IN THE
SUPERIOR COURT OF PENNSYLVANIA

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570 MDA 2018

COMMONWEALTH OF PENNSYLVANIA

APPELLEE,

V.

MICHAEL LEE BOURGEOIS,

APPELLANT.

REPLY 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 THE CASE

This matter comes before this Court following a timely filed appeal. Appellant Michael Bourgeois received an extension of time and timely filed his principal brief on September 21, 2018. The Commonwealth timely filed its appellee's brief on January 3, 2019. Appellant now timely files this reply brief. Appellant relies upon the Statement of the Case in his original brief.

SUMMARY OF THE ARGUMENT

Miller v. Alabama, 567 U.S. 460 (2012) requires a sentencing judge to consider the enumerated factors before imposing a *de facto* life without parole sentence. Allowing a court to sidestep *Miller* by crafting a term of year sentences that guarantees the same outcome as a life without parole sentence, *i.e.,* life and death in prison, impermissibly places form over substance. Mr. Bourgeois was entitled to an application of *Miller* at his resentencing and should not be unconstitutionally subjected to a *de facto* life sentence when he has demonstrated rehabilitation.

Furthermore, the trial court abused its discretion when pre-determining that Mr. Bourgeois' sentences had to run consecutively as a result of there being two victims. The court allowed the facts of the crime to override every other piece of mitigation and failed to provide a record supporting a *de facto* life sentence.

ARGUMENT

I. A SENTENCING JUDGE MUST APPLY THE *MILLER* FACTORS PRIOR TO IMPOSING A *DE FACTO* LIFE WITHOUT PAROLE SENTENCE

A juvenile cannot be constitutionally sentenced to life without parole "in the absence of the sentencing court reaching a conclusion . . . that the defendant will forever be incorrigible, without any hope for rehabilitation." *Commonwealth v. Batts*, 163 A.3d 410, 435 (Pa. 2017) [hereinafter *Batts II*]; *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016); *Miller v. Alabama*, 567 U.S. 460, 479 (2012); *Graham v. Florida*, 560 U.S. 48, 72-73 (2010); *Roper v. Simmons*, 543 U.S. 551, 572-73 (2005). As first articulated by *Graham*, juveniles may "turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives," but courts cannot "mak[e] the judgment at the outset that those offenders never will be fit to reenter society." 560 U.S. at 75. A *de faco* life sentence, such as Mr. Bourgeois', is a prohibited premature judgment. Children are "less deserving of the most severe punishments," *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68), and it is imperative that courts are required to afford them a life outside of prison when their crimes reflect transient immaturity. *See id* at 471-80; *Graham*, 560 U.S. at 79.

The Commonwealth's assertion that Mr. Bourgeois' "parole date would occur when he is 57 years old" is simply untrue. (Br. for Appellee 10.) Mr. Bourgeois will not become eligible when he is 57 as the sentences are to run consecutively. He will be nearly 100 years old at his first parole hearing. To focus on the individual sentences rather than the aggregate when discussing his release disingenuously circumvents *Miller* and ignores the virtually certain outcome that Mr. Bourgeois will die in prison.

Whether a life without parole sentence in name or a *de facto* life without parole sentence, a proper application of the *Miller* factors on the record is required to protect the constitutional rights of children at sentencing. Ignoring *de facto* sentences such as Mr. Bourgeois' would allow courts to avoid *Miller*'s premise that "children who commit even heinous crimes are capable of change" by ensuring the same outcome—the child's death in prison—and escaping review over a technicality. *Montgomery*, 136 S. Ct. at 736.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING MR. BOURGEOIS TO A *DE FACTO* LIFE SENTENCE BASED SOLELY ON THE FACTS OF THE CRIME

Aside from the illegality of Mr. Bourgeois' sentence, the court also abused its discretion in imposing a *de facto* life sentence after finding that Mr. Bourgeois' conduct inside has been "commendable as a model inmate." (N.T. 11/3/17, 157:9-

11.) Despite the Commonwealth's argument to the contrary, a perfunctory review of relevant sentencing factors cannot rescue "consecutive sentences [imposed] merely to achieve extended incarceration." *Commonwealth v. Coulverson*, 34 A.3d 135, 150 (Pa. Super. Ct. 2011). In *Coulverson*, this Court vacated a sentence due to the trial court over-emphasizing retribution:

> Although the court acknowledged the PSI report, it did so only as a perfunctory exercise and focused its consideration entirely on the severity of Coulverson's offenses and the victims' impact statements. Its discussion evinced no consideration whatsoever of the dysfunction that marked Coulverson's own life, his cooperation and remorse, his attempts at reclaiming a productive role in society, or the possibility that, with appropriate mental health treatment, he might succeed at rehabilitation after serving a substantial term of eighteen years' incarceration. The resulting sentence cannot be described as "individualized" in any meaningful way.

Id. Similarly, this Court has remanded cases in which the sentencing court had its sentence pre-determined:

> [The] mere fact that the court listened to Appellant's presentation of mitigating factors does not mean that it gave Appellant's sentence appropriate individualized consideration. The court's own Rule 1925(a) opinion makes clear that the court afforded Appellant an opportunity to argue not so that it could use Appellant's information to craft an appropriate individualized sentence, but, at most, to see if Appellant could rebut the court's "preconceived notion" of the sentence the court already had decided to impose. In these circumstances, the sentence was invalid.

Commonwealth v. Luketic, 162 A.3d 1149, 1164 (Pa. Super. Ct. 2017) (citing *Commonwealth v. Devers*, 546 A.2d 12, 16 (Pa. 1988); *Commonwealth v. Martin*, 351 A.2d 650, 653-54, 657-59 (Pa. 1976); *Commonwealth v. Knighton*, 415 A.2d 9, 12-13 (Pa. 1980) ("judge eventually afforded appellant the opportunity to speak [before sentencing, but] the gesture was an empty one for the sentence had been already determined")).

The outcome here was based on the offense and the court's belief that "some things just cannot be taken back regardless of subsequent behavior." (N.T. 11/3/17, 157:17-20.) The court had pre-determined that Mr. Bourgeois' sentences were to run consecutively despite any mitigation presented and simply went through the motions during his sentencing colloquy. Furthermore, the Commonwealth's argument that the sentence was guided by Section 1102.1 fails to demonstrate that the court conducted a balanced review of the record. Neither the trial court nor the Commonwealth provided a reason for extended incarceration other than the facts of the crime. The facts alone and a judge's personal feelings that more incarceration is needed for accountability cannot justify death by incarceration for Mr. Bourgeois, a man who has already demonstrated rehabilitation. Thus, the sentencing court committed an abuse of discretion.

CONCLUSION

For the foregoing reasons counsel respectfully request Mr. Bourgeois' sentences be vacated and remanded for a second resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify this 17th day of January, 2019, that the foregoing Reply Brief of Appellant contains 1,114 words and complies with the word count limits as set forth in Pa.R.A.P. 2135.

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