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IN THE SUPREME COURT OF PENNSYLVANIA

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18 EAP 2018

COMMONWEALTH OF PENNSYLVANIA

V.

MICHAEL FELDER, APPELLANT

REPLY 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.

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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.

The United States Supreme Court held that every juvenile, except the rare and uncommon youth whose crime reflects irreparable corruption, must be given a "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation." Graham v. Florida, 560 U.S. 48, 75 (2010). Michael Felder was given a minimum sentence of 50 years, which would mean that he would not be eligible for parole until he was 67 years old. The question presented in this case is whether such a delayed opportunity for release would deprive Mr. Felder of "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential" outside the prison walls. Graham, 560 U.S. at 79.

The Commonwealth agrees with most of the arguments presented by Appellant Michael Felder. The Commonwealth agrees that his sentence of 50 years to life is an unconstitutional *de facto* life sentence (Brief for the Commonwealth as Appellee at 2). The Commonwealth agrees that the trial court made no factual finding that Mr.

Felder was irreparably corrupt (Brief for the Commonwealth as Appellee at 2, 6). The Commonwealth agrees that the paradigm for analyzing the propriety of the instant 50 year to life sentence must start with the United States Supreme Court decisions of Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48 (2010), Miller v. Alabama, 567 U.S. 460 (2012), and Montgomery v. Louisiana, 136 S.Ct. 718 (2016), and this Court's decisions of Commonwealth v. Batts, 66 A.3d 286 (Pa. 2013) ("Batts I") and Commonwealth v. Batts, 163 A.3d 410 (Pa. 2017) ("Batts II") (Brief for the Commonwealth as Appellee at 5-6). The Commonwealth agrees that the analysis must then include how courts and legislatures around this country have modified their statutes in light of the mandate from the Supreme Court (Brief for the Commonwealth as Appellee at 7-13). When those precedents are analyzed, it is clear that Mr. Felder's 50 year to life sentence is unconstitutional and that this Court should remand this matter for a new sentencing hearing. And the Commonwealth similarly agrees that resentencing is required (Brief for the Commonwealth at 31).

The United States Supreme Court in Miller held imposition of mandatory life imprisonment requires a distinction between the "juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Miller at 479-480 quoting Roper, 543 U.S.,

at 573, 125 S.Ct. 1183 and Graham, 560 U.S., at 68, 130 S.Ct., at 2026-2027. These Supreme Court's decisions are rooted in scientific research regarding the characteristics of youthful offenders. "For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." Roper, 543 U.S. at 570 (alteration in original) (quoting Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). In a more recent study of over thirteen hundred juvenile offenders, "even among those individuals who were high-frequency offenders at the beginning of the study, the majority had stopped these behaviors by the time they were 25." Laurence Steinberg, *Give Adolescents the Time and Skills to Mature, and Most Offenders Will Stop* (2014) Chicago, IL: MacArthur Foundation, p. 3, *available at* https://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Give%20Adolescents%20Time.pdf. "The inescapable and important conclusion of these findings is that the vast majority of juvenile offenders—even those who have committed serious crimes—will become mature, law-abiding adults simply as a consequence of growing up." *Id.* at p. 4. Hence, most juvenile offenders will cease

to be a public safety risk once they reach their mid-twenties and the risk of dangerous behavior is even more remote as they mature into adults.

The absence of a penological justification for continued incarceration was part of the basis for the Supreme Court's decisions. As a result, the Graham Court mandated that not only must non-irreparably corrupt individuals be afforded an opportunity for release, but that release must also be meaningful; release late in life cannot satisfy this constitutional requirement. "The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." Graham, 560 U.S. at 79. See also Miller, 567 U.S. at 479.

Following the United States Supreme Court decision in Miller, Pennsylvania and numerous other states found their homicide sentencing statutes for juveniles were voided. State courts and state legislatures strove to bring their sentencing practices in conformity with the constitutional mandate delineated by Miller and then Montgomery. Appellant examined how various states modified their statutes. See Brief for Appellant at 20-22. The vast majority determined that juveniles convicted of homicide must now be considered for parole after 20 to 25 years.

The Commonwealth similarly analyzed state statutes and has agreed. In

analyzing the post-Miller statutes, the Commonwealth concluded that 20 of the 24 states modifying their statutes after Miller now require parole eligibility at 30 years or less. See Brief for the Commonwealth as Appellee at 10, n. 6. Thus, fourteen states (Arizona, California, District of Columbia, Florida, Louisiana, Nevada, New York, North Carolina, North Dakota, Oregon, Utah, Washington, West Virginia, Wyoming) set parole eligibility at 25 years or less, while six other states modified their statutes requiring parole eligibility at 30 years or less (Alabama, Arkansas, Connecticut, Delaware, Massachusetts, New Jersey).

In order to comply with Miller, the Pennsylvania legislature established a mandatory minimum of 35 years for those 15-17 years of age convicted of first degree murder[1]. Only after that lengthy period of time would a juvenile first be eligible for parole. According to the Commonwealth, only three other states modified their statutes to be as draconian as Pennsylvania: Missouri, Michigan and Nebraska. See Brief for the Commonwealth as Appellee at 10, fn. 6. Hence, Pennsylvania is a statutory outlier in the post-Miller landscape.

The parties have proposed two different models in order to bring Mr. Felder's sentence (and Pennsylvania sentencing) into conformity with the 8th Amendment. Mr.

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[1] 18 Pa.C.S.A. § 1102.1 established four mandatory minimums (20, 25, 30 and 35 years) depending on the age of the defendant and whether the crime was first or second degree murder.

Felder proposed that this Court's holding in Batts II should be applied to this situation: where it is not established that the juvenile is incapable of rehabilitation, the burden of proof must be on the Commonwealth to establish beyond a reasonable doubt that the minimum sentence imposed is not a *de facto* life sentence. Brief for Appellant at 18. An examination of how various states have reformed their statutes to comply with Miller suggests that the national view of *de facto* life is a sentence greater than 20 to 25 years. Brief for Appellant at 21-22. The Commonwealth posits that this Court should simply draw a bright line and mandate that any sentence greater than 40 years is a *de facto* life sentence, with the requirement that the Commonwealth establish permanent incorrigibility beyond a reasonable doubt before a sentence of that length could be imposed. Brief for the Commonwealth as Appellee at 27.

In support of its 40 year bright line, the Commonwealth explains that "no state that amended its legislation to comply with Miller set a parole eligibility date beyond 40 years." Brief for the Commonwealth as Appellee at 28. However, according to the Commonwealth 20 of 24 states amended their statutes to create parole eligibility at 30 years or less with 14 of those states creating parole eligibility at 25 years or less. Brief for the Commonwealth as Appellee at 10, fn. 6; 11. The Commonwealth also notes that the United States Sentencing Commission used a sentence of "slightly above 39 years [as] equivalent to life without parole based on federal prisoners'

average lifespan." Brief for the Commonwealth as Appellee at 29. The Commonwealth provides no explanation as to why the 40 year line it is proposing should be so out sync with the rest of the country and, as a result, would perpetuate Pennsylvania as a sentencing outlier.

It is important to note, as the Commonwealth does, that in asking this Court to establish a specific line to determine if a sentence constitutes *de facto* life, that a sentencing minimum is not when a person would be released. Rather, the minimum sentence determines when the person would be eligible to see the Parole Board. As a result there are two possible errors that could occur in setting a specific number that would delineate between *de facto* life sentences and non-*de facto* sentences: the Court could set that number too low or too high. If this Court were to set too low a number and the person was not ready to be safely released into the community when eligible for parole, the Parole Board would simply deny parole. Brief for the Commonwealth at 29. However, if this Court were to set a minimum sentence too high, that would create a constitutional deprivation because that would mean that "prisoners either will have died or are too old for parole to provide them with 'a meaningful opportunity' for release." Brief for the Commonwealth as Appellee at 30.

This constitutional problem demonstrates why, if this Court were to establish a specific minimum number beyond which would constitute *de facto* life, it should

establish a 20 to 25 year minimum, as have the vast majority of states. Such a line would protect the public because the Parole Board could determine if a person was not yet ready for release and deny parole. And such a line would create an opportunity for release based upon demonstrated maturity and rehabilitation with an opportunity "to achieve maturity of judgment and self-recognition of human worth and potential." Graham, 560 U.S. at 79.

Moreover, establishing a 20 to 25 year minimum as the *de facto* life sentencing line is actually consistent with other provisions of the current Pennsylvania juvenile homicide sentencing statute. That statute established a mandatory minimum of 20 years (for those 14 years old and younger convicted of 2nd degree murder), 25 years (for those 14 years old and younger convicted of 1st degree murder), 30 years (for those 15-17 years old and convicted of second degree murder) and 35 years (for those 15-17 years old and convicted of first degree murder). 18 Pa.C.S.A. § 1102.1. Hence, the 20-25 year line proposed by Mr. Felder is consistent with the current sentencing practice for those 14 years old and younger.

While the 20-25 year line is inconsistent with the current sentencing practice for those 15-17 years of age, there are two reasons to draw the line at 20-25 years. First, that the legislature drew the line at 20-25 years for some juveniles charged with murder suggests that the legislature determined that such a line would be consistent

with the constitutional mandate of allowing for a "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75. Possible release after 20-25 years would allow those released "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential, as well as 'fulfillment'" outside the prison walls. Graham, 560 U.S. at 79. Such an opportunity to actually rejoin society and become a productive citizen should exist for all juveniles irrespective of their age or degree of homicide.

The second reason that the 20-25 year line should be the *de facto* life line deals with the consequences of making it later, for example the 40 years of incarceration suggested by the Commonwealth. The later that line becomes the less time individuals would have upon release to realize a productive contribution to their social and economic life upon reentering society; *i.e.* to achieve their human worth and potential. The later that line becomes the more likely it will be that a person will become estranged from family and friends, lose the chances to get a job, establish a career, make meaningful relationships, marry, or have a family. Morever, studies suggest that people incarcerated lose 2 years of life for each year of incarceration (Brief for Appellant at 18, fn. 9). This means for a 17 year old like Mr. Felder the Commonwealth's line at 40 years would translate into possible release when he has aged the equivalent of 80 years as a result of 40 years of incarceration. He would

essentially be the functional equal of a 97 year old who had not been incarcerated. At least the 20-25 year old line would mean that Mr. Felder would first become eligible for release when he would be essentially the same as a 57 to 67 year old who had never been incarcerated.

Michael Felder was given a 50 year to life sentence. As a result he would be at least 67 when he first became parole eligible despite any previous ability to demonstrate his rehabilitation. That sentence is a *de facto* life sentence. This Court should vacate his sentence and remand the matter for resentencing.

II. 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/

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

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

/S/

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