

IN THE COURT OF COMMON PLEAS
OF LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA

No. CP-36-CR-0004224-2001

v.

MICHAEL LEE BOURGEOIS,

Defendant.

PETITION FOR POST-CONVICTION RELIEF
UNDER 42 Pa.C.S.A. § 9541 *et. seq.*

Petitioner Michael Bourgeois, through counsel, hereby files this Petition for Post-Conviction Relief under 42 Pa.C.S.A. §§ 9541-9546. Mr. Bourgeois respectfully requests that this Honorable Court grant the requested relief because his 80 year to life sentence constitutes a constitutionally defective *de facto* life sentence. He must be resentenced. Mr. Bourgeois states the following in support:

1. Mr. Bourgeois is currently incarcerated at SCI Mahanoy in Frackville, PA. He was seventeen (17) years old in 2001 when he was arrested and charged with two counts of first-degree murder and associated charges. He pled guilty on all counts and was sentenced by this Court on January 27, 2003, to two mandatory consecutive terms of life imprisonment without the possibility of parole. The Honorable Lawrence F. Stengel presided. Mr. Bourgeois was represented by James

Gratton from the Office of Public Defenders of Lancaster, Pennsylvania at plea and sentencing.

2. In 2012, in *Miller v. Alabama*, the United States Supreme Court held that mandatory life sentences for juveniles violated the Eighth Amendment to the United States Constitution's prohibition on cruel and unusual punishment. 567 U.S. 460, 465 (2012). On August 9, 2012, Mr. Bourgeois, represented by James J. Karl, filed a petition for Post-Conviction Relief in light of *Miller*. (See Post-Conviction Collateral Relief Act Mot., No. CP-36-CR-0004224-2001). While that motion was pending, the Supreme Court of Pennsylvania held in *Commonwealth v. Cunningham* that *Miller* does not apply retroactively. 81 A.3d 1, 11 (Pa. 2013). The PCRA court denied Mr. Bourgeois' petition based on *Cunningham*, and the Superior Court affirmed. *Commonwealth v. Bourgeois*, 120 A.3d 1067 (Pa. Super. Ct. 2015) (unpublished). Mr. Bourgeois, represented by Jeffrey Allen Conrad in the appellate courts, sought review from the Pennsylvania Supreme Court through a petition for allocatur. (See Pet. for Allowance of Appeal, No. 333 MAL 2015).

3. In 2016, in *Montgomery v. Louisiana*, the Supreme Court held that the States must apply *Miller* retroactively, overruling *Commonwealth v. Cunningham*. 577 U.S. 190, 212-13 (2016). In light of *Montgomery*, on February 24, 2016, the Supreme Court of Pennsylvania granted Mr. Bourgeois' petition for allowance of appeal, vacated the Superior Court's denial of the PCRA petition, and remanded for

further proceedings. *Commonwealth v. Bourgeois*, 120 A.3d 983 (Pa. 2016). The Pennsylvania Superior Court subsequently held that *Miller* and *Montgomery* applied to Mr. Bourgeois' sentence even though it was imposed as a term of a negotiated plea. *Commonwealth v. Bourgeois*, No. 1248 MDA 2014, 2016 WL 5210884, at *2 (Pa. Super. Ct. July 29, 2016). That court vacated his sentence and remanded to the Court of Common Pleas for resentencing. *Id.*

4. At resentencing, Jeffrey Conrad, attorney for Mr. Bourgeois, asserted that the "human brain is in constant maturation process as one goes through the teenage years" and that "the human brain continues to mature through age 25." (N.T. 140). Thus, "the impulsiveness, the recklessness of the teenage individual, the teenage human being, has to a certain degree mitigating factors in it intrinsically." (*Id.*) Mr. Conrad asserted that, because Mr. Bourgeois was only 17 at the time he committed the crimes, and because the teenage brain can undergo significant maturation and development over time, Mr. Bourgeois had a greater capacity than an adult to rehabilitate. (*Id.* at 140-41).

5. Mr. Conrad outlined the many ways that Mr. Bourgeois had, in fact, proven during his incarceration that he had grown and demonstrated rehabilitation. This included his extensive work with the prison's dog training program, (N.T. 57-61), his near-perfect behavioral record while in prison, (N.T. 79-87), the large number of correctional plan certifications and educational accomplishments Mr.

Bourgeois achieved, (N.T. 88-89, 92-94), as well as his extensive work in community service, rehabilitation programs, and religious involvement while serving as an inmate, (N.T. 74-75, 89-92, 94-97, 98-107).

6. Mr. Conrad also presented multiple witnesses attesting to the fact that Mr. Bourgeois was a model inmate and a model example of a remorseful human being who had repented for his crimes and was attempting to right the wrongs he had committed.

7. Mr. Bourgeois's older sister, Christen Tebbe, who was the daughter of one of the victims and a former middle school teacher, testified that in her experience with kids, Mr. Bourgeois, at the time of the offenses, was "a young 17" and was "physically . . . [a]nd . . . emotionally immature." (N.T. 15-16). She testified that during his time in prison, he "grew up" and went through "a great deal of spiritual growth" that she believed to be "absolutely sincere." (N.T. 18-19). She testified that Mr. Bourgeois even helped her with her own spiritual problems, started mentoring other young men, and has no anger for other siblings who refuse to have any contact with him. (*Id.* at 19).

8. Darrell Yoder, a former colleague of one of the victims and a member of the Lancaster community that was affected by Mr. Bourgeois' crimes, developed a relationship with Mr. Bourgeois after Mr. Bourgeois went to prison; he testified that Mr. Bourgeois had undergone significant growth in prison, was deeply

remorseful for the pain he inflicted, was doing everything he could to make a difference in others' lives by telling his story so they would not end up like him, and was not "the troubled boy" he once was. (N.T. 29, 33).

9. Richard Shipe, a former cellmate of Mr. Bourgeois, testified that Mr. Bourgeois was a "peacemaker," and even though he "was ten years younger" than Mr. Shipe, helped "guide me to be a better man." (N.T. 47). On a scale of one to ten, one being the worst of inmates he knew, ten being the best of inmates he knew, Mr. Shipe testified that he would rank Mr. Bourgeois as a ten and Bourgeois was "by far the best inmate I seen." (N.T. 46).

10. Mr. Bourgeois also testified on his own behalf as to the personal and spiritual growth he had experienced in prison, as well as how seriously he took atoning for his actions and trying to do good every day. Analogizing to 1 Corinthians 13:11, Bourgeois noted that "when I was a child, I spoke like a child, I acted like a child, I reasoned like a child." (N.T. 103). But then "I grew up," and "I put away those childish things." (*Id.*) "That child" who had committed the crimes, "who didn't know right from wrong and wanted things to go his own way and was so selfish was gone." (*Id.*)

11. On November 3, 2017, Mr. Bourgeois was resentenced by the Honorable David L. Ashworth to two consecutive terms of 40 years to life, and two

concurrent 10 to 20 year sentences, totaling a *de facto* life sentence of 80 years to life. (N.T. 159).

12. In resentencing Mr. Bourgeois, Judge Ashworth noted on the record that he had considered Mr. Bourgeois' "emotional maturity" and youth at the time he committed the crimes, as well as his conduct in prison (N.T. 156-57). Judge Ashworth made no findings that Mr. Bourgeois was one of the rare and uncommon juveniles who was irreparably corrupt, irretrievably depraved, or permanently incorrigible. Instead, he specifically found just the opposite, that Mr. Bourgeois had made "positive changes" while in prison and that his "conduct has been commendable as a model inmate." (N.T. 157-58).

13. Before resentencing Mr. Bourgeois to what he understood would be "a lifetime in prison," (N.T. 158), however, Judge Ashworth revealed that it was the nature of the crimes and their specific facts that were most influential in his sentencing decision, noting that "murder is incomparable in terms of its severity and irrevocability because life is over for the victims of the murderer," (N.T. 158).

14. Judge Ashworth's imposition of a term of two consecutive 40 year sentences and two concurrent 10 to 20 year sentences, totaling a sentence of 80 years to life, was an abuse of discretion. In imposing such a lengthy sentence, Judge Ashworth misapplied the controlling law for a juvenile resentencing, resulting in an excessive sentence that is manifestly unreasonable. *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)).

15. In *Miller* and *Montgomery*, the United States Supreme Court set forth the predicate factors that must be found before a life without parole sentence passes federal constitutional muster and can be imposed on a juvenile. See *Miller*, 567 U.S. at 477-78; *Montgomery*, 577 U.S. at 209-10. In *Montgomery*, the Court explained that *Miller* “bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” *Montgomery*, 577 U.S. at 209 (emphasis added).

16. 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 208-09. A life without parole sentence for a youth whose crime demonstrates “transient immaturity” is disproportionate and thus unconstitutional. *Id.* at 209.

17. In a subsequent decision clarifying and interpreting *Montgomery*, the Supreme Court, in *Jones v. Mississippi*, held that *Miller* did not impose a formal factfinding requirement of incorrigibility. *Jones v. Mississippi*, 141 S.Ct. 1307, 1313 (2021). In other words, in order for a life sentence for a juvenile to pass federal constitutional muster, a sentencing court does not need to make a specific finding on the record that the juvenile is incorrigible before imposing the life sentence. *Id.* (As long as the sentence was discretionary, it is “both constitutionally necessary and constitutionally sufficient”). That there is no such formal requirement, however, “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 (quoting *Montgomery*, 577 U.S. at 211).

18. In the wake of *Jones*, the Pennsylvania Supreme Court in *Commonwealth v. Felder*, vacated formal fact-finding requirements that it had imposed in *Commonwealth v. Batts* (“*Batts II*”). *Felder*, 269 A.3d 1232, 1244-45 (Pa. 2022). But it did not disturb the core holding of *Batts*, that a life without parole sentence for a juvenile is “disproportionate” when a sentencing court also makes a finding on the record that there is a possibility the juvenile can be rehabilitated. *Batts II*, 163 A.3d 410, 436-39 (Pa. 2017).

19. Mr. Bourgeois' cumulative sentence of 80 years to life would exceed his life expectancy and therefore is a *de facto* life sentence.

20. As set forth above, Judge Ashworth made no findings that Mr. Bourgeois was one of the rare individuals whose crimes reflected "permanent incorrigibility," "irreparable corruption" or "irretrievable depravity." *Montgomery*, 577 U.S. at 195, 208-09, 213. Moreover, counsel for Mr. Bourgeois presented uncontested record evidence that Mr. Bourgeois' crimes reflected transient immaturity, which Judge Ashworth acknowledged on the record when he said that Mr. Bourgeois had made "positive changes" while in prison. (N.T. 157-58.) Yet Judge Ashworth imposed what he understood and expressly acknowledged to be a *de facto* life sentence anyway. (See N.T. 158 (Mr. Bourgeois must be held responsible for his crime, even if it amounts to "a lifetime in prison.")). In so doing, Judge Ashworth was very clear that the reason for the imposition of this sentence was because of the *nature of the crime*: that Mr. Bourgeois had committed two murders. (See N.T. 157-58 ("I cannot accept the proposition that a juvenile offender who commits multiple murders must be afforded a volume discount. . . . [M]urder is incomparable in terms of its severity and irrevocability because life is over for the victims of the murderer.")).

21. This is not consistent with *Miller*, *Montgomery*, *Jones*, and *Batts II*. The law, as announced in those cases, is clear: a life without parole sentence imposed

upon a transiently immature youth is cruel and unusual punishment and hence unconstitutional under the Eighth Amendment. A juvenile homicide offender whose conduct was found to be the result of transient immaturity and who is determined to be capable of change cannot be sentenced to life without parole. Doing so would be akin to imposing a death sentence in a capital case despite a finding that mitigators outweighed aggravators—a constitutionally impermissible sentence. 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).

22. This issue is meritorious and apparent from the record. *Commonwealth v. Lang*, 275 A.3d 1072, 1080 (Pa. Super. Ct. 2022). 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).

23. In addition, the *de facto* life sentence here violates the Pennsylvania Constitution’s prohibition against “cruel punishment.” Pa. Const. art. I, § 13. The Pennsylvania Constitution’s protection against “cruel punishment” is broader than the United States’ Constitution’s prohibition against “cruel and unusual punishment.” 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.

269 A.3d at 1247.

24. 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 U.S. Constitution’s Eighth Amendment’s protection from “cruel and unusual punishment.” *Id.* at. 489. 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 despite an implicit finding of transient immaturity, and thus violates the Pennsylvania Constitution’s broader protection from “cruel punishment.” *See Felder*, 269 A.3d at 1247-48 (Donohue, J. concurring).

25. The evidence as presented at Mr. Bourgeois' resentencing hearing and as summarized herein plainly established that Mr. Bourgeois was redeemable and hence imposition of a life (or *de facto*) life sentence was improper.

26. On April 4, 2018, Mr. Bourgeois, represented by Marsha L. Levick and Brooke L. McCarthy of Juvenile Law Center, appealed his sentence to the Superior Court of Pennsylvania and contended that the sentence he received was a *de facto* life sentence which was improperly imposed because he had demonstrated rehabilitation. (*See Br. of Appellant*, No. 570 MDA 2018).

27. On April 12, 2019, the Superior Court upheld Mr. Bourgeois' sentence. *Commonwealth v. Bourgeois*, No. 570 MDA 2018, 2019 WL 1579816, at *1 (Pa. Super. Ct. Apr. 12, 2019) (unpublished). Mr. Bourgeois filed a Petition for Allowance of Appeal of the Superior Court's decision with the Pennsylvania Supreme Court. (*See Pet. for Allowance of Appeal*, No. 277 MAL 2019).

28. On May 25, 2022, the Pennsylvania Supreme Court denied Mr. Bourgeois' Petition for Allowance of Appeal. *Commonwealth v. Bourgeois*, 279 A.3d 35 (Pa. 2022). This petition is being filed within one year of the Pennsylvania Supreme Court decision in this case¹, so this Court has jurisdiction to consider the instant petition. 42 Pa. C.S.A. § 9545 provides:

(b) Time for filing petition.

¹ Mr. Bourgeois reserves the right to amend this 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 Michael Bourgeois, by and through counsel, respectfully requests that this Honorable Court grant relief from his 80 years to life sentence, which constitutes a constitutionally defective *de facto* life sentence. He must be resentenced.

Respectfully submitted,

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