IN THE SUPERIOR COURT OF PENNSYLVANIA

SITTING AT PITTSBURGH

1118 WDA 2016

COMMONWEALTH OF PENNSYLVANIA
APPELLEE

VS.

MICHAEL PAUL FOUST
APPELLANT

BRIEF FOR APPELLEE

APPEAL FROM SENTENCE ORDER DATED JULY 5, 2016 IN THE COURT OF COMMON PLEAS, VENANGO COUNTY CRIMINAL DIVISION
CR NO. 679-1993

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   Suggested Answer - YES

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   Suggested Answer – YES

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   Suggested Answer – YES

4. WHETHER THE SOLE CHALLENGE TO THE DISCRETIONARY ASPECTS OF APPELLANT'S SENTENCE IS A SUBSTANTIAL QUESTION REQUIRING REVIEW?

   Suggested Answer – NO

5. WHETHER APPELLANT WAIVED THE SOLE CHALLENGE TO THE DISCRETIONARY ASPECTS OF HIS SENTENCE FOR FAILURE TO INCLUDE SAID CLAIM WITH SPECIFICITY IN HIS 1925 (b) STATEMENT?

   Suggested Answer – YES

6. WHETHER THE SENTENCING COURT ABUSED ITS DISCRETION?

   Suggested Answer - NO

COUNTERSTATEMENT OF THE CASE

I. FACTUAL HISTORY

In the early morning hours of November 22, 1993, Appellant, Michael Foust and Kevin Zenker, borrowed a friend's car and drove to the residence of Appellant's father. Appellant entered the residence and stole his father's loaded 9mm handgun and extra bullets. Thereafter with Appellant at the wheel, and the gun tucked between the front seats of the car, the pair drove toward Oil City. As they passed the residence of Darla Bump and Russell Rice, Zenker fired the 9mm pistol out the passenger window at Darla's dog.

Appellant turned the car around and passed the residence a second time. At this time, Darla's daughter informed Darla and Russell the car belonged to Russell's nephew, Kevin Seigworth. Russell and Darla pulled out of their driveway and followed who they thought was Russell's nephew.

After evading Russell and Darla for approximately four (4) miles, Appellant Foust stopped the car, grabbed the 9mm pistol and jumped out of the car. Russell stopped, a distance behind Appellant, opened the driver's door, and began to emerge. Appellant Foust opened fire; four bullets tore into Russell's body. Each shot in and of itself was fatal. Russell collapsed onto Darla's lap and died. Russell was unarmed.

After fatally shooting Russell, Appellant turned his attention to Darla. Darla unarmed, wearing her seatbelt and cradling Russell's head in her lap, was trapped. She held one hand out in front of her face. Appellant answered her defenselessness by unloading the remainder of the 9mm clip into her body. The bullets cut through the windshield; one tore through her hand, then eye and entered her brain. Another tore through her heart, and a third struck her upper arm. Darla died within minutes. She remained belted to her seat.

II. PROCEDURAL HISTORY

On November 22, 1993, Appellant was arrested and charged with first degree murder. He was charged by formal information on January 11, 1994 with two counts of first degree murder each carrying a mandatory minimum sentence of life.

On May 13, 1994, Appellant filed a motion to transfer his case to the Juvenile Division of the Court of Common Pleas. The trial court denied that motion by Order of Court dated May 24, 1994. The trial commenced on June 22, 1994. On June 24, 1994, the jury returned a verdict of guilty of two counts of first degree murder in the deaths of Darla Bump and Russell Rice. Appellant was sentenced to serve two (2) consecutive life sentences on June 30, 1994.

On August 12, 1994, Michael Foust filed a post-sentence motion which was denied on August 17, 1994. A timely appeal was filed September 16, 1994. The Superior Court affirmed the Judgment of Sentence on July 18, 1995. A Petition for Allowance of Appeal was timely filed in the Supreme Court of Pennsylvania. The petition was denied December 15, 1995.

Foust filed a PCRA petition on July 26, 1996. Counsel was appointed. A hearing on the petition commenced on September 2, 1999, the petition was denied the same day.

Foust filed a timely Notice of Appeal. Thereafter, newly appointed counsel filed a "no merit" brief and request for leave to withdraw as counsel, based on her review of the record which revealed the issues raised by Foust were meritless.

The Superior Court reviewed the record and granted counsel's motion for leave to withdraw as counsel, and affirmed the denial of Post Conviction Collateral Relief. The appellate court opinion was filed April 17, 2003. Once again Appellant timely filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. Once again, the Petition for Allowance of Appeal was denied. The date of denial was November 19, 2003.

On June 23, 2004, Foust filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania. The "Magistrate Judge's Report and Recommendation" filed July 6, 2006 recommended dismissal of the habeas petition and denial

of a certificate of appealability. Appellant did not file objections to the recommendation. Failure to do so constituted a waiver of any appellate rights.

Foust filed his second PCRA petition on July 9, 2010.

The petition alleged:

> It is unconstitutional under the Pennsylvania and United States Constitutions and a violation of international law to sentence a juvenile to life imprisonment without the possibility of parole. U.S. Cons., Amend VIII, XIV; PA. Const., Art. 1, Sect. 13; United Nations Convention on the Rights of the Child, Article 37. This issue is raised within 60 days of Graham v. Florida. 42 Pa. C.S. Section 9545(b)(1)(iii).

At the time he murdered Darla Bump and Russell Rice, Appellant Foust was 17½ years old. His date of birth is June 6, 1976. The date of the murders is November 22, 1993. Foust's requested relief: "parole must exist as an option."

On August 2, 2010, the PCRA Court filed a "Pa. R. Crim. R. 907 Notice of Intent to Dismiss Appellant's second PCRA. The Order to dismiss was filed October 18, 2010.

Foust timely filed a Notice to Appeal on November 9, 2010. On September 7, 2011, the Superior Court filed a Memorandum Opinion affirming the dismissal of Foust's second Post Conviction Relief Act petition as untimely. Foust's Petition for Allowance of Appeal from the Order of the Superior Court was denied by the Pennsylvania Supreme Court on December 29, 2011. He timely filed a Petition of Certiorari on February 7, 2012.

The United States Supreme Court requested the Commonwealth to address whether or not their recent decision in Miller v. Alabama applied to Appellant retroactively. The Court ultimately denied the petition on June 29, 2012.

On July 7, 2012, Appellant filed his third petition for relief under the Post Conviction Relief Act. The lower court continued the matter generally on November 13, 2012, pending the Pennsylvania Supreme Court's decision in Cunningham. Appellant's third petition was denied on June 25, 2014.

Miller was given retroactive effect in Montgomery v. Louisana, 84 U.S.L.W. 4063, 136 S.CT. 718 (2016). Appellant filed his fourth petition for collateral relief on February 24, 2016. Appellant was granted relief by Order of Court, dated May 12, 2016. Appellant's consecutive life without parole sentence was vacated and the case was set for resentencing on July 5, 2016. Attorney Pamela Sibley was appointed as counsel on May 12, 2016.

The sentencing judge had handled all aspects of the case since the filing of the formal information. After consideration of all the facts and the applicable sentencing factors, including the appropriate age related factors, the court resentenced Appellant. The sentencing judge set forth in detail his reasons for the greatly reduced sentence imposed. Count 1, First Degree Murder, Russell J. Rice, thirty (30) years minimum sentence and a maximum of life; Count 2, First Degree Murder, Darla K. Bump, thirty (30) years minimum sentence and a maximum of live to be computed from the expiration of the sentence imposed at Count 1.

SUMMARY OF THE ARGUMENT

Appellant's characterization of his sentence as a "de facto life sentence" is inaccurate. The case involved multiple murder victims and multiple convictions for first-degree murder. Appellant received a thirty-year minimum sentence for each life he intentionally and maliciously took. The lower court imposed consecutive sentences on a victim-by-victim basis. Neither Miller nor Montgomery can be said to stand for "volume discounts" requiring multiple murder convictions to run concurrently.

Appellant's argument that the entire statutory sentencing scheme for first-degree murder has been ruled unconstitutional is not buttressed by either the language of the relevant statutory provisions or the holdings in Miller or Montgomery. The United States Supreme Court clearly stated in Montgomery that "giving Miller retroactive effect does not require a state to re-litigate sentences, let alone convictions."

As to the heightened burden of proof on a plenary de novo review espoused by Appellant, the Superior Court has held "absent a specific directive from our Supreme Court or the General Assembly to do so, we decline to expand the narrow holding in Miller. Based on the foregoing arguments this Court cannot entertain Appellant's challenges to the legality of his sentence.

Appellant's claims are in actuality challenges to the discretionary aspects of his sentence and are not appealable as of right. Any claim not set forth within his Rule 2119 (f) statement is waived. Appellant sets forth a sole issue therein, namely, that the lower court "violated the Sentencing Code by not carefully

considering his rehabilitative needs and balancing those with the protection of the public and the gravity of the offense" and cited the court to the general sentencing provision of the Code, specifically section 9721 (b). Appellant's 1925 (b) statement does not specifically challenge a violation of the sentencing code. Failure to raise an issue in a 1925 (b) statement also results in waiver of the issue.

If this Honorable Court concludes the failure to raise the sentence code violation did not result in waiver, the Court is still foreclosed from addressing the merits of the issue. The claim that the court failed to "carefully consider rehabilitative needs," under the specific facts and circumstances of this case, is not a substantial question warranting consideration on its merits. Appellant's challenge is essentially an assertion of abuse of discretion in imposing consecutive sentences; this challenge does not present a substantial question.

If this Honorable Court decides to review the merits of Appellant's sole claim, this Court will find the sentencing court did not abuse its discretion. It is apparent from the record that the court factored into his decision Appellant's endeavors at rehabilitation. The Court also considered the gravity of the offenses and its impact on the victims' family, and the community. Therefore, the sentencing court considered the factors required by the sentencing code contrary to Appellant's averments. The sentencing court did not abuse its discretion, The court considered all the evidence before it and did not ignore or misapply the law, or exercise its judgment for reasons of partiality, prejudice, bias , or ill will.

ARGUMENT

I. THIS HONORABLE COURT LACKS JURISDICTION TO ENTERTAIN APPELLANT'S CHALLENGE TO THE LEGALITY OF HIS SENTENCE WHICH IS BASED ON THE FALSE CONSTRUCT OF A DE FACTO LIFE SENTENCE.

Appellant asserts his sentence is a "de facto life sentence without parole" and is barred under Miller and Montgomery. In addition, he asserts Miller invalidated Pennsylvania's first and second-degree murder statutes, and therefore the only available punishment is a twenty to forty year sentence for third degree murder. Appellant claims these issues "clearly implicate the legality of the sentence." (Brief for Appellant, p. 9).

Our Supreme Court considered these arguments in Batts:

> Appellant's argument that the entire statutory sentencing scheme for first-degree murder has been rendered unconstitutional as applied to juveniles is not buttressed by either the language of the relevant statutory provisions or the holding in Miller....
> Miller neither barred imposition of a life without parole sentence on a juvenile categorically nor indicated that a life sentence with the possibility of parole could never be mandatorily imposed. [ ] Rather, Miller requires only that there be judicial consideration of the appropriate age related factors set forth in that decision prior to the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile. [ ].

Commonwealth v. Batts, 620 Pa 115, 66 A.3d 286, 295 (2013). The United States Supreme Court expressly limited its holding in this regard:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime – as for example we did in Roper or Graham. Instead, it mandates only that a sentence follow a certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty.

Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 2471 (2012). The United States Supreme Court in Montgomery did not change the holding in Miller, contrary to Appellant's assertion. Montgomery v. Louisana, 84 U.S.L.W. 4063, 136 S.Ct. 718 (2016). "Giving Miller retroactive effect moreover does not require states to re-litigate sentences, let alone convictions." In addition, the Pennsylvania Supreme Court in Batts addressed the authorities upon which Appellant relies to support a sentence to the lesser offense of third degree murder and found little support "as such case law is simply inapplicable to the present circumstances." Commonwealth v.Batts, 66 A.3d 296 (Pa.Super.2015).

Next, Appellant contends that this Honorable Court's standard of review of his sentence should be de novo; the scope of review should be plenary, using a "beyond a reasonable doubt" burden of proof; which is ordinarily reserved for a review of death sentences. Appellant then proceeds to contest the weight the trial court gave the evidence it reviewed at resentencing, points to specific statements of the trial court taken in isolation, and argues the trial court improperly considered mitigating factors. The Superior Court in Commonwealth v. Batts, 125 A.3d 33, 43 (Pa.Super.2015) found such issues to be a challenge to the discretionary aspects of the sentence. And as to the "heightened burden of proof" and "corresponding more stringent appellate review", The Superior Court held: "Absent a specific directive from out Supreme Court or the General Assembly to do so, we decline to expand the narrow holding in Miller." Id., at 43.

> Specifically, our Supreme Court explained that Miller requires only that there be judicial consideration of the appropriate age related factors set forth in that

> decision prior to the imposition of a sentence...[citation omitted]...the appropriate age related factors for the trial court to consider were contained in Knox.

Batts, 125 A.3d, at 42-43. See, Commonwealth v. Seagraves, 103 A.3d 839 (Pa.Super.2014), *appeal denied.* A challenge to the imposition of a sentence of life without parole on a juvenile is a challenge to the discretionary aspects of a sentence).

The above arguments of appellant were unsuccessful before the Supreme Court in Batts and the successive Batts Superior Court Panel. Therefore, this Honorable Court cannot reassess those claims. See also, Commonwealth v. Beck, 78 A.3d 656, 659 (Pa.Super. 2013). A three-judge panel "is not empowered to overrule another panel of the Superior Court."

Lastly, Appellant's characterization of his sentence as a "de facto life sentence" in inaccurate. The sentence is more properly described as a sentence imposed in a case involving multiple murder victims for which he received a thirty-year minimum sentence for each life he intentionally and maliciously took. The lower court imposed consecutive sentences on a victim-by-victim basis. This sentence does not contravene any statutory scheme or State or Federal Jurisprudence. Neither Miller nor Montgomery can arguably be said to stand for "volume discounts" requiring multiple murder convictions to run concurrently. We are aware that Appellant's aggregate minimum sentence of 60 years allows the opportunity for parole when he is approximately 76 years of age. However, it is inaccurate to state he received a de facto life sentence. Such a construct is an

attempt by Appellant to invite this Honorable Court to ignore individualized sentencing, and make rehabilitation alone the determinate factor.

II. APPELLANT'S SINGLE NON-WAIVED CHALLENGE TO THE COURT'S DISCRETION FAILS TO RAISE A SUBSTANTIAL QUESTION THAT THE SENTENCE IS APPROPRIATE UNDER THE SENTENCING CODE.

Appellant's claims are in actuality challenges to the discretionary aspects of his sentence. A challenge to the discretionary aspects of a sentence is not appealable as of right. The Appellant must petition for permission to appeal.

> Before we reach the merits of this issue, we must engage in a four part analysis to determine: (1) whether the appeal is timely; (2) whether appellant preserved his issue [at sentencing or in a motion to reconsider and modify sentence]; (3) whether appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence [as required by Pennsylvania Rule of Appellate Procedure 2119(f)]; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the sentencing code... [I]f the appeal satisfies each of these four requirements, we will then proceed to decide the substantive merits of the case.

Commonwealth v. Edwards, 71 A.3d 323, 329-30 (Pa.Super. 2013).

In the case sub judice, Appellant filed a timely post sentence motion, which contained four averments. First, Appellants alleged failure of the court to adequately consider and weigh the factors laid out in Miller and Montgomery. Second, he contends the length of his minimum sentence is manifestly unreasonable. Third, he alleged failure to provide an opportunity for meaningful parole is an abuse of discretion. And, lastly, he alleges his due process rights

were violated when his request to continue the sentence hearing was denied. The lower court denied the Post Sentence Motion after considering the issues without a hearing on July 19, 2016. Appellant field a timely appeal on July 27, 2016.

Although Appellant included in his brief a Rule 2119 (f) statement, for the most part, it reiterates that this an appeal as of right based on legality of the sentence imposed. However, he does set forth within the Rule 2119 (f) statement one reason relied upon to appeal the discretionary aspects of his sentence. He alleges the lower court "violated the Sentencing Code by not carefully considering his rehabilitative needs and balancing those with the protection of the public and the gravity of the offense." (Appellant's brief, page 10). All other issues set forth in Appellant's post sentence motion or argued elsewhere in the brief that purport to address the discretionary aspects of his sentence are waived. "If a defendant fails to include an issue in his Rule 2119 (f) statement, and the Commonwealth objects, then the issue is waived and this Court may mot review the claim." Commonwealth v. Karns, 50 A.3d 158, 166 (Pa.Super. 2012), *appeal denied.*

In addition, failure to raise an issue in a Rule 1925 (b) Statement will result in waiver. Rule 1925 (b) (4) (ii) provides in pertinent part, that, "[t]he [s]tatement shall concisely identify each challenge with sufficient detail to identify all pertinent issues for the judge." Commonwealth v. Costillo, 888 A.2d 775, 780, (Pa 2005); see also, Commonwealth v. Hansley, 24 A.3d 410, 415 (Pa.Super. 2011) (finding

waiver where Rule 1925(b) statement was too vague). In the case sub judice, Appellant raised twelve issues, of which issue 4 and 8 are pertinent here:

> 4. The Court abused its discretion and imposed an excessive or unreasonable sentence in handing down a 60 year to life sentence, failing to adequately and appropriately consider defendant's likelihood of rehabilitation as required, for example, by Miller and Montgomery.
>
> 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.

(Concise Statement of Matters Complained of on Appeal. See, Appendix E of Appellant.)

Appellant's Rule 2119 (f) Statement specifically cites to the general sentencing provision of the code he asserts was violated; its pertinent parts follow:

> **§9721 Sentencing generally**
> **(a) General rule** – In determining the sentence to be imposed the court shall...consider and select one or more of the following alternatives, and **may impose them consecutively** or concurrently:
> ...
>
> (4) Total confinement
> **(b) General Standards** – in selecting form 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.

Appellant's 1925 (b) Statement does not specifically allege a violation of the Sentencing Code, it alleges a **failure to consider rehabilitation as required, for example, by Miller and Montgomery**. Is this sufficient detail to identify for the judge that the "as required" includes section 9721 (b) of the Sentencing Code. In its 1925 (a) response the lower court opines:

> 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. Louisana*, 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.

(1925 (a) Opinion of Court dated September 26, 2016).

The new issue of a sentencing code violation was not addressed because it was not raised. If this Honorable Court concludes the failure to raise the issue did not hamper the lower court it still cannot address the discretionary challenge unless under the circumstances of this case it set forth a substantial question that the sentence appealed from is not appropriate under the Code. "The determination of what constitutes a substantial question must be evaluated on a case by case basis." Commonwealth v. Prisk, 13 A.3d 526, 533 (Pa.Super. 2011). Appellant relies on Commonwealth v. Dodge, 957 A.2d 1198, 1200 (Pa.Super. 2008), for the proposition that failure to address all relevant

sentencing criteria presents a substantial question. That reliance is misplaced as the facts of Dodge distinguish it from the case sub judice. In Dodge, the court imposed a minimum sentence of 52 years for 37 counts of receiving stolen property, comprised largely of consecutive sentences for receiving stolen costume jewelry. "[O]rdinarily a claim that the sentencing court failed to consider or afford proper weight to a specific sentencing factor does not raise a substantial question." Commonwealth v. Berry, 785 A.2d 994, 996-97 (Pa.Super.2001).Specifically:

> [t]here is ample precedent to support a determination that [a claim that the trial court failed to consider an appellant's rehabilitative needs] fails to raise a substantial question.... See *Commonwealth v. Cannon, 954 A.2d 1222, 1228-29 (Pa.Super.2008). appeal denied, 600 Pa. 743, 964 A.2d 893 (2009)* (claim that the trial court failed to consider the defendant's rehabilitative needs, age and educational background did not present a substantial question); *Commonwealth v. Coolbaugh, 770 A.2d 788, 793 (Pa.Super.2001) (citing Commonwealth v. Mobley, 399 Pa.Super.108, 581 A.2d 949, 952 (1990)*) (claim that the sentence failed to take into consideration the defendant's rehabilitative needs and was manifestly excessive did not raise a substantial question where sentence was within statutory guidelines and within sentencing guidelines); *Commonwealth v. Coss, 695 A.2d 831, 833 (Pa.Super.1997)* (when sentence imposed falls within the statutory limits, an appellant's claim that a sentence is manifestly excessive fails to raise a substantial question); *Commonwealth v. Bershad, 693 A.2d 1303, 1309 (Pa.Super.1997*) (a claim that the trial court failed to appropriately consider an appellant's rehabilitative needs does not present a substantial question); *Commonwealth v. Lawson, 437 Pa.Super.521, 650 A.2d 876, 881 (1994)* (claim of error for failing to consider rehabilitative needs does not present a substantial question).
>
> *Commonwealth v. Griffin, 65 A.3d 932, 936-37 (Pa.Super.2013), appeal denied, 621 Pa. 682, 76 A.3d 538*

> *(2013).* "Similarly, this Court has held on numerous occasions that a claim of inadequate consideration of mitigating factors does not raise a substantial question for our review." *Commonwealth v. Dislavo, 70 A.3d 900, 903 (Pa.Super.2013)* (internal citation omitted).

Commonwealth v. Caldwell, 117 A.3d 763 (Pa.Super.2015) *en banc.*

The Appellant, acting on his own, used a 9 mm handgun he had stolen from his father to shoot Russell Rice four times as he emerged from his vehicle. Each shot was a fatal shot. Russell collapsed onto the lap of Darla Bump who remained seat belted in the front passenger seat. As Darla cradled Russell's head in her lap, Appellant moved and aimed the 9 mm at Darla. Darla, defenseless, held a hand out in front of her face. Appellant unloaded the remainder of the clip into her body. One bullet tore through her hand, then eye, and ultimately her brain. A second bullet tore through her heart and the third ripped through her upper arm.

A jury convicted Appellant of first-degree murder in the intentional malicious killing of Russell, and of first-degree murder in the intentional malicious killing of Darla. The trial court initially sentenced the Appellant to two life sentences to run consecutive to each other. On resentence, considering all the factors required the court sentenced Appellant to thirty years minimum and a maximum of life for the murder of Russell, and the same sentence for the subsequent murder of Darla. The court ran the sentence consecutive which is authorized by the Sentence Code and the Commonwealth's jurisprudence. The sentence imposed must be consistent with "the protection to the public, the gravity of the offense as it relates to the impact on the life of the victim and the

community, and the rehabilitative needs of the defendant." 42 Pa.C.S.A. § 9721 (b). Since there were multiple victims, the judge possessed the discretion to impose consecutive sentences. "The lower court utilized its discretion in this case by imposing consecutive sentences on a victim by victim basis" [t]his ruling did not contravene the statutory scheme in any way. Commonwealth v. Jones, 613 A.2d 587 (Pa.Super.1992). To the extent that Appellant challenges the imposition of consecutive sentences, the issue is not only waived, he has failed to present a substantial question for review. "In imposing sentence a trial judge may determine whether given the facts of a particular case, a sentence should run consecutive to or concurrent with another sentence being imposed." Commonwealth v. Wright, 832 A.2d 1104, 1107 (Pa.Super.2003). See also, Commonwealth v. McClendon, 589 A.2d 706 (Pa.Super.1991). And to the extent Appellant's challenge is an assertion of abuse of discretion for not properly considering rehabilitative needs in imposing consecutive sentences he fails to present a substantial question. Commonwealth v. Johnson, 961 A.2d 877, 880 (Pa.Super.2008).

Based on the facts sub judice, this Honorable Court is foreclosed from addressing the merits of Appellant's sole challenge, as it does not raise a substantial question.

III. THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION.

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be

> disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias, or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Rodda, 723 A.2d 212, 214 (Pa.Super.1999) (*en banc*). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias or ill-will, or such a lack of support as to be clearly erroneous."

In the case sub judice the resentencing judge also presided over the trial and the original sentence. The trial judge is granted broad discretion because "the trial court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." Commonwealth v. Mouzon, 812 A.2d 617, 620 (Pa. 2002).

> Simply stated; the sentencing court sentences flesh and blood defendants and nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review. Moreover, the sentencing court enjoys an institutional advantage to appellate review, bringing to its decisions an expertise, experience, and judgment that should not be lightly disturbed.

Commonwealth v. Walls, 926 A.2d 957, 961 (Pa.2007).

Our Supreme Court determined the appropriate remedy for an Eighth Amendment violation that under Miller occurred when a juvenile was mandatorily sentenced to life imprisonment. Commonwealth v. Batts, 66 A.3d 286 (2013).

The Court instructed the common pleas court to resentence after considering the factors set forth in Knox.

> [A]t a minimum [the trial court] should consider a juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.

Batts, supra, at 297, quoting Commonwealth v. Knox, 50 A.3d 732, 745 (Pa.Super.2012), citing Miller v. Alabama, 567 U.S. 460, 132 S.CT. 2455 (2012).

The Sentencing Court sub judice, as indicated at the sentence hearing, considered, and was permitted to consider, not only Appellant's potential for rehabilitation, but also the fact of multiple first degree murder convictions and multiple victims. See 42 Pa.C.S.A. § 9721 (b). The sentence imposed must be consistent with the protection of the public, the gravity of the offense as it related to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.

The sentencing judge also presided over the trial and all pre-trial and post-trial proceedings and therefore came to the re-sentencing hearing with significant knowledge of the facts of the case. At the outset of the hearing he informed counsel that he recently reviewed the 1994 sentence hearing, the victim impact statements from 1994 and the new victim impact statements and statements

from the Appellant's family. The judge indicated he also reviewed the appropriate jurisprudence. (Resentencing hearing, July 5, 2016, p. 7-8).

The Commonwealth began the sentence hearing by reviewing the impact on the victims' family members. Darla bump's oldest daughter, Tracy, was 20 years old at the time. After her mother and Russell were murdered she took on the responsibility of raising her four siblings, Jessica, age 17; Jennifer, age 15; Trent, age 12; and Rusty, age 2. She raised them and worried about food, clothing and providing a home. Tracy's husband, Michael Andres, worked two full-time jobs to put food on the table and keep a roof over their heads while Tracy took care of her siblings and her own child.

Darla's daughter Jessica was 17 years old and outside the house when Appellant drove by and shots were fired at the dog. She was in the driveway when Appellant turned around and drove past again. She was going to go with her mom after the vehicle she believed was her cousin's, but Russell wouldn't let her. She revisits this fact, the fact that it could have been her, often. (Resentencing hearing, July 5, 2016, p. 8-12).

Darla's daughter Jennifer was 15 years old at the time her mother and Russell were murdered. She has been diagnosed with PTSD. She quit trying in high school, quit sports, and self- medicated. The pain caused her to move away. She has rebuilt her life from rubble. Jennifer's husband is a doctor. Dr. Keith Hosner wrote: "In my twenty plus years of practice, I have never met such a broken person as my wife, who has tried to make life worth living." (Resentencing hearing, July 5, 2016, p. 13-20).

The record reflects the continued effect of these two murders on the extended family. Russell Jr. was 2 years old when his parents were murdered. He was blessed to have his sister Tracy and her husband raise him, but feels guilty for the stress he has added to their lives. (Resentencing hearing, July 5, 2016, p. 22).

Russell Sr. was the youngest of 12 siblings, one sister heard of her brother's murder while driving along listening to the local radio news. Another sister is angered and disturbed at the senselessness and brutality of the murders of her younger brother and Darla. (Resentencing hearing, July 5, 2016, p. 20-25).

Cathy Lackatos, Darla's friend, was listed as the emergency contact in the school records. She was asked to identify Darla and Russell. The school and the community were affected. A citizen on his way to work found the car sitting in the road, interior lights on, engine running, and then he noticed the bullet holes in the windshield and immediately fled and called the police.

The Commonwealth then presented the facts of the case, as detailed at the trial. Much of which is contained in the counterstatement and will not be repeated. (Resentencing hearing, July 5, 2016, p. 30, et seq.).

The Commonwealth referred the court to the transfer hearing transcript and his findings of fact, which the judge indicated he had reviewed. The Appellant was 17 years, 5 months and 17 days old when he murdered Darla and Russell. In his findings of fact, the court found the Appellant was not immature, there existed no evidence of present mental illness or thought disorder and that

Appellant was fully cognizant the evening of the murders. The Court further found the Appellant acted alone, fled the scene, and sought to hide the gun. (Resentencing hearing, July 5, 2016, p. 43-44). Juvenile petitions were filed against the Appellant in 1993 for receiving stolen property, namely, a motorcycle and another for burglary, theft, and theft of a motor vehicle. He was adjudicated delinquent and placed on intensive probation on November 10, 1993. (Resentencing hearing, July 5, 2016, p. 52). He was under intensive supervision for only 12 days when he committed the murders of Darla and Russell.

Appellant presented the testimony of three corrections officers. They report that the Appellant is involved in the State Prison K-9 Partners for Life Program. He is a peer facilitator in group and a certified peer specialist who helps other inmates who have a hard time adjusting. The Appellant has not had an angry outburst since 2011. (Resentencing hearing, July 5, 2016, p. 70-117).

Appellant spoke to the court. He indicated at the time of the murders he did not care about the consequences of his actions. In addressing remorse, he stated it was a process requiring many group sessions. (Resentencing hearing, July 5, 2016, p. 137).

For the purpose of the sentence the trial court reviewed what he considered in preparing for the sentence:

> The sentence hearing transcript from June 30, 1994, the victim impact statements...the transcript form the transfer hearing on May 23, 1994...my findings...the entire juvenile record, two hospital records...the appellate court opinions that bear on this case...the jail report...[Appellant's] testimony from trial and Kevin Zenker's...[trial] photos submitted...the prosecutor's presentation today...four statements

> written on behalf of the defendant...thirteen on behalf of the victims...various documents submitted by defense counsel...the testimony of all the witnesses called today...the guidelines. And we agree they are not binding [but]...I'm giving them some thought. 18 Pa.C.S.A. § 1102.1...not effective [for] this case [but informative].

(Resentencing, July 5, 2016, p. 155-158). The Court then set forth the factors in the Batts case to be considered and his findings:

> The juvenile's age at the time...17 years some months...his maturity was reasonably good...no diminished capacity...the jury concluded it was a deliberate killing...horrendous circumstances of the crime...certainly as to Ms. Bump...what she must have gone through...The extent of participation in the crime, He was the sole actor...there was nothing from the testimony [to indicate Appellant was] in any way induced to conduct himself as he did...he was found by the court to be dependent and out of control...[no] palpable violence, but two serious crimes...burglary and theft.
>
> [Appellant] had a good relationship [with his attorney]...
>
> His mental health ...was considered.
>
> And his potential for rehabilitation...

(Resentencing hearing, July 5, 2016, p. 159-162). The lower court then addressed the following factors:

> The impact of the offense...physical, psychological, economic...on the victims' family...the impact of the offense on the community...the threat of safety to the public...I am satisfied he has made a conscientious effort...to rehabilitate himself...I still don't have a good handle on remorse. But I'll take him at his word that the remorse in his case was a matter of process. There certainly was not remorse at the time of the crime...
>
> The nature and circumstances of the offense...it was a deliberate murder of two innocent, defenseless people...
>
> The degree of the Defendant's culpability. Jury had no problem...finding murder [of the first degree]...that it was, in fact, two distinct shootings,

> His culpability...heinous...there was...some criminal sophistication...the defendant left the scene and hid the weapon.

(Resentencing hearing, July 5, 2016, p. 163-167).

The court found "most compelling the institutional adjustment... [L]ately, he's demonstrated remorse. More importantly, he's demonstrated a sincere effort to rehabilitate; to the extent he has completed so many courses, to the extent that he's been working with dogs". "So we are convinced this Defendant has made strides, substantial strides at rehabilitation". The Court then addresses the fact that there are two distinct victims. "Each victim...has to be recognized and ...acknowledged in the sentence". (Resentencing hearing, July 5, 2016, p. 168-169).

The court considered the non-binding statutory minimums for a 17 year old convicted of murder. The court then adjusted the sentence downward indicating the Appellant "had earned" the reduction. (Resentencing hearing, July 5, 2016, p. 169-170).

Appellant was then sentenced on Count 1 – First Degree Murder, Russell J. Rice to a minimum sentence of 30 years and a maximum sentence of life. On Count 2 – First Degree Murder, Darla Bump, a minimum sentence of 30 years and a maximum sentence of life to be computed from the expiration of the sentence at Count 1.

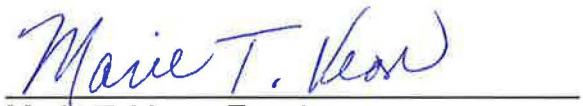
Appellant alleges the sentencing court abused its discretion by not carefully considering the relevant factor of Mr. Foust's rehabilitatative needs and balancing those with the protection of the public and the gravity of the offense. However, it is apparent from the record that the court factored into its decision

Appellant's endeavors at rehabilitation and his prospects of rehabilitation. The court also clearly considered the gravity of the offenses and its impact on the family and community. Therefore, the sentence court properly considered the requirements of Section 9721 (b) of the Sentencing Code, contrary to the Appellant's averments. Because the sentencing court considered all the evidence before it and did not ignore or misapply the law, or exercise its judgment for reasons of partiality, prejudice, bias or ill will, the court did not abuse its discretion.

CONCLUSION

FOR THE FOREGOING REASONS, this Honorable Court should affirm the judgment of sentence and dismiss Appellant's appeal.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing documents upon the person and in the manner indicated below which service satisfies the requirements of Pa. R.A.P. 121.

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