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IN THE
SUPERIOR COURT OF PENNSYLVANIA

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570 MDA 2018

COMMONWEALTH OF PENNSYLVANIA

APPELLEE,

V.

MICHAEL LEE BOURGEOIS,

APPELLANT.

BRIEF OF APPELLANT

On Appeal from the November 3, 2017 Resentencing in the Court of Common Pleas, Lancaster County, Docket CP-36-CR-0004224-2001.

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STATEMENT OF JURISDICTION

Pursuant to 42 Pa.C.S.A. § 742, this Court has exclusive appellate jurisdiction of this appeal as it is an appeal from the final resentencing order of November 3, 2017 of the Court of Common Pleas of Lancaster County, Pennsylvania, Docket No. CP-36-CR-0004224-2001.

ORDER IN QUESTION

On November 3, 2017, the Lancaster County Court of Common Pleas issued an order on Docket No. CP-36-CR-0004224-2001 imposing two consecutive 40-to-life sentences and two concurrent 10-to-20-year sentences.[1]

SCOPE AND STANDARD OF REVIEW

Michael Bourgeois first raises a challenge to the constitutionality of the *de facto* life without parole sentence of 80 years to life imposed on him. The Court's standard of review over such questions is *de novo* and its scope of review is plenary. *Commonwealth v. Northrip*, 985 A.2d 734 (Pa. 2009); *Commonwealth v. McClintic*, 909 A.2d 1241, 1245 (Pa. 2006); *see also Commonwealth v. Batts*, 163 A.3d 410, 434-35 (Pa. 2017) [hereinafter *Batts II*] (holding that a juvenile's challenge to a state's authority to impose a life without parole sentence is a question of the sentence's legality).

[1] A copy of the sentencing order is attached hereto as Appendix "A."

Mr. Bourgeois also asserts that his sentence is illegal because the sentencing court failed to consider the hallmark characteristics of youth and the factors attendant to it, pursuant to the United States Supreme Court's ruling in *Miller v. Alabama*, 567 U.S. 460 (2012), prior to sentencing Mr. Bourgeois to die in prison. Such a challenge is subject to *de novo* review and the scope is plenary. *Batts II*, 163 A.3d at 434-35.

Alternatively, Mr. Bourgeois challenges whether the trial court abused its discretion in resentencing Mr. Bourgeois to a *de facto* life without parole sentence. A challenge to the discretionary aspects of sentencing is subject to an abuse of discretion standard. *See Commonwealth v. Malovich*, 903 A.2d 1247, 1252-53 (Pa. Super. Ct. 2006) (A sentence "will not be disturbed absent a manifest abuse of [the trial court's] discretion. An abuse of discretion involves a sentence which was manifestly unreasonable, or which resulted from partiality, prejudice, bias or ill will." (citation omitted)).

The scope of review is plenary, encompassing the entire record considered at resentencing.

STATEMENT OF THE QUESTIONS INVOLVED

1. Did the trial court err in sentencing Mr. Bourgeois to an unconstitutional *de facto* life sentence without the necessary procedural protections, considerations and findings enumerated by the Pennsylvania Supreme Court in *Batts II*?[2]

   Suggested Answer: Yes.

2. Did the trial court err in failing to consider the *Miller* factors on the record prior to sentencing Mr. Bourgeois to a *de facto* life sentence?[3]

   Suggested Answer: Yes

3. Did the trial court abuse its discretion in sentencing Mr. Bourgeois to a *de facto* life sentence by failing to properly apply *Miller* and *Batts II*?

   Suggested answer: Yes.

STATEMENT OF THE CASE

Michael Lee Bourgeois, Appellant, pled guilty to two counts of first-degree murder and associated charges at Docket No. CP-36-0004224-2001 on January 27, 2003, contingent upon him providing truthful testimony regarding his participation. On a separate docket, but in the same proceeding, Mr. Bourgeois also pled guilty to one count of robbery and one count of conspiracy to commit robbery on Docket No. CP-36-CR-0004975-2001. His co-defendants, 19-year-old Landon May and 33-

[2] Appellant notes that the Pennsylvania Supreme Court will be deciding in *Commonwealth v. Felder*, No. 18 EAP 2018 whether a 50-life sentence constitutes a *de facto* life sentence requiring the protections of *Batts II*.
[3] A similar phrasing of this question is before the Pennsylvania Supreme Court in *Commonwealth v. Machicote*, No. 14 WAP 2018, and will be argued in October 2018.

year-old Drenea Rodriguez, were also convicted of first-degree murder and associated charges for their involvement in the crimes. *See Commonwealth v. May*, 887 A.2d 750 (Pa. 2005); *Rodriguez v. Lamas*, No. 08-5440, 2009 WL 1876314 (E.D. Pa. June 23, 2009). Ms. Rodriguez, who was sexually involved with Mr. Bourgeois (an adolescent half her age at the time), provided Mr. Bourgeois and Mr. May with the guns, the money to buy items they used for the crime, her car to use for its commission, and worked to cover up the evidence after they returned. (*See* Trial Court Record, Document No. 71 Commonwealth's Sentencing Memorandum: Exhibit A, Bourgeois' Confession.)

As the result of his plea, Mr. Bourgeois was sentenced to consecutive life without parole sentences for the two homicide convictions with two concurrent 10-to-20-year sentences for burglary and criminal conspiracy. Mr. Bourgeois' sentence was subsequently vacated by this Court on July 29, 2016, remanding his case for resentencing in compliance with *Miller* and *Montgomery*. *Commonwealth v. Bourgeois*, No. 1248 MDA 2014, 2016 WL 5210884 (Pa. Super. Ct. 2016).

Lancaster County Court of Common Pleas Judge David L. Ashworth presided over Mr. Bourgeois' resentencing hearing. The Commonwealth filed its notice to seek life without parole on June 28, 2017.[4] The Commonwealth ultimately withdrew this notice in its sentencing memorandum on October 27, 2017 but sought an

[4] Notice of Intent attached hereto as Appendix "B."

aggregate 100 years for the homicides and 20-40 years consecutive for the associated charges.[5]

Defense counsel was first to present its case at the resentencing and introduced the following evidence to demonstrate Mr. Bourgeois' rehabilitation during his incarceration:

1. Thinking for A Change Program – Certificate of Completion (2010)
2. Violence Prevention Program – Certificate of Completion (2008)
3. B-Unit Citizenship Program – Certificate of Completion (2003)
4. Stress/Anger Management – Certificate of Complete (2003)
5. PennDOT Flagger Training Course Completion (2017)
6. Core Curriculum, Standard Craft Training Program – Certificate of Completion (2017)
7. Core Curriculum: Introductory Craft Skills, Standardized Craft Training Program – Certificate of Completion (2017)
8. Construction Site Safety Orientation: Standard Craft Training Program – Certificate of Completion (2017)
9. Dean's Honor List, Lehigh Carbon Community College (Spring 2006)
10. Dean's Honor List, Lehigh Carbon Community College (Summer 2006)
11. Civic Responsibility – Certification of Completion (2006)
12. Business Cluster Certification (2006)
13. Occupational Testing Program – Certificate of Completion (2005)
14. Business Computing – Certificate of Achievement of 275 Hours Completed (2004)
15. Verification of Graduation, School District of Lancaster (Lancaster County Prison Education Program 2003)
16. Therapeutic Community – Certificate of Complete (2013)
17. Community Development Organization – Certificate for Dedicated Service (2009)
18. 22 Week Basic Christian Theology Class – Certificate of Completion (2016)
19. Every Mans' Battle Bible Study – Certificate of Completion (2012)

[5] Commonwealth's Sentencing Memorandum (excluding Attachment A due to size) attached hereto as Appendix "C."

20. Great Truths of the Bible – Certificate of Achievement (2012)
21. Certificate of Baptism (2012)
22. Evaluation of Therapeutic Community Program
23. Big Brother/Big Sister Programs of PA – Certificate of Appreciation for Charitable Donation (2004)
24. Lifers Against Violent Acts Group – Certificate of Attendance (10 sessions, 2014)
25. Community Development Organization, Striving Together for a Better Future Participation (2014)
26. Day of Responsibility – Participation (2014)
27. Prescriptive Treatment Program Evaluation, PA 143 (V.A.) – Completion (2003)
28. Kings College Speaking Engagement (2016)
29. Tour Group Speaking Engagement (Dec. 2015)
30. Tour Group Speaking Engagement (Nov. 2015)
31. Selected as one of four prisoners to train and house dogs to help the facility combat geese on the grounds
32. Assists other prisoners who are training dogs for adoption

The Commonwealth did not introduce any evidence regarding Mr. Bourgeois' demonstrated rehabilitation, his potential and capacity for rehabilitation, or most of the *Miller* factors. *See generally*, (N.T. 11/3/17, 121-139). Rather, the Commonwealth relied solely on the facts of the crime and the impact on the victim in support of its sentencing recommendation. *Id.* Absent a pre-sentence investigation, the trial court made findings regarding the facts and impact of the crime. The trial court provided no explanation of how it considered the *Miller* factors and stated that it was "not required to make detailed findings on the record regarding all of the factors outlined by the U.S. Supreme Court and our state Supreme Court, as well as the applicable statutes." (N.T. 11/3/17, 155:13-17). Emphasizing the heinous nature of the crime and characterizing Mr. Bourgeois' age as an aggravator,

the trial court sentenced Mr. Bourgeois to two consecutive 40-life sentences for each first-degree conviction and two concurrent sentences of 10 to 20 years for burglary and criminal conspiracy. (N.T. 11/3/17, 159:3-22), totaling a sentence of 80 years to life.

On November 7, 2017, counsel filed a post-sentence motion challenging the legality of the sentences and the discretionary aspects of sentencing.[6] On December 4, 2017, the trial court denied the post-sentence motion without a hearing or subsequent explanation.[7] After a change of counsel, the notice of appeal[8] and statement of matters complained of on appeal were filed.[9]

SUMMARY OF THE ARGUMENT

At his resentencing hearing, Mr. Bourgeois was resentenced to two consecutive forty-to-life terms, an unconstitutional *de facto* life without parole sentence of 80 years to life. As his sentence is a *de facto* life without parole sentence, Mr. Bourgeois was entitled to a presumption of parole eligibility and the trial court was required to find that the Commonwealth overcame that presumption by proving beyond a reasonable doubt that Mr. Bourgeois could never be rehabilitated before

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[6] A copy of the November 7, 2017, post-sentence motion is attached hereto as Appendix "D."
[7] A copy of the December 4, 2017, post-sentence order is attached hereto as Appendix "E."
[8] A copy of the April 4, 2018, Notice of Appeal *Nunc Pro Tunc* is attached hereto as Appendix "F."
[9] A copy of the April 6, 2018, Statement of Matters Complained of on Appeal is attached hereto as Appendix "G."

imposing such a sentence. *See Commonwealth v. Batts*, 163 A.3d 410, 415-16, 435 (Pa. 2017) [hereinafter *Batts II*]. Consecutive minimum sentences are subject to *Batts II*'s requirements when the aggregate minimum sentence effectively denies a juvenile a meaningful opportunity for parole even if the Commonwealth is not seeking a formal life sentence. Furthermore, as a matter of law, a trial court is required to consider the *Miller* factors on the record prior to imposing a *de facto* life sentence as it must demonstrate that its sentence complies with Supreme Court precedent and the Eighth Amendment. Despite Mr. Bourgeois' demonstrated rehabilitation, the trial court imposed a *de facto* life sentence and did not adequately consider the *Miller* factors on the record. Thus, Mr. Bourgeois' sentence is illegal, and his case must be vacated and remanded for resentencing.

Alternatively, Mr. Bourgeois challenges the discretionary aspects of his *de facto* life without parole sentence. The trial court's failure to detail its reasons for imposing such a lengthy sentence constitutes an abuse of discretion and renders the 80-to-life sentence manifestly excessive. The trial court also abused its discretion by routinely misapplying the controlling law for a juvenile resentencing, improperly relying on Section 1102.1, and disregarding the majority of the *Miller* factors. As the trial court abused its discretion in imposing an 80-to-life sentence, Mr. Bourgeois is entitled to vacatur and remand for further proceedings.

STATEMENT OF REASONS TO ALLOW AN APPEAL TO CHALLENGE THE DISCRETIONARY ASPECTS OF A SENTENCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2119(f):

> An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in a separate section of the brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence.

Pa. R.A.P. 2119(f). *See also*, *Commonwealth v. Tuladziecki*, 522 A.2d 17, 19 (Pa. 1987). However, when issues raised on appeal involve the legality of the sentence, and not its discretionary aspects, a Pa. R.A.P. 2119(f) ("*Tuladziecki*") statement is not required. *Commonwealth v. Shaw*, 744 A.2d 739, 742 (Pa. 2000), *superseded by statute on other grounds*, 75 Pa. C.S.A. 3806(a)(3) (West 2016).

Mr. Bourgeois has raised a question implicating the legality of his sentence, but also includes a "*Tuladziecki*" statement should this Court decline to rule on the issues of legality. *See Tuladziecki*, 522 A.2d at 19; Pa. R.A.P. 2119(f). To challenge the discretionary aspects of a sentence, an appellant must establish that there is a substantial question that the sentence imposed is inappropriate. 42 Pa. C.S.A. § 9781(b), Pa. R.A.P. 2119(f), *Commonwealth v. Kenner*, 784 A.2d 808, 810-11 (Pa. Super. Ct. 2001).

Mr. Bourgeois argues that the sentencing court ignored and misapplied the mandates of *Miller* and *Batts*; "exercised its judgment for reasons of partiality, prejudice, bias or ill will;" and "arrived at a manifestly unreasonable decision" when

imposing an aggregate minimum sentence of 80 years. *Commonwealth v. Solomon*, 151 A.3d 672, 677 (Pa. Super. Ct. 2016) (quoting *Commonwealth v. Zirkle*, 107 A.3d 127, 132 (Pa. Super. Ct. 2014)). An allegation that two consecutive sentences of 40-to-life are "clearly unreasonable and . . . excessive" presents a "substantial question" for this Court. *Commonwealth v. Foust*, 180 A.3d 416, 439 (Pa. Super. Ct. 2018) ("[Foust] argues that this case presents a substantial question because imposing consecutive sentences for the two murder convictions was clearly unreasonable and results in an excessive sentence." (citing *Commonwealth v. Dodge*, 77 A.3d 1263, 1270 (Pa. Super. Ct. 2013))).[10] Furthermore, failure to address all relevant sentencing criteria presents a substantial question that the sentence imposed is inappropriate. *Commonwealth v. Dodge*, 957 A.2d 1198, 1200 (Pa. Super. Ct. 2008); *see also Commonwealth v. Hicks*, 151 A.3d 216, 227 (Pa. Super. Ct. 2016) ("[T]he sentencing court's failure to set forth adequate reasons for the sentence imposed . . . raises a substantial question." (citing *Commonwealth v. Macias*, 968 A.2d 773, 776 (Pa. Super. Ct. 2009))); *Commonwealth v. Lawrence*, 960 A.2d 473, 478 (Pa. Super. Ct. 2008) (sentencing based solely on the seriousness of the offenses without regard to all relevant sentencing factors raises a substantial question). Because the trial court failed to adequately consider and weigh the *Miller* factors and imposed a

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[10] The Court has held a petition for allowance of appeal, *Commonwealth v. Foust*, No. 126 WAL 2018, that raises whether two consecutive 30-life sentences constitute a *de facto* life sentence, until its disposition in *Felder*, No. 18 EAP 2018.

sentence that was clearly unreasonable and excessive amounting to a *de facto* life without parole sentence, Mr. Bourgeois has identified a substantial question about the appropriateness of his sentence for this Court's review.

ARGUMENT

I. EIGHTY YEARS TO LIFE IS A *DE FACTO* LIFE WITHOUT PAROLE SENTENCE WHICH CANNOT BE CONSTITUTIONALLY IMPOSED ON A JUVENILE WITHOUT A FINDING THAT THE COMMONWEALTH HAS PROVEN BEYOND A REASONABLE DOUBT THAT THE JUVENILE CAN NEVER BE REHABILITATED

Miller v. Alabama, 567 U.S. 460, 479-80 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718, 733-35 (2016), create a presumption of parole eligibility and require a child to be found irreparably corrupt before they can be sentenced to life without parole. *See Commonwealth v. Batts*, 163 A.3d 410, 459 (Pa. 2017) [hereinafter *Batts II*]. Any sentence that condemns a child to die in prison is a life without parole sentence. Mr. Bourgeois' two consecutive forty-to-life sentences create a *de facto* life without parole sentence that unconstitutionally deprives him of a meaningful opportunity for release as he has not been found to be one of the rare and uncommon juveniles who is irreparably corrupt.

Miller and *Montgomery* vastly restrict a sentencing court's authority to impose juvenile life without parole sentences. *See generally*, 567 U.S. 460; 136 S. Ct. 718. In *Commonwealth v. Foust*, a panel of this Court recognized that the United States Supreme Court's stringent interpretation of the Eighth Amendment includes

de facto life without parole sentences originating from a single sentence and that "[p]ermitting [singular] *de facto* LWOP sentences for juvenile homicide offenders capable of rehabilitation but prohibiting *de jure* LWOP sentences for the same class of offenders places form over substance." 180 A.3d 416, 432 (Pa. 2018). While this Court in *Foust* declined to apply the restriction on de facto sentences to aggregate sentences arising from one criminal incident, its reasoning sidesteps the mandates of *Miller* and *Batts II* that children convicted of homicide who are capable of rehabilitation be afforded the opportunity for parole.

A. Mr. Bourgeois' Sentence of Eighty Years to Life Is A *De Facto* Life Without Parole Sentence

Mr. Bourgeois' must serve 80 years in prison before he is eligible to seek parole. Mr. Bourgeois' sentence is an unconstitutional *de facto* life sentence.

1. *De facto* life sentences are subject to constitutional review as violations of the Eighth Amendment

The Supreme Court's Eighth Amendment jurisprudence establishes that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not the label of the sentence. The Supreme Court has noted that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without the possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." *Sumner v. Shuman*, 483 U.S. 66, 83 (1987). In addition to this Court's ruling in *Foust*, state

Supreme Courts in California, Connecticut, Illinois, Florida, Iowa, Louisiana, Missouri, Montana, Nevada, New Jersey, New Mexico, Oregon, Washington, and Wyoming have all recognized that a term of years sentence can be an unconstitutional de facto life sentence.[11] Similarly, five federal courts have

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[11] *See People v. Caballero*, 282 P.3d 291, 297-98 (Cal. 2012) (three attempted murder counts constituting a 110-years-to life sentence are *de facto* life without parole); *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1047 (Conn. 2015) (*Miller* "implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison"); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016) (("*Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation."); *Johnson v. State*, 215 So. 3d 123724, 1242 (Fla. 2017); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (In considering an aggregate minimum over 52.5 years, the court held that "an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller."*); *State ex rel. Morgan v. State*, 217 So. 3d 266, 273 (La. 2016) (*Graham*'s prohibition of life without parole sentences extends to sentences that effectively "bar[a defendant] from ever re-entering society); *State ex. rel Carr v. Wallace*, 527 S.W.3d 55, 60-61 (Mo. 2017) (en banc); *Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017), *cert. denied*, ––– U.S. ––––, 138 S. Ct. 1999 (2018); *State v. Boston*, 363 P.3d 453, 457 (Nev. 2015) (fourteen parole-eligible life sentences and a consecutive 92 years in prison unconstitutional under *Graham*); *State v. Zuber*, 152 A.3d 197, 211 (N.J. 2017) (the focus is whether the sentence will "in all likelihood, [ ] keep [the juvenile] in jail for the rest of his life."), *cert. denied*, ––– U.S. –––, 138 S. Ct. 152 (2017); *Ira v. Janecka*, 419 P.3d 161, 167 (N.M. 2018); *State v. Moore*, 76 N.E.3d 1127, 1142-43 (Ohio 2016), *cert. denied*, ––– U.S. ––––, 138 S. Ct. 62 (2017); *Kinkel v. Persson*, 417 P.3d 401, 412 (Or. 2018) ("It follows that the reasoning in *Graham* and *Miller* permits consideration of the nature and the number of a juvenile's crimes in addition to the length of the sentence that the juvenile received and the general characteristics of juveniles in determining whether a juvenile's aggregate sentence is constitutionally disproportionate."), *petition for cert. filed*, No. 18-5634 (Aug. 8, 2018); *State v. Ramos*, 387 P.3d 650, 658 (Wash. 2017) ("every juvenile offender facing a literal or de facto life-without-parole sentence is automatically entitled to a *Miller* hearing,"); *Bear Cloud v. State*, 294 P.3d 36, 45 (Wyo. 2013). *But see Veal v. State*, 810 S.E.2d 127 (Ga. 2018), *petition for cert. filed*, No. 17-1510 (May 7, 2018); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) ("we simply hold that absent further guidance from the Court, we will not extend the *Miller/Montgomery* rule" to de facto life sentences), *cert. denied*, ––– U.S. ––––, 138 S. Ct. 640 (2018); *Lucero v. People*, 394 P.3d 1128 (Colo. 2017), *cert. denied*, ––– U.S. ––––, 138 S. Ct. 641 (2018); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 928 (Va. 2016) (addressing de facto life sentences "would require a proactive exercise inconsistent with our commitment to traditional principles of judicial restraint").

recognized de facto life sentences as unconstitutional while only one has declined to do so out of deference to state court sentences.[12]

Foust recognized that the United States Supreme Court's requirement of "a meaningful opportunity for release," *Graham v. Florida*, 560 U.S. 48, 75 (2010), was a "strong indication that [it] was more focused on the practical realities of a sentence than the name assigned to a sentence." *Foust*, 180 A.3d at 431-32 (citing *State ex rel. Morgan*, 217 So. 3d at 273 (*Graham*'s "central premise [is] that, because a juvenile nonhomicide offender has diminished culpability, a sentence which, based upon a judgment at the time of sentencing, bars him from ever re-entering society, is a grossly disproportionate punishment.") (citations omitted); *Casiano*, 115 A.3d at 1047 (*Miller* "implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison"); *Henry v. State*, 175 So. 3d 675, 679 (Fla. 2015) ("the constitutional prohibition against cruel and unusual punishment under *Graham* is implicated when a juvenile nonhomicide offender's sentence does not afford any 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'") (citations omitted)); *see also Boston*,

[12] *See generally*, *Kelly v. Brown*, 851 F.3d 686 (7th Cir. 2017); *United States v. Grant*, 887 F.3d 131 (3d Cir. 2018); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013); *Budder v. Addison*, 851 F.3d 1047 (10th Cir.), *cert. denied*, ––– U.S. ––––, 138 S. Ct. 475 (2017); *United States v. Mathurin*, 868 F.3d 921 (11th Cir. 2017), petition for cert. filed, No. 17-7988 (Mar. 6, 2018). *But see*, *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012).

363 P.3d at 457 (fourteen parole-eligible life sentences and a consecutive 92 years in prison unconstitutional under *Graham*); *Caballero*, 282 P.3d at 297-98 (three attempted murder counts constituting a 110-years-to life sentence are *de facto* life without parole). This Court also relied on the New Jersey Supreme Court's recognition in *Zuber*, 152 A.3d at 211, that "[i]t does not matter to the juvenile whether he faces formal [LWOP] or multiple term-of-years sentences that, in all likelihood, will keep him in jail for the rest of his life." *Id.* at 211; *see also Reyes*, 63 N.E.3d at 888 ("A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life, [and] *Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation."); *Bear Cloud v. State*, 334 P.3d 132, 143 (Wyo. 2014) ("On remand, the district court should weigh the entire sentencing package, and in doing so it must consider the practical result of lengthy consecutive sentences, in light of the mitigating factors of youth which have been set forth in this opinion, and in *Miller*."); *Null*, 836 N.W.2d at 72 (In considering an aggregate minimum over 52.5 years, the court held that "*Miller*'s principles are fully applicable to a lengthy term-of-years sentence as was imposed in this case because an offender sentenced to a lengthy term-of-years sentence should not be worse off

than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*.”)).

Further, this Court in *Foust* admonished that “[c]ourts should not circumvent the prohibition on LWOP sentences by imposing lengthy term-of-years punishments that equate to the unlawful sanction.” *Foust*, 180 A.3d at 432 (citations omitted). This Court noted in *Foust* that a sentencer “that imposed an unconstitutional [LWOP] sentence on a juvenile offender [cannot] correct Eighth Amendment deficiencies upon remand by resentencing the defendant to a term-of-years sentence when parole would be unavailable until after the natural life expectancy of the defendant.” *Id.* (quoting *Moore*, 76 N.E.3d at 1140). In coming to such a determination, *Foust* also referenced *Mickinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016), where the 7th Circuit held that “such a long term of years [is] . . . a *de facto* life sentence, and so the logic of *Miller* applies. . . . [T]he “children are different” passage that we quoted earlier from *Miller v. Alabama* cannot logically be limited to *de jure* life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life.” *Foust*, 180 A.3d at 432.

In sum, *Foust* held that a *de facto* LWOP sentence is unconstitutional “unless [the trial court] finds, beyond a reasonable doubt, that the juvenile is incapable of rehabilitation.” 180 A.3d at 433.

2. Aggregate *de facto* life sentences are also subject to constitutional review as violations of the Eighth Amendment as evidenced by nationwide evolving standards of decency

An examination of national trends also demonstrates a growing recognition of the unconstitutionality of aggregate, *de facto* life sentences which fail to properly consider the factors outlined in *Graham* and *Miller*.[13] This developing jurisprudence "refuse[s] to place form over substance when determining if a juvenile capable of rehabilitation will ever have the chance to walk free," even when that form includes multiple sentences. *Foust*, 180 A.3d at 432 (relying on the following cases for a *de facto* life holding but subsequently rejecting their holdings on aggregate sentences constituting *de facto* life: *Null*, 836 N.W.2d at 71-72 (holding an aggregate sentence affording parole eligibility after 52.5 years to be *de facto* life)); *Bear Cloud*, 334 P.3d at 143 (the Wyoming Supreme Court found an aggregate 45 years for first-degree murder and associated charges constituted a *de facto l*ife sentence); *Zuber*, 152 A.3d at 214 ("Judges must do an individualized assessment of the juvenile about to be sentenced—with the principles of *Graham* and *Miller* in mind [and] should apply *Miller*'s template as well when they consider a lengthy, aggregate sentence that amounts to life without parole.")).

[13] *Grant*, 887 F.3d at 142-43; *Kelly*, 851 F.3d at 686-87; *Biter*, 725 F.3d at 1191-92; *Budder*, 851 F.3d at 1059-60 (10th Cir. 2017); *Caballero*, 282 P.3d at 297-98; *State v. Riley*, 110 A.3d 1205, 1217-18 (Conn. 2015); *Johnson*, 215 So. 3d at 1242; *Reyes*, 63 N.E.3d at 888; *Steilman v. Michael*, 407 P.3d at 319; *Boston*, 363 P.3d at 457; *Zuber*, 152 A.3d at 211; *Ira*, 419 P.3d at 167 (N.M. 2018); *Moore*, 76 N.E.3d at 1142-43; *Kinkel*, 417 P.3d at 412; *Ramos*, 387 P.3d at 658; *Bear Cloud*, 294 P.3d at 45.

Despite the national trend scrutinizing de facto aggregate sentences as unconstitutional, this Court declined to extend its rationale in *Foust* to aggregate sentences. *Foust*, 180 A.3d at 434-38. In rejecting the broader rule, this Court noted Pennsylvania's general precedent establishing challenges to consecutive sentences as an abuse of discretion since defendants are not entitled to "volume discounts" for multiple crimes. *Id.* at 434-36. *Foust* relied heavily on the analysis of this issue by the Maryland Court of Special Appeals in *McCullough v. State*, 168 A.3d 1045 (Md. Ct. Spec. App. 2017), in rejecting that *Miller* overrides Pennsylvania's practice to subject consecutive sentences to an abuse of discretion review.[14]

On August 29, 2018, however, the Maryland Court of Appeals reversed that decision and emphasized that juveniles need additional protections when subject to aggregate sentences. *Carter v. State*, Nos. 54, 55, 56, __A.3d__, 2018 WL 4140672 (Md. 2018). The Maryland Court noted that "[w]hether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a *juvenile* who

[14] "Mr. McCullough was sentenced to an aggregate term of 100 years in prison, with parole eligibility after 50 years, since the trial court "impose[d], and [ran] consecutively, the maximum sentence with respect to four assault convictions relating to four different victims of the same shooting incident." *Carter v. State*, Nos. 54, 55, 56, __A.3d__, 2018 WL 4140672 at *23 (Md. 2018). The court in *McCullough* held that a trial court's imposition of consecutive sentences must be viewed as independent decisions by the trial court regarding the appropriate sentence of each conviction. The court treated each sentence as a substantive determination focused on the individual convictions rather than placing form over substance in the aggregate. *McCullough*, 168 A.3d at 1067-69. The *Foust* court also rejected precedent suggesting consideration of whether the convictions stemmed from one course of conduct or several and precedent analyzing whether the sentences were imposed simultaneously or in separate hearings. *Foust*, 180 A.3d at 437.

committed the one offense or several offenses and who has diminished moral culpability." *Carter*, 2018 WL 4140672 at *28 (emphasis in original) (quoting *Moore*, 76 N.E.3d at 1142. Therefore, the Court required consideration of the circumstances leading to multiple convictions and the differences between juveniles and adults. *Id.* Similar to Mr. Bourgeois, Mr. McCullough's convictions stemmed from a one-day, single incident. The court in reviewing *McCullough* noted the seriousness of the offenses and their consequences but still found that his sentence should be considered "no differently than a single sentence for purposes of *Graham*." *Id.* at *29. The Court of Appeals thus rejected the application of *McCullough* to juveniles and recognized that aggregate sentences are still subject to the mandates of *Miller*.

Finally, while this Court relied on Pennsylvania jurisprudence that consecutive sentences are within the discretion of the trial court and typically are subject to be reviewed individually, this approach is contrary to the Pennsylvania Supreme Court's holding in *Batts II*. *See generally*, 163 A.3d 410. There, the defendant was convicted of multiple charges involving multiple victims—one homicide and one attempted homicide—along with associated charges. *Id.* at 419. The trial court emphasized the senselessness of the crime and the impact the crime had on surviving family members of the individual who died and the surviving victim. *Id.* at 439. Despite the presence of multiple victims, the Pennsylvania

Supreme Court nevertheless directed the trial court to provide Mr. Batts with a meaningful opportunity to obtain release due to his demonstrated rehabilitation:

> His senseless and needless acts of violence ***left one teenager dead and another seriously injured***, and the victims' families are living with the consequences. There is no question that Batts, as a fourteen-year-old murderer, must be held accountable and serve a sentence commensurate with those acts. Pursuant to the evidence presented before the sentencing court, the findings of the sentencing court regarding the possibility of rehabilitation, and the clear Supreme precedent that controls in this matter, however, ***upon resentencing Batts, the court "must provide [Batts] some meaningful opportunity to obtain release*** based on demonstrated maturity and rehabilitation."

163 A.3d at 439 (citing *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 74)). Here, Mr. Bourgeois will be nearly 100 years old before he is eligible for parole—effectively assuring that he will die in prison. Such a sentence amounts to a disproportionate *de facto* life sentence and violates due process and the prohibition against cruel and unusual punishments. U.S. Const. Amend. VIII, XIV.

B. Mr. Bourgeois' Sentencing Hearing Violated The United States Supreme Court's Mandate That Juvenile Offenders Can Only Receive A Life Without Parole Sentence If Their Crimes Reflect "Permanent Incorrigibility"

1. Juvenile life without parole sentences are prohibited except in the case of a juvenile who can never be rehabilitated

The United States Supreme Court set forth the predicate factors that must be found before a life without parole sentence can be imposed on a juvenile. *Miller*, 567 U.S. 477-78; *Montgomery*, 136 S. Ct. 733-34. *Montgomery* explained that the

Court's *Miller* decision "did bar life without parole . . . for all but the rarest of juvenile offenders, *those whose crimes reflect permanent incorrigibility*." *Montgomery*, 136 S. Ct. at 734 (emphasis added). The Court held that "*Miller* drew a line between children whose crimes reflect transient immaturity and *those rare children whose crimes reflect irreparable corruption*," *id.* (emphasis added), noting that a life without parole sentence "could [only] be a proportionate sentence for the latter kind of juvenile offender." *Id.* Under the Eighth Amendment, juvenile offenders can only receive a life without parole sentence if their crimes reflect "permanent incorrigibility," "irreparable corruption" or "irretrievable depravity." *Id.* at 733, 734. A life without parole sentence for a youth whose crime demonstrates "transient immaturity" is disproportionate and thus unconstitutional. *Id.* at 734.

Montgomery requires that imposing a life without parole sentence on a juvenile should be "uncommon." *Id.* at 733-34. As the Pennsylvania Supreme Court ruled in *Batts II*:

> [F]or a sentence of life without parole to be proportional as applied to a juvenile murderer, the sentencing court must first find, based on competent evidence, that the offender is entirely unable to change. It must find that there is no possibility that the offender could be rehabilitated at any point later in his life, no matter how much time he spends in prison and regardless of the amount of therapeutic interventions he receives, and that the crime committed reflects the juvenile's true and unchangeable personality and character.

163 A.3d at 435 (citing *Montgomery*, 136 S. Ct. at 733 (stating that pursuant to *Miller*, life without parole is only justified for "the rare juvenile offender who

exhibits such irretrievable depravity that rehabilitation is impossible") (parenthetical in original)).

Subsequent to *Montgomery*, Justice Sotomayor reiterated in her concurrence in *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (mem.) that merely considering a defendant's age and associated characteristics in a checklist fashion is not sufficient. The four resentencings at issue there required remand as "none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* (Sotomayor, J., concurring) (citing *Montgomery*, 136 S. Ct. at 734); *see also Adams v. Alabama*, 136 S. Ct. 1796, 1799-1800 (2016) (Sotomayor, J., concurring) (mem.).

The record in Mr. Bourgeois' resentencing echoes the same deficiencies found in *Tatum*, *Adams*, and *Batts II*. The trial court did not address the central question posed in *Miller*—whether Mr. Bourgeois is capable of rehabilitation—prior to sentencing him to what amounted to a de facto life sentence. The trial court made no factual findings on the record regarding the majority of the *Miller* factors. When addressing Mr. Bourgeois' age, the trial court made no reference to *Miller*'s holding that children have diminished culpability nor did it "provid[e] any basis to differentiate [Mr. Bourgeois'] decision making from the typical teenager contemplated in *Roper*, *Graham*, and *Miller*." *See Batts II*, 163 A.3d at 438. Overall

the trial court engaged in a perfunctory analysis of the *Miller* factors without reference to any substantive underpinnings of the decisions. In relying solely on the facts and impact of the crime, the trial court never found that the Commonwealth overcame the required presumption of parole eligibility by proving irreparable corruption beyond a reasonable doubt. Indeed, the trial court noted Mr. Bourgeois' commendable prison record and considered him a "model inmate." Since the principles enumerated in *Miller*, *Montgomery*, *Tatum* and *Batts II* were not applied to Mr. Bourgeois' hearing, his de facto life sentence cannot be considered constitutional.

2. Even though the Commonwealth was not seeking formal life without parole, the trial court was nevertheless bound by the requirements of *Batts II*

In *Batts II*, the Pennsylvania Supreme Court held that to effectuate *Miller* and *Montgomery*, "a presumption against the imposition of a sentence of life without parole for a defendant convicted of first-degree murder committed as a juvenile" is required. 163 A.3d at 459. The presumption "arises from "a conclusion firmly based upon the generally known results of wide human experience," which is that the vast majority of adolescents change as they age and, despite their involvement in illegal activity, do not "develop entrenched patterns of problem behavior." *Id.* at 451-52 (citing *Miller*, 567 U.S. at 471 (referring to this conclusion as "common sense" and "what any parent knows") (citing *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)));

Watkins v. Prudential Ins. Co. of Am., 173 A. 644, 648 (Pa. 1934). Even though the Commonwealth was not seeking formal life without parole, the trial court is still bound by this rule because "there can be no doubt that pursuant to established Supreme Court precedent, the ultimate fact here (that an offender is capable of rehabilitation and that the crime was the result of transient immaturity) is connected to the basic fact (that the offender is under the age of eighteen)." *Batts II*, 163 A.3d at 452.

Rather than beginning with the facts of the crime, *Miller* and *Montgomery* mandate that the sentencing judge should have presumed that Mr. Bourgeois would be eligible for parole absent a finding that he was one of the rare juveniles who demonstrated irreparable corruption, a finding never made by the sentencing judge here. *See id.* The trial court never mentioned the presumption or the scientific underpinnings of that presumption. Furthermore, the defense began the hearing as if the Commonwealth did not bear the burden to justify its sentencing request for Mr. Bourgeois. Disregarding the presumption undermines the entire proceeding and constitutes an error in law requiring vacatur of Mr. Bourgeois' sentence.

II. THE TRIAL COURT COMMITTED A LEGAL ERROR BY FAILING TO CONSIDER THE *MILLER* FACTORS ON THE RECORD PRIOR TO SENTENCING MR. BOURGEOIS TO A *DE FACTO* LIFE SENTENCE[15]

The Pennsylvania Supreme Court has held "that when sentencing a juvenile facing a potential life-without-parole sentence, *Miller* requires the examination of [its] factors." *Batts II*, 163 A.3d at 421 n.5; *id.* at 455 n.23 ("in sentencing juveniles facing life without the possibility of parole, courts should examine both the *Miller* factors and the section 1102.1(d) factors prior to reaching that decision). Even Section 1102.1(d) requires the court to "consider and *make findings on the record*" regarding its enumerated factors. 18 Pa. C.S.A. § 1102.1(d) (West 2012) (emphasis added). Whether or not a sentence of life without parole is imposed, the sentencer must consider *Miller* and *Batts II* on the record prior to sentencing as juveniles are entitled to the underlying substantive holdings of the decisions.

In particular, Mr. Bourgeois is constitutionally entitled to an individualized sentence that reflects his distinct youthful attributes. This understanding of *Miller* has been widely recognized. *See*, *e.g.*, *Zuber*, 152 A.3d at 215 ("the trial court should consider the *Miller* factors when it determines the length of his sentence and when it decides whether the counts of conviction should run consecutively" even in the

[15] A panel of this Court ruled that detailed findings were not required on the record, *Commonwealth v. Machicote*, 172 A.3d 595, 602-03 (Pa. Super. Ct. 2017), *allocatur granted*, No. 14 WAP 2018 (Pa. May 22, 2018), but the Pennsylvania Supreme Court has accepted review.

absence of a formal life without parole sentence); *Ramos*, 387 P.3d at 658 ("every juvenile offender facing a literal or de facto life-without-parole sentence is automatically entitled to a *Miller* hearing," during which "the court must meaningfully consider how juveniles are different [and] how those differences apply to the facts of the case"); *Bear Cloud*, 294 P.3d at 47 (every juvenile convicted of first-degree murder is entitled to a *Miller* hearing that considers the individual, attributes of youth, and the nature of the homicide); *Lewis v. State*, 428 S.W.3d 860, 863 (Tex. Crim. App. 2014) (requires an individualized hearing when a juvenile is exposed to the possibility of a life without parole sentence).

Contrary to this legal precedent, the trial court held that it was "not required to make detailed findings on the record regarding all of the factors outlined by the U.S. Supreme Court and our state Supreme Court, as well as the applicable statutes," (N.T. 11/3/17, 155:13-17), and proceeded to note that it considered such factors without providing any specific findings as to the *Miller* factors. It is impossible to review whether the court imposed an individualized sentence in accordance with the constitutional mandates of *Miller* if there is no record detailing its considerations. Furthermore, as a juvenile at the time of his crime, attributes and characteristics associated with Mr. Bourgeois' youth must be viewed as mitigators, not aggravators. For example, *Batts II* establishes that every sentencing hearing of a juvenile must start with the presumption that the defendant shall have a meaningful opportunity

for parole. The Court further held that a trial court is bound by the scientific research underlying *Miller*—i.e., a child's diminished culpability, susceptibility to peer influence, capacity for change, etc. Therefore, as a matter of law, the trial court is required to detail its findings on the *Miller* factors to demonstrate its compliance with both Supreme Court precedent and the Eighth Amendment.

III. ALTERNATIVELY, THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING MR. BOURGEOIS TO A *DE FACTO* LIFE SENTENCE DESPITE HIS STATUS AS A JUVENILE AND DEMONSTRATED REHABILITATION

Alternatively, Mr. Bourgeois also challenges the discretionary aspects of his sentence including the failure of the trial court to adequately consider and weigh the *Miller* factors resulting in the trial court imposing a manifestly unreasonable sentence and misapplying and disregarding various *Miller* and *Batts II* mandates. *See Commonwealth v. Hicks*, 151 A.3d 216, 227 (Pa. Super. Ct. 2016) ("[T]he sentencing court's failure to set forth adequate reasons for the sentence imposed . . . raises a substantial question." (citing *Commonwealth v. Macias*, 968 A.2d 773, 776 (Pa. Super. Ct. 2009))); *Commonwealth v. Lawrence*, 960 A.2d 473, 478 (Pa. Super. Ct. 2008) (sentencing based solely on the seriousness of the offenses without regard to all relevant sentencing factors raises a substantial question); *Foust*, 180 A.3d at 439 ("[Foust] argues that this case presents a substantial question because imposing consecutive sentences for the two murder convictions was clearly unreasonable and results in an excessive sentence." (citing *Commonwealth v. Dodge*, 77 A.3d 1263,

1270 (Pa. Super. Ct. 2013))); *Commonwealth v. Solomon*, 151 A.3d 672, 677 (Pa. Super. Ct. 2016) (quoting *Commonwealth v. Zirkle*, 107 A.3d 127, 132 (Pa. Super. Ct. 2014)).

A. The Trial Court's Failure To Properly Detail The Reasons for the Sentence Imposed Constitutes An Abuse Of Discretion And Resulted In A Manifestly Excessive Sentence

Even if this Court does not find that consideration of the *Miller* factors on the record is required as a matter of law, failure to fully consider and detail its conclusions or findings regarding the *Miller* factors on the record constitutes an abuse of discretion. This Court in *Foust* "caution[ed] trial courts that they cannot circumvent the prohibition against sentencing juvenile homicide offenders capable of rehabilitation . . . to LWOP by imposing consecutive, lengthy term-of-years sentences." *Foust*, 180 A.3d at 441 n.21. Therefore, it instructed that "[t]rial courts must seriously contemplate the decision to impose lengthy term-of-years sentences . . . consecutively, instead of concurrently. If a trial court determines that the facts in a particular case warrant consecutive sentences, it should detail, on the record, why consecutive sentences are appropriate." *Id.* Unlike in *Foust*, where this Court noted the trial court's extensive explanation of sentencing on the record, the trial court's failure here to properly weigh the mitigating factors on the record resulted in an excessive and unreasonable sentence.

"The first responsibility of the sentencing judge [is] to be sure that he ha[s] before him sufficient information to enable him to make a determination of the circumstances of the offense and the character of the defendant." *Commonwealth v. Goggins*, 748 A.2d 721, 728 (Pa. Super. Ct. 2000) (alterations in original) (citing *Commonwealth v. Carter*, 485 A.2d 802, 804 (Pa. Super. Ct. 1984)). Here the lack of information was evident: The trial court did not have the benefit of a recent pre-sentencing investigation;[16] the Commonwealth's sentencing memorandum did not address the *Miller* factors; defense counsel did not submit a sentencing memorandum; and neither the defense nor the Commonwealth detailed the *Miller* factors during argument.

The trial court further failed to detail, as per *Foust*'s instruction, why it was imposing consecutive sentences. *Foust*, 180 A.3d at 441 n.21. The trial court's colloquy and opinion do not rectify concerns of insufficient consideration of the sentencing factors since it merely performs a checklist review of the factors. Finally, the trial court's colloquy demonstrates an improper focus on retribution, particularly in light of *Miller*.

[16] Additionally, the court did not place on the record why it did not order a pre-sentence investigation report as required by Pa.R.Crim.P. 1403(A)(2) as amended in response to *Commonwealth v. Martin*, 351 A.2d 650, 659 (Pa. 1976).

Such an omission of proper consideration is analogous to the record overturned by this Court in *Commonwealth v. Coulverson*, 34 A.3d 135, 148 (Pa. Super. Ct. 2011):

> In [*Coulverson*], as in *Dodge,* the record reveals scant consideration of anything other than victim impact and the court's impulse for retribution on the victims' behalf. . . . Nevertheless, those losses do not obviate the legal and social imperative that a defendant's punishment must fit not only the crime he committed, . . . but also must account for the rehabilitative need of the defendant, and the companion interest of society reflected in sections 9721(b) and 9781(d).

Id. This Court in *Coulverson* also derided the minimal discussion in support of the sentence, the focus on the victim impact testimony, and failure to consider "the tragedy and dysfunction underlying Coulverson's own life, his individual need for effective intervention, or any rehabilitation he might achieve." *Id.*

Most notably, neither the court, the Commonwealth, nor Bourgeois' counsel emphasized *Miller*'s "central intuition—that children who commit even heinous crimes are capable of change," *Montgomery*, 136 S. Ct. at 736; and there is only passing reference in the entire record to *Miller*'s adoption of adolescent brain development. Aside from a perfunctory reference to the *Miller* factors being "considered," there is no record as to the findings supporting the sentence at the time of imposition aside from the severity and impact of the offense. Therefore, the trial court should not receive the normal presumption that it adequately reviewed and

considered the required sentencing factors, and Mr. Bourgeois' sentence should be vacated and remanded for proper resentencing.[17]

B. The Trial Court Misapplied The Law In Terms Of The Weight Afforded To The Facts Of The Crime, Its Reliance On 1102.1, And Its Disregard Of The Majority Of The *Miller* Factors

Not only did the trial court fail to adequately consider the *Miller* factors, but it allowed the facts of the crime to impermissibly override mitigation, and it improperly relied on the mandatory minimum established in Section 1102.1. The Supreme Court has cautioned that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper*, 543 U.S. at 573 (2005). Therefore, the sentencer must look beyond the facts of the offense and consider how the youth's

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[17] As held in *Goggins*, 748 A.2d at 731:

> A trial court's exercise of discretionary power in sentencing requires both sufficient information and adherence to applicable rules of court. *See Martin*, 466 Pa. at 131-32, 351 A.2d at 657 ("[T]he court's discretion must be exercised within certain procedural limits, including the consideration of sufficient and accurate information."). Thus, the trial court was required to apprise itself sufficiently to impose sentence in an informed fashion as discussed *supra*, by a PSI report or otherwise, and if it chose to dispense with a PSI report, to provide cognizable reasons why. *See id*. The court's failure to do either is error and requires that the matter be remanded for re-sentencing. *See id*.; *Carter*, 485 A.2d at 804; *Warren*, 393 A.2d at 822.

age, development, and capacity for rehabilitation *counsel against* a life without parole sentence. *See id*.

In *Godfrey v. Georgia*, the United States Supreme Court held that a finding that the homicide was "outrageously or wantonly vile, horrible and inhuman" was insufficient to warrant the death penalty because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman." 446 U.S. 420, 428-29 (1980) (plurality opinion). *See also Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988) (holding Oklahoma's aggravating factor that a murder is "especially heinous, atrocious, or cruel" to be overbroad because "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'"). In Pennsylvania, while "[t]he [trial] court is not required to parrot the words of the Sentencing Code, stating every factor that must be considered under Section 9721(b), . . . the record as a whole must reflect due consideration by the court of the statutory considerations at the time of sentencing." *Foust*, 180 A.3d at 439 (second alteration in original) (citing *Commonwealth v. Bullock*, 170 A.3d 1109, 1126 (Pa. Super. Ct. 2017). The Court noted in *Foust* how "[t]he trial court's extensive, well-reasoned, and on-the-record explanation" demonstrated that the record as a whole reflected adequate consideration of the factors. *Id.* at 440 n.20.

Mr. Bourgeois' sentence lacks any supporting record and reviewed as a whole does not "reflect due consideration by the court of the statutory considerations." *See Foust*, 180 A.3d at 439. The record reveals no consideration of adolescent development, did not apply the presumption in favor of parole eligibility required by *Batts II*, and lacks even a summary of which factors weigh in favor or against the sentence imposed. The record focuses almost exclusively on the facts of the crime to support the sentence, which undermines the central holding in *Miller* and resulted in the improper denial of a meaningful opportunity for parole for Mr. Bourgeois. *Miller* required that "[t]he opportunity for release . . . be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit *even heinous crimes* are capable of change." *Montgomery*, 136 S. Ct. at 736 (emphasis added). The crime is not the focus of *Miller*, but rather the characteristics of the offender —the ability of an individual to change even following their conviction for a crime such as murder.[18] The trial court's indifference to the central questions of *Miller* and *Batts II* demonstrates a manifest abuse of discretion.

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[18] When contrasted with other juvenile homicides, Mr. Bourgeois' facts are not outside the class of individuals the Supreme Court sought to protect. For example, the defendant in *Miller* physically assaulted his victim with a baseball bat, demonstrated pleasure in the moment of it, and took extensive steps to cover up the crime while disregarding opportunities to save the victim's life. Brief of Respondent at 6-7, *Miller v. Alabama*, 567 U.S. 460, (2012) (No. 10-9646):

> Miller [ ] leapt on Cannon, hitting him several times in the face. JA 133. Despite Cannon's pleas to stop, Miller picked up the bat. Id. As Cannon screamed, Miller

Finally, the trial court record is similar to that of *Commonwealth v. Hicks* which was remanded as the court "improperly relied on 18 Pa.C.S. § 1102.1(a)" and failed to "mak[e] a determination of sentence duration based on *Knox* and *Miller*." 151 A.3d at 227. The trial court noted that "Bourgeois received two consecutive ***mandatory minimum sentences*** of 35 years for each first degree murder plus 5 years," and failed to detail its reasoning behind the *Knox* and *Miller* factors. (June 6, 2018, Opinion Sur Pa. R.A.P. 1925(a)).[19] Section 1102.1 is not mandatory for Mr.

> beat him repeatedly, breaking his ribs. JA 133, 137; R. 985, 1031. Miller told him, "I am God, I've come to take your life." JA 133. He then took one more swing. Id.
>
> Miller and Smith initially left Cannon alive, but they returned "to cover up the evidence." R. 987, 990. As Cannon lay helpless on the floor, they tried to clean up his blood, which had splattered in the kitchen. R. 987-90. After that, Miller "lit the couch" on fire, telling Smith they "had to do it." R. 990. They then set several more fires throughout the trailer. JA 133. Cannon, who was unable to move, asked why they were doing this to him. R. 990-91, 711-12. They ignored him and left him to die.

Id. at 6-7. Another particularly violent crime was also detailed in the Respondent's brief in *Miller:*

> [The defendant] was 14 . . . [and u]sing a gun Jones had stolen and given to him for that purpose, the boyfriend shot her 76-year-old grandfather at Jones's home. *See id.* While the grandfather was "still alive," Jones "poured charcoal lighter fluid on" him "and set him on fire." *Id.* He eventually died, as did Jones's aunt—after Jones and her boyfriend "hit her with portable heaters, stabbed her in the chest, and set her room on fire." *Id.* Jones's grandmother and 10-year-old sister survived the attack, but not because Jones and her boyfriend intended to spare them. After the boyfriend shot the grandmother, Jones "poured the charcoal fluid" on her, and they "set her on fire" as well. *Id.* Jones also stabbed her 10-year-old sister 14 times. *Id.; see also* Stimson & Grossman, *supra*, at 26-27 (discussing Jones's crime in more detail).

Id. at 50-51. These are the exact fact patterns the *Miller* Court wanted to ensure did not outweigh other evidence of mitigation and capacity to be rehabilitated.

[19] A copy of the June 6, 2018, Opinion Sur Pa. R.A.P. 1925(a) is attached hereto as Appendix "H."

Bourgeois, and the trial court failed to consider the possibility of deviating downwards to reflect Mr. Bourgeois' evidence of rehabilitation. Each of these errors separately and collectively constitute an abuse of discretion requiring vacatur and remand.

CONCLUSION

For the foregoing reasons, this Court should vacate Michael Bourgeois' *de facto* life without parole sentence as unconstitutional and remand the instant matter for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify this 21st day of September, 2018, that the foregoing brief of Appellant complies with the word count limits as set forth in Pa.R.A.P. 2135.

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