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IN THE
SUPERIOR COURT OF PENNSYLVANIA

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1118 WDA 2016

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COMMONWEALTH OF PENNSYLVANIA

APPELLEE,

V.

MICHAEL FOUST,

APPELLANT.

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# BRIEF OF APPELLANT

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On Appeal from the July 5, 2016 Re-Sentence in the Court of Common Pleas, Venango County, Docket No. CP-61-CR-0000679-1993.

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Bradley S. Bridge, Esq.
PA Attorney ID No. 39678
Defender Association of
Philadelphia
1441 Sansom Street
Philadelphia, PA 19102
Telephone (267) 765-6537
BBridge@philadefender.org

Marsha L. Levick, Esq.
PA Attorney ID No. 22535
Juvenile Law Center
1315 Walnut Street, 4th floor
Philadelphia, PA 19107
Telephone (215) 625-0551
Facsimile (215) 625-2808
Mlevick@jlc.org

Pamela R. Logsdon Sibley
PA Attorney ID No. 88906
1243 Liberty St., Ste 403
Franklin, PA 16323
Telephone (814) 432-5616
Sibley_pamela@yahoo.com

**COUNSEL FOR APPELLANT**

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## II. STATEMENT OF JURISDICTION

This Court's jurisdiction to hear an appeal from a judgment of sentence of Venango County Court of Common Pleas is established by Section 2 of the Judiciary Act of 1976, P.L. 586, No. 142, § 2, 42 Pa.C.S.A. § 742.

## III. ORDER IN QUESTION

On July 5, 2016, the Venango County Court of Common Pleas issued an order on Docket No. CP-61-CR-0000679-1993, titled Re-Sentence, imposing a "total aggregate sentence . . . of imprisonment of 60 years to Life."[1]

## IV. SCOPE AND STANDARD OF REVIEW

The issue presented here concerns the constitutionality of the *de facto* life without parole sentence of 60 years to life imposed on Michael Foust. Issues concerning the constitutionality of a criminal sentence are questions of law and this Court's review is plenary.

Additionally, at issue is whether the only lawful sentence Mr. Foust could have received at his resentencing hearing is a sentence pursuant to the third-degree murder statute. Again, the legality of a criminal sentence presents a question of law and this Court's review is plenary.

[1] A copy of the order resentencing Mr. Foust is attached hereto as Appendix "A."

Alternatively, at issue is whether the trial court abused its authority in resentencing Mr. Foust to a *de facto* life without parole sentence. While such a consideration in this Court typically would be pursuant to an abuse of discretion standard, the standard of appellate review of a juvenile given a life without parole sentence should be plenary to effectuate the constitutional requirement established by the United States Supreme Court in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) that imposition of a life without parole sentence only be imposed on children who are permanently incorrigible, irreparably corrupt, or irretrievably depraved. As *Montgomery* clarified, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), established a new substantive rule of constitutional law. This standard of review is currently before the Pennsylvania Supreme Court in *Commonwealth v. Batts*, 135 A.3d 176, *appeal docketed*, No. 45 MAP 2016 (Pa. Apr. 19, 2016).

The scope of review is the entire record.

## V. STATEMENT OF THE QUESTIONS INVOLVED

1. Is it unconstitutional to impose a sentence of 60 years to life, a *de facto* sentence of life imprisonment without the possibility of parole, on a juvenile absent a finding that the juvenile is one of the rare and uncommon juveniles who is permanently incorrigible, irreparably corrupt or irretrievably depraved?

   Suggested answer: Yes.

2. Pursuant to the United States Supreme Court decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), invalidating the Pennsylvania first and second degree murder statutes for juveniles, was the only constitutional sentence available a sentence for third degree murder?

   Suggested answer: Yes.

## VI. STATEMENT OF THE CASE

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

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

[2] A copy of the Motion to Continue and to Grant Access to Juvenile Records is attached hereto as Appendix "B."
[3] A copy of the June 28, 2016 order is attached hereto as Appendix "C."

Counsel introduced the following evidence to demonstrate Mr. Foust's rehabilitation during his incarceration:[4]

1. Certificate in Paralegal Studies from the Blackstone Career Institute. (N.T. 7/5/16, 150:15-17).
2. Yearly Course of Continuing Education Certificate as a Certified Peer Specialist, June 2015. (N.T. 7/5/16, 150:20-22).
3. Certified Peer Specialist Training Certificate from Recovery Opportunity Center, 2014 (N.T. 7/5/16, 150:23-25).
4. Support Specialist Certification, April 2014, including 76 hours of training. (N.T. 7/5/16, 150:25-151:2).
5. A Certificate of Awesomeness for Presentation Mindfulness, May 2016. (N.T. 7/5/16, 149:21-22).
6. QPR Gatekeeper Certificate for Suicide Prevention Gatekeeper Program. (N.T. 7/5/16, 149:23-24).
7. Emotional Balance Group Certificate of Completion, 2016. (N.T. 7/5/16, 150:1-2)
8. Act 143 Victim's Awareness Class Certificate of Completion, May 2016. (N.T. 7/5/16, 150:3-5).
9. Green Environment Certificate of Completion, March 2016 (N.T. 7/5/16, 150:6-9).
10. Emotional Balance Group Certificate of Completion, October 2015. (N.T. 7/5/16, 150:10-11).
11. Testimony from four individuals who work at SCI Albion where the defendant is incarcerated. (N.T. 7/5/16, 148:20-23).
12. Certificate of Exceptional Achievement for the preparation of two dogs through the prison's program training support dogs. (N.T. 7/5/16, 151:3-6, 13-15).
13. Certificate of Completion on First Annual Day of Responsibility at SCI Albion, January 2013. (N.T. 7/5/16, 151:7-9).
14. Peer Leader in Low Intensity Violence Prevention Class, 2011. (N.T. 7/5/16, 151:16-18).
15. Completion of hundreds of hours of instruction in business practices. (N.T. 7/5/16, 151:22-152:17).

[4] While counsel had previously submitted each of these documents to the judge, the judge stated from the bench that he did not read anything that was on the back of a page, thereby likely missing large portions of the record in his review the night before the hearing before anyone introduced the evidence. (N.T. 7/5/16, 149:3-6; 131:13-132:5).

16. Completion of Study Course for Custodial Maintenance, 2006. (N.T. 7/5/16, 152:18-19).
17. Student of the Year Certificate from SCI Albion's Education Department, 2005. (N.T. 7/5/16, 152:20-21).
18. Violence Prevention Group Certificate of Completion, 2003. (N.T. 7/5/16, 152:22-23).
19. AOD Group Therapy Certificate of Completion, 2002 (N.T. 7/5/16, 152:24-25).
20. Classroom Instructor Aid, 2002. (N.T. 7/5/16, 153:1-3).
21. Stress and Anger Management Certificate of Complete, 1997. (N.T. 7/5/16, 153:4-5).
22. Mental Health First Aid Certificate of Completion, May 2016. (N.T. 7/5/16, 153:10-12).
23. Several Vocational Training Certificates (insulation, vinyl fencing, etc.). (N.T. 7/5/16, 152:13-19).

The state did not introduce any rebuttal to the above evidence of rehabilitation. (N.T. 7/5/16, 154:7-9). The judge then took a twenty-four minute recess to deliberate. (N.T. 7/5/16, 154:10-13). In less than 30 minutes after resuming, the judge laid out his analysis and sentenced Mr. Foust to two thirty-to-life consecutive terms. (N.T. 7/5/16, 154:13; 171:9-11; 174:3). The judge found Mr. Foust to be a rehabilitated man, but relied on 1102.1 guidelines calling for 35 years and the fact that two lives were lost. (N.T. 7/5/16, 169:5-17). The judge made no findings regarding whether Mr. Foust was one of the rare and uncommon juveniles whose crime reflected irreparable corruption, irretrievable depravity, or permanent incorrigibility.

On July 15, 2016 counsel filed a post-sentence motion challenging the 60 to life sentence meted out as unconstitutional and an abuse of discretion. [5] On July 19, 2016, the sentencing court denied the motion without a hearing. [6]

## VII. SUMMARY OF THE ARGUMENT

At his resentencing hearing, Mr. Foust was resentenced to two consecutive thirty-to-life terms, a *de facto* life without parole sentence of 60 years to life. As this sentence is a *de facto* life without parole sentence for a juvenile, the United States Supreme Court's decision in *Miller* is controlling. In *Miller*, the Court outlawed mandatory life without parole sentences for juveniles and mandated that the imposition of such a sentence only occur in the rare and uncommon case where it is determined that the juvenile is irreparably corrupt, irretrievably depraved or permanently incorrigible. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012). In *Montgomery*, the Court held *Miller* to be retroactive and clarified that "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, *those whose crimes reflect permanent incorrigibility.*" *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (emphasis added).

[5] A copy of the July 15, 2016 post-sentence motion is attached hereto as Appendix "F."
[6] A copy of the July 19, 2016 order is attached hereto as Appendix "G."

Mr. Foust's hearing, however, did not meet the substantive requirements established by the United States Supreme Court. Mr. Foust was never determined to be the rare or uncommon juvenile, and there was no finding that he is irreparably corrupt, irretrievably depraved or permanently incorrigible. In fact, the sentencing judge found that Mr. Foust had been rehabilitated. Mr. Foust's sentencing judge disregarded the presumption of a meaningful opportunity for parole established in *Miller* and *Montgomery,* and improperly allowed the facts of the crime to outweigh and overshadow his own findings of rehabilitation. Mr. Foust should have been provided the same procedural safeguards as an adult facing capital punishment, but instead was sentenced at a hearing which lacked the correct legal framework.

Finally, since the Pennsylvania's sentencing statutes for first and second degree murder were invalidated by *Miller*, the only constitutional sentence available is that of twenty-to-forty years for third-degree murder.

## VIII. STATEMENT OF REASONS TO ALLOW AN APPEAL TO CHALLENGE THE DISCRETIONARY ASPECTS OF A SENTENCE

Pursuant to Pennsylvania Rules of Appellate Procedure:

> An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in a separate section of the brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence.

Pa.R.A.P. 2119(f); *See also*, *Commonwealth. v. Tuladziecki,* 522 A.2d 17, 19 (Pa. 1987). However, when issues raised on appeal involve the legality of the sentence,

and not its discretionary aspects, a Pa.R.A.P. 2119(f) ("*Tuladziecki*") statement is not required. *Commonwealth v. Shaw*, 744 A.2d 739, 742 (Pa. 2000), *superseded by statute on other grounds*, 75 Pa.C.S.A. 3806(a)(3).

Appellant, Michael Foust, challenges the constitutionality of, and the legal basis for, the life without parole sentence he received. The challenge is to the legality—not the discretionary aspects—of a sentence of 60 years to life, a *de facto* life without parole sentence barred under *Miller* and *Montgomery*. Moreover, the only appropriate punishment for Mr. Foust would have been twenty to forty years for third degree murder as *Miller* invalidated Pennsylvania's first and second degree murder statutes. For these reasons, no *Tuladziecki* statement is required.

Despite raising a question that clearly implicates the legality of the sentence, in an abundance of caution considering the gravity of the case, Mr. Foust includes a *Tuladziecki* statement. Mr. Foust's original sentence of life without parole was vacated by the Pennsylvania Supreme Court following the United States Supreme Court's decision in *Miller*. At a new sentencing hearing, he was sentenced to 60 to life. Independent from the legal issues demonstrating that such a *de facto* life without parole sentence is not permitted absent the proper protections required by *Montgomery*, the sentencing judge found that Mr. Foust had been rehabilitated (i.e., not "irreparably corrupt").

Counsel filed a post-sentence motion challenging the sentence meted out which was denied four days later without a hearing. This Court should grant allowance of appeal from the discretionary aspects of Mr. Foust's sentence because the sentencing court violated the express provisions of the Sentencing Code and imposed a sentence contrary to the fundamental norms which underlie the sentencing process. *Commonwealth v. Mouzon*, 812 A.2d 617, 627 (Pa. 2002).

In order to challenge the discretionary aspects of a sentence, an appellant must establish that there is a substantial question that the sentence imposed is inappropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b), Pa.R.A.P. 2119(f), *Commonwealth v. Kenner*, 784 A.2d 808, 810-11 (Pa. Super. Ct. 2001). Mr. Foust must raise a "plausible argument that his" 60 year to life sentence was: (1) "inconsistent with a particular provision of the Sentencing Code;" or (2) "contrary to the fundamental norms underlying the sentencing process." *Mouzon*, 812 A.2d at 622, 625 (citing *Commonwealth v. Goggins*, 748 A.2d 721, 727 (Pa. Super. Ct. 2000). Failure to address all relevant sentencing criteria presents a substantial question that the sentence imposed is inappropriate. *Commonwealth v. Dodge*, 957 A.2d 1198, 1200 (Pa. Super. Ct. 2008).

The sentencing court violated section 9721(b) of the Sentencing Code by not carefully considering the relevant factor of Mr. Foust's rehabilitative needs and balancing those with the protection of the public and the gravity of the offense.

*Commonwealth v. Mathews*, 486 A.2d 495, 497-98 (Pa. Super. Ct. 1984). The statute reads in part as follows:

> (b) **General standards.--**In selecting from the alternatives set forth in subsection (a), the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.

42 Pa.C.S.A § 9721(b). The sentencing judge failed to consider any rehabilitative needs of the defendant.

Therefore, Mr. Foust has raised substantial questions which should permit his appeal to proceed. For these reasons, the sentence imposed was excessive and was an abuse of discretion.

## IX. ARGUMENT

### A. SIXTY YEARS TO LIFE, A *DE FACTO* LIFE WITHOUT PAROLE SENTENCE, CANNOT BE CONSTITUTIONALLY IMPOSED ON A JUVENILE ABSENT A FINDING THAT THE JUVENILE IS ONE OF THE RARE AND UNCOMMON JUVENILES WHO IS PERMANENTLY INCORRIGIBLE, IRREPARABLY CORRUPT, OR IRRETRIEVABLY DEPRAVED

*Miller* and *Montgomery* create a presumption of parole eligibility and require a child to be found irreparabl[y] corrupt before receiving a life without parole sentence, even if that sentence is a *de facto* life without parole sentence. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 733-35 (2016). Mr. Foust's two consecutive thirty-to-life sentences create a *de facto* life without parole sentence that unconstitutionally deprives him of a meaningful opportunity for parole as he is not one of the rare and uncommon juveniles who is irreparably corrupt.

*Montgomery* vastly restricts a sentencing court's discretion to impose juvenile life without parole sentences. *See Veal v. State*, 784 S.E.2d 403, 411 (Ga. 2016) ("The *Montgomery* majority's characterization of *Miller* also undermines this Court's cases indicating that trial courts have significant discretion in deciding whether juvenile murderers should serve life sentences with or without the possibility of parole."). Because *Montgomery* now mandates that a juvenile life without parole sentence must be "rare," "uncommon," and reserved only for "irreparabl[y] corrupt[]" young offenders, *Montgomery*, 136 S. Ct. at 733-34,

appellate courts must have the ability to carefully scrutinize a sentencing court's decision to impose juvenile life without parole, or as in this case, a *de facto* life without parole sentence.

The imposition of a *de facto* life without parole sentence in this case was contrary to law. The sentencing court erroneously relied on statutes that did not apply to Mr. Foust either because the statute was for sentencing individuals who were adults at the time of their offense or because the statute explicitly did not apply retroactively to Mr. Foust's case. (N.T. 7/5/16, 157:5-158:18). Furthermore, the sentencing court was focused on a personal belief that the sentence for each death must run consecutively or the sentence would not give proper weight to the lives lost. (N.T. 7/5/16, 169: 14-21, 172:20-23). This type of arbitrary decision-making is precisely why a heightened standard of review is necessary to ensure that the equivalent of the death penalty for children is not handled in an *ad hoc* manner. Absent such scrutiny, the imposition of juvenile life without parole will be arbitrary and capricious; different judges and different counties may balance factors differently yet survive a challenge on appeal because of the highly deferential nature of an abuse of discretion standard.

### 1. Mr. Foust's Sentence of Sixty Years to Life Is a *De Facto* Life Without Parole Sentence

Mr. Foust's two consecutive 30 years to life sentences result in a sentence of 60 years to life, meaning that he must serve a minimum of 60 years before he can

even be eligible to petition for parole. Relevant case law demonstrates that such a sentence, imposed on a 17-year-old child, constitutes a *de facto* life sentence.[7]

The Supreme Court's Eighth Amendment jurisprudence establishes that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not the label of the sentence. The U.S. Supreme Court has noted that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without the possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." *Sumner v. Shuman*, 483 U.S. 66, 83 (1987). While this Court has not considered whether 60 years to life would be a *de facto* life sentence, other jurisdictions have made such determinations with even lower minimum terms.

The Iowa Supreme Court held that a 52½ year sentence was the functional equivalent of life imprisonment, triggering the protections established by *Miller*.

[7] In the context of addressing relief through *Graham v. Florida*, 560 U.S. 48 (2010), where the U.S. Supreme Court banned life without parole sentences for juveniles convicted of non-homicide offenses, the majority of courts agree that *Graham* and *Miller*'s analysis extend to children with multiple offenses serving *de facto* life sentences. *See Henry v. State*, 175 So. 3d 675, 676 (Fla. 2015) (eight separate felony offenses running a consecutive 90-year sentence constitute a *de facto* life without parole sentence); *State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (fourteen parole-eligible life sentences and a consecutive 92 years in prison, creating a minimum of 100 years, unconstitutional under *Graham*); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (three attempted murder counts constituting a 110-years-to life sentence are *de facto* life without parole); *People v. Rainer*, No. 10CA2414, 2013 WL 1490107, at *1 (Colo. App. 2013) (aggregate 112-year sentence violated *Graham*'s prohibition of life sentences for nonhomicide offenses despite four counts), *cert. granted*, No. 13SC408, 2014 WL 7330977 (Colo. Dec. 22, 2014).

*State v. Null*, 836 N.W.2d 41, 71-74 (Iowa, 2013).[8] The Iowa Supreme Court rejected the state's argument that a "juvenile's potential future release in his or her late sixties after a half century of incarceration" was not barred by *Miller*. *Id.* at 71. *See also Bear Cloud v. State*, 334 P.3d 132, 136, 144 (Wyo. 2014) (an aggregate sentence of 45 years was the *de facto* equivalent of a life sentence without parole); *State v. Riley*, 110 A.3d 1205, 1213-14 (Conn. 2015) (aggregate 100-year sentence for a total of four offenses, including murder, was *de facto* life sentence), *cert. denied*, 136 S. Ct. 1361 (2016); *People v. Nieto*, 52 N.E.3d 442, 447, 455 (Ill. App. Ct. 2016) (three consecutive sentences for multiple homicide and nonhomicide crimes created a *de facto* life sentence in violation of *Miller*).

The Connecticut Supreme Court found one defendant's 50 year sentence without the possibility of parole was the functional equivalent of a life sentence and, as a result, his sentencing must comport with *Miller*. *Casiano v. Comm'r of*

[8] *See also Thomas v. Pennsylvania*, 2012 WL 6678686 at *2 (E.D. Pa. 2012) (vacating a sentence in which a 15-year-old offender would not be parole-eligible until age 83 noting that "[t]his Court does not believe that the Supreme Court's analysis would change simply because a sentence is labeled a term-of-years rather than a life sentence if that term-of-years sentence does not provide a meaningful opportunity for parole in a juvenile's lifetime. This Court's concerns about juvenile culpability and inadequate penological justification apply equally in both situations, and there is no basis to distinguish sentences based on their label."); *but see Diamond v. State*, 419 S.W.3d 435 (Tex. Ct.. App. 2012) (upholding a child's consecutive 99 year and 2 year sentences without any discussion of *Graham*); *State v. Kasic*, 265 P.3d 410 (Ariz. Ct. App. 2011) (upholding an aggregate term of 139 ¾ years based on 32 felonies, including one attempted arson); *State v. Brown*, 118 So. 3d 332, 341-42 (La. 2013) (upholding consecutive term-of-years sentences rendering the defendant eligible for parole at 86); *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) (upholding a sentence where the earliest possibility of parole was at age 95); *State v. Cardeilhac*, 876 N.W.2d 876, 890 (Neb. 2016) (juvenile defendant's sentence of imprisonment for 60 years to life was not excessive).

*Correction*, 115 A.3d 1031, 1035 (Conn. 2015) The Connecticut Supreme Court evaluated the sentence by reviewing life expectancy data, which shows that such a lengthy sentence will result in the likelihood that the individual will die in prison.

> We begin by observing that recent government statistics indicate that the average life expectancy for a male in the United States is seventy-six years. United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Vital Statistics Reports, Vol. 62, No. 7 (January 6, 2014), available at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr 62_07.pdf (last visited May 26, 2015). This means that an average male juvenile offender imprisoned between the ages of sixteen and eighteen who is sentenced to a fifty year term of imprisonment would be released from prison between the ages of sixty-six and sixty-eight, leaving eight to ten years of life outside of prison. Notably, this general statistic does not account for any reduction in life expectancy due to the impact of spending the vast majority of one's life in prison. See, e.g., Campaign for the Fair Sentencing of Youth, "Michigan Life Expectancy Data for Youth Serving Natural Life Sentences," (2012–2015) p. 2, available at http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited May 26, 2015) (concluding that Michigan juveniles sentenced to natural life sentences have average life expectancy of 50.6 years); N. Straley, "*Miller*'s Promise: Re–Evaluating Extreme Criminal Sentences for Children," 89 Wn. L.Rev. 963, 986 n. 142 (2014) (data from New York suggests that "[a] person suffers a two-year decline in life expectancy for every year locked away in prison"); see also *United States v. Taveras*, 436 F.Supp.2d 493, 500 (E.D.N.Y.2006) (acknowledging that life expectancy within federal prison is "considerably shortened"), vacated in part on other grounds sub nom. *United States v. Pepin*, 514 F.3d 193 (2d Cir.2008); *State v. Null*, supra, 836 N.W.2d at 71 (acknowledging that "long-term incarceration [may present] health and safety risks that tend to decrease life expectancy as compared to the general population"). Such evidence suggests that a juvenile offender sentenced to a fifty year term of imprisonment may never experience freedom.

*Id.* at 1046.

The federal government has used life expectancy data in recognizing that a sentence of just under 40 years is the functional equivalent of a life sentence. The United States Sentencing Commission defines a life sentence as 470 months (or just over 39 years), based on average life expectancy of those serving prison sentences. *See, e.g.*, *United States v. Nelson*, 491 F.3d 344, 349-50 (7th Cir. 2007); U.S. Sentencing Commission Quarterly Data Report (Through June 30, 2016) at 28, Figure E, n.1, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_3rd_16_Final.pdf.pdf (last accessed December 22, 2016). The average life expectancy for an adult serving a life sentence in Michigan, for example, is 58.1 years. Campaign for the Fair Sentencing of Youth, *Michigan Life Expectancey Data for Youth Serving Natural Life Sentences*, (2012-2015) p. 2, available at http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last visited December 22, 2016). The life expectancy for juvenile lifers is even shorter, dropping almost a decade to 50.6 years. *Id.*

Michael Foust will be incarcerated for at least 60 years before he is even be eligible to be considered for parole. Such a sentence amounts to a *de facto* life sentence and violates due process and the prohibition again cruel and unusual punishments. U.S. Const. Amend. VIII, XIV.

### 2. Mr. Foust's Sentencing Hearing, Which Resulted in His *De Facto* Life Without Parole Sentence, Violated the Mandates of *Miller* and *Montgomery*

#### a. *Miller* and *Montgomery* prohibit juvenile life without parole sentences "for all but the rarest of juvenile offenders, *those whose crimes reflect permanent incorrigibility*"

Through its decisions in *Miller* and *Montgomery*, the United States Supreme Court set forth the predicate factors that must be found before a life without parole sentence can be imposed on a juvenile. *Montgomery* explained that the Court's 2012 *Miller* decision "did bar life without parole . . . for all but the rarest of juvenile offenders, *those whose crimes reflect permanent incorrigibility*." *Montgomery*, 136 S. Ct. at 734 (emphasis added). The Court held that "*Miller* drew a line between children whose crimes reflect transient immaturity and *those rare children whose crimes reflect irreparable corruption*," *id.* (emphasis added), noting that a life without parole sentence "could [only] be a proportionate sentence for the latter kind of juvenile offender." *Id.* Under the Eighth Amendment, juvenile offenders can only receive a life without parole sentence if their crimes reflect "permanent incorrigibility," "irreparable corruption" or "irretrievable depravity." *Id.* at 733, 734. A life without parole sentence for a youth whose crime demonstrates "transient immaturity" is disproportionate and thus unconstitutional. *Id.* at 734.

*Montgomery* requires that imposing a life without parole sentence on a juvenile should be "uncommon." *Id.* at 733-34. One state supreme court noted:

> "[t]he *Montgomery* majority explains . . . that by *uncommon*, *Miller* meant *exceptionally rare*, and that determining whether a juvenile falls into that exclusive realm turns not on the sentencing court's consideration of his age and the qualities that accompany youth along with all of the other circumstances of the given case, but rather on a specific determination that he is *irreparably corrupt*.

*Veal*, 784 S.E.2d at 411. The Georgia Supreme Court further reasoned that "[t]he Supreme Court has now made it clear that [life without parole sentences] may be constitutionally imposed only on the worst-of-the-worst juvenile murderers, much like the Supreme Court has long directed that the death penalty may be imposed only on the worst-of-the-worst adult murderers." *Id.* at 412.

The United States Supreme Court recently reiterated that merely considering a defendant's age and associate characteristics in a checklist fashion is not sufficient. This was made clear by the Supreme Court's recent decision remanding several cases for resentencing consistent with *Montgomery*. *Tatum v. Arizona*, 137 S. Ct. 11 (2016).[9] As Justice Sotomayor stated in her concurrence, the cases required remand as "none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 12

[9] The Court noted that the *Tatum* "opinion also applies to No. 15–8842, *Purcell* v. *Arizona*; No. 15– 8878, *Najar* v. *Arizona*; No. 15–9044, *Arias* v. *Arizona*; and No. 15– 9057, *DeShaw* v. *Arizona*." *Tatum*, 137 S. Ct. at 11 n.1.

(Sotomayor, J., concurring) (citing *Montgomery*, 136 S. Ct. at 734); *see also Adams v. Alabama*, 136 S. Ct. 1796, 1799-1800 (2016) (Sotomayor, J., concurring).

This central question was also identified by the court in *Veal*, when the trial court did consider the defendant's age, the associated youthful characteristics, and the crime before imposing a life without parole sentence.

> The trial court did not, however, make any sort of distinct determination on the record that Appellant is irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by Montgomery.

784 S.E.2d at 412.

The record in Mr. Foust's resentencing manifested the same deficiencies found in *Tatum*, *Adams*, and *Veal*. First, the sentencing judge barely noted Mr. Foust's age, and did not properly consider his age as mitigating. *See* (N.T. 7/5/16, 158:25-159:10) Similarly, in *Tatum*, Sotomayor found that "the sentencing judge identified as mitigating factors that the defendant was '16 years of age' and 'emotionally and physically immature.' He said no more on this front." 137 S. Ct. at 12 (Sotomayor, J., concurring) (citations omitted). The judge in Mr. Foust's case noted that "[a]s to his maturity, we find and we concluded at the time of the transfer case that his maturity was reasonably good." (N.T. 7/5/16, 159: 3-5). The judge then contradicted his own finding, though, when he noted that Mr. Foust's "emotional maturity and development were problematic" but did not expound on how those

counsel against a *de facto* life sentence. (N.T. 7/5/16, 160:21-23). The judge demonstrated a fundamental misunderstanding of *Miller* and the Court's recognition that "children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking" which weigh in favor of parole eligibility. *Miller*, 132 S. Ct. at 2464 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

The judge further erred in arguably considering the attendant immaturity of a teenager and a troubled home life as aggravating. The judge found that "the juvenile record is replete with issues on his family," (N.T. 7/5/16, 160:4-5), but discounted the immature behavior that could correspond to a troubled home life when he stated:

> I'm not sure it's a parenting failure so much as it is a societal issue with the kids his age. It just seems to be a certain percentage of kids his age, who because of peers or for whatever, become irresponsible.

(N.T. 7/5/16, 160:5-9). This disregard of his home life by the trial court in Foust's case is the type of mistake identified by Justice Sotomayor in her *Tatum* concurrence. 137 S. Ct. at 12 (The judge "then minimized the relevance of [the defendant's] troubled childhood."). The judge's analysis discounts the mitigating evidence that Mr. Foust's mother was "heavy on drugs and had used drugs before and after the time of the crime," and allegedly there was cocaine at his father's house (N.T. 7/5/16, 161:18-25). The judge also apparently gave no weight to Mr. Foust's mental health history despite two hospitalizations. (N.T. 7/5/16, 162:14-18).

As for Mr. Foust's participation in the crime, there is no question that he shot the victims. However, there was another individual with Mr. Foust who was nicknamed "Crazy" and was "incredibly irresponsible," yet the judge made no inquiry into how this other individual may have impacted Mr. Foust's actions. (N.T. 7/5/16, 159:16-160:3). Also, the judge did not consider how the other individual's actions caused the rest of the crime to unfold by shooting the victims' dog. (N.T. 7/5/16, 159:21-23).

Most importantly, the judge disregarded his own finding that Mr. Foust was rehabilitated. The only expert testimony referenced in Mr. Foust's hearing was from 1993 and supported the presumption that he was capable of rehabilitation.[10] Out of three individuals who evaluated him, none of them concluded that he was irreparably corrupt or beyond state services. (N.T. 7/5/16, 143:12-144:12). The judge also found

[10] In fact, such a determination of irreparable corruption and the related predicate characteristics must be based on expert testimony, not a lay evaluation of the individual's character or prospects for rehabilitation. As the Supreme Court found in *Graham*, "[i]t is difficult *even for expert psychologists* to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 560 U.S. at 68 (emphasis added) (quoting *Roper*, 543 U.S. at 573). *See also* Brief for the American Psychological Association et al. as *Amici Curiae* in Support of Petitioners at 25, *Miller v. Alabama*, 132 S. Ct. 2455, (2012) (Nos. 10-9646, 10-9647) [hereinafter APA *Miller Amicus*] ("[T]here is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character; and there is thus no reliable way to conclude that a juvenile—even one convicted of an extremely serious offense—should be sentenced to life in prison, without any opportunity to demonstrate change or reform.") Notably, the difficulty in making this assessment has led to at least two state supreme courts to ban juvenile life without parole entirely. *See Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270, 283-84 (Mass. 2013); *State v. Sweet*, 879 N.W.2d 811, 836-37 (Iowa 2016). Without expert testimony regarding possible rehabilitation, a sentence lacks sufficient evidence to place a juvenile in this category of rare, irreparably corrupt children.

that Mr. Foust "demonstrated a sincere effort to rehabilitate;" "has made strides -- very substantial strides at rehabilitation;" is "not the same person he was when he committed the crime;" "has made a conscientious effort to demonstrate that he is trying to rehabilitate himself;" and that Mr. Foust "in very clear terms" had "done a really good job. As good as [the judge] could hope for" during his incarceration. (N.T. 7/5/16, 168:16-18; 169:5-7; 166:8-9, 11-13; 140:1-3). Therefore, the sentencing judge's own finding that Mr. Foust had rehabilitated himself and demonstrated growth and change precluded a *de facto* life sentence.

**b. *Miller* and *Montgomery* establish a presumption against imposing life without parole sentences on juveniles, including *de facto* life sentences, which was disregarded during Mr. Foust's hearing**

Even before the Supreme Court's decision in *Montgomery*, three state supreme courts held that *Miller* dictated a presumption against juvenile life without parole. The Connecticut Supreme Court found:

> [I]n *Miller*, the court expressed its confidence that, once the sentencing authority considers the mitigating factors of the offender's youth and its attendant characteristics, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id. This language suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances.*

*Riley*, 110 A.3d at 1214 (emphasis added). Similarly, the Missouri Supreme Court held that the state bears the burden of demonstrating, beyond a reasonable doubt,

that life without parole is an appropriate sentence. *See State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013 (*en banc*) ("[A] juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentence beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances.")

The Iowa Supreme Court recognized that there is a presumption against *de facto* life without parole. *State v. Seats*, 865 N.W.2d 545, 555 (Iowa 2015) (recognizing that a judge should presume parole eligibility).[11] Notably, since its decision in *Seats*, the Iowa Supreme Court has expanded its decision and held that juvenile life without parole sentences are *always* unconstitutional pursuant to their state constitution. The Iowa Supreme Court found:

[11] Massachusetts has gone further, banning juvenile life without parole sentences altogether. Relying on the United States Supreme Court precedent, the Massachusetts Supreme Judicial Court held that even the discretionary imposition of juvenile life without parole violates the state constitution. *Diatchenko*, 1 N.E.3d at 284-85. The Court held:

> Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an "irretrievably depraved character," can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender. Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved. Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted.

*Id.* at 283-84 (footnote and citations omitted).

> [T]he enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation. . . . But a district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentence to do the impossible, namely, to determine whether the offender is "irretrievably corrupt" at a time when even trained professional with years of clinical experience would not attempt to make such a determination.
>
> No structural or procedural approach, including a provision of a death-penalty-type legal defense, will cure this fundamental problem.

*Sweet*, 879 N.W.2d at 836-37.

*Montgomery* establishes a presumption against juvenile life without parole sentences in order to effectuate the mandate that such sentences will be "rare" and only apply to the very narrow group of juveniles who are irreparably corrupt, permanently incorrigible, or irretrievably depraved. *Montgomery*, 136 S. Ct. at 734; U.S. Const. Amend. VIII, XIV.

The judge in Mr. Foust's case, though, started with an understanding that the sentences had to run consecutively, inherently creating a *de facto* life sentence. He stated he personally could not "in any way rationalize a sentence that is not consecutive," and stated that "[w]hat drives this case is the fact it was Murder 1, and there were two victims." (N.T. 7/5/16, 169:15-16, 172:20-21). Rather than beginning with the facts of the crime, *Miller* and *Montgomery* mandate that the sentencing judge should have presumed that Mr. Foust would be eligible for parole absent a

finding that he was a rare juvenile who demonstrated irreparable corruption, a finding never made by the sentencing judge here. Given the length of the sentence, such a finding was a predicate of the sentence imposed.

### c. The sentencer cannot allow the facts of a crime to overpower evidence of rehabilitation and mitigation

The Supreme Court has cautioned that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper*, 543 U.S. at 573. This same warning must apply to juvenile life without parole cases to properly effectuate *Miller*'s mandate that only the rare and uncommon child whose crime reflects irreparable corruption is given such a sentence. *Miller*, 132 S. Ct. at 2469. Therefore, the sentence must look beyond the facts of the offense and consider how the youth's age, development, and capacity for rehabilitation *counsel against* a life without parole sentence. *See id.* A juvenile life without parole sentence must be reserved, if imposed at all, for the exceptional cases in which both the circumstances of the offense *and* the particular characteristics of the juvenile demonstrate irreparable corruption.

In *Godfrey*, the Court held that a finding that the homicide was "outrageously or wantonly vile, horrible and inhuman" was insufficient to warrant the death penalty

because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman." *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (plurality opinion). *See also Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988) (holding Oklahoma's aggravating factor that a murder is "especially heinous, atrocious, or cruel" to be overbroad because "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'") (citations omitted). Similarly, a single sentencer's finding that the crime is particularly heinous cannot override evidence of rehabilitation and does not meet the constitutional standard for imposition of a life without parole sentence on a juvenile.

Mr. Foust's crime, a tragic homicide, is not one of the crimes that reflects irreparable corruption. The sentencing judge focused on two lives being lost during the commission of the crime, however, *Miller* required that "[t]he opportunity for release . . . be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit *even heinous crimes* are capable of change." *Montgomery*, 136 S. Ct. at 736 (emphasis added). The crime is not the focus of *Miller*, but rather the ability for an individual to change even after committing a crime such as murder.[12]

[12] When contrasted with other juvenile homicides, Mr. Foust's crime does not rise to the level of particularly cruel and he was certainly not irreparably corrupt. For example, the defendant in *Miller*, physically assaulted his victim with a baseball bat, demonstrated pleasure in the moment

Rather than focusing on Mr. Foust's rehabilitation, though, the Court determined that the sentences would run consecutively before any evidence was presented by Mr. Foust. (N.T. 7/5/16, 59:12-16) ("I mean, that's the real issue, consecutive sentences. Everything else pretty much pales. But on the other hand,

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of it, and took extensive steps to cover up the crime while disregarding opportunities to save the victim's life. Brief of Respondent at 6-7, *Miller v. Alabama*, 132 S. Ct. 2455, (2012) (Nos. 10-9646):

> *Miller [ ] leapt on Cannon, hitting him several times in the face.* JA 133. *Despite Cannon's pleas to stop, Miller picked up the bat. Id. As Cannon screamed, Miller beat him repeatedly, breaking his ribs.* JA 133, 137; R. 985, 1031. *Miller told him, "I am God, I've come to take your life."* JA 133. *He then took one more swing. Id.*
>
> Miller and Smith initially left Cannon alive, but they returned "to cover up the evidence." R. 987, 990. As Cannon lay helpless on the floor, they tried to clean up his blood, which had splattered in the kitchen. R. 987-90. After that, Miller "lit the couch" on fire, telling Smith they "had to do it." R. 990. They then set several more fires throughout the trailer. JA 133. *Cannon, who was unable to move, asked why they were doing this to him.* R. 990-91, 711-12. *They ignored him and left him to die.*

*Id.* at 6-7. Another particularly violent crime was detailed in the Respondent's brief in *Miller:*

> [The defendant] was 14 . . . [and u]sing a gun Jones had stolen and given to him for that purpose, the boyfriend shot her 76-year-old grandfather at Jones's home. *See id.* While the grandfather was "still alive," Jones "poured charcoal lighter fluid on" him "and set him on fire." *Id.* He eventually died, as did Jones's aunt—after Jones and her boyfriend "hit her with portable heaters, stabbed her in the chest, and set her room on fire." *Id.* Jones's grandmother and 10-year-old sister survived the attack, but not because Jones and her boyfriend intended to spare them. After the boyfriend shot the grandmother, Jones "poured the charcoal fluid" on her, and they "set her on fire" as well. *Id.* Jones also stabbed her 10-year-old sister 14 times. *Id.; see also* Stimson & Grossman, *supra*, at 26-27 (discussing Jones's crime in more detail).

*Id.* at 50-51. These are the exact fact patterns the *Miller* Court wanted to ensure did not outweigh other evidence of mitigation and capacity to be rehabilitated. Surely Foust's impulsive reaction to the car chase similarly falls into the category of crimes that should not overpower a sentencer's ability to assess rehabilitation.

how could you not reconcile the fact there were two lives."). Despite the overwhelming evidence of rehabilitation, the judge stated:

> I could make a finding that . . . you have made a sincere effort to improve yourself. *But it doesn't change the fact that I have two victims here, and that's the driver in this case.*

(N.T. 7/5/16, 140:8-11) (emphasis added). This analysis was encouraged by the district attorney who spent the bulk of his presentation recounting victim impact statements and the facts of the crime. (N.T. 7/5/16, 8-29; 31-43). Allowing the facts of a crime to drive the case, however, undermines the central holding in *Miller* and resulted in the improper denial of a meaningful opportunity for parole for Mr. Foust. U.S. Const. Amend. VIII, XIV.

### 3. Mr. Foust Is Constitutionally Entitled to the Same Procedural Safeguards as Adults Facing Capital Punishment, Which He Was Not Afforded at His Hearing

In *Graham*, the United States Supreme Court observed that juvenile life without parole "share[s] some characteristics with death sentences that are shared by no other sentence." 560 U.S. at 69. In *Miller*, the Court attributed its individualized sentencing requirement to *Graham*'s comparison of juvenile life without parole to the death penalty. 132 S. Ct. at 2463, 2466 (describing life without parole "for juveniles as akin to the death penalty"). The Court explained that this comparison evoked the line of precedent prohibiting mandatory capital punishment and requiring

the sentencer to consider the defendant's characteristics and the details of the offense before sentencing him to death. *Id.* at 2463-64.

The Pennsylvania General Assembly has provided extensive safeguards for an adult facing capital punishment: (a) the right to be sentenced by a jury; (b) a default sentence of life imprisonment; (c) a "beyond a reasonable doubt" standard for the Commonwealth, and a "beyond a preponderance of the evidence" standard for the defendant; (d) a verdict of death must be unanimous; and (e) automatic review of all death sentences by this Court. *See* 42 Pa.C.S.A. § 9711(a)-(h).

Mr. Foust was entitled to at least the same procedural due process afforded an adult facing capital punishment under the Eighth Amendment and Article I, Section 12 of the Pennsylvania Constitution, as juvenile life without parole is the death penalty for children. A review of Pennsylvania's capital sentencing provision illustrates the shortcomings in the resentencing below.

The capital sentencing procedure in Pennsylvania is governed by 42 Pa.C.S.A. § 9711, which provides in relevant part:

> (b) If the defendant has waived a jury trial or pleaded guilty, the sentencing proceedings shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, *in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury as provided in subsection (a).*
>
> (c)(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) The aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) The mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) *Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.*

. . . .

(h) Review of death sentences. –

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for further proceedings as provided in paragraph (4).

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor; or

(ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d).

(4) If the Supreme Court determines that the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g).

42 Pa.C.S.A. § 9711 (emphasis added).

Because the factual finding that a juvenile is permanently incorrigible, irreparably corrupt, or irretrievably depraved is required before a life without parole sentence can be imposed, that factual finding mandates a jury trial right. U.S. Const. Amend. VI, XIV. The United States Supreme Court has held that "it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment" and trigger a jury trial right. *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013). As held by the Court in *Blakely*:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may imposes *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment."

*Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (citations omitted).

Mr. Foust was found guilty of two counts of first degree murder and found to be a minor. At the time of his conviction, there was no submission to the jury regarding irreparable corruption. Therefore, based solely on these facts, he cannot receive a *de facto* life without parole sentence under *Miller* and *Montgomery*. Rather, he must be determined to be irreparably corrupt, which requires additional findings neither submitted to nor found by the jury.

Moreover, even if a *de facto* life sentence could constitutionally be permitted, it is clear that here it was an abuse of discretion for the sentencing court to impose

one on the facts presented. Here, the trial judge agreed that Mr. Foust had grown and matured while in prison. He was not in need of additional incarceration or in need of life time parole. Imposition of such a sentence was an abuse of discretion, whether or not a reviewing court uses the enhanced review mandated under *Miller* and *Montgomery* in reviewing the propriety of juvenile life sentences.

The overall procedures utilized at Mr. Foust's resentencing were inconsistent with the procedure outlined by 42 Pa.C.S.A. § 9711 and the due process requirements for capital sentences. U.S. Const. Amend. VI, XIV. This Court must bridge the constitutional gap between the due process afforded a juvenile facing life without parole and the due process afforded an adult facing capital punishment. Considering 42 Pa.C.S.A. § 9711, a juvenile sentencing proceeding where life without parole, or virtual life without parole is sought must include: (a) the right to be sentenced by a jury; (b) a burden of proof beyond a reasonable doubt assumed by the Commonwealth; (c) the requirement for a unanimous verdict; and (d) de novo review on appeal.

### B. BECAUSE *MILLER* INVALIDATED PENNSYLVANIA'S FIRST AND SECOND DEGREE MURDER STATUTES FOR JUVENILES, THE ONLY CONSTITUTIONAL SENTENCE AVAILABLE IS THAT FOR THIRD DEGREE MURDER

The applicable sentencing statute at the time of Mr. Foust's conviction mandated a life without parole sentence for any juvenile found guilty of first or second degree murder. The United States Supreme Court in *Miller* invalidated that

sentencing scheme in 2012. The General Assembly fixed Pennsylvania's "*Miller* problem" prospectively in October 2012, but expressly excluded cases of individuals convicted and sentenced prior to June 25, 2012, including that of Mr. Foust. *See* 18 Pa.C.S.A. § 1102.1(a) (applicable only to those "convicted after June 24, 2012"). Hence, there was no intact sentencing scheme in place at the time of Mr. Foust's resentencing in 2016.

The unconstitutional features of the current statutory scheme (the "*Miller* problem") cannot be severed under 1 Pa.C.S.A. § 1925, because the provisions that would remain would be contrary to legislative intent and not capable of fulfillment without impermissible judicial elaboration or correction. Under our state Constitution's separation of powers doctrine the function of assigning a punishment to statutory criminal conduct is purely legislative. *See Commonwealth v. Wolfe*, 140 A.3d 651, 662 (Pa. 2016); *Commonwealth v. Hopkins*, 117 A.3d 247, 261 (Pa. 2015); *Commonwealth ex rel. Varronne v. Cunningham*, 73 A.2d 705, 706 (Pa. 1950). Provisions of a sentencing scheme cannot be severed when excluding the unconstitutional provisions would result in "the remaining valid provisions, standing alone, [being] incomplete and [ ] incapable of being executed in accordance with the legislative intent." *Hopkins*, 117 A.3d at 252. Such a severance of the sentencing scheme rendered unconstitutional under *Miller* would leave no term of years available for a judge to choose as a minimum that could be calculated to "not exceed

one-half of the maximum sentence imposed," 42 Pa.C.S.A. § 9756(b)(1), as required by the Legislature for the selection of minimum terms in parole-eligible sentences.

Moreover, the function of assigning a "missing" penalty cannot be exercised by the judiciary in the course of an appeal, without running afoul of due process. U.S. CONST. AMEND. XIV. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979). As noted, the General Assembly has expressly refused to exercise its authority over the cases of individuals sentenced prior to 2012, like Mr. Foust, leaving the only available punishment for Mr. Foust one that is unconstitutional. As a result, this Court has no choice but to order that upon resentencing, Mr. Foust not be sentenced for first degree murder at all, but only for any other or lesser offense for which he may have been convicted and for which a lawful penalty is still available.

This issue was presented to the Pennsylvania Supreme Court in *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013) [hereinafter Batts I].[13] Decided shortly after *Miller* and several years before *Montgomery*, the Pennsylvania Supreme Court reached a different conclusion on this question of judicial authority and separation of powers when *Batts I* was before the Court. *Id.* at 294-96. However, that decision does not comport with *Montgomery*'s explanation of *Miller*. As

[13] This issue is presented again in *Commonwealth v. Batts*, 135 A.3d 176, appeal docketed, No. 45 MAP 2016 (Pa. April 19, 2016) [hereinafter Batts II], as the Pennsylvania Supreme Court has granted review of the life without parole sentenced meted out against Batts upon his resentencing.

*Montgomery* ***had not been decided*** at the time of *Batts I*, this Court must address the issue anew. To say that a given sentence would not be unconstitutional (were it actually authorized by law), does not mean that the sentence has in fact been authorized. Yet just such a fallacy underlies the *Batts I* decision on this point.

Imposing a sentence based on the most severe lesser included sentence when the greater offense is voided is consistent with the Pennsylvania Supreme Court's approach in analogous cases. In *Story*, Story was sentenced to death pursuant to a statute which mandated the imposition of the death penalty where at least one of nine specific aggravating circumstances existed and none of the three specified mitigating factors existed. *Commonwealth v. Story*, 440 A.2d 488, 488-89 (Pa. 1981). When this mandatory death penalty statute was struck down as unconstitutional, the Pennsylvania Supreme Court imposed life imprisonment, the next most severe punishment prescribed under Pennsylvania law. *Id.* at 492. In *Bradley*, the defendant was similarly sentenced to death pursuant to a statute that was subsequently deemed unconstitutional. The Pennsylvania Supreme Court vacated the death sentence and imposed the next most severe constitutionally available sentence: life imprisonment. *Commonwealth v. Bradley*, 295 A.2d 842, 845 (Pa. 1972); *See also Commonwealth v. Edwards*, 411 A.2d 493, 494 (Pa. 1979).

There is also precedent from the United States Supreme Court. In *Rutledge*, the defendant was found guilty of both engaging in a criminal enterprise and

conspiracy. *Rutledge v. United States*, 517 U.S. 292, 294 (1996). The Supreme Court found that the conspiracy was a lesser included offense of engaging in a criminal enterprise, which required the vacation of that conviction and imposition of sentence only on the criminal enterprise conviction. *Id.* at 300-02. The *Rutledge* Court opined that where a greater offense must be reversed, the courts may enter judgment on the lesser included offense. *Rutledge* cited numerous decisions with approval that authorized the reduction to a lesser included offense when judgment of sentence could not be imposed upon the greater offense. *See id.* at 305-07.

Finally, resentencing based on the lesser included offense is in line with United States Supreme Court precedent in *Roper*, *Graham*, *Miller*, and now *Montgomery* as juveniles are categorically less culpable than adults who commit similar offenses. *See, e.g.*, *Miller*, 132 S. Ct. at 2464 (noting that "juveniles have diminished culpability and greater prospects for reform"). In other words, juveniles who commit first degree murder are categorically less culpable than adults who commit first degree murder. This approach also addresses the United States Supreme Court's concern in *Graham* and *Miller* that juveniles sentenced to life, because of their young age, serve longer sentences than adult murderers who receive the same sentence. *See, e.g.*, *Graham*, 560 U.S. at 70 ("Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on

average serve more years and a greater percentage of his life in prison than an adult offender.")

Because the *Miller* court invalidated the Pennsylvania homicide sentencing statute for juveniles convicted of first or second degree murder and because the legislature did not establish a statutory scheme to fix that, the only statutory scheme available when Mr. Foust was resentenced was that for third degree murder. U.S. Const. Amend. VI, XIV. The trial court failed to apply this sentencing scheme and thus, Mr. Foust's sentence should be vacated and remanded for a new sentencing hearing consistent with the statutory scheme for third degree murder.

## X. CONCLUSION

For the foregoing reasons, this Honorable Court should vacate Mr. Foust's *de facto* life without parole sentence as unconstitutional and remand the instant matter for resentencing. Alternatively, his sentence should be vacated and remanded for resentencing consistent with third degree murder.

Respectfully submitted,

/s/ Marsha L. Levick
Marsha L. Levick, (PA No. 22535)
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
(215) 625-0551
(215) 625-2808 (Fax)
mlevick@jlc.org

Bradley S. Bridge, Esq.
PA Attorney ID No. 39678
Defender Association of Philadelphia
1441 Sansom Street
Philadelphia, PA 19102
Telephone (267) 765-6537
BBridge@philadefender.org

Pamela R. Logsdon Sibley
PA Attorney ID No. 88906
1243 Liberty St., Ste 403
Franklin, PA 16323
Telephone (814) 432-5616
Sibley_pamela@yahoo.com

DATED: December 22, 2016

## CERTIFICATE OF COMPLIANCE

I hereby certify this 22nd day of December, 2016, that the foregoing brief of Appellant contains 9,574 words and complies with the word count limits as set forth in Pa.R.A.P. 2135.

/s/ Marsha L. Levick
Marsha L. Levick, (PA No. 22535)
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
(215) 625-0551
(215) 625-2808 (Fax)
mlevick@jlc.org

# APPENDIX A

**Re-Sentencing Order of July 5, 2016,**

**in the Court of Common Pleas of Venango County,**

**Pennsylvania, Docket No. CP-61-CR-0000679-1993.**

| | | |
|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA** | : | **IN THE COURT OF COMMON PLEAS OF** |
| | : | **VENANGO COUNTY, PENNSYLVANIA** |
| | : | |
| **VS.** | : | |
| | : | |
| **MICHAEL PAUL FOUST** | : | **C.R. No. 679-1993** |



**RE-SENTENCE**

AND NOW, 5th day of July 2016, the SENTENCE and ORDER of Court on **Count 1, First Degree Murder - Russel J. Rice, in violation of 18 Pa. C.S.A. §2502(a)**, is that you, Michael Paul Foust, Defendant, pay the costs of prosecution, all other costs, we impose no fine, we impose no restitution, and undergo an imprisonment in a STATE INSTITUTION OF THE DEPARTMENT OF CORRECTIONS for a minimum of which shall be **thirty (30) years**, the maximum of which shall be **Life**, to be computed from November 22, 1993, at that institution to be kept, fed, clothed, and treated as the law directs, and stand committed to the Diagnostic and Classification Center, for compliance with the within sentence.

The SENTENCE and ORDER of Court on **Count 2, First Degree Murder - Darla K. Bump, in violation of 18 Pa. C.S.A. §2502(a)**, is that you, **Michael Paul Foust**, Defendant, pay the costs of prosecution, all other costs, we impose no fine, we impose no restitution, and undergo an imprisonment in a STATE INSTITUTION OF THE DEPARTMENT OF CORRECTIONS for a minimum of which shall be **thirty (30) years**, the maximum of which shall be **Life**, to be

computed from the expiration of the sentence imposed at Count 1, at that institution to be kept, fed, clothed, and treated as the law directs, and stand committed to the Diagnostic and Classification Center, for compliance with the within sentence.

During the period of time the Defendant spends incarcerated in the Venango County Jail, the Defendant will be required to reimburse any health care provider charges paid for the Defendant, pay the administrative fee imposed by the Warden and reimburse all other costs incurred.

Credit shall be allowed for **8,262 days** previously served in the Venango County Jail and the Bureau of Corrections from November 22, 1993 until today.

The sentences imposed at Count 1 and Count 2 are intended to run consecutive to and not concurrent with one another.

The total aggregate sentence imposed is a term of imprisonment of 60 years to Life.

The court determines that the Defendant is not RRRI eligible.

BY THE COURT,

**H. William White, Senior Judge**
**Specially Presiding**

nac
cc: Marie T. Veon, Esquire mld 7/12/16
Pamela Sibley, Esquire
PBPP
VCJ
Jail Advocate
LE
DA

# APPENDIX B

## Motion to Continue and Grant Access to Juvenile Records

**Notice to Opposing Counsel**

You are hereby notified that the attached motion has been filed with the Prothonotary/Clerk of Courts on June 24, 2016.

**Certification of Notice and Service**

The undersigned certifies that a copy of this Motion/Petition and proposed Order have been served on:

District Attorney

By:
X fax
____ mail
____ personal service
on the 27th day of June, 2016.

**Information for Court Administrator**

Is this the original filing of this case? ____ yes X no

Has a judge heard any matter previously on this case? X yes ____ no
If yes, name of judge White

If you have knowledge that one of the judges may be conflicted in hearing this case, please name the judge

Estimated time needed for hearing: _____

Counsel is unavailable on the following dates:
8/1 a.m.; 8/2 a.m.; 8/5 a.m.; 8/9 a.m.; 8/10 a.m.; 8/30; 9/7 p.m.; 9/13 a.m.; 9/27 a.m.; 10/11 a.m.; 10/25 a.m.; 10/31 p.m.

Name of opposing counsel DA
Telephone Number 432-9598 Fax Number 437-6721

____ All parties or counsel have consented
____ Consents of all parties are attached
____ Opposing counsel/party does NOT consent

____ Order seeks hearing
____ Order seeks argument only
____ Order seeks special relief
____ Order seeks ex parte relief
____ Order seeks appointment of Mediator/Master

Pamela R. Logsdon Sibley, Esq.

IN THE COURT OF COMMON PLEAS
OF VENANGO COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : C.R. NO. 679 - 1993

V. :

MICHAEL PAUL FOUST :



MOTION TO CONTINUE AND TO GRANT ACCESS TO JUVENILE RECORDS

AND NOW, this 24th day of June 2016, comes the Defendant, by and through his attorney Pamela R. Logsdon Sibley, Esquire, and requests that this Honorable Court continue sentencing on the within case, and in support thereof avers as follows:

1. The undersigned was appointed on this case on May 12, 2016, to represent the Defendant at resentencing pursuant to the Supreme Court's invalidation of mandatory life sentencing for juveniles in *Miller v. Alabama* and *Montgomery v. Louisiana*.
2. This case has a 23 year history which includes multiple appeals and post-conviction relief proceedings.
3. The events for which Defendant is being sentenced occurred more than 23 years ago, and Defendant's educational, legal, social, and medical history are therefore more difficult to recover.
4. The undersigned was unable to review the trial court record for several weeks after being appointed because the Clerk of Courts could not immediately locate the Court's file. Additionally, Defendant's trial counsel no longer has a file because it was destroyed long ago pursuant to the normal file destruction schedule of his office.
5. The Juvenile Court and Juvenile Probation records of the Defendant were made a part of the record of this case by reference both at sentencing and at a hearing on Defendant's

motion to be transferred to juvenile court. However, the undersigned does not have access to those records because of the restriction of public access to juvenile records.

6. Attorney Marie Veon, who is returning to represent the Commonwealth in the within case at resentencing, was contacted by voicemail regarding this request for continuance. However, no response was received as of this writing.

WHEREFORE, this undersigned respectfully requests that this Honorable Court grant a continuance of the sentencing currently scheduled for July 5, 2016 for at least an additional 45 days to allow the undersigned sufficient time to investigate the Defendant's case, and to Order that any and all records of Defendant's juvenile adjudications and juvenile supervision be disclosed to the undersigned.

RESPECTFULLY SUBMITTED,

Pamela R. Logsdon Sibley, Esquire
Attorney for Defendant

I certify that a true and correct copy of the within Motion was served upon the District Attorney of Venango County by facsimile transmission on the 24th day of June 2016 at (814)437-6721.

Pamela R. Logsdon Sibley, Esquire

IN THE COURT OF COMMON PLEAS
OF VENANGO COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | C.R. NO. 679 - 1993 |
| | : | |
| V. | : | |
| | : | |
| MICHAEL PAUL FOUST | : | |

ORDER OF COURT

AND NOW, this _____ day of _____ 2016 upon consideration of Defendant's Motion to Continue and to Grant Access to Juvenile Records, said Motion is GRANTED. Sentencing is the within case is continued for at least 45 days to the _____ day of _____ 2016 at _____ __.m. in Courtroom _____ of the Venango County Courthouse. The Clerk of Courts and Court Supervision Services are directed to make available to Defendant's attorney any and all juvenile records relating to the Defendant, Michael Paul Foust, date of birth June 6, 1976.

BY THE COURT,

_____
H. William White, Senior Judge

# APPENDIX C

## June 28, 2016 Order Denying Motion for Continuance

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | IN THE COURT OF COMMON PLEAS OF |
| | : | VENANGO COUNTY, PENNSYLVANIA |
| vs. | : | |
| | : | |
| MICHAEL FOUST | : | C.R. NO. 679 - 1993 |

ORDER OF COURT

AND NOW, this 28th day of June, 2016, the Court has received and has considered the *Motion to Continue and to Grant Access to Juvenile Records* filed by counsel for the defendant. The Court believes counsel is entitled to the relief requested regarding Juvenile Court and Juvenile Probation records of the defendant. Therefore, Venango County Court Supervision Services, Juvenile Division, is directed, by June 29, 2016, to provide counsel for the defendant, all juvenile records held by that office pertaining to the defendant. The Clerk of Courts is directed to make available to counsel for the defendant all juvenile records relating to the defendant.

The Motion to Continue is hereby refused.

BY THE COURT,

H. WILLIAM WHITE, Senior Judge

cc: DA
P. Sibley, Esquire
CSS (Juvenile Division) ✓ fld

# APPENDIX D

**Opinion of September 26, 2016, issued pursuant to Pa.R.A.P. 1925(a), in the Court of Common Pleas of Venango County, Pennsylvania, Docket No. CP-61-CR-0000679-1993**

IN THE COURT OF COMMON PLEAS OF VENANGO COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
:
v. : CR. No. 679-1993
:
MICHAEL PAUL FOUST, :
Defendant/Appellant. :



**OPINION OF COURT**

AND NOW, this 26 day of September, 2016, the Court has received Appellant's Concise Statement of Matters Complained of on Appeal. In his Concise Statement, Appellant raises twelve points of alleged error in this Court's resentencing of Appellant on two counts of first-degree murder. Following a resentencing hearing following the U.S. Supreme Court decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*, the Court resentenced Appellant to consecutive terms of thirty (30) years to life.

The Court addressed in detail the reasons for imposing the sentence which it did during the resentencing hearing. The Court had the opportunity to hear from the Commonwealth, victims' families, Appellant, and those who have worked with Appellant during his time in prison. The Court stands by the reasoning set forth in the Order and Sentence of Court, and therefore will not issue further opinion. This Opinion is intended to satisfy the Court's requirements under Pa. R.A.P. 1925(a).

BY THE COURT.

H. WILLIAM WHITE, Senior J.
*Specially Presiding*

cc: Pamela Logsdon Sibley, Esq.
DA

# APPENDIX E

## Concise Statement of the Matters Complained of on Appeal

IN THE COURT OF COMMON PLEAS OF VENANGO COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA,<br>Respondent | : | C.R. No. 679 – 1993 |
| V. | : | |
| MICHAEL PAUL FOUST,<br>Defendant/Appellant | : | |



CONCISE STATEMENT OF MATTERS COMPLAINED OF ON APPEAL
PURSUANT TO RULE OF APPELLATE PROCEDURE 1925(b)

AND NOW, this 29th day of August 2016, comes Defendant Michael Paul Foust, by and through his attorney Pamela R. Logsdon Sibley, Esq. and files the within Concise Statement of Matters Complained of on Appeal of which the following is a statement.

1. This Honorable Court sentenced Defendant to an aggregate of 60 years to life (30 years to life on each count to run consecutively). This was error because that sentence is a *de facto* life without parole sentence and it violates due process, equal protection and the prohibition against cruel and unusual punishment under both the United States and Pennsylvania Constitutions when applied to a juvenile offender. It is arbitrary and capricious. U.S. Const., Amend. V, VIII, XIV,; Pa. Const., Art. I, Section 1,9,13.
2. Defendant's sentence violates the constitutional mandate articulated by the U.S. Supreme Court in Miller v. Alabama, 132 S. Ct. 2455 (2012); and Montgomery v. Louisiana, 136 S. Ct. 718 (2016) that life sentences for juveniles be "unusual" or "rare" and reserved only for those who are "permanently incorrigible, irreparably corrupt or irretrievably depraved.". The instant case was not one of the "unusual" or

"rare" cases permitting such a sentence, and the Defendant is not permanently incorrigible, irreparably corrupt or irretrievably depraved.

3. Defendant's sentence violates Graham v. Florida, 560 U.S. 48 (2010) and its mandate that juveniles be permitted an opportunity for release.
4. The Court abused its discretion and imposed an excessive or unreasonable sentence in handing down a 60 year to life sentence, by failing to adequately and appropriately consider defendant's likelihood of rehabilitation as required, for example, by Miller and Montgomery.
5. This Honorable Court erred because it did not have the benefit of a pre-sentence investigation and failed to adequately review the record from the trial, which occurred twenty-three years prior to resentencing.
6. The sentence was imposed in error because, to the extent that this Court considered the current homicide statutory minimum, it was imposed in consideration of an unconstitutional statute: Act 204 of 2012 is unconstitutional because the original purpose of the bill was improperly changed during the legislative process in violation of Article III, Section 1 of the Pennsylvania Constitution and because it contains more than one subject in violation of Article III, Section 3 of the Pennsylvania Constitution. The statute also violates the 8th Amendment's Cruel and Unusual Punishment clauses, Miller, Montgomery, and Graham. The statute is unconstitutional because it violates the U.S. and Pennsylvania constitutional prohibitions against ex post facto laws. These arguments were rejected by the Superior Court in Commonwealth v Brooker, 103 A.3d 325 (Pa. Super. 2014), but are raised and preserved here. Moreover, to the extent that this Court considered that

current unconstitutional statute, that was improper because that statute did not apply to Defendant because his crime occurred before the decision in Miller, the operative date in that statute.

7. This Honorable Court erred because Defendant's sentence is beyond the statutory maximum. After Miller struck down the entire Pennsylvania sentencing scheme for first and second degree murder as applied to juveniles, the only constitutional sentence scheme was the sentencing scheme for third degree murder. This court was mandated to impose a new sentence in the instant matter under the sentencing scheme for third degree murder which existed at the time of Defendant's offense.
8. This Honorable Court erred because it did not give appropriate consideration and weight to the Miller and Montgomery sentencing factors. This sentence was, additionally, an abuse of discretion and was excessive and unreasonable.
9. This Honorable Court erred in that it imposed a *de facto* life sentence. Miller established a presumption against life without parole or its functional equivalent for juveniles. This can only be overcome in an "unusual" or "rare" case with proof beyond a reasonable doubt, which was not done here.
10. The Commonwealth did not meet its burden of proof beyond a reasonable doubt to justify a *de facto* life sentence.
11. This Honorable Court sentenced Defendant to an aggregate of 60 years to life where the Commonwealth did not overcome the presumption of immaturity under Miller.
12. Defendant's due process rights under the Pennsylvania and U.S. Constitutions were violated when he was denied a continuance so that his attorney, who had been appointed approximately six weeks prior to resentencing, could recover and develop

long misplaced evidence regarding his juvenile history, life conditions and mental health at the time of the offense. This is further illustrated by the fact that some juvenile and dependency records were discovered in the Judge's private file in the middle of resentencing which had not been disclosed to Defendant's counsel prior to resentencing. Had these records been disclosed earlier, and had Defendant been afforded the requested continuance to further develop such information, Defendant is likely to have presented substantial additional evidence regarding the sentencing factors prescribed in Miller and Montgomery.

Respectfully Submitted,

Pamela R. Logsdon Sibley, Esq.
Attorney for Defendant

IN THE COURT OF COMMON PLEAS OF VENANGO COUNTY, PENNSYLVANIA

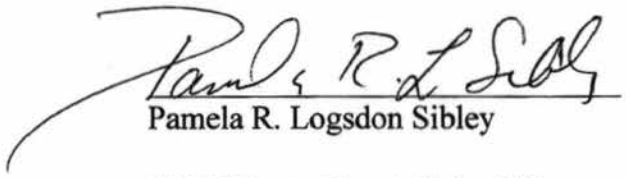
| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA,<br>Respondent | : | C.R. No. 679 – 1993 |
| V. | : | |
| MICHAEL PAUL FOUST,<br>Defendant/Appellant | : | |

Certificate of Service

I certify that on September 1, 2016, a true and correct copy of the within Concise Statement of Matters Complained of on Appeal was been served upon each of the following persons in accordance with Pa.R.A.P. 1925(b)(1):

The H. William White, Judge
Venango County Courthouse
P.O. Box 831
Franklin, PA 16323

The Honorable D. Shawn White
Venango County District Attorney
Venango County Courthouse
P.O. Box 831
Franklin, PA 16323



Pamela R. Logsdon Sibley

1243 Liberty Street, Suite 403
Franklin, PA 16323
(814)432-5616

# APPENDIX F

## Post-Sentence Motion of July 15, 2016

**Notice to Opposing Counsel**

You are hereby notified that the attached motion has been filed with the Prothonotary/Clerk of Courts on July 15, 2016.

**Certification of Notice and Service**

The undersigned certifies that a copy of this Motion/Petition and proposed Order have been served on:

DA

By:
X fax
___ mail
X personal service
on the 15th day of July, 2016.

FILED
COMMON PLEAS COURT
VENANGO COUNTY
2016 JUL 15 PM 3:02
PROTHONOTARY/
CLERK OF COURTS

**Information for Court Administrator**

Is this the original filing of this case? ___ yes X no

Has a judge heard any matter previously on this case? X yes ___ no
If yes, name of judge White

If you have knowledge that one of the judges may be conflicted in hearing this case, please name the judge

Estimated time needed for hearing: 30 min

Counsel is unavailable on the following dates:
7/18; 7/19; 7/20; 7/21 a.m.; 7/25 p.m.; 8/2 a.m.; 8/5 a.m.; 8/9 p.m.
8/16 a.m.; 8/30 a.m.; 9/7 p.m.; 9/13 a.m.; 9/23 a.m.; 9/27 a.m.;
10/11 a.m.; 10/25 a.m.; 10/31 p.m.

Name of opposing counsel DA
Telephone Number 432-9598 Fax Number 437-6221

___ All parties or counsel have consented
___ Consents of all parties are attached
___ Opposing counsel/party does NOT consent

X Order seeks hearing
___ Order seeks argument only
___ Order seeks special relief
___ Order seeks ex parte relief
___ Order seeks appointment of Mediator/Master

Pamela R. Logsdon Sibley, Esq.

IN THE COURT OF COMMON PLEAS
OF VENANGO COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | C.R. NO. 679 - 1993 |
| | : | |
| V. | : | |
| | : | |
| MICHAEL PAUL FOUST | : | |

POST SENTENCE MOTION

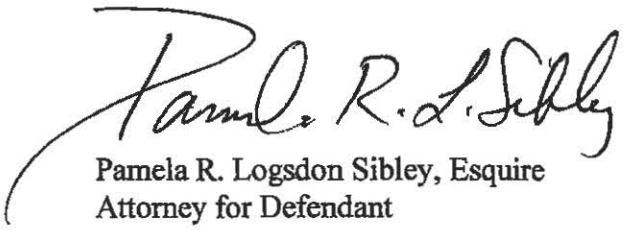
AND NOW, this 15TH day of July 2016, comes the Defendant Michael Paul Foust, by and through his attorney Pamela R. Logsdon Sibley, Esquire, and requests that this Honorable Court reconsider the sentence handed down in the within case on July 5, 2016, and in support thereof avers as follows:

1. Although the Court did consider in some way the factors laid out in Miller v. Alabama and Montgomery v. Louisiana, it failed to adequately consider those factors as they were intended - in the light of the diminished capabilities and greater prospects for reform of the adolescent offender, both of which were demonstrated amply by the Defendant. The court also gave inappropriate weight to Commonwealth v. Batts, considering that case predates Montgomery v. Louisiana and has again been allowed appeal to the Pennsylvania Supreme Court at docket No. 941 MAL 2015.
2. The sentence handed down by this Court on July 5, 2016, although seeming to provide an opportunity for parole, is a de facto life without parole sentence because it would not permit the Defendant an opportunity for parole until after he reaches the age of 77. Considering that the average life expectancy of a male in the United States is 76 years, it is unlikely that Defendant will live long enough to see parole, and the sentence is manifestly unreasonable.

3. Considering the ample evidence of full rehabilitation presented by the Defendant, and the evidence on the record and presented at sentencing of the difficult life the Defendant endured as a child, the failure to provide a meaningful opportunity for parole is an abuse of discretion and violates the Eighth Amendment of the United States Constitution.
4. By denying Defendant's request for a continuance so that his attorney, who was not involved with his case previously, could have more time to prepare and gather historical documents, the Court violated Defendant's due process rights by preventing the Defendant from developing additional evidence relevant to those factors cited in Miller v. Alabama and Montgomery v. Louisiana relating to the conditions of Defendant's childhood prior to the murders.

WHEREFORE, Defendant respectfully requests that this Honorable Court reconsider the sentence handed down in the within case on July 5, 2016, and to grant some concurrency or overlap in the sentence so that Defendant will have a meaningful opportunity for parole at a reasonable age.

RESPECTFULLY SUBMITTED,



Pamela R. Logsdon Sibley, Esquire
Attorney for Defendant

IN THE COURT OF COMMON PLEAS
OF VENANGO COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | C.R. NO. 679 - 1993 |
| V. | : | |
| MICHAEL PAUL FOUST | : | |

ORDER OF COURT

AND NOW, this ____ day of _____ 2016, upon consideration of Defendant's Post-Sentence Motion, a hearing on said Motion is scheduled for the _____ day of _____ 2016 at _____ __.m. in courtroom ____ of the Venango County Courthouse.

BY THE COURT,

_____
J.

Certificate of Service

I hereby certify that a true and correct copy of the within Motion was served upon the District Attorney of Venango County, Pennsylvania by hand delivery and by facsimile transmission to (814)437-6721 on the 15th day of July 2016.

Pamela R. Logsdon Sibley, Esq.

# APPENDIX G

## July 19, 2016 Order Denying Post-Sentence Motion

IN THE COURT OF COMMON PLEAS
OF VENANGO COUNTY, PENNSYLVANIA



COMMONWEALTH OF PENNSYLVANIA : C.R. NO. 679 - 1993

V.

MICHAEL PAUL FOUST

ORDER OF COURT

AND NOW, this 19 day of July 2016, upon consideration of Defendant's Post-Sentence Motion, ~~a hearing on said Motion is scheduled for the _____ day of~~ the court has considered the issues raised therein, the post ~~_____ 2016 at _____ .m. in courtroom _____ of the Venango County Courthouse.~~ sentence motion is hereby Refused.

BY THE COURT,

J.

cc: DA
P. Sibley, Esq.