

**IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA

VS.

MICHAEL L. BOURGEOIS

626 MDA 2024

BRIEF FOR APPELLEE

Appeal from the Final Order of April 8, 2024 Denying
PCRA Petition in the Lancaster County Court of Common Pleas
Criminal No. CP-36-CR-4224-2001

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. Whether Article 1 Section 13 of the Pennsylvania Constitution provides broader protections against cruel and unusual punishment than the Eighth Amendment to the United States Constitution.**

Answered in the negative by the Lower Court.

- II. Whether Petitioner's consecutive sentence of 40 years to life imprisonment for two counts of First-Degree Murder violates the constitutional prohibition against cruel and unusual punishments.**

Answered in the negative by the Lower Court.

COUNTER-STATEMENT OF THE CASE

By Lancaster County Information number 4224 of 2001, the District Attorney of Lancaster County charged Michael Lee Bourgeois (Petitioner) with two counts of Criminal Homicide; and one count each of Criminal Conspiracy, Robbery, and Burglary.¹

The events underlying these charges took place in early September 2001, while Petitioner was engaging in a series of criminal activities.² On or about September 6, 2001, Petitioner and his co-defendant (Landon May) went to the home of Petitioner's parents with the intent to commit a burglary. During the course of this burglary, Petitioner and May encountered Petitioner's parents, Lucy Smith and Terry Smith. Petitioner and May bound Terry and Lucy with duct tape and proceeded to torture them before fleeing the residence. Terry and Lucy's deceased bodies were left wrapped in bedding.

The bloody scene found by law enforcement officers, and the autopsies performed on Lucy and Terry showed the horror that Petitioner and May inflicted upon them. "Terry Smith was stabbed 47 times, his neck was cut at least five times, he was shot 'execution style' five times and was strangled or asphyxiated. There were no defensive wounds on Terry Smith." "Lucy Smith was cut 51 times,

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

² The factual summation is taken from the Superior Court's Memorandum decision filed April 12, 2019. Commonwealth v. Bourgeois, 2019 WL 1579816 (Pa. Super. Ct. Apr. 12, 2019) (mem.).

shot in the head, beaten on the left side of her head with a claw hammer, suffered blunt force trauma to her forehead, had 17 fractures to her skull, and was eventually smothered to death. She suffered defensive wounds to her hands and arms.” In addition to these torturous injuries, Lucy Smith was sexually assaulted by May.

On January 27, 2003, Petitioner entered into a negotiated plea agreement with the Commonwealth. Pursuant to the plea agreement, Petitioner was found guilty of two-counts of First-Degree Murder,³ Criminal Conspiracy, and Burglary.⁴ Following an extensive colloquy and waiver of a pre-sentence investigation, Petitioner was sentenced to serve two consecutive life sentences without the possibility of parole for the murders of Terry Smith and Lucy Smith, as well as concurrent terms of 10-20 years’ incarceration for criminal conspiracy and burglary.⁵

Following two unsuccessful attempts at obtaining relief under the Post-Conviction Relief Act (PCRA),⁶ Petitioner filed a third PCRA seeking relief based

³ 18 Pa. C.S.A. § 2502(a).

⁴ Petitioner also entered a plea of guilty to Robbery and Burglary charges at Lancaster County Information number 4975 of 2001. The Robbery charge on Information 4224 of 2001 was *nolle prossed* at sentencing.

⁵ On Information number 4975 of 2001, Petitioner received a concurrent negotiated sentence of 10-20 years’ incarceration.

⁶ 42 Pa. C.S.A. §§ 9541, *et seq.*

on the United States Supreme Court's decision in Miller v. Alabama, 567 U.S. 460 (2012) (holding that mandatory life sentences for juveniles convicted of murder were unconstitutional). While initially unsuccessful on his third petition, during the pendency of his appeal the United States Supreme Court gave retroactive effect to its holding in Miller. Montgomery v. Louisiana, 577 U.S. 190 (2016). As a result, Petitioner's sentence was vacated, and the case was remanded for resentencing. Commonwealth v. Bourgeois, 2016 WL 5210884 (Pa. Super. Ct. Jul. 29, 2016) (mem.).

Prior to resentencing, the Commonwealth filed a Notice of Intent to Seek Life Without Parole. Petitioner, for his part, submitted a letter to the Court with "Resentencing Documentation." Petitioner's submission included over 55 attachments. The Commonwealth, in response, filed a Sentencing Memorandum on October 27, 2017. Ultimately the Commonwealth sought consecutive sentences of 50 years to life for each murder committed by Petitioner.

On November 3, 2017, Petitioner appeared for re-sentencing before the Honorable David L. Ashworth, President Judge, Lancaster County Court of Common Pleas. During an extensive hearing, Petitioner testified along with 5 other witnesses on his behalf. The Commonwealth presented the testimony of the assigned investigator and prosecutor. (N.T. 11/3/17, at 5-138). At the conclusion of testimony Lower Court noted, *inter alia*, that it "simply cannot accept the

proposition that a juvenile offender who commits multiple murders must be afforded a volume discount and not held responsible for each and every life he has taken, even if the sentence imposed approaches a lifetime in prison. Youth matters, but so did the lives of the victims.” (N.T. 11/3/17, at 158).

Thereafter, the Lower Court imposed a sentence of not less than 40 years to life for the murder of Terry Smith, and a consecutive term of 40 years to life for murder of Lucy Smith. (N.T. 11/3/17, at 159). The sentences on the remaining charges were imposed concurrently for an aggregate sentence of 80 years to life in prison.

Following the denial of his post-sentence motion, Petitioner filed an appeal with the Superior Court of Pennsylvania. In that appeal, Petitioner raised three issues: (1) the sentence imposed was an unconstitutional *de facto* life sentence; (2) this Honorable Court erred in failing to consider the Miller factors prior to imposing a *de facto* life sentence; (3) the sentence imposed amounted to an abuse of discretion. Commonwealth v. Bourgeois, 2019 WL 1579816, slip op. at 9 (Pa. Super. Ct. Apr. 12, 2019) (mem.). On April 12, 2019, the Superior Court of Pennsylvania issued a memorandum decision finding that Petitioner’s sentence was constitutional and not an abuse of discretion. Id. Petitioner’s subsequent Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on May 25, 2022.

On May 23, 2023, Petitioner file his first post-resentencing PCRA Petition. Therein, Petitioner alleged that he was entitled to relief because: (1) his sentence violated the Pennsylvania Constitution's prohibition against cruel unusual punishments, (2) and that sentence imposed amounted to an unconstitutional *de facto* life sentence.

On December 29, 2023, the PCRA Court issued an Opinion and Notice of its intent to dismiss Petitioner's PCRA petition without an evidentiary hearing. Following consideration of Petitioner's response to its notice, the PCRA Court issued an Order denying relief on April 8, 2024. The instant appeal followed.

SUMMARY OF ARGUMENT

It is well settled “that ‘[t]he Pennsylvania prohibition against cruel and unusual punishment is coextensive with the Eighth and Fourteenth Amendments [to] the United States Constitution,’ and that ‘the Pennsylvania Constitution affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution.’” Such is the clarity in this area that Pennsylvania Courts have continually and unanimously found these constitutional provisions to be coterminous. To that end, this Honorable Court need not engage in a separate state constitutional analysis as review under the federal constitutional standards is directly applicable.

The Pennsylvania Supreme Court has determined that “[a] life-without-parole sentence for a juvenile murderer is [] constitutional, and hence no viable *Miller* claim exists, ‘so long as the sentence is not mandatory — that is, [] so long as the sentencer has discretion to consider the mitigating qualities of youth and impose a lesser punishment.’”

With respect to alleged *de facto* life sentences such as the one challenged here, the Supreme Court held

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. This includes a term-of-years sentence that may amount to a *de facto* life

sentence. Stated differently, as long as the sentence was the product of a discretionary sentencing system that included consideration of the juvenile's youth, the Eighth Amendment is satisfied.

Here, Petitioner was sentenced under a discretionary sentencing scheme, and proceedings that took into account, amongst other things, his youth at the time of the offense. Therefore, as Petitioner "received the constitutionally required procedure guaranteed by *Miller* and the Eighth Amendment[,]” his sentence does not amount to cruel and unusual punishment. As the Lower Court eloquently stated “[y]outh matters, but so did the lives of the victims.”

ARGUMENT

I. Article 1 Section 13 of the Pennsylvania Constitution does not provide broader protection against cruel and unusual punishment than the Eighth Amendment to the United States Constitution.

Pennsylvania Court's examining the contours of Article 1 Section 13 have consistently held "that '[t]he Pennsylvania prohibition against cruel and unusual punishment is coextensive with the Eighth and Fourteenth Amendments [to] the United States Constitution,' and that 'the Pennsylvania Constitution affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution.'" Commonwealth v. Elia, 2013 PA Super 323, 83 A.3d 254, 267 (Pa. Super. Ct. 2013). Despite Petitioner's argument the contrary, in Elia, this Honorable Court has examined the breadth of the cruel and unusual punishment protections under the state constitution in light of the framework established by the Pennsylvania Supreme Court in Edmunds.⁷ Elia, 83 A.3d at 267.

Notwithstanding Elia's comprehensive and zealous arguments for broader protections under the state charter, the Elia Court "decline[d] his invitation to construe our Constitution differently than the United States Supreme Court has interpreted the Eighth Amendment to the United States Constitution." Id. To that end, court's reviewing claims that a sentence violates the prohibition against cruel

⁷ Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991).

and unusual punishments “need not engage in a separate state constitutional review[.]” of that claim. Commonwealth v. Parker, 718 A.2d 1266, 1268 (Pa. Super. Ct. 1998).

Based on the foregoing, the PCRA Court correctly determined that the state constitution provided no broader protection, and properly reviewed Petitioner’s claim under the Eighth Amendment. See Commonwealth v. Ishankulov, 2022 PA Super 73, 275 A.3d 498, 505 (2022); Commonwealth v. Barnett, 2012 PA Super 157, 50 A.3d 176, 197 (2012).

II. Petitioner’s consecutive sentences of 40 years to life imprisonment for two counts of First-Degree Murder do not violate the constitutional prohibition against cruel and unusual punishments.

“The Eight Amendment to the Federal Constitution states that ‘[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.’” Commonwealth v. Lawrence, 2014 Pa. Super. 182, 99 A.3d 116, 119 (2014) (quoting U.S. Const. amend. VIII). As the United States Supreme Court has frequently noted, the Eighth Amendment embodies a concept of proportionality that must be viewed “according to ‘the evolving standards of decency that mark the progress of a maturing society.’” Miller v. Alabama, 567 U.S. 460 (2012). Those evolving standards were at the core of a line of Supreme Court cases applying the Eighth Amendment’s “evolved standards” to juvenile offenders. See, Id. (finding *mandatory* life-without-parole unconstitutional as

applied to juveniles convicted of homicide offenses); Graham v. Florida, 560 U. S. 48 (2010) (finding a sentence of life-without-parole for a non-homicide offense violates the Eighth Amendment when the offender is a juvenile); Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting imposition of the death penalty on juvenile offenders).

None of the cases in this trilogy of juvenile Eight Amendment decisions established bright line prohibitions on discretionary term of years sentences imposed for multiple offenses. Rather, to the extent that discretion was discussed in Miller, the Court noted that “[i]t would be easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would otherwise receive in juvenile court, while still not thinking life-without-parole appropriate.” Miller, at 489. Further, the same Miller Court specifically noted that its decision did “not foreclose a sentencer’s ability [to impose life-without-parole] in homicide cases” Id. at 480.

In the years since mandatory life without parole sentences for juvenile offenders was deemed unconstitutional, “there has been widespread ‘disagreement in state and federal courts about how to interpret *Miller* and *Montgomery*[⁸.]’” Commonwealth v. Felder, 269 A.3d 1232, 1241 (Pa. 2022), *reargument denied*

⁸ Montgomery v. Louisiana, 577 U.S. 190 (2016) (providing retroactive application to the rule announced in Miller)

(Apr. 12, 2022) *citing* Jones v. Mississippi, 593 U.S. 98, 141 S.Ct. 1307, 1313 (2021). This disagreement was ultimately resolved by the United States Supreme Court in Jones, *supra*.

Therein, the United States Supreme Court found that there is no requirement under Miller or Montgomery that a court make a separate factual finding or permanent incorrigibility before sentencing a juvenile to life without parole for homicide. Instead, a discretionary sentencing system wherein the sentencer considers the factor of youth noted in Miller, “is both constitutionally necessary and constitutionally sufficient.” Jones, 593 U.S. at 105.

In the wake of the Jones decision, the Pennsylvania Supreme Court determined that “[a] life-without-parole sentence for a juvenile murderer is [] constitutional, and hence no viable *Miller* claim exists, ‘so long as the sentence is not mandatory — that is, [] so long as the sentencer has discretion to consider the mitigating qualities of youth and impose a lesser punishment.’” Felder, 269 A.3d, 1243. Turning to the “purported *de facto* life sentence” before it in Felder, the Pennsylvania Supreme Court found that Jones controlled. Id. at 1245. Therefore, the Pennsylvania Supreme Court held

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. This includes a term-of-years sentence that may amount to a *de facto* life

sentence. Stated differently, as long as the sentence was the product of a discretionary sentencing system that included consideration of the juvenile's youth, the Eighth Amendment is satisfied.

Id. at 1245-1246.

In the instant case, Petitioner was afforded a full resentencing hearing following the decision in Montgomery, supra. Prior to that hearing, the Commonwealth filed a Notice of Intent to Seek Life Without Parole. Petitioner, for his part, submitted a letter to the Court with "Re-sentencing Documentation" including over 55 attachments. The Commonwealth's pre-sentence memorandum ultimately sought consecutive sentences of 50 years to life for each murder committed by Petitioner.

On November 3, 2017, Petitioner appeared for resentencing. During an extensive hearing, Petitioner testified along with 5 other witnesses on his behalf. (N.T. 11/3/17, at 5-121). The Commonwealth presented the testimony of the assigned investigator and prosecutor. (N.T. 11/3/17, at 121-138). When imposing sentence, the Lower Court acknowledged that even though a full detailed recitation of the Miller factors was not necessary in this case, it had "chosen to consider and review all of those factors in arriving at the appropriate sentence here today." (N.T. 11/3/17, at 155). The Lower Court then briefly reviewed all of the factors attendant to Petitioner's youth that it had considered in arriving at its sentence. (N.T. 11/3/17, at 155).

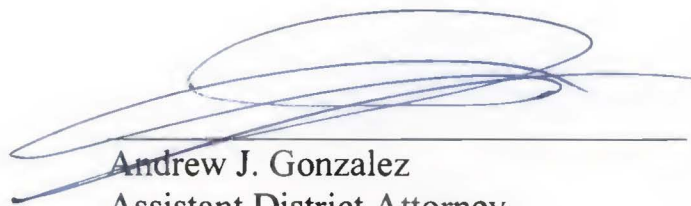
In the end, Lower Court noted, *inter alia*, that it “simply cannot accept the proposition that a juvenile offender who commits multiple murders must be afforded a volume discount and not held responsible for each and every life he has taken, even if the sentence imposed approaches a lifetime in prison. Youth matters, but so did the lives of the victims.” (N.T. 11/3/17, at 158).

Based on the foregoing, Petitioner, like the defendant in *Felder*, “received the constitutionally required procedure guaranteed by *Miller* and the Eighth Amendment.” *Felder*, 269 A.3d, 1246. Therefore, Petitioner’s consecutive sentences of 40 years to life for two murders do not violate *Miller* nor do they amount to cruel and unusual punishment. As such, the Lower Court correctly found that Petitioner’s sentences did not violate the constitutional prohibition against cruel and unusual punishment.

CONCLUSION

Wherefore, based on the foregoing, the Commonwealth of Pennsylvania respectfully requests that this Honorable Court affirm the Order of the Court of Common Pleas of Lancaster County.

Respectfully submitted,
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COMMONWEALTH OF PENNSYLVANIA :
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 VS. : NO. 626 MDA 2024
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 MICHAEL L. BOURGEOIS :

PROOF OF SERVICE

I hereby certify that I am this day serving a copy of the foregoing, “Brief for Appellee” upon the person and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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CERTIFICATE OF COMPLIANCE

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

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