

NO. 18 EAP 2018

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

V.

MICHAEL FELDER,
Appellant.

BRIEF FOR THE COMMONWEALTH AS APPELLEE

Defense 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 Docket No. CP-51-CR-0014896-2009.

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Wyo. Stat. Ann. §6-10-30111

Other Authorities

Rachel Bunn, Here’s where you’ll live the longest in Pennsylvania if you’re poor, Penn Live (May 3, 2016, 11:59 a.m.).....24

Center for Disease Control, Adverse Childhood Experiences (ACEs) (last accessed Feb. 11, 2019).....24

Yael Cannon & Dr. Andrew Hsi, Disrupting the Path from Childhood Trauma to Juvenile Justice: An Upstream Health and Justice Approach,43 Fordham Urb. L.J. 425 (2016)25

Adele Cummings, Stacie Nelson Colling, There Is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences, 18 U.C. Davis J. Juv. L. & Pol’y 267 (2014).....21, 23

Heather C. Forkey, Children Exposed to Abuse and Neglect: The Effects of Trauma on the Body and Brain, 30 J. Am. Acad. Matrim. Law 307 (2018)24

Thalia González, Youth Incarceration, Health, and Length of Stay, 45 Fordham Urb. L.J. 45 (2017).....25

Institute for Health Metrics and Evaluation, US Health Map, Dataset: Life expectancy (last accessed Feb. 11, 2019).....23

Justice Policy Institute, The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars (November 2018).....18

Samantha Melamed, Why are juvenile lifers from Philly getting radically different sentences from those in the rest of Pennsylvania, Philadelphia Inquirer (July 10, 2018).....14

National Center for Health Statistics, Mortality in the United States, 2017 (Nov. 2018)29

Karen Oehme, et al., <u>Trauma-Informed Co-Parenting: How A Shift in Compulsory Divorce Education to Reflect New Brain Development Research Can Promote Both Parents’ and Children’s Best Interests</u> , 39 U. Haw. L. Rev. 37 (2016)	24
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Philadelphia Police Department, <u>Annual Murder and Shooting Victim Report: 2016</u> (July 20, 2017)	24
Separate: <u>Black Health in America</u> , NPR The Pulse (Feb. 1, 2019).....	23
Robert G. Shipp III, <u>Your Zip Code—Your Health?</u> , Hospital and Healthsystem Association of Pennsylvania (last accessed Feb. 11, 2019)	23
Brett Sholtis, <u>Report shows vast differences in life expectancy from one neighborhood to another</u> , WHYY (Sept. 12, 2018).....	23
U.S. Sent. Comm’n., <u>2013 Sourcebook of Federal Sentencing Statistics</u> (2014)	29
U.S. Sent. Comm’n., <u>The Effects of Aging on Recidivism Among Federal Offenders</u> (December 2017)	18
Eliza Wallace, <u>Knowing Life Expectancy to Improve Public Health</u> , PolicyMap, (Oct. 22, 2018)	23, 24

COUNTER-STATEMENT OF THE QUESTION PRESENTED*

Is a minimum sentence of 50 years a *de facto* life sentence that unconstitutionally denies a redeemable juvenile a meaningful opportunity to obtain release?

(Answered in the negative by the court below.)

*The Commonwealth acknowledges the outstanding contribution of its law clerk, James Rathz, in the preparation of this brief.

COUNTER-STATEMENT OF THE CASE

Defendant Michael Felder committed first-degree murder as a juvenile. When he was 17 years old, he was playing basketball against the victims Malcom Green and Jarrett Green. They got into an argument, and Felder took a gun from his bag. He shot Malcom in the head, injuring him, then shot and killed Jarrett.

A jury found Felder guilty of first-degree murder, aggravated assault, recklessly endangering another person, and firearms offenses. The trial court originally sentenced him to life without parole for the murder conviction. After the U.S. Supreme Court's decision in Miller v. Alabama, 567 U.S. 460 (2012), the trial court resentenced Felder to 50 years to life imprisonment for the murder conviction, making him eligible for parole at age 67. The resentencing court did not make a finding that Felder was incorrigible.

Felder now challenges the constitutionality of his new sentence. His brief accurately recounts the procedural history of this case. For the reasons set forth in this brief, the Commonwealth agrees that Felder's minimum sentence of 50 years of imprisonment is unconstitutional for a redeemable juvenile offender.

SUMMARY OF ARGUMENT

The issue in this case is whether a 50-year minimum sentence imposed on a redeemable juvenile constitutes a *de facto* life sentence and is therefore unconstitutional.

Two threshold matters bear mention. First, it cannot be reasonably disputed that, at some point, a term-of-years sentence is so long that it becomes an unconstitutional *de facto* life sentence, which cannot be imposed unless the juvenile defendant has been proven incorrigible beyond a reasonable doubt. It should obviously make no difference, for example, whether a juvenile is sentenced to life without parole or to a minimum term of 100 years. The judicial system, therefore, must determine when the limit has been crossed. Second, neither Felder nor any similarly situated juvenile has an affirmative right to release from prison once he has served his minimum sentence. Rather, at issue is a redeemable juvenile's right to a hearing before the Parole Board, to decide whether release is consistent with the safety of the public and other relevant considerations.

The Superior Court here upheld Felder's 50-year minimum sentence on the ground that such a penalty would not clearly exceed Felder's life expectancy. But applying such an approach on a case-by-case basis is not viable. Determining life expectancy is difficult and controversial, and doing so accurately may largely depend on constitutionally suspect factors such as race or gender. Such an approach

also threatens to convert sentencing hearings into a protracted battle of competing experts. Additionally, in focusing on life expectancy, the Superior Court overlooked a fundamental principle articulated in Miller v. Alabama: a redeemable juvenile must have a meaningful opportunity for release in time to become a contributing member of society, not simply prior to death.

This Court should provide clear guidance by adopting a rule—in the absence of more specific legislative guidance—that is consistent with the underlying goals of Miller v. Alabama and the sentencing practices of Pennsylvania and other jurisdictions. This Court should hold that Felder and other redeemable juveniles may be sentenced only to a minimum term of up to 40 years imprisonment before becoming eligible for parole. Longer minimum terms are inconsistent with the United States Supreme Court’s reasoning and violate both prongs of its Eighth Amendment analysis. Such an approach would also have the advantage of being consistent with 18 Pa.C.S. §1102.1—the statute that now governs juvenile homicide cases—which explicitly authorizes minimum sentences of 35 years. Thus, the Superior Court’s order should be reversed and the case remanded for resentencing.

ARGUMENT

I. FELDER’S 50-YEAR MINIMUM SENTENCE IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT.

Felder’s sentence is unconstitutional under the Eighth Amendment.¹ A brief review of the law is helpful to set the stage.

Modern Eighth Amendment doctrine for juveniles began with Roper v. Simmons, 543 U.S. 551 (2005), which banned the death penalty for juveniles because children are constitutionally different than adults for sentencing purposes. Id. at 568-70. Graham v. Florida, 560 U.S. 48 (2010), expanded the doctrine by prohibiting sentences of life without parole for juveniles who did not commit homicide. The Court required states to give those juvenile offenders “some *meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation,” and let the states decide the means for compliance. Id. at 75 (emphasis added). Miller v. Alabama, 567 U.S. 460 (2012), applied similar reasoning to juvenile offenders who commit homicide, requiring individualized sentencing for such defendants. Id. at 479 (citing Graham’s requirement for a “meaningful opportunity to obtain release”).

¹ Felder also raised the argument in the Superior Court that his minimum sentence violates the Pennsylvania Constitution, but did not brief it here so neither does the Commonwealth. We note, however, that issues of sentence legality are not subject to waiver. Commonwealth v. Batts, (Batts II), 163 A.3d 410, 441 (Pa. 2017) (citations omitted). Accordingly, the Court could request that the parties file supplemental briefs on this point.

After Miller, this Court held in Commonwealth v. Batts, (Batts I), 66 A.3d 286 (Pa. 2013), that a juvenile convicted of first-degree murder prior to Miller could still be sentenced to a minimum prison term of life without parole if the sentencing court reached that conclusion after evaluating the criteria identified in Miller. Id. at 296. Montgomery v. Louisiana, 136 S.Ct. 718 (2016), held that Miller applies retroactively, and clarified that, under Miller, life-without-parole sentences for juveniles violate the Eighth Amendment unless the offender is incorrigible. Id. at 732, 734.

In Commonwealth v. Batts, (Batts II), 163 A.3d 410 (Pa. 2017), this Court held that, in Pennsylvania, there is a presumption against life-without-parole sentences for juveniles. Id. at 452. The presumption can be rebutted by proving beyond a reasonable doubt that the defendant is incorrigible. Id. at 455.

The Superior Court here remanded Felder’s case for resentencing to comply with Miller and Batts I. In October 2014—before Montgomery and Batts II were decided—the trial court conducted the resentencing hearing. At that time, the Commonwealth recommended a minimum sentence of “somewhere 50 and above,” (N.T. 10/24/14, 50), and did not ask for a life sentence or for a finding that Felder was incorrigible. The court imposed a sentence of 50 years to life imprisonment and did not make a finding that Felder was incorrigible. For the reasons next discussed,

Felder's minimum sentence of 50 years of imprisonment is unconstitutional under the two-prong analysis of a categorical Eighth Amendment challenge.

A. Eighth Amendment Jurisprudence

Eighth Amendment jurisprudence provides a two-prong approach for analyzing whether Felder's sentence is unconstitutional.² First, a court must consider the national consensus for sentencing juveniles by examining relevant state legislation and sentencing practices across the country. Roper, 543 U.S. at 564-67; Graham, 560 U.S. at 62-67. Second, a court must exercise independent judgment guided by Supreme Court jurisprudence to determine whether the sentencing practice aligns with society's reasons for imposing punishment. Roper, 543 U.S. at 571-72; Graham, 560 U.S. at 71-74. Both prongs lead to the conclusion that Felder's sentence is unconstitutional.

B. The National Consensus Forbids Imposing a 50-Year Minimum Sentence on a Redeemable Juvenile.

The national consensus compels the conclusion that Felder's sentence is unconstitutional. In cases addressing the issue of when a term-of-years sentence becomes an unconstitutional *de facto* life sentence for a redeemable juvenile

² The two-prong analysis applies to Eighth Amendment challenges like Felder's that are categorical, *i.e.*, ones based on being a child or mentally disabled. There is a separate three-part test for as-applied challenges, which any litigant could raise. Solem v. Helm, 463 U.S. 277, 290-92 (1983).

offender, 21 jurisdictions have concluded that various term-of-years sentences were *de facto* life sentences under Graham or Miller.³

The national consensus is reflected in the statutes and sentencing practices of other states, which reveal a trend of prohibiting sentences like Felder’s. Under the first prong for a categorical Eighth Amendment challenge, this Court should “consider[] ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice’ to determine whether there is a national consensus against [this] sentencing practice.” Graham, 560 U.S. at 61 (quoting Roper, 543 U.S. at 572).

In Roper, the United States Supreme Court analyzed this factor by recognizing that 30 states prohibited the death penalty as applied to juveniles, with the rest rarely imposing it. 543 U.S. at 564-67. In Graham, the Court concluded that although a

³ United States v. Mathurin, 868 F.3d 921, 934 (11th Cir. 2017); Budder v. Addison, 851 F.3d 1047, 1049 (10th Cir. 2017); McKinley v. Butler, 809 F.3d 908, 914 (7th Cir. 2016); LeBlanc v. Mathena, 841 F.3d 256, 272 (4th Cir. 2016) (reversed on other grounds, Virginia v. LeBlanc, 137 S.Ct. 1726 (2017)); Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013); People v. Contreras, 411 P.3d 445, 455 (Cal. 2018); Casiano v. Comm’r of Correction, 115 A.3d 1031, 1048 (Conn. 2015); Lee v. State, 234 So.3d 562, 563-64 (Fla. 2018); People v. Reyes, 63 N.E.3d 884, 889 (Ill. 2016); State v. Null, 836 N.W.2d 41, 74 (Iowa 2013); Morgan v. State, 217 So.3d 266, 274 (La. 2016); Carter v. State, 192 A.3d 695, 728-30 (Md. 2018); State ex. rel Carr v. Wallace, 527 S.W.3d 55, 61-62 (Mo. 2017); Steilman v. Michael, 407 P.3d 313, 319-20 (Mont. 2017); State v. Boston, 363 P.3d 453, 457 (Nev. 2015); State v. Zuber, 152 A.3d 197, 213 (N.J. 2017); Ira v. Janecka, 419 P.3d 161, 170 (N.M. 2018); State v. Moore, 76 N.E.3d 1127, 1141 (Ohio 2016); Kinkel v. Persson, 417 P.3d 401, 402-403 (Or. 2018); State v. Ramos, 387 P.3d 650, 660 (Wash. 2017); Bear Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014).

life-without-parole sentence for juveniles who did not commit homicide was theoretically possible in 37 states, only 11 states ever imposed it, and then only rarely. 560 U.S. at 63-64.

Here, as will be seen, only five jurisdictions permit withholding parole consideration for longer than 40 years, meaning that Felder's minimum sentence of 50 years of imprisonment before parole eligibility is permissible in only five states. By comparison, the sentence struck down in Graham was allowed in 37 states, 560 U.S. at 64, and the practice struck down in Roper was permitted in 20 states, 543 U.S. at 564. Accordingly, the national consensus against Felder's sentence is even stronger than was the consensus against the death penalty for juveniles and against life without parole for non-homicide juvenile offenders.

i. Sentencing Statutes⁴

A review of sentencing statutes in the 50 states reveals that Felder's sentence is prohibited in most jurisdictions.⁵ The passage of legislation responding to

⁴ The table attached to this brief as Attachment A visually depicts the 50-state statutory summary described in this section.

⁵ This 50-state review does not include states that do not have a statutory parole date (Hawaii, Iowa, New Hampshire, South Dakota, Virginia) because it is impossible to infer any legislative judgment from statutes that do not define when an offender must receive parole consideration. The review also does not include two states that use determinate sentences (Illinois, Maine), because parole is not a possibility in those states. Illinois may soon change its determinate sentence structure, however, as both houses of the Illinois legislature have passed a bill providing parole consideration at

Supreme Court precedent reflects “the evolving standards of decency that mark the progress of a maturing society.” Miller, 567 U.S. at 469 (quotations omitted). After Graham and Miller, many states could not lawfully sentence juveniles under their statutes because the only available sentence was life without parole. To provide lawful punishments for redeemable juveniles, legislatures amended sentencing statutes to provide parole consideration.

Twenty-four states amended their statutes by providing parole eligibility to comply with Miller.⁶ The post-Miller statutes demonstrate the national consensus

20 years to those who were 20 years old or younger at the time of their offense. H.B. 0531, 100th Gen. Assem. (Ill. 2018).

Despite the inability to fairly compare these states’ statutes with the rest of the country, case law from these states reveals that they would not likely impose a sentence as long as Felder’s on a redeemable juvenile offender. See, e.g., State v. Pearson, 836 N.W.2d 88, 96 (Iowa 2013) (holding that minimum sentences of 35 years are unconstitutional). In South Dakota, all juvenile lifers will have the opportunity for release before 50 years. See State v. Jensen, 894 N.W.2d 397, 399 (S.D. 2017) (parole eligibility after 25 years for murder, two counts felony murder, robbery, grand theft, kidnapping, and related charges); State v. Springer, 856 N.W.2d 460, 462-63 (S.D. 2014) (parole eligibility after 33 years for Jensen’s accomplice); State v. Charles, 892 N.W.2d 915, 920 (S.D. 2017) (parole eligibility after 46 years for first-degree murder). So far, all of New Hampshire’s resentenced juvenile lifers are serving minimum terms less than 50 years. Paige Sutherland, N.H. Judge Reduces Sentence of Juvenile Lifer, New Hampshire Public Radio (Jan. 30, 2018), <https://www.nhpr.org/post/nh-judge-reduces-sentence-juvenile-lifer> (minimum term of 45 years); Robert Dingman Resentenced to 40 Years in Parents’ 1996 Murder, New Hampshire Public Radio (Oct. 31, 2018), <https://www.nhpr.org/post/robert-dingman-resentenced-40-years-parents-1996-murder> (minimum term of 40 years).

⁶ Twenty of those states now require parole consideration after 30 years or less: Alabama (30 years), Ala. Code §13A-6-2(c); Arizona (25 years unless victim was

for what constitutes a “meaningful opportunity to obtain release.” Miller, 567 U.S. at 479 (quoting Graham, 560 U.S. at 75). Significantly, of the 24 states that amended, the majority (22) now require parole consideration *before* 40 years have passed, with 20 requiring parole consideration before 30 years. See supra note 6.

Twenty states did not amend their sentencing legislation after Miller. Of those, five specifically prohibited life without parole for all juvenile offenders even

under the age of 15 or unborn child), Ariz. Rev. Stat. Ann. §13-751(A)(2); Arkansas (30 years), Ark. Code Ann. §§5-4-104(b), 5-10-101(c)(1)(B); California (25 years), Cal. Penal Code §3051; Connecticut (30 years), Conn. Gen. Stat. Ann. §54-125a(f)(1); Delaware (30 years), Del. Code Ann. tit. 11, §4204A(d)(2); District of Columbia (20 years), D.C. Code Ann. §24-403.03; Florida (25 years), Fla. Stat. Ann. §921.1402(2); Louisiana (25 years), La. Rev. Stat. §15:574.4(E)(1); Massachusetts (30 years), Mass. Gen. Laws Ann. ch. 279, §24; Nevada (20 years), Nev. Rev. Stat. Ann. §213.12135; New Jersey (30 years), N.J. State. Ann. §2C:11-3(b)(1); New York (15 years), N.Y. Penal Law §§10.00, 70.00, 70.05, 125.25; North Carolina (25 years), N.C. Gen. Stat. Ann. §15A-1340.19A; North Dakota (20 years), N.D. Cent. Code Ann. §12.1-32-13.1; Oregon (25 years), Or. Rev. Stat. Ann. §163.115(5)(b); Utah (25 years), Utah Code Ann. §76-3-206; Washington (25 years), Wash. Rev. Code Ann. §§9.94A.505, 9.94A.510; West Virginia (15 years), W.Va. Code §61-11-23(b); Wyoming (25 years), Wyo. Stat. Ann. §6-10-301(c).

Two of the 24 states now require parole consideration after 40 years or less: Missouri (40 years), Mo. Ann. Stat. §565.033 (allowing for shorter sentences by giving judges discretion to set parole eligibility dates between 30 and 40 years); Michigan (40 years), Mich. Comp. Laws Ann. §769.25 (same as Missouri, but allowing minimum sentences as low as 25 years).

Two of the 24 states now grant judges discretion to set minimum sentences: Nebraska (judges have discretion to set minimum sentences at or above 40 years), Neb. Rev. Stat. Ann. §28-105.02; Pennsylvania (judges have discretion to set minimum sentences at or above 35 years), 18 Pa.C.S. §1102.1.

before Miller was decided. All five require parole consideration by the time 40 years have passed.⁷

The remaining 15 states that did not amend their legislation do not differentiate between adult and juvenile offenders in their statutes. Even so, 12 of those 15 require that, whenever an offender *of any age* is sentenced to less than life without parole for committing murder, the offender must have an opportunity for parole after 40 years *or less*.⁸ Only two states allow judges to withhold parole, although they *permit* parole consideration as early as 10 and 20 years.⁹ The only

⁷ Colorado (40 years), Colo. Rev. Stat. Ann. §17-22.5-104(2)(d)(IV); Kansas (25 years), Kan. Stat. Ann. §22-3717(b)(2); Kentucky (25 years), Ky. Rev. Stat. Ann. §640.040; Montana (30 years), Mont. Code Ann. §46-23-201; Texas (40 years), Tex. Pen. Code Ann. §12.31; Tex. Gov't Code Ann. §508.145.

⁸ Alaska (33 years), Alaska Stat. §§12.55.125, 33.16.090; Georgia (30 years), Ga. Code Ann. §§16-5-1, 17-10-6.1(c)(1); Indiana (20 years), Ind. Code Ann. §§35-50-2-3(a), 11-13-3-2 (b)(3); Maryland (25 years), Md. Code Ann., Corr. Servs. §7-301(d)(2); Minnesota (30 years), Minn. Stat. Ann. §244.05; Mississippi (10 years), Miss. Code. Ann. §47-7-3(1), Parker v. State, 119 So.3d 987, 998 (Miss. 2013) (remanding for resentencing to consider if Miller factors warrant imposing life without parole or annulling part of the parole statute to allow life with the possibility of parole after 10 years); New Mexico (30 years), N.M. Stat. Ann. §31-21-10; Ohio (30 years), Ohio Rev. Code Ann. §2929.03; Oklahoma (38.25 years), Okla. Stat. Ann., tit. 21, §§13.1, 701.9, Runnels v. State, 426 P.3d 614, 622 (Okla. 2018) (explaining that parole eligibility for life sentences is calculated as 85% of a 45 year term by Department of Corrections); Rhode Island (25 years), 13 R.I. Gen. Laws Ann. §13-8-13(a)(4); South Carolina (30 years), S.C. Code Ann. §16-3-20; Vermont (presumptive minimum sentence of 35 years before considering aggravating and mitigating circumstances, reducible to minimum term of 15 years), Vt. Stat. Ann. tit. 13, §2303(a).

⁹ Idaho (10 years), Idaho Code Ann. §18-4004 (governing offenders convicted of murder); Wisconsin (20 years), Wis. Stat. Ann. §973.014.

outlier is Tennessee, which withholds parole from all offenders convicted of murder for at least 51 years.¹⁰

ii. Sentencing Practices

Even in the five states (including Pennsylvania) that do not statutorily prohibit a sentence like Felder's,¹¹ such lengthy minimum sentences are rarely imposed. As the U.S. Supreme Court has made clear, "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus." Graham, 560 U.S. at 62 (citations omitted). In Tennessee, judges are not given discretion and must sentence every offender convicted of murder to a minimum of 51 years of imprisonment. But in Idaho, Nebraska, Wisconsin, and Pennsylvania, where judges can choose to sentence redeemable juvenile offenders to minimum sentences below Felder's, they most often do.¹² These states' sentencing practices support the same conclusion: minimum sentences of 50 years do not reflect the national consensus.

¹⁰ Tenn. Code Ann. §40-35-501(i); Brown v. Jordan, 563 S.W.3d 196, 202 (Tenn. 2018). Towards the close of last year's legislative session, both chambers of the Tennessee legislature introduced bills providing parole eligibility to juveniles after they had served 20 years. H.B. 274, 110th Leg. Sess. (Tenn. 2018); S.B. 197, 110th Leg. Sess. (Tenn. 2018).

¹¹ Idaho, Nebraska, Pennsylvania, Tennessee, Wisconsin.

¹² In Wisconsin, only five of 70 juvenile offenders serving life sentences will remain in prison as long as Felder before becoming parole eligible. State v. Jackson, 2018 WL 4179078, at *1 (Wis. Ct. App. Aug. 28, 2018) (parole eligibility at the age of 101); State v. Frison, 2018 WL 1770179 at *1 (Wis. Ct. App. Apr. 11, 2018) (parole eligibility after 50 years for double homicide); State v. Walker, 2018 WL 3326694 at *1 (Wis. Ct. App. Mar. 6, 2018) (parole at age of 95); State v. Williams, 2013 WL

Felder's sentence is not only an outlier nationally, but in Pennsylvania as well. As of July 2018, only three of 339 juvenile offenders resentenced in Pennsylvania post-Miller received longer minimum sentences than Felder, less than 1%. The vast majority of the resentenced lifers (275 or 81%), received minimum sentences of 40 or fewer years. The remaining 56 juvenile lifers (17%) received minimum sentences between 41 and 50 years, but it is unclear how many of those received 50-year minimum sentences like Felder.¹³

6418971 at *1 (parole eligibility at the age of 118). Three of them are serving sentences actuarially equivalent to life without parole, and will likely die in prison.

No juvenile lifer in Idaho is serving a longer sentence than Felder. Judges typically impose the statutory minimum sentence. Matthews v. State, 839 P.2d 1215, 1217 (Idaho 1992) (describing sentence simply as “indeterminate life”); State v. Kaiser, 696 P.2d 868, 870 (Idaho 1985) (treating all indeterminate life sentences as eligible for parole after 10 years). When judges elect to impose a longer minimum term, it is never above 35 years. State v. Shanahan, 994 P.2d 1059, 1061 (Idaho Ct. App. 1999).

Nebraska, like Pennsylvania, gives judges discretion to set higher minimum sentences, but with a key difference. Nebraska permits prisoners to earn “gain time,” reducing their minimum sentence by half and making them eligible for parole as early as 20 years. Neb. Rev. Stat. Ann. §83-1,110. After accounting for gain time, only three of Nebraska's 22 juvenile lifers received prison sentences as long as Felder. State v. Steele, 915 N.W.2d 560, 562 (Neb. 2018); State v. Russell, 908 N.W.2d 669, 671 (Neb. 2018); State v. Castaneda, 889 N.W.2d 87, 93 (Neb. 2017).

¹³ Samantha Melamed, Why are juvenile lifers from Philly getting radically different sentences from those in the rest of Pennsylvania, Philadelphia Inquirer (July 10, 2018), <http://www.philly.com/philly/news/philly-bucks-county-pennsylvania-jvenile-lifers-jlwop-jvenile-law-center-life-without-parole-20180710.html>. Five resentenced juvenile offenders received a sentence of life without parole.

In sum, although a handful of states permit discretionary minimum sentences like Felder’s, even in those jurisdictions, courts rarely delay parole eligibility for 50 years. Because minimum sentences of 50 years are consistently prohibited by legislatures and rarely imposed in the few jurisdictions that allow them, the first prong of the categorical Eighth Amendment analysis supports the conclusion that Felder’s sentence is unconstitutional.

C. A 50-Year Minimum Sentence Imposed on a Redeemable Juvenile Does Not Align With Society’s Justifications for Punishment.

The second prong of a categorical Eighth Amendment challenge requires this Court to exercise its independent judgment as to the constitutionality of the punishment, “guided by ‘the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.’” Graham, 560 U.S. at 61 (quoting Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)).

The primary standard guiding the Eighth Amendment is proportionality. It has been “recognized explicitly in [the U.S. Supreme] Court for almost a century,” Solem v. Helm, 463 U.S. 277, 286 (1983), “flow[ing] from the basic ‘precept of justice that punishment for crime should be graduated and proportioned to the offense.’” Roper, 543 U.S. at 560 (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002)). The proportionality of a sentence depends largely on whether it advances

theories of punishment. Graham, 560 U.S. at 71-75. A punishment lacking penological justification is “by its nature disproportionate.” Id. at 71.

In Roper, the Court concluded that no penological theory justified the death penalty for juveniles given that juveniles have an underdeveloped sense of responsibility, lack maturity, make impetuous and ill-considered decisions, are more vulnerable or susceptible to negative influences and outside pressures, lack control over their environment, and are still forming their character and personalities. 543 U.S. at 568-71.

In Graham, the Court considered the penological justifications of retribution, deterrence, incapacitation, and rehabilitation for sentencing juveniles to life without parole for non-homicide offenses and concluded that none justified such a sentence. Retribution failed because “the heart” of that rationale is that a “sentence must be directly related to the personal culpability of the criminal offender,” which is diminished in the case of a juvenile. 560 U.S. at 71 (quotation omitted). Deterrence failed because juveniles are less likely to consider punishment when making decisions, which is necessary for deterrence to have any effect. Id. at 72. Incapacitation failed because one cannot reliably say that a juvenile will remain dangerous forever. Id. at 72-73. Nor could rehabilitation support the sentence. The sentence forbade reentering the community, but “the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more

evident” when applied to “juvenile offenders, who are most in need of and receptive to rehabilitation[.]” Id. at 74.

Here, Felder will not be eligible for parole until he is 67 years old. The reasoning in Graham regarding whether penological justifications are proportionate to life-without-parole sentences for juveniles who did not commit homicide also applies to Felder’s sentence. See People v. Contreras, 411 P.3d 445, 454 (Cal. 2018) (“a sentence of 50 years to life imprisonment bears an attenuated relationship to legitimate penological goals”).

First, retribution does not justify Felder’s sentence. “[T]he case for retribution is not as strong with a minor as with an adult.” Roper, 543 U.S. at 571. “The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” Tison v. Arizona, 481 U.S. 137, 149 (1987). Although all first-degree murders are heinous, the particular circumstances of defendant’s crime are far from unique. “[T]here have always been disagreements among young people ... what would have been a fist fight or a knife fight in years past, today has elevated consequences because of the ubiquity of guns; not the stuff of a crime demonstrating ... complete depravity.” Kelly v. Brown, 851 F.3d 686, 689 (7th Cir. 2017) (Posner, J. dissenting). Felder is responsible for the life he took and deserves a serious punishment. However, he is not more culpable than the vast number of juveniles who received shorter sentences for the same crime.

Deterrence and incapacitation also do not justify Felder’s sentence. Deterrence has diminishing returns with juveniles. Graham, 560 U.S. at 72; McKinley v. Butler, 809 F.3d 908, 914 (7th Cir. 2016) (“Given that criminals [and children] tend to have high discount rates, meaning that they weight future events very lightly, does it matter greatly, so far as deterrence is concerned, whether a [juvenile] murderer ... is sentenced to 20 years in prison or 100 years?”). Similarly, the benefits of incapacitation decline drastically for those released when they are 50 years old or older. Statistical data demonstrate that prisoners released above age 50 have the lowest recidivism rates, and rarely commit violent crimes.¹⁴

Finally, rehabilitation does not justify Felder’s sentence. Minimum sentences do not dictate when an offender will be released. Rather, they govern how long an offender must wait before having the opportunity to argue rehabilitation in front of

¹⁴ U.S. Sent. Comm’n., The Effects of Aging on Recidivism Among Federal Offenders, 22-25, Table 1, Fig. 12-15, Fig. 20 (December 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf; Pennsylvania Department of Corrections, Recidivism Report 2013, 18, 23 (February 8, 2013) <https://www.nationalcia.org/wp-content/uploads/2013-PA-DOC-Recidivism-Report.pdf>). See also Justice Policy Institute, The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars, 9-10, 17 (November 2018), https://www.abell.org/sites/default/files/files/JPI_The%20Ungers%205%20Years%20and%20Counting_Nov_2018.pdf (recognizing that only one of the 188 inmates aged 51 to 85 released under Unger v. Maryland, 48 A.3d 242 (Md. 2012), had recidivated, even though over 80% of the group were convicted of homicide).

the Parole Board. A shorter minimum sentence would not change that Felder will never be released unless he can prove that he has rehabilitated himself.

Furthermore, the delay in when Felder can argue for supervised release based on demonstrated rehabilitation will only make his potential integration into the community more difficult. If he becomes eligible for parole after 50 years, Felder might re-enter the community as a senior citizen, but one unlikely to use vocational training or education the Supreme Court presumed would help juvenile lifers find “value and place in society.” Graham, 560 U.S. at 74, 79. Indeed, reintegration takes more than just technical skills. It requires a support system, which facilitates meaning and purpose in life. Upon release, however, the life Felder knew will have passed him by, and he will have little opportunity to begin a new family or career. His resentencing has made almost no difference in terms of “fulfillment outside prison walls,” “reconciliation with society,” the “incentive to become a responsible individual,” or “self-recognition of human worth and potential.” Id. at 79.

* * *

In summary, under the two prongs of an Eighth Amendment analysis, Felder’s minimum sentence of 50 years of imprisonment is unconstitutional. First, as evidenced by the statutes and sentencing practices in other jurisdictions, sentencing a juvenile to 50 years without the possibility of parole is a highly unusual sentence not reflective of the national consensus. Second, the penological justifications of

retribution, deterrence, incapacitation, and rehabilitation do not justify withholding parole consideration for 50 years. A minimum sentence of 50 years for a redeemable juvenile like Felder is unconstitutional under the Eighth Amendment.

II. LIFE EXPECTANCY IS NOT THE APPROPRIATE LENS THROUGH WHICH TO ANALYZE THIS ISSUE.

The Superior Court analyzed Felder’s sentence in terms of his life expectancy to determine if it is unconstitutional. That approach is too narrow. As the California Supreme Court reasoned in Contreras, “the issue of functional equivalence in this context is not limited to determining whether a term-of-years sentence is *actuarially* equivalent to LWOP ... [T]here is a separate and distinct question whether a lengthy term-of-years sentence, though not clearly exceeding a juvenile offender’s natural lifespan, may nonetheless impinge on the same substantive concerns that make the imposition of LWOP on juvenile” offenders unconstitutional. 411 P.3d at 451 (emphasis added). Because life expectancy appears on the surface to be an easy shortcut to determining what constitutes an unconstitutional *de facto* life sentence, and because the Superior Court based its ruling on Felder’s life expectancy, the Commonwealth addresses the reasons why this Court should not use life expectancy to analyze this issue.

Since the Superior Court’s decision, Pennsylvania courts have expressed disfavor towards using life expectancy as a tool to calculate life sentences. In Batts II, for example, this Court explained that “there is no way to accurately calculate

half of a life sentence.” 163 A.3d at 442. The same is true for calculating how many years constitute a full life sentence. The Pennsylvania Superior Court has also opined that the “use of statistical analysis of life expectancies to govern a *de facto* LWOP standard appears to create a myriad of new questions without any easy answers, sending us down a constantly evolving rabbit hole from which we may never escape as more and more data arrives.” Commonwealth v. Bebout, 186 A.3d 462, 469 (Pa. Super. 2018). For the following three reasons, this Court should treat life expectancy models with skepticism.

First, imposing term-of-year minimum sentences based on life expectancies would result in illegal *de facto* life-without-parole sentences for many juveniles. Life expectancies are only averages of populations—meaning that many individuals with a particular life expectancy will not live that long. Adele Cummings, Stacie Nelson Colling, There Is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences, 18 U.C. Davis J. Juv. L. & Pol’y 267, 279-80 (2014). “In a normal distribution, about half of a population reaches or exceeds its life expectancy, while the other half does not.” Contreras, 411 P.3d at 451. The very notion of using life expectancy to adjudicate Felder’s claim may be unconstitutional. Relying on an estimate of how long juveniles will live to set minimum prison sentences creates an “unacceptable risk” that half of the juveniles with a certain life expectancy will die without ever

obtaining an opportunity for release. Cf. Hall v. Florida, 572 U.S. 701, 704, 724 (2014) (rejecting the use of IQ test scores to authorize or forbid the death penalty for offenders with a potential intellectual disability).¹⁵

Second, this Court should not consider Felder’s life expectancy because of the problems that arise with relying on demographic characteristics to estimate a person’s lifespan. The two most common characteristics used to estimate life expectancy are race and gender, factors that lead to significant differences in lifespan. Hispanic women, for example, live on average over a decade longer than black men. Contreras, 411 P.3d at 450 (citations omitted). Accounting for those differences is akin to sentencing on the impermissible basis of race and gender.¹⁶ This Court should not resolve one thorny constitutional issue by creating several more. Yet ignoring race and gender in estimating life expectancy would only create

¹⁵ In Hall, the Supreme Court rejected the use of a similar “single factor as dispositive of a conjunctive and interrelated assessment” under the Eighth Amendment. 572 U.S. at 723. Relying on life expectancies to determine punishments is even worse than using IQ scores. IQ scores measure a specific person’s performance on a test, while life expectancies make predictions about a person’s future based on trends derived from groups of other people. Life expectancy models are not unique to a specific offender and are inherently speculative, so they cannot form the basis of an individualized sentence.

¹⁶ See Contreras, 411 P.3d at 450 (“Although persons of different races and genders are not similarly situated in terms of life expectancy, it seems doubtful that considering such differences in juvenile sentencing would pass constitutional muster.”). See also Zuber, 152 A.3d at 214; United States v. Mathurin, 868 F.3d 921, 932 (11th Cir. 2017); Carter, 192 A.3d at 727 (same).

a larger error margin, resulting in more juvenile offenders who die before their first chance of release.

Moreover, additional characteristics can alter a person's expected lifespan dramatically, and there is no consensus regarding which characteristics should be included. Where someone lives, for example, can affect life expectancy by as much as 20 years.¹⁷

Getting more specific with where a person lives creates even larger differences in expected lifespan. Without adjusting for race, gender, or income, people in some Philadelphia neighborhoods can expect to live to 64, but those in others will live over two decades more.¹⁸ Most of the city's homicides occur in

¹⁷ Institute for Health Metrics and Evaluation, US Health Map, Dataset: Life expectancy (last accessed Feb. 11, 2019), <https://vizhub.healthdata.org/subnational/usa>; Cummings, supra p. 21, at 276-83. See also Separate: Black Health in America, NPR The Pulse (Feb. 1, 2019), <https://www.npr.org/podcasts/381443461/the-pulse> (describing a 16-year difference in life expectancy between residents of neighborhoods five miles away in Chicago).

Philadelphians live about 75.49 years, lower than any other county in Pennsylvania and about three years less than the state average. Robert G. Shipp III, Your Zip Code—Your Health?, Hospital and Healthsystem Association of Pennsylvania (last accessed Feb. 11, 2019), <https://www.haponline.org/Initiatives/Population-Health/Your-Zip-Code-Your-Health> (citing data from Institute for Health Metrics and Evaluation, supra).

¹⁸ Brett Sholtis, Report shows vast differences in life expectancy from one neighborhood to another, WHYY (Sept. 12, 2018), <https://whyy.org/articles/report-shows-vast-differences-in-life-expectancy-from-one-neighborhood-to-another/>; Eliza Wallace, Knowing Life Expectancy to Improve Public Health, PolicyMap, (Oct. 22, 2018), <https://www.policymap.com/2018/10/knowning-life-expectancy-to-improve-public-health/>.

neighborhoods with the lowest life expectancies.¹⁹ The “average” juvenile from those neighborhoods who, like Felder, is 17 when convicted will die before spending 50 years in prison. This provides no chance for “some years of life outside prison walls” as Montgomery requires. 136 S.Ct. at 736-37. The differences in lifespan reflect racial demographics in part; however, after controlling for that variable, the poorest Philadelphians still die seven years before the wealthiest.²⁰

Another variable, adverse childhood experiences,²¹ can reduce lifespan up to twenty years. Karen Oehme, et al., Trauma-Informed Co-Parenting: How A Shift in Compulsory Divorce Education to Reflect New Brain Development Research Can Promote Both Parents’ and Children’s Best Interests, 39 U. Haw. L. Rev. 37, 50 (2016). Traumatic events trigger hormonal responses to stress, causing chronic health problems and exacerbating the cognitive deficiencies identified in Roper. Heather C. Forkey, Children Exposed to Abuse and Neglect: The Effects of Trauma on the Body and Brain, 30 J. Am. Acad. Matrim. Law. 307, 312 (2018); Yael Cannon

¹⁹ Philadelphia Police Department, Annual Murder and Shooting Victim Report: 2016, 15-16 (July 20, 2017), <https://www.phillypolice.com/assets/crime-maps-stats/2016-Homicide-Report.pdf>; Wallace, supra note 18.

²⁰ Rachel Bunn, Here’s where you’ll live the longest in Pennsylvania if you’re poor, Penn Live (May 3, 2016, 11:59 a.m.), https://www.pennlive.com/news/2016/05/heres_where_youll_live_the_lon.html.

²¹ Adverse Childhood Experiences are events such as abuse, neglect, victimization, and family instability that can impact futures and cause early death. See generally, Center for Disease Control, Adverse Childhood Experiences (ACEs) (last accessed Feb. 11, 2019), <https://www.cdc.gov/violenceprevention/acestudy/index.html>.

& Dr. Andrew Hsi, Disrupting the Path from Childhood Trauma to Juvenile Justice: An Upstream Health and Justice Approach, 43 Fordham Urb. L.J. 425, 442 (2016). Unsurprisingly, these traumatic experiences are common among juvenile offenders and prisoners generally. Thalia González, Youth Incarceration, Health, and Length of Stay, 45 Fordham Urb. L.J. 45, 58-60 (2017); Cannon & Hsi, supra, at 452-57. Additionally, as Felder and several courts recognize, prison conditions shorten lifespans.²²

Third, if life expectancy were the standard, every sentencing hearing to determine a redeemable juvenile offender's minimum term would devolve into a battle of experts and sentencing judges would be forced to make factual findings based on statistical models that are, by their very nature, imprecise averages. Offenders could later raise ineffective assistance of counsel claims, alleging that their attorneys should have chosen a different life expectancy model in arguing for a more lenient sentence. Given the imprecise and easily debated nature of life expectancy models, they should not be used as a proxy for the important constitutional question before this Court.

²² Contreras, 411 P.3d at 450 (empirical citations omitted); Casiano, 115 A.3d at 1046 (empirical citations omitted); Null, 836 N.W.2d at 71. See also Justice Policy Institute, supra note 14, at 6 (“A study in Pennsylvania concluded that incarcerated individuals with an average age of 57 had similar health ailments to men in the general public with an average age of 72.”).

No one knows which metric is best to predict the day Felder will die, but choosing incorrectly can be a difference of decades. This uncertainty implicates the Eighth Amendment analysis in Hall and the due process considerations identified in Batts II. Life expectancies are simply too difficult to administer and not accurate enough to adequately allocate the risk of erroneously condemning a defendant to die in prison.

For these reasons, this Court should answer the question before it not by determining whether Felder's sentence is *actuarially* equivalent to a life sentence, but whether it functions like a life sentence based on constitutional constraints.

III. A REDEEMABLE JUVENILE SHOULD NOT BE SENTENCED TO A MINIMUM PRISON TERM OF MORE THAN 40 YEARS.

In addition to holding that Felder's sentence is an unconstitutional *de facto* life-without-parole sentence for a redeemable juvenile, this Court should implement a bright line rule for deciding when juvenile offenders' sentences are unconstitutional *de facto* life sentences. Given the complexity of the issue and the tendency of courts and litigants to default to life expectancy, providing such a rule will provide much-needed guidance to Pennsylvania courts and will streamline and make consistent the resolution of future *de facto* life challenges.

Felder's counsel suggests that any sentence above 20 to 25 years of imprisonment before parole eligibility is an unconstitutional *de facto* life sentence

(Brief for Appellant, 21-22). The Commonwealth disagrees about where the line should be drawn and proposes a constitutional line of 40 years—meaning that no juvenile offender in Pennsylvania can be sentenced to a minimum sentence of more than 40 years of imprisonment unless he is first found to be incorrigible. Importantly, the Commonwealth’s proposed rule is consistent with 18 Pa.C.S. §1102.1, which sets mandatory minimum terms for juvenile offenders convicted of first or second-degree murder, with the highest mandatory minimum at 35 years. The benefits of drawing a constitutional line, and the specific line the Commonwealth proposes, are based in case law.

“[C]ourts are constantly called upon to draw similar lines in a variety of contexts.” Solem, 463 U.S. at 294.²³ In this context, the Supreme Court has explicitly left the means and methods of complying with Miller to the states. Montgomery, 136 S.Ct. at 735-36.

Bright line rules such as the one proposed are appropriate under the Eighth Amendment. Roper, Graham, and Hall each acknowledged that the reasoning that applies to a group may not be true in discrete cases, and the difficulty in identifying those exceptions.²⁴ Each adopted a bright line rule because the Court worried more

²³ See, e.g., Ballew v. Georgia, 435 U.S. 223 (1978) (minimum jury size).

²⁴ Graham, 560 U.S. at 75 (“Categorical rules tend to be imperfect, but one is necessary here [because] alternative approaches are not adequate to address the relevant constitutional concerns.”); Roper, 543 U.S. at 572-73 (“a rare case might arise in which a juvenile offender ... merit[s] a sentence of death[, but] ... [t]he

about under-protecting rights than over-protecting them. Here, no one knows if Felder will die in prison, or if the potential for parole at the age of 67 provides enough time outside prison to be “meaningful.”

Forty years is an appropriate limit for the proposed constitutional line. Forty years is the latest parole eligibility date of the jurisdictions the Supreme Court cited with approval. Graham, 560 U.S. at 62, App. (listing “[s]ix jurisdictions [that] do not allow life without parole sentences for any juvenile offenders,” all of which require parole eligibility after 40 years or less). Moreover, no state that amended its legislation to comply with Miller set a parole eligibility date beyond 40 years. See supra note 6.

Forty years is also consistent with the reasoning in Graham and Miller. Both noted that sentences of life without parole are “‘especially harsh ... for a juvenile,’ because he will almost inevitably serve ‘more years and a greater percentage of his life in prison than an adult offender.’” Miller, 567 U.S. at 475 (quoting Graham, 560 U.S. at 70). Minimum sentences above 40 years also result in redeemable juvenile offenders spending more years in prison than adults serving life sentences.

differences between juvenile and adult offenders are too ... well understood to risk [imposing] the death penalty despite insufficient culpability”); Hall, 572 U.S. at 714 (“even a consistent score is not conclusive evidence of intellectual functioning.”).

According to the United States Sentencing Commission, sentences slightly above 39 years are equivalent to life without parole based on federal prisoners' average lifespan.²⁵ Thirty-nine years is just less than half the average American life expectancy according to the Center for Disease Control's National Center for Health Statistics,²⁶ whereas juvenile offenders who serve more than 40 years before being paroled will likely have spent more than 50% of their lives in prison. As explained supra, the life expectancy of the average American dramatically overestimates that of a juvenile lifer like Felder. Minimum sentences above 40 years are "especially harsh" for juveniles, and are inconsistent with Miller.

Following modern Eighth Amendment jurisprudence, this Court should minimize the risk that any juvenile offender receives an illegal sentence and vindicate the rights protected by the Constitution. If the proposed rule of 40 years is over-inclusive (*i.e.*, provides a person with the opportunity for parole before it is constitutionally necessary), parole boards will defer release. This Court should not lose sight of the fact that a minimum sentence is an *opportunity* for release:

²⁵ U.S. Sent. Comm'n., 2013 Sourcebook of Federal Sentencing Statistics, 5-6 (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Appendix_A.pdf. Wyoming and Maryland both relied on this statistic when considering the issue *sub judice*. Bear Cloud, 334 P.3d at 142; Carter, 192 A.3d at 728 n.40. Felder does the same in his brief before this Court (Brief for Appellant, 17).

²⁶ National Center for Health Statistics, Mortality in the United States, 2017, 1 (Nov. 2018), <https://www.cdc.gov/nchs/data/databriefs/db328-h.pdf>.

dangerous people will stay in prison. On the other hand, if the rule is under-inclusive (*i.e.*, provides parole too late), it means prisoners either will have died or are too old for parole to provide them with “a meaningful opportunity” for release. Miller, 567 U.S. at 479; Batts II, 163 A.3d at 450 (both quoting Graham, 560 U.S. at 75).

CONCLUSION

Regardless of the precise line, Felder’s sentence is cruel, unusual, and unconstitutionally disproportionate. A constitutional sentence for a redeemable juvenile must provide him with “a meaningful opportunity to obtain release.” Miller, 567 U.S. at 479; Batts II, 163 A.3d at 450 (both quoting Graham, 560 U.S. at 75). That opportunity must give “hope for some years of life outside prison walls[.]” Montgomery, 136 S.Ct. at 736-37. Felder’s sentence does not meet these requirements.

For the foregoing reasons, the Commonwealth respectfully requests that this Court vacate Felder’s sentence and remand for resentencing.

Respectfully submitted,

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Attachment A

States that Statutorily Impose
Parole Eligibility Dates

In Alphabetical Order

STATE	LONGEST MINIMUM SENTENCE FOR JUVENILE OFFENDER	STATUTE
Alabama	30 years	Ala. Code §13A-6-2(c)
Alaska*	33 years	Alaska Stat. §§12.55.125, 33.16.090
Arizona	25 years	Ariz. Rev. Stat. Ann. §§13-751(A)(2)
Arkansas	30 years	Ark. Code Ann. §§5-4-104(b), 5-10-101(c)(1)(B)
California	25 years	Cal. Penal Code §3051
Colorado	40 years	Colo. Rev. Stat. Ann. §17-22.5-104(2)(d)(IV)
Connecticut	30 years	Conn. Gen. Stat. Ann. §54-125a(f)(1)
Delaware	30 years	Del. Code Ann. tit. 11, §4204A(d)(2)
D.C.	20 years	D.C. Code Ann. §24-403.03
Florida	25 years	Fla. Stat. Ann. § 921.1402(2)
Georgia*	30 years	Ga. Code Ann. §§16-5-1, 17-10-6.1(c)(1)
Idaho*	N/A	Idaho Code Ann. §18-4004
Indiana*	20 years	Ind. Code Ann. §§35-50-2-3(a), 11-13-3-2(b)(3)
Kansas	25 years	Kan. Stat. Ann. §22-3717(b)(2)
Kentucky	25 years	Ky. Rev. Stat. Ann. §640.040
Louisiana	25 years	La. Rev. Stat. §15:574.4(E)(1)
Maryland*	25 years	Md. Code Ann., Corr. Servs. §7-301(d)(2)
Massachusetts	30 years	Mass. Gen. Laws Ann. ch. 279, §24
Michigan	40 years	Mich. Comp. Laws Ann. §769.25
Minnesota*	30 years	Minn. Stat. Ann. §244.05
Mississippi*	10 years	Miss. Code. Ann. §47-7-3(1); <u>Parker v. State</u> , 119 So.3d 987, 998 (Miss. 2013)
Missouri	40 years	Mo. Ann. Stat. §565.033
Montana	30 years	Mont. Code Ann. §46-23-201
Nebraska	N/A	Neb. Rev. Stat. Ann. §28-105.02
Nevada	20 years	Nev. Rev. Stat. Ann. §213.12135
New Jersey	30 years	N.J. State. Ann. §2C:11-3(b)(1)
New Mexico*	30 years	N.M. Stat. Ann. §31-21-10
New York	15 years	N.Y. Penal Law §§10.00, 70.00, 70.05, 125.25

North Carolina	25 years	N.C. Gen. Stat. Ann. §15A-1340.19A
North Dakota	20 years	N.D. Cent. Code Ann. §12.1-32-13.1
Ohio*	30 years	Ohio Rev. Code Ann. §2929.03
Oklahoma*	38.25 years	Okla. Stat. Ann., tit. 21, §§13.1, 701.9; <u>Runnels v. State</u> , 426 P.3d 614, 622 (Okla. 2018)
Oregon	25 years	Or. Rev. Stat. Ann. §63.115(5)(b)
Pennsylvania	N/A	18 Pa.C.S. §1102.1
Rhode Island*	25 years	13 R.I. Gen. Laws Ann. §13-8-13(a)(4)
South Carolina*	30 years	S.C. Code Ann. §16-3-20
Tennessee*	51 years	Tenn. Code Ann. §40-35-501(i); <u>Brown v. Jordan</u> , 563 S.W.3d 196, 202 (Tenn. 2018).
Texas	40 years	Tex. Pen. Code Ann. §12.31; Tex. Gov't Code Ann. §508.145
Utah	25 years	Utah Code Ann. §76-3-206
Vermont*	35 years	Vt. Stat. Ann. tit. 13, §2303(a)
Washington	25 years	Wash. Rev. Code Ann. §§9.94A.505, 9.94A.510
West Virginia	15 years	W.Va. Code §61-11-23(b)
Wisconsin*	N/A	Wis. Stat. Ann. §973.014
Wyoming	25 years	Wyo. Stat. Ann. §6-10-301(c)

To account for the differences between sentencing schemes, “Longest Minimum Sentence” means all juveniles are eligible for release at or before the stated term of years.

N/A denotes statute permits any minimum sentence above a given number, such as Pennsylvania’s. For sentencing practices of these states, see Brief for Appellee, 13-15.

* Denotes sentencing statute applies to both juveniles and adults.

This table excludes states without a statutory parole date (Hawaii, Iowa, New Hampshire, South Dakota, Virginia) and those that use determinate sentences without parole (Illinois, Maine). See Brief for Appellee, note 5.

In Order From Earliest Opportunity for Release to Latest

STATE	LONGEST MINIMUM SENTENCE FOR JUVENILE OFFENDER	STATUTE
Mississippi*	10 years	Miss. Code. Ann. §47-7-3(1); <u>Parker v. State</u> , 119 So.3d 987, 998 (Miss. 2013)
New York	15 years	N.Y. Penal Law §§10.00, 70.00, 70.05, 125.25
West Virginia	15 years	W.Va. Code §61-11-23(b)
D.C.	20 years	D.C. Code Ann. §24-403.03
Indiana*	20 years	Ind. Code Ann. §§35-50-2-3(a), 11-13-3-2 (b)(3)
Nevada	20 years	Nev. Rev. Stat. Ann. §213.12135
North Dakota	20 years	N.D. Cent. Code Ann. §12.1-32-13.1
Arizona	25 years	Ariz. Rev. Stat. Ann. §§13-751(A)(2)
California	25 years	Cal. Penal Code, §3051
Florida	25 years	Fla. Stat. Ann. § 921.1402(2)
Kansas	25 years	Kan. Stat. Ann. §22-3717(b)(2)
Kentucky	25 years	Ky. Rev. Stat. Ann. §640.040
Louisiana	25 years	La. Rev. Stat. §15:574.4(E)(1)
Maryland*	25 years	Md. Code Ann., Corr. Servs. §7-301(d)(2)
North Carolina	25 years	N.C. Gen. Stat. Ann. §15A-1340.19A
Oregon	25 years	Or. Rev. Stat. Ann. §63.115(5)(b)
Rhode Island*	25 years	13 R.I. Gen. Laws Ann. §13-8-13(a)(4)
Utah	25 years	Utah Code Ann. §76-3-206
Washington	25 years	Wash. Rev. Code Ann. §§9.94A.505, 9.94A.510
Wyoming	25 years	Wyo. Stat. Ann. §6-10-301(c)
Alabama	30 years	Ala. Code §13A-6-2(c)
Arkansas	30 years	Ark. Code Ann. §§5-4-104(b), 5-10-101(c)(1)(B)
Connecticut	30 years	Conn. Gen. Stat. Ann. §54-125a(f)(1)
Delaware	30 years	Del. Code Ann. tit. 11, §4204A(d)(2)
Georgia*	30 years	Ga. Code Ann. §§16-5-1, 17-10-6.1(c)(1)
Massachusetts	30 years	Mass. Gen. Laws Ann. ch. 279, §24
Minnesota*	30 years	Minn. Stat. Ann. §244.05

Montana	30 years	Mont. Code Ann. §46-23-201
New Jersey	30 years	N.J. State. Ann. §2C:11-3(b)(1)
New Mexico*	30 years	N.M. Stat. Ann. §31-21-10
Ohio*	30 years	Ohio Rev. Code Ann. §2929.03
South Carolina*	30 years	S.C. Code Ann. §16-3-20
Alaska*	33 years	Alaska Stat. §§12.55.125, 33.16.090
Vermont*	35 years	Vt. Stat. Ann. tit. 13, §2303(a)
Oklahoma*	38.25 years	Okla. Stat. Ann., tit. 21, §§13.1, 701.9; <u>Runnels v. State</u> , 426 P.3d 614, 622 (Okla. 2018)
Colorado	40 years	Colo. Rev. Stat. Ann. §17-22.5-104(2)(d)(IV)
Michigan	40 years	Mich. Comp. Laws Ann. §769.25
Missouri	40 years	Mo. Ann. Stat. §565.033
Texas	40 years	Tex. Pen. Code Ann. §12.31; Tex. Gov't Code Ann. §508.145
Tennessee*	51 years	Tenn. Code Ann. §40-35-501(i); <u>Brown v. Jordan</u> , 563 S.W.3d 196, 202 (Tenn. 2018).
Idaho*	N/A	Idaho Code Ann. §18-4004
Nebraska	N/A	Neb. Rev. Stat. Ann. §28-105.02
Pennsylvania	N/A	18 Pa.C.S. §1102.1
Wisconsin*	N/A	Wis. Stat. Ann. §973.014

To account for the differences between sentencing schemes, “Longest Minimum Sentence” means all juveniles are eligible for release at or before the stated term of years.

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

This document complies with the word-count limitation of Pa.R.A.P. 2135(a)(1), because it contains 8,797 words, including footnotes, based on the word count of the word processing system used to prepare it.

/s/ Emily P. Daly
EMILY P. DALY
Assistant District Attorney

Dated: February 14, 2019