

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

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**Commonwealth of Pennsylvania v. Michael Lehman 47 MAP 2019**  
(CP-67-CR-0002000-1988)

**AND**

**Commonwealth of Pennsylvania v. Scott Davis 49 MAP 2019**  
(CP-67-CR-0000728-1980)

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**BRIEF OF APPELLANT**

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Brief in support of Commonwealth's appeals of two Orders of Pennsylvania Superior Court vacating imposition of costs relating to resentencing which share a similar issue that has been joined for argument:

**47 MAP 2019, (Superior Court: 1556 MDA 2017):**

Whether the Pennsylvania Superior Court erred as a matter of law by holding that the costs relating to contested expert testimony in a contested resentencing do not constitute costs of prosecution under 16 P.S. §1403, and are ineligible for imposition upon a defendant reimbursement as part of a sentence as a matter of law rather than the sentencing court's discretion?

**49 MAP 2019, (Superior Court: 76 MDA 2018):**

Whether costs relating to sentencing, and costs relating to re-sentencing, constitute "costs of prosecution and trial" under 16 P.S. § 1403?

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## STATEMENT OF JURISDICTION

### **Jurisdiction for appeal of Superior Court's decision:**

An appeal may be taken by allowance under 42 Pa.C.S. § 724(a) (allowance of appeals from Superior and Commonwealth Courts) from any final order of the Commonwealth Court, not appealable under Rule 1101 (appeals as of right from the Commonwealth Court), or from any final order of the Superior Court per 42 Pa.C.S. § 1112.

Allowance for appeal was granted by this Honorable Court pursuant to the petitions for Allocatur on the following issues:

### **Lehman: 47 MAP 2019, - 69 MAL 2019 - (Superior Court: 1556 MDA 2017):**

Whether the Pennsylvania Superior Court erred as a matter of law by holding that the costs relating to contested expert testimony in a contested resentencing do not constitute costs of prosecution under 16 P.S. § 1403, and are ineligible for imposition upon a defendant reimbursement as part of a sentence as a matter of law rather than the sentencing court's discretion?

Order of the Pennsylvania Supreme Court dated June 25 2019 docketed at 69 Mal 2019, attached as Appendix A, *see also* Reproduced Record (hereinafter "RR") at p.110a

### **Davis: 49 MAP 2019, - 52 MAL 2019 - (Superior Court: 76 MDA 2018):**

Whether costs relating to sentencing, and costs relating to re-sentencing, constitute "costs of prosecution and trial" under 16 P.S. § 1403?

Order of the Pennsylvania Supreme Court dated June 25 2019 docketed at 52 MAL 2019, attached as Appendix B, *see also* RR at p.1a

## **ORDERS IN QUESTION**

### **I. Commonwealth v. Lehman 47 MAP 2019; Superior Court 1556 MDA 2017**

This appeal is taken from an order of the Superior Court issued on January 4, 2019, as a published decision at Commonwealth v. Lehman, 201 A.3d 1279 (Pa.Super. 2019) wherein a panel of the Pennsylvania Superior Court affirmed Defendant's conviction for Murder in the First Degree and sentence of 30 years to life incarceration, but reversed the imposition of costs of prosecution as it related to Defendant's resentencing as a juvenile lifer. The relevant excerpt reads as follows:

In sum, the trial court had the authority to sentence Appellant to 30 years to life imprisonment for his first-degree murder conviction. We hold that the trial court lacked the authority to order Appellant to pay the costs associated with the resentencing necessitated by evolution of constitutional law. Accordingly, we affirm Appellant's judgment of sentence in part, vacate it in part, and remand for further proceedings consistent with this opinion.

Commonwealth v. Lehman, 201 A.3d 1279, 1287 (Pa. Super. 2019)

### **II. Commonwealth v. Davis 49 MAP 2019; Superior Court 76 MDA 2018)**

This appeal is taken from an order of the Superior Court originally issued on December 26, 2018 as an unpublished memorandum, and then reissued as a published decision on March 29, 2019, at Commonwealth v. Davis 207 A.3d 341 (Pa. Super. 2019) wherein a panel of the Pennsylvania Superior Court affirmed

Defendant's conviction for Murder in the First Degree and sentence of 40 years to life incarceration, but reversed the imposition of costs of prosecution as it related to Defendants resentencing as a juvenile lifer. The relevant excerpt reads as follows:

As we have determined that, under 16 P.S. § 1403, "prosecution" ends at the time of a conviction or acquittal, the trial court imposed an illegal sentence by ordering Davis to pay the costs relative to his resentencing.

Commonwealth v. Davis, 207 A.3d 341, 346 (Pa. Super. 2019)

## **STATEMENT OF SCOPE AND STANDARD OF REVIEW**

An appellate court's standard of review regarding questions of law, such as statutory interpretation is *de novo* with a plenary scope of review. "Where a [party] challenges the authority of the court to impose the disposition in question, it is a challenge to the legality of the disposition." In re S.A.S., 839 A.2d 1106, 1107 (Pa.Super. 2003). "Accordingly, our standard of review for such a claim is plenary, and it is limited to determining whether the lower court committed an error of law." In re J.M., 42 A.3d 348, 350 (Pa.Super. 2012).



## STATEMENT OF QUESTION INVOLVED

The questions for which Allocatur was granted read as follows:

Allowance for appeal was granted by this Honorable Court pursuant to the petitions for Allocatur on the following issues:

**Lehman 47 MAP 2019, - 69 MAL 2019 - (Superior Court: 1556 MDA 2017):**

Whether the Pennsylvania Superior Court erred as a matter of law by holding that the costs relating to contested expert testimony in a contested resentencing do not constitute costs of prosecution under 16 P.S. §1403, and are ineligible for imposition upon a defendant reimbursement as part of a sentence as a matter of law rather than the sentencing court's discretion?

Order of the Pennsylvania Supreme Court dated June 25 2019 docketed at 69 Mal 2019 attached as Appendix A; *see also* Reproduced Record (hereinafter "RR") at p.110a

**Davis 49 MAP 2019, - 52 MAL 2019 - (Superior Court: 76 MDA 2018):**

Whether costs relating to sentencing, and costs relating to re-sentencing, constitute "costs of prosecution and trial" under 16 P.S. § 1403?

Order of the Pennsylvania Supreme Court dated June 25 2019 docketed at 52 MAL 2019 attached as Appendix B; *see also* RR at p.1a

***Suggested Outcome:*** Reversal of Superior Court's orders finding that the sentencing courts lacked the authority to impose costs of prosecution related to resentencing.

## STATEMENT OF THE CASE

### **I. Commonwealth v. Lehman: 47 MAP 2019, - 69 MAL 2019 - (Superior Court: 1556 MDA 2017):**

#### **PROCEDURAL HISTORY**

The Commonwealth adopts the procedural history as set forth by the sentencing court in its 1925(a) Opinion:

For the sake of expediency in a case that has generated a great deal of writing, we begin our procedural history with an excerpt from the Superior Court of Pennsylvania's most recent review of the Appellant's case:

When he was fourteen years old, [Defendant], along with three co-defendants, was charged with murder, burglary, robbery, criminal conspiracy, and criminal homicide relating to the murder of Kwame Beatty on June 18, 1988. In January 1990, [Defendant] was tried as an adult and convicted by a jury of all charges, including first-degree murder. Later that year, the trial court imposed the mandatory sentence of life imprisonment without parole, as well as a consecutive five to ten year sentence for burglary and concurrent sentences of three to six years for each robbery and criminal conspiracy count. [Defendant] filed a direct appeal from the judgment of sentence, which this Court affirmed on December 27, 1991. Commonwealth v. Lehman, 606 A.2d 1231 ( Pa. Super. Ct. 1991) ( unpublished memorandum).

Commonwealth v. Lehman, 1208 MDA 2014 ( unpublished memorandum). Following this denial, the [Defendant] engaged in years of fruitless challenges to his conviction and sentence. On March 16, 2016, the [Defendant] docketed the Post-Conviction Relief Act (hereinafter: PCRA) petition giving rise to this appeal and premised upon Montgomery v. Louisiana, 136 S. Ct. 718 ( 2016), which held that all juvenile offenders who received mandatory life sentences could avail themselves of resentencing pursuant to Miller v. Alabama,

567 U. S. 460 ( 2012). Thus began a long process of status hearings with an intervening event on August 8, 2016 when United States District Judge the Honorable Sylvia H. Rambo granted habeas corpus relief to the [Defendant] and remanded his case to the Court of Common pleas for resentencing in accordance with Miller, supra, and Montgomery, supra. A resentencing hearing was held on April 5, 2017. The [Defendant] was sentenced to thirty years- to- life on count 1, criminal homicide, murder of the first degree. The [Defendant] received five-to-ten years, concurrent with count 1, on count 7, burglary, and count 9, robbery. And on count 6, criminal conspiracy to commit criminal homicide, count 8, criminal conspiracy to commit burglary, and count 10, criminal conspiracy to commit robbery, the [Defendant] received three-to- six years concurrent to count 1. Costs of prosecution were assessed against the [Defendant] for all charges. The effective date of sentence was October 22, 1990 with credit granted from June 19, 1988. On April 13, 2017, the Commonwealth filed their post-sentence motion Asking for Reconsideration of Defendant' s Sentence. The Defendant submitted a response on June 9, 2017. A post-sentence motion hearing was held on July 31, 2017 and, at the conclusion of this hearing, this Court reserved its decision. On September 18, 2017, we entered an order denying the Commonwealth's motions as a matter of law. The [Defendant] docketed a timely Notice of Appeal of this order on October 10, 2017. On November 3, 2017, pursuant to the Pennsylvania Rules of Appellate Procedure, Rule 1925( b), the [Defendant] was directed to file a statement of matters complained of. The [Defendant] filed his Concise Statement of Errors Complained of on Appeal Pursuant to Pa.R.A.P. § 1925( b) on November 22, 2017.

Sentencing Court's 1925(a) opinion p. 1-3, RR p. 117a-119a

The Superior Court heard the instant appeal and affirmed the conviction and the incarceration component of the Defendant's sentence, but reversed the imposition of costs on the basis that the sentencing court lacked the legal authority to impose costs related to resentencing. The Commonwealth has subsequently petitioned for allocatur in regards to this issue pertaining to costs. On June 25,

2019 allocatur was granted and the commonwealth files its instant brief in support of its appeal.

## **FACTUAL HISTORY**

Defendant was fourteen (14) years old on June 18, 1988, the date on which Defendant and three co-defendants participated in stabbing Kwame Beatty to death with a butcher knife while he slept.<sup>1</sup> Mr. Beatty was a youth counselor at the Children's Home of York (hereinafter: "Home") and lived at the home several nights a week. That is where he was held down and stabbed over twenty times with a butcher knife while he slept. The Children's Home is a home for juveniles who, for any number of reasons, cannot live with their families. Many of the boys who lived at the Home were sent there by courts or probation departments for incorrigibility and emotional problems.

Defendant, M.Y. and D.M., the two other juvenile co-defendants, had been committed to the Home by order of court. At the Home, D.M. was Defendant's roommate. Mr. Beatty and Defendant had a "very good" relationship while Defendant lived at the home. Moreover, Mr. Beatty was known to stand up for Defendant and convinced other staff members to give Defendant a second chance

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<sup>1</sup> The facts are taken from the Pennsylvania Superior Court decision in *Commonwealth v. Lehman*, 606 A.2d 1231 (Pa.Super. 1991), and the Notes of Testimony from Defendant's jury trial held on January 8 through 18, 1990.

and keep him at the home, despite other staff members wanting Defendant to be placed somewhere else due to his behavior.

The Saturday before Mr. Beatty was murdered, Defendant, M.Y. and D.M. ran away from the Home. The three co-defendants met Cornell Mitchell, an adult, who housed them for several days prior to the murder. The night before the murder, while away from Mitchell's house, Defendant was found by staff members from the Home. The staff members returned Defendant to the Home. Defendant was scolded by Mr. Beatty for running away and sent to his room. Later that evening, however, around midnight, Defendant ran away from the Home a second time and returned to Mitchell's house.

While there, Defendant and the three other co-defendants discussed killing the counselor, Mr. Beatty. Defendant and the other two juveniles explained to Mitchell that the boys in the Home go to bed around 12:30 A.M., and that Mr. Beatty goes to bed right after that. Defendant, carrying a steak knife, and Mitchell, carrying a butcher knife, left Mitchell's home and began walking towards the Home. The four co-defendants stopped in a cemetery to discuss the plans further to make sure all four co-defendants knew their individual roles when they entered the home. The four of them agreed that Mitchell, D.M., and M.Y. would enter the bedroom where Mr. Beatty was sleeping and kill him. Defendant's job was to stay

upstairs and kill any boys in the home that happened to wake up. Defendant participated in formulating this plan, and agreed to his role in Mr. Beatty's murder.

At that time, the co-defendants placed socks on their hands to avoid leaving fingerprints and entered the Home through Defendant's bedroom window. Defendant had broken the security system on the window and left the window open when he ran away earlier that day so that he could regain entry. Once in the Home, Defendant took socks from his drawer and put them over his hands. Then, the three juvenile co-defendants, including Defendant, took Mitchell around the house and let him know where everything was and where Mr. Beatty was sleeping. Mitchell, D.M. , and M.Y. entered Mr. Beatty's bedroom and Defendant returned to the second floor of the Home with his knife to kill any boys that woke up.

In the early morning hours of June 18, 1988 Mitchell, D.M., and M.Y. held Mr. Beatty down and stabbed him twenty-one (21) times with a butcher knife in his chest, neck, abdomen, and back. Mr. Beatty was alive and conscious for the duration of the stabbing, suffering massive hemorrhaging. Mr. Beatty called out to D.M. and M.Y. to help him, begged the defendants not to kill him, and pleaded for his life for his little daughter. At one point during the brutal stabbing, Defendant came downstairs to shut the door so that the residents upstairs would not hear Mr. Beatty screaming. When Mr. Beatty became quiet, and after making sure everybody in the home was still asleep, Defendant went back downstairs with his

knife. Defendant helped the other three co-defendants ransack Mr. Beatty's room and steal money, cigarettes, food, and Mr. Beatty's wallet and car keys from the home. The four co-defendants then exited out Defendant's bedroom window, stole Mr. Beatty's car, and fled. The four co-defendants drove to Lancaster, then up to Harrisburg where they wiped all of the fingerprints off Mr. Beatty's car and abandoned it. They took all of the bloody clothing they were wearing, the two knives, and the socks that they had on their hands and shoved them in a gym bag. They took the bag down to a creek and stuffed them under a bush. They also hid Mr. Beatty's credit cards, keys, and other belongings at another location in Harrisburg, near the Capitol. Then, the four co-defendants took a Greyhound bus and returned to York, where the police later arrested them in connection with the murder of Mr. Beatty.

Notably at the time of the defendant's resentencing, the Commonwealth's expert and the Defendant's expert could not be farther apart in terms of their evaluations. Defense Psychologist, Dr. Foley stated that Defendant Lehman was a person who had left his criminality in the past and who was a low risk to the community and should be released forthwith. Defendant's sentencing Memo at. P. 22, whereas the Commonwealth's Psychiatrist, Dr. Rotenberg presented to the court that Lehman was a narcissist, who, while treatable, had not yet reached a level where it would be safe to release him into the community due to his narcissistic

personality disorder, and recommended a sentence where defendant was parole-able, but not until after the age of 60 years old. Def Sentencing Memo p. 22. RR p. 185a

**II. Commonwealth v. Davis: 49 MAP 2019, - 52 MAL 2019 - (Superior Court: 76 MDA 2018):**

**PROCEDURAL HISTORY**

The Commonwealth adopts the procedural history as set forth by the court of common pleas in its 1925(a) Opinion

At the time of the incident of June 7, 1980, Appellant was fifteen years of age. A Jury Trial was held between May 4, 1981 and May 7, 1981 resulting in Appellant's conviction of First Degree Murder. On June 11, 1982, Appellant was sentenced to life imprisonment.

Appellant filed a Notice of Appeal on June 21, 1982. The Superior Court affirmed Appellant's sentence on July 13, 1984. The Supreme Court of Pennsylvania affirmed on July 18, 1986. Appellant filed a Petition for Post Conviction Collateral Relief on December 17, 1996. The Superior Court affirmed the Order denying the Petition on May 26, 1998. Appellant filed a second Petition for Post Conviction Collateral Relief on July 12, 2010. The Superior Court affirmed the Order denying the second Petition on October 20, 2011.

Appellant filed a third Petition for Post Conviction Collateral Relief on July 26, 2012. The third Petition was denied by the trial court on November 20, 2013. Appellant filed a Petition for Writ of Habeas Corpus in the United States District Court, which was granted on June 2, 2016. The United States District Court remanded to the York County Court of Common Pleas for re-sentencing. A re-sentence hearing was held over the course of three days on September 19, 2017, October 27, 2017 and December 7, 2017 before the Honorable Christy H. Fawcett. Judge Fawcett



resentenced Appellant to serve a minimum of forty (40) years to life imprisonment, time served. As of December 7, 2017, Appellant was 52 years old and has been incarcerated for approximately 37 years and 6 months.

On December 20, 2017, Judge Fawcett held a hearing for Appellant's post sentence motions. The trial court granted Appellant's motion to waive his counsel and proceed pro se, while ordering Appellant's then attorney, Christopher Ferro, Esquire, to advise Appellant with his appeal. The trial court granted Appellant's motion to have the Commonwealth return Appellant's wallet. The trial court granted Appellant's motion to grant Appellant in forma pauperis status. The trial court also granted Appellant service of documents and transcripts pertaining to this matter. The trial court denied Appellant's motion to modify the Re-Sentence Order. The trial court also denied Appellant's motion to be reimbursed for attorney fees and to waive court and prosecution costs.

Sentencing Court's 1925(a) opinion of 3/29/18 p. 1-3, RR p. 6a-8a

## **FACTUAL HISTORY**

Defendant shot and killed Roderick Kotchin on June 7, 1980 when Defendant was 15 years old during what appears to be an attempted burglary. Commonwealth v. Davis, 479 A.2d 1041, 1043 (Pa. Super. 1984). Defendant was subsequently found guilty of First Degree Murder and sentenced to mandatory life in prison in 1981 as a juvenile lifer. Id. at 1044. Defendant's sentence was subsequently vacated as mandatory imposition of life imprisonment for juvenile murderers was deemed unconstitutional by the United States Supreme Court.

It is important to note that Defendant pursued a defense psychological evaluation from a defense expert, and thus the Commonwealth was obligated to

respond by seeking an evaluation by an evaluator that the Commonwealth found credible. In this case the Defendant sought an evaluation from Dr. Paul Delfin, and the Commonwealth sought an evaluation by Dr. Larry Rotenberg.

In the sentencing memoranda, the Defendant sought a sentence of 35 years to life, and the Commonwealth sought a sentence of 45 years to life. At the re-sentencing hearing, Judge Fawcett re-sentenced Defendant to 40 years to life imprisonment. 1925(a) at 2-3. RR p. 7a-8a At the time of the re-sentencing Defendant had been in prison for 37 years and 6 months, thus not making him immediately eligible to be released from prison. 1925(a) at 3, RR p. 8a. After receiving his re-sentencing, Defendant filed post sentence motions and his motion to modify the Re-sentence Order was denied by the trial court. 1925(a) at 3, RR p. 8a.

Subsequently, the defendant appealed, and the sentence issued by the court was affirmed, however the Superior court vacated the imposition of costs of prosecution relating to the resentencing, on the basis that costs relating to a resentencing are not “costs of prosecution” the Commonwealth appeals this interpretation by the Pennsylvania Superior Court.

## **SUMMARY OF ARGUMENT**

The defendants in the instant cases are juvenile lifers who were subject to resentencing in light of this court's ruling in Commonwealth v. Batts, 163 A.3d 410, 415 (Pa. 2017) applying Miller v. Alabama, 567 U.S. 460, (2012) to juvenile mandatory life without parole sentences.

The Defendants held contested sentencings wherein Defendants obtained psychological evaluations in support of their arguments regarding sentencing. The Commonwealth obtained evaluations through Dr. Lawrence Rotenberg M.D. and relied upon the experts to support the Commonwealth's positions. The experts provided their opinions, and the sentencing courts crafted sentences generally between the sentences requested by the Commonwealth and the Defendants. As part of their sentences, the sentencing courts imposed costs of prosecution, which included the costs of the psychological evaluation and testimony by the Commonwealth's expert.

The Commonwealth argues that the Superior Court erred in holding that the sentencing courts could not, as a matter of law, impose the costs associated with these re-sentencings. Prior precedent holds that costs that are reasonably related to prosecution should be assessed upon defendants, and the psychiatric evaluation was necessary to rebut defense experts.

## ARGUMENT

### **Introduction**

Allowance for appeal was granted by this Honorable Court pursuant to the two similar petitions for Allocatur on the following issues: Are costs related to a re-sentencing considered costs of prosecution, and if so, did the Superior Court err when it vacated the imposition of such costs of prosecution related to responsive expert testimony in a contested sentencing hearing? The Commonwealth avers that the Superior Court did err as the costs were reasonable expenditures related to the Defendants' sentencing, and not the result of Commonwealth malfeasance or waste. The issues set forth in the grants of Allocatur read as follows:

#### **Lehman 47 MAP 2019, - 69 MAL 2019 - (Superior Court: 1556 MDA 2017):**

Whether the Pennsylvania Superior Court erred as a matter of law by holding that the costs relating to contested expert testimony in a contested resentencing do not constitute costs of prosecution under 16 P.S. §1403, and are ineligible for imposition upon a defendant reimbursement as part of a sentence as a matter of law rather than the sentencing court's discretion?

Order of the Pennsylvania Supreme Court dated June 25 2019 docketed at 69 Mal 2019 attached as Appendix A; *see also* Reproduced Record (hereinafter "RR") at p.110a

#### **Davis 49 MAP 2019, - 52 MAL 2019 - (Superior Court: 76 MDA 2018):**

Whether costs relating to sentencing, and costs relating to re-sentencing, constitute "costs of prosecution and trial" under 16 P.S. § 1403?

Order of the Pennsylvania Supreme Court dated June 25 2019 docketed at 52 MAL 2019 attached as Appendix B; *see also* RR at p. 1a

The statutory provision at question states that “[I]n any case where a defendant is convicted and sentenced to pay the costs of prosecution and trial, the expenses of the district attorney in connection with such prosecution shall be considered a part of the costs of the case and be paid by the defendant.” 16 P.S. § 1403 (Act 1955-130, P.L. 323, § 1403, approved Aug. 9, 1955, eff. Jan. 1, 1956; Act 2018-154 (S.B. 1005), § 27, approved October 24, 2018, eff. December 24, 2018.) The Superior Court erred as a matter of law in holding that:

We hold that the trial court lacked the authority to order Appellant to pay the costs associated with the resentencing necessitated by evolution of constitutional law.

Commonwealth v. Lehman, 2019 PA Super 2, 201 A.3d 1279, 1287. and,

As we have determined that, under 16 P.S. § 1403, "prosecution" ends at the time of a conviction or acquittal, the trial court imposed an illegal sentence by ordering Davis to pay the costs relative to his resentencing.

Commonwealth v. Davis, 207 A.3d 341, 346 (Pa. Super. 2019)

Under these theories, the sentencing court may not even consider the costs of a contested re-sentencing to be costs of prosecution. The case law relied upon by the Superior Court does not support such a finding as a matter of law, and is contrary to existing Pennsylvania Supreme Court and Superior Court Precedent.

Specifically, the case law relied upon by the Superior Court in both Davis and Lehman are: Commonwealth v. Weaver, 76 A.3d 562, 574 (Pa. Super. 2013) Affirmed per curiam Commonwealth v. Weaver, 629 Pa. 313 (Pa. 2014 and Commonwealth v. Garzone, 993 A.2d 306, 318-20 (Pa. Super. 2010) which stand for the proposition that the Sentencing Court may in its discretion determine that a defendant should not be liable for unnecessary costs that were created by waste or malfeasance. Indeed, this is the actual meaning underlying Garzone and Weaver's reliance in Commonwealth v. Coder, 415 A.2d 406, 408 (Pa. 1980) The Commonwealth believes that the policy considerations of Weaver are appropriate.

In Garzone, the District Attorney was attempting to recover the costs associated with the employment of the prosecutors. The Pennsylvania Supreme Court examined this type of request and found that only under the most exceptional circumstances could the costs of hiring prosecutors be imposed as a cost of prosecution. Conversely the court recognized in Garzone footnote 11 that costs associated with the calling of expert witnesses was a common expense subject to reimbursement as a cost of prosecution. Commonwealth v. Garzone, 34 A.3d 67, 80 n.11 (Pa. 2012) Thus a reading of Garzone, when the footnote is incorporated recognizes that the imposition of costs of expert testimony did not even warrant argument.

In the case of Commonwealth v. Weaver, the Pennsylvania Superior court (affirmed by Pennsylvania Supreme Court per curiam) reviewed a case where a case was previously remanded for a retrial due to the Commonwealth's failure to file proper informations, and the necessity for a second round of expert testimony was needed. The court recognized that the incurrance of the costs in the second trial was due to the Prosecutor's error, and the court did in fact impose the costs of the witnesses in the first trial, but found that the defendant should not be liable for expenses caused entirely by the prosecutor's wasteful oversight.

The interpretation of Weaver by the Superior Court in both Lehman and Davis is incorrect as in Weaver the first time that the Commonwealth had to incur the costs of an expert witness, those costs were imposed and affirmed, it was only the second imposition **of the duplicate costs** during a retrial caused by the office of the prosecutor making a wasteful error in the charging documents that were rejected.

In the instant case, the Commonwealth has never made an error of law in regards to the juvenile sentencing. Rather it was a change in jurisprudence of the United States Supreme Court that held in Miller that it was improper to sentence Juveniles to a mandatory imposition of Life without Parole. Furthermore, this represents the first contested sentencing hearing for the instant defendants. Originally the defendants were sentenced to a mandatory sentence of life without

parole, and the Commonwealth can locate no sentencing hearing where any experts were called or considered because such experts would have been irrelevant for sentencing purposes. The instant cases represent the first time in the history of either cases that the defendant's mental states became relevant to a sentencing hearing. This is not a situation where the Prosecutor's office engaged in any form of malfeasance or waste, this is simply the first time the defendant's were not subject to mandatory life without parole.

Furthermore, in this case both Defendants obtained a Psychologist to present expert testimony and opinions that their respective defendant were ready for immediate parole, which clearly necessitated the Commonwealth's having its own expert testify s in these two cases the Commonwealth's expert believed they required more time rather than allow the record to be dominated by a pro-defense perspective that does not consider concerns relevant to the Commonwealth.<sup>2</sup>

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<sup>2</sup> York County had 11 juvenile lifers subject to re-sentencing; however, the Commonwealth's Psychiatrist Dr. Rotenberg only recommended life without parole for a single defendant Daron Nesbit, CP-67-CR-0002131-1997.

Dr. Rotenberg also found that one of the 11, Defendant Warner Batty CP-67-CR-0001505-1975, required no further treatment resulting in a joint stipulation by commonwealth and defense counsel to the sentencing court so the expense of testimony was avoided by the Commonwealth where possible.



In addition to the impact of Garzone and Weaver actually being in the Commonwealth's favor, the Superior Court's reliance in Lehman on United States v. Goodwin, 457 U.S. 368, 372 (1982) and Commonwealth v. Speight, 854 A.2d 450, 455 (Pa. 2004) is misplaced. These cases stand for the proposition that a defendant who is subject to a resentencing proceeding may not be sentenced to a higher sentence as a vindictive punishment for appealing his case. Both Goodwin and Speight are based on a question as to whether a court is acting with "vindictiveness". The cost of having the defendant evaluated by an expert psychiatrist to determine his amenability to treatment and the sentence that the Commonwealth would seek is clearly not done out of vindictiveness. Thus, contrary to the opinion of the Pennsylvania Superior Court, the case law relied upon by the panel in Lehman does NOT stand for the blanket position by the Superior Court that a sentencing court lacks the legal authority to impose costs relating to sentencing or re-sentencing proceedings.

A plain reading of the statute expressly notes that in any case where the defendant is convicted, "the expenses of the district attorney in connection with such prosecution shall be considered a part of the costs of the case and be paid by the defendant." 16 P.S. § 1403 *supra*. It is impossible for the Superior Court to divorce a sentencing proceeding from being part of the prosecution in the manner contemplated in the Superior Court's opinion.

Firstly, when a sentence is vacated, the prosecution is rendered incomplete. In Pennsylvania, it is the order of sentence that gives any “conviction” finality, and if a sentence is vacated, the Commonwealth has an obligation to re-assume the prosecution until such time that the case can become final once more. As stated by the Pennsylvania Supreme Court previously: “[S]ince the post-conviction hearing court referred the instant record to the trial court for resentencing, and appellant has not been sentenced, no final order has been entered in this case from which an appeal would lie.” Commonwealth v. Lockhart, 289 A.2d 248, 249 (Pa. Super. 1972). As the instant case lacked a final order when the Juvenile Lifer’s sentences were vacated, the Commonwealth had a legal obligation to pursue a final sentence and thus the costs associated with that sentencing were legitimate costs of prosecution. By the wording of 16 P.S. § 1403, the Commonwealth may seek the costs of prosecution associated with the sentencing as it is clearly related to the prosecution of the case, and the finality of the case is dependent on the sentencing.

Moreover, the instant opinions by the Superior Court are inconsistent with existing Pennsylvania Supreme Court precedent. In the case Commonwealth v. Davy, 317 A.2d 48 (Pa. 1974) the Pennsylvania Supreme Court held that the **cost of extradition for the purposes of a probation violation hearing was a cost that may be assessed upon the defendant pursuant to 16 P.S. § 1403** as a cost of prosecution. This is opposite to the position advanced by the Superior Court’s

opinion that the Commonwealth is limited to costs incurred in matters up to only the verdict, and does not include sentencing or subsequent post-conviction proceedings. Indeed, the purpose of a probation violation hearing is to determine whether a defendant has been compliant with his sentence, and if he has not been compliant, then to re-sentence the defendant. The recognition that post-sentencing matters may require the imposition of costs upon the defendant supports the Commonwealth's position in this case, that the re-sentencing court appropriately awarded costs of prosecution.

In the Lehman, the Defendant was a juvenile lifer who obtained a defense expert, Dr. Timothy Foley to support his opinion that he should receive a sentence no longer than 15 years to 30 years incarceration. (Lehman Def. Sentencing Memo page 25, appendix p. 88). The Commonwealth obtained its own expert, Dr. Larry Rotenberg, and based on his opinion, argued to the contrary that the defendant required a sentence of 45 years to life. (Lehman Commonwealth's sentencing Memo p. 14, appendix. p. 104). The Sentencing court issued a sentence of 30 years to life, and assessed the costs of prosecution upon the defendant.

In Davis, the Defendant was a juvenile lifer who obtained a defense expert, Dr. Amy Taylor in support of his argument that the defendant should received a sentence of time-served (37 years) to life (Davis Def. Sentencing Memo page 16-17.). The Commonwealth obtained its own expert, Dr. Larry Rotenberg, and based

on his opinion, argued to the contrary that the defendant required a sentence of 45 years to life (Davis Commonwealth's sentencing Memo p. 18)

Unlike Weaver and Garzone, the costs of hiring an expert to first assess what sentence is appropriate to recommend and to second rebut the position of Defendant are clearly necessary costs of prosecution. The Commonwealth would note that even if the Defendants in the instant case did not present their own evaluations and experts to support sentencing theories, the Commonwealth's hiring of an expert to evaluate the defendants and determine whether they warranted pursuit of sentences of life without parole, or sentences with parole-ability, but a greater sentence than the mandatory minimum<sup>3</sup>, is not an excessive incurrence of costs against the Defendant, but an example of Commonwealth's due diligence as noted by the Pennsylvania Supreme Court in the resentencing of juvenile lifers as explained in the opinion referred to as Batts-3.

Given the presumption against life without parole and the Commonwealth's burden beyond a reasonable doubt to rebut the presumption, it is difficult to conceive of a case where the Commonwealth would not proffer expert testimony and where the sentencer would not find expert testimony to be necessary.

Commonwealth v. Batts, 163 A.3d 410, 456 (Pa. 2017)

The Commonwealth read this provision of the Pennsylvania Supreme Court's opinion as an entreaty to have the Juvenile lifers evaluated, and to only

seek juvenile life without parole where the defendant was “incorrigible” to use the US Supreme Court’s definition. In only one of York County’s cases did our expert make findings that the defendant’s mental state warranted life without parole. As such for ten of the eleven cases, York County did not pursue life without parole at resentencing, and instead crafted sentencing recommendations consistent with the evaluations of the juvenile lifer’s reform-ability. Thus in the circumstances presented by the Juvenile Life without parole re-sentencings, even had the Commonwealth not needed an expert to testify to rebut defense witnesses, there was a clearly legitimate reason for incurring the expense of a mental health evaluation, as previously recognized by this court in *Batts-3*, rather than simply pursuing life without parole against every defendant as a matter of course.

To be clear, if the costs of a probation violation hearing, and its re-sentencing may constitute costs of prosecution under the prior precedent of this court *Commonwealth v. Davy*, 317 A.2d 48 (Pa. 1974), then the costs of a re-sentencing hearing where the defendant has called his own expert to testify and the Commonwealth must call its own expert to rebut the defense expert is clearly eligible to be considered costs of prosecution.

As noted by the Superior Court in both *Lehman* and *Davis* they did not view this as a question of the discretionary aspects of sentencing, but rather a matter of

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<sup>3</sup> On the JLWOP resentencing’s for cases prior to 2012, the mandatory minimum was not

legality of sentence. If the Superior Court had reviewed the expense, and held that as a matter of the court's discretion, that the particular cost was not related to the prosecution, or that the cost should not be imposed upon the defendant for reasons comparable to Garzone, the court would have an opinion consistent with Weaver. However the Superior Court's instant opinions improperly overrules and exceeds both Garzone and Weaver, and undercuts the constitutional basis for imposing any costs on a defendant at any time in a criminal proceeding.

This issue of the constitutionality of the assessment of costs has been reviewed by the Superior Court previously in the case Commonwealth v. Hower, 406 A.2d 754, 757-58 (Pa. Super. 1979), a case that both of superior court panels failed to address. The Commonwealth agrees with Hower that the standard should be that the court may require the Commonwealth to prove that the expenses were necessary, and if not necessary, the court in its discretion may choose not to impose them.

However, a blanket prohibition on the imposition of costs that were necessary is simply an incorrect application of the law. In this case obtaining a psychological expert to rebut the arguments of the Defendant's psychological expert is clearly a litigation necessity, and therefore a cost of prosecution that

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binding upon the sentencing courts, but was a strong factor for the courts to consider.

should be imposed upon the defendant. In fact, in a reading of Batts 3, , The relevant excerpt from Hower reads as follows:

[h]owever, a defendant is in any case protected by the requirement in the Act of August 9, 1955, *supra*, 16 P.S. § 1403, of proof that the expenses incurred by the district attorney were "necessary." If the expenses were unnecessary, a defendant cannot be required to pay them. We see nothing unfair in requiring a convicted defendant to pay such of the district attorney's trial preparation and consultation expenses as were necessary to secure the conviction, even though that necessity was to some extent a function of the nature of the defendant's defense. To hold otherwise would produce a strange result. A defendant convicted of a routine robbery could be required to pay the costs of prosecution; but a defendant convicted of a crime that had been carefully concealed and was therefore difficult to prove -- homicide by some rare poison, for example; *cf. Coppolino v. State*, 223 So.2d 68 (Fla.App.1968), *cert. denied*, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1969) -- could not be required to pay the costs of prosecution. In this case, the lower court found that the district attorney's expenses were both necessary and reasonable, and appellant has not appealed these findings.

We acknowledge that the possibility that a convicted defendant may be required to pay the costs of prosecution may impose some burden on a particular defendant's choice of whether to go to trial or plead guilty and thereby avoid the costs. Nevertheless, not every burden imposed by the state on a defendant's right to trial is constitutionally prohibited. *See Commonwealth v. Coder*, *supra*, 252 Pa.Super. at 511, 382 A.2d at 133 (plurality opinion). In *United States v. American Theater Corp.*, 526 F.2d 48, 50 (8th Cir. 1975), *cert. denied*, 430 U.S. 938, 97 S.Ct. 1569, 51 L.Ed.2d 786 (1977), **it was held that neither the fifth nor sixth amendments to the United States Constitution prevented the government from taxing "the cost of prosecution to an unsuccessful, non-indigent defendant in accordance with [a duly enacted statute] as long as it does so in a nondiscriminatory manner."** And in *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974), the United States Supreme Court held that an indigent defendant's right to counsel was not impermissibly infringed by a requirement that upon conviction he repay the costs of his

representation when he acquired the means to do so, even though some persons might thus forgo assistance of counsel. *See also United States v. Bracewell*, 569 F.2d 1194, 1197 (2d Cir. 1978) (such reimbursement statute for costs of legal counsel "creates a constitutionally proper ground for depriving a financially able defendant of available funds which, in fairness, should be remitted to the public coffers").

**In considering the permissibility of imposing a burden on a defendant who chooses to go to trial rather than plead guilty, one must ask why the burden is imposed. Thus, "' [a]n accused cannot be punished by a more severe sentence because he unsuccessfully exercised his constitutional right to stand trial rather than plead guilty.'" *Commonwealth v. Staley*, 229 Pa.Super. 322, 324, 324 A.2d 393, 394-95 (1974) (citations omitted). Here, however, it cannot be maintained that by providing that a convicted defendant may be required to pay the costs of prosecution, the legislature intended to punish defendants who choose to go to trial rather than plead guilty.**

*Commonwealth v. Hower*, 406 A.2d 754, 757-58 (Pa. Super. 1979)

(emphasis added).

What happened in the instant cases of *Lehman* and *Davis* is that the Pennsylvania Superior Court has improperly divested the sentencing court of its discretion in determining whether the costs incurred were necessary, and has outright barred the imposition of costs relating to a resentencing, which is contrary to existing Pennsylvania Supreme Court and Superior Court precedent and a plain reading of the statute.



## CONCLUSION

Wherefore, the Commonwealth of Pennsylvania requests that this Court reverse the orders of the Pennsylvania Superior Court regarding the Court of Common Pleas imposition of costs, and affirm the sentences as issued by the Court of Common Pleas.

Respectfully submitted,

/s/ James Zamkotowicz

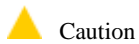
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*DATED:* 9th day of October, 2019

# APPENDIX

## A



Caution

As of: October 9, 2019 1:59 PM Z

## Commonwealth v. Lehman

Superior Court of Pennsylvania

November 14, 2018, Argued; January 4, 2019, Decided; January 4, 2019, Filed

No. 1556 MDA 2017

### Reporter

201 A.3d 1279 \*; 2019 Pa. Super. LEXIS 10 \*\*; 2019 PA Super 2; 2019 WL 100374

COMMONWEALTH OF PENNSYLVANIA v. MICHAEL

A. LEHMAN, Appellant

**Subsequent History:** Appeal granted by [Commonwealth v. Lehman, 2019 Pa. LEXIS 3476 \(Pa., June 25, 2019\)](#)

**Prior History:** [\*\*1] Appeal from the Judgment of Sentence April 4, 2017. In the Court of Common Pleas of York County Criminal Division at No(s): CP-67-CR-0002000-1988. Before MICHAEL E. BORTNER, J.

*Commonwealth v. Lehman, 418 Pa. Super. 634, 606 A.2d 1231, 1991 Pa. Super. LEXIS 4105 (Dec. 27, 1991)*

### Core Terms

costs, sentence, trial court, resentencing, murder, proceedings, district attorney, illegal sentence, first-degree, convicted, pay costs, imprisonment, necessitated, laboratory, life imprisonment, years to life, common law, repeal, cases, venue, commission of a crime, habeas corpus, general rule, mandatory, paying

### Case Summary

#### Overview

**HOLDINGS:** [1]-The court held that the trial court had the authority to sentence appellant to 30 years to life imprisonment for his first-degree murder conviction but that it lacked the authority to order appellant to pay the costs associated with the resentencing necessitated by evolution of constitutional law since the resentencing proceeding was necessitated by the imposition of a prior illegal sentence.

#### Outcome

Sentence affirmed, in part and vacated in part; case remanded to trial court for further proceedings.

### LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Costs

Criminal Law & Procedure > Sentencing > Resentencing

[HN1](#) [↓] **Sentencing, Costs**

A trial court lacks authority to impose costs associated with a resentencing proceeding necessitated by the imposition of a prior illegal sentence.

Constitutional Law > The Judiciary > Case or Controversy > Mootness

[HN2](#) [↓] **Case or Controversy, Mootness**

If events occur to eliminate the claim or controversy at any stage in the process, the issue becomes moot.

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Sentencing > Appeals > Legality Review

[HN3](#) [↓] **Standards of Review, De Novo Review**

The appellate court reviews an illegal sentencing claim de novo and its scope of review is plenary.

Criminal Law & Procedure > Sentencing > Costs

[HN4](#) [↓] **Sentencing, Costs**

The Judicial Code provides that, the governing authority shall

prescribe by general rule the standards governing the imposition and taxation of costs, including the items which constitute taxable costs, the litigants who shall bear such costs, and the discretion vested in the courts to modify the amount and responsibility for costs in specific matters. [42 Pa.C.S. § 1726\(a\)](#). The Pennsylvania Supreme Court has not, pursuant to [section 1726\(a\)](#), prescribed by general rules such standards in criminal cases.

Governments > Legislation > Enactment

Governments > Legislation > Statutory Remedies & Rights

### [HN5](#) Legislation, Enactment

As the Pennsylvania Supreme Court explains: The Judicial Code was created by the Judiciary Act of 1976, which, in conjunction with the Judiciary Act Repealer Act (JARA) and the Judiciary Act Repealer Act of 1980, represented the culmination of a ten year effort to achieve the first complete judicial codification in Pennsylvania's history. Although the Judicial Code was enacted in 1976, it did not take effect until June 27, 1978, the effective date of JARA. The primary purpose of JARA, is to repeal those statutes which had been supplanted by the Code. JARA expressly repealed parts or all of more than 1500 statutes, comprising approximately 6000 sections of Purdon's Pennsylvania Statutes, enacted between 1700 and 1977.

Criminal Law & Procedure > Sentencing > Costs

Criminal Law & Procedure > Sentencing > Resentencing

Criminal Law & Procedure > Juvenile Offenders > Sentencing

### [HN6](#) Sentencing, Costs

The Superior Court of Pennsylvania is cognizant of the fact that, at the time the Pennsylvania General Assembly passed [18 Pa.C.S. § 1102\(a\)](#) and [61 Pa.C.S. § 6137\(a\)\(3\)](#), they were constitutional as applied to juveniles and the Supreme Court of the United States upheld similar statutes for decades after their enactment. However, the court believes that, once the sentencing statutes are declared to be unconstitutional necessitating a resentencing, a defendant, who originally received what is deemed to be an illegal sentence, should not be responsible for the costs associated with the resentencing.

Criminal Law & Procedure > Sentencing > Costs

Criminal Law & Procedure > Sentencing > Resentencing

### [HN7](#) Sentencing, Costs

A defendant can expect to be held financially liable for the costs associated with a sentencing proceeding when he or she commits a crime. A defendant does not, however, reasonably expect to be financially responsible for the costs associated with resentencing necessitated by changes in law many years later. This reasonable expectation has played an important role in the Pennsylvania Supreme Court's jurisprudence in this area of the law. In *Coder*, the Supreme Court justifies requiring the defendant to pay the costs associated with the change in venue by noting that when a person commits a crime which stirs wide community interest, either because the crime is heinous or its perpetrator is a person invested with a public trust, publicity will follow inevitably. The ensuing publicity should be readily foreseeable by the perpetrator of the crime, so that it is neither arbitrary, capricious nor unreasonable to hold him responsible for the dysfunction his conduct caused the criminal justice system.

**Counsel:** William H. Graff, Jr., York, for Appellant.

Justin M. Talarowski, Assistant District Attorney, York, for Commonwealth, Appellee.

**Judges:** BEFORE: LAZARUS, J., OLSON, J., and MUSMANNO, J. OPINION BY OLSON, J.

**Opinion by:** OLSON

## Opinion

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[\*1280] OPINION BY OLSON, J.:

More than 28 years ago, the trial court sentenced Appellant, Michael A. Lehman, to the then-mandatory term of life imprisonment without the possibility of parole for a murder committed when he was 14 years old. On April 4, 2017, he was resentenced to 30 years to life imprisonment in light of intervening decisions of the Supreme Court of the United States. *See Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *see also Montgomery v. Louisiana*, 136 S.Ct. 718, 193 L. Ed. 2d 599 (2016). In [\*1281] addition, the trial court ordered him to pay costs associated with that resentencing.<sup>1</sup> Appellant appeals from that judgment

<sup>1</sup>The total costs imposed were \$15,150.28. The bulk of the costs—\$8,950.00—involved the examination and testimony of the

of sentence, challenging the trial court's authority to sentence him for first-degree murder and to require payment of the costs. After careful consideration, we hold that, although Appellant's sentence of imprisonment is lawful, [HNI](#) a trial court lacks authority to impose costs associated with a resentencing proceeding necessitated by the imposition of a prior illegal sentence. We, therefore, affirm in part, vacate in part, and remand for further proceedings **[\*\*2]** consistent with this opinion.

In June 1988, Appellant was 14 years old. He and two other residents escaped from the Children's Home of York County ("the Home"). Appellant was apprehended. The same day, however, he fled the Home again. He, along with his confederates, then plotted to murder one of the Home's staff members. They returned to the Home and Appellant served as a lookout while his confederates viciously murdered the staff member by stabbing him 21 times.

Appellant was convicted of first-degree murder,<sup>2</sup> burglary,<sup>3</sup> robbery,<sup>4</sup> and criminal conspiracy.<sup>5</sup> On October 22, 1990, the trial court sentenced Appellant to the then-mandatory term of life imprisonment without the possibility of parole. *See* [18 Pa.C.S.A. § 1102\(a\)](#) (West 1988) (requiring sentence of life imprisonment); [61 Pa.C.S.A. § 6137\(a\)\(3\)](#) (West 1988) (barring parole for individuals sentenced to life imprisonment). This Court affirmed. *Commonwealth v. Lehman*, 418 Pa. Super. 634, 606 A.2d 1231 (Pa. Super. 1991) (unpublished memorandum).

On October 8, 1998, Appellant filed his first petition pursuant to the *Post-Conviction Relief Act ("PCRA")*, [42 Pa.C.S.A. §§ 9541-9546](#). On May 26, 1999, the PCRA court denied the petition. This Court affirmed and our Supreme Court denied allowance of appeal. *Commonwealth v. Lehman*, 754 A.2d 19 (Pa. Super. 2000) (unpublished memorandum), *appeal denied*, 564 Pa. 706, 764 A.2d 1066 (Pa. 2000). On July 1, 2010, Appellant filed his second **[\*\*3]** PCRA petition. The PCRA court dismissed that petition on August 26, 2010. Again, this Court affirmed and our Supreme Court denied allowance of appeal. *Commonwealth v. Lehman*, 34 A.3d 221 (Pa. Super. 2011) (unpublished memorandum), *appeal denied*, 613 Pa. 662, 34 A.3d 827 (Pa. 2011).

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Commonwealth's expert witness, Dr. Larry Rotenberg, who did not find Appellant to be irreparably corrupt.

<sup>2</sup> [18 Pa.C.S.A. § 2502\(a\)](#).

<sup>3</sup> [18 Pa.C.S.A. § 3502](#).

<sup>4</sup> [18 Pa.C.S.A. § 3701](#).

<sup>5</sup> [18 Pa.C.S.A. § 903](#).

On August 21, 2012, Appellant filed his third PCRA petition in which he alleged that *Miller* entitled him to relief. In *Miller*, the Supreme Court of the United States held that juvenile homicide offenders may not be sentenced pursuant to schemes that impose mandatory life imprisonment without the possibility of parole. *Miller*, 567 U.S. at 469-489. Thereafter, in *Commonwealth v. Cunningham*, 622 Pa. 543, 81 A.3d 1 (Pa. 2013), our Supreme Court held that *Miller* did not apply retroactively. *Id.* at 4-11. On November 20, 2013, the PCRA court dismissed Appellant's third petition based on *Cunningham*. Bound by *Cunningham*, this Court affirmed. *Commonwealth v. Lehman*, 122 A.3d 1131 (Pa. Super. 2015) (unpublished memorandum).

The following year, resolving a split amongst state courts of last resort, the **[\*1282]** Supreme Court of the United States held that *Miller* applied retroactively. *Montgomery*, 136 S.Ct. at 732-737. On March 16, 2016, Appellant filed his fourth PCRA petition. Prior to the PCRA court ruling on that petition, the United States District Court for the Middle District of Pennsylvania granted Appellant a writ of *habeas corpus* and ordered the trial court to resentence Appellant.<sup>6</sup> *Lehman v. Commonwealth*, 15cv843 (M.D. Pa. Aug. 8, 2016).

**[\*\*4]** On April 7, 2017, the trial court resentenced Appellant to an aggregate term of 30 years to life imprisonment. The trial court also ordered Appellant to pay costs associated with the resentencing proceedings. The Commonwealth filed a post-sentence motion challenging the discretionary aspects of Appellant's sentence. On September 18, 2017, the trial court denied the post-sentence motion. This timely appeal followed.<sup>7</sup>

Appellant presents three issues for our review:

1. Was [Appellant] granted relief under the [PCRA] or pursuant to a petition for a writ of *habeas corpus*?
2. [Did the trial court impose an illegal sentence by ordering Appellant to serve 30 years to life imprisonment?
3. Did the trial court impose an illegal sentence by ordering Appellant to pay the costs associated with the resentencing proceedings?]

Appellant's Brief at 3.<sup>8</sup>

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<sup>6</sup> Although it was not titled as such, nor did it include the normal language associated therewith, we believe that it was a conditional writ.

<sup>7</sup> Appellant and the trial court complied with [Pennsylvania Rule of Appellate Procedure 1925](#).

<sup>8</sup> We have re-numbered the issues for ease of disposition.

In his first issue, Appellant argues that he obtained relief pursuant to the writ of *habeas corpus* issued by the United States District Court for the Middle District of Pennsylvania and not because the PCRA court granted him relief. This issue is moot because the trial court resentenced Appellant. *Cf. In re S.H., 2013 PA Super 165, 71 A.3d 973, 976 (Pa. Super. 2013)* (citation [\*\*5] omitted) *HN2*[↑] ("If events occur to eliminate the claim or controversy at any stage in the process, the [issue] becomes moot."). For purposes of the central issues presented in this appeal from Appellant's judgment of sentence, it is immaterial whether Appellant was before the trial court for resentencing pursuant to an order issued under the PCRA or the writ of *habeas corpus* issued by the United States District Court for the Middle District of Pennsylvania. Accordingly, we decline to address Appellant's first issue.

In his second issue, Appellant argues that the trial court imposed an illegal sentence by ordering him to serve 30 years to life imprisonment for his first-degree murder conviction.<sup>9</sup> According to Appellant, there was no statutory authority by which the trial court could sentence Appellant for first-degree murder because *18 Pa.C.S.A. § 1102*, when combined with *61 Pa.C.S.A. § 6137(a)(3)*, was deemed unconstitutional in *Miller*. Appellant argues that the trial court was required to (1) sentence him for third-degree murder, a crime he was not convicted of committing, or (2) discharge him. *HN3*[↑] We review an illegal sentencing claim *de novo* and our scope of review is plenary. *Commonwealth v. White, 2018 PA Super 214, 193 A.3d 977, 985 (Pa. Super. 2018)* (citation omitted).

Our Supreme Court and this Court have [\*\*6] rejected Appellant's argument on numerous occasions. *E.g., Commonwealth v. Batts, 640 Pa. 401, 163 A.3d 410, 421 (Pa. [\*\*1283] 2017); Commonwealth v. Olds, 2018 PA Super 197, 192 A.3d 1188, 1193 (Pa. Super. 2018); Commonwealth v. Foust, 2018 PA Super 39, 180 A.3d 416, 430 (Pa. Super. 2018); Commonwealth v. Seskey, 2017 PA Super 278, 170 A.3d 1105, 1106 (Pa. Super. 2017).*<sup>10</sup> Pursuant to these binding decisions, the trial court was required to impose a sentence for first-degree murder. The sentencing options available to the trial court offered no mandatory minimum

<sup>9</sup>We note that this argument was made by an attorney that withdrew his appearance during the pendency of this appeal.

<sup>10</sup>Appellant was sentenced after our General Assembly enacted *18 Pa.C.S.A. § 1102.1(a)*, which sets forth the mandatory minimum for juveniles convicted of first-degree murder. That statute, however, only applies to juveniles convicted of committing crimes that occurred after June 24, 2012. *See 18 Pa.C.S.A. § 1102.1(a)*. Nonetheless, we note that a 14-year-old convicted of first-degree murder for an offense that occurred after June 24, 2012 faces a 25-year mandatory minimum. *See 18 Pa.C.S.A. § 1102.1(a)(2)*.

and a mandatory maximum term of life imprisonment. The trial court imposed such a sentence. Hence, Appellant's sentence of 30 years to life imprisonment was legal.

In his final issue, Appellant argues that the trial court imposed an illegal sentence by ordering him to pay costs associated with his resentencing proceedings, which came about because of the illegality of his original sentence. In essence, Appellant's claim is that expenses incurred by reason of resentencing proceedings undertaken after the initial imposition of an unlawful sentence fall outside the trial court's authority to impose costs. The Commonwealth, on the other hand, contends that Appellant's claim challenges the discretionary aspects of his sentence. Because Appellant challenges the trial court's authority to impose costs as part of its resentencing order, we conclude that the Appellant's claim implicates the legality of his sentence and, thus, he was [\*\*7] not required to include a statement pursuant to *Pennsylvania Rule of Appellate Procedure 2119(f)* in his brief or to raise the issue before the trial court. *See Commonwealth v. Robinson, 2010 PA Super 192, 7 A.3d 868, 871 (Pa. Super. 2010)*. We apply a *de novo* standard of review to such a claim and our scope of review is plenary. *See White, 193 A.3d at 985* (citation omitted).

Preliminarily, we set forth the legal framework governing this issue. It is unclear from the record whether the trial court imposed costs pursuant to the common law, pursuant to *16 P.S. § 4403*,<sup>11</sup> or both.<sup>12</sup> Ultimately, we conclude that it is

<sup>11</sup>*Section 4403* provides that

All necessary expenses incurred by the district attorney or his assistants or any officer directed by him in the investigation of crime and the apprehension and prosecution of persons charged with or suspected of the commission of crime shall be paid by the county from the general funds of the county, upon the approval of the bill of expenses by the district attorney and the court. In any case where a defendant is convicted and sentenced to pay the costs of prosecution and trial, the expenses of the district attorney in connection with such prosecution [\*\*8] shall be considered a part of the costs of the case and be paid by the defendant.

*16 P.S. § 4403.*

In its opinion, the trial court cited *16 P.S. § 7708*, however, *section 7708* only governs cases in counties of the first-class. *Section 4403* governs cases in counties of the second-class. As Montgomery County is a county of the second-class, *Feldman v. Hoffman, 107 A.3d 821, 823 n.1 (Pa. Cmwlth. 2014), appeal denied, 632 Pa. 695, 121 A.3d 497 (Pa. 2015), section 4403* is the relevant statute.

<sup>12</sup>The Commonwealth cites *42 Pa.C.S.A. § 9728(g)* in support of its



[\*1284] immaterial for purposes of this decision whether costs were imposed under the common law, [section 4403](#), or both because the result is the same. Hence, we set forth the framework for both the common law and [section 4403](#).

[HN4](#)<sup>↑</sup> The Judicial Code provides that, "The governing authority shall prescribe by general rule the standards governing the imposition and taxation of costs, including the items which constitute taxable costs, the litigants who shall bear such costs, and the discretion vested in the courts to modify the amount and responsibility for costs in specific matters." [42 Pa.C.S.A. § 1726\(a\)](#). Our Supreme Court has not, pursuant to [section 1726\(a\)](#), prescribed by general rules such standards in criminal cases.

[HN5](#)<sup>↑</sup> As our Supreme Court explained:

The [Judicial Code](#) was created by the Judiciary Act of 1976, which, in conjunction with the Judiciary Act Repealer Act ("JARA") and the [Judiciary Act Repealer Act of 1980](#) [], represented the culmination of a ten year effort to achieve the first complete judicial codification in Pennsylvania's history.

Although the Judicial Code was enacted in 1976, it did not take effect until June 27, 1978, the effective date of JARA. The primary purpose of JARA [], was to repeal those statutes which had been supplanted by the Code. [JARA] expressly repealed parts or all of more than 1500 statutes, comprising approximately [\*9] 6000 sections of Purdon's Pennsylvania Statutes, enacted between 1700 and 1977.

[Chartiers Valley Sch. Dist. v. Twp. of Ross, 501 Pa. 620, 462 A.2d 673, 675 \(Pa. 1983\)](#) (cleaned up).

JARA contained a savings clause, which provided that:

General rules promulgated pursuant to the Constitution of Pennsylvania and the Judicial Code in effect on the effective date of the repeal of a statute, shall prescribe and provide the practice and procedure with respect to the enforcement of any right, remedy or immunity where the practice and procedure had been governed by the repealed statute on the date of its repeal. If no such general rules are in effect with respect to the repealed

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argument that Appellant was responsible for costs related to his resentencing. That statute is inapposite because that statute addresses "costs associated with the collection of restitution, transportation costs and other costs associated with the prosecution[.]" [42 Pa.C.S.A. § 9728\(g\)](#). It does not address costs borne by the district attorney in prosecuting a case. Such costs are governed by Section 64 and [section 4403](#). Cf. [1 Pa.C.S.A. § 1933](#) (a specific statute controls over a general statute).

statute on the effective date of its repeal, the practice and procedure provided in the repealed statute shall continue in full force and effect, as part of the common law of the Commonwealth, until such general rules are promulgated.

Act 53 of 1978 § 3(b), 1978 P.L. 202, 352.

At the time the Judicial Code was enacted, costs in criminal cases were primarily governed by Section 64 of the Criminal Procedure Act of 1860 ("Section 64"), 1860 P.L. 427, 445. *See* 19 P.S. § 1223 (repealed).<sup>13</sup> Hence, pursuant to JARA's savings clause, Section 64 is part of our Commonwealth's common law. Section 64 provided that "in all cases of conviction of any crime, all costs shall be paid by [\*10] the party convicted; but where such party shall have been discharged, according to law, without payment of costs, the costs of prosecution shall be paid by the county[.]" *Id.*

As previously noted, [section 4403](#) sets forth the statutory language that controls the costs at issue in this case. That statute governs the payment of all necessary expenses incurred by the district attorney, and his or her assistants and officers.

[\*1285] Having set forth the legal framework governing the assessment of costs, we now consider whether Section 64 and [section 4403](#) permit the imposition of costs for resentencing following an illegal sentence. Under both provisions "trial court[s] must carefully examine [the totality of the circumstances. Assessable] costs are those which are necessary for prosecution when considered in light of the peculiar facts and circumstances of each case[.]" [Commonwealth v. Garzone, 2010 PA Super 58, 993 A.2d 1245, 1258 \(Pa. Super. 2010\)](#), *aff'd*, [613 Pa. 481, 34 A.3d 67 \(Pa. 2012\)](#).

We are aware of only two, non-binding, decisions addressing the assessment of costs after an original judgment of sentence was imposed. In [Commonwealth v. Morales-Rivera, 67 A.3d 1290 \(Pa. Cmwlth. 2013\)](#), the Commonwealth Court held that the trial court had the authority to order the defendant to pay costs associated with his PCRA hearing. *Id.* at 1294. In [United States ex rel. Brink v. Claudy, 96 F.Supp. 220 \(W.D. Pa. 1951\)](#), the district attorney sought costs associated with defending a federal [\*11] *habeas corpus* petition. The United States District Court for the Western District of Pennsylvania found that the district attorney was entitled to such costs under Pennsylvania law; however, the district attorney must seek those costs in state court. *Id.* at 224. We

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<sup>13</sup>The Criminal Procedure Act of 1860 was repealed by JARA. *See* Act 53 of 1978 § 2, 1978 P.L. 202, 232.

do not find *Morales-Rivera* or *Brink* persuasive for the issue presented in this case. In both *Morales-Rivera* and *Brink*, the defendants were denied relief within the context of their respective post-conviction proceedings. In this case, the resentencing hearing was the result of Appellant's successful litigation of his *habeas corpus* petition in the United States District Court for the Middle District of Pennsylvania. Hence, we turn to analogous cases and general tools of statutory interpretation<sup>14</sup> to guide our decision.

We acknowledge that Section 64's language differs from [section 4403](#)'s language insofar as [section 4403](#) uses the words "necessary expenses" and Section 64 uses the words "all costs." We conclude, however, that construing Section 64 differently than [section 4403](#) would lead to absurd results. Under the current Statutory Construction Act, and the law that preceded it, we must interpret statutes to avoid such absurd results. See [1 Pa.C.S.A. § 1922\(1\)](#).<sup>15</sup> If we interpreted the word "all" literally, a defendant could **[\*\*12]** be forced to pay costs associated with lighting and heating the courtroom in which he or she was tried. A defendant could also be forced to pay for out-of-town jurors to stay at the Ritz-Carlton. These are absurd results. Hence, we conclude that the word "all" in Section 64 means "necessary" as in [section 4403](#). For this reason, we conclude that if costs are not "necessary" they are not authorized under either Section 64 or [section 4403](#).

We agree with the learned trial judge that this case is most analogous to [Commonwealth v. Weaver, 2013 PA Super 245, 76 A.3d 562 \(Pa. Super. 2013\)](#), *aff'd*, [629 Pa. 313, 105 A.3d 656 \(Pa. 2014\)](#) (*per curiam*). In that case, the Commonwealth charged the defendant with driving under the influence of drugs. The criminal information alleged that morphine was present in his blood while he operated his motor vehicle. Similarly, a pre-trial report presented to the defendant **[\*1286]** indicated that a laboratory found morphine in his blood. At trial, the Commonwealth called a laboratory employee to testify regarding the test results. That witness, however, testified that benzodiazepines were found in the defendant's blood. At that point, the trial court declared a mistrial and permitted the Commonwealth to amend the criminal information.

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<sup>14</sup> Although Section 64 is now part of our common law and is no longer a statute, we believe that as it was formerly a statute it should be interpreted according to the general tools of statutory construction.

<sup>15</sup> Prior to passage of the [Statutory Construction Act](#), statutes were construed pursuant to Act 282 of 1937, 1937 P.L. 1019. Act 282 contained operative language identical to that of [section 1922\(1\)](#). See Act 282 of 1937 § 52(1), 1937 P.L. 1019, 1024.

At the retrial, a different laboratory employee testified and the defendant was convicted. **[\*\*13]** At sentencing, the trial court ordered the defendant to pay costs associated with the laboratory employees' testimony at both trials. The defendant filed a post-sentence motion arguing that he should not be responsible for paying costs associated with the laboratory employee's testimony at the second trial. The trial court granted the post-sentence motion and amended the judgment of sentence so that the defendant was responsible for paying the costs for the laboratory employee's testimony only at the first trial. The Commonwealth appealed that determination to this Court and this Court affirmed the trial court's decision not to impose costs related to the second trial.

The costs of resentencing in this case arose because Appellant elected to exercise his rights under *Miller* and *Montgomery*. This is akin to the circumstances in *Weaver*, where the defendant "chose" to exercise his constitutional right to due process of law by being informed of the charges against him prior to trial. In *Weaver*, this Court held that the Commonwealth was responsible for the costs of the second trial. This is sensible because it is well-settled that a defendant may not be punished for exercising his or her **[\*\*14]** constitutional rights. [Commonwealth v. Speight, 578 Pa. 520, 854 A.2d 450, 455 \(Pa. 2004\)](#); [United States v. Goodwin, 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L. Ed. 2d 74 \(1982\)](#). If we held that Appellant was responsible for paying the costs associated with resentencing, we would punish him for exercising his constitutional right to receive a sentence that comports with the [Eighth Amendment of the United States Constitution](#) (as incorporated against the states via the [Fourteenth Amendment](#)). Thus, although Appellant "chose" to receive a constitutional sentence by filing his PCRA petition and petition for a writ of *habeas corpus*, that does not entitle the Commonwealth to recover the costs associated with the resentencing process.

Additionally, in affirming the trial court's decision limiting the defendant's payment of costs associated with the laboratory employee's testimony in only the first trial, this Court in *Weaver* explained that a defendant is not responsible for costs that are a result of certain actions by the Commonwealth. [Weaver, 76 A.3d at 574](#). In reaching that decision, this Court relied on our Supreme Court's decision in [Commonwealth v. Coder, 490 Pa. 194, 415 A.2d 406 \(Pa. 1980\)](#). In *Coder*, our Supreme Court held that the defendant was responsible for paying the costs associated with a change in venue. Our Supreme Court explained, however, that when "the prosecution is primarily responsible for the conditions which necessitate the change of venue, the defendant should be **[\*\*15]** absolved of the costs incident to the change of venue." *Id. at 409 n.4*. This Court reasoned that *Coder* indicates that the Commonwealth must bear the costs of



prosecution when the Commonwealth is responsible for the increase in costs. *Weaver*, 76 A.3d at 574. In other words, costs are not "necessary" if they would not have arisen but for the Commonwealth's actions. *See id.*

While we recognize that the situation in *Weaver* does not align perfectly with the circumstances presently before us, we nonetheless believe that *Weaver* supplies the principle to be applied here. In *Weaver*, [\*1287] the costs were accrued as a result of actions taken by the Commonwealth through the district attorney. We see no reason to differentiate between the actions taken by the Commonwealth in prosecuting an action from the actions taken by the Commonwealth in enacting a statute that is later declared to be unconstitutional. There was no action taken by the defendant in *Weaver* or Appellant in this case which necessitated the further proceedings for which costs were imposed. In both situations, the additional costs would not have arisen but for the actions of the Commonwealth.<sup>16</sup> Thus, when further proceedings are not necessitated by the actions of the defendant [\*\*16] and the defendant obtains relief as a result of those proceedings, the Commonwealth should bear the risk of paying the additional costs.

Finally, [HN7](#)<sup>[↑]</sup> a defendant can expect to be held financially liable for the costs associated with a sentencing proceeding when he or she commits a crime. A defendant does not, however, reasonably expect to be financially responsible for the costs associated with resentencing necessitated by changes in law many years later. This reasonable expectation has played an important role in our Supreme Court's jurisprudence in this area of the law. In *Coder*, our Supreme Court justified requiring the defendant to pay the costs associated with the change in venue by noting that

when a person commits a crime which stirs wide community interest, either because the crime is heinous or its perpetrator is a person invested with a public trust, publicity will follow inevitably. The ensuing publicity should be **readily foreseeable by the perpetrator** of the crime, so that it is neither arbitrary, capricious nor unreasonable to hold him responsible for the dysfunction

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<sup>16</sup> [HN6](#)<sup>[↑]</sup> We are cognizant of the fact that, at the time our General Assembly passed [18 Pa.C.S.A. § 1102\(a\)](#) and [61 Pa.C.S.A. § 6137\(a\)\(3\)](#), they were constitutional as applied to juveniles and the Supreme Court of the United States upheld similar statutes for decades after their enactment. However, we believe that, once the sentencing statutes are declared to be unconstitutional necessitating a resentencing, a defendant, who originally received what is deemed to be an illegal sentence, should not be responsible for the costs associated with the resentencing.

his conduct caused the criminal justice system.

*Coder*, 415 A.2d at 409 (emphasis added; citation omitted). In other words, our Supreme [\*\*17] Court held that the defendant could be required to pay the costs associated with the change in venue because that change in venue was reasonably foreseeable at the time the defendant committed the crime in question. As explained above, it was not reasonably foreseeable that Appellant would receive an illegal sentence and later be resentenced. Accordingly, we hold that the trial court lacked the authority to order Appellant to pay costs associated with the resentencing proceedings.

In sum, the trial court had the authority to sentence Appellant to 30 years to life imprisonment for his first-degree murder conviction. We hold that the trial court lacked the authority to order Appellant to pay the costs associated with the resentencing necessitated by evolution of constitutional law. Accordingly, we affirm Appellant's judgment of sentence in part, vacate it in part, and remand for further proceedings consistent with this opinion.

Judgment of sentence affirmed in part and vacated in part. Case remanded. Jurisdiction relinquished.

Judgment Entered.

Date: 01/04/2019

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# APPENDIX

## B



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## Commonwealth v. Davis

Superior Court of Pennsylvania

March 29, 2019, Decided; March 29, 2019, Filed

No. 76 MDA 2018

### Reporter

207 A.3d 341 \*; 2019 Pa. Super. LEXIS 297 \*\*; 2019 PA Super 99; 2019 WL 1414158

COMMONWEALTH OF PENNSYLVANIA v. SCOTT

CHARLES DAVIS, Appellant

**Prior History:** [\*\*1] Appeal from the Judgment of Sentence December 7, 2017, in the Court of Common Pleas of York County. Criminal Division at No(s): CP-67-MD-1000728-1980. Before GREGORY M. SNYDER, J.

[Commonwealth v. Davis, 510 Pa. 536, 510 A.2d 722, 1986 Pa. LEXIS 804 \(June 27, 1986\)](#)

### Core Terms

sentence, costs, trial court, resentencing, murder, minimum sentence, legality, convicted, prison, district attorney, years to life

### Case Summary

#### Overview

**HOLDINGS:** [1]-After being resentenced to 40 years to life in prison pursuant to Miller and Montgomery for committing murder in the first degree under [18 Pa.C.S. § 2502\(a\)](#) when he was 15 years old, whereupon he had been initially sentenced to life in prison without parole, defendant's claim that the sentence was illegal under [18 Pa.C.S. § 1102.1\(e\)](#) lacked merit, as the trial court properly exercised its discretion in imposing a sentence beyond the 35-year minimum of [§ 1102.1\(a\)](#); [2]-However, it was error to impose the costs of prosecution associated with the resentencing on defendant, as they were not related to his "prosecution" pursuant to [16 Pa. Stat. Ann. § 1403](#) because prosecution ended at the time of his conviction.

#### Outcome

Judgment of sentence affirmed in part; vacated in part. Matter remanded with instructions to determine appropriate costs.

### LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Governments > Courts > Judicial Precedent

#### [HNI](#) **Fundamental Rights, Cruel & Unusual Punishment**

The Supreme Court in Miller held that sentencing schemes that mandate life in prison without parole sentences for defendants who committed their crimes while under the age of 18 violate the [Eighth Amendment's](#) prohibition on "cruel and unusual punishments." [U.S. Const. amend. VIII](#). The Supreme Court in Montgomery held that the Miller decision announced a new substantive rule of constitutional law that applies retroactively.

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Sentencing > Appeals > Legality Review

#### [HN2](#) **Standards of Review, De Novo Review**

Issues relating to the legality of a sentence are questions of law. An appellate court's standard of review over such questions is de novo and the scope of review is plenary.

Criminal Law & Procedure > Juvenile  
Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Resentencing

Criminal Law & Procedure > ... > Murder > First-Degree  
Murder > Penalties

### [HN3](#) Sentencing, Age & Term Limits

In *Batts II*, the Pennsylvania Supreme Court set forth the guidelines for resentencing defendants whose sentences had been declared unconstitutional by *Miller/Montgomery*. The Court instructed, look to the mandatory minimum sentences set forth in [18 Pa.C.S. § 1102.1\(a\)](#) for guidance in setting a minimum sentence for a juvenile convicted of first-degree murder prior to *Miller*. Further, the Court in *Batts II* held that the sentencing court may deviate upwards from the mandatory minimum. [Section 1102.1\(e\)](#) makes clear that 35 years in prison is only the minimum sentence required. In determining the minimum sentence for a juvenile convicted of first-degree murder prior to *Miller*, a sentencing court is to exercise its discretion to find the appropriate, individualized sentence in each case, just as it would when fashioning the minimum sentence for any other defendant before it.

Criminal Law & Procedure > Sentencing > Costs

Criminal Law &  
Procedure > Sentencing > Appeals > Legality Review

### [HN4](#) Sentencing, Costs

A challenge to the trial court's imposition of costs presents a legality of sentencing claim.

Criminal Law & Procedure > ... > Standards of  
Review > De Novo Review > Conclusions of Law

Governments > Legislation > Interpretation

### [HN5](#) De Novo Review, Conclusions of Law

An issue that is one of statutory interpretation is a question of law and requires a de novo standard of review. Pursuant to the Statutory Construction Act, [1 Pa.C.S. §§ 1501-1991](#), a court's paramount interpretive task is to give effect to the intent of the General Assembly in enacting the particular legislation under review. [1 Pa.C.S. § 1921\(a\)](#) provides that the object of all interpretation and construction of statutes is to ascertain

and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions. The best indication of the General Assembly's intent may be found in the plain language of the statute. Consequently, when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. [§ 1921\(b\)](#). [1 Pa.C.S. § 1922\(1\)](#) states that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

Criminal Law & Procedure > Sentencing > Costs

Governments > Legislation > Interpretation

### [HN6](#) Sentencing, Costs

While [16 Pa. Stat. Ann. § 1403](#) does not define "prosecution" or "costs of prosecution," the term "prosecution" must be read as synonymous with "conviction." Further, [§ 1403](#) makes no mention of sentencing or sentencing costs. Thus, because the purpose of imposing the costs of prosecution against the defendant is to reimburse the Commonwealth for the expenses incurred preparing a case for, and conducting, a trial, "prosecution" ends with the conviction or acquittal of the defendant.

**Counsel:** Scott C. Davis, appellant, pro se.

James E. Zamkotowicz, Assistant District Attorney, York, for Commonwealth, appellee.

**Judges:** BEFORE: OTT, J., MUSMANNO, J., and PLATT\*,  
J. OPINION BY MUSMANNO, J.

**Opinion by:** MUSMANNO


## Opinion

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[\*342] OPINION BY MUSMANNO, J.:

Scott Charles Davis ("Davis") appeals from the judgment of sentence imposed after he was resentenced pursuant to [Miller v. Alabama](#), 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and [Montgomery v. Louisiana](#), 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).<sup>1,2</sup> We [\*343] affirm in part, vacate in

\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> [HNI](#)  The Supreme Court in *Miller* held that sentencing schemes that mandate life in prison without parole ("LWOP")

part, and remand with instructions.

In 1980, Davis, who was 15 years old, shot and killed Roderick Kotchin. On May 7, 1981, following a jury trial, Davis was convicted of murder in the first degree.<sup>3</sup> The trial court sentenced Davis to a mandatory term of LWOP, and ordered Davis to pay the costs of prosecution.<sup>4</sup> This Court and the Pennsylvania Supreme Court affirmed the judgment of sentence. *See Commonwealth v. Davis*, 330 Pa. Super. 551, 479 A.2d 1041 (Pa. Super. 1984), *aff'd*, 510 Pa. 536, 510 A.2d 722 (Pa. 1986).

Following a procedural history not relevant to this appeal, the United States District Court for the Middle District of Pennsylvania granted Davis's Petition for Writ of *Habeas Corpus* based upon *Miller* and *Montgomery*. *See Markle v. Wetzel*, No. 3:13-CV-1687, 2016 U.S. Dist. LEXIS 11804 (M.D. Pa. 2016) (unpublished memorandum). The federal district court ordered the York County Court of Common Pleas [\*\*2] to resentence Davis. After a hearing, the trial court resentedenced Davis to 40 years to life in prison, and ordered Davis to pay the costs of prosecution.<sup>5</sup> Davis filed Post-Sentence Motions, which the trial court denied. Davis filed a timely Notice of Appeal and a *Pa.R.A.P. 1925(b)* Concise Statement of errors complained of on appeal.

On appeal, Davis raises the following questions for our review:

1. Did the resentencing court commit an error of law and abuse its discretion by ignoring the mandate of the Pennsylvania Supreme Court in *Commonwealth v. Batts*, 640 Pa. 401, 163 A.3d 410 (Pa. 2017) ("*Batts II*"), which held that [Davis] should have been resentedenced to 35 years to life [in prison]?
2. Did the resentencing court commit an error of law and abuse its discretion when it imposed costs [on Davis]?

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sentences for defendants who committed their crimes while under the age of eighteen violate the *Eighth Amendment's* prohibition on "cruel and unusual punishments." *Miller*, 567 U.S. at 465.

<sup>2</sup>The Supreme Court in *Montgomery* held that the *Miller* decision announced a new substantive rule of constitutional law that applies retroactively. *Montgomery*, 136 S. Ct. at 736.

<sup>3</sup>*See* 18 Pa.C.S.A. § 2502(a).

<sup>4</sup>The costs assessed against Davis at that time totaled \$1,248.78. *See* Court Commitment, 6/15/82, at 1 (pages unnumbered).

<sup>5</sup>The costs assessed against Davis relative to resentencing were \$20,674.73, and included charges for "transport costs," "transcript fees," and "witness fees." *See* Trial Court Docket, 11/14/18, at 20.

3. Did the resentencing court commit an error of law and abuse its discretion by not ordering the Commonwealth to compensate [Davis] for his costs and attorneys' fees?  
Brief for Appellant at 2.

In his first claim, Davis alleges that the trial court's sentence of 40 years to life in prison is an illegal sentence.<sup>6</sup> *See id.* at 8-21. Davis argues that there is no statutory authority for the trial court's sentence. *Id.* at 8-9. Davis claims that 18 Pa.C.S.A. § 1102.1 requires the trial court to sentence him to a [\*\*3] 35-year minimum sentence. *Id.* at 9-21. According to Davis, 18 Pa.C.S.A. § 1102.1(e) does not apply to him, because he committed his crime prior to the Supreme Court's holding in *Miller*. *Id.*

HN2[↑] "Issues relating to the legality of a sentence are questions of law. Our standard of review over such questions is *de novo* and our scope of review is plenary." *Commonwealth v. Cardwell*, 2014 PA Super 263, 105 A.3d 748, 750 [\*344] (Pa. Super. 2014) (brackets and ellipses omitted).

*Section 1102.1* states, in relevant part, as follows:

**§ 1102.1. Sentence of persons under the age of 18 for murder, murder of an unborn child and murder of a law enforcement officer**

(a) **First degree murder.**--A person who has been convicted after June 24, 2012, of a murder of the first degree, first degree murder of an unborn child or murder of a law enforcement officer of the first degree and who was under the age of 18 at the time of the commission of the offense shall be sentenced as follows:

(1) A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of life imprisonment without parole, or a term of imprisonment, **the minimum of which shall be at least 35 years to life.**

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(e) **Minimum sentence.**--**Nothing under this section shall prevent the sentencing court from imposing a**

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<sup>6</sup>Although Davis's Statement of Questions Involved is vague as to whether his first claim challenges the legality of his sentence or the discretionary aspects of his sentence, his Reply Brief makes it clear that he is challenging the legality of his sentence. *See* Reply Brief of Appellant at 2-3 (stating that "[Davis] challenged the legality of his sentence, not the discretionary aspect of the sentence...."). Accordingly, we will limit our review on this claim to the legality of the sentence.

**minimum sentence greater than that [\*\*4] provided in this section. ...**

18 Pa.C.S.A. § 1102.1 (emphasis added).

**HN3**<sup>[↑]</sup> In *Batts II*, our Supreme Court set forth the guidelines for resentencing defendants whose sentences had been declared unconstitutional by *Miller/Montgomery*. The Court instructed, "look to the mandatory minimum sentences set forth in [S]ection 1102.1(a) for guidance in setting a minimum sentence for a juvenile convicted of first-degree murder prior to *Miller*." *Batts II*, 163 A.3d at 443 n.16. Further, the Court in *Batts II* held that the sentencing court may deviate upwards from the mandatory minimum. *See id.* at 443 (stating that "[s]ubsection (e) makes clear that [35 years in prison] is only the minimum sentence required.... In determining the minimum sentence for a juvenile convicted of first-degree murder prior to *Miller*, a sentencing court is to exercise its discretion to find the appropriate, individualized sentence in each case, just as it would when fashioning the minimum sentence for any other defendant before it.>").

Here, the trial court sentenced Davis to 40 years to life in prison.<sup>7</sup> Accordingly, because trial courts may exercise discretion in imposing sentences beyond the 35-year minimum provided for in Section 1102.1(a), *see Batts II*, 163 A.3d at 443, Davis's sentence is not illegal. *See 18 Pa.C.S.A. § 1102.1(e)*.

In his [\*\*5] second claim, Davis alleges that the sentencing court imposed an illegal sentence by ordering him to pay the costs of prosecution associated with his resentencing.<sup>8</sup> *See* Brief for Appellant at 21-34. [\*345] Davis alleges that the

<sup>7</sup>Although Davis did not challenge the discretionary aspects of his sentence on appeal, we briefly note that the trial court considered the testimony and reports of expert witnesses for Davis and the Commonwealth, and Davis's testimony. The trial court analyzed, in detail, each of the *Miller* "hallmark factors," *see Miller*, 567 U.S. at 477-78, and the sentencing factors set forth at 18 Pa.C.S.A. § 1102.1(d). *See* N.T., 12/7/17, at 7-23. Significantly, the trial court voiced concern with Davis's lingering psychological issues and continued danger to the community. *Id.* at 23.

<sup>8</sup>Although Davis phrases his second claim as whether the trial court abused its discretion, *see* Brief for Appellant at 2, **HN4**<sup>[↑]</sup> a challenge to the trial court's imposition of costs presents a legality of sentencing claim. *See Commonwealth v. Garzone*, 2010 PA Super 57, 993 A.2d 306, 316 (Pa. Super. 2010) (stating that "inasmuch as [a]ppellant's argument is premised upon a claim that the trial court did not have the authority to impose the costs at issue, [a]ppellant has presented a legality of sentencing claim."). Accordingly, we limit our review of Davis's second claim to the legality of the court's imposition of costs.

costs imposed against him are not related to his "prosecution" under 16 P.S. § 1403.<sup>9</sup> *See* Brief for Appellant at 23-27. Further, Davis asserts that the costs should be paid by the Commonwealth because the costs were unnecessary and unreasonable. *Id.* at 27-32. Finally, Davis claims that the costs cannot be imposed because he is indigent. *Id.* at 32-33.

In order to determine whether the costs imposed upon Davis fall within the purview of Section 1403, we must look to the language of the statute. **HNS**<sup>[↑]</sup> This issue is one of statutory interpretation, which is a question of law and requires a *de novo* standard of review. *See Commonwealth v. Segida*, 604 Pa. 103, 985 A.2d 871, 874 (Pa. 2009). Pursuant to the Statutory Construction Act,<sup>10</sup> "our paramount interpretive task is to give effect to the intent of our General Assembly in enacting the particular legislation under review." *Commonwealth v. Wright*, 609 Pa. 22, 14 A.3d 798, 814 (Pa. 2011). *See also 1 Pa.C.S.A. § 1921(a)* (providing that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give [\*\*6] effect to all its provisions."). "The best indication of the General Assembly's intent may be found in the plain language of the statute." *Commonwealth v. Popielarcheck*, 190 A.3d 1137, 1140 (Pa. 2018). Consequently, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S.A. § 1921(b); *see also id. § 1922(1)* (stating that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.").

Section 1403 states the following:

**§ 1403. Expenses incurred by district attorney**

All necessary expenses incurred by the district attorney or his assistants or any office directed by him in the investigation of crime and the apprehension and prosecution of persons charged with or suspected of the commission of crime, upon approval thereof by the district attorney and the court, shall be paid by the county from the general funds of the county. In any case where a defendant is convicted and sentenced to pay the costs of prosecution and trial, the expenses of the district attorney in connection with such prosecution shall be

<sup>9</sup>Davis also alleges that 42 Pa.C.S.A. § 9728 does not authorize the costs imposed against him. However, because the trial court relied on 16 P.S. § 1403 in imposing costs, we limit our analysis to Section 1403.

<sup>10</sup>*See 1 Pa.C.S.A. §§ 1501-1991*.



considered a part of the costs of the case and be paid by the defendant.

[16 P.S. § 1403](#).

[HN6](#)<sup>[↑]</sup> While [Section 1403](#) does not define "prosecution" or "costs of prosecution," "[t]he [\\*\\*7](#) term 'prosecution' [must] be read as synonymous with 'conviction.'" [Commonwealth v. Moran, 450 Pa. Super. 283, 675 A.2d 1269, 1272 \(Pa. Super. 1996\)](#); *see also id.* (stating that [16 P.S. § 1403](#) "explicitly permits a District Attorney to be reimbursed for expenses incurred in prosecuting cases, with the proviso that the defendant be 'convicted' and the expenses have arisen 'in connection with such prosecution.'"); [Commonwealth v. Ramirez, 367 Pa. Super. 477, 533 A.2d 116, 118-19 \(Pa. Super. 1987\)](#) (holding, in the context of determining when prosecutions are barred by former prosecutions under [Section 111](#) of the Crimes Code, that the "prosecution" is completed when a defendant is acquitted [\[\\*346\]](#) or convicted). Further, [Section 1403](#) makes no mention of sentencing or sentencing costs. Thus, because the purpose of imposing the costs of prosecution against the defendant is to reimburse the Commonwealth for the expenses incurred preparing a case for, and conducting, a trial, "prosecution" ends with the conviction or acquittal of the defendant. *See Commonwealth v. Coder, 490 Pa. 194, 415 A.2d 406, 408 (Pa. 1980)* (stating that "[t]he purpose of [\[Section 1403\]](#) is to recoup the costs of trial where a jury finds the defendant guilty beyond a reasonable doubt[.]").

Here, the trial court resentenced Davis, in part, to pay costs that were purportedly incurred by the Commonwealth relative to Davis's resentencing. *See* Court Commitment, 6/15/82, at 1 (unnumbered). As we have determined [\\*\\*8](#) that, under [16 P.S. § 1403](#), "prosecution" ends at the time of a conviction or acquittal, the trial court imposed an illegal sentence by ordering Davis to pay the costs relative to his resentencing. Moreover, Davis's resentencing, through no fault of his own, occurred only after his sentence was deemed unconstitutional, and he should not be liable for such costs. *See generally Commonwealth v. Weaver, 2013 PA Super 245, 76 A.3d 562, 574 (Pa. Super. 2013)*; [Commonwealth v. Garzone, 2010 PA Super 57, 993 A.2d 306, 318-20 \(Pa. Super. 2010\)](#). Accordingly, we vacate the portion of Davis's sentence that ordered him to pay the costs of prosecution, and remand for resentencing for the following reasons.

It is unclear from the record before us which costs assessed against Davis were denoted "costs of prosecution" by the trial court. *See* Trial Court Docket, 11/14/18, at 20. We therefore remand to the trial court for a determination of the origin of the costs. Any costs not considered "costs of prosecution," as

defined in this Opinion, shall not be imposed upon Davis.<sup>11</sup>

Judgment of sentence affirmed in part and vacated in part. Case remanded with instructions. Superior Court jurisdiction relinquished.

Judge Platt did not participate in the consideration or decision of this case.

Judgment Entered.

Date: 03/29/2019

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<sup>11</sup>We need not address Davis's remaining claims in light of our disposition.