
NO.
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Respondent,
V.
MICHAEL FOUST,
Petitioner.

**PETITION FOR ALLOWANCE OF APPEAL
FROM THE SUPERIOR TO THE SUPREME COURT**

Petition To Allow An Appeal From The February 21, 2018
Judgment Of The Superior Court Of Pennsylvania (No. 1118
WDA 2016) Affirming The July 5, 2016 Re-Sentencing Order of
the Court of Common Pleas of Venango County, No. CP-61-CR-
0000679-1993.

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March 23, 2018

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I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The opinion that the Superior Court of Pennsylvania issued on February 21, 2018 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 February 21, 2018, the Superior Court of Pennsylvania issued an opinion that concludes: "Judgment of sentence affirmed." *See* Appendix A at 49. While the Superior Court held *de facto* life sentences unconstitutional, it did not extend its holding to consecutive sentences; Petitioner appeals only that part of the Superior Court ruling that two consecutive 30 years to life sentences, for an aggregate sentence of 60 years to life, do not violate the Eighth Amendment. *See generally id.*

III. QUESTIONS PRESENTED

1. Is it unconstitutional to impose a sentence of 60 years to life on a juvenile, a *de facto* sentence of life imprisonment without the possibility of 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.

2. Did the Superior Court err in holding that a challenge to the sentencing court's decision to run sentences consecutively rather than concurrently, where the aggregate sentence is a *de facto* life without parole sentence, constitutes a challenge to the discretionary aspects of the sentence rather than a challenge to the legality of the sentence, which would be subject to *de novo* review?

Suggested Answer: Yes

3. Did the lower court err in holding that consecutive, lawful sentences that in the aggregate constitute an unconstitutional *de facto* life sentence are nevertheless insulated from scrutiny under the Eighth Amendment on appeal?

Suggested Answer: Yes

IV. STATEMENT OF THE CASE

Michael Foust, Appellant, was found guilty of two counts of first degree murder in 1994 at Docket No. CP-61-CR-0000679-1993 in the Venango County Court of Common Pleas. Mr. Foust's sentence was then vacated in the Venango County Court of Common Pleas on May 12, 2016 on Docket No. CP-61-CR-0000679-1993 after the United States Supreme Court issued its decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

The resentencing hearing was conducted by Judge H. William White of the Venango County Court of Common Pleas. Counsel was appointed on May 12, 2016 and the resentencing hearing occurred less than two months later on July 5, 2016. On June 24, 2016, defense counsel requested a continuance to allow her to conduct a more thorough investigation, to review the trial court record, and to obtain Mr. Foust's juvenile record.¹ The judge granted permission for counsel to access the juvenile court records, but denied her request for a continuance.² Counsel was never able to obtain the full juvenile records before the hearing; however, the judge had them in his personal file and then relied on them despite giving counsel less than an hour to review the documents during the course of the hearing (N.T. 7/5/16, 47:10-51:15).³

Counsel introduced the following evidence to demonstrate Mr. Foust's rehabilitation during his incarceration:

1. Certificate in Paralegal Studies from the Blackstone Career Institute. (N.T. 7/5/16, 150:15-17).
2. Yearly Course of Continuing Education Certificate as a Certified Peer Specialist, June 2015. (N.T. 7/5/16, 150:20-22).
3. Certified Peer Specialist Training Certificate from Recovery Opportunity Center, 2014 (N.T. 7/5/16, 150:23-25).
4. Support Specialist Certification, April 2014, including 76 hours of training. (N.T. 7/5/16, 150:25-151:2).

¹ A copy of the Motion to Continue and to Grant Access to Juvenile Records is attached hereto as Appendix D.

² A copy of the June 28, 2016 order is attached hereto as Appendix E.

³ The judge referred to the juvenile record provided as a copy of what was in his "personal" file. The clerk, agencies, and others no longer possessed a full copy of the file. (N.T. 7/5/16 47:10-51:4).

5. A Certificate of Awesomeness for Presentation Mindfulness, May 2016. (N.T. 7/5/16, 149:21-22).
6. QPR Gatekeeper Certificate for Suicide Prevention Gatekeeper Program. (N.T. 7/5/16, 149:23-24).
7. Emotional Balance Group Certificate of Completion, 2016. (N.T. 7/5/16, 150:1-2)
8. Act 143 Victim's Awareness Class Certificate of Completion, May 2016. (N.T. 7/5/16, 150:3-5).
9. Green Environment Certificate of Completion, March 2016 (N.T. 7/5/16, 150:6-9).
10. Emotional Balance Group Certificate of Completion, October 2015. (N.T. 7/5/16, 150:10-11).
11. Testimony from four individuals who work at SCI Albion where the defendant is incarcerated. (N.T. 7/5/16, 148:20-23).
12. 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).
13. Certificate of Completion on First Annual Day of Responsibility at SCI Albion, January 2013. (N.T. 7/5/16, 151:7-9).
14. Peer Leader in Low Intensity Violence Prevention Class, 2011. (N.T. 7/5/16, 151:16-18).
15. Completion of hundreds of hours of instruction in business practices. (N.T. 7/5/16, 151:22-152:17).
16. Completion of Study Course for Custodial Maintenance, 2006. (N.T. 7/5/16, 152:18-19).
17. Student of the Year Certificate from SCI Albion's Education Department, 2005. (N.T. 7/5/16, 152:20-21).
18. Violence Prevention Group Certificate of Completion, 2003. (N.T. 7/5/16, 152:22-23).
19. AOD Group Therapy Certificate of Completion, 2002 (N.T. 7/5/16, 152:24-25).
20. Classroom Instructor Aid, 2002. (N.T. 7/5/16, 153:1-3).
21. Stress and Anger Management Certificate of Complete, 1997. (N.T. 7/5/16, 153:4-5).
22. Mental Health First Aid Certificate of Completion, May 2016. (N.T. 7/5/16, 153:10-12).
23. Several Vocational Training Certificates (insulation, vinyl fencing, etc.). (N.T. 7/5/16, 152:13-19).

The Commonwealth did not introduce any rebuttal to the above evidence of rehabilitation. (N.T. 7/5/16, 154:7-9). Judge White then took a twenty-four-minute recess to deliberate. (N.T. 7/5/16, 154:10-13). In less than 30 minutes after resuming, Judge White explained his analysis and sentenced Mr. Foust to two thirty years to life consecutive terms. (N.T. 7/5/16, 154:13; 171:9-11; 174:3). The Court found that Mr. Foust had been rehabilitated but looked to 18 Pa.C.S.A. Section 1102.1 for guidance, which calls for a minimum sentence of 35 years; the court imposed two consecutive sentences of 30 years because two lives were lost. (N.T. 7/5/16, 169:5-17). The judge made no findings regarding whether Mr. Foust was one of the rare and uncommon juveniles whose crime reflected irreparable corruption, irretrievable depravity, or permanent incorrigibility.

On July 15, 2016, counsel for Mr. Foust filed a post-sentence motion challenging the imposition of two consecutive 30 years to life sentences as unconstitutional and an abuse of discretion.⁴ On July 19, 2016, the sentencing court denied the motion without a hearing.⁵ After a timely appeal, the Superior Court affirmed Mr. Foust's sentence:

As an initial matter, we hold that because the Supreme Court of the United States has severely limited the circumstances under which juvenile defendants may be sentenced to LWOP, a *de facto* LWOP sentence is illegal in certain circumstances when imposed upon a juvenile offender. We also conclude that, in cases such as the present

⁴ A copy of the July 15, 2016 post-sentence motion is attached hereto as Appendix F.

⁵ A copy of the July 19, 2016 order is attached hereto as Appendix G.

one that involves multiple killings, we must evaluate the sentence for each crime separately when determining if a term-of-years sentence constitutes a *de facto* LWOP sentence.

Commonwealth v. Foust, ___ A.3d ___, 2018 WL 988904, at *1 (Pa. Super. Ct. Feb. 21, 2018).

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

A. 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 first 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.

Absent clear guidance from this Court, individuals facing re-sentencing (or new sentencing hearings) throughout the Commonwealth will be subject to disparate sentencing rules and practices and many will be sentenced illegally under both *Miller v. Alabama*, 567 U.S. 460 (2012) and *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) [hereinafter *Batts II*]. To date, approximately a dozen individuals have been

re-sentenced to minimum sentences of at least 50 years to life.⁶ Over 200 juvenile

⁶ The Superior Court itself has issued contradictory opinions on how to apply *Miller* to such sentences as evidenced by its ruling in *Commonwealth v. Felder*, No. 660 EDA 2015, 2017 WL 6505643 (Pa. Super. Ct. Dec. 20, 2017), *petition for allowance of appeal filed*, No. 41 ELA 2018 (Pa. Jan. 19, 2018). **Michael Felder's** case is currently pending before this Court on a Petition for Allowance of Appeal and raises the related question of whether a sentence of 50 years to life imposed for one homicide constitutes a *de facto* life sentence requiring the protections announced in *Batts II*. No. 41 EAL 2018.

Counsel also knows of the following cases in which a minimum term of 50 years or more was imposed. **William Hines** was 15 years old at the time of the offense, and he was convicted of one count of first-degree murder; upon resentencing, 50 years to life was imposed. See <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-02-CR-0013322-1970>; see also *Commonwealth v. Hines*, 491 A.2d 907, 908, 913 (Pa. Super. Ct. 1985) (upholding first-degree conviction). **Donald Zoller** was 14 years old at the time of the offense, and he was convicted of three counts of first-degree murder; upon resentencing, 75 to life was imposed. See <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-02-CR-0004839-1986>; see also *Commonwealth v. Zoller*, No. 1676 WDA 2014, 2015 WL 6675508, at *1 (Pa. Super. Ct. Aug. 21, 2015) (describing procedural history as three counts of first-degree murder). **George Elliott** was 17 years old at the time of the offense and he was convicted of one count of first-degree murder; upon resentencing, 50 years to life was imposed. See <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-20-MD-0000004-1977>. **Michael Bourgeois** was 17 years old at the time of the offense, and he was convicted of two counts of first-degree murder; upon resentencing, 80 years to life was imposed. See <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-36-CR-0004224-2001>; see also *Commonwealth v. Bourgeois*, No. 1248 MDA 2014, 2015 WL 7571963 (Pa. Super. Ct. Mar. 31, 2015) (noting a guilty plea to two counts of first-degree murder). **Warner Batty** was 15 years old at the time of the offense, and he was convicted of one count of first-degree murder; upon resentencing, 50 years to life was imposed. See <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-67-MD-0001505-1975>; **Matthew Baldwin** was 17 years old at the time of the offense, and he was convicted of one count of first-degree murder and associated charges; upon sentencing under 1102.1, he was sentenced to 50 years to life for the homicide and the associated sentences were run concurrently. See <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-51-CR-0010832-2013>. **Kazair Gist** was 17 years old at the time of the offense, and he was convicted of one count of first-degree murder and associated charges; he was sentenced to 52 years to life for the homicide and the associated sentences were run concurrently. See <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-09-CR-0003596-2012>. **Raymarr Alford** was 17 years old at the time of the offense, and he was convicted of one count of first-degree murder and associated charges; he was sentenced to 62 years to life, 50 for the homicide and the associated sentences of 9, 1, and 2 years were each run consecutively. See <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-41-CR-0001969-2012>. **Marcus Rutter** was 16 years old at the time of the offense and he was sentenced to an aggregate minimum of 54 years for first-degree murder and associated charges including

lifers remain to be re-sentenced; countless other juveniles will face new sentencing hearings under Section 1102.1.

Despite an extensive review of the national jurisprudence on *de facto* life sentences, the Superior Court failed to provide clear guidance or rules for determining when a term of years sentence is a *de facto* life sentence; the court also did not address at all whether the protections of *Batts II* applied to Mr. Foust's re-sentencing hearing. The Superior Court held "the Supreme Court of the United States was more focused on the practical realities of a sentence than the name assigned to a sentence," and that "[c]ourts should not circumvent the prohibition on LWOP sentences by imposing lengthy term-of-years punishments that equate to the unlawful sanction." *Commonwealth v. Foust*, ___ A.3d ___, 2018 WL 988904, at *11 (Pa. Super. Ct. Feb. 21, 2018). However, the court provided no bright line to

conspiracy, robbery, burglary, receiving stolen property, and access device fraud. *See* <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-36-CR-0000287-2015>. **Ferock Smith** was 16 years old at the time of the offense, and he was convicted of one count of first-degree murder and associated charges; he was sentenced to 50 years to life for the homicide and the associated sentences were run concurrently. *See* <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-51-CR-0006875-2009>. **Akeem Page-Jones** was 16 years old at the time of the offense, and he was convicted of one count of first-degree murder and associated charges; he was sentenced to 60 years to life, 55 years for the homicide and an additional five years for the other charges. *See* <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-02-CR-0004298-2011>. **Ryan Hardwick** was 15 years old at the time of the offense, and he was convicted of one count of first-degree murder and associated charges; he was sentenced to 60 years to life for the homicide and the associated sentences were run concurrently. *See* <https://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-05-CR-0000485-2015>.

demarcate a term of years sentence, nor did the court articulate a method for determining this question. This creates an unreasonable risk of unconstitutional sentences being imposed on juveniles, who may receive a *de facto* life without parole sentence without the procedural protections established by this Court in *Batts II* for the imposition of such sentences. *See*, 163 A.3d at 415-16. Such illegal sentences might also be imposed at the whim of an individual judge’s view of life expectancy or what constitutes a “reasonable opportunity” for parole.

Additionally, the Superior Court ruling contradicts itself, leaving even greater risk of confusion among the lower courts. While the 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 Foust*, 2018 WL 988904, at *11 (citing *State v. Zuber*, 152 A.3d 197, 211 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017) (*Zuber* strikes down an aggregate minimum term of 55 years for separate indictments and offenses and an aggregate minimum of 68.25 for four robberies and a murder with associated charges); *Bear Cloud v. State*, 334 P.3d 132, 143 (Wyo. 2014) (finding an aggregate sentence of 45 years to be a *de facto* life sentence); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (striking an aggregate term that did not permit parole eligible for 52.5 years); *People v. Reyes*, 63 N.E.3d 884,

888 (Ill. 2016) (holding unconstitutional a *de facto* life sentence allowing for parole after 89 years as the result of consecutive terms for “offenses in a single course of conduct”)).

In upholding Mr. Foust’s 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 “[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 attempts to justify elevating Pennsylvania case law by “recogniz[ing 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*, 2018 WL 988904, at *14. 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 *12.

The lower court’s reliance on “volume discounts” also mischaracterizes the charges, treating them as if distinct incidents rather than stemming from the same incident. Moreover, none of the cases cited by the court regarding volume discounts

involved a juvenile defendant, and none included a discussion of how the unique attributes of youth counsel against an irrevocable sentence of life in prison.⁷ *Miller* and *Montgomery* 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 also subverts the Supreme Court’s recognition that “children who commit even heinous crimes are capable of change.” *Montgomery*, 136 S. Ct. at 736.

⁷ Further, the majority of cases addressed consecutive sentences for separate offenses rather than sentences arising from the same incident. See *Commonwealth v. Brown*, 145 A.3d 184, 188 (Pa. Super. Ct. 2016), *appeal denied*, 165 A.3d 892 (Pa. 2017) (concerned “whether a state probation period can be served while in federal imprisonment” and sentences resulted from multiple convictions after various periods of incarceration); *Commonwealth v. Bonner*, 135 A.3d 592, 605 (Pa. Super. Ct. 2016), *appeal denied*, 145 A.3d 161 (Pa. 2016) (multiple offenses and dockets over the course of several months); *Commonwealth v. Swope*, 123 A.3d 333, 341 (Pa. Super. Ct. 2015) (considered the consecutive nature of sentences resulting from probation violations and subsequent convictions years later); *Commonwealth v. Zirkle*, 107 A.3d 127, 134 (Pa. Super. Ct. 2014) (multiple burglaries at different locations on the same day). The only cited case that did not result from separate offenses was *Commonwealth v. Green*, 149 A.3d 43 (Pa. Super. Ct. 2016), *appeal denied*, 168 A.3d 1255 (Pa. 2017) which limited its “volume discount” discussion to the merger of underlying convictions for purposes of sentencing.

The lower court's focus on the facts and circumstances of Mr. Foust's crime undercuts *Miller*'s mandate that the youth's capacity to be rehabilitated must drive the choice of sentence, and unconstitutionally elevates retribution as a justification for a *de facto* life without parole sentence. Indeed, the judge explicitly acknowledged that the facts underlying Mr. Foust's crime determined his sentencing decision. (N.T. 7/5/16, 140:8-11) ("I could make a finding that . . . you have made a sincere effort to improve yourself. But it doesn't change the fact that *I have two victims here, and that's the driver in this case.*" (emphasis added)). Thus, Mr. Foust has been condemned to die in prison not based upon a finding—beyond a reasonable doubt—that he is permanently incorrigible but based explicitly on the facts and circumstances of his conviction. Reviewing each sentence individually circumvents the spirit 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.

B. 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 second 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*. If allowed to stand, the Superior Court's decision—while holding *de facto* life sentences unconstitutional—would nevertheless allow sentencers' to stack sentences in violation of *Miller*'s mandate and subject to an abuse of discretion standard on appeal.

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 generally 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 by incarceration 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 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 contravention of both *Miller* and *Batts II*.

VI. CONCLUSION

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

Respectfully submitted,

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Dated: March 23, 2018

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 3,712 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

Dated: March 23, 2018

/s/ Marsha L. Levick
Marsha L. Levick