

No. 626 MDA 2024

IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

MICHAEL LEE BOURGEOIS,

Appellant.

BRIEF FOR APPELLANT

Appeal from Final Order of April 8, 2024 Denying
PCRA Petition in the Lancaster County Court of Common Pleas,
Case No. CP-36-CR-0004224-2001

The Honorable David L. Ashworth, Judge Presiding.

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STATEMENT OF JURISDICTION

Pursuant to 42 Pa.C.S.A. § 742 and 234 Pa. Code § 910, this Court has exclusive appellate jurisdiction of this appeal, as it is an appeal from the April 8, 2024 final order of the Lancaster County Court of Common Pleas denying Appellant Michael Bourgeois’s Post-Conviction Relief Act Petition, Docket No. CP-36-CR-0004224-2001.

ORDER IN QUESTION

Mr. Bourgeois appeals from the April 8, 2024, Order issued by the Lancaster County Court of Common Pleas (“PCRA Court”) denying his Post-Conviction Relief Act Petition.¹ The Order states:

AND NOW, this 8th day of April, 2024, upon consideration of Michael Lee Bourgeois’ Amended PCRA Petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-46, and for the reasons set forth in this Court's Opinion of December 29, 2023, it is hereby ORDERED that Petitioner’s Amended PCRA Petition is DENIED.

SCOPE AND STANDARD OF REVIEW

In reviewing the PCRA Court’s denial of post-conviction relief, this Court must determine whether the record supports the PCRA Court’s findings and whether

¹ A copy of the April 8, 2024 Order is attached hereto as Appendix A. The PCRA Court’s August 21, 2024 1925(a) Memorandum is attached hereto as Appendix B. The PCRA Court’s December 29, 2023 Opinion and Notice of Intent to Deny PCRA Petition is attached hereto as Appendix C. Mr. Bourgeois’s August 16, 2024 Statement of Errors Complained of on Appeal is attached hereto as Appendix D.

its Order is otherwise free of legal error. *See, e.g., Commonwealth v. Fears*, 86 A.3d 795, 803 (Pa. 2014).

Factual findings by the PCRA Court that are supported by the record are given deference on appeal; however, this Court is not bound by factual findings that are not supported by the record. *See, e.g., Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009); *see also Commonwealth v. Benton*, 655 A.2d 1030, 1032 (Pa. Super. 1995) (“Only factual findings which are supported by the record are binding upon this court.”).

The PCRA Court’s legal conclusions are reviewed *de novo*. *See, e.g., Commonwealth v. Rios*, 920 A.2d 790, 810 (Pa. 2007).

STATEMENT OF THE QUESTIONS INVOLVED

1. Is the imposition of an 80 years to life sentence on a transiently immature youth unconstitutional under the Eighth Amendment of the U.S. Constitution and Article 1, Section 13 of the Pennsylvania Constitution?

Suggested answer: Yes.

2. Did the PCRA Court err in interpreting the Pennsylvania Constitution’s prohibition against “cruel punishment” co-extensively with the United States Constitution’s prohibition against cruel and unusual punishment?

Suggested answer: Yes.

3. Is Mr. Bourgeois’s *de facto* life sentence cruel under the Pennsylvania Constitution?

Suggested answer: Yes.

STATEMENT OF THE CASE

Mr. Bourgeois was seventeen 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.

In 2012, the United States Supreme Court held in *Miller v. Alabama* 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 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's petition based on *Cunningham*, and the Superior Court affirmed. *Commonwealth v. Bourgeois*, 120 A.3d 1067 (Pa. Super. 2015). Mr. Bourgeois sought review from the Pennsylvania Supreme Court through a petition for allocatur. (See Pet. for Allowance of Appeal, No. 333 MAL 2015).

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's Petition for Allowance of Appeal, vacated the Superior Court's denial of the PCRA petition, and remanded for further proceedings. *Commonwealth v. Bourgeois*, 132 A.3d 983 (Pa. 2016). The Pennsylvania Superior Court subsequently held that *Miller* and *Montgomery* applied to Mr. Bourgeois's sentence even though it was imposed as a term of a negotiated plea. *Commonwealth v. Bourgeois*, No. 1248 MDA 2014, 2016 WL 5210884, at *1-2 (Pa. Super. July 29, 2016). That court vacated his sentence and remanded to the Court of Common Pleas for resentencing. *Id.* at *2.

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. 11/27/17, 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).

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, (*id.* at 57-61),

his near-perfect behavioral record, (*id.* at 79-87), and the large number of correctional plan certifications and educational accomplishments he achieved (*id.* at 88-89, 92-94). It also included his extensive work in community service, rehabilitation programs, and religious involvement. (*Id.* at 74-75, 89-92, 94-107).

Multiple witnesses also attested to the fact that Mr. Bourgeois had been a model prisoner who demonstrated remorse and a desire to atone for the wrongs he committed in his youth. Mr. Bourgeois's older sister Christen Tebbe, the daughter of one of the victims and a former middle school teacher, testified that, in her experience working with children, Mr. Bourgeois was "a young 17" and was "physically . . . [a]nd . . . emotionally immature." (*Id.* at 15-16). She testified that, during his time in prison, he "grew up" and went through "a great deal of spiritual growth," which she believed to be "absolutely sincere." (*Id.* at 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 contact with him. (*Id.* at 19).

Darrell Yoder, a former colleague of one of the victims and a member of the Lancaster community affected by Mr. Bourgeois's crimes, developed a relationship with Mr. Bourgeois after Mr. Bourgeois went to prison. (*Id.* at 26-28). 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. (*Id.* at 29, 33).

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." (*Id.* at 47). Mr. Shipe testified that Mr. Bourgeois was "by far the best inmate I seen." (*Id.* at 46).

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." (*Id.* at 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.*)

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 80 years to life. (*Id.* at 159). Because Mr. Bourgeois will be at least 97 years old when he is released—well beyond the average life expectancy for males in the United States of 74.8 years—his sentence is a *de*

facto life sentence. *Life Expectancy*, Nat'l Ctr. for Health Stats. (May 2, 2024), <https://www.cdc.gov/nchs/fastats/life-expectancy.htm>.

In resentencing Mr. Bourgeois, Judge Ashworth noted on the record that he had considered Mr. Bourgeois's "emotional maturity" and youth at the time he committed the crimes, as well as his conduct in prison (*Id.* at 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, noting that Mr. Bourgeois had made "positive changes" while in prison and that his "conduct has been commendable as a model inmate." (*Id.* at 157-58).

Before resentencing Mr. Bourgeois to what he understood would be "a lifetime in prison," (*id.* at 158), however, Judge Ashworth revealed that it was the nature and specifics of the crimes 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." (*Id.* at 158).

On April 4, 2018, Mr. Bourgeois appealed his sentence to the Superior Court of Pennsylvania and contended that the sentence he received was a *de facto* life sentence that was improperly imposed because he had demonstrated rehabilitation. (*See Br. of Appellant*, No. 570 MDA 2018).

On April 12, 2019, the Superior Court upheld Mr. Bourgeois's sentence. *Commonwealth v. Bourgeois*, No. 570 MDA 2018, 2019 WL 1579816, at *1 (Pa. Super. Apr. 12, 2019). 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).

On May 25, 2022, the Pennsylvania Supreme Court denied Mr. Bourgeois's Petition for Allowance of Appeal. *Commonwealth v. Bourgeois*, 279 A.3d 35 (Pa. 2022).

On May 23, 2023, Mr. Bourgeois filed a Post-Conviction Relief Act Petition in the Lancaster County Court of Common Pleas. On April 8, 2024, the PCRA Court entered an Order denying his Petition. Mr. Bourgeois timely appealed the Order.

SUMMARY OF THE ARGUMENT

Mr. Bourgeois's sentence is unconstitutional under the Eighth Amendment of the U.S. Constitution because it does not adequately take into consideration his demonstrated rehabilitation or scientific research on juvenile brain development. Even if Mr. Bourgeois's sentence did not violate the Eighth Amendment or United States Supreme Court precedent, it would still be excessive under Article 1, § 13 of the Pennsylvania Constitution. Historical evidence and comparison to the interpretation of the constitutions of other states with similarly worded provisions demonstrates that the Pennsylvania Constitution's prohibition on cruel punishment

is broader than that of the U.S. Constitution. Under the broader Pennsylvania standard, Mr. Bourgeois's sentence is cruel because it is harsher than necessary to accomplish any rehabilitative or deterrent purpose.

ARGUMENT

I. MR. BOURGEOIS'S *DE FACTO* LIFE WITHOUT PAROLE SENTENCE IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE 1, § 13 OF THE PENNSYLVANIA CONSTITUTION

The aggregate 80 years to life sentence issued to Mr. Bourgeois violates the Eighth Amendment of the U.S. Constitution and Article 1, § 13 of the Pennsylvania Constitution. The sentence is unconstitutional because the sentencing court disregarded Mr. Bourgeois's capacity for rehabilitation and emphasized the nature of the offense.

A. The Sentencing Court Failed To Meaningfully Consider Mr. Bourgeois's Youth And Attendant Circumstances

In resentencing Mr. Bourgeois, Judge Ashworth noted on the record that he had considered Mr. Bourgeois's "emotional maturity" and youth at the time he committed the crimes, as well as his conduct in prison. (N.T. 11/27/17, 156-157). 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. *See Montgomery v. Louisiana*, 577 U.S. 190, 208-09 (2016) (holding that the imposition of a life without parole sentence may only be

imposed on children who are permanently incorrigible, irreparably corrupt, or irretrievably depraved).

In *Miller v. Alabama*, the Supreme Court held that a mandatory life without parole sentence for juvenile offenders violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Miller v. Alabama*, 567 U.S. 460, 465 (2012). *Miller* notes the importance of “distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’” *Id.* at 479-80 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). *Miller* requires sentencers to “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” 567 U.S. at 480.

Our Supreme Court reiterated the importance of age in *Commonwealth v. Felder*, explaining that although the Commonwealth does not have “the burden of proving beyond a reasonable doubt that the juvenile is permanently incorrigible,” a sentencing court must “consider the mitigating qualities of youth” as required by *Miller*. 269 A.3d 1232, 1244-45 (Pa. 2022) (quoting *Miller*, 567 U.S. at 476). While the PCRA Court correctly stated that the court “was not required to make any specific finding of permanent incorrigibility, irreparable corruption, or irretrievable depravity” in resentencing Mr. Bourgeois, (Appendix C at C19), it erred by failing to meaningfully consider his unique capacity for rehabilitation as a juvenile offender.

The sentencing court rattled off many of the factors the Pennsylvania Supreme Court endorsed as relevant when considering a life without parole sentence, including Mr. Bourgeois's age and maturity at the time of the offense and the "positive changes" he had made in prison. (N.T. 11/27/17, 155-158). Notwithstanding, the court resentenced Mr. Bourgeois to what "a lifetime in prison," (*Id.* at 158), in part due to the nature of Mr. Bourgeois's offenses. Judge Ashworth noted that the specific facts of the crimes were the 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." (*Id.*)

The sentencing court's analysis is improper as it ignores *Miller*'s requirement that factors other than the crime be considered in sentencing. As this Court held in *Commonwealth v. Schroat*:

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[,]" is manifestly unreasonable, and an abuse of discretion.

272 A.3d 523, 530 (Pa. Super. 2022) (alteration in original) (quoting *Montgomery*, 577 U.S. at 212). Here too, the sentencing court placed an "inordinate focus on the

heinous act he committed as a minor” without giving any due consideration to Mr. Bourgeois’s “youth, history, and rehabilitative needs.” *Id.*

B. Because The Sentencing Court Failed To Meaningfully Consider The Unique Rehabilitative Capacity Of Juvenile Offenders, The *De Facto* Life Sentence Is Disproportionate And Unconstitutional

When the sentencing court imposed Mr. Bourgeois’s sentence, it explained that it “must look to traditional sentencing considerations as outlined in the applicable statutes and the case law.” (N.T. 11/27/17, 151-152). However, sentencing juvenile offenders requires a deviation from “traditional” considerations under both *Miller* and *Jones*. *Miller*, 567 U.S. at 471 (“*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing.”); *Jones v. Mississippi*, 593 U.S. 98, 105 (2021) (“[T]his Court has stated that youth matters in sentencing.”).

In sentencing Mr. Bourgeois, the court did not consider the research and character developments unique to juvenile offenders and imposed a disproportionate sentence. Research establishes that adolescent brains are characterized by their exceptional neuroplasticity, which *Miller* recognized as both creating a unique opportunity for rehabilitation and diminishing the culpability of a juvenile offender. 567 U.S. at 471-72; *see also* Chiye Aoki et al., *Adolescence as a Critical Period for Developmental Plasticity*, 1654 *Brain Rsch.* 85, 85 (2017). The *Miller* Court emphasized the importance of the growing body of scientific and social scientific

research demonstrating that few juvenile offenders will “develop entrenched patterns of problem behavior” and continue to pose a societal danger as adults. 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 570).

Youthful characteristics have long been mitigating factors in homicide cases for adult offenders, but *Miller* made clear that consideration of age in the context of juvenile offenders goes beyond the traditional question of whether a young defendant acted impetuously or brashly. Juvenile offenders’ ongoing brain development impacts their capacity for rehabilitation and their culpability. As *Miller* held, “we require [courts] to take into account how children are different.” 567 U.S. at 480.

Jones later clarified: “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.” *Jones*, 593 U.S. at 106 n.2 (quoting *Montgomery*, 577 U.S. at 211). 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.* at 104-5. Under this framework, the sentencing court still must meaningfully evaluate the neuroscientific research and character

development of the juvenile. This is particularly true in cases where, as here, the defendant has grown and demonstrated rehabilitation and maturation.

II. THE PENNSYLVANIA PROHIBITION AGAINST CRUEL PUNISHMENT IS NOT COEXTENSIVE WITH THE FEDERAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Pennsylvania is not “bound by the decisions of the United States Supreme Court which interpret similar (yet distinct) federal constitutional provisions.” *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991). The Federal Constitution establishes a minimum level of rights and protections, but states have the power to provide broader relief “beyond the minimum floor which is established by the federal Constitution.” *Id.* (citing *Commonwealth v. Sell*, 470 A.2d 457, 467 (Pa. 1983)). To maintain autonomy, states are encouraged to engage in their own independent analysis “in drawing meaning from their own state constitutions.” *Id.*

A. Mr. Bourgeois Has Not Waived His Claim That His *De Facto* Life Sentence Is Unconstitutional Under The Pennsylvania Constitution

Mr. Bourgeois’s claim that his aggregate sentence is unconstitutional under the Pennsylvania Constitution has not been previously litigated: he did not raise such a challenge in either his post-sentence motion or his direct appeal. *See* 42 Pa.C.S.A. §§ 9543(a)(3), 9544 (an issue is previously litigated if “the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue”).

Moreover, Mr. Bourgeois has not waived his claim that his aggregate sentence is illegal under the Pennsylvania Constitution because “challenges to the legality of a judgment of sentence can not be waived.” *Commonwealth v. Jones*, 932 A.2d 179, 182 (Pa. Super. 2007). Any sentence that “the sentencing court had no jurisdiction or authority to impose” is an illegal sentence. *Commonwealth v. Barnes*, 151 A.3d 121, 126 (Pa. 2016). Because Mr. Bourgeois’s sentence is prohibited by the Pennsylvania Constitution, it is an illegal sentence. *See id.* at 126-27 (finding a challenge to a sentence under *Alleyne v. United States*, 570 U.S. 99 (2013), is a challenge to the legality of the sentence). Mr. Bourgeois therefore did not waive his claim that his aggregate sentence is illegal under the Pennsylvania Constitution.

B. Mr. Bourgeois’s *De Facto* Life Sentence Violates The Pennsylvania Constitutional Prohibition Against Cruel Punishments

Even if this Court concludes that Mr. Bourgeois’s sentence was permissible and the sentencing process was sufficient under the United States Constitution, his *de facto* life sentence violates the Pennsylvania Constitution’s prohibition against “cruel punishments,” Pa. Const. art. 1, § 13 (“Section 13”), which is broader than the United States Constitution’s prohibition against “cruel *and* unusual punishments,” U.S. Const. amend VIII (emphasis added). The body of Pennsylvania case law interpreting these two provisions coextensively must be reconsidered because it has failed to consider the factors set forth by the Pennsylvania Supreme Court for analyzing provisions of the Pennsylvania Constitution.

The Pennsylvania Supreme Court has stated that it will not depart from the Eighth Amendment in interpreting Section 13 because there is no unique Pennsylvania history to the “cruel” punishments provision. *See, e.g., Commonwealth v. Bonner*, 135 A.3d 592, 597 n.18 (Pa. Super. 2016) (“‘The Pennsylvania prohibition against cruel and unusual punishment is coextensive with the Eighth and Fourteenth Amendment of the United States Constitution.’ Therefore, we do not conduct a separate analysis of Appellant’s state constitutional claim.” (quoting *Commonwealth v. Yasipour*, 957 A.2d 734, 743 (Pa. Super. 2008))). In support of this conclusion, the Pennsylvania Supreme Court surmised that, because Pennsylvania law had originally tolerated the death penalty, the punishment could not be considered “cruel” today. *Commonwealth v. Zettlemyer*, 454 A.2d 937, 967-69 (Pa. 1982).

Since *Zettlemyer*, the Pennsylvania Supreme Court has “set forth certain factors to be briefed and analyzed by litigants in each case . . . implicating a provision of the Pennsylvania constitution.” *Edmunds*, 586 A.2d at 895. Those factors include: “1) the text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.” *Id.* This Court must conduct an analysis

of Section 13 through the lens of *Edmunds* to determine whether the current interpretation of this provision is sound.

1. The plain text of Section 13 supports an independent meaning

The Pennsylvania provision is similar to the Federal Constitution, but it diverges in one area: it prohibits only cruel punishment, unlike the Federal Constitution’s prohibition of punishment that is cruel and unusual. A plain reading makes clear that these distinct phrases cannot be interpreted coextensively. *Cf. Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (basic principle of statutory interpretation is that courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed”); *Stollar v. Cont’l Can Co.*, 180 A.2d 71, 74 (Pa. 1962) (“To fail to give effect to all of the provisions of a statute or to give them an unreasonable or absurd construction violates the fundamental rules of statutory interpretation.”).

2. The history of Section 13 is starkly different from that of the Eighth Amendment

When a court endeavors to interpret a provision of the Pennsylvania Constitution, it must also evaluate the history of the provision. *Edmunds*, 586 A.2d 887 at 390. The history of Section 13 demonstrates that its drafters had a unique focus on deterrence and reform that mandates a unique interpretation of the

provision. It also demonstrates that the drafters had a distinct interpretation of “cruelty.”

Whereas the United States Constitution’s Eighth Amendment has its foundations in English criminal law, the Pennsylvania Constitution’s Section 13 is based on an enlightenment philosophy. *See* Kevin Bendesky, “*The Key-Stone to the Arch*”: *Unlocking Section 13’s Original Meaning*, 26 Univ. Pa. J. Const. L. 201, 208-218 (2023), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1853&context=jcl> (discussing the disparate historical underpinnings of the Eighth Amendment and Section 13). This is a meaningful distinction: as students of the Enlightenment, drafters of the Pennsylvania Constitution believed that the purpose of punishment was to deter and reform, that punishments ought to be proportional to crimes, and, most importantly, that no punishment was permissible unless it was “necessary” for these purposes. *See id.* at 219-235.

In contrast, the Eighth Amendment originally sought to prohibit only methods of punishment armed with a “(cruel) ‘superadd[ition]’ of ‘terror, pain, or disgrace.’” *Bucklew v. Precythe*, 587 U.S. 119, 133 (2019) (alteration in original) (quoting *Baze v. Rees*, 553 U.S. 35, 48 (2008)). “In all the[] contemporaneous discussions,” surrounding the enactment of the Declaration of Rights, as well “as in the prologue of the Declaration,” wrote Justice Scalia, “a punishment is not considered objectionable because it is disproportionate.” *Harmelin v. Michigan*, 501 U.S. 957,

973 (1991). It is objectionable “because it is ‘out of [the Judges’] Power,’ ‘contrary to Law and ancient practice,’ without ‘Precedents’ or ‘express Law to warrant,’ ‘unusual,’ ‘illegal,’ or imposed by ‘Pretence to a discretionary power.’” *Id.* (alteration in original) (first quoting 1 Journals of the House of Lords 367 (May 31, 1689); and then quoting 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

The Federal Constitution’s framers knew that, of the state constitutions, “two prohibited ‘cruel’ punishments, Pa. Const. Art. IX, § 13 (1790); S.C. Const. Art. IX, § 4 (1790). The new Federal Bill of Rights, however, tracked Virginia’s prohibition of ‘cruel *and* unusual punishments.’” *Harmelin*, 501 U.S. at 966. Then, shortly after Congress proposed the Bill of Rights, it promulgated the nation’s first Penal Code, which permitted excessive punishments. In *Harmelin*, Justice Scalia conceded that a long mandatory prison sentence “may be cruel,” but held that the punishment was outside the purview of the Eighth Amendment only because it “was not unusual in the constitutional sense.” *Id.* at 994.

By comparison, in 1776, the Commonwealth’s first Constitution mandated proportional punishments and demanded less “sanguinary”—that is, less “cruel; bloody; and mur[d]erous”—ones. Bendesky, *supra*, at 213 (alteration in original) (quoting Robert James Turnbull, *A Visit to the Philadelphia Prison* 6 (1797)). In 1790, the Commonwealth adopted a new Constitution—its current constitution—prohibiting “cruel punishments.” *Id.* at 214. In 1793, the Commonwealth’s first

governor, Thomas Mifflin, asked William Bradford² to study the necessity of capital punishments. *Id.* at 241. It was “from satisfactory evidence,” Mifflin told the Assembly, “that the experiment in rendering the penal laws of Pennsylvania less sanguinary, has been attended with an obvious decrease of the number and atrocity of offences.” *Id.* at 242 (quoting S. Journal, 17th Assemb. 14 (Pa. 1792)). Mifflin, in referring the legislature to Bradford’s work, declared that “while we consider the prevention of crimes to be the sole end of punishment, we, also, admit, that every punishment, which is not absolutely necessary for that purpose, is an act of tyranny and cruelty.” *Id.*

Early Pennsylvania case law confirms that deterrence and reformation were indeed the guiding principles of Pennsylvania criminal law. *See, e.g., James v. Commonwealth*, 12 Serg. & Rawle 220, 235 (Pa. 1825) (holding the state could not punish a “common scold” by plunging her into water three times with a “ducking stool,” rejecting that punishment as incompatible with goals of reformation and deterrence, which were “the just foundation and object of all punishments”); *Commonwealth v. Ritter*, 13 Pa. D. & C. 285, 290, 293 (Pa. Ct. of Oyer & Terminer 1930) (rejecting retribution as a justification for punishment because it “looks to the

² William Bradford served as both the Pennsylvania Attorney General and a Supreme Court Justice of the Commonwealth. In the former position, he attended the 1790 Constitutional Convention. Not long after, he became the second Attorney General of the United States, appointed by George Washington. Bendesky, *supra*, at 220.

past, not the future, and rests solely upon the foundation of vindictive justice” and instead holding that “the two elements which should be taken into consideration are those of restraint and deterrence”). The Pennsylvania Supreme Court later quoted with approval *Ritter*’s “demonstrat[ion] that the necessity for an appropriate punishment in criminal cases is chiefly in the interest of the protection of society.” *Commonwealth v. Carluccetti*, 85 A.2d 391, 400 (Pa. 1952) (Stearne, J., dissenting). The starkly different histories of Section 13 and the Eighth Amendment require a re-evaluation of *Zettlemyer* and a determination that the two provisions are not co-extensive.

3. Other jurisdictions have interpreted similar provisions in their own state constitutions as broader than the Eighth Amendment

Like Pennsylvania, several other jurisdictions have diverted from the language of the Eighth Amendment and banned “cruel punishments,” or “cruel or unusual punishments.” Courts in many of those states have interpreted these provisions as providing greater protections than the Eighth Amendment. *See e.g.*, *State v. Vang*, 847 N.W.2d 248, 263 (Minn. 2014) (holding the difference between Minnesota’s nearly identical “cruel or unusual” punishment provision as “‘not trivial’ because the ‘United States Supreme Court has upheld punishments that, although . . . cruel, are not unusual’” (quoting *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998))); *Hale v. State*, 630 So. 2d 521, 526 (Fla. 1993) (“The federal constitution protects against sentences that are *both* cruel and unusual. The Florida

Constitution, arguably a broader constitutional provision, protects against sentences that are *either* cruel or unusual.”); *Commonwealth v. Concepcion*, 164 N.E.3d 842, 855 (Mass. 2021) (noting that Article 26 of the Massachusetts Constitution “affords defendants greater protections than the Eighth Amendment”); *People v. Anderson*, 493 P.2d 880, 883 (Cal. 1972), *superseded by constitutional amendment*, Cal. Const. art. 1, § 27 (rejecting the idea that the California constitution was “coextensive” with the Eighth Amendment, and holding that use of the disjunctive “or” in the state constitution was significant and purposeful); *People v. Baker*, 229 Cal. Rptr. 3d 431, 442 (Cal. Ct. App. 2018) (California Court of Appeal construed the state constitutional provision separate from its federal counterpart and found that the distinction between Eighth Amendment wording and the California Constitution was “purposeful and substantive rather than merely semantic” (quoting *People v. Carmony*, 26 Cal. Rptr. 3d 365, 378 (Cal. Ct. App. 2005))); *see also Burnor v. State*, 829 P.2d 837, 839-40 (Alaska Ct. App. 1992) (applying its own “single test to determine whether a statutory penalty constitutes cruel and unusual punishment”).

The Washington Supreme Court has also interpreted its state constitutional prohibition of “cruel punishment” as more protective than the Eighth Amendment, and its reasoning is instructive here. *State v. Fain*, 617 P.2d 720, 723 (Wash. 1980) (en banc). In *Fain*, the court reasoned that “[e]specially where the language of our constitution is different from the analogous federal provision, we are not bound to

assume the framers intended an identical interpretation.” *Id.* This was clear from historical evidence that revealed that the Framers viewed the word “cruel” as sufficient to express their intent and “refused to adopt an amendment inserting the word unusual.” *Id.* In 2018, after an *Edmunds*-like analysis, the court confirmed its broader interpretation in the context of youth sentencing. *State v. Bassett*, 428 P.3d 343, 346 (Wash. 2018). It reasoned that “on its face” the Washington Constitution offers greater protection because it prohibits “merely cruel” punishments. *Id.* at 349 (quoting *State v. Dodd*, 838 P.2d 86, 96 (Wash. 1992)). The court also recognized how the state has evolved, through legislation and case law, to recognize that children warrant special protection. *Id.* at 349-50. The court reasoned that, in the context of juvenile sentencing, the Washington Constitution provided greater protection than the Eighth Amendment. *Id.*

More recently, in *State v. Kelliher*, decided after *Jones*, the North Carolina Supreme Court found that it violates both the Eighth Amendment and “article I, section 27 of the North Carolina Constitution to sentence a juvenile homicide offender” who is “‘neither incorrigible nor irredeemable’ to life without parole.” *State v. Kelliher*, 873 S.E.2d 366, 370 (N.C. 2022). The court found that the North Carolina Constitution, which prohibits “cruel *or* unusual punishments,” N.C. Const. art. I, § 27 (emphasis added), offers protections that are distinct and broader than those provided under the Eighth Amendment, *Kelliher*, 873 S.E.2d at 382. The court

noted the different language and presumed that the Framers of the North Carolina Constitution intentionally chose the words “cruel or unusual punishment” to prohibit punishments that were either cruel or unusual, “consistent with the ordinary meaning of the disjunctive term ‘or.’” *Id.* The court looked at the text of the state constitution, precedent regarding the state supreme court’s role in interpreting the constitution, and the analysis used in interpreting the federal constitution in holding that the state constitution was not in “lockstep” with the Eighth Amendment. *Id.* at 383. The court also noted how its interpretation changed to conform with contemporary understandings of adolescent cognitive development. *Id.* at 384.

Notably, the North Carolina Supreme Court further held that any sentence, or combination of sentences, which require youth to serve more than 40 years in prison before parole eligibility, constitutes a *de facto* life without parole sentence “because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison” and that such sentences also violated the Eighth Amendment. *Id.* at 370. The court reasoned that adopting a position that under *Jones*, “the Eighth Amendment requires nothing more than that ‘sentencing courts . . . take children’s age into account before condemning them to die in prison’” would repudiate core principles articulated in *Miller* and *Montgomery*. *Id.* at 379 (alteration in original) (quoting *Montgomery*, 577 U.S. at 209). This interpretation is “irreconcilable” with the U.S. Supreme Court’s own

stated characterization of its holding: that *Jones* did not abrogate *Miller*, and that the U.S. Supreme Court only intended to reject the appendage of new procedural requirements to *Miller* and *Montgomery*. *Id.* “To hold otherwise would require us to read *Jones* far more expansively” than intended, “the very sin that *Jones* warns against committing.” *Id.* at 380.

4. Policy considerations also weigh in favor of interpreting Section 13 as broader than the Eighth Amendment

Policy considerations also support a broader interpretation of Section 13. Pennsylvania has a long history of providing special protections for minors against the full weight of criminal punishment. As early as 1905, the Pennsylvania Supreme Court spoke of saving youth from becoming criminals or having careers in crime. *Commonwealth v. Fisher*, 62 A. 198, 200 (Pa. 1905); *see also* Justin D. Okun & Lisle T. Weaver, *Critical Issues Regarding Juvenile Justice in Pennsylvania: Life Without the Possibility of Parole and Use of Juvenile Adjudications to Enhance Later Adult Sentencing*, 93 Pa. Bar Ass’n Q. 62, 63 (2022). The State was the protector of youth, “not its punishment.” *Fisher*, 62 A. at 200. Decades later, the Pennsylvania Supreme Court correctly noted that “there is an abiding concern, in Pennsylvania, that juvenile offenders be treated commensurate with their stage of emotional and intellectual development and personal characteristics.” *Commonwealth v. Batts (Batts I)*, 66 A.3d 286, 299 (Pa. 2013).

Over 150 years ago, the Pennsylvania Supreme Court approved the detention of children in reform schools with the explicit goal of “reformation, and not punishment.” *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839). Years later, in 1901, Pennsylvania passed its first Juvenile Act. It was immediately subject to a constitutional challenge. *See Case of Mansfield*, 22 Pa. Super. 224, 225 (1903). While the *Mansfield* Court declared the Act unconstitutional, it commended the purpose of the law—to shield the young from the grave punishments of the criminal legal system. *Id.* at 235. Later amendments to the Juvenile Act expanded the court’s jurisdiction beyond minor offenses and gave the court jurisdiction over youth up to age 18. Pa. Juv. Ct. Judges’ Comm’n, *Pennsylvania Juvenile Delinquency Benchbook* 3.2 (2018), https://www.pa.gov/content/dam/copapwp-pagov/en/jcjc/documents/publications/juvenile-delinquency-benchbook/pennsylvania%20juvenile%20delinquency%20benchbook_10-2018.pdf. These jurisdictional changes reflected a shift to ensure the full and complete separation of juvenile courts. The 1972 Juvenile Act further ensured that youth would be treated with care and differentiated from their adult counterparts. The Act provided that children must be placed in juvenile facilities and not adult facilities, unless there are no other appropriate facilities available, in which case they must be kept separate from adults. *See* S.B. 439, 1971-1972 Reg. Sess. (Pa. 1972).

Likewise, Pennsylvania courts have consistently held that children are entitled to a special place of reform and care within the legal system. The Pennsylvania Supreme Court has recognized the special status of adolescents and has held, for example, that a court determining the voluntariness of a youth's confession must consider the youth's age, experience, and comprehension, as well as the presence or absence of an interested adult. *Commonwealth v. Williams*, 475 A.2d 1283, 1288 (Pa. 1984). The Juvenile Act also recognizes the special status of minors in its aim "to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community." 42 Pa.C.S.A. § 6301(b)(2). This focus on rehabilitation and competency development underscores Pennsylvania's recognition that children are still changing and deserve special protections under the law.

The Pennsylvania Supreme Court also has a history of protecting youth. In *Batts II*, the Court noted the unique attributes of youth (that youth are impetuous, have an underdeveloped sense of responsibility, lessened culpability and greater capacity for change and rehabilitation than adults) recognized elsewhere by the U.S. Supreme Court, and adopted expansive procedural safeguards to protect youth against life without parole sentences, *See Commonwealth v. Batts (Batts II)*, 163

A.3d 410, 428-34, 443-44 (Pa. 2017). The Pennsylvania Supreme Court only reversed these safeguards after the Supreme Court’s ruling in *Jones* and only upon an interpretation that they were not required under the Eighth Amendment to the U.S. constitution. *Felder*, 269 A.3d at 1243-44. As outlined above, the Pennsylvania Constitution’s text, history, and public policy considerations favor a broader reading of its prohibition against cruel punishment. Courts in other states with cruel punishment provisions worded more broadly than the Eight Amendment are also trending away from coextensive interpretations toward independent analysis, especially in the context of juvenile sentencing.

Under an *Edmunds* analysis, Pennsylvania’s constitutional protection against “cruel punishment” is broader than the Eighth Amendment’s, and a *de facto* life sentence against a juvenile is necessarily unconstitutional.

III. MR. BOURGEOIS’S SENTENCE IS CRUEL UNDER THE PENNSYLVANIA CONSTITUTION

The Framers’ intent in proposing Article 1, Section 13, would plainly void Mr. Bourgeois’s two consecutive 40 years to life sentences as they are an unconstitutional *de facto* life without parole sentence and unreasonably cruel. As outlined above, anything that is not necessary to deter or reform *is* cruel under the Pennsylvania Constitution. This is especially true for individuals sentenced as youth, who will serve “more years and a greater percentage of [their] life in prison than an adult offender.” *Graham v. Florida*, 560 U.S. 48, 70 (2010); *see also Miller*, 567

U.S. at 475. The unique characteristics of youth “diminish the penological justifications” for imposing life without parole sentences. *Miller*, 567 U.S. at 472; *Montgomery*, 577 U.S. at 207. Deterrence cannot be rationalized because the same characteristics that render youth less culpable “make them less likely to consider potential punishment.” *Miller*, 567 U.S. at 472. The need for incapacitation is also lessened because adolescent development diminishes the likelihood that youth will forever be a danger to society. *Id.* at 472-73. A life behind bars also “forswears” rehabilitation as one will never have the opportunity at a rehabilitated life outside of prison walls. *Id.* at 473 (quoting *Graham*, 560 U.S. at 74).

Mr. Bourgeois was 17 years old at the time of his incarceration. He has already served over 20 years in prison. As noted by the court below, he has also shown significant signs of rehabilitation. Currently he will not be eligible for parole until he is 97 years old. Such a sentence—essentially a sentence to die in prison—serves neither deterrence nor rehabilitation. Given Mr. Bourgeois’s age at the time of the offense, this sentence is unreasonable cruel and unconstitutional under the Pennsylvania Constitution.

CONCLUSION

For the foregoing reasons, Appellant Michael Bourgeois requests that this Honorable Court vacate his *de facto* life without parole sentence as unconstitutional and remand the matter for resentencing.

Respectfully submitted,

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COUNSEL FOR APPELLANT

DATED: October 4th, 2024

CERTIFICATE OF COMPLIANCE

I hereby certify this 4th day of October, 2024, that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that requires filing confidential information and documents differently than non-confidential information and documents.

I hereby certify this 4th day of October, 2024, that the foregoing Brief of Appellant complies with the word count limits as set forth in Pennsylvania Rule of Appellate Procedure 2135 and contains 6,586 words.

/s/ Marsha L. Levick
Marsha L. Levick

APPENDIX A

April 8, 2024 Order Denying PCRA Petition

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

COMMONWEALTH OF PENNSYLVANIA :

v. :

MICHAEL LEE BOURGEOIS :

No. 4224-2001

CLERK OF COURTS
2024 APR - 8 AM 9:30
LANCASTER COUNTY, PA

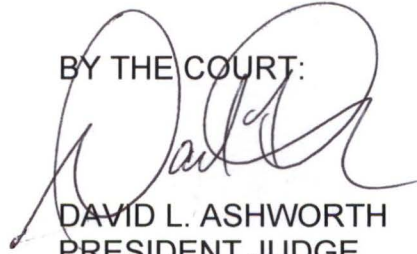
ORDER

AND NOW, this 8th day of April, 2024, upon consideration of Michael Lee Bourgeois' Amended PCRA Petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-46, and for the reasons set forth in this Court's Opinion of December 29, 2023, it is hereby ORDERED that Petitioner's Amended PCRA Petition is DENIED.

Pursuant to Pa. R.Crim.P. 908, this Court advises Petitioner that he has the right to appeal from this Order. Petitioner shall have 30 days from the date of this final Order to appeal to the Superior Court of Pennsylvania. Failure to appeal within 30 days will result in the loss of appellate rights.

It is further ORDERED that Petitioner shall have the right, if indigent, to appeal *in forma pauperis*.

BY THE COURT:



DAVID L. ASHWORTH
PRESIDENT JUDGE

Dist. 4/8/24 @ 9:38

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APPENDIX B

August 21, 2024 1925(a) Memorandum

APPENDIX C

December 29, 2023 Opinion and Notice of Intent to Deny PCRA Petition

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
C R I M I N A L

COMMONWEALTH OF PENNSYLVANIA

v.

No. 4224-2001

MICHAEL LEE BOURGEOIS

OPINION

BY: ASHWORTH, P.J., December 29, 2023

Before the Court is Michael Lee Bourgeois's serial petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-46. For the reasons set forth below, Petitioner is being notified pursuant to section 907 of the PCRA that this petition will be dismissed in 30 days without a hearing.¹

I. Background

The facts of this case have been previously summarized in opinions by this Court as well as the Superior Court of Pennsylvania and need not be reiterated in full here. In sum, on September 6, 2001, Bourgeois, along with his co-defendant Landon May, went to the residence of Bourgeois' adoptive parents, Lucy and Terry Smith, with the intention of burglarizing their home. Upon entering the home, they were confronted by the Smiths and thereafter bound them with duct tape, shot them and stabbed them

¹Under Pa.R.Crim.P. 907, a court may dispose of PCRA petitions without a hearing if it is satisfied after reviewing the materials submitted that no genuine issues of material fact exist and that petitioner is not entitled to post conviction relief.

multiple times. The autopsy revealed that Lucy Smith was also sexually assaulted, beaten on the left side of her head, and eventually smothered to death.

II. Procedural Background

As a result of the murders, the Commonwealth charged Bourgeois, then 17 years old, with two counts of homicide, criminal conspiracy, robbery, and burglary² at Information No. 4224-2001.³ Pursuant to section 6355(e) of the Juvenile Act, Bourgeois' case was filed directly in criminal court, as the criminal division is vested with exclusive jurisdiction over the crime of murder. 42 Pa. C.S.A. § 6355(e).⁴

On November 19, 2001, the Commonwealth informed Bourgeois and the Court of its intention to seek the death penalty. The three aggravating circumstances charged were that: (1) Bourgeois committed a killing while in the perpetration of a felony (burglary and robbery), 18 Pa. C.S.A. § 9711(d)(6); (2) in the commission of the offense, Bourgeois knowingly created a grave risk of death to another person in addition to the victim of the offense, 42 Pa. C.S.A. § 9711(7); and (3) the offense was committed by means of torture, 18 Pa. C.S.A. § 9711(8).

² 18 Pa. C.S.A. § 2501(a), 18 Pa. C.S.A. § 903(a)(1),(2), 18 Pa. C.S.A. § 3502(a), and 18 Pa. C.S.A. § 3701(a)(1)(i), respectively.

³ Bourgeois was also charged with robbery, conspiracy and theft at Information No. 4975-2001 for separate offenses.

⁴This section provides:

Murder and other excluded acts.— Where the petition alleges conduct which if proven would constitute murder . . . , the court shall require the offense to be prosecuted under the criminal law and procedures, except where the case has been transferred pursuant to section 6322 (relating to transfer from criminal proceedings) from the division or a judge of the court assigned to conduct criminal proceedings.

42 Pa. C.S.A. § 6355(e).

The trial of Bourgeois' co-defendant May began on November 1, 2002. The jury found May guilty on November 27, 2002, of two counts of burglary, two counts of conspiracy, one count of involuntary deviate sexual intercourse, and two counts of first-degree murder for the killings of Terry and Lucy Smith. After a penalty hearing, the jury returned two sentences of death against May, having specifically found the aggravating factor of torture.

At that point, Bourgeois chose to resolve his charges through a negotiated plea agreement with the Commonwealth. Accordingly, on January 6, 2003, Bourgeois entered into an "Agreement for Truthful Testimony" with the Commonwealth in which Bourgeois agreed "to cooperate fully and truthfully with the Commonwealth in the investigation and prosecution of the persons responsible for the deaths of Lucy and Terry Smith."⁴ See January 6, 2003, Agreement for Truthful Testimony at ¶ 1. In exchange for this cooperation and testimony, the Commonwealth agreed to present a plea agreement in which Bourgeois would plead guilty to the first-degree murders of Lucy and Terry Smith and receive consecutive sentences of life imprisonment without the possibility of parole. As a result, Bourgeois was spared the death penalty. *Id.* at ¶ 2.

On January 27, 2003, Bourgeois tendered a negotiated plea to all of the charges, with the exception of one count of robbery at No. 4224-2001, which was to be *nolle prossed* by the Commonwealth at the time of sentencing. After an extensive colloquy,

⁴ Bourgeois also agreed to provide information about the burglary, assault, robbery, and theft crimes perpetrated by [Bourgeois], Landon May, Dreneia Rodriguez, Steve Estes and any other person or crime of which he has knowledge.

the Honorable Lawrence F. Stengel accepted Bourgeois' guilty plea.⁵ Bourgeois waived his right to a presentence investigation and was immediately sentenced to two consecutive terms of life in prison without the possibility of parole for the first-degree murder charges, with concurrent sentences of 10 to 20 years' imprisonment for each of the criminal conspiracy and burglary charges. N.T., 2003 Sentencing at 42-43. The robbery charge was *nolle prossed* at the time of sentencing. *Id.* at 43. No post sentence motions were filed nor did Bourgeois file a direct appeal. Therefore, the judgment of sentence became final on February 26, 2003.

On July 16, 2007, Bourgeois filed his first *pro se* PCRA petition. Pursuant to Rule 904(A) of the Pennsylvania Rules of Criminal Procedure, Jeffrey A. Conrad, Esquire, was appointed to represent Bourgeois and filed an amended petition on January 29, 2008. In this pleading, Bourgeois claimed that he suffered from mental deficiencies at the time of his plea and that the Court erroneously accepted his unlawfully induced guilty plea due to trial counsel's ineffective assistance in failing to explore his competency. In response to the Commonwealth's position that the petition was untimely filed, Bourgeois argued that he failed to raise his claims timely because of interference of government officials and because he was mentally incompetent during the period of filing his claim.

⁵ As part of the same proceeding, Bourgeois also pleaded guilty to one count of robbery and one count of conspiracy to commit robbery on Docket No. 4975-2001 and received concurrent negotiated sentences of 10 to 20 years' incarceration on each charge. N.T., 2003 Sentencing at 43. These sentences were also concurrent with the first count of criminal homicide for Terry Smith. *Id.* at 43-44. The theft charge was *nolle prossed* as part of the negotiated plea agreement. *Id.*

As a result of Bourgeois' claims, the PCRA court issued an order granting defense counsel \$3,000.00 to hire a psychologist. Dr. Jerome Gottlieb performed an evaluation of Bourgeois. An evidentiary hearing was held on April 23, 2008, before the Honorable Joseph C. Madenspacher to determine the merit of these alleged exceptions with regard to timeliness. Dr. Gottlieb's April 12, 2008, report was admitted as evidence at that hearing. See PCRA Hearing Defense Exhibit 1; see also Exhibit "B" attached to PCRA Counsel's Motion to Withdraw from Representation and "No Merit" Letter. Dr. Gottlieb opined "with a Reasonable Degree of Medical Certainty that Mr. Bourgeois ha[d] not been suffering from a Mental Illness or Mental Defect that substantially interfered with his ability to file this petition during the time of his incarceration." *Id.*

Bourgeois did not present any evidence regarding the interference of government officials. PCRA counsel, therefore, conceded he was unable to mount a meritorious challenge to the timeliness argument. (N.T., PCRA Hearing at 3). Accordingly, Bourgeois' PCRA petition was dismissed on April 24, 2008, because the petition was not timely filed pursuant to 42 Pa. C.S.A. § 9545(b) and because Bourgeois failed to plead and prove any of the exceptions set forth in section 9545(b)(1)(i-iii) to the timeliness requirement.

Following Judge Madenspacher's denial of Bourgeois' PCRA claim, Bourgeois notified his PCRA counsel that he wished to appeal the Court's Order. Finding no merit in Bourgeois' appeal, PCRA counsel filed a motion to withdraw from representation and "no merit" letter on May 28, 2008. The Court granted counsel's motion on June 17, 2008. A *pro se* notice of appeal was filed on July 8, 2008.

On August 6, 2009, a three-judge panel of the Superior Court affirmed the denial of Bourgeois' first PCRA petition as untimely in an unpublished memorandum opinion. See *Commonwealth v. Bourgeois*, 984 A.2d 1007 (Pa. Super. 2009) (table). No petition for allowance of appeal was filed with the Supreme Court of Pennsylvania.

On July 16, 2010, Bourgeois filed his second *pro se* PCRA petition challenging the imposition of a sentence greater than the lawful maximum, based upon the United States Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010). Bourgeois' first PCRA counsel, Attorney Conrad, was appointed again to represent Bourgeois on his second PCRA. On September 24, 2010, PCRA counsel filed a motion to withdraw and "no merit" letter, pointing out that in *Graham* the Supreme Court held that the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits the imposition of life without possibility of parole on a juvenile offender convicted of a *non-homicide* offense. Since Bourgeois pleaded guilty to two counts of first-degree murder, he was a juvenile homicide offender and the ruling in *Graham* did not apply to him. After giving the appropriate notice, Bourgeois' second PCRA petition was denied by Order of Judge Madenspacher on December 27, 2010, and counsel was permitted to withdraw. No appeal followed.

On August 9, 2012, the Public Defender's Office filed a third PCRA petition on behalf of Bourgeois raising a claim based on *Miller v. Alabama*, 567 U.S. 460 (2012), which held that the Eighth Amendment to the United States Constitution prohibits the imposition of a mandatory sentence of life imprisonment without the possibility of parole on a juvenile offender. However, the Supreme Court did not address the issue of

whether its decision in *Miller* would apply retroactively to such cases on collateral review, and the Supreme Court of Pennsylvania had granted allowance of appeal on the identical issue in *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013). Accordingly, Judge Madenspacher stayed any action on Bourgeois' PCRA petition pending the Supreme Court of Pennsylvania's decision in *Cunningham*.

On October 30, 2013, the Supreme Court of Pennsylvania held that the ruling in *Miller* should not be applied retroactively to benefit individuals such as Bourgeois whose judgment of sentence became final prior to the decision in *Miller*. See *Cunningham*, 81 A.3d at 11. On June 9, 2014, the Supreme Court of the United States denied the petition for writ of certiorari in *Cunningham*. Accordingly, the ruling of the Supreme Court of Pennsylvania in *Cunningham* was binding on Bourgeois. On July 7, 2014, this Court entered an Order denying Bourgeois' petition as untimely, pursuant to the ruling of the Supreme Court in *Cunningham* that the holding of *Miller* is not retroactively applicable to cases on collateral appeal. Bourgeois filed a timely Notice of Appeal.

On March 31, 2015, a three-judge panel of the Superior Court affirmed the denial of Bourgeois' third PCRA petition as untimely in an unpublished memorandum opinion. See 120 A.3d 1067 (Pa. Super. 2015) (table); see also *Commonwealth v. Bourgeois*, 2015 WL 7571963, Memo. Op. (Pa. Super. 2015). A petition for allowance of appeal was filed with the Supreme Court of Pennsylvania and granted on February 24, 2016. As a result of the holding by the Supreme Court of the United States in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), that *Miller* must be applied retroactively by the States, the Supreme Court of Pennsylvania vacated the Superior Court of Pennsylvania's order,

and the case was remanded for further proceedings consistent with *Montgomery*. See *Commonwealth v. Bourgeois*, 132 A.3d 983 (Pa. 2016).

On remand, the Superior Court reversed and vacated the denial of Bourgeois's petition as untimely and remanded the case for resentencing. See *Commonwealth v. Bourgeois*, 154 A.3d 874 (Pa. Super. 2016) (table); see also *Commonwealth v. Bourgeois*, 2016 WL 5210884, Memo. Op. (Pa. Super. 2016). The original record was returned to the Court of Common Pleas on September 12, 2016.

Meanwhile, on April 19, 2016, the Pennsylvania Supreme Court granted the petition for allowance of appeal in the case of *Commonwealth v. Batts*, 125 A.3d 33 (Pa. Super. 2015), to consider what procedures and standards were to be employed when resentencing juveniles who had previously received mandatory sentences of life without parole. See *Commonwealth v. Batts*, 135 A.3d 176 (Pa. 2016). On May 23, 2016, the Commonwealth filed, and this Court granted, a motion for stay of proceedings pending a decision in *Batts*.

On June 26, 2017, the Supreme Court issued a decision in *Commonwealth v. Batts*, 163 A.3d 410, 455 (Pa. 2017) (*Batts II*), requiring the Commonwealth to prove, beyond a reasonable doubt, that a juvenile offender is incapable of rehabilitation for a sentencing court to impose a sentence of life without the possibility of parole, and further requiring the Commonwealth to give reasonable notice to the juvenile offender of its intention to seek a sentence of life without parole. Accordingly, on June 28, 2017, the Commonwealth gave Bourgeois notice of its intent to seek consecutive sentences of

life without the possibility of parole for each count of murder in the first degree, and a resentencing hearing was scheduled for November 3, 2017.

In anticipation of the resentencing, defense counsel submitted a letter to the Court on October 27, 2017, with "Resentencing Documentation" which consisted of over 55 attachments. The Commonwealth submitted a Sentencing Memorandum on October 27, 2017, which included the transcript of the police interview of Bourgeois on January 6, 2002, and the autopsy reports of Lucy and Terry Smith. The Commonwealth indicated at that time that it was no longer seeking a sentence of life without parole for Bourgeois.

On November 3, 2017, this Court imposed consecutive sentences of 40 years' incarceration to life for each of the two homicides. (N.T., Sentencing at 159). Concurrent sentences of 10 to 20 years' incarceration were imposed for the charges of criminal conspiracy and burglary. *Id.* The robbery count was *nolle prossed* on January 27, 2003. *Id.* Restitution in the amount of \$20,307.25 was imposed, as well as court costs. *Id.* at 160.

On November 7, 2017, Bourgeois filed a timely post-sentence motion to reconsider and modify the sentence. Bourgeois challenged his sentence as the functional equivalent of a life sentence without the possibility of parole, claiming this Court "abused its discretion by effectively imposing life without parole in direct contravention to the reasoning of both *Miller* and *Montgomery*." *Id.* at ¶¶ 4-6. Moreover, Bourgeois argued that this Court "failed to fully appreciate [his] distinctive youthful attributes and model prisoner status, instead focusing its analysis on the facts

and circumstances surrounding the crime itself and imposed, for all intents and purposes, a sentence of life without the (actual) possibility of parole.” *Id.* at ¶ 10.

Bourgeois requested a sentence of 35 years to life imprisonment for each count of murder to be run concurrently, as well as concurrent with all other counts.⁶

The Commonwealth filed a timely answer to Bourgeois' post-sentence motion on November 27, 2017, asserting that the sentence was within the sound discretion of the court, and it was supported by the evidence. See Commonwealth's Answer to Defendant's Post-Sentence Motion at ¶¶ 3-5. On December 4, 2017, Bourgeois' post-sentence motion was denied, and he filed a notice of appeal on April 4, 2018.⁷

Pursuant to this Court's directive, on April 6, 2018, Bourgeois filed a statement of errors complained of on appeal pursuant to Rule 1925(b) of the Appellate Rules of Procedure raising the following issues:

(1) the sentence constitutes an unconstitutional de facto life without parole sentence;

⁶ On November 7, 2017, Attorney Conrad also filed a motion to withdraw as counsel, as he would no longer be practicing law after November 7, 2017. The motion was granted on November 8, 2017, and Attorney Randall Miller was appointed to represent Bourgeois.

⁷ On January 4, 2018, Marsha L. Levick, Esquire, of the Juvenile Law Center in Philadelphia, entered her appearance in this case. Attorney Levick timely filed a notice of appeal on January 2, 2018, challenging Bourgeois' aggregate sentence of 80 years to life imprisonment. However, the Notice of Appeal was filed to the wrong docket number (the Turkey Hill robbery case, No. 4975-2001). The Court brought this to the attention of defense counsel on January 4, 2018.

With the agreement of the Commonwealth, defense counsel served the Court on January 5, 2018, with a motion for leave to file notice of appeal *nunc pro tunc* under the correct case number, along with a notice of appeal and an application for in forma pauperis status. By Order dated January 5, 2018, Bourgeois' motion was granted, he was granted in forma pauperis status, and he was directed to file a concise statement of the errors complained of on appeal within 21 days of the date of the Order.

It came to the Court's attention on March 5, 2018, that while it had been served with a courtesy copy of the motion for leave, the original had not been filed with the Office of the Clerk of Courts. Apparently, defense counsel's submission of the documents had been rejected because the Juvenile Law Center had not been recognized as pro bono representation and no fees had been paid. Another motion for leave to file notice of appeal *nunc pro tunc* was filed on March 13, 2018, and granted on March 28, 2018.

(2) the Court committed a legal error when failing to provide Bourgeois a reasonable opportunity for parole;

(3) the Court lacked competent evidence to constitutionally sentence Bourgeois to a *de facto* life sentence;

(4) the Court committed an error of law by allowing the facts of the crime to dictate the sentencing outcome;

(5) the Court committed an error of law when using Bourgeois' proximity to 18 years old as an aggravating rather than a mitigating factor;

(6) the Court committed an error of law by failing to properly recognize and adopt the Supreme Court's jurisprudence recognizing adolescent development and children's reduced culpability;

(7) the Court committed legal error when it determined it was not bound by *Miller* to make detailed findings regarding each *Miller* factor as the Commonwealth was not seeking life without parole in name;

(8) the Court committed a legal error when using jurisprudence emphasizing the maximum punishment for each homicide as that jurisprudence directly contradicts the constitutional mandates in *Miller*, and

(9) the Court committed a legal error by disproportionately sentencing Bourgeois to an 80-year minimum term of incarceration before he would be eligible for parole.

See April 6, 2018, Statement of Matters Complained of on Appeal.

On June 6, 2018, this Court issued an opinion and order pursuant to Pa.R.A.P.

1925(a) concluding as follows:

Bourgeois' 40-year sentence for each of the two homicides was an individualized sentence after weighing all the mitigating and aggravating factors in this case, including the factors outlined in *Batts II* and the *Miller* and *Knox* age-related factors codified in section 1102.1. There was no abuse of discretion, and the sentence did not violate federal and state constitutional concerns.

See June 6, 2018, 1925(b) Opinion.

On April 12, 2019, the Superior Court of Pennsylvania issued an opinion addressing the following three issues:

1. Did the trial court err in sentencing [Bourgeois] to an unconstitutional *de facto* life sentence without the necessary procedural protections, considerations and findings enumerated by the Pennsylvania Supreme Court in *Batts II*?
2. Did the trial court err in failing to consider the Miller factors on the record prior to sentencing [Bourgeois] to a *de facto* life sentence?
3. Did the trial court abuse its discretion in sentencing [Bourgeois] to a *de facto* life sentence by failing to properly apply *Miller* and *Batts II*?

See *Commonwealth v Bourgeois*, 2019 WL 1579816 (Pa. Super. Ct. Apr. 12, 2019).

In addressing these issues, the Superior Court referred to its decision in *Commonwealth v. Bebout*, 186 A.3d 462 (Pa. Super. 2018), where it held that “a sentence of forty-five years to life imprisonment is not the fundamental equivalent of life without parole for a juvenile offender.” *Id.* at 12. It also discussed its decision in *Commonwealth v. Foust*, 180 A.3d 416 (Pa. Super 2018), where it held that individual sentences, rather than the aggregate sentence, must be considered when determining if the trial court imposed a term-of-years sentence which constitutes a *de facto* life without parole sentence. *Bourgeois*, at 6. Thus, the Superior Court concluded that based on “the relevant case law, the trial court did not commit an error of law that requires [it] to vacate [Bourgeois’] sentences.” *Id.*

Next, the Superior Court discussed whether this Court properly considered and applied *Batts II* and *Miller*. In doing so, the Superior Court stated that this Court “did not need to conduct an on-the-record examination of the *Miller* factors” since the

Commonwealth did not attempt to overcome the presumption against juvenile life without parole sentences in Bourgeois' case. *Bourgeois*, at *7. Additionally, it quoted this Court's Rule 1925(b) opinion which incorporated the portion of the sentencing hearing that detailed the reasons for the sentence imposed. *Id.* at *8. Thereafter, the Superior Court concluded that there was "no support for [Bourgeois'] assertion that the trial court failed to consider [Bourgeois'] mitigating factors or that it imposed an excessive sentence." *Id.* at *9.

On May 22, 2022, the Supreme Court of Pennsylvania denied Bourgeois' Petition for Allowance of Appeal. *Commonwealth v. Bourgeois*, 279 A.3d 35 (Pa. 2022). On May 23, 2023, Bourgeois filed the instant Petition for Post-Conviction Relief under 42 Pa.C.S.A. §§ 9541-46 making the following claims: (1) his consecutive sentences of 40 years to life violate the Pennsylvania Constitution's prohibition against "cruel punishments," and (2) the sentences imposed by this Court amount to an unconstitutional *de facto* life sentence despite an implicit finding of transient immaturity.

III. Discussion

Before the Court may address the merits of Bourgeois' arguments, it must first consider the timeliness of the instant PCRA petition because it implicates the jurisdiction of the Court. *Commonwealth v. Davis*, 86 A.3d 883, 887 (Pa. Super. 2014). The instant PCRA petition is governed by 42 Pa.C.S.A. § 9545(b), which provides as follows:

(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[.]

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

42 Pa. C.S.A. § 9545 (b). This time restriction is "jurisdictional in nature."

Commonwealth v. Albrecht, 994 A.2d 1091, 1093 (Pa. 2010) (citation omitted). Thus, "if a PCRA petition is untimely, neither [the Superior] Court nor the trial court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims." *Commonwealth v. Seskey*, 86 A.3d 237, 241 (Pa. Super. 2014) (internal citation omitted).

The Supreme Court of Pennsylvania denied Bourgeois' Petition for Allowance of Appeal on May 25, 2022, and the instant petition was filed on May 23, 2023. Since this petition was filed within one year of the date Bourgeois' judgment became final, it is timely, and this Court has jurisdiction to address the merits of his claims.

a. Article 1, § 13 of the Pennsylvania Constitution

Bourgeois' first claim is that his consecutive sentences are unconstitutional under Article 1, § 13 of the Pennsylvania Constitution. Bourgeois finds support for this claim in Justice Donohue's concurring opinion in *Commonwealth v. Felder*, where she stated:

I write separately to recognize that this result is limited to what the Eighth Amendment requires. 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 1232, 1247 (Pa. 2022) (Donahue, J., concurring). Based on Justice Donohue's statement, Bourgeois makes the following argument in his reply to the Commonwealth's Answer to his Petition for Post-Conviction Collateral Relief:

The Pennsylvania Constitutional protection against "cruel punishment" is broader than the United States' Constitutional prohibition against "cruel and unusual punishment." No court has had the opportunity to review whether Mr. Bourgeois' sentence passes muster under the Pennsylvania Constitution, including whether the discretionary *de facto* life sentence imposed here—despite an implicit finding of transient immaturity—is cruel in violation of the Pennsylvania Constitution, even if it is not also unusual under the U.S. Constitution.

(Petitioner's Reply, p. 3-4).

The appellant in *Commonwealth v. Barnett*, 50 A.3d 176 (Pa. Super. 2012), made an identical claim. In that case, the appellant argued that his 25-to-50-year sentence violated the Eighth Amendment to the United States Constitution as well as Article 1, § 13 of the Pennsylvania Constitution. In denying appellant relief, the Superior Court of Pennsylvania stated as follows:

This Court has consistently held that "[t]he Pennsylvania prohibition against cruel and unusual punishment is *coextensive* with the Eighth and Fourteenth Amendment of the United States Constitution" and, thus, "*the Pennsylvania Constitution affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution.*" For this reason, and because Appellant has failed to develop any argument why Pennsylvania's prohibition against cruel and unusual punishment under Article I, Section 13 establishes greater protection than that afforded by the federal constitution, we address Appellant's claim only as a challenge under the Eighth Amendment to the United States Constitution.

50 A.3d 176, 197 (Pa. Super. 2012)(emphasis added) (internal citations omitted).

The current law is clear, and Bourgeois makes his argument without any support—legal or otherwise. As such, this Court will address Bourgeois' claim as a

challenge under the Eighth Amendment to the United States Constitution. See *Commonwealth v. Parker*, 718 A.2d 1266, 1268 (Pa. Super. 1998) (Because “our analysis of this case under the United States constitution is applicable to the state constitution and we need not engage in a separate state constitutional review.”).

b. The Eighth Amendment to the United States Constitution

Bourgeois’ second claim in the instant PCRA is as follows:

Judge Ashworth made no findings that Mr. Bourgeois was one of the rare individuals whose crimes reflected permanent incorrigibility, irreparable corruption, or irretrievable depravity.

See PCRA Petition at ¶ 9. In his reply to the Commonwealth’s answer, Bourgeois expands upon the issue and claims that this Court “sentenced Mr. Bourgeois to what it understood to be a life sentence, even though, by finding that Mr. Bourgeois had ‘changed’ while in prison, it implicitly found that Mr. Bourgeois’ crime reflected transient immaturity.” Petitioner’s Reply, p. 4.

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Supreme Court of the United States (“SCOTUS”) has long held that “[t]he final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.” *Barnett*, 50 A.3d at 198 (quoting *Solem v. Helm*, 463 U.S. 277, 284 (1983)). However, “the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences which are grossly disproportionate to the crime.” *Id.* (citing *Commonwealth v. Hall*, 701 A.2d 190, 209 (Pa. 1997)).

The SCOTUS has addressed the constitutionality of life sentences for people under 18 years old in five decisions: *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), *Montgomery v. Louisiana*, 577 U.S. 190 (2016), and *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). In *Roper*, the SCOTUS ruled that juveniles cannot be sentenced to death. 543 U.S. at 575. In *Graham*, the SCOTUS banned the use of life without parole for juveniles not convicted of homicide. 560 U.S. at 82. In *Miller*, the SCOTUS held that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits mandatory life-without-parole sentences for people under 18 convicted of murder, but the Court allowed discretionary life-without-parole sentences for those offenders. *Miller*, 567 U.S. at 489. In *Montgomery*, the SCOTUS held that *Miller* applied retroactively and that sentences of life without parole must be reserved “for the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” 577 U.S. at 209.

Most recently, the SCOTUS decided *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). In that case, Brett Jones was eligible for resentencing following the decisions in *Miller* and *Montgomery*. At his resentencing the judge acknowledged that he had discretion in deciding whether to sentence Jones to less than life without parole; however, the judge resentenced Jones to life without parole for a second time. Jones made the following argument in challenging his sentence:

[A] sentencer who imposes a life-without-parole sentence must also either (i) make a separate factual finding of permanent incorrigibility, or (ii) at least provide an on-the-record sentencing explanation with an “implicit finding” of permanent incorrigibility.

Jones, 141 S. Ct. at 1311.

In deciding Jones' case, Associate Justice Brett Kavanaugh, writing on behalf of a 6-3 majority, upheld *Miller* and *Montgomery*'s requirement that "youth matters in sentencing," but also held that a separate and specific factual finding of "permanent incorrigibility" was not required to sentence a person who was under 18 at the time of their offense to life without parole. 141 S. Ct. at 1314-15. In fact, the SCOTUS explained that *Miller* and *Montgomery* "squarely rejected such a requirement." *Id.* at 1314. It further explained that *Miller* only "mandated that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a life-without-parole sentence." *Id.* at 1315 (citing *Miller*, 567 U.S. at 483). Additionally, *Montgomery* "flatly stated that *Miller* did not impose a formal fact-finding requirement and that a finding of fact regarding a child's incorrigibility is not required." *Id.* at 1315 (citing *Montgomery*, 577 U.S. at 211) (internal citations omitted).

The SCOTUS also rejected Jones' alternative argument that a judge is required to make an *implicit* finding of permanent incorrigibility, stating that such a finding:

- (i) is not necessary to ensure that a sentencer considers a defendant's youth, (ii) is not required by or consistent with *Miller*, (iii) is not required by or consistent with this Court's analogous death penalty precedents, and (iv) is not dictated by any consistent historical or contemporary sentencing practice in the States.

Jones, 141 S. Ct. at 1319.

The Supreme Court of Pennsylvania ("SCOPA") discussed *Miller* and its progeny in *Commonwealth v. Felder*, 269 A.3d 1232 (Pa. 2022). In *Felder*, the appellant challenged the legality of his sentence, and the SCOPA initially granted review in that case to address the following issue:

[W]hether a discretionary term-of-years sentence 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 at 1235. However, before it had a chance to address that issue, the SCOTUS decided *Jones, supra*. Consequently, in *Felder*, the SCOPA stated that “pursuant to the reasoning in *Jones*, even if a term-of-years sentence amounts to a *de facto* life sentence, *Miller* provides no viable avenue for relief.” *Id.* The SCOPA further explained that, following *Jones*:

[T]he authority of a sentencing court to impose a life-without-parole sentence on a juvenile homicide offender is circumscribed only to the extent set forth in 42 Pa.C.S. § 9721(b) and 18 Pa.C.S. § 1102.1, and by *Miller’s* command to “consider the mitigating qualities of youth.”

Id. at 1245. Thus, the SCOPA affirmed *Felder’s* sentence of 50-years-to-life and reasoned as follows:

It logically and necessarily follows that if a discretionary sentencing scheme is constitutionally sufficient to permit the imposition of a life-without-parole sentence on a juvenile homicide offender, so too can a court impose a sentence that is something *less than life* without parole.

Id. at 1245-46 (emphasis added).

Turning to *Bourgeois’s* claims, even assuming arguendo that his aggregate sentence of 80-years-to-life constitutes a *de facto* life sentence, he is not entitled to relief. As stated in *Felder*, this Court was not required to make any specific finding of permanent incorrigibility, irreparable corruption, or irretrievable depravity as *Bourgeois* suggests. Likewise, his assertion that this Court made an implied finding of transient immaturity is incorrect and immaterial. Case law has established that “[s]o long as the

sentence imposed is discretionary and takes into account the offender's youth, even if it amounts to a *de facto* life sentence, *Miller* is not violated." *Felder*, 269 A.3d at 1246.

At the time of Bourgeois' resentencing hearing, this Court gave the following explanation prior to imposing sentence:

In determining the minimum sentence in this case, I must look to traditional sentencing considerations as outlined in the applicable statutes and the case law.

The sentence imposed here today must take into consideration the protection of the public, the gravity of the offense as it relates to the impact on the life of the victims and the community, and the rehabilitative needs of the defendant.

In this case, the Court must also be guided by Title 18, Section 1102.1(a), which provides for a minimum of at least 35 years to life where the offender was 15 years of age or older at the time of the crime.

As indicated throughout the records, the defendant in this case was 17 years and approximately five months of age on the date he committed these offenses. Just a few months short of 18.

December 7, 2017, Sentencing Transcript, at 151-52. Therefore, the record clearly reflects that this Court imposed a discretionary sentence after making the requisite statutory considerations and taking into account Bourgeois' age at the time.

Based on the foregoing, this Court rejects Bourgeois' claims that his consecutive sentences of 40 years to life are unconstitutional under the Eighth Amendment to the United States Constitution and Article 1, § 13 of the Pennsylvania Constitution.

IV. Conclusion

For the reasons set forth above, Bourgeois' most recent PCRA petition will be dismissed in 30 days without a hearing.

Accordingly, I enter the following:

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
C R I M I N A L

COMMONWEALTH OF PENNSYLVANIA :

v. :

No. 4224-2001

MICHAEL LEE BOURGEOIS :

NOTICE PURSUANT TO PA. R.CRIM.P. 907

TO: MICHAEL LEE BOURGEOIS

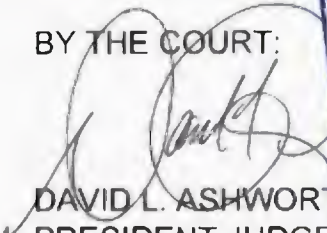
DATE: DECEMBER 29, 2023

You are hereby advised that, after a review of your counseled PCRA Petition, and the matters of record relating to your claims, your request for post-conviction relief will be denied without further proceedings, in 30 days from the date of this Notice, for the following reasons:

1. There are no genuine issues concerning any material fact;
2. You are not entitled to post-conviction collateral relief; and
3. No purpose would be served by any further proceedings.

If you wish to file an amended petition or to otherwise respond to this Notice, you must do so within 30 days of the date of this Notice.

BY THE COURT:


DAVID L. ASHWORTH
PRESIDENT JUDGE



1/22/2024 @ 4:31 pm

Copies to:

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APPENDIX D

August 16, 2024 Statement of Errors Complained of on Appeal

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

COMMONWEALTH OF PENNSYLVANIA

CP-36-CR-0004224-2001

v.

MICHAEL LEE BOURGEOIS,

Defendant.

STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

On April 8, 2024, this Court denied Michael Bourgeois's Petition for Post-Conviction Relief. Mr. Bourgeois filed a Notice of Appeal which was docketed by this Court on May 1, 2024. On August 2, 2024, this Court entered an Order requiring Mr. Bourgeois to file a Statement of Errors Complained of on Appeal. This Statement identifies the following errors complained of on appeal:

1. This Court erred as a matter of law in finding that the imposition of a *de facto* life without parole sentence of 80 years to life on a transiently immature youth with an acknowledged capacity for rehabilitation does not violate the Pennsylvania Constitution and/or the U.S. Constitution.
 - a. This Court committed a legal error by disregarding Mr. Bourgeois's capacity for rehabilitation and instead focusing exclusively on the nature of the offense.
 - b. This Court committed legal error when it declined to consider the unique rehabilitative capacity of juvenile offenders and the still growing body of science regarding the brain development of teenagers, misconstruing *Jones v. Mississippi*, 593 U.S. 98 (2021), and ignoring the mandate of *Miller v. Alabama*, 567 U.S. 460 (2012), which requires distinct treatment for juveniles.

2. The Court erred as a matter of law in interpreting the Pennsylvania Constitution’s prohibition of cruel punishment coextensively with the federal prohibition against cruel and unusual punishment, where the two documents are not coextensive in all contexts. *See* U.S. Const. amend. VIII; Pa. Const. art. I, § 13.

3. The Court erred as a matter of law in concluding that Mr. Bourgeois’s sentence is not cruel. *See* Pa. Const. art. I, § 13.

Respectfully Submitted,

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Counsel for Defendant Michael Bourgeois

DATED: August 16, 2024

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Marsha L. Levick _____
Marsha L. Levick