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406 EDA 2023

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 406 EDA 2023

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff-Appellee,

v.

IVORY KING,

Defendant-Appellant.

BRIEF OF JUVENILE LAW CENTER AND DEFENDER ASSOCIATION OF PHILADELPHIA AS *AMICI CURIAE* IN SUPPORT OF APPELLANT IVORY KING

Bradley S. Bridge, No. 39678
DEFENDER ASSOCIATION OF PHILADELPHIA
1441 Sansom Street
Philadelphia, PA 19102
(215) 568-3190
BBridge@philadefender.org

Marsha L. Levick, No. 22535
Tiara J. Greene, No. 318526
JUVENILE LAW CENTER
1800 JFK Blvd, Ste. 1900B
Philadelphia, PA 19103
(215) 625-0551
mlevick@jlc.org
tgreene@jlc.org

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth. Juvenile Law Center works to reduce the harm of the child welfare and justice systems, limit their reach, and ultimately abolish them so all young people can thrive. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center's legal and policy agenda is informed by—and often conducted in collaboration with—youth, family members, and grassroots partners. Since its founding, Juvenile Law Center has filed influential amicus briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity.

The **Defender Association of Philadelphia** is an independent, non-profit corporation created in 1934 by a group of Philadelphia lawyers dedicated to the ideal of high-quality legal services for indigent criminal defendants. Today some 250 full time Assistant Defenders represent clients in adult and juvenile, state, and federal, trial and appellate courts, and at civil and criminal mental health hearings as well as at state and county violation of probation/parole hearings. Association attorneys also serve as the Child Advocate in neglect and dependency court. More particularly,

[1] Pursuant to Rule 531, no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

Association attorneys represent juveniles charged with homicide. Following the Supreme Court's decision in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), approximately 325 juvenile lifers in Philadelphia required resentencing. The Defender Association was appointed as counsel for about 225 juvenile lifers requiring resentencing. The constitutionality of the sentences some of those clients received has been challenged at the trial level and at the appellate level by Defender Association lawyers.

SUMMARY OF ARGUMENT

An 80-year aggregate life sentence is a *de facto* life without parole sentence which is unconstitutional under both the U.S. and Pennsylvania Constitutions when imposed on an individual who was a child at the time of sentencing and who has demonstrated a capacity for rehabilitation. As the U.S. Supreme Court held in *Jones v. Mississippi*, a life without parole sentence violates the Eighth Amendment when imposed on youth whose crimes reflect transient immaturity. *See infra* Section I.A. An aggregate 80 years to life sentence ensures that Mr. King will die in prison, as it far exceeds his life expectancy and is therefore a *de facto* life without parole sentence. This sentence is also unconstitutionally cruel under Article I, Section 13 of the Pennsylvania Constitution, which the Framers of that provision intended to prohibit a broader range of punishment than the Eighth Amendment. *See infra* Section II.A. *Amici* urge this Court to reverse the holding of the lower court, and

find Mr. King's sentence in violation of both the U.S and Pennsylvania Constitutions.

ARGUMENT

At Ivory King's resentencing, the sentencing judge imposed four consecutive 20 years to life sentences for a total sentence of 80 years to life. The sentence imposed at the resentencing hearing was a *de facto* life sentence. Mr. King's first opportunity for parole, 80 years into the future, is well past any reasonable life expectancy for Mr. King. To protect the rights of Mr. King and other juveniles facing either resentencing or sentencing upon conviction of first degree homicide, the constitutionality of Mr. King's *de facto* life sentence must be assessed under both the federal and state constitutions. Additionally, rules of procedure for those resentencing hearings should be adopted. This *amicus* brief examines those issues.

I. MR. KING'S SENTENCE IS UNCONSTITUTIONALLY DISPROPORTIONATE UNDER THE EIGHTH AMENDMENT

A. A Sentence Of Life Without Parole Imposed On A Youth Whose Crime Reflects Transient Immaturity Is Disproportionate Under The Eighth Amendment

In *Jones v. Mississippi*, 141 S.Ct. 1307 (2021), the United States Supreme Court gave broad discretion to the judge in sentencing a juvenile for murder but affirmed the constitutionally mandated holding of *Miller v. Alabama*, 567 U.S. 460 (2012), that a discretionary life sentence may not be imposed upon a youth whose crime reflects transient immaturity. Thus, while *Jones* unequivocally declined to

impose a formal or informal fact finding by the sentencing judge concerning incorrigibility, it also unequivocally held that it remains a violation of the Eighth Amendment to impose a life without parole sentence on youths whose crimes reflect transient immaturity.

The *Jones* Court underscored the unconstitutionality of such a sentence for these particular youth in footnote 2 of its opinion:

> That *Miller* did not impose formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.

Jones, 141 S. Ct. at 1315 n.2 (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016)).

B. Because A Life Without Parole Sentence Imposed On A Youth Whose Crime Reflects Transient Immaturity Is Unconstitutionally Disproportionate Under *Jones v. Mississippi*, This Court Must Determine Whether Ivory King's 80 Year To Life Sentence Is An Unconstitutional *De Facto* Life Sentence

The judge below agreed that Mr. King was not one of those rare juveniles who could not be rehabilitated. Rather, the judge agreed that he had demonstrated rehabilitation:

> The defendant participated in mediation voluntarily. The defendant has never admitted to intentionally shooting all four victims and has given inconsistent statements. However, in the mediation he did admit to the intentionally killing of Saphil Taylor, and I consider participation in mediation and him taking greater

> responsibility from the crime as mitigation.
>
> While I do not believe the defendant has accepted full responsibility for the crimes for which he's been convicted, he has demonstrated a capacity for change. Defendant has assisted and supported other people in and out of the jail and participated programs and volunteered. The defendant has participated in evidence-based programming calculated to reduce risk. Defendant has completed drug and alcohol treatment.

(Tr., Nov. 21, 2022, pp. 67-68).

However, despite explicitly finding Mr. King had demonstrated his capacity for change, the sentencing judge imposed a sentence of 80 years to life. (*Id.* at pp. 69-70). This violated the Eighth Amendment's prohibition against cruel and unusual punishment. The question presented by this case is not whether the sentencing court erred in failing to make a finding of permanent incorrigibility, but whether a discretionary life without parole sentence can be imposed upon a juvenile whose crime reflects transient immaturity—a characterization plainly apt for Mr. King in light of the court's findings. Ivory King has demonstrated rehabilitation during his years of incarceration. He was not irredeemably depraved or irreparably corrupt. The sentencing judge found that he was "a positive member of the prison community" and that he had demonstrated mitigation by participating in mediation and accepting greater responsibility for the crime, thereby demonstrating "capacity for change." (Tr., Nov. 21, 2022, p. 67). Indeed, the individual 20 year to life sentences for each murder reflects that finding by the sentencing judge: Mr. King was not the rare

incorrigible juvenile for which a life sentence could be imposed. *Jones*, *Montgomery*, and *Miller* plainly hold that such a sentence violates the Eighth Amendment.

Because the Eighth Amendment is violated by imposition of a life sentence upon a juvenile whose crime reflects transient immaturity, the Eighth Amendment would similarly be violated by a *de facto* life sentence imposed upon a juvenile whose crime reflects transient immaturity. *See, e.g.*, *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016) ("[S]entencing a juvenile offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the eighth amendment."); *State v. Booker*, 656 S.W.3d 49, 52-53 (Tenn. 2022) (holding that a mandatory life sentence of 51 years violates the Eight Amendment); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (where the Iowa Supreme Court held that an aggregate mandatory minimum sentence over 52.5 years is unconstitutional as release "after a half century of incarceration" is not "sufficient to escape the rationales of *Graham* or *Miller*").This Court should, therefore, vacate the sentence imposed upon Mr. King and remand for a new sentencing hearing in which a *de facto* life sentence would be barred.

II. MR. KING'S SENTENCE IS UNCONSTITUTIONALLY CRUEL UNDER ARTICLE I, SECTION 13 OF THE PENNSYLVANIA CONSTITUTION

Relying on the U.S. Supreme Court's recent holding in *Jones v. Mississippi*, the Pennsylvania Supreme Court ruled that "the sentencing procedures we adopted in *Batts II* 'do not carry the protections of the Eighth Amendment.'" *Commonwealth v. Felder*, 269 A.3d 1232, 1244 (Pa. 2022) (quoting *Commonwealth v. DeJesus*, 266 A.3d 49, 54 (Pa. Super. Ct. 2021) (en banc)). However, as stated by Justice Donohue:

> Today's decision does not foreclose further developments in the law as to the legality of juvenile life without parole sentences (or their de facto equivalent as alleged here) under the Pennsylvania Constitution nor as to how appellate courts will review the discretionary aspects of such sentences.

Felder, 269 A.3d at 1247 (Donahue, J. concurring, joined by Justice Todd); (*see also* Op., June 7, 2023, p. 28 (where the sentencing judge in her written opinion noted that the Pennsylvania Constitution's prohibition on *cruel* punishment alone could be broader than the Eighth Amendment protections, and "whether 'any or all components of *Batts II* remain in place . . . remains an open question' in Pennsylvania" (quoting *Felder*, 269 A.3d at 1247-48))).

Further, Pennsylvania is not "bound by the decisions of the United States Supreme Court which interpret similar (yet distinct) federal constitutional provisions." *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991). The federal Constitution establishes a minimum level of rights and protections, but states have

the power to provide broader relief "beyond the minimum floor which is established by the federal Constitution." *Id.* (citing *Commonwealth v. Sell*, 470 A.2d 457, 467 (Pa. 1983)). To maintain autonomy, states are encouraged to engage in their own independent analysis "in drawing meaning from their own state constitutions." *Id*.

A. Pennsylvania's Constitutional Ban On Cruel Punishments Is Not Co-Extensive With The Eighth Amendment's Ban On Cruel And Unusual Punishments

The Pennsylvania Supreme Court last considered whether to accord Article 1, Section 13 a broader interpretation than the Eighth Amendment ten years ago in *Commonwealth v. Batts.* 66 A.3d 286, 297-99 (Pa. 2013). In declining to do so, the Court wrote: "the arguments presented do not persuade us that the Pennsylvania Constitution requires a broader approach to proportionality vis- á-vis juveniles than is reflected in prevailing United States Supreme Court jurisprudence." *Id.* at 299. The Court's position cannot be squared with the historical record underlying the Pennsylvania provision, nor with its own framework for evaluating this question.

To determine whether the Pennsylvania statute provides broader protection than the federal statute, the Court must analyze: "1) [the] text of the Pennsylvania constitutional provision; 2) [the] history of the provision, including Pennsylvania case-law; 3) related case-law from other states; and 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Edmunds*, 586 A.2d at 390.

1. The Text of the Pennsylvania Constitution is Broader Than the Eighth Amendment

On its face, the text of the Pennsylvania Constitution is broader than the Eighth Amendment. Article I, Section 13 of the Pennsylvania Constitution provides: "excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const. art. I, § 13. This differs from the Eighth Amendment's more narrow prohibition against punishments that must be both "cruel" *and* "unusual." U.S. Const. amend. VIII.

2. History: Drafters of Article I, Section 13 Sought to Prohibit All Punishments Which Did Not Deter or Support Reformation of the Individual

In a recent examination of the historical foundations for Pennsylvania's "cruel punishments" ban, one commentator has noted that the original understanding of "cruel" by the Pennsylvania Framers actually favors a broader interpretation of the state provision. *See* Kevin Bendesky, "*The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 U. Pa. J. Const. L. (forthcoming 2023) (manuscript at 19), https://ssrn.com/abstract=4457030. The Pennsylvania Constitution was adopted on September 28, 1776, ten years before ratification of the U.S. Constitution. *Edmunds,* 586 A.2d at 896. In fact, the Federal Bill of Rights "borrowed heavily" from the Declaration of Rights of Pennsylvania and other colonies. *Id*. Pennsylvania ratified the second constitution in 1790, a year before adoption of the Eighth Amendment, and forbid all cruel punishments. Bendesky,

supra, at 5-6. This provision remains in the Pennsylvania Constitution to date.

The original purpose of punishment in Pennsylvania was to deter and reform. As adopted by Enlightenment thinkers Cesare Beccaria and Baron De Montesquieu, no punishment was permissible unless necessary, making "cruel" anything that did not deter or reform. Bendesky, *supra,* at 15-19 (first citing Montesquieu, *The Spirit of Laws* (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 2018) (1748), and then citing Cesare Beccaria, *On Crimes and Punishments* (1794), reprinted in *On Crimes and Punishments and Other Writing* (Richard Bellamy ed., Richard Davies trans., 2003)). Pennsylvania constitutional Framers wrote against "sanguinary" punishments. *See* Jared Ingersoll*, Report*, 7 J. Juris: New Series Am. L. J. 325, 325 (1821), bit.ly/44Qt8OM; Bendesky, *supra,* at 13. Framers came to believe that every punishment, that is not absolutely necessary for deterrence, is "tyrannical" and cruel. *See* Bendesky, *supra*, at 15-16. This informed the meaning of cruelty and led to Section 13 of the Pennsylvania Constitution.

In contrast, the Eighth Amendment drew on England's 1688 Bill of Rights and was meant to admonish and warn the "National Government" against violent proceedings that had taken place in England. Ben Finholt, *Toward Mercy: Excessive Sentencing and the Untapped Power of North Carolina's Constitution*, Elon L. Rev. (forthcoming) (manuscript at 5), https://ssrn.com/abstract=4464100. The federal Amendment originally sought to prohibit punishments that were unusual, where

"terror, pain, or disgrace [were] superadded" to the penalty of death. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (alteration in original) (quoting William Blackstone, *Commentaries on the Laws of England* 370 (1769)). "Cruel" was understood to mean "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting," or "[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness." *Id.* (alterations in original) (first quoting Samuel Johnson, *A Dictionary of the English Language* (4th ed. 1773), and then quoting Noah Webster, *An American Dictionary of the English Language* (1828)). Ratifiers of the Eighth Amendment sought to prohibit torturous and barbarous punishments such as disemboweling, public dissection, burning alive, mutilating, and other "atrocious" methods of execution, practices which "had long fallen out of use and so had become 'unusual.'" *See id.* Thus, the federal Framers were not concerned with proportionality, but with outlawing barbarous punishments.

At the federal level, a punishment also had to be both cruel *and* unusual, as the Court would permit punishments that were unusual, but not cruel. *See Bucklew*, 139 S. Ct. at 1123-24 (citing *In Re Kemmler*, 136 U.S. 436, 447 (1890) (where death by electrocution was a new method of punishment, and could be considered unusual, but was legal because the "punishment of death is not cruel, within the meaning of that word as used in the Constitution.")). According to the late Justice Scalia, this

was intentional as the Framers of the federal Constitution knew of state constitutions, like Pennsylvania's and South Carolina's, which prohibited only cruel punishment and guaranteed proportional punishments, but purposely chose not to adopt such provisions. *See Harmelin v. Michigan*, 501 U.S. 957, 966 (1991); *see also Bucklew*,139 S. Ct. at 1124.

Pennsylvania's independent meaning of "cruel" prevailed until the federal government ruled that the Eighth Amendment applied to the states. *See Robinson v. California*, 370 U.S. 660 (1962). Since then, Pennsylvania courts appear to have ignored the state's history and purpose in choosing "cruel" versus "cruel and unusual" constitutional language.

3. Other Jurisdictions Have Interpreted Similar State Protections More Broadly Than the Eighth Amendment

Pennsylvania's ban on cruel punishments is not unique; several other jurisdictions have likewise banned cruel punishments, or cruel *or* unusual punishments. Many of these state constitutional provisions have been interpreted to provide greater protections than the Eighth Amendment. *See State v. Vang*, 847 N.W.2d 248, 263 (Minn. 2014) (where the Minnesota Supreme Court found the difference between its nearly identical "cruel or unusual" punishment provision as "'not trivial' because the 'United States Supreme Court has upheld punishments that, although . . . cruel, are not unusual" (quoting *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998))); *Hale v. State*, 630 So.2d 521, 526 (Fla. 1993) ("The federal

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

The Washington Supreme Court has also interpreted its constitution as more protective than the Eighth Amendment, and its reasoning is instructive here. *State v. Fain*, 617 P.2d 720, 723 (Wash. 1980) (en banc). In *Fain*, the Court reasoned that

"[e]specially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation." *Id.* This was clear from historical evidence that revealed that the Framers viewed the word "cruel" as sufficient to express their intent and "refused to adopt an amendment inserting the word unusual." *Id*. In 2018, after an *Edmunds*-like analysis, the Court confirmed its broader interpretation in the context of youth sentencing. *State v. Bassett*, 428 P.3d 343, 346 (Wash. 2018). It reasoned that "on its face" the Washington Constitution offers greater protection because it prohibits "merely cruel" punishments. *Id.* at 349 (quoting *State v. Dodd*, 838 P.2d 86, 96 (Wash. 1992) (en banc)). The Court also recognized how the state has evolved, through legislation and case-law, to recognize that children warrant special protection. *Id.* at 350. The Court reasoned that, in the context of juvenile sentencing, the Washington Constitution provided greater protection than the Eighth amendment. *Id.*

Most recently, in *State v. Kelliher*, decided after *Jones*, the North Carolina Supreme Court found that it violates both the Eighth Amendment and "article I, section 27 of the North Carolina Constitution to sentence a juvenile homicide offender" who is "'neither incorrigible nor irredeemable' to life without parole." *State v. Kelliher*, 873 S.E.2d 366, 370 (N.C. 2022). The Court found that the North Carolina Constitution, which prohibits "cruel *or* unusual punishments," N.C. Const.

art. I, § 27 (emphasis added), offers protections that are distinct and broader than those provided under the Eighth Amendment, *Kelliher*, 873 S.E.2d at 382. The Court noted the different language and presumed that the Framers of the North Carolina Constitution intentionally chose the words "cruel or unusual punishment" to prohibit punishments that were either cruel or unusual, "consistent with the ordinary meaning of the disjunctive term 'or.'" *Id.* The Court looked at the constitutional text, precedent illustrating the Court's "role in interpreting the North Carolina Constitution, and the nature of the inquiry used to determine whether a punishment violates the federal constitution" to hold that the state constitution is *not* in "lockstep" with the Eighth Amendment. *Id.* at 383. The Court also noted how its interpretation changed to conform with contemporary understanding of adolescent development recognized by the Court. *Id.* at 384.

Notably, the North Carolina Supreme Court further held that any sentence, or combination of sentences, which require youth to serve more than 40 years in prison before parole eligibility, is a *de facto* life without parole sentence "because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison" and that such sentences also violated the Eighth Amendment. *Kelliher*, 873 S.E.2d at 370. The Court reasoned that adopting a position that under *Jones*, "the Eighth Amendment requires nothing more than that 'sentencing courts . . . take children's age into

account before condemning them to die in prison'" would repudiate core principles articulated in *Miller* and *Montgomery*. *Id.* at 379 (alteration in original) (quoting *Montgomery*, 577 U.S. at 209). This interpretation is "irreconcilable" with the Supreme Court's own stated characterization of its holding: that *Jones* did not abrogate *Miller*, and the Supreme Court only intended to reject the appendage of new procedural requirements to *Miller* and *Montgomery*. *Id.* "To hold otherwise would require us to read *Jones* far more expansively" than intended, "the very sin that *Jones* warns us against committing." *Id.* at 380.

4. Pennsylvania Has a Long History of Protecting Youth

Policy considerations also support a broader interpretation of Article I, Section 13. Pennsylvania has a long history of protecting youth. As early as 1905, the Pennsylvania Supreme Court spoke of saving youth from becoming criminals, or continuing careers in crime. *Commonwealth v. Fisher*, 62 A. 198, 200 (Pa. 1905); *see also* Justin D. Okun & Lisle T. Weaver, *Critical Issues Regarding Juvenile Justice in Pennsylvania: Life Without the Possibility of Parole and Use of Juvenile Adjudications to Enhance Later Adult Sentencing*, 93 Pa. Bar Ass'n. Q. 62, 63 (2022). The state was the protector of youth, "not its punishment." *Fisher*, 62 A. at 200. Decades later, the Pennsylvania Supreme Court correctly noted that "there is an abiding concern, in Pennsylvania, that juvenile offenders be treated commensurate with their stage of emotional and intellectual development and

personal characteristics." *Batts*, 66 A.3d at 299.

Pennsylvania history reveals a longstanding commitment to providing special protections for minors against the full weight of criminal punishment. Over 150 years ago, well before the Commonwealth enacted the Juvenile Act, the Pennsylvania Supreme Court approved the detention of children in reform schools or Houses of Refuge. While the creation of these detention centers was concerning for many reasons, the Court articulated that the goal was explicitly "reformation, and not punishment." *Ex parte Crouse*, 4 Whart. 9, 9 (Pa. 1839). Years later, Pennsylvania passed its first Juvenile Act in 1901. It was immediately subject to constitutional challenge. *See Case of Mansfield*, 22 Pa. Super. 224, 225 (Pa. Super. Ct. 1903). While the *Mansfield* Court, declared the act unconstitutional, it commended the purpose of the law—to shield the young from the grave punishments of the criminal legal system. *Id*. at 235. Later amendments to the Juvenile Act expanded the court's jurisdiction beyond minor offenses, and gave the court jurisdiction of youth up to age 18. Pa. Juv. Ct. Judges' Comm'n, *Pennsylvania Juvenile Delinquency Benchbook* 3.2 (2018), https://www.jcjc.pa.gov/Publications/Documents/Juvenile%20Delinquency%20Benchbook/Pennsylvania%20Juvenile%20Delinquency%20Benchbook_10-2018.pdf. These jurisdictional changes reflected a shift to ensure the full and complete separation of juvenile courts. The 1972 Juvenile Act further ensured that youth should be treated with care and differentiated

from their adult counterparts. The Act provided that children must be placed in juvenile facilities and not adult facilities unless there are no other appropriate facilities available, in which case they must be kept separate from adults. *See* S.B. 439, 1971-1972 Reg. Sess. (Pa. 1972).

Likewise, Pennsylvania courts have consistently held that children are entitled a special place of reform and care within the legal system. The Pennsylvania Supreme Court has recognized the special status of adolescents, and has held, for example, that a court determining the voluntariness of a youth's confession must consider the youth's age, experience, comprehension, and the presence or absence of an interested adult. *Commonwealth v. Williams*, 475 A.2d 1283, 1288 (Pa. 1984). In *Commonwealth v. Kocher*, involving the prosecution of a nine-year-old for murder, the Pennsylvania Supreme Court referred to the common law presumption that children under the age of 14 are incapable of forming the requisite criminal intent to commit a crime. 602 A.2d 1307, 1313 (Pa. 1992). While this common law presumption was replaced by the Juvenile Act, its existence for decades demonstrates that Pennsylvania's common law was especially protective of minors. The Juvenile Act also recognizes the special status of minors in its aim "to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of

competencies to enable children to become responsible and productive members of the community." 42 Pa.C.S.A. § 6301(b)(2). This focus on rehabilitation and competency development underscores Pennsylvania's recognition that children are still changing and deserve special protections under the law.[2]

The Pennsylvania Supreme Court also has a history of protecting youth. This is evident in *In re J.B.*, where the Pennsylvania Supreme Court held that the Sex Offender Registration and Notification Act (SORNA) "violates juvenile offenders' due process rights through use of an irrebuttable presumption." 107 A.3d 1, 2 (Pa. 2014). The Court recognized that youth commit sexual offenses due to "impulsivity and sexual curiosity, which diminish with rehabilitation and general maturation," and make them less likely than adults to reoffend. *Id.* at 17. Similarly, in *Batts II* the Court adopted expansive procedural safeguards to protect youth potentially eligible for life without parole sentences. *See Commonwealth v. Batts* (*Batts II*), 163 A.3d 410, 443-444 (Pa. 2017), *rev'd on Eighth Amendment grounds*, *Commonwealth v. Felder*, 269 A. 3d 1232 (Pa. 2022). The Court noted the unique attributes of youth

[2] Additionally, Pennsylvania statutory law consistently recognizes that children lack the same judgment, maturity and responsibility as adults. *See, e.g.,* 23 Pa.C.S.A. § 5101 (the ability to sue and be sued or form binding contracts attaches at age 18); 18 Pa.C.S.A. §§ 6308, 6305 (a person cannot legally purchase alcohol or tobacco products until age 21); 10 Pa.C.S.A. § 305(c)(1) (no person under the age of 18 in Pennsylvania may play bingo unless accompanied by an adult); 18 Pa.C.S.A. § 6311 (a person under age 18 cannot get a tattoo or body piercing without parental consent); 72 Pa.C.S.A. § 3761-309(a) (a person under age 18 cannot buy a lottery ticket); 3 Pa.C.S.A. § 9340 (no one under age 18 may make a wager at a racetrack); 23 Pa.C.S.A. § 1304(a) (youth under the age of 18 cannot get married in Pennsylvania without parental consent).

(that youth are impetuous, have an underdeveloped sense of responsibility, lessoned culpability and greater capacity for change and rehabilitation than adults) recognized in *Roper, Graham, Miller* and *Montgomery*. *See Batts II*, 163 A.3d at 428-34. The Pennsylvania Supreme Court only reversed these safeguards after the Supreme Court's ruling in *Jones* and only upon an interpretation that they were not required under the Eighth Amendment. *Felder*, 269 A.3d at 1243-44.

As outlined above, the text, history and policy in Pennsylvania favor a broader reading of its prohibition against cruel punishment. Other state courts also show a trend away from coextensive interpretations towards independent analysis, especially in the context of youth sentencing.

B. Mr. King's Sentence Is Cruel Under The Pennsylvania Constitution

The Framers' intent in proposing Article 1, Section 13, would plainly void Mr. King's four consecutive 20 to life sentences as they are an unconstitutional *de facto* life without parole sentences and unreasonably cruel. As outlined above, anything that is not necessary to deter or reform *is* cruel under the Pennsylvania Constitution. This is especially true for individuals sentenced as youth, who will serve "more years and a greater percentage of his life in prison than an adult offender." *Graham v. Florida*, 560 U.S. 48, 70 (2010); see also *Miller*, 567 U.S. at 475.

As clearly outlined in *Miller*, and confirmed in *Jones*, certain punishments are

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

Mr. King was 17 years old at the time of his offenses. He has already served 25 years in prison. As noted by the court below, he has also shown significant signs of rehabilitation. Currently he will not be eligible for parole until he has served at least 80 years in prison, well beyond his life expectancy. Such a sentence—essentially a sentence to die in prison—serves neither deterrence nor rehabilitation. Given Mr. King's youth at the time of conviction, this sentence is unreasonably cruel and unconstitutional under the Pennsylvania Constitution.

III. DUE PROCESS AND THE PROHIBITION AGAINST CRUEL PUNISHMENTS UNDER THE PENNSYLVANIA CONSTITUTION REQUIRE THAT APPROPRIATE PROCEDURES, PRESUMPTIONS AND THE BURDEN OF PROOF BE IN PLACE FOR THE RESENTENCING OF CHILDREN CONVICTED OF FIRST OR SECOND DEGREE MURDER[3]

In *Batts II*, the Pennsylvania Supreme Court set forth what it considered appropriate procedures for the sentencing of children convicted of first-degree murder in order to comply with the mandates of *Miller* and *Montgomery*. *Batts II*, 163 A.3d at 459-60. In *Felder*, the Pennsylvania Supreme Court vacated these protections, based upon its view that *Jones'* limited reading of the Eighth Amendment did not require procedural protections. Specifically, the Court eliminated "the presumption against sentencing a juvenile homicide offender to life without parole, and the imposition on the Commonwealth of the burden of proving beyond a reasonable doubt that the juvenile is permanently incorrigible." *Felder*, 269 A.3d at 1243. However, such protections are required under the Pennsylvania Constitution's broader cruel punishment prohibition, Pa. Const. art. I, §13, and under Pennsylvania's broader due process protections, Pa. Const. art. I, §§ 1, 9. This Court should, therefore, reinstate the *Batts II* procedural protections.

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[3] After *Miller was* decided, the Pennsylvania Legislature determined that a life without parole sentence, and hence a *de facto* life without parole sentence, cannot be imposed for second degree murder. 18 Pa. C.S.A. § 1102.1(c).

It must first be noted that the establishment of protections under the Pennsylvania Constitution is explicitly permitted by *Jones*. The *Jones* Court, bound by prior precedent, explicitly acknowledged states' authority to create additional sentencing protections: "Under our precedents, this Court's more limited role is to safeguard the limits imposed by the Cruel and Unusual Punishments Clause of the Eighth Amendment." *Jones*, 141 S. Ct. at 1322.

> [O]ur holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences.

Id. at 1323.

The Court reasoned that:

> When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." See *Ford v. Wainwright*, 477 U.S. 399, 416-417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences").

Id. at 1315 n.2 (alterations in original) (quoting *Montgomery*, 577 U.S. at 211).

The procedural protections provided for in *Batts II* were to provide a framework to determine the subclass of juvenile offenders who are ineligible to receive a life sentence. This is a subclass of juveniles whose crimes reflect transient immaturity. Even *Jones* agreed that this subclass was ineligible to receive a life sentence. Similarly, imposing a discretionary life sentence upon a child whose crime reflects transient immaturity is not permitted under the Pennsylvania Constitution. The procedural protections the Pennsylvania Supreme Court advanced in *Batts II* did not expand youth's substantive rights and are still required to protect the subclass of juveniles who are ineligible to receive a life without parole sentence (or a *de facto* life sentence).

A life without parole sentence imposed upon a transiently immature youth is cruel punishment and hence unconstitutional under the Pennsylvania Constitution. By imposing a four 20 year to life sentences (nonlife sentences) upon Mr. King, the sentencing judge clearly found that his crime, though serious, was reflective of transient immaturity and that Mr. King had demonstrated growth and rehabilitation during his decades of incarceration.

However, by running those four 20 year to life sentences consecutively, the judge imposed an 80 year to life sentence, a *de facto* life without parole sentence. The procedural protections sought here would have barred such a sentence. That sentence would have violated the presumption against imposition of a *de facto* (or

life) sentence, as well as the requirement that the Commonwealth has the burden to prove beyond a reasonable doubt that Mr. King was one of the rare youths who was permanently incorrigible and incapable of rehabilitation—characterizations clearly belied by the record. The establishment of procedural protections would not only protect Mr. King, they would protect all juveniles convicted of first or second degree murder.

CONCLUSION

Wherefore, for the foregoing reasons, we urge this Court to reverse the holding of the lower court and find Mr. King's sentence is in violation of both the Eighth Amendment and Article I, Section 13 of the Pennsylvania Constitution.

Respectfully submitted,

/s/ Marsha L. Levick
Marsha L. Levick, No. 22535
Tiara J. Greene, No. 318526
JUVENILE LAW CENTER
1800 JFK Blvd, Ste. 1900B
Philadelphia, PA 19103
(215) 625-0551
mlevick@jlc.org
tgreene@jlc.org

/s/ Bradley S. Bridge
Bradley S. Bridge, No. 39678
DEFENDER ASSOCIATION OF PHILADELPHIA
1441 Sansom Street
Philadelphia, PA 19102
(215) 568-3190
BBridge@philadefender.org

Counsel for Amici Curiae

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 531 and 2135 of the Pennsylvania Rules of Appellate Procedure. This brief contains 5,762 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

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

Dated: September 18, 2023

/s/ Marsha L. Levick
Marsha L. Levick