IN THE

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

NO. 1772 WDA 2016

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

RICKY L. OLDS ,
Appellant

BRIEF FOR APPELLEE

Appeal from the Judgment of Sentence entered on November 21, 2016 at No. CP-02-CR-06857-1979 in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

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COUNTER-STATEMENT OF THE CASE

It is noted that appellant was resentenced on November 21, 2016 on the charge of criminal homicide (murder of 2nd degree) to 20 years' imprisonment to life and no further penalty was imposed on the counts of robbery and conspiracy (Docket Entry 72; ST at 46-47).[1] Appellant immediately filed a Notice of Appeal on November 21, 2016. Despite the pending Notice of Appeal, appellant then filed a Motion To Reconsider and an Amended Motion to Reconsider on November 28, 2016, in which he noted that he had already filed a Notice of Appeal but wanted the trial court to consider his post sentence motion, despite the pending appeal (Docket Entries 82, 84). Contrary to Pa.R.A.P. 1701, the Honorable David R. Cashman issued an Order of Court dated November 29, 2016 denying the post sentence motion, even though the trial court had not expressly granted reconsideration (Docket Entry 85).

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[1] Numerals preceded by the letters "ST" refer to the sentencing hearing conducted on November 21, 2016.

SUMMARY OF THE ARGUMENT

The sentence of 20 years' imprisonment to life, imposed on appellant who was a juvenile at the time he committed the crimes of murder of the second degree, robbery, and conspiracy, was not illegal. It did not exceed the statutory maximum. Judge Cashman had jurisdiction to impose it. The sentence is exactly in line with how the Legislature determined juveniles convicted of murder of the second degree after the date of June 24, 2012, should be sentenced. It thus insured that appellant would be treated like any other juvenile murderer and would not receive a longer, or shorter sentence, just because of the date of his crime and conviction. And the sentence is not cruel or unusual. *Commonwealth v. Sesky,* 170 A.3d 1105 (Pa. Super. 2017) is the law of this Honorable Court. The Court in that Opinion made explicitly clear that the decision was applicable to juveniles who committed both murder of the first and second degree. A three judge panel does not have the authority to overrule another panel's decision.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN IMPOSING A SENTENCE OF 20 YEARS' IMPRISONMENT TO LIFE ON APPELLANT, WHO WAS A JUVENILE AT THE TIME HE COMMITTED THE CRIME OF MURDER OF THE 2ND DEGREE.[2]

Despite the inclusion of a Statement For Reasons to Allow an Appeal in his brief at pp. 6-7, pursuant to Pa.R.A.P. 2119(f) (*see Commonwealth v. Tuladziecki,* 522 A.2d 17 (Pa. 1987)), appellant asserts:

> Appellant, Ricky Olds, challenges the constitutionality of, and the legal basis for, the trial court's holding that a mandatory life maximum was required and the subsequent imposition of such sentence. Furthermore, Mr. Olds challenges his life maximum even if it was not mandatorily imposed, as it would be an improper application of *Graham, Miller,* and *Montgomery*, since he did not kill nor have the intent to kill. **The challenges are to the ultimate legality—not the discretionary aspects—**

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[2] As housekeeping matters, it is noted that contrary to Pa.R.A.P. 2115, which requires an Order to "be set forth verbatim," appellant's Order in Question at p.1 of his brief violates the Rule. Appellant also ignores Pa.R.A.P. 2117, 2119 and 2132 by asserting facts (see, i.e., Brief for Appellant at pp.3, 16 fn. #6) without providing reference in the record where said facts can be found. Footnote #6 further violates the rule against referencing matters not of record. *Hasson v. Hasson,* 696 A.2d 221 (Pa. Super. 1997); *Larson v. Diveglia,* 700 A.2d 931 (Pa. 1997). Appellant has also chosen to ignore Pa.R.A.P. 2111 by not including a copy of his statement of errors filed pursuant to Pa.R.A.P. 2111, in his brief.

> **of the imposition of a maximum life sentence.** Such challenges do not require a *Tuladziecki* statement. (…) ”

Brief for Appellant at p.6 (emphasis added).

The Commonwealth and this Court must take appellant at his word that this appeal goes to the legality of the sentence imposed, and not Judge Cashman's exercise of discretion. Support for the assumption that this appeal only challenges the legality of the sentence, despite the inclusion of a 2119(f) statement (albeit a statement that declares itself unnecessary and irrelevant), can be found in the fact that appellant offers no case law to this Court dealing with the discretionary aspects of sentence and abuse of discretion; nor does appellant follow the requirement of Pa.R.A.P. 2119(e), which is applicable to such claims that must be raised and preserved below.

As noted by this Court in *Commonwealth v. Allen,* 24 A.3d 1058, 1064 (Pa. Super. 2011):

> An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test: (1) whether appellant has filed a timely notice of appeal, *see* Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, *see* Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b). *Commonwealth v. Evans,* 901 A.2d 528, 533 (Pa.Super.2006).
>
> Further, if appellant's argument was a challenge to the

discretionary aspect of sentence, it would fail due to the inadequate nature of the Pa.R.A.P. 2119(f) statement.

> Our Supreme Court has emphasized that we must determine whether an appellant's Rule **2119**(**f**) **statement** presents a substantial question *before* reaching the merits of an appellant's arguments. *See Commonwealth v. Tuladziecki*, 513 Pa. 508, 512-13, 522 A.2d 17, 19 (1987); *Gambal*, 522 Pa. at 286, 561 A.2d at 713. Accordingly, the **statement** both frames issues and limits the extent to which we may conduct appellate review. The Supreme Court has explained that:
>
> > If [the determination that a substantial question exists] is not made prior to examination of and ruling on the merits of the issue of the appropriateness of the sentence, the [appealing party] has in effect obtained an appeal as of right from the discretionary aspects of a sentence. It is elementary that such an enlargement of the appeal rights of a party cannot be accomplished by rule of court.
>
> *Tuladziecki*, 513 Pa. at 513, 522 A.2d at 19. Because a party's right to appeal the discretionary aspects of a criminal sentence is limited by legislative enactment in the Sentencing Code, we must not allow the presentation of issues on appeal, the **content** of which exceeds the scope of the relevant provision of the Code. The applicable provision of the Sentencing Code reads as follows:
>
> > **§ 9781. Appellate review of sentence**
> > *** * * ***
> > **(b) Right to appeal.**-The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals. Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter.
> > 42 Pa.C.S. § 9781(b).

Rule **2119**(**f**) and decisions applying it provide the prescribed means by which we may give effect to this section 9781. Our Supreme Court has been specific in its admonition that:

> [S]eparate presentation of these issues is more than mere formalism; important concerns of substance guide this decision. In addition to preserving the respective rights of both parties according to the jurisdictional scheme provided by the legislature, it furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to exceptional cases.

Tuladziecki, 513 Pa. at 513, 522 A.2d at 19.

Historically, this Court has reviewed "discretionary aspects of a sentence" where the Rule **2119**(**f**) **statement** reveals a plausible argument that procedures followed by the sentencing court were either inconsistent with a specific provision of the Sentencing Code or contrary to the fundamental norms underlying the sentencing process. *See Commonwealth v. Nelson*, 446 Pa.Super. 240, 666 A.2d 714, 720 (1995). Where a party makes such an argument, we have found that the party has raised a substantial question, as required by section 9781. *See Commonwealth v. Jones*, 418 Pa.Super. 93, 613 A.2d 587, 590 (1992).

Nevertheless, we have also held that when a Rule **2119**(**f**) **statement** "contains incantations of statutory provisions and pronouncements of conclusions of law[,]" it is inadequate. *Commonwealth v. Martin*, 727 A.2d 1136, 1143 (Pa.Super.1999). *See also Commonwealth v. Mobley*, 399 Pa.Super. 108, 581 A.2d 949, 952 (1990) (claim that sentence imposed for narcotics offense failed to take into consideration defendant's rehabilitative needs and was manifestly excessive did not raise a substantial question where sentence was within statutory limits and within sentencing guidelines). Accordingly, where a defendant merely asserts that his sentence is inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing scheme without explaining how or why, we cannot determine whether he has raised a substantial question.

> The procedural rule, Pa.R.A.P. § **2119**(**f**) is designed to enhance the functioning of [the] appellate review process. The legislature has provided [in] 42 Pa.C.S. § 9721, a thorough, though not exhaustive, outline of considerations to focus the court's deliberations in imposing an appropriate sentence. To demonstrate that a substantial sentencing question exists, a party must articulate reasons why a particular sentence raises doubts that the trial court did not properly consider these general guidelines provided by the legislature.

Commonwealth v. Saranchak, 544 Pa. 158, 177, 675 A.2d 268, 277 (1996).

We read *Saranchak* to require a party appealing from the discretionary aspects of sentence to articulate the manner in which the sentence violates either a particular provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process. We emphasize that an appellant is required only to make a *plausible* argument that the sentence is contrary to a specific provision of the Sentencing Code or to the fundamental norms underlying the sentencing process. Our inquiry must focus on the *reasons* for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on the merits.

Accordingly, we hold that Rule **2119**(**f**) requires only that a concise **statement** of reasons relied upon for allowance of appeal allow us to determine the allegation of trial court error and the immediate context of the allegation as it relates to the prescribed sentencing norms. Thus, the Rule **2119**(**f**) **statement** must specify where the sentence falls in relation to the sentencing guidelines and what particular provision of the Code is violated (*e.g.,* the sentence is outside the guidelines and the court did not offer any reasons either on the record or in writing, or double-counted factors already considered). Similarly, the Rule **2119**(**f**) **statement** must specify what fundamental norm the sentence violates and the manner in which it violates that norm (*e.g.,* the sentence is unreasonable or the result of prejudice because it is 500 percent greater than the extreme end of the aggravated range). If the Rule **2119**(**f**) **statement** meets these

> requirements, we can decide whether a substantial question exists. The nature of the crime underlying the sentence and the specific sentence in months or years imposed for that crime are therefore not required in a Rule **2119**(**f**) **statement** because they are unnecessary to determining the existence of a substantial question. Insofar as *Cummings*, *Vickers*, *Ziegler*, and their progeny stand for a proposition contrary to that which we set forth today, they should no longer be followed.

Commonwealth v. Goggins, 748 A.2d 721, 726-727 (Pa. Super. 2000) (emphasis in original).

Before addressing the issue of legality, it must also be noted that appellant includes no discussion in the Argument section of his brief as to why Judge Cashman was wrong in ruling that the issue was moot. In his Statement of the Case appellant included a footnote (Brief for Appellant at p.5, fn.#2) with a short comment about "mootness." That comment cannot be considered argument; both because it contains no substantive discussion, and because Pa.R.A.P. 2117 prohibits argument in the Statement of the Case. Be that as it may, there is no discussion in the Summary of the Argument or the Argument of appellant's brief, dealing with "mootness." Absence of any discussion is puzzling, given it was the foundation of the trial court's decision and has resulted in this Honorable Court having a Trial Court Opinion which does not address this issue of whether it is illegal to sentence a juvenile convicted of murder of the second degree to a maximum sentence of life in prison. Appellant has not

requested that this Court remand for preparation of a trial court Opinion dealing with the issue.[3] Given the fact that Judge Cashman has invoked mootness, the Commonwealth will briefly respond to the trial court's determination that this appeal is moot.

The issue of mootness was addressed by the Pennsylvania Supreme Court in the decision of *In re Gross,* 382 A.2d 116, 119 (Pa. 1978):

> An accurate description of those circumstances which raise the issue of mootness is provided by Professor Gunther, who writes:
>
> The cases presenting mootness problems involve litigants who clearly had standing to sue at the outset of the litigation. The problems arise from events occurring after the lawsuit has gotten under way, changes in the facts or in the law which allegedly deprive the litigant of the necessary stake in the outcome. The mootness doctrine requires that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." G. Gunther, Constitutional Law 1578 (9th ed. 1975).

See also, In re: 2014 Allegheny County Investigating Grand Jury, __ A.3d __ (Pa. 2017; 2017 WL 5616237). With all respect to the trial court, the present issue does not appear to be moot, given the fact that appellant was sentenced to a maximum of life imprisonment, served his

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[3] Given this Court's decision in *Commonwealth v. Sesky,* a remand would serve no purpose at this time.

minimum, is on parole, and if violated, would be returned to prison to serve time on the parole violation.

Turning to the issue of legality of sentence, the Commonwealth submits that the sentence was not illegal. It did not exceed the statutory maximum. Judge Cashman had jurisdiction to impose it. The sentence is exactly in line with how the Legislature determined juveniles convicted of murder of the second degree after the date of June 24, 2012, should be sentenced. It thus insured that appellant would be treated like any other juvenile murderer and would not receive a longer, or shorter sentence, just because of the date of his crime and conviction. And the sentence is not cruel or unusual.

The law on what constitutes an illegal sentence has been anything but clear over the past years. An extensive discussion of the issue was provided by this Court in *Commonwealth v. Tobin,* 89 A.3d 663, 667-669 (Pa. Super. 2014) (footnotes omitted):

> We reject Appellant's position that his constitutional due process issue equates to an illegal sentencing claim. *See Commonwealth v. Hartz,* 367 Pa.Super. 267, 532 A.2d 1139, 1142 (1987) (Cirillo, P.J. concurring) (collecting Pennsylvania Supreme Court cases finding various constitutional sentencing claims, including due process challenges, waived); *see also Commonwealth v. Wallace,* 368 Pa.Super. 255, 533 A.2d 1051 (1987). Simply evoking the magic words “due process” does not transform a sentencing claim into an illegal sentencing issue. *Commonwealth v. Robinson,* 931 A.2d 15 (Pa.Super.2007) (*en banc*).[2] As we noted

recently, not “all constitutional cases implicating sentencing raise legality of sentence concerns.” *Commonwealth v. Watley,* 81 A.3d 108, 118 (Pa.Super.2013) (*en banc*); *see also Commonwealth v. Jacobs,* 900 A.2d 368, 373 n. 6 (Pa.Super.2006) (*en banc*).

Admittedly, “a precise definition of an illegal sentence has eluded both this Court and our Supreme Court.” *Commonwealth v. Cartrette,* 2013 WL 6821398, *12 n. 5 (*en banc*); *Watley, supra* at 118 (“we acknowledge that both currently and in the past, Pennsylvania courts have struggled with the concept of illegal sentences.”); *see also Commonwealth v. Mattison,* 82 A.3d 386, 402 n. 13 (Pa.2013); *Commonwealth v. Spruill,* —— Pa. ——, 80 A.3d 453, 460–461 (2013); *Commonwealth v. Archer,* 722 A.2d 203 (Pa.Super.1998) (*en banc*); *Commonwealth v. Foster,* 960 A.2d 160 (Pa.Super.2008), *affirmed,* 609 Pa. 502, 17 A.3d 332 (2011) (OAJC). A general definition of an illegal sentence is one that exceeds the jurisdiction or power of the sentencing court to impose. *See Commonwealth v. Vasquez,* 560 Pa. 381, 744 A.2d 1280, 1284 (2000) (“When a trial court imposes a sentence outside of the legal parameters prescribed by the applicable statute, the sentence is illegal and should be remanded for correction.”). A plurality of the Pennsylvania Supreme Court has also reasoned,

> Consistent, then, with this Court's jurisprudence in this area of the law throughout the years, legality of sentence issues occur generally either: (1) when a trial court's traditional authority to use discretion in the act of sentencing is somehow affected, *see e.g. In re M.W.,* 725 A.2d at 731 (holding that, when a sentencing issue “centers upon a court's statutory authority” to impose a sentence, rather than the “court's exercise of discretion in fashioning” the sentence, the issue raised implicates the legality of the sentence imposed); and/or (2) when the sentence imposed is patently inconsistent with the sentencing parameters set forth by the General Assembly.

Foster, 17 A.3d at 342. Of course, this definition did not garner a majority.

The two most basic and classic examples of an illegal sentence are sentences that exceed the statutory maximum and a sentence imposed by a court without jurisdiction. In *Watley,* we opined that

> "only [a] narrow class of cases .... such as double jeopardy,[3] *Apprendi* challenges, mandatory minimum sentencing, and other traditional illegal sentencing claims pertaining to sentences that exceed the statutory maximum," are considered legality of sentence issues. *Watley, supra* at 118 (footnote and citation omitted). This list is not exhaustive.
>
> Other legality of sentence issues include the failure to grant appropriate credit for time served, violations of the minimum-maximum sentencing requirement, merger claims, *see Jacobs, supra* (collecting cases related to aforementioned categories), imposing a sentence absent jurisdiction, *Commonwealth v. Quinlan,* 433 Pa.Super. 111, 639 A.2d 1235 (1994), the prohibition against cruel and unusual punishment, *Commonwealth v. Robinson,* ––– Pa. ––––, 82 A.3d 998, 1020 (2013); *Commonwealth v. Henkel,* 938 A.2d 433 (Pa.Super.2007), a claim that no record of a defendant's ability to pay a fine before the court exists, *Commonwealth v. Boyd,* 73 A.3d 1269, 1273 (Pa.Super.2013) (*en banc*), a challenge to the trial court's authority to impose restitution, *In re M.W.,* 555 Pa. 505, 725 A.2d 729, 731 n. 4 (1999), and failure to impose a RRRI sentence. *Commonwealth v. Robinson,* 7 A.3d 868 (Pa.Super.2010).[4]

It is not illegal to sentence a juvenile convicted of 2nd degree murder to a maximum term of life in prison. It is curious that appellant gives so little attention to this Court's recent decision in *Commonwealth v. Sesky,* 170 A.3d 1105 (Pa. Super. 2017). This Court in *Sesky, Id.,* made clear that its rationale and holding applied to juveniles convicted of **both** first and second degree murder. "This panel is not empowered to overrule another panel of the Superior Court." *Commonwealth v. Beck,* 78 A.3d 656, 659 (Pa. Super. 2013). The *Sesky* Court explained the error in appellant's attempt to portray *Miller v. Alabama,* 132 S.Ct. 2455 (2012) and

Montgomery v. Louisiana, 136 S.Ct. 716 (2016) as dealing only with murder of the first degree, rather than the issue of imposing a mandatory life imprisonment without chance for parole on juveniles convicted of murder:

> The Commonwealth of Pennsylvania appeals from the judgment of sentence entered on November 16, 2016, as made final by the disposition of Regis Seskey's ("Appellee's") post-sentence motion on December 5, 2016. **In this case, we hold that our Supreme Court's recent decision in *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) ("*Batts II*") requires that an individual convicted of first or second-degree murder[1] for a crime committed as a minor be sentenced to a maximum term of life imprisonment.** As the trial court in this case sentenced Appellee, who was convicted of first-degree murder for a crime committed as a minor, to a maximum term of 26 years' imprisonment, we affirm in part, vacate in part, and remand for the sole purpose of resentencing.
>
> * * * *
>
> In its first issue, the Commonwealth argues that the trial court imposed an illegal sentence because the maximum term of imprisonment was set at 26 years instead of life.[5] Appellee, on the other hand, contends that the trial court possessed unfettered sentencing discretion and it was not required to impose any minimum or maximum term of imprisonment. When reviewing the legality of a sentence, our standard of review is *de novo* and our scope of review is plenary. ***Commonwealth v. Brown***, 159 A.3d 531, 532 (Pa. Super. 2017) (citation omitted).
>
> In order to understand the Commonwealth's illegal sentence argument, it is necessary to review the relevant Pennsylvania statutes regarding mandatory LWOP sentences for minors convicted of first or second-degree murder. The Crimes Code provides that an individual convicted of first or second-degree murder must be sentenced to a term of life imprisonment. ***See*** 18 Pa.C.S.A. § 1102(a), (b). The Parole Code provides that an individual sentenced

to a term of life imprisonment is not eligible for parole. ***See*** 61 Pa.C.S.A. § 6137(a)(1); ***but see*** 18 Pa.C.S.A. § 1102.1 (discussed ***infra***). Finally, the Juvenile Act provides that the term "delinquent act" does not include the crime of murder. ***See*** 42 Pa.C.S.A. § 6302. Under this statutory framework, a minor who commits first or second-degree murder must be charged as an adult. If convicted, the minor must be sentenced to a term of life imprisonment and is not eligible for parole. ***But see*** 18 Pa.C.S.A. § 1102.1 (discussed ***infra***). Thus, a minor convicted of first or second-degree murder receives a mandatory LWOP sentence. ***But see id.***

In 2012, the Supreme Court of the United States held that mandatory LWOP sentences for minors violate the Eighth Amendment's prohibition against cruel and unusual punishment. ***Miller v. Alabama***, 567 U.S. 460, 469–489, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). Our General Assembly responded to ***Miller*** by passing 18 Pa.C.S.A. § 1102.1. Section 1102.1 provides that an individual between the ages of 15 and 17 years old convicted of first-degree murder after June 24, 2012 must be sentenced to a maximum term of life imprisonment. 18 Pa.C.S.A. § 1102.1(a)(1). The minimum term of imprisonment for such an offender can be set anywhere from 35 years to life, *i.e.*, LWOP. ***See id.*** Section 1102.1 further provides that an individual under 15 years old convicted of first-degree murder after June 24, 2012 must be sentenced to a maximum term of life imprisonment. 18 Pa.C.S.A. § 1102.1(a)(2). The minimum term of imprisonment for such an offender can be set anywhere from 25 years to life, *i.e.*, LWOP. ***See id.***

Section 1102.1 provides that an individual between the ages of 15 and 17 years old convicted of second-degree murder after June 24, 2012 must be sentenced to a maximum term of life imprisonment. 18 Pa.C.S.A. § 1102.1(c)(1). The minimum term of imprisonment for such an offender can be set anywhere from 30 years to life, *i.e.*, LWOP. ***See id.*** Section 1102.1 further provides that an individual under 15 years old convicted of second-degree murder after June 24, 2012 must be sentenced to a maximum term of life imprisonment. 18 Pa.C.S.A. § 1102.1(c)(2). The minimum term of imprisonment for such an offender can be set anywhere from 20 years to life, *i.e.*, LWOP. ***See id.***

After our General Assembly passed section 1102.1, our Supreme Court held that it does not apply to those minors, like Appellee, who were convicted of first or second-degree murder prior to June 25, 2012. ***Commonwealth v. Batts***, 620 Pa. 115, 66 A.3d 286, 293 (2013) ("***Batts I***") (citations omitted).

The question presented in this case is what sentencing framework applies to those minor offenders who were convicted of first or second-degree murder prior to June 25, 2012. As noted above, the Commonwealth argues that these offenders must be sentenced to a maximum term of life imprisonment and trial courts have the discretion to determine the appropriate minimum sentence. Appellee, on the other hand, argues that trial courts possess unfettered discretion when resentencing these offenders.
In support of his argument that the trial court had unfettered sentencing discretion, Appellee relies upon ***Batts I***. After this case was argued, our Supreme Court issued its opinion in ***Batts II***. In that case, our Supreme Court held that whether a minor offender is eligible for LWOP is a purely legal question subject to *de novo* review. ***Batts II***, 163 A.3d at 434–436. Our Supreme Court also held that the Commonwealth bears the burden of proving that a minor is eligible for LWOP beyond a reasonable doubt. ***Id.*** at 452–455. Most importantly for our disposition of this case, our Supreme Court reaffirmed its holding in ***Batts I*** that:

> For those defendants [convicted of first or second-degree murder prior to June 25, 2012] for whom the sentencing court determines a [LWOP] sentence is inappropriate, it is our determination here that they are subject to a **mandatory maximum sentence of life imprisonment** as required by section 1102(a), **accompanied by a minimum sentence determined by the common pleas court upon resentencing**[.]

Batts II, 163 A.3d at 421, *citing* ***Batts I***, 66 A.3d at 297 (internal alteration and quotation marks omitted; emphasis added). In other words, our Supreme Court merely severed "the prohibition against paroling an individual sentenced to serve life in prison in section 6137(a)(1) as applied to these offenders." ***Id.***

Our Supreme Court explained that its interpretation of the interplay between sections 1102(a) and 6137(a)(1) in ***Batts I*** was correct because

> Despite the passage of four years since we issued our decision in ***Batts I***, the General Assembly has not passed a statute addressing the sentencing of juveniles convicted of first-degree murder pre–***Miller***, nor has it amended the pertinent provisions that were severed in ***Batts I***. As we have previously stated, the General Assembly is quite able to address what it believes is a judicial misinterpretation of a statute, and its failure to do so in the years following the ***Batts I*** decision gives rise to the presumption that the General Assembly is in agreement with our interpretation.

Batts II, 163 A.3d at 445 (internal quotation marks, citations, and footnote omitted). Therefore, under ***Batts II*** the trial court was required to sentence Appellee to a maximum term of life imprisonment.

Appellee also relies upon decisions of the United States District Court for the Eastern District of Pennsylvania and other states' courts in support of his argument that the trial court possessed unfettered sentencing discretion. It is well-settled, however, that decisions of the federal courts and other states' courts are merely persuasive authority. ***Bensinger v. Univ. of Pittsburgh Med. Ctr.***, 98 A.3d 672, 682 & n.10 (Pa. Super. 2014). On the other hand, this Court is duty-bound to effectuate our Supreme Court's decisional law. ***Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc.***, 610 Pa. 371, 20 A.3d 468, 480 (2011) (citation omitted). ***Batts II***, which our Supreme Court decided after ***Montgomery***, explicitly holds that the trial court was required to sentence Appellee to a maximum term of life imprisonment.

The trial court in this case failed to impose the mandatory maximum sentence of life imprisonment. As such, Appellee's sentence was illegal and must be vacated. As we conclude that the 26–year maximum sentence imposed was illegal, and remand for resentencing,[6] we need not address the Commonwealth's second issue that the maximum sentence was an abuse of discretion. ***See***

> ***Commonwealth v. Barnes***, 167 A.3d 110, 124–25 n.13, 2017 WL 2927566, *10 n.13 (Pa. Super. July 10, 2017) (*en banc*).

Commonwealth v. Sesky, Id., 170 A.3d at 1105-1109 (footnotes omitted) (emphasis added).

In *Miller v. Alabama, supra,* the United States Supreme Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller, supra,* 132 S.Ct. at 2469.

> *Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Ibid.* The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," *Miller* made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."

Montgomery v. Louisiana, 136 S.Ct. 718, 733-734 (2016). *Miller* did not require states to conduct resentencing, it did not require states to pass legislation prohibiting life sentences for juveniles convicted of murder, it did not call into question the ability of state parole boards to make the decision as to whether a juvenile murderer should be paroled, and it did not even

prohibit the imposition of a life sentence without parole on a juvenile murderer:

> Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, *e.g.,* Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Montgomery, Id., 136 S.Ct at 736.

One of the errors in appellant's reasoning is his belief that *Miller* rendered 18 Pa.C.S.A. §1102 unconstitutional. That statute has not been declared invalid and does not bar parole. The bar to parole is imposed by 61 Pa.C.S. §6137 (a) (1). That fact was explained by this Court in *Commonwealth v. Knox,* 50 A.3d 732, 745-746 (Pa. Super. 2012):

> With this jurisprudential background in mind, we turn to the United States Supreme Court's recent *Miller* decision, which is the controlling law on the issue currently before us. First, however, we reiterate that there is no single particular statute in Pennsylvania which directs that juveniles must be sentenced to a term of life in prison without parole upon a conviction of second-degree murder. Rather, a series of statutes in Pennsylvania intertwine to reach the result of a mandatory sentence of life imprisonment without parole for juveniles convicted of second-degree murder. The Juvenile Act provides

> that when a juvenile is charged with murder, criminal courts automatically have original jurisdiction and the burden rests upon the juvenile to prove that the case should be transferred to juvenile court. 42 Pa.C.S.A. § 6322(a). It is the Crimes Code which mandates that a person who has been convicted of murder of the second degree shall be sentenced to a term of life imprisonment. 18 Pa.C.S.A. § 1102(b). Furthermore, the statute governing the Pennsylvania Board of Probation and Parole (the "Parole Board") instructs that the Parole Board may not parole an inmate serving life imprisonment. 61 Pa.C.S.A. § 6137(a)(1). By virtue of these three provisions, a juvenile in Pennsylvania, charged and convicted with second-degree murder, must receive a sentence of life imprisonment and the Parole Board may not grant parole to the juvenile.

Commonwealth v. Knox, 50 A.3d 732, 743-744 (Pa. Super. 2012)

(footnotes omitted). *See also the companion case of Commonwealth v. Knox,* 50 A.3d 749, 767 (Pa. Super. 2012):

> We now turn to the case *sub judice.* Like the Arkansas and Alabama sentencing practices at issue in *Miller,* the mandatory sentence of life in prison without parole for a juvenile convicted of first- or second-degree murder in Pennsylvania is not the product of legislative deliberation resulting in a decision that the sentence is appropriate for juvenile offenders. Rather, the sentence of life in prison without parole applies to juveniles in Pennsylvania because of the mandatory transfer provision in the Juvenile Act. *See Commonwealth v. Archer,* ––– Pa. ––––, 722 A.2d 203, 206 (1998) (when a juvenile is charged with murder, the adult criminal division has original jurisdiction); 42 Pa.C.S.A. §§ 6302(2)(i), 6322(a), 6355(e); *see also Miller,* 132 S.Ct. at 2471–73; *Graham,* 130 S.Ct. at 2025. Pursuant to the Crimes Code, a person convicted of second-degree murder, as Knox was, is required to serve a sentence of life in prison. 18 Pa.C.S.A. § 1102(b). Finally, the "without the possibility of parole" provision is derived from the statute governing the powers and duties of the Pennsylvania Board of Probation and

> Parole, which prohibits the grant of parole to an inmate sentenced to serve life in prison. 61 Pa.C.S.A. § 6137(a)(1). Therefore, it is the interplay of three separate statutes in three separate chapters that results in juveniles convicted of first- or second-degree murder in Pennsylvania to be sentenced to life in prison without the possibility of parole. No personal information, factors, or mitigating circumstances are considered by the trial court when meting out this sentence. Because of the mandatory nature of this sentence, it is unconstitutional as applied to juveniles pursuant to the holding of the Supreme Court in *Miller.*
>
> It must be noted that this Court in *Knox, supra,* 50 A.3d at 745

was clear to the trial court that on remand, the issue was whether defendant Knox would be sentenced to life with or without the possibility of parole:

> In summary, a mandatory sentence of a term of life imprisonment without the possibility of parole for a juvenile offender in Pennsylvania is a violation of the Eighth Amendment of the United States Constitution, as well as Article I, Section 13 of the Pennsylvania Constitution. Because Appellant was sentenced to a mandatory sentence of life in prison without the possibility of parole for the commission of a second-degree murder as a juvenile, we are constrained to vacate the judgment of sentence and remand the case to the trial court for resentencing.
>
> We emphasize that our disposition does not mean that it is unconstitutional for a juvenile actually to spend the rest of his life in prison, only that the mandatory nature of the sentence, determined at the outset, is unconstitutional. Therefore, although *Miller* did not delineate specifically what factors a sentencing court must consider, at a minimum it 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. *Miller,* 567 U.S. at —— —, 132 S.Ct. 2455. Prior to sentencing, we anticipate that the trial court will order briefs from the Commonwealth and Appellant, and accept briefs from their *amici,* if any, on these factors and the issue of whether life with or without the possibility of parole should be imposed.

This Court in *Knox* was doing exactly what is required as a result of the decision in *Miller v. Alabama.* The Pennsylvania Supreme Court's decisions in *Commonwealth v. Batts,* 66 A.3d 286 (Pa. 2013) (*Batts I)* and *Commonwealth v. Batts,* 163 A.3d 410 (Pa. 2017) (*Batts II)* made that clear. And that is exactly what Judge Cashman did in this case.

The defendant in *Batts, Id.,* was 14 years old. The new sentencing scheme found at 18 Pa.C.S. §1102.1 was not applicable to Batts because he was convicted before *Miller* was decided. The Supreme Court was thus required to decide what the applicable minimum and maximum sentences should be as to Batts. Batts argued to the Court that *Miller* abrogated 18 Pa.C.S. §1102 as unconstitutional and thus he should be sentenced as if he had committed murder of the third degree. The Court disagreed with that argument and accepted the reasoning put forth by the Commonwealth and its *Amici*-that the unconstitutional part of

Pennsylvania's sentencing scheme was the lack of parole eligibility and that part of the sentencing scheme was severable, that 18 Pa.C.S. §1102 was not rendered unconstitutional, and that the minimum term of years was up to the trial court but that the maximum sentence had to be either life with parole or life without parole:

> Substantively, Appellant asserts that the statutory scheme providing for a mandatory sentence of life-without-parole upon conviction of first-degree murder is unconstitutional in its entirety in light of *Miller.* Hence, Appellant contends that this Court should look to other statutes existing at the time that the offense was committed in order to determine the appropriate sentence that may be imposed consistent with the Eighth Amendment. *See* Supplemental Brief for Appellant at 7–8 (citing *Miller,* ––– U.S. at ––––, 132 S.Ct. at 2464). This existing constitutional sentence, Appellant argues, should be based on the most severe lesser included offense, namely, third-degree murder, with a maximum term of forty years' imprisonment. *See id.* at 8 (citing 18 Pa.C.S. § 1102(d)). Devising any other sentence would, in Appellant's view, be most appropriately left to the Legislature. *See id.* at 8–9 (citing *Spectrum Arena L.P. v. Commonwealth,* 603 Pa. 180, 197–98, 983 A.2d 641, 651 (2009) ("It is not within this Court's power to alter this scheme and the impact of any inconsistency is more properly addressed directly to the legislature.") (citations omitted)). Appellant contends that this approach is particularly apt in the present matter, as it recognizes that "juveniles are categorically less culpable than adults," *id.* at 10 (citing *Miller,* ––U.S. at ––––, 132 S.Ct. at 2464), and ameliorates the concern that juveniles sentenced to life imprisonment will necessarily serve a longer term than adults receiving the same sentence, *see id.* at 11 (citing *Graham,* 560 U.S. at ––––, 130 S.Ct. at 2028). Moreover, Appellant maintains that this remedy is consistent with that applied in analogous cases. *See id.* at 9 (citing *Commonwealth v. Story,* 497 Pa. 273, 282, 440 A.2d 488, 492 (1981) (imposing a sentence of life imprisonment when a statute mandating imposition of the death penalty in certain circumstances was found unconstitutional)); *id.* at

10 (citing *Rutledge v. United States,* 517 U.S. 292, 306, 116 S.Ct. 1241, 1250, 134 L.Ed.2d 419 (1996), for the proposition that "where a greater offense must be reversed, the courts may enter judgment on the lesser included offense").

A remedy that would permit a court to impose a sentence of life imprisonment with the possibility of parole, Appellant continues, would still violate the Eighth Amendment under *Miller,* as the mandatory nature of such a sentence (absent further revision to the statutory scheme) fails to take into account the age-related factors set forth by the Supreme Court. *See* Supplemental Reply Brief for Appellant at 4 n.3 (citing *Miller,* ––– U.S. at ––––, 132 S.Ct. at 2467). Accordingly, Appellant argues that he is entitled to a remand for an individualized sentencing hearing in which the judge should consider the factors delineated in *Miller* prior to imposing an appropriate sentence pursuant to the statutory penalty for third-degree murder. *See* Supplemental Brief for Appellant at 12 (citing *Miller,* ––– U.S. at ––––, 132 S.Ct. at 2468).

Characterizing the impact of *Miller* on the current sentencing scheme as "minimal," the Commonwealth responds that the unconstitutional portion of the sentencing scheme is the statute governing parole eligibility, which does not distinguish juvenile offenders when stating that parole may not be granted to those serving a life sentence. *See* Supplemental Brief for Commonwealth at 7 (citing 61 Pa.C.S. § 6137(a)(1) (excluding inmates serving terms of life imprisonment from those who may be released on parole)). Because this portion of the statute is severable, the Commonwealth continues, the "remaining unaltered statutory sentencing provisions," including Section 1102(a) of the Criminal Code, still require that the court impose a sentence of life imprisonment for a juvenile convicted of first-degree murder. *See* Supplemental Brief for Commonwealth at 8 (citing 18 Pa.C.S. § 1102(a) (superseded, in relevant part)). In the Commonwealth's view, however, the judge now has discretion, based on the age-related considerations set forth in *Miller,* to impose the sentence either without parole or with the possibility of parole after a specified term of years. *See id.* The Commonwealth observes that the United States Supreme Court expressly limited its holding in this regard:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham.* Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty.

Miller, ––– U.S. at ––––, 132 S.Ct. at 2471. The Commonwealth also notes that, in other cases, the Superior Court has remanded for resentencing in light of *Miller* for the trial court to consider the relevant factors and determine whether a sentence of "life imprisonment with, or without, the possibility of parole" should be imposed. Supplemental Brief for Commonwealth at 10 (citing *Commonwealth v. Knox,* 50 A.3d 732, 745 (Pa.Super.2012)). Thus, the Commonwealth reasons that the appropriate remedy for Appellant's unconstitutionally mandatory life-without-parole sentence is for this Court to remand for a new sentencing hearing at which the trial court may consider the factors detailed in *Miller* and impose a life sentence, either with or without parole. *See id.* at 10–11.

The Commonwealth's *amicus,* the Pennsylvania District Attorneys Association, adds that Appellant's argument is, in essence, an attempt to "negate[ ] his first degree murder conviction" in order to obtain the lesser sentence for third-degree murder. Supplemental *Amicus* Brief at 11. In this regard, *amicus* argues that the capital cases relied upon by Appellant are inapposite, as they involved death sentences that "could no longer be imposed because no applicable sentencing statute existed." *Id.* at 11–12 (citing Story, 497 Pa. at 282, 440 A.2d at 492). By contrast, *amicus* continues, *Miller* did not invalidate the entire sentencing scheme and does not prevent Appellant from receiving a life-without-parole sentence after the trial court considers the age-related factors set forth by the Supreme Court. *See id.* at 12 (citing *Miller,* ––– U.S. at ––––, 132 S.Ct. at 2471). Similarly, *amicus* distinguishes *Rutledge* because that case involved convictions for two offenses that were based on the same activity, which necessitated vacating one conviction and sentence. *Id.* at 12 n. 7 (citing *Rutledge,* 517 U.S. at 307, 116 S.Ct. at 1250–51). Moreover, *amicus* asserts that "[n]othing in that case, or any other case, suggests that a sentence of life without parole, originally imposed in a constitutionally unsound manner, cannot be reimposed in a constitutionally sound one." *Id.* at 12.

We find the Commonwealth's construction of the applicable statutes to be the best supported. 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.* Section 1102, which mandates the imposition of a life sentence upon conviction for first-degree murder, *see* 18 Pa.C.S. § 1102(a), does not itself contradict *Miller;* it is only **296 when that mandate becomes a sentence of life-without-parole as applied to a juvenile offender—which occurs as a result of the interaction between Section 1102, the Parole Code, *see* 61 Pa.C.S. § 6137(a)(1), and the Juvenile Act, *see* 42 Pa.C.S. § 6302—that *Miller* 's proscription squarely is triggered. *See Miller,* ––– U.S. at ––––, 132 S.Ct. at 2469. *Miller* neither barred imposition of a life-without-parole sentence on a juvenile categorically nor indicated that a life sentence with the possibility of parole could never be mandatorily imposed on a juvenile. *See id.* at ––––, 132 S.Ct. at 2469. Rather, *Miller* requires only *132 that there be judicial consideration of the appropriate age-related factors set forth in that decision prior to the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile. *See id.* at ––––, 132 S.Ct. at 2467–68.

We recognize, as a policy matter, that *Miller* 's rationale—emphasizing characteristics attending youth—militates in favor of individualized sentencing for those under the age of eighteen both in terms of minimum and maximum sentences. In terms of the actual constitutional command, however, *Miller* 's binding holding is specifically couched more narrowly. *See id.* at ––––, 132 S.Ct. at 2469 (“We ... hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison *without possibility of parole* for juvenile offenders.”) (emphasis added). The High Court thus left unanswered the question of whether a life sentence with the possibility of parole offends the evolving standards it is discerning.

Significantly, in the arena of evolving federal constitutional standards, we have expressed a 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.” *Commonwealth v. Sanchez,* 614 Pa. 1, ––––, 36 A.3d 24, 66 (Pa.2011), *cert. denied,*

—— U.S. ——, 133 S.Ct. 122, 184 L.Ed.2d 58 (2012). Moreover, barring application of the entire statutory scheme as applied to juveniles convicted of first-degree murder, based solely on the policy discussion in *Miller* (short of its affirmative holding), would contradict the "strong presumption that legislative enactments do not violate the constitution." *Commonwealth v. Chase,* 599 Pa. 80, 89, 960 A.2d 108, 112 (2008); *see also* 1 Pa.C.S. § 1922(3) (presumption that the General Assembly does not intend to violate the federal or state constitutions when it enacts legislation).

In addition, Appellant's argument that he should be sentenced as if he had been convicted of the lesser offense of third-degree murder finds little support in the authorities upon which he relies, as such case law is simply inapplicable to the present circumstances. In *Story,* for example, this Court imposed a life sentence because the effectuation of a death sentence would violate the defendant's equal protection and due process rights. *See Story,* 497 Pa. at 281, 440 A.2d at 492 ("Because appellant was tried, convicted, and sentenced to death under an unconstitutional statute, he must be treated the same as all those persons whose death penalties have been set aside."). Notably, the life sentence imposed in *Story,* like the death penalty that was vacated, was a legislatively sanctioned punishment for first-degree murder and not a lesser offense. *See id.* at 277, 440 A.2d at 490. *Rutledge* is similarly distinguishable, as that case involved the vacation of one conviction and sentence where the defendant had been convicted of two separate crimes, one of which was determined to be a lesser-included offense. *See Rutledge,* 517 U.S. at 307, 116 S.Ct. at 1250. Here, by contrast, Appellant's conviction for first-degree murder has not been vacated; rather, we are tasked with **297 determining an appropriate scheme for resentencing for that offense, consistent with *Miller.*

Regarding the appropriate age-related factors, as the Commonwealth and its *amicus* observe, the Superior Court has considered the impact of *Miller* and vacated and remanded for resentencing, instructing the trial court that:

> [A]t a minimum it 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.
>
> *Knox,* 50 A.3d at 745 (citing *Miller,* ––– U.S. at ––––, 132 S.Ct. at 2455). We agree with the Commonwealth that the imposition of a minimum sentence taking such factors into account is the most appropriate remedy for the federal constitutional violation that occurred when a life-without-parole sentence was mandatorily applied to Appellant.
>
> We recognize the difference in treatment accorded to those subject to non-final judgments of sentence for murder as of *Miller* 's issuance and those convicted on or after the date of the High Court's decision. As to the former, it is our determination here that they are subject to a mandatory maximum sentence of life imprisonment as required by Section 1102(a), accompanied by a minimum sentence determined by the common pleas court upon resentencing. Defendants in the latter category are subject to high mandatory minimum sentences and the possibility of life without parole, upon evaluation by the sentencing court of criteria along the lines of those identified in *Miller. See* 18 Pa.C.S. § 1102.1. Nevertheless, in the absence of a claim that such difference violates constitutional norms, we have interpreted the statutory provisions applicable to Appellant (and all others similarly situated) in accord with the dictates of the Eighth Amendment as set forth in *Miller,* as well as the Pennsylvania Legislature's intent as reflected in the relevant statutory provisions.

Commonwealth v. Batts, supra, 66 A.3d at 294-297.

Appellant Olds (even though convicted of murder of the 2nd degree rather than murder of the 1st degree), like Mr. Batts, was required to be “subject to a mandatory maximum sentence of life imprisonment as

required by Section 1102(a), accompanied by a minimum sentence determined by the common pleas court upon resentencing." *Batts, Id., at* 297. It is clear that the minimum sentence becomes flexible because of the timing of the commission and conviction, but the maximum sentence remains the same for pre and post June 24, 2012 defendants, insuring equal protection and due process for all defendants convicted of murder. A maximum sentence of life imprisonment is just what the Pennsylvania Supreme Court and the Legislature determined was appropriate when it comes to the maximum sentence to be imposed in these types of cases:

> We find the Commonwealth's construction of the applicable statutes to be the best supported. 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.* Section 1102, which mandates the imposition of a life sentence upon conviction for first-degree murder, *see* 18 Pa.C.S. § 1102(a), does not itself contradict *Miller;* it is only when that mandate becomes a sentence of life-without-parole as applied to a juvenile offender—which occurs as a result of the interaction between Section 1102, the Parole Code, *see* 61 Pa.C.S. § 6137(a)(1), and the Juvenile Act, *see* 42 Pa.C.S. § 6302—that *Miller* 's proscription squarely is triggered. *See Miller,* —— U.S. at ——, 132 S.Ct. at 2469. *Miller* neither barred imposition of a life-without-parole sentence on a juvenile categorically nor indicated that a life sentence with the possibility of parole could never be mandatorily imposed on a juvenile. *See id.* at ——, 132 S.Ct. at 2469. Rather, *Miller* requires only that there be judicial consideration of the appropriate age-related factors set forth in that decision prior to the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile. *See*

id. at ——, 132 S.Ct. at 2467–68.

Batts, Id., 66 A.3d at 295-296. *See also Commonwealth v. Melvin,* __A.3d __, (Pa. Super. 2017; 2017 WL 4159284) (sentence of 30 years to life was not unconstitutional for juvenile convicted of murder of the 2nd degree); *Commonwealth v. Machicote,* ___A.3d ___, (Pa. Super. 2017; 2017 WL 4250023) (sentence of 30 years to life was not unconstitutional for juvenile convicted of murder of the 2nd degree).

The federal district court decision in *Songster v. Beard,* 201 F.Supp. 3d 639 (E.D. Pa. 2016) has no precedential value in Pennsylvania. *Commonwealth v. Lambert,* 765 A.2d 306 (Pa. 2000). Further, the intimation of District Court Judge Savage that the Pennsylvania Board of Parole cannot be trusted to do its job in a fair and equitable fashion is offensive and without support. It is certainly not grounded in the decision of either *Miller* or *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016).

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham,* 500 U.S., at ___, 130 S.Ct., at 2030 ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").

Miller, supra, 132 S.Ct. at 2469.

The Commonwealth of Pennsylvania is "not required to guarantee eventual freedom." *Id.* Nor is it required to ignore the strictures of parole, should appellant violate them. Appellant is now on parole. The fact that he might violate parole and be returned to prison does not constitute cruel and unusual punishment.

> The Eighth Amendment to the Federal Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[6] U.S. Const. amend. VIII. The Eighth Amendment is unique in constitutional jurisprudence because it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality). "[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' " *Kennedy v. Louisiana,* 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008), *quoting Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Hall v. Florida,* ——U.S. ——, 134 S.Ct. 1986, 1992, 188 L.Ed.2d 1007 (2014) (citation omitted).

Commonwealth v. Lawrence, 99 A.3d 116, 119 (Pa. Super. 2014) (footnote omitted) (finding no constitutional violation in applying 18 Pa.C.S.A. § 1102.1 to juvenile convicted of murder of 1st degree). The various cases cited by appellant do not support his argument, as noted by this Court in *Commonwealth v. Lawrence, Id.,* at 120:

> *Graham, Roper,* and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

See also, *Commonwealth v. Brooker*, 103 A.3d 325, 339-340 (Pa. Super. 2014) (footnote omitted):

> The Eighth Amendment does not dictate a specific minimum sentence, nor does it divest state legislatures of their authority to decide on such a minimum sentence.[9] Additionally, our cases have concluded that even the chance of parole when a defendant is in his or her eighties is not the equivalent of a life sentence. *See, e.g., Commonwealth v. Dodge,* 77 A.3d 1263, 1275 (Pa.Super.2013) (concluding that a "sentence [that] would allow [a defendant] to be paroled in his early eighties ... though lengthy, is not the equivalent of a life sentence[ ]"). As Appellant acknowledges in his brief, Appellant will be eligible for parole in his fifties, which does not render the instant sentence equivalent to a life sentence. *See id.* Based on these considerations, we conclude that Appellant is not entitled to relief on Eighth Amendment grounds.
>
> Appellant Olds, although trying to cast doubt on the sufficiency of the evidence and the jury's finding as to his role in participating in a robbery where the victim was killed, stands convicted of murder of the 2nd

degree, robbery, and conspiracy.[4] He is now on parole. It is not cruel or unusual to subject a person who was found to have participated in a robbery which resulted in the death of an innocent victim, to life time supervision. If appellant feels that a particular parole provision should be modified, he can petition the Parole Board. The existence of any such provision is not evidence of cruel and unusual punishment.

---

[4] Appellant's failure to understand the standard and scope of review and the right of the Commonwealth to rely on reasonable inferences as well as the jury's finding of guilt, is evidenced in such statements as: "He served 37 years in prison for essentially purchasing a bag of potato chips and failing to take an older co-defendant seriously when he made a loose-lipped threat." Brief for Appellant at pp. 18-19. Judge Cashman thought otherwise:

> THE COURT: I can't say that. I have tried hundreds of homicides and hundreds felony murder cases, and I have had them go in and use that as a ruse to get the cash register open.
> (ST at p.14).

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that the Judgment of Sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the principle brief for the Commonwealth/Appellee does not exceed the 14,000-word limitation of Pa.R.A.P. 2135.

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