014). Davis v. State, 415 P.2d 666, 676 (Wyo. 2018) found the threshold at almost 45 years. In Carter the Maryland Court struck down as *de facto* life the sentence given one of the three consolidated defendants that made him parole eligible after 50 years of incarceration. See also

People v. Contreras, 4 Cal. 5th 349 (2018) (50 year sentence was *de facto* life and violated Graham).

The final model examined by Carter suggested looking at how state legislatures dealt with amending their sentencing statutes in light of Miller. As this Court is aware, after Miller invalidated the Pennsylvania murder sentencing statute for juveniles, the Pennsylvania legislature set up a series of mandatory minimum sentences of 20, 25, 30 or 35 years depending on the juvenile's age and whether the crime was first or second degree murder. 18 Pa.C.S.A. § 1102.1. While that statute was not retroactive and is therefore inapplicable to Mr. Felder, it does suggest how long the legislature thought that a juvenile convicted of murder should be incarcerated before becoming eligible for parole.

A number of legislatures across the country have also assessed how long a juvenile sentenced to life or *de facto* life must be incarcerated before being considered eligible for parole. That assessment provides an answer to the question of when a juvenile must be provided a meaningful opportunity for release based on demonstrated maturity and rehabilitation, in other words of when *de facto* life occurs. For example, the Supreme Court of Washington examined the legislature's adoption of a Miller fix statute that created parole eligibility for juveniles given life sentences. The state legislature in Washington created parole eligibility after 20 years of

incarceration. The Supreme Court of Washington found that such parole eligibility provided adequate protection from a *de facto* life sentence. State v. Scott, 190 Wash.2d 586, 597 (2018). Twenty years incarceration is also the line drawn by the legislatures in the District of Columbia, Nevada and North Dakota. D.C. Code Ann. §24-403.03(a)(1)(A); Nev. Rev. Stat. § 213.12135(1)(b); N.D. Cent.Code Ann. 12.1-32-13.1 (1). The legislatures in Arkansas, California, Florida, Louisiana, Missouri, North Carolina and Wyoming have all concluded that the line should be drawn at twenty-five years of incarceration. Ark. Code. Ann. § 5-10-102(c)(2); Cal.Pen.Code § 3051; Fla. Stat. 21921.1402 (2)(a); La. Stat. Ann. §15.574.4(E) and (F); Mo. Rev. Stat. §558.047(1); N.C.Gen.Stat. Ann § 15A-1340.19A; Wyo.Stat.Ann. § 6-10-301 (c).¹⁰

These legislative choices provide this Court with an emerging national view of what constitutes *de facto* life sentences – and that view suggests twenty to twenty-

¹⁰ Colorado determined that the line was at twenty or twenty-five years of incarceration depending upon which statutory offense applied. Colo.Rev.Stat.Ann. §§ 17-34-101(1)(a)(II) and (III). Arizona drew the line at 25 years of incarceration if the murdered person was fifteen years of age or older and 35 years of incarceration if the murdered person was under fifteen or was an unborn child. Ariz.Rev.Stat. § 13-751 (A)(2). The Connecticut legislature created eligibility after 30 years of incarceration or less. Conn. Gen. Stat. Ann. §54-125a(f)(1). Thirty years incarceration is the line in Delaware. Del.Code. Tit. 11, § 4204A (d)(1)(2). Massachusetts found that, depending on the facts of the case and the age of the defendant, the appropriate parole eligibility numbers would be 20, 25 or 30 years. Mass.G.L.A. Ch. 279 § 24.

five years of incarceration before being eligible to being considered for parole. A sentence greater than that would deprive a defendant a meaningful opportunity to demonstrate rehabilitation and maturity, and thus eligible for consideration for release.

The sentence Michael Felder was given would not permit parole eligibility regardless of his demonstrated rehabilitation until he would have been incarcerated for at least fifty years. Such a sentence constitutes a *de facto* life sentence. U.S. Const. amend. XIV; PA. Const., art. I, sec. 13. This Court should vacate his sentence and remand the matter for resentencing where the judge must impose a minimum sentence that does not constitute a *de facto* life sentence and that satisfies the requirement this Court established in Batts II that no such sentence may be imposed unless the Commonwealth proves beyond a reasonable doubt that the juvenile is incapable of rehabilitation.

VIII. CONCLUSION

This Court should vacate Michael Felder's *de facto* life without parole sentence as unconstitutional and remand the instant matter for resentencing.

Respectfully submitted,

_____/S/

BRADLEY S. BRIDGE

Assistant Defender

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

JUVENILE LAW CENTER

The Philadelphia Building

1315 Walnut Street, 4th Floor

Philadelphia, PA 19107

CERTIFICATION OF COMPLIANCE WITH RULE 127, P.A.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

* 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,

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

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

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

⁴ This Report is from 2012. It may be viewed at: http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/US_SC_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

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

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-

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. Spatz***, 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.

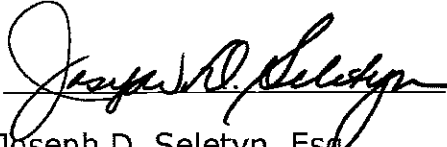
Judge Ransom joins this memorandum.

Justice Fitzgerald concurs in the result.

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.

J-A02012-17

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line drawn through the middle of the letters.

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 convictions¹. 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. § 1102.1².

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 motion³. 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 sentence⁴.

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.

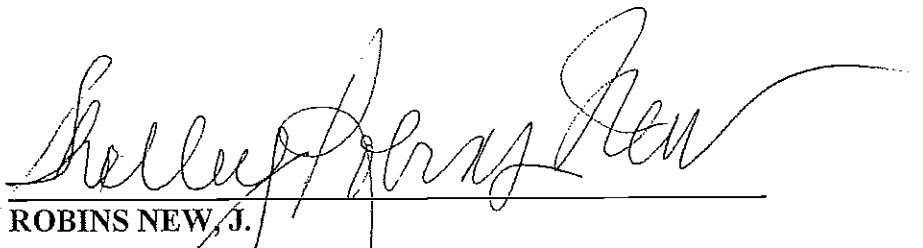
In addition to his challenges legal and constitutional challenges, Appellant also challenges the discretionary aspects of the sentence. Our Supreme Court has stated that the proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. Commonwealth 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 “C”

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 41 EAL 2018
	:	
Respondent	:	
	:	Petition for Allowance of Appeal from
v.	:	the Order of the Superior Court
	:	
MICHAEL FELDER,	:	
	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 19th day of June, 2018, the Petition for Allowance of Appeal is **GRANTED**. The issue, as stated by petitioner, 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?