

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

|                              |   |                          |
|------------------------------|---|--------------------------|
| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF |
|                              | : | PENNSYLVANIA             |
|                              | : |                          |
| v.                           | : |                          |
|                              | : |                          |
|                              | : |                          |
| PERCY LEE                    | : |                          |
|                              | : |                          |
|                              | : |                          |
| Appellant                    | : | No. 1016 EDA 2021        |

Appeal from the Judgment of Sentence Entered March 11, 2021  
In the Court of Common Pleas of Philadelphia County Criminal Division at  
No(s): CP-51-CR-0511562-1986

BEFORE: BENDER, P.J.E., BOWES, J., and DUBOW, J.

MEMORANDUM BY BOWES, J.:

**FILED JUNE 22, 2022**

Percy Lee appeals from the aggregate judgment of sentence of fifty years to life imprisonment following resentencing on his two juvenile convictions for first-degree murder. We affirm.

The trial court summarized the history of this case as follows:

On February 28, 1986, Appellant, and co-defendant Russell Cox ("Cox"), were arrested for the homicides of Evelyn ("Ms. Brown") and her daughter, Tina Brown ("Tina"), which occurred on February 27, 1986 at an apartment building on 2443 North 11th Street in Philadelphia, PA. Appellant was 17 years old at the time of the murders.

Appellant knew both victims prior to the murders and had lived at the apartment with Ms. Brown, along with his girlfriend and child. At some point, during his stay there, however, he was asked to leave by Ms. Brown. On the evening of February 26, 1986, Appellant arrived at the apartment at 2443 North 11th Street with Cox and knocked on the door asking to use the phone. Appellant was refused entry by another of Ms. Brown's daughters. Appellant left but not before banging on the door for several

minutes and leaving a threatening message in magic marker which read, "All you bitches, hit man Butter."

At approximately 2:00 a.m. on February 27, 1986, Ms. Williams, Ms. Brown's neighbor, observed Cox talk through the closed door and heard the voice of one of the female occupants. She also observed Appellant standing to the side with his back against the wall. At approximately 3:30 a.m., Appellant and Cox went to the apartment of an acquaintance, Samuel Gilbert, who lived in the same building and Appellant told him that he "did something bad," and explained that he "stabbed Evelyn." Appellant then took some clothing that he kept at Gilbert's apartment and went to his mother's house.

The police arrived at the apartment at 8:40 a.m. that day. Ms. Brown, 33 years-old at the time, was found bound and gagged and had been stabbed 48 times with a pair of scissors and a knife. Tina, aged 17 years at the time, was found with a cloth noose around her neck and had been raped by co-defendant Cox before being stabbed 53 times. Two playing cards, an ace and a jack, were found lying face up on a pillow next to Tina's body.

Appellant was jointly tried before a jury with Cox. Appellant was convicted of two counts of first-degree murder and related charges. At the conclusion of the penalty phase of his trial, Appellant was sentenced to death for both murder convictions.

On September 20th , 2005, after successfully appealing his death sentence, Appellant was resentenced to two consecutive life sentences without possibility of parole. On August 23, 2012, Appellant filed a Post-Conviction Relief Act ("PCRA") petition pursuant **Miller v. Alabama**, [567 U.S. 460] (2012), arguing his life without parole sentence was unconstitutional because he was 17 at the time of the murder and that he was entitled to a new sentence. On March 21, 2016, Appellant filed a motion for leave to amend his PCRA petition, along with a copy of the amended petition following the United States Supreme Court's decision in **Montgomery v. Louisiana**, [577 U.S. 190] (2016), that made Miller retroactive.

On August 8, 2016, Appellant again filed a motion to amend his PCRA petition, along with a copy of the amended petition, following the US Supreme Court's decision in **Williams v. Pennsylvania**, 136 S.Ct. 1899 (2016). **Williams** held that

former Pennsylvania Supreme Court “Chief Justice Ronald Castille’s failure to recuse himself in an appeal from a case in which he participated as district attorney was a violation of Williams’ due process rights.” **Commonwealth v. Lee**, No. 2100 EDA 2017, 2019 WL 4131429, at \* 2 (Pa. Super. Aug. 30, 2019) (quoting **Commonwealth v. Cox**, 204 A.3d 371, 390 n. 19 (Pa. 2019)). Appellant claimed he was entitled to the same remedy as Williams because the same circumstances existed in his case.

On June 1, 2017, the PCRA court entered an order granting Appellant’s PCRA petition pursuant to **Williams** and without prejudice to revisit the **Miller** and **Montgomery** claim while reinstating Appellant’s direct appeal right *nunc pro tunc*. On August 30, 2019, the Pennsylvania Superior Court reversed the PCRA order, without prejudice for Appellant to revisit any claim pursuant **Miller** and **Montgomery** and quashed as untimely his appeal from his judgment of sentence.

Pursuant to **Miller** and **Montgomery**, a resentencing hearing was scheduled for March 11, 2021. Following the hearing and having reviewed all the documents submitted by Appellant and the Commonwealth, having listened to the summary of the facts, having listened to argument from both sides, and having listened to victim impact statement provided by decedents’ family member, Tracey Brown, this court sentenced the Appellant 50 years to life on each murder conviction and ordered the sentences to run concurrently with credit for time served. The court imposed no further sentence on the remaining possession of an instrument of crime conviction.

On March 22, 2021, Appellant filed a motion for reconsideration of sentence which this court denied on April 20, 2021. On May 19, 2021, Appellant filed a notice of appeal to the Superior Court. . . .

Trial Court Opinion, 8/11/21, at 1-4 (cleaned up). Thereafter, both Appellant and the trial court complied with Pa.R.A.P. 1925.

Appellant presents the following questions for our consideration:

1. Absent a finding that a juvenile is permanently incorrigible, is it unconstitutional and a violation of **Commonwealth v. Batts**, 163 A.3d 410 (Pa. 2017) (“**Batts II**”),

and **Miller v. Alabama**, [567 U.S. 460] (2012), to sentence a juvenile to fifty years to life, a sentence of *de facto* life imprisonment without the possibility of parole?

2. Under the circumstances of this case, was the fifty years to life sentence [Appellant] received an unconstitutional *de facto* sentence of life imprisonment without the possibility of parole and a violation of [**Batts II** and **Miller**])?

Appellant's brief at 3.

While this appeal was pending, our Supreme Court supplied the answers to Appellant's questions with its decision in **Commonwealth v. Felder**, 269 A.3d 1232 (Pa. 2022). Before addressing the substance of that decision, we briefly discuss the decisional law that preceded it. In **Miller**, 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** at 479. In **Montgomery**, the High Court ruled that the **Miller** decision announced a new substantive rule of constitutional law that applied retroactively on collateral review. **See Montgomery, supra** at 212.

The Pennsylvania Supreme Court subsequently adopted certain age-related factors that a trial court was required to consider in determining the appropriate sentence for a juvenile convicted of murder:

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.

***Commonwealth v. Batts***, 66 A.3d 286, 297 (Pa. 2013) (“***Batts I***”) (cleaned up).

In ***Batts II***, our Supreme Court provided further guidance for the application of ***Miller*** and ***Montgomery*** by Pennsylvania courts. The Court proclaimed that ***Miller*** and ***Montgomery*** “unambiguously permit the imposition of a life-without-parole sentence upon a juvenile offender **only** if the crime committed is indicative of the offender’s permanent incorrigibility; that the crime was not the result of the ‘unfortunate yet transient immaturity endemic of all juveniles.’” ***Batts II, supra*** at 435 (emphasis in original). Accordingly, before a sentencing court could impose a sentence of life without parole for a murder committed by a juvenile, the Commonwealth was required to provide notice of intent to seek that penalty, and “to prove, beyond a reasonable doubt, that the juvenile offender is permanently incorrigible and thus is unable to be rehabilitated.” ***Id.*** at 459. A sentence of life without parole imposed without the trial court reaching that conclusion upon competent evidence was illegal, and was subject to *de novo*, plenary appellate review. ***Id.*** at 436.

In ***Felder***, our Supreme Court undertook review of the following question: “Does not a sentence of 50 years to life imposed upon a juvenile constitute a *de facto* life sentence requiring the sentencing court, as mandated by this Court in [***Batts II***] to first find permanent incorrigibility, irreparable

corruption or irretrievable depravity beyond a reasonable doubt[?]" **Felder, supra** at 1241. However, after that issue was briefed and argued, the United States Supreme Court decided **Jones v. Mississippi**, 141 S.Ct. 1307 (2021). The **Jones** Court held that "a separate factual finding of permanent incorrigibility is not required" by the Eighth Amendment, **Miller**, or **Montgomery** "before a sentencer imposes a life-without-parole sentence on a murderer under 18." **Id.** at 1318–19.

Consequently, the **Felder** Court was "forced to conclude the sentencing procedures we adopted in **Batts II** do not carry the protections of the Eighth Amendment." **Felder, supra** at 1244 (cleaned up). Rather, "the authority of a sentencing court to impose a life-without-parole sentence on a juvenile homicide offender is circumscribed only . . . by **Miller's** command to 'consider the mitigating qualities of youth'" and, moving forward, any mechanisms imposed by our General Assembly. **Id.** at 1245 (citing 42 Pa.C.S. § 9721(b) (supplying general standards for the exercise of sentencing authority) and 18 Pa.C.S. § 1102.1 (providing sentencing procedures for juveniles convicted of murder after **Miller** was decided)).

Upon establishing the import of the newly-applicable law, the **Felder** Court addressed the "purported *de facto* life sentence" to which it granted review and concluded "that **Jones** controls." **Id.** Specifically, the Court ruled as follows:

To put it simply, even if a 50-years-to-life sentence amounts to a *de facto* life sentence, there is no **Miller** problem here. This is

because **Miller**'s bar on mandatory life-without-parole sentencing regimes "is a prophylactic that entitles a juvenile homicide offender to a certain sentencing process, but not a particular sentencing outcome. Indeed, permanent incorrigibility is not an eligibility criterion akin to sanity or a lack of intellectual disability, rather it is a sentencing factor akin to a mitigating circumstance. For that reason, **Miller** mandated only that a sentencer follow a certain process — considering an offender's youth and attendant characteristics — before imposing a life-without-parole sentence.

It logically and necessarily follows that if a discretionary sentencing scheme is constitutionally sufficient to permit the imposition of a life-without-parole sentence on a juvenile homicide offender, so too can a court impose a sentence that is something less than life without parole. This includes a term-of-years sentence that may amount to a *de facto* life sentence. Stated differently, as long as the sentence was the product of a discretionary sentencing system that included consideration of the juvenile's youth, the Eighth Amendment is satisfied.

**Id.** at 1245–46 (cleaned up). Since the sentencing court had considered the pertinent general sentencing factors along with the appellant's youth, and indeed all the no-longer-required **Batts I** factors, the "appellant received the constitutionally required procedure guaranteed by **Miller** and the Eighth Amendment." **Id.** at 1246. In other words, because "the sentence imposed [was] discretionary and [took] into account the offender's youth, even if it amount[ed] to a *de facto* life sentence," the sentence was not illegal as violative of the Eighth Amendment. **Id.**

In light of this case law, neither of Appellant's claims that his sentence is illegal is viable. The foundation of both of them is **Batts II**'s requirement of a finding of incorrigibility before imposing a life sentence, and, as detailed above, **Felder** expressly holds that **Jones** abrogated **Batts II** by discarding

that requirement. As the law now stands, it is immaterial for purposes of a **Miller** claim whether Appellant's concurrent terms of fifty years to life amount to a *de facto* life sentence, as no finding of incorrigibility was necessary under the Eighth Amendment even if we were to agree that they do. The trial court here considered Appellant's youth and the **Batts I** factors and imposed a sentence less than life without parole. Pursuant to **Felder**, there is no Eighth Amendment violation.

As Appellant's opening brief was filed before **Felder** was decided, he utilizes his reply brief to assert that he need not "rely upon **Batts II** to make [the] argument" that his "50 years to life sentence was an illegal and unconstitutional sentence." Appellant's reply brief at 4. He asserts that, because he raises a challenge to the legality of his sentence, "it need not be preserved in the lower courts to be reviewable and may even be raised by an appellate court *sua sponte*." **Id.** (cleaned up). Appellant and the Commonwealth both contend that, while **Jones** and **Felder** discarded any procedural requirements concerning the finding of incorrigibility before imposing a life sentence without the possibility of parole, **Miller's** substantive prohibition against denying a person an opportunity for parole when his murder was committed as a juvenile remains intact. **See id.** at 8; Commonwealth's brief at 12-16. Both parties assert that, since they agreed that Appellant's crime was a result of transient immaturity and he was capable of rehabilitation, as has been demonstrated by his conduct while he has been



incarcerated for the past thirty-five years, the trial court lacked the authority to sentence him to what they contend is a *de facto* life sentence. **See** Appellant's reply brief at 10; Commonwealth's brief at 17-18. We disagree.

In ***Commonwealth v. J. Miller***, \_\_\_ A.3d \_\_\_, 2022 PA Super 88, 2022 WL 1482496 (Pa.Super. May 11, 2022), we rejected a similar argument.

Therein, we observed as follows:

Appellant does not aver that the trial court failed to consider the mitigating qualities of his youth and its attendant characteristics. Rather, he purports to challenge the constitutionality of his sentence with his contention that the court imposed an impermissible *de facto* [life-without-possibility-of-parole] sentence even though he demonstrated a remarkable degree of rehabilitation. In light of ***Jones*** and ***Felder***, Appellant's sentence does not violate the Eighth Amendment and, thus, Appellant's challenge does not implicate the legality of his sentence. Rather, Appellant's argument that the trial court failed to consider his rehabilitation must be addressed as a challenge to the discretionary aspects of his sentence.

***Id.*** at \*2 (cleaned up). **See also *Commonwealth v. Schroat***, 272 A.3d 523, 526 (Pa.Super. 2022) ("Appellant does not allege that the court lacked the discretion to consider his youth and its attendant characteristics. Rather, he assails the court's balancing of those factors and its conclusion that he is permanently incorrigible. Pursuant to ***Felder*** . . . , the sentencing court's consideration of the factors of youth goes to its sentencing discretion and not to the legality of the sentence. As a result, Appellant's legality claim fails.").

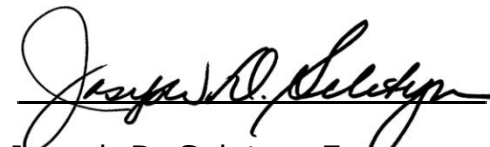
Appellant clearly based his entitlement to appellate relief upon ***Batts II*** and the lack of a finding that he was incapable of rehabilitation. **See** Appellant's brief at 3, 8. Based on the controlling precedent, ***Miller*** required

only a procedure—one that Appellant does not dispute that he received—not a substantive right to the opportunity for parole when his crime was a product of immaturity. While Appellant and the Commonwealth attempt to recast the outcome-challenging claim as one of sentencing illegality, his contention that the trial court’s sentence is excessive under the specific circumstances of his case is a discretionary aspects challenge that is waivable. Since Appellant raised his new discretionary-aspects argument for the first time in his reply brief, it was not properly preserved for our review and is waived. **See, e.g.,** Pa.R.A.P. 2116(a) (“No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.”).

In sum, **Jones** and **Felder** eradicated the foundation of Appellant’s **Miller** claim, and he presents us with no preserved basis to interfere with the trial court’s exercise of its sentencing discretion. Therefore, we affirm Appellant’s judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 6/22/2022