



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

TREY M. MILLER, :  
 :  
 :  
 Defendant-Below, :  
 Appellant, :  
 :  
 v. : No.: 241, 2018  
 :  
 STATE OF DELAWARE, :  
 :  
 :  
 Plaintiff-Below, :  
 Appellee. :

Upon Appeal from the Superior Court of the State of Delaware to the Supreme Court of Delaware

**APPELLANT'S REPLY BRIEF**

John S. Malik, Esquire, ID 2320  
The Law Office of John S. Malik  
100 East 14th Street  
Wilmington, Delaware 19801  
302-427-2247  
*jmalik@malik-law.com*  
Attorney for Appellant Trey M.  
Miller

A. Dale Bowers, Esq., ID 3932  
Caren L. Sydnor, Esq., ID 6332  
Law Office of A. Dale Bowers, P.A.  
203 North Maryland Avenue  
Wilmington, Delaware 19804  
302-691-3786  
*dale@bowerslegal.com*  
Attorneys for Appellant Trey M.  
Miller

Dated: November 7, 2018

## TABLE OF CONTENTS

TABLE OF CASES .....	iii
NATURE AND STAGE OF THE PROCEEDINGS .....	1
SUMMARY OF ARGUMENT .....	2
STATEMENT OF FACTS .....	3
ARGUMENT .....	4
I. DEFENDANT TREY MILLER’S SENTENCE MUST BE VACATED AND HIS CASE REMANDED FOR RE-SENTENCING SINCE THE COURT EXHIBITED A CLOSED MIND WHEN SENTENCING TREY MILLER AND THE SENTENCE APPEARS TO BE THE RESULT OF JUDICIAL VINDICTIVENESS. ....	4
A. Question Presented.....	4
1. Whether the lack of consideration of the nature of the offenses, character of Trey Miller or any mitigating factors during the violation of probation proceedings by the lower Court warrant finding Trey Miller’s sentence was the result of a closed mind and judicial vindictiveness or bias? This issue was preserved during the hearing and in Miller’s Motion for Sentence Modification. (A 72-73, 86-89).....	4
B. Standard and Scope of Review. ....	4
C. Merits of Argument.....	5
1. The proper scope of review is Abuse of Discretion. ....	6
2. Timing does not preclude the review of the issues of closed mind or judicial vindictiveness as to sentencing in the present case.....	7
3. The closed mind and judicial vindictiveness present in this case meets the plain error standard. ....	9
4. The State failed to establish that the lower court explained its substantial deviation from the recommendation of the Probation Officer and SENTAC Guidelines. ....	11
5. The lower court acted with a closed mind and judicial vindictiveness imposing a sentence outside the zone of reasonableness.....	12

CONCLUSION.....14

## TABLE OF CASES

### **Cases**

<i>Cruz v. State</i> , 990 A.2d 409 (Del. 2010).....	4, 5, 6
<i>Fisher v. State</i> , 2003 WL 1443050 (Del. 2003).....	5, 7, 8, 9, 10
<i>Mayes v. State</i> , 604 A.2d 839 (Del. 1992).....	4, 12, 13
<i>Pipkin v. State</i> , 2004 WL 2419087 (Del. 2004).....	7, 8
<i>Tramill v. State</i> , 425 A.2d 142 (Del. 1980) .....	5

## **NATURE AND STAGE OF THE PROCEEDINGS**

Appellant hereby incorporates the Nature and Stage of the Proceedings of his Opening Brief filed with this Honorable Court on July 20, 2018.

The State filed their Answering Brief on October 26, 2018. This is Trey Miller's Reply Brief in support of his appeal.

## **SUMMARY OF ARGUMENT**

I. Trey Miller's sentence must be vacated and his case remanded for re-sentencing because the Court exhibited closed mind towards Trey Miller during the sentencing hearing and the sentence appears to be the result of judicial vindictiveness or bias.

## **STATEMENT OF FACTS**

Appellant hereby incorporates the Statement of Facts in his Opening Brief filed with this Honorable Court on July 20, 2018.

## ARGUMENT

### **I. DEFENDANT TREY MILLER’S SENTENCE MUST BE VACATED AND HIS CASE REMANDED FOR RE-SENTENCING SINCE THE COURT EXHIBITED A CLOSED MIND WHEN SENTENCING TREY MILLER AND THE SENTENCE APPEARS TO BE THE RESULT OF JUDICIAL VINDICTIVENESS.**

#### **A. Question Presented.**

1. Whether the lack of consideration of the nature of the offenses, character of Trey Miller or any mitigating factors during the violation of probation proceedings by the lower Court warrant finding Trey Miller’s sentence was the result of a closed mind and judicial vindictiveness or bias? This issue was preserved during the hearing and in Miller’s Motion for Sentence Modification. (A 72-73, 86-89).

#### **B. Standard and Scope of Review.**

The trial court’s revocation of a Appellant Miller’s probation and the imposition of a sentence is normally reviewed for an abuse of discretion. *Cruz v. State*, 990 A.2d 409, 412 (Del. 2010) (citing *Kurzmann v. State*, 903 A.2d 702, 716 (Del. 2006)). In considering whether an abuse of discretion occurred, this Court’s “review of a sentence is limited to whether the sentence is within the statutory limits prescribed by the General Assembly and whether it is based on factual predicates which are false, impermissible, or lack minimal reliability, judicial vindictiveness or bias, or a closed mind.” *Id.* at 416 (Del. 2010) (quoting *Weston v. State*, 832 A.2d 742, 746 (Del. 2003) (citing *Siple v. State*, 701 A.2d 79, 83 (Del. 1997) and *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992))).

Claims not raised in the lower Court are reviewed for plain error. *Fisher v. State*, 2003 WL 1443050 at \*2 (Del. March 19, 2003) (citing *Trump v. State*, 753 A.2d 963, 971 (Del. 2000) (citing *Wainwright v. State*, 504 A.2d 1096)(1986)). “Plain error is ‘limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.’” *Id.* “To constitute ‘plain error,’ the error ‘must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.’” *Id.*

### **C. Merits of Argument.**

While Trey Miller’s sentence following the Violation of Probation hearing was within the statutory limits, it was the exercise of a judicially “closed mind” and appears to be the result of judicial vindictiveness or bias. This Court has explained that a sentence is the result of a “closed mind” when the sentence is based on a “preconceived bias without consideration of the nature of the offense or the character of the defendant.” *Cruz*, 990 A.2d at 412 (quoting *Weston*, 832 A.2d at 746). When evaluating whether a sentence is the result of judicial vindictiveness, the focus of an analysis is whether the record has been developed sufficiently to support the sentence. *Tramill v. State*, 425 A.2d 142, 145 (Del. 1980) (citing *Jacobs v. State*, 358 A.2d 725, 729 (Del. 1976) (quoting the United

States Supreme Court)). The record below is not sufficiently developed to support the excessive sentence. As a result, the sentence appears to be based on a “preconceived bias without consideration of the nature of the offense or the character of the defendant.” *Cruz*, 990 A.2d at 412.

During the March 2018 Violation of Probation hearing, the Court manifested a preconceived bias and did not appear to consider the nature of the offenses before the Court, the character of Trey Miller or any mitigating factors. Rather, the Court’s explanation for its sentence is limited to general statements relating to Trey Miller and his family. In fact, the record is unclear why the Court imposed the maximum amount of time possible following the sentencing hearing.

**1. The proper scope of review is abuse of discretion.**

The State argues that because Mr. Miller did not raise the issue of closed mind and judicial vindictiveness below that this Honorable Court must review his claims under plain error. (State’s Answering Brief at 11). Appellant Miller submits that the practicality of raising the issue of judicial closed mind and vindictiveness on the record either at the proceeding below or thereafter in his Rule 35(b) motion combined with the precarious position in which he was placed in at the thought of raising such an issue with the Court below should allow him to proceed under an abuse of discretion standard. On the practical side, the argument of closed mind and vindictiveness was not known until the Court rendered its

decision. Therefore, the Miller could not have raised that issue until the hearing was over. On the precarious side, Miller would be expected to risk offending the Court by suggesting the Court is acting with a closed mind before the Court has rendered a final decision and risked having the preservation of the issue viewed as disrespect which could result in a harsher sentence.

Assuming *arguendo*, the State is correct in its assertion that the proper standard of review is plain error, Mr. Miller has established plain error in his Opening Brief. Appellant hereby incorporates all arguments made within his Opening Brief herein.

**2. Timing does not preclude the review of the issues of closed mind or judicial vindictiveness as to sentencing in the present case.**

The State argues that because Mr. Miller filed a 35(b) motion for sentence reduction rather than an appeal with this Honorable Court within thirty (30) days that he is unable to obtain review of his arguments. (State's Answering Brief at 10). Further, the State argues that "[h]e cannot collaterally attack his VOP sentence by appealing the denial of his motion." *Id.* at 9 (citing *Pipkin v. State*, 2004 WL 2419087 at \*1 (Del. Oct. 26, 2004)).

*Pipkin* holds that a Defendant "may not use the instant appeal from the Superior Court's denial of his Rule 35 motion to collaterally attack the *merits* of his VOP conviction." 2004 Del. LEXIS 480 at \*3 (Del. Oct. 26, 2004) (citing *Fisher v. State*, Del. Supr., No. 603, 2002, Walsh, J. (Mar. 19, 2003) (emphasis

added)). The Appellant in *Pipkin* did not attack his sentence, but instead claimed his due process rights were violated on five (5) grounds, none of which included a closed mind or judicial vindictiveness. *Id.* at \*2. Looking further into *Fisher*, the premise for a Defendant's inability to "collaterally attack the merits of his VOP conviction," as also stated in *Pipkin*, it is apparent that this Honorable Court determined that the collateral attack was to the sufficiency of evidence as to his VOP conviction, not his sentence. 2003 WL 1443050 at \*2. This Honorable Court entertained the challenges as to Defendant Fisher's sentence under the plain error standard, but ultimately found the claim had no merit. *Id.* In *Pipkin* and *Fisher*, the timeliness of the appeals was applied to the attack on the merits of the conviction, not the sentence.

In the instant case, Mr. Miller was sentenced in connection with his VOP on March 6, 2018. He then filed his 35(b) Motion for Reduction of Sentence on or about March 19, 2018, approximately thirteen (13) days after his sentencing. An Order denying Mr. Miller's 35(b) motion was entered on or about April 10, 2018 approximately twenty-one (21) days after the 35(b) motion was filed. Mr. Miller then filed his original notice of appeal on or about May 4, 2018, approximately twenty-four (24) days after the Order was entered. Mr. Miller filed his 35(b) motion rather than an appeal as this procedural avenue provides an opportunity for the lower court to reduce the sentence imposed rather than proceed directly to this

Honorable Court. Within thirty (30) days of the denial of his 35(b) motion, Mr. Miller filed his instant appeal with the arguments that Mr. Miller has urged are delicate and pragmatic for both Appellant and Defense Counsel to raise with the proper respect owed to the presiding Judicial Officer.

Mr. Miller is not challenging the merits of his VOP conviction, in fact, Mr. Miller admits that he violated his probation. Appellant urges this Honorable Court to review this appeal under the abuse of discretion standard for the foregoing reasons. However, if the Court were to determine that this appellate issue was not properly raised in the court below, plain error exists for review by this Court.

**3. The closed mind and judicial vindictiveness present in this case meets the plain error standard.**

The first part of the plain error test requires that the material defect be “apparent on the face of the record.” *Fisher*, 2003 WL 1443050 at \*2. Appellant argues that the State’s purported explanation of the sentence of eight (8) years of Level V incarceration and the request by the lower court to ask what the back-up time of the robbery offense was and immediately sentence Mr. Miller to that back-up time of three (3) years establishes that a material defect exists and is apparent in the record. (A 080)(T pg. 9 lns. 21-22).

The sentence of eight (8) years for technical violations of probation when no other crimes have been committed, Mr. Miller had steady employment, and he had been taking care of his ill grandmother is outside of the zone of reasonableness and

clearly shows a manifest injustice, the second part of the plain error test. *Fisher*, 2003 WL 1443050 at \*2. The final part of the plain error test requires that the error “be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the [...] process,” which is apparent here. *Id.*

It is clear from the record, and Mr. Miller does not dispute, that he had multiple capiases for failure to appear, did not go to probation and report to TASC as required. Mr. Miller accepted responsibility for his actions and gave his reasons why he failed to appear which included his employment and care for his grandmother, in addition to having problems dealing with the death of his infant daughter. The State remarks that Mr. Miller could have requested a mental health evaluation to help him with the death of his daughter; however, that is often a difficult thing for people request and not something the Court addressed on the record. (State’s Answering Brief at 16). The State further remarks that he should have considered his grandmother’s needs before violating his probation; however, what the State fails to recognize is his care for his grandmother was part of the reason he had failed to appear or attend certain dates. Moreover, once again, the record does not reflect how the Court considered this evidence in the decision to sentence Mr. Miller so severely. Mr. Miller understood that he would be serving some Level V incarceration sentence to account for his actions. However, eight (8) years of Level V incarceration in this instance is plain error and is manifestly

unjust when considering the limited record and all facts presented.

**4. The State failed to establish that the lower court explained its substantial deviation from the recommendation of the Probation Officer and SENTAC Guidelines.**

The State asserts that the lower court explained its conclusion thoroughly after hearing from Mr. Miller, his counsel, and probation officer. (State's Answering Brief at 12-13). However, the State does not include any specific citations to the record where this explanation is given. The Hearing transcript reflects another story altogether. The lower court allowed Mr. Miller and his Counsel to speak on his behalf, but the focus of the Court was not on his technical violations and the proper sentence, but on how he "tried to manipulate the Court" by not coming back to court when he said he would. (A 080) (T pg. 9 lns. 6-11). The lower court further went on to discuss how his family continued to post his bail and that he never returned to Court, probation, or TASC, and that "your family cannot control you." (A 080) (T pg. 9 lns. 12-20). The lower court mentions remembering "seeing him for quite some time." (A 079) (T pg. 8 lns. 22-23). The State's discussion of Mr. Miller's criminal history and interpretation of the Court's comments do not address how the lower Court's failure to acknowledge and explain the substantial deviation from both the sentence recommendation of the probation officer and SENTAC guidelines did not constitute a judicially closed mind or lack reliability.

**5. The lower court acted with a closed mind and judicial vindictiveness imposing a sentence outside the zone of reasonableness.**

The lower court's basis for a sentence totaling eight (8) years of Level V incarceration was outside the zone of reasonableness based on the violations that Appellant Miller was alleged to have committed. The State is accurate in its assertion that where a violation of probation exists, the court has the discretion to sentence an individual up to the statutory sentence or "back-up" time. However, the lower court may not fail to consider the nature of offenses at a VOP hearing before determining the proper sentence. Mr. Miller technically violated his probation; however, he was working and caring for his grandmother, not committing other crimes.

The State relies on *Mayes v. State*, for the assertion that Mr. Miller's claims do not support plain error because his sentence is not appealable and the SENTAC guidelines are non-binding. ((State's Answering Brief at 15)(citing 604 A.2d 839, 845 (1992)). Claimant is not arguing that SENTAC guidelines are binding as suggested by the State. Rather, Mr. Miller is arguing the significant departure is just one factor, among others, which supports Mr. Miller's claim of a judicially closed mind. Moreover, the State does not address that the Court in *Mayes* sentenced a Defendant on a conviction due to a guilty plea, not a violation of probation. *Mayes*, 604 A.2d at 841. Further, the Court in *Mayes* relied largely

upon a pre-sentence investigation report, which contained statements from the victim, the family of the victim, the investigating officer, the victim's psychiatrist, and discussed the continued sexual assault of the victim, a then eleven (11) year old girl, and the psychological trauma caused by the Defendant in that case. *Mayes*, 604 A.2d at 841. Mr. Miller was not afforded a presentence investigation before being sentenced upon his VOP. His violations were not of a criminal nature, insofar as he had not committed additional crimes, quite the contrary.

Finally, the lower court further showed judicial vindictiveness by before sentencing asking what the "back-up" time was on the Robbery Second Degree charge and immediately sentenced Mr. Miller to same, which was three (3) years. (A080-A082, T pg. 9 lns. 21-22, T pg. 10 lns. 19-23, and T pg. 11 lns. 1-2). His total eight (8) year sentence, although within the statutory guidelines, exceeded the presumptive sentence of three (3) years and three (3) months of Level V incarceration by four (4) years and three (3) months, more than double. This sentence is outside the zone of reasonableness when coupled with all of the information provided in the record and the technical violations to which Mr. Miller admitted. Therefore, Appellant Trey Miller respectfully requests this Honorable Court to vacate and reverse the lower court's sentence and to remand this case for resentencing as to his violation of probation.

## CONCLUSION

For the foregoing reasons, Appellant Trey Miller respectfully requests that the Court vacate his sentences and remand for re-sentencing; and grant such other relief as may be necessary, just or appropriate.

Respectfully submitted,

/s/ John S. Malik

John S. Malik, Esquire, ID 2320  
The Law Office of John S. Malik  
100 East 14th Street  
Wilmington, Delaware 19801  
302-427-2247  
*jmalik@malik-law.com*  
Attorney for Appellant,  
Trey M. Miller

Respectfully submitted,

/s/ A. Dale Bowers

A. Dale Bowers, Esq., ID 3932  
Caren L. Sydnor, Esq., ID 6332  
Law Office of A. Dale Bowers, P.A.  
203 North Maryland Avenue  
Wilmington, Delaware 19804  
302-691-3786  
*dale@bowerslegal.com*  
Attorneys for Appellant,  
Trey M. Miller

DATE: November 7, 2018