

**IN THE COURT OF COMMON PLEAS
OF VENANGO COUNTY PENNSYLVANIA**

COMMONWEALTH OF
PENNSYLVANIA,

v.

MICHAEL PAUL FOUST

CP-61-CR-0000679-1993

PROthonotary AND
CLERK OF COURTS

2023 MAY 22 PM 2:44

FILED
COMMON PLEAS COURT
VENANGO COUNTY

PETITION FOR POST-CONVICTION RELIEF

AND NOW, this 22nd day of May 2023, comes the Defendant, by and through his attorneys, and requests that this Honorable Court grant this Petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546, and in support thereof avers as follows:

1. Petitioner Michael Foust is currently incarcerated at SCI Albion in Albion, Pennsylvania. He was seventeen (17) years old when he was arrested and charged with two counts of first degree murder. He was found guilty of both counts following a jury trial and was sentenced on June 30, 1994 to two consecutive terms of life imprisonment without the possibility of parole. The Honorable H. William White presided. Mr. Foust was represented by Mr. Michael Antkowiak.

2. Mr. Foust timely appealed. For this appeal, he was again represented by Mr. Antkowiak. The Superior Court affirmed his sentence and the Supreme Court denied allowance of appeal. *Commonwealth v. Foust*, 667 A.2d 418 (Pa. Super. Ct. 1995) (unpublished memorandum), *appeal denied*, 672 A.2d 304 (Pa. 1995).

3. On February 24, 2016, Mr. Foust filed a petition pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa. C.S.A. §§ 9541-9546. In that petition, he argued that his life without parole sentences violated the Eighth Amendment of the United States Constitution as interpreted by *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

4. On May 12, 2016, the PCRA court granted the petition and vacated Mr. Foust’s judgment of sentence. (Order Granting PCRA Pet., May 12, 2016).

5. At Mr. Foust’s resentencing hearing, Ms. Pamela Sibley, counsel for Mr. Foust, maintained that, because he was a minor at the time of his crimes, Mr. Foust had a greater capacity than an adult to change and rehabilitate himself. Ms. Sibley outlined the many ways that Mr. Foust had proven during his incarceration that he had grown and demonstrated rehabilitation. Ms. Karla Webb, Mr. Foust’s corrections counselor, testified that Mr. Foust has positively changed in his ability to express his emotions and in the way he thinks. (N.T. 7/5/16, 70:4-8, 79:1-16). Three additional SCI Albion staff members testified as to Mr. Foust’s success in numerous prison programs. (N.T. 7/5/16, 87-104). Counsel also introduced the following evidence to demonstrate Mr. Foust’s rehabilitation during his incarceration:

- a. Certificate in Paralegal Studies from the Blackstone Career Institute. (N.T. 7/5/16, 150:15-17).

- b. Yearly Course of Continuing Education Certificate as a Certified Peer Specialist, June 2015. (N.T. 7/5/16, 150:20-22).
- c. Certified Peer Specialist Training Certificate from Recovery Opportunity Center, 2014 (N.T. 7/5/16, 150:23-25).
- d. Support Specialist Certification, April 2014, including 76 hours of training. (N.T. 7/5/16, 150:25-151:2).
- e. A Certificate of Awesomeness for Presentation Mindfulness, May 2016. (N.T. 7/5/16, 149:21-22).
- f. QPR Gatekeeper Certificate for Suicide Prevention Gatekeeper Program. (N.T. 7/5/16, 149:23-24).
- g. Emotional Balance Group Certificate of Completion, 2016. (N.T. 7/5/16, 150:1-2)
- h. Act 143 Victim's Awareness Class Certificate of Completion, May 2016. (N.T. 7/5/16, 150:3-5).
- i. Green Environment Certificate of Completion, March 2016 (N.T. 7/5/16, 150:6-9).
- j. Emotional Balance Group Certificate of Completion, October 2015. (N.T. 7/5/16, 150:10-11).

- k. Certificate of Exceptional Achievement for the preparation of two dogs through the prison's program training support dogs. (N.T. 7/5/16, 151:3-6, 13-15).
- l. Certificate of Completion on First Annual Day of Responsibility at SCI Albion, January 2013. (N.T. 7/5/16, 151:7-9).
- m. Peer Leader in Low Intensity Violence Prevention Class, 2011. (N.T. 7/5/16, 151:16-18).
- n. Completion of hundreds of hours of instruction in business practices. (N.T. 7/5/16, 151:22-152:17).
- o. Completion of Study Course for Custodial Maintenance, 2006. (N.T. 7/5/16, 152:18-19).
- p. Student of the Year Certificate from SCI Albion's Education Department, 2005. (N.T. 7/5/16, 152:20-21).
- q. Violence Prevention Group Certificate of Completion, 2003. (N.T. 7/5/16, 152:22-23).
- r. AOD Group Therapy Certificate of Completion, 2002 (N.T. 7/5/16, 152:24-25).
- s. Classroom Instructor Aid, 2002. (N.T. 7/5/16, 153:1-3).
- t. Stress and Anger Management Certificate of Completion, 1997. (N.T. 7/5/16, 153:4-5).

- u. Mental Health First Aid Certificate of Completion, May 2016. (N.T. 7/5/16, 153:10-12).
- v. Several Vocational Training Certificates (insulation, vinyl fencing, etc.). (N.T. 7/5/16, 152:13-19)

6. Notwithstanding that evidence, on July 5, 2016, Mr. Foust was resentenced to two consecutive terms of 30 years to life, a *de facto* life without parole sentence of 60 years to life. (Re-Sentence Order 2, July 5, 2016) (“The total aggregate sentence imposed is a term of imprisonment of 60 years to Life.”).

7. Judge White found that Mr. Foust should be eligible for parole, while at the same time acknowledging that a sentence of 60 years to life is a *de facto* life without parole sentence. ((N.T. 7/5/16, 170:1-5) (Mr. Foust “has earned the opportunity to be considered for parole at some time in his life, if he lives long enough.”)).

8. In resentencing Mr. Foust, Judge White did not find Mr. Foust was one of the rare and uncommon juveniles whose crime reflected irreparable corruption, irretrievable depravity, or permanent incorrigibility—the only class of juveniles for whom a life (or *de facto* life) sentence is permissible. *Montgomery*, 577 U.S. at 195, 208-09, 213.

9. To the contrary, Judge White expressly found that Mr. Foust “convinced [him] that [he’s] trying . . . [and] doing some good with [his] life in the prison.” (N.T. 7/5/16, 172:17-20.)

10. In fact, Judge White expressly found “a significant change in his person between the time of his sentencing at age 18 and his person today.” (N.T. 7/5/16, 160:20-161:2). Judge White further concluded that Mr. Foust had “demonstrated remorse” for his crimes and “[m]ore importantly, he’s demonstrated a sincere effort to rehabilitate” and made “very substantial strides at rehabilitation.” (N.T. 7/5/16, 168:12-169:7).

11. Despite these findings, the resentencing court concluded that the offenses themselves were determinative of the *de facto* life without parole sentence. (N.T. 7/5/16, 172:20-23).

12. On July 15, 2016, Mr. Foust filed a post-sentence motion challenging his sixty (60) years to life sentence as an unconstitutional life without parole sentence and an abuse of discretion. On July 19, 2016, Judge White denied the motion. (Order Den. Post-Sentence Mot., July 19, 2016).

13. On August 4, 2016, Mr. Foust appealed the sentence. Mr. Foust was represented on appeal by Pamela R. Logsdon Sibley, Marsha L. Levick, and Bradley S. Bridge. The Superior Court affirmed his sentence on February 21, 2018. *Commonwealth v. Foust*, 180 A.3d 416, 441 (Pa. Super. Ct. 2018). Mr. Foust,

represented by Marsha L. Levick, petitioned on March 23, 2018 for allowance of appeal, which was denied by the Pennsylvania Supreme Court on May 25, 2022. *Commonwealth v. Foust*, 279 A.3d 39 (Pa. 2022) (per curiam).

14. On June 19, 2018, the Pennsylvania Supreme Court granted review in *Commonwealth v. Felder* to consider “whether a discretionary term-of-years sentence [imposed upon a minor] may be so long as to amount to a *de facto* life sentence, thereby triggering the substantive and procedural protections afforded by *Miller* and its progeny.” 269 A.3d 1232, 1234-35 (Pa. 2022). Before the Pennsylvania Supreme Court decided *Felder*, the United States Supreme Court held in *Jones v. Mississippi* that a sentencing judge need not make a separate factual finding of permanent incorrigibility before imposing a sentence of life without parole upon a minor. 141 S. Ct. 1307, 1318-20 (2021). The *Jones* Court reaffirmed, however, the constitutionally mandated holdings of *Miller* and *Montgomery* that a life without parole sentence may not be imposed upon a youth whose crime reflects transient immaturity:

That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.

Id. at 1315 n.2. Guided by *Jones*, the *Felder* Court decided that a judge must “consider the juvenile’s youth and attendant characteristics as required by *Miller*”

before imposing upon a minor a life (or *de facto* life) sentence. *Felder*, 269 A3.d at 1246.

15. The imposition of a *de facto* life sentence on Mr. Foust violates the Eight Amendment of the U.S. Constitution. Judge White was very clear that the reason for the imposition of that sentence was because of the nature of the crime. (N.T. 169:15-21 (“I cannot in any way rationalize a sentence that is not consecutive. This case—there are two distinct victims. . . . And the effect of that is that I have to, in my mind, run these sentences consecutively.”); *see also id.* 172:20-23 (“What drives this case is the fact that it was Murder 1, and there were two victims.”)). Such an analysis is improper as it ignores *Miller*’s requirement that factors other than the crime be considered in sentencing. As the Superior Court in *Commonwealth v. Schroat* held:

In total, the court’s opinion reflects a lack of consideration for Appellant’s youth, history, and rehabilitative needs in favor of an inordinate focus on the heinous act he committed as a minor. Appellant presented significant, uncontroverted evidence that he has matured and made steps toward rehabilitation while in prison. Yet, in the sentencing court’s view, Appellant has made no progress because he committed murder in 1992. This view directly contradicts the Supreme Court’s edict that “children who commit even heinous crimes are capable of change[.]”

272 A.3d 523, 530 (Pa. Super. Ct. 2022) (alteration in original) (quoting *Montgomery*, 577 U.S. at 212).

This issue is meritorious and apparent from the record. It can, therefore, be raised here. *Commonwealth v. Lang*, 275 A.3d 1072, 1080 (Pa. Super. Ct. 2022).

16. In addition, the *de facto* life sentence here violates the Pennsylvania Constitution’s prohibition against “cruel punishment.” Pa. Const. art. I, § 13. The Pennsylvania Constitutional protection against “cruel punishment” is broader than the United States’ Constitutional prohibition against “cruel *and* unusual punishment.” *See Felder*, 269 A.3d at 1247-48 (Donohue, J. concurring). As Justice Donohue noted in her concurrence in *Felder*:

Today’s decision does not foreclose further developments in the law as to the legality of juvenile life without parole sentences (or their *de facto* equivalent as alleged here) under the Pennsylvania Constitution nor as to how appellate courts will review the discretionary aspects of such sentences.

Id. at 1247.

17. Because of “children’s diminished culpability and heightened capacity for change . . . appropriate occasions for sentencing juveniles” to life without parole are “uncommon”—*i.e.*, *unusual*. *Miller*, 567 U.S. at 479. Such sentences, when imposed without discretion, thus violate the United States Constitution’s Eight Amendment’s protection from “cruel and unusual punishment.” *Id.* at 2475. Implicit in the Court’s decision is that such a punishment is also cruel. *See id.* Even if it were not unusual, a discretionary life without parole (or a *de facto* life) sentence is cruel where imposed without a factual finding of permanent incorrigibility, and thus

violates the Pennsylvania Constitution's broader protection from "cruel punishment." *See Felder*, 269 A.3d at 1247-48 (Donohue, J. concurring).

18. Even after *Jones* and *Felder*, the law remains the same: a life without parole sentence imposed upon a transiently immature youth is cruel and unusual punishment and hence unconstitutional under the Eighth Amendment (or the broader provision under the Pennsylvania Constitution). *See Jones*, 141 S. Ct. at 1315 n.2.

19. A judge sentencing a juvenile homicide offender cannot find that the offender's conduct was the result of transient immaturity and then sentence the offender to life without parole. That would not be constitutionally permissible any more than it would be permissible in a capital case to find that mitigators outweighed aggravators but nonetheless sentence the offender to death. *Jones*, 141 S. Ct. at 1315 n.2 (States may not "sentence a child whose crime reflects transient immaturity to life without parole."). The imposition of a life (or *de facto* life) sentence upon a transiently immature youth implicates the legality of the sentence, cannot be waived and, therefore, can be raised here. *Commonwealth v. Holmes*, 79 A.3d 562 (Pa. 2013).

20. The evidence here plainly established that Mr. Foust was redeemable. As a result, imposition of a life (or *de facto*) life sentence was improper and fundamentally at odds with both the federal and the Pennsylvania constitutions.

21. This petition is being filed within one year of the Pennsylvania Supreme Court's denial of Mr. Foust's appeal of his sentence.¹ *Commonwealth v. Foust*, 279 A.3d 39 (Pa. 2022) (per curiam). This Court thus has jurisdiction to consider the instant petition. 42 Pa. C.S.A § 9545 provides:

(b) Time for filing petition.

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final

WHEREFORE, Petitioner, by and through undersigned counsel, respectfully requests that this Honorable Court grant relief as his 60 years to life sentence constitutes a constitutionally defective *de facto* life sentence. He must be resentenced.

Dated: May 22nd, 2023

Respectfully submitted,



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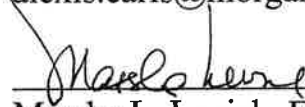
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¹ Mr. Foust reserves the right to amend this Petition.

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