Received 5/13/2019 12:53:35 PM Supreme Court Middle District

Filed 5/13/2019 12:53:00 PM Supreme Court Middle District
277 MAL 2019

NO.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

V.

MICHAEL LEE BOURGEOIS,

Petitioner.

PETITION FOR ALLOWANCE OF APPEAL TO THE PENNSYLVANIA SUPREME COURT

Petition To Allow An Appeal From The April 12, 2019 Judgment Of The Superior Court Of Pennsylvania (No. 570 MDA 2018) Affirming The November 3, 2017 Resentencing in the Court of Common Pleas, Lancaster County, Docket CP-36-CR-0004224-2001.

Marsha L. Levick, 22535
Brooke L. McCarthy, 325155
JUVENILE LAW CENTER
1315 Walnut Street, 4th floor
Philadelphia, PA 19107
Telephone (215) 625-0551
Facsimile (215) 625-2808
mlevick@jlc.org
bmccarthy@jlc.org

COUNSEL FOR PETITIONER

May 13, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW 1

II. THE ORDER IN QUESTION 1

III. QUESTIONS PRESENTED 1

IV. STATEMENT OF THE CASE 2

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED 7

A. This Court Should Grant Review As Mr. Bourgeois' Sentence Is Illegal Under *Commonwealth v. Machicote* Because The Trial Court Failed To Consider The *Miller* Factors On The Record 7

B. This Court Should Grant Review To Determine If Consecutive Sentences That Amount To A *De Facto* Life Sentence In The Aggregate Are Unconstitutional Where The Commonwealth Has Not Met Its Burden To Prove The Defendant Is Incapable Of Rehabilitation Beyond A Reasonable Doubt 12

C. This Court Should Grant Review To Determine If A Challenge To The Imposition Of Consecutive Sentences, Which In The Aggregate Constitute A *De Facto* Life Sentence, Is An Appeal Of The Legality Of The Sentence Or The Discretionary Aspects Of The Sentence 19

VI. CONCLUSION 20

APPENDIX A: April 12, 2019 Superior Court Opinion A1

APPENDIX B: June 6, 2018 Trial Court 1925(a) Opinion B1

APPENDIX C: November 3, 2017 Resentencing Order C1

APPENDIX D: April 26, 2019 Order Denying Appellant's Application for Relief D1

TABLE OF AUTHORITIES

Page(s)

Cases

Bear Cloud v. State,
334 P.3d 132 (Wyo. 2014) 13

Commonwealth v. Batts,
163 A.3d 410 (Pa. 2017) 19

Commonwealth v. Bourgeois,
No. 570 MDA 2018, 2019 WL 1579816 (Pa. Super. Ct. April 12, 2019) 11, 12

Commonwealth v. Brian Samuel,
Docket No. CP-04-CR-0001376-1996 15

Commonwealth v. Charles Carlson,
Docket No. CP-04-CR-0002338-1999 15

Commonwealth v. Donald Zoller,
Docket No. CP-02-CR-0004839-1986 14

Commonwealth v. Foust,
180 A.3d 416 (Pa. Super. Ct. 2018) 13, 15, 16

Commonwealth v. Kenneth Crawford,
Docket No. CP-40-CR-0001480-2000 15

Commonwealth v. Machicote,
No. 14 WAP 2018, 2019 WL 1870259 (Pa. Apr. 26, 2019) .... *passim*

Graham v. Florida,
560 U.S. 48 (2010) 17, 18

Miller v. Alabama,
567 U.S. 460 (2012) 17, 19

Montgomery v. Louisiana,
136 S. Ct. 718 (2016) 16, 17

People v. Reyes,
63 N.E.3d 884 (Ill. 2016) 13

Roper v. Simmons,
543 U.S. 551 (2005) 16

State v. Null,
836 N.W.2d 41 (Iowa 2013) 13

State v. Zuber,
152 A.3d 197 (N.J. 2017) 13

Sumner v. Shuman,
483 U.S. 66 (1987) 19

Statutes

18 Pa. C.S. § 1102 8

18 Pa. C.S. § 1102.1 8

Other Authorities

210 Pa. Code R. 1114 .... 7, 12, 13

Beth Caldwell, *Creating Meaningful Opportunities for Release: Miller, Graham, and California's Youth Offender Parole Hearings*, 40 NYU REV. L. & SOC. CHANGE 245 (2016) 17

Commonwealth v. Machicote, Appellee's Br. at 9 9

I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The opinion, *Commonwealth v. Bourgeois*, 2019 WL 1579816 (Pa. Super. Ct. Apr. 12, 2019), that the Superior Court of Pennsylvania issued on April 12, 2019 is attached hereto as Appendix A. The trial court's opinion, issued pursuant to Pennsylvania Rule of Appellate Procedure 1925(a), is attached hereto as Appendix B, and the trial court's order, which the Superior Court affirmed, is attached hereto as Appendix C.

II. THE ORDER IN QUESTION

On April 12, 2019, the Superior Court of Pennsylvania issued an opinion that concludes: "Judgment of sentence affirmed." (*See* Appendix A at 19.) The Superior Court held that "the trial court did not need to conduct an on-the-record examination of the *Miller* factors at the resentencing hearing in Appellant's case." (*Id.* at 13-14.) Furthermore, the Superior Court held that consecutive 40-to-life sentences were not a *de facto* life without parole sentence. (*Id.* at 11-12.)

III. QUESTIONS PRESENTED

1. Did the Superior Court err in holding that the trial court did not need to make findings on the record regarding the *Miller* factors when Mr. Bourgeois was exposed to a life without parole sentence?

   Suggested answer: Yes.

2. Is it unconstitutional to impose a sentence of 80 years to life on a juvenile, a *de facto* sentence of life imprisonment without parole, absent a finding that the juvenile is one of the rare and uncommon juveniles who is permanently incorrigible, irreparably corrupt or irretrievably depraved?

   Suggested answer: Yes.

3. Did the lower court err in holding that challenges to consecutive sentences that in the aggregate constitute an unconstitutional *de facto* life sentence are discretionary in nature, thus insulating the aggregate term from scrutiny under the Eighth Amendment on Appeal?

   Suggested answer: Yes.

IV. 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-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. (Super. Ct. Br. of Appellant at App. B.) The Commonwealth ultimately withdrew this notice in its sentencing memorandum on October 27, 2017 but sought an aggregate 100 years for the homicides and 20-40 years consecutive for the associated charges. (Super. Ct. Br. of Appellant at App.

C.)

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)
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. (Super. Ct. Br. of Appellant at App. D.) On December 4, 2017, the trial court denied the post-sentence motion without a hearing or subsequent explanation. (Super. Ct. Br. of Appellant at App. E.) On September 10, 2018, Mr. Bourgeois requested the Superior Court to stay proceedings pending the outcome in *Commonwealth v. Machicote*, No. 41 WAP 2018, and *Commonwealth v. Felder*, No. 41 EAL 2018, as his case raises questions implicated by both decisions. (Mot. to Stay Pending Resolution of *Commw. v. Felder* & *Commw. v. Machicote*.) After initially denying this request, the Superior Court stayed the case from the bench during oral argument with the parties agreeing to hold the case in abeyance pending this Court's decision in *Felder*. When the Superior Court affirmed Mr. Bourgeois' sentence, *Commonwealth v. Bourgeois*, 2019 WL 1579816, at *10 (Pa. Super. Ct. Apr. 12, 2019), Mr. Bourgeois requested the opinion be withdrawn and the case stayed as originally stated; this motion was denied. (Application for Relief; Apr. 26, 2019 Order, attached hereto as Appendix D.)

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

The Petition for Allowance of Appeal should be granted as the Superior Court did not require the trial court to make findings on the record regarding the *Miller* factors despite Mr. Bourgeois being exposed to life without parole, a holding which "conflicts with a holding of the Pennsylvania Supreme Court or the United States Supreme Court on the same legal question." 210 Pa. Code R. 1114(b)(2).

A. This Court Should Grant Review As Mr. Bourgeois' Sentence Is Illegal Under *Commonwealth v. Machicote* Because The Trial Court Failed To Consider The *Miller* Factors On The Record

Shortly after the Superior Court issued its opinion in this case, this Court addressed in *Commonwealth v. Machicote* the question of whether "a court sentencing a juvenile defendant for a crime for which life without parole is an available sentence must review and consider on the record the *Miller* factors . . ., regardless of whether the defendant is ultimately sentenced to life without parole." No. 14 WAP 2018, 2019 WL 1870259, at *5 (Pa. Apr. 26, 2019). The Court answered that question in the affirmative, concluding that consideration on the record of the *Miller* factors was required in that case because the juvenile defendant was sentenced to 30 years to life in prison for second-degree murder under the prior version of Section 1102, which meant "life without the possibility of parole was a viable sentence." *Id.* at *7. The Court noted that "one of the hallmarks of the line of United States Supreme Court cases pertaining to juvenile sentencing" is the need for

"individualized sentence[s] based on the criteria developed in *Miller*," as consideration of those factors is necessary to adequately account for developmental immaturity, mental capacity, and other age-related characteristics of juvenile defendants. *Id.* As such, citing its prior holding in *Batts II* and the United States Supreme Court's holdings in *Miller* and *Montgomery*, the Court held that whenever "a juvenile is exposed to a potential sentence of life without the possibility of parole the trial court must consider the *Miller* factors, on the record, prior to imposing a sentence." *Id.*; *see also id.* at *5 (describing "*Montgomery*'s procedural holding that the *Miller* factors must be assessed to guarantee individualized sentencing"); *id.* at *6 ("[I]n *Batts II*, we held the court shall consider and make findings on the record 'after the sentencing court's evaluation of the criteria identified in *Miller*.'") (quoting *Commonwealth v. Batts*, 163 A.3d 410, 421 (Pa. 2017) [hereinafter *Batts II*]). Failure to do so, the Court continued, results in "an illegal sentence," regardless of whether life without the possibility of parole is ultimately imposed. *Machicote*, 2019 WL 1870259, at *8.

Here, Mr. Bourgeois was clearly "exposed to a potential sentence of life without the possibility of parole." *See id.* at *7. Mr. Bourgeois was convicted of two counts of first-degree murder, an offense that, both before and after the passage of Section 1102.1, exposes a juvenile defendant to the possibility of a life without parole sentence. *See* 18 Pa. C.S. §§ 1102; 1102.1. Indeed, in *Machicote*, the

Commonwealth conceded that "a trial court must consider the *Miller* factors when . . . a juvenile is convicted of first-degree murder." *Machicote*, 2019 WL 1870259, at *6; *see also Commonwealth v. Machicote*, Appellee's Br. at 9, ("[W]hen a trial court is sentencing a juvenile convicted of first-degree murder under §1102.1(a) . . . the juvenile *clearly faces a potential life sentence*" and the trial court must consider the requisite factors) (emphasis added); *see also Commonwealth v. Machicote*, Appellee's Br. at 12 ("[Section] 1102.1 mandates a trial court consider the *Miller* factors when sentencing a juvenile convicted of first-degree murder, for such a conviction does indeed carry a potential sentence of life without the possibility of parole."). In addition to this statutory exposure, the Commonwealth filed a notice indicating it intended to seek life without parole. (Super. Ct. Br. of Appellant at App. B.)[1] Thus, because "life without the possibility of parole was a viable sentence," the trial court was required to "consider, on the record, the *Miller* factors and Section 1102.1 criteria," regardless of the sentence ultimately imposed. *See Machicote*, 2019 WL 1870259, at *7.

The trial court did not do so, instead concluding that, because the Commonwealth abandoned its intention to seek life without parole, the court was not required to consider and make findings on "the factors outlined by the U.S.

[1] Although the Commonwealth ultimately withdrew this notice in its sentencing memorandum, it nonetheless sought an aggregate 100-year sentence for the homicides, plus 20-40 years to be served consecutively for the associated charges. (Super. Ct. Br. of Appellant at App. C.)

Supreme Court and our state Supreme Court, as well as the applicable statutes," (N.T. 11/3/17, 155:13-17),—in direct contradiction to this Court's recent decision in *Machicote*. Although the court claims to "have chosen to consider and review" those factors in sentencing Mr. Bourgeois (N.T. 11/3/17, 155:17), it did not do so on the record, as required by *Machicote*. Indeed, the court specifically stated, "I am not going to elaborate on each one of those factors," and then merely recited the factors, noting that the court had considered them. (N.T. 11/3/17, 155:20-21, 155:23-157:20.) The only factual information specific to Mr. Bourgeois' case that the court discussed on the record during the recitation of the factors was the victim's family's forgiveness of him and his impeccable conduct while incarcerated.[2] (N.T. 11/3/17, 156:20-25, 157:7-20.)

This bare recitation, with extremely limited factual findings, falls far short of the requirements articulated by this Court and the United States Supreme Court that "sentencing of juvenile homicide offenders . . . be individualized" and that the sentencing court "create[] a record to aid the appellate courts throughout the appeal process." *Machicote*, 2019 WL 1870259, at *7. In *Machicote*, the trial court reviewed a pre-sentence investigation report, considered the record in the case,

---

[2] The trial court's subsequent 1925(a) opinion does not cure these defects. Although the opinion describes the documentation and other record evidence the court reviewed, and highlights certain facts about the offense and Mr. Bourgeois' background, it does not use the *Miller* factors to "analyze [Mr. Bourgeois'] specific characteristics and circumstances" and "impose a sentence based on them," and thus does not satisfy this Court's requirement of on-the-record consideration of the relevant factors. *See Machicote*, 2019 WL 1870259, at *7.

believed it was required to re-sentence the defendant in accordance with *Miller*, and discussed in substantial detail the defendant's history and personal characteristics, which, according to the Commonwealth, demonstrated that "serious consideration was given to all, or at least a strong majority, of the factors set forth in *Miller* and § 1102.1(d)." *Machicote*, 2019 WL 1870259, at *6. Yet this Court rejected that argument out of hand, concluding that "the trial court is required to make a record of the *Miller* factors at sentencing," and, notwithstanding the scope of the evidence it had considered, the court in that case had failed to do so. *Id.* at *7-*8. The record here is far thinner than the record in *Machicote*; here, there was no pre-sentence investigation report, the court did not believe it was bound by *Miller*, and the court offered no detailed discussion on any of the factors.[3] Thus, the trial court cannot be said to have "consider[ed], on the record, the *Miller* factors and Section 1102.1 criteria," as required by *Machicote*. *See* 2019 WL 1870259, at *7.

In sum, Mr. Bourgeois was exposed to a potential sentence of life without parole, yet the trial court failed to consider the *Miller* and § 1102.1 factors on the record, rendering his sentence illegal under *Machicote*. This Court should therefore grant his Petition for Allowance of Appeal, as the Superior Court's ruling that "an

[3] The Superior Court seemed to agree that the trial court "did not provide any specific findings as to the *Miller* factors for this case," but found no legal error, concluding—without the benefit of the *Machicote* decision—that "an on-the-record examination of the *Miller* factors" was unnecessary. *Commonwealth v. Bourgeois*, No. 570 MDA 2018, 2019 WL 1579816, at *6-*7 (Pa. Super. Ct. April 12, 2019).

on-the-record examination of the *Miller* factors" was unnecessary, *Commonwealth v. Bourgeois*, No. 570 MDA 2018, 2019 WL 1579816, at *7 (Pa. Super. Ct. April 12, 2019), "conflicts with a holding of the Pennsylvania Supreme Court" on the same legal question. *See* 210 Pa. Code R. 1114(b)(2).[4]

B. This Court Should Grant Review To Determine If Consecutive Sentences That Amount To A *De Facto* Life Sentence In The Aggregate Are Unconstitutional Where The Commonwealth Has Not Met Its Burden To Prove The Defendant Is Incapable Of Rehabilitation Beyond A Reasonable Doubt

The second question presented raises two issues of first impression in Pennsylvania: 1) given the Superior Court's holding that a *de facto* life sentence violates the Constitution in certain circumstances, whether an aggregate sentence that is a *de facto* life sentence is subject to the same analysis; and 2) whether the Commonwealth must prove irreparable corruption beyond a reasonable doubt prior to the imposition of a *de facto* life sentence, including one comprised of consecutive sentences. The same issues are currently pending before this Court in *Commonwealth v. Foust*, which has been held in abeyance until the disposition of *Commonwealth v. Felder*.

In addition to being an issue of first impression, "the question presented is one

[4] Given the virtual life sentence imposed here, Petitioner also argues that even if this Court were to find that he was not in fact facing a possible life without parole sentence because the Commonwealth withdrew its notice, the same requirement to conduct an individualized sentencing hearing and consider, on the record, all of the *Miller* factors should apply when a defendant is facing a *de facto* life sentence as Bourgeois clearly was here.

of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court." 210 Pa. Code R. 1114(b)(4) The Superior Court's decision in Mr. Bourgeois' case continues to place Pennsylvania outside of the national trends recognizing that *Miller* applies to *de facto* life sentences even when they are consecutive.[5] Across the country, state courts are recognizing that *Miller* mandates a review of the aggregate sentence to ensure trial courts do not subvert *Miller*'s holding. In *State v. Zuber*, 152 A.3d 197, 211 (2017), *cert. denied*, ___ U.S. ___, 138 S. Ct. 152 (N.J. 2017), the New Jersey Supreme Court held:

> It 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. We believe it does not matter for purposes of [*Graham* or *Miller*.]

Similarly, the Wyoming Supreme Court has found that an aggregate sentence of 45 years, just over half of Mr. Bourgeois' sentence, constituted a *de facto* life sentence. *Bear Cloud v. State*, 334 P.3d 132, 143 (Wyo. 2014). Illinois has also struck down *de facto* life sentences so long as the aggregate term is the result of consecutive sentences arising from "offenses in a single course of conduct." *People v. Reyes*, 63

[5] Furthermore, the Superior Court's decision relies on the flawed analysis in *Foust*. While the *Foust* court explicitly relies upon cases involving aggregate sentences to support its holding that "[p]ermitting *de facto* LWOP sentences for juvenile homicide offenders capable of rehabilitation . . . places form over substance," it then rejects the same logic as applied to the aggregate terms Mr. Foust received stemming from a single criminal event. *See Commonwealth v. Foust,* 180 A.3d 416, 432 (Pa. Super. Ct. 2018) (citing *State v. Zuber*, 152 A.3d 197, 211 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017); *Bear Cloud*, 334 P.3d 132, 143 (Wyo. 2014); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016).

N.E.3d 884, 888 (Ill. 2016).

Aside from bucking national trends, the decision in *Bourgeois* (and *Commonwealth v. Foust)* permit trial courts to sidestep this Court's requirement in *Batts II* that the Commonwealth prove irreparable corruption beyond a reasonable doubt before denying a juvenile a reasonable opportunity for release and a fulfilled life outside of prison walls. Mr. Bourgeois' case perfectly illustrates the need to clarify this Court's mandate in *Batts II*. Recognizing the difficulty of the burden associated with seeking life without parole, the Commonwealth instead asked for consecutive sentences that would amount to a minimum of 120 years, indisputably beyond anyone's life expectancy. The trial court then imposed an aggregate minimum of 80 years, equally beyond anyone's life expectancy; Mr. Bourgeois must reach the age of nearly 100 before becoming even eligible for parole, a sentence that guarantees his death in prison as surely as a formal life without parole sentence. Unfortunately, Mr. Bourgeois is not the only one to find himself in such an impossible situation. Donald Zoller, who was 14 at the time of his crime, received consecutive sentences equal to 75-to-life, making him eligible for parole just shy of his 90th birthday;[6] Charles Carlson was sentenced to two consecutive 25-to-life

[6] *Commonwealth v. Donald Zoller*, Docket No. CP-02-CR-0004839-1986 (accessible through https://ujsportal.pacourts.us/DocketSheets/CP.aspx).

sentences, foreclosing any opportunity for parole before he reaches at least age 70;[7] Brian Samuel received an aggregate 60 year to life sentence, foreclosing parole eligibility until his late seventies;[8] Kenneth Crawford was sentenced to an aggregate minimum of 52 years, making him eligible for parole when he is nearly 70;[9] and Michael Foust was sentenced to an aggregate of 60 years, delaying his parole eligibility until his mid-seventies.[10] Each of these individuals, while not receiving life without parole in name, can all reasonably expect to die in prison even though the Commonwealth did not prove irreparable corruption beyond a reasonable doubt before their sentences were imposed. Therefore, absent clear guidance from this Court, individuals across the Commonwealth will be subject to disparate sentencing rules and practices as trial courts continue to impose *de facto* life without parole sentences by masquerading them as term of years sentences.

In upholding Mr. Bourgeois' sentence, the court ignores *Miller*'s mandate in favor of Pennsylvania's jurisprudence against "volume discounts" and allows the sentencing court to focus on the number of victims, associated charges, or other facts of the crime in sentencing. But such an analysis voids *Miller*'s requirement that

---

[7] *Commonwealth v. Charles Carlson*, Docket No. CP-04-CR-0002338-1999 (accessible through https://ujsportal.pacourts.us/DocketSheets/CP.aspx).
[8] *Commonwealth v. Brian Samuel*, Docket No. CP-04-CR-0001376-1996 (accessible through https://ujsportal.pacourts.us/DocketSheets/CP.aspx)
[9] *Commonwealth v. Kenneth Crawford*, Docket No. CP-40-CR-0001480-2000 (accessible through https://ujsportal.pacourts.us/DocketSheets/CP.aspx).
[10] *Foust*, 180 A.3d at 420-21.

"[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 v. Louisiana*, 136 S. Ct. 718, 736 (2016). The court below relies on *Foust* to justify its ruling here, noting that *Foust* "recogniz[ed that] the rationale in *Roper*, *Graham*, and *Miller* regarding the decreased deterrent effect that accompanies harsher punishments for juveniles. . . . is limited to the *maximum* possible penalty for an offense." *Foust*, 180 A.3d at 436 (emphasis added). However, this reasoning is at odds with the court's holding in the same opinion that a minimum sentence for a *single* offense would be unconstitutional if it amounted to a *de facto* life sentence. *Id.*, at 431.

The lower court's reliance on "volume discounts" also mischaracterizes *Miller* and *Montgomery*, which focus specifically on the potential for rehabilitation among juvenile offenders; the United States Supreme Court has stated unequivocally that the science underpinning the abolition of extreme sentences for youth applies regardless of the specific nature of the underlying offense or offenses. Considering a parole-eligible sentence as a volume discount rather than a reflection of the distinct attributes of youth would create "[a]n unacceptable likelihood . . . that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course." *Roper v. Simmons*, 543 U.S. 551, 553 (2005). The volume discount characterization subverts the Supreme Court's

recognition that "children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736.

As long as the jurisprudence treats *Miller*'s mandate as excluding consecutive sentences, countless individuals will be denied a meaningful chance at fulfillment outside of prison walls which is a requirement under *Miller* and *Graham*. Although Graham found that individuals must be afforded release, release must also be meaningful: release late in life cannot satisfy this constitutional requirement. *See* Beth Caldwell, *Creating Meaningful Opportunities for Release: Miller, Graham, and California's Youth Offender Parole Hearings*, 40 NYU REV. L. & SOC. CHANGE 245, 281 (2016) (noting many courts have correctly interpreted the U.S. Supreme Court's holding to conclude that "mere release from prison at some age is not necessarily meaningful"). "The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham v. Florida*, 560 U.S. 48, 79 (2010); *see also Miller v. Alabama*, 567 U.S. 460, 479 (2012).

While the elements of a fulfilled life may vary depending upon the lens through which one examines the question—experts and commentators in the fields of religion, philosophy, psychology and the humanities, for example, may describe

a "fulfilled life" differently—fulfillment must include not only a reasonable, but also a realistic opportunity to contribute to community, develop family relationships, pursue educational interests, demonstrate remorse and achieve reconciliation with one's past. It should allow individuals to lead lives reflective of their social, moral and spiritual values. Parenting, employment, serving others, and developing a sense of purpose are all aspects of living a "fulfilled" life. Experiencing these facets of life require more than a few years at the end of one's life; indeed, some elements, like the chance to experience becoming a parent, are all but foreclosed to women released late in life. Ensuring that sentences imposed on juvenile offenders meet this requirement for fulfillment requires a qualitative as well as quantitative calculus. Moreover, although the Eighth Amendment does not bar the possibility that individuals convicted of crimes committed before adulthood will remain behind bars for life, it "does prohibit States from making the judgment at the *outset* that [juvenile nonhomicide] offenders never will be fit to reenter society." *Graham*, 560 U.S. at 75 (emphasis added). Sentences such as Mr. Bourgeois' effectively reflect precisely that judgment at the outset, though.

Therefore, permitting courts to review each sentence of an aggregate term of years sentence individually circumvents both the spirit and letter of *Miller* and *Montgomery* by permitting the imposition of a sentence of life without parole on a juvenile defendant whose crime does not reflect permanent incorrigibility.

C. This Court Should Grant Review To Determine If A Challenge To The Imposition Of Consecutive Sentences, Which In The Aggregate Constitute A *De Facto* Life Sentence, Is An Appeal Of The Legality Of The Sentence Or The Discretionary Aspects Of The Sentence

The third question presented—whether appealing consecutive sentences amounting to *de facto* life is a challenge to the legality of the sentence, rather than the discretionary aspects—is also a matter of first impression for this Court. Characterizing the sentencing court's choice to impose consecutive, rather than concurrent, sentences as a matter of discretion subject to only limited appellate review gives judges near carte blanche to circumvent not only *Miller*, but also *Batts II*.

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. *See Sumner v. Shuman*, 483 U.S. 66, 83 (1987). Pennsylvania has historically considered challenges to a court's decision to impose consecutive rather than concurrent sentences to be discretionary challenges, and the Superior Court therefore encourages discretionary review as there is no constitutional protection against consecutive sentences when each sentence is independently valid. Applying that rationale to juveniles, however, ignores the central premise of *Miller*, 567 U.S. at 489, that children are different, as well as this Court's holding in *Batts II*, 163 A.3d at 415-16, that a child can only be given a

sentence of death in prison when the Commonwealth has proven irreparable corruption beyond a reasonable doubt. Relegating *de facto* life sentences, even when the result of consecutive sentences, to a discretionary review standard would prevent this Court from ensuring that only the rare and uncommon juvenile is sentenced to die in prison. It creates a gaping loophole that would allow courts to do indirectly that which they may not do directly.

Without this Court's review and clarification, not only will countless juveniles be unconstitutionally sentenced to die in prison, but they also will have no recourse to effectively challenge that illegal sentence if it results from consecutive sentences. This allows juveniles to receive *de facto* life without parole sentences even where their crime reflects transient immaturity and the Commonwealth has not established, on proof beyond a reasonable doubt, that they are incapable of rehabilitation, in violation of both *Miller* and *Batts II*.

VI. CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Allowance of Appeal and reverse the order of the Superior Court.

Respectfully submitted,

/s/ Marsha L. Levick
Marsha L. Levick, 22535
Brooke L. McCarthy, 325155
JUVENILE LAW CENTER
1315 Walnut Street, 4th floor
Philadelphia, PA 19107

Dated: May 13, 2019

Telephone (215) 625-0551
Facsimile (215) 625-2808
mlevick@jlc.org
bmccarthy@jlc.org

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 1115(f) of the Pennsylvania Rules of Appellate Procedure. This brief contains 4,875 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

Dated: May 13, 2019

/s/ Marsha L. Levick
Marsha L. Levick