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IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 406 EDA 2023

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

IVORY KING,

Appellant.

Appeal From The Judgment of Sentence Of The Court Of Common Pleas Of Bucks County, Trial Division, Criminal Section, Order Entered November 21, 2022, Imposed On Information CP-09-CR-0003727-1998

BRIEF OF APPELLANT

October 13, 2023

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal from the judgment of sentence of the Court of Common Pleas of Bucks County pursuant to 42 Pa. Cons. Stat. § 742.

II. ORDER IN QUESTION

This is a timely appeal from the judgment of sentence upon appellant-defendant Ivory King entered on November 21, 2022 by the Honorable Rea B. Boylan in the Court of Common Pleas of Bucks County ("the Sentencing Court") following a resentencing hearing in the matter docketed under CP-09-CR-0003727-1998. Following the resentencing hearing, the Sentencing Court imposed four sentences of 20 years to life for four first degree murders to be served consecutively. (R. 432a-442a). Mr. King committed the crime when he was 17 years old, thus he will not be eligible for parole until he is 97 years old. The judgment of sentence was made final by the Order denying Mr. King's Motion for Reconsideration entered on January 19, 2023 (the Order"). Mr. King filed a statement of errors complained of on appeal, dated March 14, 2023.[1] The Sentencing Court issued a Rule 1925 Opinion in Support of Order dated June 7, 2023 (the "Opinion"). (R. 5a-59a).

[1] The statement of errors complained of on appeal is attached hereto as Exhibit "A".

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

Where a defendant seeks review of the legality of his sentence, the court's legal authority to impose the sentence is reviewed *de novo* and the scope of review is plenary. *See Commonwealth v. Edwards*, 256 A.3d 1130, 1136 (Pa. 2021). "[W]hen a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016), as revised (Jan. 27, 2016).

Discretionary aspects of a sentence are reviewed for abuse of discretion. *Commonwealth v. Coulverson*, 34 A.3d 135, 143-44 (Pa. Super. 2011). Review for abuse of discretion includes assessing whether the lower court exercised its judgment unreasonably, or whether the sentence imposed has "such lack of support so as to be clearly erroneous." *Commonwealth v. Walls*, 926 A.2d 957, 961 (Pa. 2007).

IV. STATEMENT OF THE QUESTIONS PRESENTED

Where a sentencing court finds that a juvenile defendant has demonstrated a capacity for change and rehabilitation, does it violate the Eighth Amendment of the United States Constitution's prohibition on cruel and unusual punishment to sentence the juvenile to a *de facto* life sentence?

The Court should answer: Yes.

Where the Sentencing Court found that Mr. King demonstrated a capacity for change and rehabilitation, as applied to Mr. King, does it violate the Eighth Amendment of the United States Constitution's prohibition on cruel and unusual punishment to sentence Mr. King to a *de facto* life sentence?

The Court should answer: Yes.

Where a sentencing court finds that a defendant has demonstrated a capacity for change and rehabilitation, does it violate Article I, Section 13 of the Pennsylvania State Constitution's prohibition on cruel punishments to sentence the juvenile to a *de facto* life sentence?

The Court should answer: Yes.

Where the Sentencing Court found that Mr. King has demonstrated capacity for change and rehabilitation, as applied to Mr. King, does it violate Article I, Section 13 of the Pennsylvania State Constitution's prohibition on cruel punishments to sentence Mr. King to a *de facto* life sentence?

The Court should answer: Yes.

Did the Sentencing Court err and abuse its discretion in imposing four sentences of 20 years to life to be served consecutively, rendering Mr. King ineligible for parole until he is 97 years old, where the Sentencing Court deviated from sentencing norms and statute by placing an inordinate focus on Mr. King's crime to the detriment of fully considering his youth, history, and rehabilitative needs, and where the Sentencing Court's conclusion about Mr. King's alleged inadequate remorse and purported continued criminal thinking was contradicted by the evidence.

The Court should answer: Yes.

V. STATEMENT OF THE CASE

1. Original Sentencing Hearing

This is an appeal from the Sentencing Court's judgment of sentence against Mr. King following a resentencing hearing in accordance with *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), which declared unconstitutional Mr. King's original sentence of four terms of life without parole to be served consecutively for a crime he committed as a juvenile.

On May 23, 1998, Mr. King shot and killed four adults and wounded a fifth at a party. He was 17 years old. On October 26, 1998, in the Court of Common Pleas of Bucks County, Mr. King pleaded guilty to murder generally, and the court proceeded with a degree of guilt hearing that took place on October 26 and 27, 1998. At the conclusion of that hearing, the court found Mr. King guilty of four counts of first-degree murder. On October 28, 1998, the court held a penalty phase hearing. At the conclusion, the court imposed four unconstitutional mandatory life sentences without parole, to be served consecutively.

Mr. King filed a petition for collateral review pursuant to the Post Conviction Relief Act ("PCRA") on September 17, 1999, which he withdrew on November 23, 1999. *Commonwealth v King*, No. 3323 EDA 2014, 2016 WL 1136304, at *2 (Pa. Super. Mar. 23, 2016). Mr. King filed a second PCRA petition in 2005, which was denied by the PCRA court. *Id.* The Superior Court dismissed

Mr. King's appeal from that decision on January 12, 2006, "when he failed to file a brief." *Id.* Mr. King filed his third PCRA petition on September 11, 2007, which was denied by the PCRA court on March 3, 2008. *Id.* He filed his fourth PCRA petition on June 4, 2010, which was denied by the PCRA court on August 18, 2010. *Id.*

On July 5, 2012, Mr. King filed a PCRA, which the Court of Common Pleas denied in an order dated November 7, 2014. *Id.* at *1. On appeal, the Superior Court held that *Miller* was retroactive, vacated Mr. King's life without parole sentences and remanded for further proceedings. *Id.*

2. At the Resentencing Hearing, Mr. King Presented Unrebutted Expert and Lay Evidence About How He Had Mitigated His Risks of Reoffending, His Positive Changes in Behavior, and His Troubled Childhood

A resentencing hearing took place on November 18 and 21, 2022. The Commonwealth presented a recitation of facts concerning the crime, introduced exhibits regarding Mr. King's prison record (including prison misconducts), photos of the victims, and victim impact statements presented at the original sentencing. In addition, family members testified about the impact of the crime.

Mr. King introduced three reports into evidence: (1) a mitigation report prepared by Jill Steinberg of Zedek Partners, LLC, a mitigation specialist, that compiled information concerning Mr. King's childhood and prison accomplishments, (R. 132a-159a); (2) an expert report prepared by Dr. Robin

Timme, an expert in Forensic Psychology and Developmental Psychology, attesting to how Mr. King met the *Miller* factors, had no mental health issues and was amenable to rehabilitation, (R. 60a-90a), and; (3) an expert report from Kathy Gnall, an expert in prison adjustment, readiness for release from incarceration, and reentry planning (and former employee of the Pennsylvania Department of Corrections for 17 years), attesting to the fact that Mr. King had taken every step possible in prison to mitigate his risk of reoffending, (R. 91a-107a). Mr. King also introduced into evidence prison records concerning his work performance and housing reports, (R. 108a-131a), and report cards from elementary school.

The mitigation report and transcripts from the October 28, 1998, penalty phase hearing provided information about Mr. King's difficult childhood, facts which were not contested. These facts are summarized as follows:

Mr. King's parents had a troubled marriage, in part because his father abused alcohol and drugs. (R. 137-138a; *see also* R. 173a-175a). His parents fought frequently and often separated for periods of time, with Mr. King and his older brother living with his mother. (R. 138a-139a, 173a-179a, 186a-188a).

In 1985, when Mr. King entered kindergarten, he was diagnosed with Attention-Deficit Hyperactivity disorder ("ADHD") and prescribed Ritalin. (R. 139a-140a, 176a, 187a-188a). His father opposed the treatment. (*Id.*) Thus, Mr. King's ADHD was not treated. (*Id.*) As a result, Mr. King performed poorly

throughout elementary school, and Mr. King's parents physically abused him, blaming his behaviors. (R. 139a-141a, 175a, R. 188a).

When Mr. King was eight years old, he was molested numerous times over the course of a year by a family member. (R. 138a). When Mr. King was either nine or 10 years old, he was molested by a friend of his older brother who would sleep over at the King house. (R. 143a). The molestation lasted until Mr. King was either 14 or 15 years old. (*Id.*).

Mr. King's parents divorced when Mr. King was 14 years old. (R. 143a, 180a-182a, 192a-194a). His father got remarried shortly thereafter, became stepfather to his new wife's two children, and ceased seeing his own two sons. (*Id*.) Around this time, Mr. King was chronically absent from school (120 days in the 1992-93 term, 49 days in the 1993-94 term, and 50 days in the 1994-95 term), his academic performance and behavior were poor, and he was suspended in 1996. (R. 143a-144a). Mr. King failed ninth grade and enrolled in a different school, where he repeated ninth grade, was absent 27 times, and failed most of his classes. (*Id.*)

In 1997, he left his mother's home as result of her physical abuse and moved in with his father and his father's new family. (R. 144a). It was in this environment that Mr. King had his first involvement with law enforcement. Mr. King and one of his stepbrothers got into an altercation, and Mr. King's father sent

his stepson to his room and called the police to arrest Mr. King, choosing his stepson over his own son. (R. 144a, 195a).

In and around this time Mr. King, who had been involved with drug dealers since he was a pre-teen, became further involved, selling drugs for neighborhood dealers, using drugs himself and living with a cousin who was a drug dealer. (R. 142a-146a, 182a-184a). In January of 1998, Mr. King was arrested for drug possession and placed on probation that required him to live with his mother. (*Id.*) Mr. King was doing well at his mother's home and was attempting to get his GED, until he and his mother got into a fight, and Mr. King moved out. (*Id.*; R. 145a). The offense at issue occurred just a few months later.

At his resentencing hearing, Mr. King presented testimony from four witness. Ms. Gnall, the prison adjustment expert,[2] testified that Mr. King had taken all programming possible—including cognitive behavioral interventions, GED and vocational programs—to mitigate his risk of reoffending. (R. 261a-262a; *see* R. 92a, 267a-268a). Ms. Gnall, who met with Mr. King to prepare her report, observed that Mr. King took responsibility for his crime, was remorseful, and demonstrated a commitment to self-improvement. (R. 93a). Ms. Gnall testified

[2] At the Pennsylvania Department of Corrections Ms. Gnall "oversaw the classification and diagnostic process when it came to actuarial risk and needs and other assessments to determine both how a person would behave in prison and then their risk to re-offend post release." (R. 255a). Ms. Gnall has also "trained probation officers, employees in jails and prisons, judges, officials in other state department of corrections on the use of risk and needs assessment and also in other evidence-based practices…." (R. 256a).

that even though Mr. King had misconducts in prison, his last misconduct occurred in 2015, demonstrating a veritable positive change.[3] (R. 316a-317a). In her experience, Mr. King's misconduct record was not serious for someone who had been incarcerated for 24 years and was just one piece of his entire prison record. (R. 282a-283a, 295a, 298a-299a). Ms. Gnall testified that there was no rehabilitative value left in Mr. King remaining in prison. (R. 270a).

Another witness, Dr. Timme, assessed Mr. King on three separate occasions and completed a report of psychological evaluation. (R. 325a-326a, *see also* R. 60a-90a). Dr. Timme testified that, based upon his assessments and documents reviewed, he concluded that all of the factors identified in *Miller* concerning the differences between juvenile and adult brains applied to Mr. King's case. (R. 326a-327a). Dr. Timme explained that *Miller* identified that children are different from adults due to their lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity and heedless risk-taking. *See* 567 U.S. at 471. He testified that:

> [n]ormal adolescent development includes those factors I just described. But in Mr. King's case, we actually have an exacerbation of the decisional factor. We see in multiple sources of information a diagnosis of attention-deficit/hyperactivity disorder, which is a

[3] With respect to the 2015 misconduct, Ms. Gnall testified that another inmate initiated the confrontation by spitting in Mr. King's face, and that Mr. King was found guilty and sanctioned to disciplinary custody for 60 days, but that time was cut in half, to 30 days, by the superintendent: "Now, when that happens, because the superintendent is going to review any appeal of misconduct, the superintendent would have to be convinced that there was less punishment necessary or less culpability." (R. 318a; *see also* R. 93a).

> neurodevelopmental disorder, and it was identified and diagnosed and not treated… normal adolescent behavior would be exacerbated by a diagnosis of ADHD left untreated – impulsivity… So all of these symptoms of ADHD would be compounded on top of that normal adolescent development in which the frontal lobe of the brain is not fully developed.

(R. 328a).

In his report, Dr. Timme explained that "Mr. King was particularly vulnerable to the influence of peers in a manner that impacted his self-control and decision-making… the record is replete with references to Mr. King's association and need for affiliation with a particularly delinquent peer group." (R. 70a). He also observed that a "physically and psychologically damaging childhood environment has long been known to correlate with subsequent negative outcomes," a "relationship qualified in research on Adverse Childhood Experiences (ACEs)." (R. 70a-72a, 330a). Mr. King's ACE score was a 6 out of a possible 10: "just 3 percent of the population have experienced that level of childhood adversity." (R. 330-331a, *see also* R. 71a). Dr. Timme also stated in his report that "Mr. King's family and home environment included significant childhood adversity, which impacted his developmental trajectory," (R. 70a), and testified that Mr. King did not have any buffer against the impact of that childhood adversity, a buffer that can prevent other children with similar ACE scores from becoming criminally justice involved. (R. 331a-332a).

Dr. Timme also addressed Mr. King's potential for rehabilitation. Taking into consideration the totality of Mr. King's prison record and his own assessments, Dr. Timme concluded that Mr. King was amenable to rehabilitation and has no notable mental health issues. (R. 338a-340a).

As to Mr. King's misconducts, Dr. Timme testified that the threshold for misconducts was very subjective and that in his role as chief psychologist in the Delaware Department of Corrections, he has assessed approximately 1,000 inmates, and estimated that "only a handful, maybe ten, had no misconducts whatsoever." (R. 336a, 348a). He testified that it is difficult to avoid behaviors that may lead to misconducts, because, for example, an inmate who does not respond to a provocation could be subjected to even more danger. (R. 349a-350a).

Another witness, Lieutenant Shawn Horner, was employed as a critical incident manager for the Pennsylvania Department of Corrections. (R. 208a). He had worked at SCI-Smithfield for nine years, first as a corrections officer trainee, then as a relief officer and ultimately as a regular officer. (R. 208a-209a). He was promoted to lieutenant in 2020. (R. 210a). Mr. King was a resident on Lieutenant Horner's block, and he oversaw Mr. King's participation in Therapeutic Community, "a drug and alcohol treatment program that the Department of Corrections utilizes to try to rehabilitate residents back into the community that suffer from drug and alcohol issues." (R. 211a). Lieutenant Horner testified that

Mr. King was motivated, "went above and beyond [using downtime to continue program functions], and actually became a mentor for a lot of the guys on the unit as well," helping inmates who were struggling. (R. 212a-213a). Lieutenant Horner testified that Mr. King was selected as a senior coordinator, "was a positive role model for others in the TC Community," a good leader who constantly went out of his way to help, and took the program seriously. (R. 131a, 213a-214a). Lieutenant Horner also testified that Mr. King was a motivated block worker who required very little to no supervision. (R. 216a). Lieutenant Horner testified that he was never concerned Mr. King would be a source of conflict or aggression, and that Mr. King was respectful to him and other staff, as well as other inmates. (R. 218a-220a).

A fourth witness, Rachel Mills, was a former employee of the Pennsylvania Department of Corrections, who worked at SCI-Smithfield for 15 years. (R. 230a-231a). She first worked as a counselor on the special needs unit and then as a treatment specialist. (R. 231a). Ms. Mills met Mr. King when he was transferred to Smithfield in or around 2013 or 2014 and got to know him as part of the juvenile lifer group she ran. (R. 232a). Ms. Mills testified that, initially, Mr. King would come to the meetings, but then leave with a headache or for other reasons. (R. 233a). She testified that at some point she confronted him when he tried to leave:

> I walked out, and I said, Mr. King, what's going on. He described how hard it's been for him dealing with all this. And I just looked at

> him and I said, Mr. King, did you do what they say you did. And he said, yes, ma'am, I did. And I said, then we're going to work with that. And after that he attended every meeting that I can remember.

(R. 234a).

Ms. Mills testified that Mr. King's participation was always positive and he was helpful to other members of the group. (R. 234a). Mr. King attended sessions of a violence prevention group called "Impact of Crime" and shared his story and his experience meeting the relative of one of his victims in mediation. (R. 234a-235a).[4] Ms. Mills testified that Mr. King was always respectful with her, other staff members, and other inmates, and mentored younger inmates. (R. 236a-238a). Ms. Mills testified that she felt safe around Mr. King. (R. 238a). As to the 2015 misconduct, Ms. Mills testified that, at the time, corrections officers indicated to her that Mr. King "was really trying to avoid a problem again. Sometimes situations in prison can be difficult to avoid." (R. 237a).

At the conclusion of the resentencing hearing, Mr. King made a statement, which read in part:

> On May 23rd, 1998 I made a decision that was responsible for taking the lives of Milika Johnson, Saphil Taylor, Anthony Jackson, Jackie Wilson & scaring the lives of countless other's. My actions are why they are being mentioned in a statement of sorrow and not one of

[4] At SCI-Chester, Mr. King participated in a "Day of Responsibility," which is an opportunity for inmates to take responsibility for their crimes and the impact of those crimes on the victims' families. (R. 269a-270a). One of the organizers submitted a letter, attached to the mitigation report, that attested to Mr. King's dedication to facilitating the program. (R. 158a).

> appreciation. They deserve so much more than this. To the family and friends of Milika, Phil, Anthony, and Jackie, I offer my sincere apologies. There's no justification for what I did, and I'm unworthy of your forgiveness, yet I seek it. … I am truly sorry and take full responsibility for the hurt and pain that I caused everyone in this courtroom.

(R. 367a-370a).

The Commonwealth failed to present any experts. The Commonwealth failed to present testimony from any Department of Corrections employees who had personal experience with Mr. King. Further, in closing arguments, the Commonwealth stated: "[The Court] can accept and give [Mr. King] credit for everything positive that he has presented as true under the *Miller* factors and otherwise; in fact, I urge you to do so, and he is entitled to that," (R. 410a-411a); "I do believe [Mr. King] should he given credit for all of the positive things that he's done in prison and for his remorse," (R. 418a); "Please give him credit for all of his good conduct, for expressing his remorse, although slightly misguided, while in prison," (R. 423a), and; "[G]ive Mr. King all the credit for all the good work, for all the remorse, for all the rehabilitation efforts that he has put in. All the *Miller* factors, give him credit for all of that stuff." (R. 429a).

Before resentencing Mr. King, the Sentencing Court expressly found that: ***"[Mr. King] has demonstrated a capacity for change***." (R. 438a) (emphasis added).

Despite its finding of corrigibility, the Sentencing Court resentenced Mr. King to four terms of 20 years to life to be served consecutively, i.e., a term of 80 years until he is eligible for parole. (R. 440a-441a). The aggregated consecutive sentences constitute the functional equivalent of a life without parole sentence in that Mr. King will not be eligible for parole until he is 97 years and 4 months old.

Mr. King filed a Motion for Reconsideration on November 30, 2022. The Sentencing Court issued the Order denying it, dated January 18, 2023 and entered on January 19, 2023. (R. 1a-3a). Mr. King filed a statement of errors complained of on appeal on March 14, 2023. (Exh. A). The Sentencing Court issued a Rule 1925 Opinion in Support of Order dated June 7, 2023 ("Opinion"). (R. 5a-59a). In the Opinion, the Sentencing Court emphasized that ***"[it] did find that [Mr. King] was capable of rehabilitation***…." (R. 54a) (emphasis added).

VI. SUMMARY OF ARGUMENT

The Sentencing Court expressly found that Mr. King is corrigible. In the face of this finding, it still sentenced him to an aggregate of 80 years to life, a *de facto* sentence of life, that all but guarantees he will die in prison without any chance to seek parole. Such a sentence, in light of such a finding, in unjust and unconstitutional.

Mr. King's sentence is disproportionate under the Eighth Amendment of the United States Constitution. Where, as here, a sentencing court choses to make an affirmative finding that a juvenile defendant has demonstrated a capacity for change and rehabilitation, a *de facto* life sentence violates the Eighth Amendment of the United States Constitution's prohibition on cruel and unusual punishment. Further, Mr. King's aggregated sentences constitute a *de facto* life sentence. Moreover, Mr. King's aggregated sentences, as applied to Mr. King, violates the Eighth Amendment of the United States Constitution's prohibition on cruel and unusual punishment.

Because the Sentencing Court made the affirmative finding that Mr. King is corrigible, Mr. King's aggregated sentences constitute a *de facto* life sentence that violates Article I, Section 13 of the Pennsylvania State Constitution's prohibition on cruel punishments, both facially and as applied. A review of the history of Article I, Section 13, which was predicated on Enlightenment principles of

deterrence and reformation, reveals that "cruel punishments" are punishments unnecessary to attain the aforementioned principles. Sentencing a child capable of change and rehabilitation to life in prison is unnecessary to deter and reform, thus is a cruel punishment prohibited by the Pennsylvania Constitution.

In addition, the Sentencing Court abused its discretion and issued an excessive sentence by ordering that Mr. King serve four 20 years to life sentences consecutively. The Sentencing Court deviated from sentencing norms and statute by placing an inordinate focus on Mr. King's crime to the detriment of fully considering his youth, history, and rehabilitative needs. The Sentencing Court also erroneously concluded that Mr. King did not demonstrate remorse and continued to have criminal thinking. Its conclusions were contrary to the expert and fact evidence presented at the resentencing hearing.

Moreover, while courts have discretion to order that sentences be served concurrently or consecutively, because there are no standards in case law or statute, the Sentencing Court abused its discretion because it failed to follow its own established sentencing norms. Prior to Mr. King's resentencing hearing, the Sentencing Court (Judge Boylan) had sentenced a different juvenile offender, who shot his grandparents in their living room, to two concurrent sentences of 45 years to life. In doing so, the Sentencing Court explicitly stated that it made the decision to order the sentences run concurrently, versus consecutively, because he murdered

his two grandparents in one event. Here, Mr. King's crime was one event: shooting four people in an event that was over within seconds. Thus, Sentencing Court's decision to order Mr. King's sentences run consecutively was arbitrary at best and biased at worst. This Court should vacate the sentences imposed and remand the matter to the Sentencing Court for the issuance of new sentences.

VII. STATEMENT OF REASONS FOR ALLOWANCE OF APPEAL FROM DISCRETIONARY ASPECTS OF SENTENCE

"An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in a separate section of the brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of the sentence." Pa.R.A.P. 2119(f). The Superior Court "determine[s] on a case-by-case basis whether an appellant has raised a substantial question regarding discretionary sentencing." *Commonwealth v. Schroat*, 272 A.3d 523, 527 (Pa. Super. 2022). An appellant challenging the lower court's discretion must invoke this Court's jurisdiction by:

> (1) filing a timely notice of appeal; (2) properly preserving the issue at sentencing or in a post-sentence motion; (3) complying with Pa.R.A.P. 2119(f), which requires a separate section of the brief setting forth a concise statement of the reasons relied upon for allowance of appeal of the discretionary aspects of a sentence; and (4) presenting a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S. § 9781(b), or sentencing norms.

Id.

Mr. King satisfies all four elements. As to the first two, the Sentencing Court imposed its sentence on Mr. King on November 21, 2022. (R. 432a-442a). Mr. King preserved his challenges to the discretionary aspects of his sentence both in his Motion for Reconsideration and in his Statement of Errors. (Exh. A). Mr. King timely filed his Notice of Appeal on February 10, 2023.

As to the third element, Mr. King sets forth his 2119(f) statement here.

As to the fourth element, Mr. King presents a substantial question because the Sentencing Court's consecutive sentences, aggregating to 80 years to life, is manifestly excessive. The Sentencing Court deviated from sentencing norms and statute by placing an inordinate focus on Mr. King's crime to the detriment of fully considering his youth, history, and rehabilitative needs. Further, its conclusions that Mr. King continued to engage in criminal thinking and has not accepted full responsibility was contrary to the uncontested evidence at the sentencing hearing. Mr. King's consecutive sentences are disproportionate to the circumstances when adjudged as a whole and unreasonable, and thus both deviates from sentencing norms and violates 42 Pa. Cons. Stat. § 9721(b). *See Schroat*, 272 A.3d at 527; *Coulverson*, 34 A.3d at 143.

Accordingly, this Court should grant review of the discretionary aspects of Mr. King's sentences.

VIII. ARGUMENT

A. WHERE A SENTENCING COURT MAKES A FINDING THAT A DEFENDANT HAS DEMONSTRATED A CAPACITY FOR CHANGE AND REHABILITATION, A *DE FACTO* LIFE SENTENCE WITHOUT PAROLE IS DISPROPORTIONATE UNDER THE EIGHTH AMENDMENT

1. It Is Well-Settled Law that Sentencing a Child Capable of Change and Rehabilitation to *De Facto Life Without Parole* Is Disproportionate Under the Eighth Amendment

In its Opinion, the Sentencing Court held that Mr. King's challenges to the legality of his sentence were "moot" because a sentencing court is not required to find that a defendant is permanently incorrigible before imposing a *de facto* life sentence. (R. 33a). The Sentencing Court misapprehended the law. While the United States Supreme Court has held that the Eighth Amendment's prohibition of cruel and unusual punishments does not require a separate procedural factual finding of permanent incorrigibility before imposing a life without parole sentence, it has also held that sentencing a juvenile substantively found by the sentencing court to be capable of change and rehabilitation to life in prison is disproportionate under the Eighth Amendment. Here, the Sentencing Court found that Mr. King is capable of change and rehabilitation, rendering his *de facto* life sentence unconstitutional.

In *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), the United States Supreme Court reiterated its holdings in *Miller* and *Montgomery* that sentencing a child to

life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption: "'*Miller* established that this punishment is disproportionate under the Eighth Amendment.'" *Jones*, 141 S. Ct. at 1315, n.2 (quoting *Montgomery*, 577 U.S. at 211). *Jones's* very limited holding is merely that "[t]he Court's precedents do not require an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility" prior to sentencing a juvenile to life in prison. *Id.* at 1320-21. *Jones* did not disturb *Miller's* substantive holding, which was reiterated in *Montgomery*:

> *Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." *Id*., at ——, 132 S.Ct., at 2465. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.'" *Id*., at ——, 132 S.Ct., at 2469 (quoting *Roper* [*v Simmons*, 543 U.S. 551, 573, 125 S.Ct. 1183 (2005)]). ***Because Miller determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption***,'" 567 U.S., at ——, 132 S.Ct., at 2469 (quoting *Roper*, supra, at 573, 125 S.Ct. 1183), ***it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth***. *Penry* [*v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934 (1989).

577 U.S. at 208–09 (emphasis added).

Miller, *Montgomery*, and *Jones* make clear that sentencing a child, who is corrigible, to life or *de facto* life without parole is disproportionate under the

Eighth Amendment. Thus, while a sentencing court is not procedurally required to make an on the record finding of incorrigibility prior to issuing a sentence of life or *de facto* life, where, as here, a sentencing court chose to make the substantive finding that a juvenile offender is capable of change and rehabilitation, a sentence of life or *de facto* life in prison is disproportionate under the Eighth Amendment.

2. Mr. King's Sentences Constitute a *De Facto* Life Sentence

The Sentencing Court did not opine on whether Mr. King's sentences in the aggregate constitute a *de facto* life without parole sentence. (R. 30a-59a). This Court should find that they do.

This Court should consider the consecutive sentences in the aggregate when determining whether the Sentencing Court imposed a *de facto* life sentence because it is consistent with United States Supreme Court precedent. While neither *Jones*, *Montgomery*, *Miller* nor *Miller's* other progeny involved juveniles with consecutive sentences that, in the aggregate, sentenced the juvenile to die in prison, *Montgomery* explained that the heart of its decision and the *Miller* decision is that it is unconstitutional to sentence a child to spend the rest of their life in prison, except in very rare cases: "[A]lthough *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children whose crimes reflect 'irreparable corruption.'" *Montgomery*, 577 U.S. at 726

(quoting *Roper*, 543 U.S. at 573). The Supreme Court made a similar statement in *Graham v. Florida*, in addressing non-homicide crimes: "the State must… give defendants like Graham some ***meaningful opportunity to obtain release*** based on demonstrated maturity and rehabilitation." 560 U.S. 48, 75 (2010) (emphasis added).

Mr. King acknowledges that *Commonwealth v. Foust*, 180 A.3d 416 (Pa. Super. 2018)—which held that individual, rather than the aggregate, sentences must be considered when determining if a term-of-years sentence constitutes a *de facto* life sentence—and the Superior Court cases that follow *Foust* are at odds with his position. But the Pennsylvania Supreme Court has never opined on this issue, and the Superior Court, sitting *en banc*, may overrule the decision of a three-judge panel of the Superior Court. *Commonwealth v. Morris*, 958 A.2d 569, 580 (Pa. Super. 2008).

Indeed, *Foust* stands on shaky grounds because it relied upon a now-reversed case, *McCullough v. State*, 168 A.3d 1045 (Md. Ct. Spec. App. 2017), which held that a juvenile serving an aggregate sentence of 100 years on four counts of first-degree murder was not an illegal sentence under *Graham.* *Foust*, 180 A.3d at 436. Six months after *Foust* was decided, the Court of Appeals of Maryland (now the Maryland Supreme Court) reversed *McCullough*, holding that the aggregate sentence of 100 years on four counts of first-degree assault, for

which a juvenile would have to serve 50 years before becoming eligible for parole, was a *de facto* life sentence, in violation of the Eighth Amendment. *Carter v. State*, 192 A.3d 695 (Md. 2018), superseded by statue as stated in *Farmer v. State*, 281 A.3d 834, 841 (Md. 2022).

In explaining when a court should consider consecutive sentences in the aggregate in determining if those sentences are constitutionally disproportionate, *Carter* provided the following detailed analysis:

> whether a sentence, stacked or otherwise, is excessive under the Eighth Amendment "can never be litigated in the abstract but must be assessed on a case-by-case basis.... We measure proportionality not by comparing the sentence with the label of the crime (that the sentence be within legal limits is a legal problem, not a constitutional problem) but by comparing the sentence with the behavior of the criminal and the consequences of his act." *Thomas v. State*, 333 Md. 84, 97, 634 A.2d 1 (1993) (quoting *Walker v. State*,… 452 A.2d 1234 (1982)).
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> * * * * * * * * * * *
>
> There may be any number of circumstances under which an inmate – adult or juvenile –comes to be serving consecutive sentences that add up to a lengthy term of incarceration. At one end of the spectrum, an individual may embark on a serious crime spree, involving, for example, a series of armed robberies or sexual assaults over weeks or months or even years. Whether the crimes are prosecuted together or separately, the courts may sentence the individual to significant periods of incarceration for each incident. These circumstances are least likely to warrant the aggregate sentence being treated as a *de facto* life sentence. The number of crimes, their seriousness, and the opportunity for the juvenile to reflect before each bad decision also makes it less likely that the aggregate sentence is constitutionally disproportionate even after taking youth and attendant characteristics into account.

> At the other end of the spectrum is a situation where an individual is involved in one event or makes one bad decision that, for various reasons, may involve several separate crimes that do not merge into one another for sentencing purposes and for which consecutive sentences may be imposed. Here, the argument to treat a lengthy stacked sentence as if it were a *de facto* life sentence is strongest. There is little, if any, opportunity to reflect upon or abandon the underlying conduct between individual offenses. The initial decision should usually be treated the same as one to commit a single criminal offense carrying a sentence of life without parole.

Id., 192 A.3d at 730-31.

The court concluded that:

> We thus disagree with the holding of the Court of Special Appeals… consideration must be given to where the stacked sentence falls on the spectrum as well as to the differences between adult and juvenile offenders.

Id., at 733-34 (footnote omitted).

The rationale provided in *Carter* is persuasive and commonsense, "[o]therwise, the Eighth Amendment proscription against cruel and unusual punishment in the context of a juvenile offender could be circumvented simply by stating the sentence in numerical terms that exceed any reasonable life expectancy rather than labeling it a 'life' sentence." *Carter*, 192 A.3d at 737 (Barbera, C.J., concurring in relevant part). Whether a child commits one murder or four murders in one moment of shooting a gun, they are still a child, and "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*,

567 U.S. at 471. *Carter's* thorough analysis also addresses one of the concerns expressed in *Foust* decision: the difficulty of determining whether crime occurred in one course of conduct or separate courses of conduct. 180 A.3d at 437.

Further, since *Foust* was decided, the highest courts in North Carolina, Oregon, and New Mexico have found that the aggregate number of years of multiple sentences determines the presence of a *de facto* life sentence for juveniles, adding to other states that have held similarly.[5] *See State v. Conner*, 873 S.E.2d 339 (N.C. 2022) (under the Eighth Amendment and North Carolina Constitutions, a redeemable juvenile homicide offender who receives consecutive sentence must have the opportunity to seek parole after serving 40 years in prison); *State v. Kelliher*, 873 S.E.2d 366 (N.C. 2020) (same); *White v. Premo*, 443 P.3d 597 (Or. 2019) (juvenile lengthy term-of-years consecutive sentence was functional equivalent to life without parole under *Miller*); *Ira v. Janecka*, 419 P.3d 161 (N.M. 2018) ("We are persuaded by the Supreme Court's rationale in *Roper*, *Graham*, and *Miller* that the cumulative impact of consecutive sentences on a juvenile is required by the Eighth Amendment.").

Here, *Carter's* persuasive analysis concerning when to evaluate sentences in the aggregate supports holding that the constitutionality of Mr. King's sentences

[5] Numerous other cases pre-dated *Foust*. *See also State v. Ramos*, 387 P.3d 650 (Wash. 2017); *State v. Zuber*, 152 A.3d 197 (N.J 2017); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016); *Cloud v. State*, 334 P.3d 132, 142-143 (Wyo. 2014); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013); *People v. Caballero*, 282 P.3d 291, 294-95 (Cal. 2012).

should be assessed in the aggregate. 192 A.3d at 730–31. Mr. King's case is akin to "a situation where an individual is involved in one event or makes one bad decision… for which consecutive sentences may be imposed." *Id.* at 733-34. Mr. King murdered multiple people in one night at one party when he shot them in one event that lasted seconds. (R. 161a-164a) (Multiple witnesses testified that the shots they heard were fired within seconds, very quickly).

When viewed in the aggregate, it is evident that 80 years to life is a *de facto* life sentence. Pursuant to *Graham*, the key factor in considering the upper limit of what constitutes a constitutional sentence appears to be whether the juvenile has "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. at 75. Implied in this holding is that the juvenile offender must be likely to survive the term of years of the sentence with a substantial likelihood that a more than insignificant amount of time of freedom if paroled is possible.

Here, Mr. King will have to reach the age of 97 before becoming eligible for parole. Based upon commonsense and statistics, such a sentence is *de facto* life. The United States Social Security Administration's Actuarial Life Table states that the life expectancy for men in the United States is 74.12 years.[6] The United States

[6] *See* U.S. SOC. SEC. ADMIN., *2020 Actuarial Life Table*, https://www.ssa.gov/oact/STATS/table4c6.html#; *See also Casiano v. Comm'r of Corr.*, 115

Sentencing Commission defines a life sentence as 470 months (or 39 years and 2 months), based upon the average life expectancy of those serving in prison.[7] Table 7 of Primary Offenses and Offender Characteristics in the 2021 Annual Report and Sourcebook sets forth that the mean age for federal offenders (of all genders) is 37 years. Thus, the United States Sentencing Commission considers the average life expectancy to be 76 years and 2 months. Mr. King would have to survive an additional 13 to 15 years past his life expectancy in order to be eligible for parole. And even if he survived and was paroled, his time of freedom would, at best, be *de minimis*. *Cf. Commonwealth v. Bebout*, 186 A.3d 462, 469–70 (Pa. Super. 2018), abrogated by *Commonwealth v. Felder*, 269 A.3d 1232 (Pa. 2022) (in finding a minimum sentence of 45 years' incarceration for murder committed as a 15-year-old was not so long that it was virtually certain that defendant could not survive it, and observing that "[t]here simply is no comparison between the opportunity to be paroled at 60 years of age and 100+ years of age. The difference is, quite literally, a lifetime.")

Thus, this Court should hold that where the sentencing court makes a finding that a juvenile offender is capable of change and rehabilitation, a *de facto* life

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A.3d 1031, 1046 (Conn. 2015) (citing government statistics to determine an average life sentence for a man in the United States).

[7] U.S. SENT'G COMM'N, *2021 Annual Report and Sourcebook of Fed. Sent'g Stat.* (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf.

sentence is unconstitutional, and that Mr. King's sentences in the aggregate constitute a *de facto* life sentence. The Court should vacate Mr. King's sentences and remand to the Sentencing Court for the issuance of new sentences.

B. WHERE THE SENTENCING COURT AND THE COMMONWEALTH RECOGNIZED MR. KING IS CAPABLE OF CHANGE AND REHABILITATION, SENTENCE OF *DE FACTO* LIFE AS APPLIED TO MR. KING IS DISPROPORTIONATE UNDER THE EIGHTH AMENDMENT

If this Court does not agree that the Eighth Amendment is a categorical bar against a *de facto* life sentence for a child deemed by the sentencing court to be capable of change and rehabilitation, this Court should hold that Mr. King's *de facto* life sentence is a disproportionate punishment as applied to Mr. King for four reasons. First, *Miller* announced, and *Jones* did not disturb, a retroactive substantive rule banning life without parole for juvenile offenders for corrigible juvenile offenders. Second, *Miller's* substantive rule controls the evaluation of an as applied proportionality challenge to a juvenile life without parole sentence. Third, Sentencing Court found that Mr. King demonstrated a capacity for change and rehabilitation. Fourth, *Foust* is not binding on this issue because it was decided within the context of a request for a finding of a categorical bar. 180 A.3d at 437-38. Here, Mr. King asks the Court to make a determination only as to the facts in his case.

In assessing whether Mr. King's *de facto* life sentence as applied is disproportionate under the Eighth Amendment, it is first necessary to determine the appropriate standard. An "as applied challenge" is a "claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party." Thomson Reuters, Black's Law Dictionary (Bryan A. Garner ed.) (11th ed. 2019). The United States Supreme Court has never articulated the approach for an individual as applied challenge to a juvenile life without parole case, but in dicta in *Jones*, it suggested that the defendant *could* have made an individual as applied challenge to his sentence under the Eighth Amendment. 141 S. Ct. at 1322. *Jones* cited to Justice Kennedy's concurrence in *Harmelin v. Michigan*, 501 U.S. 957, 996–1009 (1991) (Kennedy, J., concurring in part and concurring in judgment), which addressed as applied Eighth Amendment proportionality challenges using the "narrow proportionality" standard—which forbids only "grossly disproportionate" sentences. *Id*. However, *Jones* did not endorse the narrow proportionality as controlling the evaluation of as applied proportionality challenges to juvenile life without parole sentences.

In fact, the United States Supreme Court has never used a "narrow proportionality" standard for juvenile life without parole cases. In *Miller* and *Graham*, it interpreted the Eighth Amendment as placing limits on categories of punishment for juveniles, and the basis for these decisions was the evolving

standards of decency doctrine and the recognition that children are "different." *See Miller*, 567 U.S. at 471; *Graham*, 560 U.S. at 71. It was for those reasons that *Miller* rejected an argument by Alabama and Arkansas that *Harmelin* precluded its holding. 567 U.S. at 481.

The standard of review for categorical challenges for juvenile defendants applied by *Miller* and *Graham* should also apply to as applied challenges under the Eighth Amendment for juvenile defendants. As the Supreme Court recently explained in addressing a different Eighth Amendment as applied challenge:

> [C]lassifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding "breadth of the remedy," but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation… we have seen "no basis whatever" for applying a different legal standard to "deprivations inflicted upon all prisoners" and those "inflicted upon particular prisoners."

Bucklew v. Precythe, 139 S. Ct. 1112, 1127–28 (2019) (quoting *Wilson v. Seiter*, 501 U.S. 294, 299, n.1 (1991)).

Notably, Chief Justice Roberts's concurrence in *Graham*, finding that the defendant's sentence was unconstitutional as applied, referred to the "narrow proportionality" standard, but he based his conclusion upon the defendant's status as a juvenile, suggesting that it was his opinion that juveniles are entitled to a heightened degree of scrutiny in as applied cases. 560 U.S. at 91-92.

Accordingly, this Court should apply the same legal standard to as applied challenges to the Eighth Amendment by juvenile defendants as the United States Supreme Court applied in categorical challenges. In doing so, it is evident that, as applied to Mr. King, the aggregate sentence of 80 years to life is disproportionate under the Eighth Amendment.

As set forth in Section VIII.A.1, *supra*, *Miller's* substantive rule prohibits life without parole for juvenile offenders capable of change and rehabilitation. The Sentencing Court found that Mr. King is that corrigible juvenile. (R. 54a, R. 438a). Even the Commonwealth conceded Mr. King demonstrated that the *Miller* factors apply to him, urging the Sentencing Court to give him credit for that. (R. 410a, 411a, 418a, 423a, 429a). If Mr. King is capable of change and rehabilitation, Mr. King's sentences should provide him an opportunity to face a parole board in his lifetime that could evaluate if he is rehabilitated.

Further, for the reasons set forth in Section VIII.A.2, *supra*, the Court should make this evaluation by viewing his sentences in the aggregate and not each sentence independently, because Mr. King's crime was one event. Indeed, the aggregate number is the reality of how much time Mr. King will spend in prison before he is eligible to see a parole board: 80 years. The consequence is that Mr. King will likely die in prison before he is eligible for parole. Because the Sentencing Court found Mr. King capable of change and rehabilitation, yet Mr.

King's consecutive sentences do not provide him with a "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,'" *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75), Mr. King's aggregated 80 years to life *de facto* life sentence is disproportionate under the Eighth Amendment.

This Court should vacate his sentences and remand to the Sentencing Court for the issuance of new sentences.

C. WHERE THE SENTENCING COURT MAKES A FINDING THAT A DEFENDANT HAS DEMONSTRATED A CAPACITY FOR CHANGE AND REHABILITATION, A *DE FACTO* LIFE SENTENCE IS A CRUEL PUNISHMENT UNDER ARTICLE I, SECTION 13 OF THE PENNSYLVANIA CONSTITUTION

Article I, Section 13 of the Pennsylvania Constitution provides in full that: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const. art. I, § 13. The only case to address what constitutes "cruel punishments" in the context of life prison terms for juveniles is *Commonwealth v. Batts*, 66 A.3d 286, 297 (Pa. 2013) ("*Batts I*"). In *Batts I*, the Pennsylvania Supreme Court addressed and rejected "only the specific claim 'that a categorical ban on the imposition of life-without-parole sentences on juvenile offenders is required by Article I, Section 13 of the Pennsylvania Constitution, which prohibits "cruel punishments."'" *Commonwealth v. Felder*, 269 A.3d 1232, 1248 (Pa. 2022), reargument denied (Apr. 12, 2022) (Donohue, J., concurring).

However, Justice Donohue observed in her concurrence in *Felder*, which held that *Jones* abrogated *Commonwealth v. Batts*, 163 A.3d 410 (2017) ("*Batts II"*), that:

> [i]t remains an open question whether any or all components of *Batts II* remain in place with respect to the Pennsylvania Constitution's prohibition of "cruel punishments." In the predecessor decision to *Batts II*, we rejected a claim that Article I, Section 13 provides greater protection than the Eighth Amendment. However, the *Batts I* Court analyzed only the specific claim "that a categorical ban on the imposition of life-without-parole sentences on juvenile offenders is required by Article I, Section 13 of the Pennsylvania Constitution, which prohibits 'cruel punishments.'" *Commonwealth v. Batts*, 620 Pa. 115, 66 A.3d 286, 297 (2013). The appellant's primary argument was "that this Court should expand upon the United States Supreme Court's proportionality approach, not that it should derive new theoretical distinctions based on differences between the conceptions of 'cruel' and 'unusual.'" *Id*. at 298.
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> Although we rejected the proffered argument, in my view, *Batts I* does not foreclose a departure from *Jones* with respect to the separate question of how a trial court determines whether a particular juvenile is the rare individual who should be incarcerated for life with no possibility of parole….

269 A.3d at 1248 (footnote omitted).

Here, this Court has the opportunity to answer a different question: where the sentencing court makes a finding that the juvenile defendant has demonstrated a capacity for change and rehabilitation, does a *de facto* life sentence constitute a cruel punishment prohibited by Article I, Section 13. The Court should answer in the affirmative.

In *Commonwealth v. Zettlemoyer,* the Pennsylvania Supreme Court held that the rights secured by the Pennsylvania Constitution's prohibition against "cruel

punishments" are coextensive with those secured by the Eighth Amendment. 454 A.2d 937, 967–69 (Pa. 1982), cert. denied, 461 U.S. 970 (1983), abrogated on other grounds by *Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003). However, the Pennsylvania Supreme Court later recognized that *Zettlemoyer* spoke to a coextensive standard only within the context in which that case was decided. *Commonwealth v. Means*, 773 A.2d 143, 151 (Pa. 2001) (addressing challenge to statute allowing victim impact testimony in penalty phase; recognizing that *Zettlemoyer* holding on coextensive standard was distinguishable because different Article I, Section 13 challenge was involved).[8] In fact, the Pennsylvania Supreme Court "has long emphasized that, in interpreting a provision of the Pennsylvania Constitution, [it 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) (collecting cases). Indeed, from 1968, the last time the Pennsylvania Constitution was amended, through 2018, the Pennsylvania Supreme Court has engaged in independent analyses under multiple constitutional provisions.[9] Thus, in interpreting what constitutes "cruel punishments" under Article I, Section 13, this Court is not bound

[8] *See also Commonwealth v. Baker*, 78 A.3d 1044, 1054 (Pa. 2013) (Castille, C.J., concurring) ("Properly understood, *Zettlemoyer* recognized that even an equivalency in governing constitutional standards does not mean that the Court is absolved of the duty to independently review a properly presented state constitutional claim.)

[9] Seth F. Kramer, *Still Living After Fifty Years; A Census of Judicial Review under the Pennsylvania Constitution of 1968*, 71 RUTGERS U.L. REV. 287, 291, 206, 312 (2018).

by the decisions of the United States Supreme Court that interpret the similar but distinct Eighth Amendment prohibition on "cruel and unusual punishments."

The *Edmunds* Court laid out four factors courts should consider when analyzing the Pennsylvania Constitution: "1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." 586 A.2d at 895. Based upon these factors the Court should find that sentencing a juvenile offender, who a court finds is capable of change and rehabilitation, to a *de facto* life sentence is a cruel punishment barred by Article I, Section 13.

1. The Text of Article I, Section 13's Prohibition on Cruel Punishments Is Distinct From the Eighth Amendment

"The touchstone of interpretation of a constitutional provision is the actual language of the Constitution itself." *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018). Article I, Section 13, without qualification, prohibits the Commonwealth from inflicting "cruel punishments." Pa. Const. art. I, § 13. In contrast, the Eighth Amendment bars punishments that are both "cruel and unusual." U.S. Const. Amend. VIII; *see Baker*, 78 A.3d at 1052 (Castille, C.J., concurring) ("Notably, the wording of Article I, Section 13, prohibiting 'cruel punishments,' is not identical to that of the Eighth Amendment

which prohibits 'cruel and unusual punishments.'"). The textual difference is meaningful because the "set of punishments which are either 'cruel' or 'unusual' would seem necessarily broader than the set of punishments which are both 'cruel' and 'unusual.'" *People v. Bullock*, 485 N.W.2d 866, 872 n.11 (Mich. 1992).

Thus, the question of what type of punishments are barred by Article I, Section 13 necessarily depends upon the definition of "cruel," which is not only capable of definition, but also requires a moral judgment. *See* Clarendon Press, *Oxford English Dictionary* (2d ed. 1989) ("disposed to inflict suffering; indifferent to or taking pleasure in another's pain or distress; destitute of kindness or compassion; merciless, pitiless, hardhearted."); see *Kennedy v. Louisiana*, 554 U.S. 407, 419, as modified (Oct. 1, 2008), opinion modified on denial of reh'g, 554 U.S. 945 (2008) ("'[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'") (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)). Further, what constitutes "cruel punishments" has its roots in the history of Article I, Section 13 and Pennsylvania's historically progressive position on criminal justice.

2. When Article I, Section 13 Was Adopted, Cruel Punishments Were Punishments in Excess of What Was Necessary to Prevent Crime.

The history of the Pennsylvania Constitution supports the notion that the decision to bar "cruel punishments" was with the intent to adopt a more progressive position than that of the federal government in adopting the Eighth Amendment. The two provisions originated from distinct philosophies and rules of law. The Eighth Amendment was predicated upon the English Declaration of Rights of 1689 and English criminal law. *Harmelin*, 501 U.S. at 965-66. In contrast, "Pennsylvania's Constitution was drafted in the midst of the American Revolution, as the first overt expression of independence from the British Crown… The Pennsylvania Constitution was therefore meant to reduce to writing a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn's charter in 1681." *Edmunds*, 586 A.2d at 896 (internal citations omitted). Pennsylvania's first criminal code was based upon Enlightenment theories of punishment and Quaker ideals. The Pennsylvanians who helped craft the criminal law were influenced by the French philosopher Baron de Montesqieu and Italian criminologist Cesare Beccaria, who both shunned

severity in penalties, advocated for proportionality, and believed that "[e]very punishment that is not derived from absolute necessity is tyrannous."[10]

For example, in 1792, Governor Thomas Mifflin asked Justice William Bradford of this Court for his views on the necessity of capital punishment in Pennsylvania.[11] In *An Enquiry: How Far the Punishment of Death Is Necessary in Pennsylvania*, Justice Bradford, who attended Pennsylvania's constitutional convention, relying upon Montesqieu and Beccaria, emphasized the importance of prevention of crime in considering punishment, and stated that "every punishment which is not absolutely necessary for that purpose is a cruel and tyrannical act."[12]

Indeed, Pennsylvania's constitution advocated for proportionate punishments and limited sanguinary punishments:

> SECT. 38. The penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes.
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> SECT. 39. To deter more effectually from the commission of crimes by continued visible punishments of long duration, and to make

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[10] CESARE BECCARIA, *Of Crimes and Punishments* (1794*), reprinted in* PHILIP H. NICKLIN, *An Essay on Crimes and Punishments*, (1819), https://www.laits.utexas.edu/poltheory/beccaria/delitti/delitti.c02.html.

[11] *See also* WILLIAM BRADFORD, *An Enquiry: How Far the Punishment of Death is Necessary in Pennsylvania* (1793), published in 12 Am. J. Legal Hist. 122 (1968), https://archive.org/details/enquiryhowfarpun00brad/page/n3/mode/2up. Justice Bradford was appointed as attorney general of Pennsylvania in 1780 and then to the Supreme Court of Pennsylvania from 1791 to 1794. See Joseph S. Foster, The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789-90, 59 Pa. Hist. 122, 129-31 (1992), https://journals. psu.edu/phj/article/view/24953/24722.

[12] *See Id.* at 3–6, https://archive.org/details/enquiryhowfarpun00brad/page/n3/mode/2up..

> sanguinary punishments less necessary; houses ought to be provided for punishing by hard labour, those who shall be convicted of crimes not capital…

Pa. Const. of 1776.[13]

In 1789 and 1790, the Pennsylvania Legislature revised the penal laws by limiting capital and other sanguinary punishments, abolishing the public labor system, and creating a centralized state penitentiary, which sought to reform offenders through labor and solitary confinement.[14] Thus, when Pennsylvania adopted Section 13 in 1790,[15] one year before the Eighth Amendment was ratified, it is evident that Pennsylvania considered "cruel punishments" to be punishments unnecessary to preventing crime, and only punishments required for deterrence were permissible. *See* Justice Bradford, *Enquiry* ("[t]he prevention of crimes is the sole end of punishment.")[16]

In addition to these progressive rules on punishment generally, Pennsylvania has a history of treating juvenile offenders differently, as recognized by the Pennsylvania Supreme Court in *Batts I*:

> there is an abiding concern, in Pennsylvania, that juvenile offenders be treated commensurate with their stage of emotional and intellectual

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[13] *See* http://www.phmc.state.pa.us/portal/communities/documents/1776-1865/pennsylvania-constitution-1776.html.

[14] *See* JAMES T. MITCHELL, *13 The Statutes at Large of Pennsylvania from 1682 to 1801*, HARRISBURG PUBL'G CO., 243, 245–46 (1789), *https://babel.hathitrust.org/cgi/pt?id=hvd.hl3ck7&seq=256*

[15] Pa. Const. of 1790.

[16] *See* BRADFORD, *Supra* note 14, at 3–6 (1793). https://archive.org/details/enquiryhowfarpun00brad/page/n3/mode/2up.

> development and personal characteristics. As a matter of legislative judgment, this is reflected in the salient transfer provisions of the Juvenile Act, which, historically, has been considered to be the most appropriate manner in which to make individualized determinations concerning age-related characteristics and situational factors in connection with a particular offender's suitability for treatment within the juvenile system.

66 A.3d at 299.

While the Court in *Batts* was unpersuaded that this history supported a decision that Article I, Section 13 barred all life sentences for juveniles, Pennsylvania's history of treating children differently is relevant here because Mr. King asks the Court to address a different question: whether it is cruel to sentence a child, who is capable of change and rehabilitation, to a *de facto* life sentence. When the Court considers the history of Article I, Section 13 and Pennsylvania's special treatment of children, it is evident that any punishment of a juvenile that is unnecessary to prevent or deter crime is cruel. Relevant here, the United States Supreme Court has found that juvenile life without parole sentences don't deter or prevent crime because the characteristics that render juveniles less culpable than adults, "their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Miller*, 567 U.S. at 472; *see also Graham*, 560 U.S. at 72; *Roper*, 543 U.S. at 571. Further, a study of former juvenile lifers in Philadelphia concluded that they have a recidivism rate of just over 1%, far lower than an estimated 30% of individuals nationally convicted of homicide offenses,

demonstrating that juvenile life sentences are not necessary to prevent recidivism.[17] Moreover, the evolving standards of decency doctrine articulated in *Miller*, *Graham*, and endorsed by *Jones*, counsel that juveniles who are capable of rehabilitation should have a meaningful opportunity to obtain release. Therefore, without any deterrence justification, it is evident that it is cruel punishment under the Pennsylvania Constitution to sentence a child, who is capable of change and rehabilitation, to a life or *de facto* life sentence.

3. Courts in other States with Prohibitions on "Cruel," or "Cruel or Unusual," Punishments Have Found that it Constitutes Cruel Punishment to Sentence a Child Capable of Change to Life in Prison

Courts in other states, whose constitutions bar either "cruel" or "cruel or unusual" punishments, have found that it violates their state constitutions to sentence a child who is corrigible to a *de facto* life sentence. *See Kelliher*, 873 S.E.2d at 369-70; *State v. Haag*, 495 P.3d 241, 248 (Wash. 2021) (holding that state constitution prohibition on "cruel punishment" bars de facto LWOP sentences for those juvenile offenders whose crimes reflect qualities of youth.)[18] For

[17] Tarika Daftary-Kapur & Tina Zottoli, "Resentencing of Juvenile Lifers: The Philadelphia Experience" (2020). Department of Justice Studies Faculty Scholarship and Creative Works. 84. https://digitalcommons.montclair.edu/justice-studies-facpubs/84.

[18] *Cf. Commonwealth v. Perez*, 106 N.E.3d 620, 630 (Mass. 2018) ("We therefore do not require the Commonwealth to prove that the defendant exhibited 'irretrievable depravity' or 'irreparable corruption' such as might justify, for Eighth Amendment purposes albeit not under art. 26, a sentence of life without parole… Rather, we require the Commonwealth to prove that the juvenile's personal characteristics make it necessary to delay parole eligibility for a time exceeding that available to juveniles convicted of murder. Stated another way, the

example, in *Kelliher*, the court addressed whether two consecutive 25 years to life terms with the possibility of parole, making the defendant eligible for parole at the age of 67, was a *de facto* life sentence that violated the Eighth Amendment and article I section 27 of the North Carolina Constitution, which prohibits "cruel or unusual punishment," where the trial court found that he was neither irredeemable nor incorrigible. 873 S.E.2d at 370. The North Carolina Supreme Court held that:

> it violates both the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution to sentence a juvenile homicide offender who has been determined to be 'neither incorrigible nor irredeemable' to life without parole", and that "any sentence or combination of sentences which, considered together, requires a juvenile offender to serve more than forty years in prison before becoming eligible for parole is a *de facto* sentence of life without parole within the meaning of article I, section 27 of the North Carolina Constitution 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.

Id.

Kelliher found, in part, that "sentencing a juvenile who can be rehabilitated to life without parole is cruel because it allows retribution to completely override the rehabilitative function of criminal punishment." *Id*. This is because "juveniles are inherently malleable, they have a greater chance of being rehabilitated as

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Commonwealth must prove that there is no reasonable possibility of the juvenile's being rehabilitated within the time after which a juvenile convicted of murder becomes eligible for parole. As applied to the defendant, that length of time is fifteen years") (footnote omitted).

compared to adults." *Id.* The court was also persuaded by additional provisions language in its own constitution. *Id.*

4. Holding *De Facto* Life Sentences for Corrigible Juveniles Constitutes a Cruel Punishment, Prohibited by Section I, Article 13, Is Consistent with Pennsylvania Policy

Pennsylvania law has long recognized that children are different than adults and require additional attention and care. The Juvenile Act, for example, demonstrates a commitment towards fairness and sensitivity to juvenile offenders. *See* 42 Pa. Cons. Stat. § 6301(b)(2) (2022). Further, Pennsylvania statutory law has long recognized that children lack the same judgment, maturity and responsibility as adults. *See, e.g.*, 23 Pa. Cons. Stat. § 5101 (the ability to sue and be sued or form binding contracts attaches at age 18); 18 Pa. Cons. Stat. §§ 6308, 6305 (a person cannot legally purchase alcohol until age 21 and cannot legally purchase tobacco products until age 18); 10 Pa. Code § 305(c)(1) (no person under the age of 18 in Pennsylvania may play bingo unless accompanied by an adult); 18 Pa. Cons. Stat. § 6311 (a person under age 18 cannot get a tattoo or body piercing without parental consent); 72 Pa. Cons. Stat. § 3761-309(a) (a person under age 18 cannot buy a lottery ticket); 23 Pa. Cons. Stat. § 1304(a) (youth under the age of 18 cannot get married in Pennsylvania without parental consent or, if under 16, judicial authorization). This recognition demonstrates a commitment towards treating juveniles differently than adults.

Thus, considering all of the *Edmunds* factors, applying the evolving standards of decency doctrine articulated in *Miller*, *Graham*, and endorsed by *Jones*, which counsels that juveniles who are capable of rehabilitation should have a meaningful opportunity to obtain release, it is evident that it is cruel under the Pennsylvania Constitution to sentence a child, who is capable of change and rehabilitation, to *de facto* life without parole.

The Court should also find that Mr. King's sentences constitute *de facto* life for all the reasons set forth in Section VIII.A.2., *supra*, thus is a cruel punishment under the Pennsylvania Constitution. In addition to the reasons set forth in that section, the history of the adoption of Article I, Section 13, coupled with Pennsylvania's progressive position on punishment and its historical recognition that children should be treated differently in the criminal justice system, also justify considering Mr. King's sentence in the aggregate. The real, punitive consequences of ordering four consecutive 20 year to life sentences is that Mr. King will spend the next 80 years, if he lives that long, in prison before he has any opportunity to see a parole board. It's that concrete number that the Court should consider when evaluating if Mr. King's punishment is a *de facto* life sentence barred by the Pennsylvania Constitution.

No doubt the Commonwealth will argue that testing the constitutionality of an aggregated sentence permits "volume discounts." But the case law cited in

Foust arguing that multiple offenses are not entitled to volume discounts all involved adults, not juveniles. 180 A.2d at 434-35. The argument against permitting "volume discounts" is based on the theory that offenders should face appropriate responsibility for their crimes. But evaluating consecutive sentences in the aggregate doesn't diminish a juvenile offender's responsibility. Instead, it recognizes all of the *Miller* factors about how children are different than adults in culpability.

This Court should vacate Mr. King's sentences and remand to the Sentencing Court for the issuance of new sentences.

D. WHERE THE SENTENCING COURT RECOGNIZED MR. KING IS CAPABLE OF CHANGE AND REHABILITATION, SENTENCE OF *DE FACTO* LIFE AS APPLIED TO MR. KING IS CRUEL PUNISHMENT UNDER ARTICLE I, SECTION 13

The Pennsylvania Supreme Court, like the United States Supreme Court, has not used the "narrow proportionality" test in evaluating as applied claims in juvenile life without parole cases. As set forth Section VIII.B, *supra,* this Court should follow *Miller's* substantive rule as controlling that evaluation. Further, for the reasons set forth in Section VIII.B, *supra*, *Miller's* substantive rule prohibits life without parole for juvenile offenders capable of change and rehabilitation and, as applied to Mr. King, it was cruel punishment, in violation of Article I, Section 13, to sentence him to a *de facto* life sentence when the Sentencing Court found Mr. King is capable of change and rehabilitation.

This Court should vacate his sentences and remand to the Sentencing Court for the issuance of new sentences.

E. THE SENTENCING COURT ABUSED ITS DISCRETION IN SENTENCING MR. KING TO FOUR CONSECUTIVE SENTENCES OF TWENTY YEARS TO LIFE THAT AGGREGATE TO 80 YEARS TO LIFE BECAUSE THE SENTENCE WAS EXCESSIVE WHERE IT DEVIATED FROM SENTENCING NORMS AND FAILED TO COMPLY WITH STATUTE

Sentencing in Pennsylvania is individualized and requires the trial court to fashion a sentence that is consistent with the rehabilitative needs of the defendant. *Schroat*, 272 A.3d at 528; *see also* 42 Pa. Cons. Stat. § 9721(b). "Additionally, when sentencing to total confinement, the court must consider 'the history, character, and condition of the defendant[.]'" *Id.* (citing 42 Pa. Cons. Stat. § 9725). Where, as here, no sentencing guidelines existed for Mr. King, who was sentenced prior to June 25, 2012, sentencing courts should consider—but are not bound by—specifically enumerated sentencing factors, including seven age-related characteristics. *Id.* (citing 18 Pa. Cons. Stat. § 1102.1(d)).

"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… 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." *Coulverson*, 34 A.3d at 143–44 (quoting *Commonwealth*

v. Rodda, 723 A.2d 212, 214 (Pa .Super. 1999) (en banc) (quotation marks and citations omitted) (holding sentencing court's decision was unreasonable where "the record reveals scant consideration for anything other than victim impact and the court's impulse for retribution on the victim's behalf"); *see also Commonwealth v. Walls*, 926 A.2d 957, 961 (Pa. 2007) (citation omitted). ("An abuse of discretion… requires a result of manifest unreasonableness, or partiality, prejudice bias or ill-will, or such a lack of support as to be clearly erroneous."); *Commonwealth v. Dodge*, 957 A.2d 1198, 1201-02 (Pa. Super. 2008) (holding sentencing court's decision was "irrational" and "clearly unreasonable" where the sentencing court displayed a "fixed purpose of keeping Appellant in jail for his life.") "A sentence may still be excessive regardless of the commencement of terms of imprisonment in the standard guidelines range if the upper end of the sentence imposes a term unlikely to end during the defendant's natural life span." *Coulverson*, 34 A.3d at 148. "Thus, the term of imprisonment must be individualized in its entirety as a sentence of confinement and not treated as a means to indefinite parole, or worse, as a means of private retribution or judicial policy-making." *Id.*

Here, in imposing the four consecutive 20 years to life sentences, the Sentencing Court knew that Mr. King would not be eligible for parole until he is 97 years old, and thus will likely die in prison before he is parole eligible. In

fashioning this sentence structure, which will keep Mr. King incarcerated for the remainder of his life, the Sentencing Court fixated on several issues: (1) the facts of the original crime; (2) concerns that Mr. King's misconducts demonstrated he remains a danger, and; (3) Mr. King's alleged failure to adequately demonstrate remorse. Not only was the Sentencing Court's substantial focus on the crime improper, but the conclusions it reached about the misconducts and Mr. King's remorse were not founded on evidence and contradicted by unrebutted testimony.

For example, in the Order, the Sentencing Court stated, in part:

> We considered the expert testimony regarding risk and rehabilitation. However, an analysis of the need for protection of the community must consider the Defendant's lack of acceptance of responsibility, his criminal thinking, his history, and the nature of the crimes he committed. While some of his behaviors have changed, his multiple versions of the murders including blame shifting, the minimization of his *mens rea*, and refusal to accept responsibility demonstrate that he continues to engage in criminal thinking.
>
> * * * * * * * * * *
>
> The record supports the finding that the murders were premeditated and *part* of Defendant's ongoing drug business rather than the commission of a crime reflective of "transient immaturity."

(R. 2a-3a).

However, there was no expert, or even lay, testimony that Mr. King continued to engage in "criminal thinking." In fact, the testimony and evidence was to the contrary. Dr. Timme testified that Mr. King had no mental health issues, and both he and Ms. Gnall testified about evidence that Mr. King had

changed. (R. 267a-268a, R. 338a-340a, *see also* R. 76a, R. 102a-103a). Ms. Gnall testified that Mr. King had mitigated his risks taking programs in prison, and that his remaining misconduct free for seven years indicated a veritable change. (R. 266a-268a). Both Ms. Mills and Lieutenant Horner testified about Mr. King's conduct in prison, including that he was respectful to inmates and staff, participated in programming that supported other inmates, and that they felt safe around him. (R. 211a-220a, 234a-238a). A violence prevention instructor stated that Mr. King "appears sincere in his desire to implement [the concepts presented] into his life." (R130a). There was no evidentiary basis for the Sentencing Court to conclude that Mr. King "continues to engage in criminal thinking."

Similarly, there was no basis for the Sentencing Court to conclude that Mr. King "refus[ed] to accept responsibility", a conclusion contrary to the evidence. (R. 2a). As an initial matter, Ms. Gnall's unrebutted testimony was there is no strong causal relationship between expressing remorse and recidivism, (R. 313a), undermining the Sentencing Court's conclusion that Mr. King's failure to properly express remorse meant he maintained "criminal thinking." Further, Ms. Mills and Lieutenant Horner testified that Mr. King was remorseful and took responsibility for his crimes and never blamed anyone else for what happened. (R. 217a, 235a, 312a-314a). Ms. Gnall and Dr. Timme also observed that Mr. King not only took responsibility for killing four people, but for the damage it did to their families and

friends, demonstrating not only an acceptance of responsibility but a depth of understanding about how his actions reverberated throughout the community. (R. 67a, 76a, 78a, 93a, 103a). Mr. King spoke about his crimes to other inmates in a violence prevention group and participated in a "Day of Responsibility." (R. 158a, 235a-236a, 269a-270a).

Mr. King also stated to the Court that he was responsible for killing the four victims, that he was sorry and took full responsibility. (R. 367a-370a). Thus, the Sentencing Court's conclusion that Mr. King refused to accept responsibility was contrary to the evidence.

As to Mr. King's rehabilitative needs, the Sentencing Court offered only a cursory statement about this in the Order, concluding that Mr. King was not yet rehabilitated after 24 years in prison. (R. 1a-3a). It offered no justification for how Mr. King's rehabilitative needs were served by spending the remainder of his life in prison. Further, the Sentencing Court's finding that Mr. King is capable of rehabilitation undermines any justification for Mr. King spending the rest of his life in prison. If he is capable of rehabilitation, Mr. King's sentence should provide him an opportunity to face a parole board that can evaluate whether he is rehabilitated. Moreover, Ms. Gnall testified that Mr. King had taken all programming and education available to him in prison to mitigate his risks of reoffending should he ever be released. (R. 261a-262a; *see also* R. 92a, 267a-

268a). There was no justification for the Sentencing Court's tacit conclusion that it would take 80 years—if he even lives that long—for Mr. King to be rehabilitated. Its failure to do so demonstrated it did not veritably consider his rehabilitative needs.

Moreover, the imposition of consecutive sentences is an abuse of discretion because the Sentencing Court decided to order that the sentences run consecutively based on the crime, without properly considering Mr. King's youth and rehabilitative needs. Its Opinion stated that the consecutive sentences "imposed reflect that Appellant willfully, deliberately, and intentionally ended the lives of four people." (R. 53a).

But the same Sentencing Court (Judge Boylan) took a different view in a double-murder case involving another juvenile offender in Bucks County. In *Commonwealth v. Mazeffa*, No. CP-09-CR-1213-1986, the Sentencing Court resentenced Mr. Mazeffa, who murdered his grandparents, to two terms of 45 years to life to run concurrently on two counts of first-degree murder. In so doing, the Sentencing Court stated: "I would note I believe under the law I certainly could give the defendant consecutive sentences for each victim, and that would be appropriate. But it seems to me logically to look at and consider -- I have considered the fact that two people lost their lives at his hand, but I -- and I

consider the episode as one event, and, therefore, I am giving him one sentence that will run concurrently as to both cases."[19]

Why did the Sentencing Court find that Mr. Mazeffa's crime constituted one event entitled to concurrent sentences, but Mr. King's did not? In Mr. Mazeffa's case, when he was 17 years old, he grabbed a shotgun from his grandparents' garage, walked into the house and killed the couple with one blast each while they were sitting together in their living room.[20] In Mr. King's case, Mr. King shot and killed four people at a party, in an event that took place within seconds. (R. 161a-164a). Both events took place on one day, at one scene, in one moment of firing a gun, i.e., were both one event.

In its Opinion, the Sentencing Court asserts that Mr. King's crime was not "one continuous, impulsive act" because the shooting was intentional. (R. 47a). But Mr. King's intent does not change the fact that the shooting transpired at one time in a matter of seconds, just like Mr. Mazeffa's crime. While there is no standard for issuing concurrent versus consecutive sentences in case law or statute, the Sentencing Court announced its own standard in *Mazeffa*, yet with no explanation failed to follow that standard in Mr. King's case. For the Sentencing

[19] The Court may take judicial notice of the transcript of a resentencing hearing in the Court of Common Pleas of Bucks County, attached hereto as Exhibit "B", Tr. at 6:13-24, pursuant to 225 Pa. Con. Stat. § 201.

[20] 69 NEWS, *supra* Note 5, https://www.wfmz.com/news/crime/man-who-killed-grandparents-resentenced-to-45-years-to-life/article_75d93238-bf5c-566b-82d1-5d150442925f.html (last visited on Sept. 16, 2023

Court to have one standard for one juvenile offender convicted of multiple murders, and another standard for a different juvenile offender convicted of multiple murders, suggests arbitrariness in its decision making at best or some kind of partiality at worst.[21] Regardless, it demonstrates that Mr. King's sentence was unreasonable and that the Sentencing Court abused its discretion.

In addition, the Sentencing Court gave short shrift to the overwhelming, unrebutted evidence concerning Mr. King's troubled childhood and untreated ADHD. As Dr. Timme pointed out, all normally developing juveniles exhibit, among other things, the impulsivity and heedless risk discussed at length in *Miller*. Dr. Timme testified, and stated in his report, that, in Mr. King's case, many of these typical adolescent features were exacerbated by events beyond his control, including untreated ADHD, parents who abused him, and a father who sporadically abandoned him, resulting in a high ACE score. (R. 69a-72a, 330a-332a). These events, rendered Mr. King vulnerable to the influence of delinquent peers with

[21] The Sentencing Court (Judge Boylan) resentenced all six juvenile lifers in Bucks County. Mr. King was the only black defendant and the only one who will spend the next 80 years in prison before becoming eligible for parole. *See Commonwealth v. Mazeffa*, No. CP-09-CR-1213-1986 (resentenced to two terms of 45 years to life to run concurrently on two counts of first degree murder); *Commonwealth v. Buli*, No. CP-09-CR-1294-1978, No. CP-09-CR-2872-1978 (per agreement, resentenced to 48 years to life on one count of first degree murder, and a concurrent sentence of five to ten years for one count of criminal conspiracy to commit homicide); *Commonwealth v. Lekka*, No. CP-09-CR-1295-1978 (resentenced to 45 years to life on one count of first degree murder); *Commonwealth v. Graber*, CP-09-CR-0001410-1990 (per agreement, resentenced to 45 years to life for one count of first degree murder); *Commonwealth v. Flanagan*, CP-09-MD-0002831-1981 (resentenced to 40 years to life). (information about their race is located here: https://inmatelocator.cor.pa.gov/#/).

whom he associated because of a human need for companionship. In sum, circumstances beyond Mr. King's control as a juvenile negatively impacted his developmental trajectory and rendered him less culpable than an adult, undermining the justification for issuing a sentence that will require him to spend the remainder of his life in prison. The Sentencing Court did not genuinely weigh these facts.

This case is analogous to *Schroat*, which held that the trial court abused its discretion by sentencing a juvenile to life in prison by discrediting evidence that the juvenile experienced growth and maturity while incarcerated, referring consistently to the nature of the juveniles crimes, and giving "short shrift to factors indicative of [the juvenile's] history, character, condition, and rehabilitative needs, statutory factors it is required to consider." 272 A.3d at 529–30. In *Schroat*, the defendant presented testimony by a psychiatry expert who testified about the defendant's immaturity and unhealthy home life at the time of the commission of the crime, plus the facts that he had matured in prison and did not suffer any mental health disorders. *Id.* at 528. Similarly, here, Mr. King presented significant expert testimony and reports stating the same.

In *Schroat*, the court observed that "[t]he Commonwealth did not present any expert testimony at Appellant's Resentencing Hearing to contradict Dr. Calvert's opinions, nor did it introduce evidence proving that Appellant suffers any

mental health disorders." *Id.* at 529. Similarly, here, the Commonwealth did not present any expert testimony at Mr. King's resentencing hearing to contradict either Dr. Timme's or Ms. Gnall's expert opinions.

The court in *Schroat* described evidence concerning the sentencing court's improper focus on the crime: "[t]o discredit evidence that Appellant has experienced growth and maturity while incarcerated, the court referred consistently to the nature of Appellant's crimes…" *Id.* at 529. It did so in analyzing Appellant's capacity for change, extent of participation in the crime, mental health history, potential for rehabilitation, threat to public safety, and degree of criminal sophistication. *Id.* Similarly, here, in the Order and in the Opinion, the Sentencing Court focused on the crime, Mr. King's actions after the crime, and its erroneous opinion that Mr. King was not remorseful or accepting of responsibility, as a way of justifying the 80 years to life aggregate sentences. (R. 1a-2a, 47a-48a, 53a-54a).

As in *Schroat*, the Sentencing Court here gave "short shrift" to all the evidence concerning Mr. King's troubled upbringing, that Mr. King was remorseful, admitted to his crime, had been a positive person in the prison community for at least seven years, and was well regarded by staff. Thus, as in *Schroat*, this Court should find that the Sentencing Court placed an inordinate focus on Mr. King's crime to the detriment of fully considering his youth, history, and rehabilitative needs, and that the Sentencing Court's unfounded conclusions

that Mr. King was not remorseful and continued to engage in criminal thinking were contradicted by the evidence. Accordingly, Mr. King's sentence was excessive, and the decision to impose consecutive sentences that aggregate to 80 years to life was a manifestly unreasonable abuse of discretion.

This Court should vacate Mr. King's sentences and remand to the Sentencing Court for the issuance of new sentences.

IX. CONCLUSION

For the above reasons, this Court should vacate the sentences imposed and remand the matter to the Sentencing Court for the issuance of new sentences.

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CERTIFICATE OF WORD COUNT

I, Caroline J. Heller, certify that the Brief for Appellant contains fewer than 14,000 words as prescribed by Pa.R.A.P. 2135.

October 13, 2023 /s/ Caroline J. Heller

CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

I, Caroline J. Heller, certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than nonconfidential information and documents.

October 13, 2023 /s/ Caroline J. Heller

CERTIFICATE OF SERVICE

I, Brian T. Feeney, do hereby certify that on this 13th day of October 2023, a true and correct copy of Brief of Appellant was presented for electronic filing and served upon counsel *via* the Court's electronic filing system, electronic and U.S. Mail at the following address:

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