IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 2114 EDA 2015

COMMONWEALTH OF PENNSYLVANIA
Appellee

V.

ANTHONY ROMANELLI

COMMONWEALTH'S BRIEF AS APPELLEE

Defendant's appeal from the May 29, 2015 resentencing proceeding in the Court Of Common Pleas Of Philadelphia County, Trial Division, Criminal Section, at CP-51-CR-0300422-2005, for murder of the second degree, robbery, aggravated indecent assault, burglary, and criminal conspiracy.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Do the federal or state constitutions categorically forbid life without parole for second degree murder where the offender was under 18?

(Answered in the negative by the court below).

2. Did the trial court have discretion to find defendant incorrigible and impose an individualized sentence of life without parole?

(Answered in the afirmative by the court below).[1]

[1] Because defendant's second and third issues state the same discretionary sentencing claim in different ways (the third refers to "the circumstances of this case" while the second incorrectly assumes that the trial court did not find him to be incorrigible), they are combined here for the sake of clarity.

COUNTER-STATEMENT OF THE CASE

Juvenile life without parole is allowed in exceptional cases. Here, defendant, Anthony Romanelli, was just over two months shy of his eighteenth birthday when he and his co-defendant broke into the home of an eighty-four year old woman. They brutally assaulted, sexually abused, mutilated, and finally murdered her by slitting her throat. On resentencing under *Miller v. Alabama* the trial court re-imposed life without parole.

On appeal, defendant contends that if the United States Supreme Court has not barred juvenile life without parole for second degree murder (and it has not), this Court should create new law under the state constitution to remove all remaining discretion from trial judges. Because the law properly allows trial judges to instead retain the independence to decide whether an exceptional offender is a calculating killer rather than a youth misled by transient immaturity, there was no error. The judgments of sentence should be affirmed.

1. The murder

On the morning of Saturday November 13, 2004, Olga Medina, a home health aide, went to the home of eighty-four-year-old Marie Lindgren at 3453 Keim Street in Philadelphia for a regularly scheduled visit. When Ms. Lindgren did not answer the door, Ms. Medina contacted her daughter Betty. Ms. Lindgren's daughter called a neighbor, Cecilia Midri, and asked her to check on her mother. When there was no answer at the door, Ms. Midri got a step ladder and attempted to look in the window. She saw that the house appeared to have been ransacked. At this point, co-defendant

Joseph Mumma, who lived across the street from the victim, appeared and offered to help.

Unbeknownst to these neighbors, Mumma was one of the two intruders who had murdered the elderly victim. Pretending to render assistance, Mumma kicked in the front door of the home he had recently invaded, and he, Ms. Midri, and Ms. Midri's daughter entered the house. In the area between the living room and dining room (the victim used her dining room as a bedroom because she could not go up and down stairs; N.T. 11/17/06, 94-95), they found Ms. Lindgren's body underneath a mattress, a box spring and sheets.

Officer Julio Ortiz was the first officer to arrive on the scene. He found the victim's body under a mattress, with various things piled on top of her. He could see that she had a very large laceration on her neck. Detectives from the Homicide Unit and personnel from the Crime Scene Unit were summoned and a crime scene was established.

Officer Adrian Makuch of the Crime Scene Unit photographed and videotaped the scene and collected evidence for fingerprinting. The house had been ransacked. On the wall in the dining room, he observed graffiti style writing saying “Fuck Bitches” in red lettering and “RNC” in green lettering. The officer also found two small bottles of finger nail polish that could have been used to write on the walls. In the kitchen, Officer Makuch saw two pieces of board attached to the wall with the words, “Love me or hate me, I'm still the best” and “White Power” written in orange. The words “Krazy Young Kenso” were also written on the wall. Beneath this writing

the officer found a container of orange lipstick. Officer Makuch also recovered a pair of garden shears, a box cutter, and a pillow case that appeared to be stained in blood. The following day, Cesar Mujica, a civilian employee of the Crime Scene Unit, found a piece of a human finger on the dining room floor (N.T. 11/17/06, 178-225, 240-247).

Autopsy of the victim's body revealed extensive areas of bruising on the left side of her face and a laceration on the left eyebrow. Both sides of her scalp were densely bruised, and her entire head was contused, with tiny bruises known as petechia which were cause by anoxia, i.e., suffocation by strangling. Petechia were also scattered over the victim's face and around her eyelids. The medical examiner concluded the victim had been strangled prior to her death, most likely by hand, as shown by bruising to the deep tissue in the neck and several broken bones in the neck.

The most prominent injury was a large, gaping, incised wound below the jawbone, which went from ear to ear. The wound penetrated halfway through the neck, through all of the structures of the front of the neck except the carotid arteries. It appeared to have been made by several sawing motions, most likely with a serrated blade.

The victim had defensive wounds on her arms, and bruises on her left forearm and inner right knee, and a large tear on the back of her left hand where much of the skin had been ripped off and the tendons exposed. There was a complete avulsion, or skin and muscle removal, injury to the little finger of the victim's left hand, where the tissue had literally been pulled from the bone.

Most of the victim's ribs had been fractured. Bruising and abrasions were found in the victim's vagina, consistent with an object being violently inserted. The medical examiner also found sub arachnoid hemorrhaging in the victim's brain (N.T. 11/20/06, 121-124, 129-161).

Sometime after police arrived on the scene on November 13, 2004, Mumma agreed to go to the Homicide Unit to be interviewed as a witness. He was initially interviewed by Detective Theodore Hagan and gave a statement essentially recounting his entering the victim's house with other neighbors and discovering the body. Following this statement, Mumma agreed to wait until the assigned detective returned from the scene. At about 11:00 p.m., Detective James McLaughlin, the assigned detective, returned to the Homicide Unit and subsequently began interviewing Mumma. During the conversation, the detective observed that Mumma had red and green stains on his sneakers similar to the writing that was found on the walls in the victim's dining room. When Mumma said that he had only gone into the victim's house a few feet before discovering the body, Detective McLaughlin began to view Mumma as a suspect and gave him *Miranda* warnings.

Mumma gave a statement in which he admitted entering the victim's house with defendant, Anthony Romanelli (N.T. 11/20/06, 57-78, 191-245; N.T. 11/21/06, 55-62, 126-136).[2] He said he and Romanelli had been at a party drinking and smoking marijuana. At about 3:00 a.m. they left the party, and Mumma suggested they could

[2] At trial each co-conspirator's statement was redacted to refer to "the other guy," and the jury was instructed that each such statement could be considered only against the individual who made it.

make a couple of dollars. He told Romanelli he, Mumma, had a key to the victim's house and that they could get in by the back door and take money out. Mumma said he put on hospital gloves that he retrieved from his house, while Romanelli wore a pair of baseball batting gloves. They went through an alley and entered the victim's back door. When they did so the victim started yelling. Romanelli struck her, causing her to fall to the floor.

Mumma said he then went upstairs where he found ten dollars. When he went back down stairs, Romanelli was looking through the house but found nothing valuable. Mumma said they should leave, but Romanelli dragged the victim along the floor saying "where's the money bitch." When the victim did not say anything, according to Mumma, Romanelli grabbed a pair of garden sheers and cut off one of her fingers. After repeatedly saying "where's the money bitch," Mumma said, Romanelli grabbed the victim by the hair and cut her throat, getting "blood everywhere" and on Mumma's pants. They then ran out of the house and promised each other to tell no one what had happened. Mumma said they then bought marijuana with the ten dollars he had found in the victim's house. They smoked it and then went to Romanelli's house to change their bloody clothes. Mumma said they burned Romanelli's clothes near some railroad tracks and then he went home. Mumma was supposed to burn his own clothes too, but fell asleep. When asked about writing on the walls, Mumma said he wrote the word "fuck" on the wall and Romanelli wrote "bitches" (N.T. 11/20/06, 217-228).

At 6:00 a.m. on November 14, 2004, police executed a search warrant at

Mumma's residence at 3454 Keim Street. Among the items recovered in that search was a pair of blue jeans with red and green stains on the pant legs and a reddish brown stain on the bottom of the pant; a black long-sleeve T-shirt; a white T-shirt with red stains on the inside right side; a white T-shirt with red stains on the bottom rear and red and green stains on the bottom front; a jacket with red stains near the left pocket; a folding knife; a plastic utility knife; and note books containing graffiti style writing with phrases such a "Krazy Young Kenso," "Krazy White Trash," and "hated by most, loved by none" written in them. Subsequent laboratory testing disclosed that stains on Mumma's blue jeans and the two white T-shirts found in his bedroom indicated the presence of human blood. DNA analysis of those blood stains matched the victim (N.T. 11/21/06, 85-108; N.T. 11/27/06, 98-101, 142-152).

During that search another warrant was executed for Romanelli's home at 3433 H Street. The search disclosed from defendant's bedroom an address book with an entry and a number for "Joey M"; a photograph depicting himself, Mumma and another unidentified male; two envelopes addressed to him; and a pay stub in the name of Joseph Mumma. Detective John Harkins spoke to defendant's mother, Joanne Romanelli, and obtained oral and written permission to transport defendant to the homicide unit for questioning. Ms. Romanelli declined to accompany him. Meanwhile Detective Richard Reinhold told Romanelli that the police needed to speak with him. He agreed to come to the homicide unit to answer questions (N.T. 11/21/06, 136-141, 161-171, 222-225).

In the interview Romanelli's demeanor was "cold, calculating and

unremorseful." He "didn't seem the slightest bit upset about any of this. He didn't seem the slightest bit remorseful considering the nature of what he was being questioned about" (N.T. 11/21/06, 232-233, 265).[3]

Romanelli said he and Mumma left the party and Mumma asked if he wanted to make a couple of dollars. Romanelli said he was drunk and high and that "[o]ne thing led to another."After Mumma opened the back door Romanelli was the first one in. Romanelli encountered the victim walking into the kitchen. He claimed he only "pushed" or "knocked" her to the floor, but with the result that she was physically unable to answer the intruders' demand to be told where her money was: "She was making noises but words weren't coming out" (N.T. 11/21/06, 243-245).

They grabbed her and pulled her into the living room. Romanelli said he searched the upstairs for money and pulled out drawers, and upon returning found that the downstairs had been ransacked by his partner and that the victim was on the floor. Romanelli claimed he told Mumma they had to go and that he was "about to cry," but that Mumma told him to "chill" and "relax," produced a silver knife, and "made two rips to her throat." Outside, Mumma said he was going back to the party, and left. In response to further questions, Romanelli described the knife as a silver folding knife, with a six or seven inch blade with ripples on the blade. He denied cutting the victim's finger off and claimed he did not see Mumma do it either. He said

[3] Detective Reinhold's direct testimony that Romanelli's was "cold and calculating" was objected to and stricken, but the same testimony was then elicited by the defense, without objection, on cross-examination (N.T. 11/21/06, 265 [... "you felt he was acting without remorse, he was sitting there without remorse at that time, is that fair to say?" A. "Yes, sir; cold, calculating and unremorseful"]).

that Mumma alone wrote on the walls, and that he did not know what was written (N.t. 11/21/06, 241-245). DNA testing showed that a brown stain on Romanelli's left sneaker was the blood of the murdered victim (N.T. 11/21/06, 213-219; N.T. 11/27/06, 105-106, 152-154).

On November 30, 2006, a jury before the Honorable Sheila Woods-Skipper found Romanelli and Mumma guilty of murder in the second degree, robbery, burglary, aggravated indecent assault, and criminal conspiracy.

2. Initial sentencing

At the sentencing proceeding on February 2, 2007, the Commonwealth entered into the record a letter from the victim's daughter.[4] The court also heard from counsel,

[4] Stating, in part:

> My life remains completely turned upside-down. Every day I shake uncontrollably as I think of the heinous act committed by these men that left me motherless. I have become fearful and suspicious of others since this tragedy. It is difficult to understand why and how a neighbor whom you are friendly with and gave gifts to would tresspass, burglarize and violently murder someone. My mother had her trust complte[ly] violated.
>
> No closure was obtained with respect to my mother's death. I was unable to see her body since it was virtually destroyed. I did not want to remember her this way. Yet my daughter who had to identify the body will be haunted by those images of her grandmother. I have nothing from my mother's home. As if to underscore the malicious intent of the crime, virtually all of her possessions were destroyed by these two men. Her home was absolutely upended, literally. Everything was broken or destroyed, scattered across the floor. There was insulting, vulgar graffiti on the walls. Her blood had soaked through the furniture and saturated the carpet. A specialty cleaning firm had to dispose of items properly. I now have no family pictures, heirlooms or for that matter none of her personal items to remember her by.

including the prosecutor's uncontested representation that homicide detectives inured to human carnage, and a criminal defense attorney practicing in homicide cases, had commented on the shocking and horrific nature of the offense (N.T. 2/2/07, 11-16). The court sentenced defendant to life imprisonment for murder and a consecutive term of 10 to 20 years for conspiracy.

Defendant filed an appeal that was dismissed for procedural defects on July 11, 2007, but had his appeal reinstated on May 29, 2009. This Court affirmed the judgments of sentence on March 1, 2010, at 613 EDA 2007.

3. The *Miller* decision

On March 25, 2010, defendant filed a petition for allowance of appeal. On August 13, 2010, the Supreme Court ordered that petition held pending its decision in *Commonwealth v. Batts*, 79 MAP 2009. *Batts* involved the issue then pending in the United States Supreme Court in *Miller v. Alabama*, i.e., whether it was constitutionally permitted to automatically impose life without parole where the offender was under the age of 18 at the time of the murder. On June 25, 2012, *Miller* decided that question in the negative. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

The *Miller* Court held that an offender who had been 18 at the time of the offense must be afforded "individualized sentencing" that would recognize the "mitigating qualities of youth" and "require [the sentencing court] to take into account how children are different." While sentences of life without parole would be "uncommon" under these conditions, the Court specifically declined to "foreclose a sentencer's ability to make that judgment," and held that life without parole sentences

could continue to be imposed in cases of "the rare juvenile offender whose crime reflects irreparable corruption." 132 S. Ct. at 2467, 2469.[5]

In *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013), the Pennsylvania Supreme Court held that *Miller* required resentencing in such cases. It rejected a claim that broader protection is afforded under the state constitution. Hence, it remanded defendant's case, among others, for resentencing consistent with *Miller*. Approving this Court's analysis in *Commonwealth v. Knox*, 50 A.3d 732, 745 (Pa. 2012), the Supreme Court in *Batts* held that the resentencing court, at a minimum:

> ... should consider a juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.

Batts, 66 A.3d at 297.

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[5]

> [W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S., at 573, 125 S.Ct. 1183; *Graham*, 560 U.S., at ——, 130 S.Ct., at 2026–2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Miller at 2469.

4. Resentencing pursuant to *Miller*

At the resentencing proceeding of May 29, 2015, defendant argued that life without parole had been constitutionally barred for juvenile offenders. He also personally testified, to the effect that he had taken responsibility for his offense, had matured in prison, and had undertaken numerous rehabilitative projects and charitable endeavors. In addition, he introduced the report of a defense psychologist, which presented a highly favorable profile of him as accepting "full responsibility" and ready to become a "productive member of society."

The Commonwealth established that defendant had incurred seven prison disciplinary violations in the three-year period between initial sentencing, in 2007, through 2010 when the Supreme Court announced it was holding his allocatur petition in light of *Miller* and *Batts*. The court heard from family members of the victim, who again stressed that defendant and his accomplice had "viciously tortured and murdered our grandmother" (N.T. 5/29/15, 48). The Commonwealth noted that defendant, according to his own statement, was first through the door of the burglarized home; and it was he who immediately made the encounter with the victim a violent one, striking her with such force that (in his words) "She was making noises but words weren't coming out" (*see* N.T. 11/21/06, 245). It also noted defendant's sophistication following the crime in destroying his clothes to eliminate evidence, and that his prior juvenile commitment for an earlier offense (he had been adjudicated for possession of an instrument of crime and institutional vandalism in 2001 and discharged in 2004) had no rehabilitative effect (*Id*., 49-53).

Having considered all that had been presented, including the factors listed in 18 Pa.C.S. § 1102.1(d),[6] the court reimposed life without parole and a consecutive term of 10 to 20 years for conspiracy. Judge Woods-Skipper found that even "as a homicide judge," defendant's murder of Marie Lindgren was "one of the most heinous crimes that have come before me." The court acknowledged defendant had "matured" in prison, but that "[a]ge does that to us." It further found that defendant's "ability to try to hide the crime and his participation in it showed a certain level of maturity at that level," and that he was "not just a kid who was maybe being led by

[6] Sentencing courts may take non-binding notice of the statutory sentencing factors even where, as here, the statute was not yet in effect for the instant murder. *See Batts*, 66 A.3d at 300 (Baer, J., concurring). Those factors are:

> (1) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. A victim impact statement may include comment on the sentence of the defendant.
> (2) The impact of the offense on the community.
> (3) The threat to the safety of the public or any individual posed by the defendant.
> (4) The nature and circumstances of the offense committed by the defendant.
> (5) The degree of the defendant's culpability.
> (6) Guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing.
> (7) Age-related characteristics of the defendant, including:
> (i) Age.
> (ii) Mental capacity.
> (iii) Maturity.
> (iv) The degree of criminal sophistication exhibited by the defendant.
> (v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.
> (vi) Probation or institutional reports.
> (vii) Other relevant factors.

someone else" (*Id*., 61-64).

Defendant appeals.

SUMMARY OF ARGUMENT

This Court should not go beyond *Miller v. Alabama* and *Montgomery v. Louisiana* to make new law to immunize defendant from juvenile life without parole. Contrary to his argument, *Graham* validates that sentence for offenders who "kill, intend to kill, or foresee that life will be taken." Consistent with *Graham*, second degree murder includes an offender who "foresee[s] that life will be taken," and the record shows defendant did "kill [or] intend to kill." *Miller* and *Montgomery* do not support defendant's argument, and nothing in the state constitution supports going beyond those decisions.

Defendant's challenge to the sentencing court's discretion should not be reviewed because his Rule 2119(f) statement is inadequate. Regardless, his claim that the court did not follow *Miller* is really an argument that *Miller* does not mean what it says. But the United States Supreme Court does not speak in riddles. Under *Miller*, as further explained by that Court in *Montgomery*, juvenile life without parole must be rare; but trial courts still retain independence to decide if an exceptional case warrants that punishment. Defendant is exceptional. The record shows him to be a "cold, calculating and unremorseful" killer who was not exhibiting "transient immaturity" when he and his accomplice brutally murdered Marie Lindgren.

The judgments of sentence should be affirmed.

ARGUMENT

I. Life without parole for juvenile second degree murder is constitutionally permitted.

Defendant argues that life without parole is impossible for second degree murder. No precedent says that, nor should this Court extend the state constitution to make it so. It should not make new law to immunize defendant from life without parole for the instant murder.

1. The United States Supreme Court does not bar juvenile life without parole for second degree murder.

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the United States Supreme Court held that an automatic, mandatory sentence of life without parole constitutes cruel and unusual punishment where the offender was under 18 at the time of the offense; and that individualized sentencing, taking account of the unique characteristics of youth, was instead required. *Miller* explained that juvenile life without parole is restricted to the "rare" juvenile offender "whose crime reflects permanent incorrigibility," or "irreparable corruption."132 S. Ct. at 2469.

Miller extended prior decisions establishing the importance of the unique characteristics of juvenile offenders. In 2005, the Court held that the Eighth Amendment bars the death penalty for juvenile offenders in *Roper v. Simmons,* 543 U.S. 551 (2005). In 2010, the Court held that such offenders could not be sentenced to life without the possibility of parole for crimes other than homicide in *Graham v. Florida,* 560 U.S. 48 (2010). Finally, in *Miller*, where the question was whether mandatory juvenile life without parole sentences are allowed, the Court, as in *Roper*

and *Graham*, noted that juveniles differ from adults in three ways. First, juvenile offenders have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. *Roper,* 543 U.S. at 569. Second, they "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Id*. Third, a juvenile offender's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievably depraved character." *Roper* at 570; *Graham* at 68; *Miller* at 2464.

Miller ruled that mandatory life without parole statutes cannot stand because such laws "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 2466. Relying on the conclusions reached in *Roper* and *Graham,* the *Miller* Court stated that, when those factors are given effect, "sentencing juveniles to this harshest possible penalty" will be "uncommon" given the difficulty "of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Nevertheless, the Court did not absolutely "foreclose a sentencer's ability to make that judgment in homicide cases," but held that it must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469 (citations and internal quotation marks omitted).

Neither *Miller*, nor *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013), the later decision of the Pennsylvania Supreme Court applying *Miller,* prohibited reimposing a juvenile life without parole sentence. The Court in *Batts* specifically rejected an argument that, as a result of *Miller*, Pennsylvania's statutory scheme for imposing life sentences for murder was rendered unconstitutional, such that juvenile murder offenders must be resentenced to third degree murder. *Id*. at 294, 295 ("Appellant's argument that the entire statutory sentencing scheme for first-degree murder has been rendered unconstitutional as applied to juvenile offenders is not buttressed by either the language of the relevant statutory provisions or the holding in *Miller*"); *see also Commonwealth v. Cunningham*, 81 A.3d 1, 2-3 (Pa. 2013) (discussing relevance of *Batts* and *Miller* where appellant convicted of second degree murder). The *Batts* Court also held that it would not go beyond the holding of *Miller* in order to find additional restrictions on sentencing, expressing "reluctance" to "go further than what is affirmatively commanded by the High Court" without "a common law history or a policy directive from our Legislature," and heeding the "strong presumption" that legislative enactments are constitutional. *Batts*, 66 A.3d at 295.

After defendant was resentenced in May 2015, on January 25, 2016, the United States Supreme Court in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), clarified that *Miller* was a "substantive" decision that is fully retroactive.[7]

[7] *See Teague v. Lane*, 489 U.S. 288 (1989) (plurality) (holding that only "substantive," as opposed to "procedural," constitutional rulings are effective following the conclusion of direct appellate review). *Montgomery* effectively overruled that part of *Cunningham* that held *Miller* to be non-retroactive.

The *Montgomery* Court also explained that *Miller* is to be understood in light of *Atkins v. Virginia*, 536 U.S. 304 (2002), which requires "a procedure through which [an offender] can show that he belongs to the protected class." "The procedure *Miller* prescribes," the Court said, "is no different." For *Miller* cases, rather than a procedure in which the offender may prove he is a member of the intellectually disability class, what is required is "a hearing where youth and its attendant characteristics are considered as sentencing factors," in order to "separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 136 S. Ct. at 735; *Miller*, 132 S. Ct. at 2460.

The *Montgomery* Court acknowledged that "a finding of fact regarding incorrigibility ... is not required" under *Miller*. That decision did not "impose a formal factfinding requirement," but only barred life without parole for an offender "whose crime reflects transient immaturity[.]" *Montgomery*, 136 S. Ct. at 735 (internal quotation marks omitted). What *Miller* requires is a hearing for the defendant to establish that he is of the class of the transiently immature, and not the rare juvenile offender "whose crime reflects irreparable corruption." 132 S. Ct. at 2469.

Therefore, *Miller*, including the *Montgomery* Court's explanation of *Miller*, requires a discretionary ruling. It does not raise an absolute bar to life without parole. *Miller*, 132 S. Ct. at 2469 ("we do not foreclose a sentencer's ability to make that judgment"). *Miller* and *Montgomery* deal with the individual characteristics and circumstances of the offender, and not, for example, the kind or degree of homicide for which he was convicted. Discretion is heavily weighted in favor of the juvenile

offender; but deciding if he is of the protected class "whose crime reflects transient immunity" or the "rare" sort "whose crime reflects irreparable corruption" remains a matter for independent judicial determination.

2. The sentence is consistent with *Graham*, *Miller*, and *Montgomery*.

Against this legal background defendant nevertheless cites "*Graham*, *Miller*, and *Montgomery*" and argues under these cases that, as a juvenile offender, he is "constitutionally ineligible" to be sentenced to life without parole for second degree murder, because second degree murder does not require specific intent to kill (defendant's brief, 22).

Graham, however, prevented juvenile life without parole for crimes *other than homicide*. Graham was convicted of "armed burglary," not homicide, and the Court classified that as a crime in which offenders "do not kill, intend to kill, or foresee that life will be taken." *Graham*, 460 U.S. at 69.[8] The Court thus effectively *accepted* life without parole for juvenile offenders who "kill, intend to kill, or foresee that life will be taken."

Juvenile life without parole for second degree murder is therefore consistent

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[8]

> The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. There is a line between homicide and other serious violent offenses against the individual. Serious nonhomicide crimes may be devastating in their harm ... but in terms of moral depravity and of the injury to the person and to the public, ... they cannot be compared to murder in their severity and irrevocability.

Graham, 560 U.S. at 69, citations and internal quotation marks omitted.

with *Graham*. Murder is a form of *homicide*; second degree murder infers the killing was "malicious" (and thus, murder) from the fact the actor was committing a felony of "such a dangerous nature" that he "knew or should have known that death might result[.]" *Commonwealth v. Lambert*, 795 A.2d 1010, 1023 (Pa. Super. 2002). Second degree murder requires that the offender "knew or should have known that the possibility of death" accompanied a dangerous felony. *Id*. (citations omitted).[9] The killing "must be accomplished *in furtherance of* the intentional felony," *Commonwealth v. Rawls*, 477 A.2d 540, 543 (Pa. Super. 1984) (original emphasis), and death must be *foreseeable*. *Commonwealth v. Waters,* 418 A.2d 312, 317 n.10 (Pa. 1980) (explaining that second degree murder excludes unforeseeable death; "even though an accomplice knows or should know those connected to a robbery may be killed during the course of a dangerous felony, he should not be held accountable for that which he cannot at least foresee") (citation omitted). Second degree murder establishes at a minimum that the offender, as stated in *Graham*, "fores[aw] that life will be taken."

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[9]

> Malice express or implied is the criterion and absolutely essential ingredient of murder. Malice in its legal sense exists not only where there is a particular ill will, but also whenever there is a wickendness of disposition, hardness of heart, wanton conduct, cruelty, recklessness of consequences and a mind regardless of social duty. Legal malice may be inferred and found from the attending circumstances.

Commonwealth v. Commander, 260 A.2d 773, 776 (Pa. 1970). Defendant cites *Commonwealth v. Legg*, 417 A.2d 1152, 1154 (Pa. 1980), which merely holds that second degree murder is inapplicable where the murder occurs before the intent to commit the underlying felony is formed. It is the heightened malice associated with certain felonies that raises the degree of murder from third to second.

Because *Graham* expressly allows juvenile life without parole for offenders who "kill, intend to kill, or foresee that life will be taken," it certainly allows that penalty for second degree murder; to argue otherwise is to contradict that case.

Miller and *Montgomery*, the other cases on which defendant relies as supporting an absolute bar to juvenile life without parole for second degree murder, do not even discuss kinds or degrees of murder. Instead they require a hearing to "separate those juveniles who may be sentenced to life without parole from those who may not" on the basis of their "youth and its attendant characteristics." *Montgomery*, 136 S. Ct. at 735. This is an inherently discretionary decision. Defendant italicizes language from *Miller* saying that life without parole sentences must be "uncommon" (defendant's brief, 26, emphasis omitted), not that such sentences are limited by type or degree of murder.[10]

And even if some second degree murderers do not kill or intend to kill, defendant did. His conviction of second degree murder did not amount to a finding that he did *not* kill or intend to kill. *See Commonwealth v. Fisher*, 80 A.3d 1186, 1191 (Pa. 2013) (that third degree murder does not *require* intent to kill does not mean it establishes *absence* of intent to kill).

Defendant's argument assumes he had little to do with murdering the victim,

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[10] Defendant relies on the concurring opinion by Justice Bryer, joined by Justice Sotomayor, in *Miller*. That opinion says, "Given *Graham* 's reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim." 132 S. Ct. at 2475-2476 (Bryer, J., with Sotomayor, J., concurring). But this was the minority view of only two jurists, and it attempted no analysis of second degree murder as defined in Pennsylvania.

as if her death were collateral damage. That is unfounded. Mumma's statement asserted that defendant personally killed the victim. Though defendant's statement in turn blamed Mumma, where killers blame the fatal blow on each other, *both* – not *neither* – are responsible. *Commonwealth v. Galindes*, 786 A.2d 1004, 1012 n.6 (Pa. Super. 2001) ("Because [the offenders] were engaged in a conspiracy to commit burglary, the act of one of them ... renders the other co-conspirator criminally responsible").[11]

Defendant's *own confession* established that he initiated the ultimately-fatal violence, by striking the frail and elderly victim with such force that "She was making noises but words weren't coming out." It is implausible that he was elsewhere or distracted while the vast range of harrowing injuries the victim sustained were being inflicted. His own clothes were so stained with the victim's blood he decided to burn them. The evidence, in short, was easily sufficient to prove *first* degree murder and specific intent to kill. *E.g. Commonwealth v. Chester*, 587 A.2d 1367, 1372 (Pa. 1991) (evidence sufficient for first degree murder where victim's throat slashed with a knife and the two co-defendants who participated in the attack each blamed the fatal

[11] *Commonwealth v. La*, 640 A.2d 1336, 1351 (Pa. Super. 1994) ("when there is evidence that one who has not struck a fatal blow has, nevertheless, shared in the criminal intent and the criminal activity, that person has aided and abetted in the commission of the crime and may be held responsible as an accomplice for the acts of another and the consequence of those acts. ... The slightest amount of concert or collusion between the parties to an illegal action makes the act of one member of the group an act of all members") (citation omitted); *Commonwealth v. Edney*, 464 A.2d 1386, 1390 (Pa. Super. 1983) (conspiracy conviction requires "holding all conspirators criminally responsible for the acts of one conspirator committed in furtherance of the plan").

slashing on the other). He is therefore in no position to claim that he did not "kill, intend to kill, or foresee that life will be taken."

In rejecting a similar argument, albeit in the context of adult capital sentencing (the same procedure defendant says he was entitled to, see part II, *infra*), the Pennsylvania Supreme Court found it did not "even reach the level of speciousness":

> Appellant also claims trial counsel was ineffective for failing to argue to the jury that the Commonwealth did not present evidence that appellant "committed a killing while in the perpetration of a felony," because there was no proof presented that appellant, rather than his co-brutalizer, Draper, landed the fatal blow. This argument, when raised in the context of the penalty stage, does not even reach the level of speciousness; it is simply ludicrous. The very same jury, less than twenty-four hours before, had just convicted appellant of first degree murder. Appellant now urges that his trial counsel was ineffective for not suggesting to the jury that appellant had not been convicted for "killing" the victim. Counsel is not required to present such patently meritless arguments even when the only straws within appellant's reach are exceedingly slippery ones.

Commonwealth v. Williams, 570 A.2d 75, 83 (Pa. 1990) (footnote omitted).

3. Neurological science does not absolve defendant.

This Court should not make new law absolving defendant of life without parole based on his claims concerning neurological science.

Defendant contends that holding him fully responsible for his crime is inconsistent with "neurological research recognized ... in *Roper*" (defendant's brief, 23-24), and contends it is not even possible to determine if an offender deserves life without parole for second degree murder (*Id*., 14). But in fact, there is no neurological basis for claiming that offenders under the age of 18 are less responsible for, or less able to control, their conduct. *See* Patterson, *Criminal law, neuroscience, and*

voluntary acts (Journal of Law and the Biosciences, May 4, 2016), 3 ("all behavior is caused ... if causation is an excuse, then no one is guilty of anything"), 4 ("Neuroscience is potentially quite useful in making judgments about criminal responsibility" but "the science is not quite sufficiently developed to do more than provide a promise for the future"); Epstein, *The Myth of the Teen Brain* (Scientific American, June 1 2007) ("I have not been able to find even a single study that establishes a *causal* relation between the properties of the brain being examined and the problems we see in teens") (original emphasis); Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio St. J. Crim. L. 397, 409 (2006) (Noting that while *Roper* is supportable by "common sense and behavioral science evidence that adolescents differ from adults," the "neuroscience evidence in no way independently confirms that adolescents are less responsible").

4. This court should not make new law under the state constitution.

As the Eighth Amendment will not support his claim that he was "ineligible" to be sentenced to life without parole for second degree murder, defendant turns to Article I, § 13 of the Pennsylvania constitution. This argument fails as well.

The Pennsylvania Supreme Court has construed the state constitution as treating murder as a special category of violence that cannot be categorically excused or mitigated by youth. *E.g.*, *Commonwealth v. Williams*, 522 A.2d 1058, 1063 (Pa. 1987) ("[T]here is no constitutional guarantee of special treatment for juvenile offenders"); *Commonwealth v. Pyle*, 342 A.2d 101, 104 (Pa. 1975) ("Where murder is charged, treatment as a 'youthful offender' still does not arise as a matter of right").

In *Batts*, while recognizing the "trend of the United States Supreme Court towards viewing juveniles as a category as less culpable than adults," the Court found that "there has been no concomitant movement in this Court or in the Pennsylvania Legislature away from considering murder to be a particularly heinous offense, even when committed by a juvenile." *Batts*, 66 A.3d at 299. The Court therefore *specifically rejected* a claim that rights greater than those afforded by *Miller* should be discerned in the state constitution. *Id*.[12]

There is little reason to look for state constitutional opportunities to extend *Miller*. The dissenting opinions in that 5-4 ruling contended that it was unsupported by any precedent or principled basis of decision. Likewise, Professor Richard Epstein recently observed that *Miller* lacks any discernable "intellectual metric":

> It is hard to resist the conclusion that in the hands of the Supreme Court, evolving standards of decency are always elitist, and often against dominant sentiments of the people, which in this area of dominant public control at least should carry a lot of weight. It is thus hard to fathom what intellectual metric drives such political *ipse dixits* as *Graham v. Florida*, which concluded that a mandatory life sentence without parole is inappropriate for juveniles who commit non-homicide offenses, or that this holding should be extended in *Miller* to cover a prohibition against the use of life without parole in juvenile homicide offenses as well. It is imperative to give some explanation as to how the various weights are to be assigned in this open-ended modernist calculus.

Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 Harv. J. L. &

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[12] Defendant also submits an "*Edmunds* analysis." *See Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) (setting forth appropriate analysis for parties claiming greater rights than the U.S. constitution under the state constitution based on text, history, related law from other states, and policy contentions). This merits no substantial discussion, because *Batts* rejected the same claim under each facet of the *Edmunds* analysis. 66 A.3d at 297-299.

Pub. Policy no. 3, 583, 609 (2016) (footnote omitted).

There is no national consensus against imposing juvenile life without parole in exceptional cases. *See Commonwealth v. Lawrence*, 99 A.3d 116, 121 n.10 (Pa. Super. 2014), *appeal denied* 114 A.3d 416 (Pa. 2015) (lack of national consensus undermines argument that punishment is unconstitutionally cruel). Since *Miller* was decided, defendant points to one state (in fact there are two, Massachusetts and Iowa) that construed its own constitution to bar life without parole for juvenile murderers (defendant's brief, 33); but four other states – Pennsylvania (in *Batts*), Indiana, Utah, and Georgia, have specifically refused to so read their constitutions.[13]

That the Pennsylvania Supreme Court has already rejected his state constitutional argument is of no moment, defendant argues, because in his view the General Assembly "specifically barred" life without parole for future juvenile second

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[13] *Bun v. State,* 769 S.E.2d 381, 383-384 (Ga. 2015); *Conley v. State,* 972 N.E.2d 864, 879-880 (Ind. 2012); *State v. Houston,* 353 P.3d 55, 76-77 (Utah 2015). The opinion of the Supreme Court of Massachusetts, which is not precedent in Pennsylvania, explained that it "often" affords criminal defendants "greater protections under the Massachusetts Declaration of Rights than are available under corresponding provisions of the Federal Constitution," and that it has banned the death penalty under that constitution. *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 283, 284 (Mass. 2013). Neither of those things is true of the Pennsylvania constitution. The Iowa Supreme Court did so in a 4-3 exercise of "independent judgment," which might be taken as a euphemism for a ruling without textual support, in *State v. Sweet*, 879 N.W.2d 811, ¶ 8 (Iowa 2016). Pennsylvania jurisprudence, in contrast, considers the constitutionally-expressed will of the people the ultimate source of law. *See In re Bruno*, 101 A.3d 635, 659 (Pa. 2014) (constitutional language "must be interpreted in its popular sense, as understood by the people when they voted on its adoption"); *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (same). Defendant also seeks to bolster his argument by reference to states have abolished the penalty by *legislation*; but that undermines, rather than supports, his claim that this is *constitutionally* required.

degree murder convictions when it enacted 18 Pa.C.S. § 1102.1(c) (defendant's brief, 29). But this argument is irrelevant to constitutional construction. Legislative action is not evidence that the constitution required that action: to the contrary, legislation is needed to accomplish what the constitution has not already imposed. And in any case, the statute here creates no such bar. While § 1102(a) specifically identifies life without parole as a penalty for juvenile first degree murder, § 1102.1(c) does not reference it, let alone ban it. Rather, § 1102.1(c) requires a minimum term of "*at least*" 30 years (or 20 years if the offender was under 15) while subsection (e) states that "[n]othing ... shall prevent the sentencing court from imposing a minimum sentence *greater* than that provided in this section" (emphasis added). Because the statute thus imposes no limit on a *higher* minimum term, it thereby *allows* a minimum term of life imprisonment – i.e., life without parole.[14] Since defendant relies on a supposed legislative ban that does not exist (and in any event, § 1102.1 was not in effect for this case), there is no difference between his constitutional claim and that rejected by the Supreme Court in *Batts*. No basis exists for his claim that he was categorically immune to a sentence of life without parole.

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[14] Parole eligibility begins when the minimum term ends. 42 Pa.C.S. § 9756(b)(1), which requires "a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed," is inapplicable to first and second degree murder because life cannot be halved. *Commonwealth v. Manning*, 435 A.2d 1207, 1212 & n.5 (Pa. 1981) (finding "meritless" claim that mandatory life term was "illegal" because it did not include a half-life term). Since there is no limit on the length of the minimum term, it may therefore be defined as life, thus making the offender ineligible for parole for life. The difference between § 1102.1(a) and (c) signals a legislative emphasis or preference for juvenile life without parole in cases of first degree murder, without excluding that penalty for second degree murder.

II. The trial court had discretion to impose life without parole where defendant and his accomplice tortured and murdered their elderly burglary victim.

Defendant also contends that the sentencing court "unconstitutionally" abused its discretion in sentencing him to life without parole. This claim should not be accepted for review, but in any event is without merit.

The essence of defendant's argument is that *Miller* and *Montgomery* do not mean what they say. While he argues that the sentencing court misunderstood the law, his real contention is that the court erred by taking the United States Supreme Court at its word instead of interpreting "rare" to mean "nonexistent." Because under the law judges may still exercise independent judgment to decide an offender is exceptionally deserving of life without parole, there was no error.

1. Defendant's claims should not be reviewed under Rule 2119(f).

Initially however, defendant's discretionary sentencing claims should not be reviewed, because he does not articulate a substantial question as required by Pa.R.A.P. 2119(f). *See Commonwealth v. Batts*, 125 A.3d 33, 42-43 (Pa. Super. 2015), *appeal granted in part*, 135 A.3d 176 (Pa. 2016) (herein, *Batts III*) (similar claims barred by failure to petition for permission to appeal under Rule 2119). While defendant unlike Batts at least produced a Rule 2119 statement, he devotes no less than half of it to arguing that no statement is necessary (defendant's brief, 8-9). *Batts III* held otherwise. The balance of his Rule 2119 statement (referring to claims "completely apart from" the "life without parole is never permitted" ones) briefly argues that the sentence was improper because the court supposedly observed "he had

matured and grown" and "accomplished much while incarcerated" (*Id*., 9). Because this attenuated assertion fails to explain how the sentencing court's actions were "contrary to the fundamental norms which underlie the sentencing process," *Commonwealth v. Rodda*, 723 A.2d 212, 214 (Pa. Super. 1999) (en banc), this Court should not grant review of defendant's claims. *See Commonwealth v. Provenzano*, 50 A.3d 148, 154 (Pa. Super. 2012) (Superior Court "cannot look beyond" the Rule 2119 statement to determine if a substantial question exists).

If review is allowed, the standard is a rigorous one. The sentencing court's decision "will not be disturbed on appeal absent a manifest abuse of discretion." An abuse of discretion "is not shown merely by an error in judgment" but requires "that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision." *Rodda, id*. To reiterate, *Miller* did not "foreclose a sentencer's ability to make that judgment [that juvenile life without parole is warranted] in homicide cases," but held that it must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S. Ct. at 2469 (citations and internal quotation marks omitted). Further, "[t]he procedure *Miller* prescribes is no different" than that in *Atkins*, i.e., "a procedure through which [the offender] can show that he belongs to a protected class"; *Miller* requires a hearing to "separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 136 S. Ct. at 735; *Miller*, 132 S. Ct. at 2460. "[A] finding of fact regarding incorrigibility ... is not

required" under *Miller*. *Id*.

2. There is no legal basis for imposing capital sentencing procedures.

Defendant asks this Court to make new procedural law by holding that he was entitled to sentencing in accord with "death penalty jurisprudence," i.e., that he was constitutionally entitled to, and the trial court erred in not following, the same process applicable to an adult capital case (and akin to a separate trial) under to 42 Pa.C.S. § 9711 (defendant's brief, 34). He adds that otherwise his sentence should be assumed to be the product of "caprice and emotion" (*Id*., 37). But while defendant does not acknowledge it, this Court rejected this precise claim in *Batts III*, 125 A.3d at 45.[15] As explained in that binding decision, the claim lacks merit because there is no constitutional or statutory basis for this Court to impose such a process.

Far from suggesting that *Miller* called for transplanting the adult capital sentencing process to juvenile non-capital sentencing, *Montgomery* explained that *Miller* is "no different" from *Atkins* in requiring only "a procedure through which [the offender] can show that he belongs to a protected class." *Montgomery*, 136 S. Ct. at 735. It is therefore unsurprising that, when the Pennsylvania Supreme Court decided

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[15] *Batts III* implicitly treated this as a non-discretionary claim, but it is discretionary because it contends that the sentencing court misunderstood the standards governing its decision. Though defendant claims these standards were constitutionally rather than legislatively required, this is no different from alleging that the sentencing court misapplied the guidelines or some other legal or procedural norm. *E.g., Commonwealth v. Provenzano*, 50 A.3d at 154 (miscalculation of prior record score implicates discretionary aspects of sentence). That an abuse of discretion might be found on the merits if they could be reached does not support permission to appeal where the Rule 2119 statement is inadequate. *See Batts III*, 125 A.3d at 44 n. 9 (rejecting argument that substantial question could "be determined from the appellant's brief").

Batts, it did not require capital-like procedures for resentencing under *Miller*. And, while defendant was not entitled to be sentenced under § 1102.1, that provision is a non-binding expression of legislative intent that likewise instructs the court to consider certain factors, including age-related ones, in determining whether the defendant is in the protected class immune to life without parole. The legislature did not impose anything resembling the elaborate process found in 42 Pa.C.S. § 9711. Hence, defendant was not entitled to such procedures.[16]

3. The trial court properly understood *Miller*.

According to defendant, there is also a clear "presumption against juvenile life without parole" that the trial court erred in supposedly "rejecting" (defendant's brief, 17, citing page 6 of the trial court opinion). This is incorrect. Judge Woods-Skipper's opinion did not "reject," but explicitly recognized, the *Miller* directive that juvenile life without parole is to be "uncommon," "unusual," and imposed only on the "rare" juvenile offender. It acknowledged the *Batts* ruling of the Pennsylvania Supreme Court that it must consider "appropriate age-related factors" under *Miller* (trial court opinion, 6). In addition to the presumption that the sentencing court knew the law, *Commonwealth v. Hunter*, 554 A.2d 550, 558 (Pa. Super. 1989) ("we will presume that the court applied proper legal standards"), the court specifically stated that it was "careful to consider the *Miller* factors" (trial court opinion, 3).

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[16] This Court's ruling in *Batts III* remains controlling even though the Supreme Court granted allocatur in that case. Because that Court has constitutional authority to create procedural rules under Article V, § 10(c), it could conceivably decide to impose new procedures not required by *Miller*. But that remains to be seen, and is not an issue in this case.

Miller, *Montgomery*, and *Batts* did not use the term "presumption," but described exactly the same analysis applied by the trial court, using the same terms. The United States Supreme Court might conceivably have imposed a legal presumption, but in fact it did not. As explained in *Montgomery*, *Miller* deliberately refrained from detailed procedural instructions "to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Montgomery*, 136 S. Ct. at 735. Since the United States Supreme Court presumably understands its own decisions, the trial court did not err in using that Court's own terms.

Defendant argues that there is a "new, more restrictive *Montgomery* standard" (defendant's brief, 19) that the sentencing court failed to apply. But this argument has no support in the case that matters, *Montgomery* itself. What *Montgomery* said about *Miller* (aside from the retroactivity issue) in order to explain *Miller* had been said before, in *Miller*. For example, defendant says it was "new" for *Montgomery* to state that life without parole is restricted to the juvenile offender "whose crime reflects permanent incorrigibility," citing 136 S. Ct. at 734 (defendant's brief, 17-18). But that was not new. Those words in *Montgomery* were clearly presented, by the *Montgomery* Court, as a quote of *Miller*, 132 S. Ct. at 2469, which in turn quoted the same words from *Roper*, 543 U.S. at 573. The same is true of such terms as "transient immaturity" and "irreparable corruption" (defendant's brief, 18). *Montgomery*, 136 S. Ct. at 734, *quoting Miller*, 132 S. Ct. at 2469, *quoting Roper*, 543 U.S. at 573. There was nothing "new" or "more restrictive" in the fact that *Montgomery* in 2016

quoted language from *Miller* that was first used in *Roper* in 2005.[17] As the Montgomery Court itself explained, the hearing it requires "does not replace but rather gives effect to *Miller*'s substantive holding." *Montgomery*, 136 S. Ct. at 735. *Montgomery* did not *change*, but *reiterated*, the holding of *Miller*.

Defendant relies on *Veal v. State*, 784 S.E. 2d 403, 411 (Ga. 2016), in which the Supreme Court of Georgia reads *Montgomery* as going beyond *Miller*. *Veal* says that, as *Montgomery* explains it, "by *uncommon, Miller* meant *exceptionally rare*" (original emphasis). But as the Georgia Court itself noted, *Montgomery* was explaining *Miller*. In so doing *Montgomery* quotes *Miller* itself, which *likewise* said that the penalty must be "uncommon" and "unusual" and restricted to the "rare" offender. *Veal* simply supplies its own modifier ("exceptionally") to "rare." Thus, any supposed difference between the trial court and the Georga Court (although the trial court was of course not required to anticipate language used in a later decision in another state) is only a matter of emphasis.

Defendant nevertheless argues that the trial court misunderstood the law because it said "life without parole was not foreclosed" (defendant's brief,19). But that was perfectly accurate. *Miller*, 132 S. Ct. at 2469 ("we do not foreclose a sentencer's ability to make that judgment"). The court knew that such a sentence must

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[17] Defendant cites the late Justice Scalia's dissent in *Montgomery* as support for his view that *Montgomery* altered and expanded *Miller* (defendant's brief, 18). But of course, it is the majority opinion, not the dissent, that defines the holding of a case. He also cites footnote 19 in *Commonwealth v. Bonner*, 135 A.3d 592, 598-599 (Pa. Super. 2016); but *Bonner* simply noted the same dissenting opinion in *rejecting* an argument that *Montgomery* required the sentencing guidelines to be re-written when it comes to accounting for prior juvenile offenses.

be "uncommon" or "unusual," because it said so in its opinion (trial court opinion, 6). The court understood it must consider "appropriate age-related factors" (*Id.*), to decide whether defendant was a "rare" juvenile offender of "irretrievably depraved character," otherwise styled as "permanent incorrigibility," or "irreparable corruption." *Miller*, 132 S. Ct. at 2464, 2469. *Miller* plainly said this, and the court plainly said it followed *Miller* (trial court opinion, 3).

The trial court therefore correctly articulated the substance of what it was required to decide; indeed, its opinion does a better job of adhering to *Miller* than defendant's argument. While he claims the trial court misunderstood the law, his real contention is that the United States Supreme Court did not really mean what it said. In his view, the trial court should have read terms like "uncommon" and "unusual" to mean "prohibited" and "nonexistent." But the Supreme Court does not speak in riddles. It clearly set forth a standard in which juvenile life without parole must be confined to exceptional cases. Trial courts retain independent judgment to determine what cases are exceptional.

4. The court did not abuse its discretion.

Defendant relies on semantics when he asserts that Judge Woods-Skipper "specifically determined" that he is *not* "irreparably corrupt" (defendant's brief, 21), because (1) he presented mitigating evidence, apologized, and promised to "spend the rest of my life becoming a better person"; and (2) the judge said he was "different" and had "certainly matured. Age does that to us" (*Id.*; N.T. 5/29/15, 63). But these are not findings against irreparable corruption. The judge was not obliged to credit

defendant's personal assurances or his evidence, but was free to disbelieve all of it. It is not plausible to claim that the judge, who was following *Miller*, considered its observation that defendant had matured with age (as everyone does) a "finding" that he was not subject to the very sentence it imposed. To the contrary, the court found he was "not just a kid who was maybe being led by someone else" (*Id*., 64).

The detective who took defendant's statement testified that his demeanor was "cold, calculating and unremorseful" (N.T. 11/21/06, 232-233, 265). He "didn't seem the slightest bit upset about any of this" (*Id.*, 233). Defendant ignores that he initiated the brutal violence against the 84-year-old victim, striking her so hard she was unable to form words; he had a steady progression of prison disciplinary violations until *Miller* was in the offing; the court found he displayed significant maturity at the time of the murder, when 2 months short of his 18th birthday; and that he took steps to conceal his guilt. He also ignores the unique circumstances of the crime, in which he and his accomplice brutalized, sexually abused, maimed, and ultimately murdered a frail, elderly victim for no reason other than their own depraved amusement. Whether the "crime" reflects transient immaturity is a relevant consideration. *Montgomery*, 136 S. Ct. at 734, *quoting Miller*, 132 S. Ct. at 2469, *quoting Roper*, 543 U.S. at 573. Defendant claimed in his confession to be on the brink of tears, yet he did not flee or go to the authorities. Instead, as the victim's throat was being sawed he was close enough to get blood on his clothes, which, with icy criminal calculation, he later undertook to burn. The court explained that its decision to impose life without parole was appropriate even though such sentences must be rare (trial court opinion, 3-4, 5-

6, 11). Hence, contrary to defendant's argument (defendant's brief, 20), the court plainly found him to be irreparably corrupt (or irretrievably depraved, or permanently incorrigible). *Miller*, 132 S. Ct. at 2464, 2469. It did not have to utter any particular magic words to reach that conclusion. *Montgomery*, 136 S. Ct. at 735 (specific fact finding "is not required").

Defendant correctly concedes that the court was obliged to consider "the circumstances of the offense *and* the particular characteristics of the juvenile offender" (defendant's brief, 39, original emphasis), but says it "attached too much weight" to considerations unfavorable to him (*Id*.). But it was for the court, not defendant, to decide what weight to give various sentencing factors within the constraints of *Miller*. *See, e.g., Commonwealth v. Zirkle*, 107 A.3d 127, 133 (Pa. Super. 2014) ("Zirkle argued that the court was unduly influenced by the victims' statements. However, we have held that a claim that a court did not weigh the factors as an appellant wishes does not raise a substantial question") (citations omitted). The record supports the trial court's decision, and the judgments of sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLAINCE

Aforesaid counsel for the Commonwealth hereby certifies that this brief complies with the 14,000 word count limit of Pa.R.A.P. 2135 based on the word count (11,188) of the word processing system used to prepare it.