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406 EDA 2023

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	**NO. 406 EDA 2023**
APPELLEE	:	
	:	
v.	:	
	:	
IVORY KING,	:	
APPELLANT	:	**ATTY I.D. NO. 69706**

BRIEF FOR APPELLEE

APPEAL FROM THE JUDGMENT OF SETNENCE ENTERED ON NOVEMBER 21, 2022, IN THE COURT OF COMMON PLEAS, BUCKS COUNTY, CRIMINAL DIVISION, AT DOCKET NUMBER CP-09-CR-0003727-1998

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III. COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

A. Does a Sentence of Incarceration for Not Less Than 20 Years to Life, on Four Separate Murders, Amount to a *De Facto* LWOP[1] Sentence When Ordered to Run Consecutively?

Answer in the trial court: No

B. Defendant's Sentence Does Not Violate the Eighth Amendment As Applied Under a Proportionality Review and Defendant Has Waived Any Such Claim for Failing to Raise it in the Trial Court.

The trial court did not have an opportunity to address this claim.

C. Any Argument that Article I, Section 13 of the Pennsylvania Constitution Provides Greater Protection than the Eighth Amendment to the United States Constitution is Waived for Failure to Preserve in the Trial Court and is Nonetheless Meritless.

The trial court did not have an opportunity to address this claim.

D. Did the Trial Court Properly Exercise its Considerable Discretion After Weighing All Appropriate Sentencing Factors Before Imposing a Discretionary Sentence?

Answer of the trial court: Yes.

[1] Consistent with prior opinions from this Honorable Court, this brief will use the shorthand "*de facto* LWOP" in the place of life without the possibility of parole.

IV. COUNTER-STATEMENT OF THE CASE

A. Factual History

In the early morning hours of May 23, 1998, Sergeant Steve Mawhinney responded to a call regarding a shooting in the Venice-Ashby Section of Bristol Township, specifically K-55 Beaver Dam Road. N.T. 10/26/98, p. 33. After speaking with witnesses, Sergeant Mawhinney observed Lakeisha Monroe with a head wound lying on the ground. N.T. 10/26/98, p. 36. She survived her gunshot wound. Later, Ms. Monroe testified that she was attending a neighborhood party when shots were fired. After shots were fired, a stampede of people fled from the party. When she was fleeing the party, Ms. Monroe was shot outside. N.T. 10/26/98, p. 54. Officers located 4 other individuals with gunshot wounds. They were identified as Anthony Jackson, Jackie Wilson, Saphil Taylor and Milika Brinson. N.T. 10/26/98, p. 41.

Anthony Jackson, who was 37 years old, was shot above his right ear by Ivory King (hereinafter "Defendant") while he was standing outside the apartment building. Mr. Jackson was transported to Frankford Torresdale Hospital where he was pronounced deceased. N.T. 10/26/98, p. 73.

Jackie Wilson, who was 27 years old, was leaving the party when she was shot. As she opened the door, she was shot by Defendant and fell to the ground, partially blocking the doorway. Ms. Wilson sustained injuries to her right lung and upper aorta and was pronounced dead at the scene. N.T. 10/27/98, p. 84.

Saphil Taylor, who was 19 years old, was struck in the forehead as Defendant continued to fire through the doorway of the apartment. He was pronounced dead at the scene.

Milika Brinson, who was 22 years old, was shot in the back of the head by a round that came through the apartment walls when the Defendant fired rounds into the walls and windows of the apartment as he fled. N.T. 10/27/98, p. 91. Ms. Brinson was transported to St. Mary's Hospital where she was pronounced dead.

Hazel Burdge, who lived in a nearby apartment, testified that she was present at the time of the mass murder. Specifically, she heard arguing and observed the Defendant shoot Anthony Jackson. N.T. 10/26/98, p.77-82. After watching the Defendant fire his weapon and shoot Anthony Jackson, she contacted police and continued to hear shots being fired. N.T. 10/26/98, p. 83.

Tramaine Williams, who was collecting money at the door of the party, stated that she observed Jackie Wilson and Saphil Taylor fall after being shot. N.T. 10/26/98, p.128-129. After watching Jackie Wilson and Saphil Taylor collapse, she heard about 5 more shots. N.T. 10/26/98, p.128-129.

Patricia Kenney, an acquaintance of the Defendant, testified that the Defendant asked her if she had a gun on the day of the shooting. N.T. 10/26/98, p.67. Earlier in the evening, the Defendant showed Latoya McClain a box of bullets. N.T. 10/26/98, p.110.

Shirley Harden testified that the Defendant confessed to her that he killed four people at the party. N.T. 10/26/98, p.120. Harden testified that the Defendant laughed as he recounted the incident. N.T. 10/26/98, p.119. Defendant also bragged to Harden and stated that he would shoot Detective Beidler if he tried to arrest him. N.T. 10/26/98, p.118. Defendant admitted that he was with Craig Jones and Corey McCloud at the time of the shootings, but Jones and McCloud did not commit the shootings. N.T. 10/26/98, p.116. Defendant, Jones, and McCloud fled to Camden, New Jersey after the killings. N.T. 10/26/98, p.116.

On May 27, 1998, Defendant turned himself in to police. N.T. 10/26/98, p. 11.

B. Relevant Procedural History

On May 25, 1998, an arrest warrant was filed for Defendant asserting four counts of first degree murder and one count each of criminal conspiracy to commit first degree murder, possession of an instrument of crime, possession of a weapon, aggravated assault, criminal conspiracy to commit aggravated assault, simple assault, criminal conspiracy to commit recklessly endangering another person, and fifteen counts of recklessly endangering another person. Defendant surrendered himself on May 27, 1998, to the Camden County Police Department in New Jersey and was extradited to Bucks County, Pennsylvania following an extradition hearing on June 4, 1998.

Defendant was born on January 11, 1981. At the time of the murders on May 23, 1998, Defendant was 17 years, 4 months, and 12 days old. Defendant entered a guilty plea to four counts of murder generally as well as the balance of the charges. He proceeded to a degree of guilt hearing and, on October 27, 1998, he was found to have committed first-degree murder on each of the four counts. Defendant was sentenced to four consecutive sentences of life without the possibility of parole and a concurrent term of not less than one to not more than two years on the aggravated assault charge.

Defendant did not file a direct appeal from the judgment of sentence. However, he did file five separate PCRA petitions. No relief was obtained from these petitions until his fifth, which followed the United States Supreme Court's decision in Miller v. Alabama, 567 U.S. 460 (2012), which ruled that mandatory life without parole sentences for juvenile murders violated the Eighth Amendment to the United States Constitution. Defendant sought retroactive application of that ruling which the PCRA court denied on the basis of the Pennsylvania Supreme Court's holding on Commonwealth v. Cunningham, 81 A.3d 1 (Pa. 2013), *cert. denied*, 573 U.S. 904 (2014). Defendant appealed that denial to this Honorable Court which reversed the PCRA court's decision, vacated the judgment of sentence on the four counts of murder, and remanded for resentencing in light of Montgomery v. Louisiana, 577 U.S. 190 (2016).

Upon remand, re-sentencing was held in abeyance pending the Supreme Court's ruling in Commonwealth v. Batts, 163 A.3d 410 (Pa. 2017)(Batts II). Following Batts II, the Commonwealth filed notice indicating that it intended to seek a sentence of life without parole in this matter – which was later withdrawn. The matter was again stayed to await the ruling from our Supreme Court in Commonwealth v. Foust, 168 WAL 2018, which itself was held by the Supreme Court pending the outcome of Commonwealth v. Felder, 269 A.3d 1232 (Pa. 2022).

Felder was decided on February 23, 2022, and our Supreme Court denied allowance of appeal in Foust on May 22, 2022. Commonwealth v. Foust, 297 A.3d 39 (Pa. 2022). The matter then ultimately proceeded to a sentencing hearing which began on Friday, November 18, 2022, and concluded on Monday, November 21, 2023. At the conclusion of testimony and argument, the trial court imposed a mitigated sentence of incarceration for not less than 20 years to life on each of the four counts of first-degree murder. These sentences were ordered to run consecutively to each other for an aggregate sentence of 80 years to life.

Defendant filed a timely motion for reconsideration of sentence on December 1, 2022. The trial court solicited a response from the Commonwealth, which was filed on December 22, 2022. The trial court denied relief on January 19, 2023. Defendant filed Notice of Appeal to this Honorable Court on February 10, 2023. The trial court then entered an Order directing Defendant file a Concise Statement

of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925. Defendant submitted a lengthy and verbose statement on March 14, 2023. The trial court issued its Opinion pursuant to Rule 1925 on June 7, 2023.

V. **SUMMARY OF THE ARGUMENT**

Pursuant to precedential and binding opinions of this Honorable Court, a sentence of 20 years to life does not amount to a *de facto* LWOP sentence and consecutive sentences for separate murders do not aggregate to a *de facto* LWOP sentence. Even if Defendant's sentence did amount to a *de facto* LWOP sentence, as this sentence is a term of years sentence imposed pursuant to the discretion of the trial court after it considered Defendant's youth and other characteristics, the sentence comports with the Eighth Amendment.

Any as applied challenge to Defendant's sentence or "narrow proportionality" claim is waived for failure to present this argument in the trial court, nor did he include such a claim in his concise statement. Defendant also fails to develop any proportionality claim in this section of his brief to this Honorable Court and the claim is waived for this additional reason. Further, the claim is meritless as the entire proportionality argument wholly ignores the facts of the crime which are required to be analyzed in an allegation of disproportionate sentencing.

Any claim that Article I, Section 13, of the Pennsylvania Constitution provides greater protection than the Eighth Amendment is waived as Defendant did not argue for greater protection in the trial court and he cannot raise this claim for the first time on appeal. Defendant also did not include an argument for greater

protection in his concise statement and this claim is waived for this additional reason. Nonetheless, it is meritless as no greater protection exists in this area of the law.

Finally, in addressing Defendant's challenge to the discretionary aspects of his sentence, he fails to raise a substantial question as his allegation that the trial court placed inordinate focus on some factors as opposed to others is nothing more than a request for this Honorable Court to re-weigh the sentencing factors – which does not raise a substantial question. Nevertheless, it is clear that the trial court considered all necessary and appropriate factors, made findings of fact which were supported by the record, and imposed a mitigated sentence on each count of murder. This process was in accordance with governing law and the resulting sentence was well within the discretion of the trial court.

VI. ARGUMENT

Defendant asserts numerous claims, many of which are built upon the premise that he was subjected to a *de facto* LWOP sentence as his aggregated sentence calls for him to serve a minimum of 80 years before he is eligible for parole. However, under Pennsylvania law, it is improper to determine whether a *de facto* LWOP sentence exists based upon an aggregate sentence for multiple offenses. The realization of this conclusion removes the factual premise for a number of Defendant assignments of error. Nevertheless, in the interests of thoroughness, this brief will address all arguments in turn as each claim is equally meritless based upon waiver and upon the merits.

A. Does a Sentence of Incarceration for Not Less Than 20 Years to Life, on Four Separate Murders, Amount to a *De Facto* LWOP Sentence When Ordered to Run Consecutively?

Defendant first argues that he received a *de facto* life sentence when the trial court sentenced him to imprisonment for not less than 20 years to life on each of four counts of murder and directed those sentences to run consecutively. This Honorable Court has already ruled on the question of whether a term of years sentence on multiple counts, imposed consecutively to each other, would amount to a *de facto* life sentence and trigger the substantive guarantees of Miller v. Alabama, 567 U.S. 460 (2012), and the procedural protections of Commonwealth v. Batts, 640 Pa. 401 (2017)(Batts II). In Commonwealth v. Foust, 180 A.3d 416 (Pa. Super.

2018), *appeal denied*, 279 A.3d 39 (Pa. 2022), this Court squarely held "when considering the constitutionality of a sentence, the individual sentence must be considered when determining if a juvenile received a *de facto* LWOP sentence." Foust, at 434.

While a portion of the Foust opinion, that which opined that a *de facto* LWOP sentence could implicate the holdings of Miller and Batts II as the equivalent of a sentence with no meaningful opportunity for parole, has been abrogated by our Supreme Court in Commonwealth v. Felder, 269 A.3d 1232, 1245 (Pa. 2022)("To put it simply, even if a 50-years-to-life sentence amounts to a *de facto* life sentence, there is no *Miller* problem here."), the holding that dictates we look at each sentence individually and not in the aggregate remains the binding law of this Commonwealth. *See, e.g.*, Commonwealth v. Boggs, 2890 EDA 2022; 2023 Pa. Super. Unpub. LEXIS 1899, p.11 (non-precedential decision Aug. 3, 2023).[2] While Defendant assails this holding as resting on "shaky grounds," it is well established that one panel of this Honorable Court may not overrule the precedential authority of a prior panel on the same issue. Commonwealth v. McCormick, 772 A.2d 982, 984 n.1 (Pa. Super. 2001).

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[2] Non-precedential decisions issued after May 1, 2019, may be cited for their persuasive authority. Pa.R.A.P. 126(b)

Moreover, Defendant's logical analysis for overturning Foust is faulty. Defendant points to the fact that the panel in Foust cited McCullough v. State, 168 A.3d 1045 (Md. Spec. App. 2017), which has had its reasoning overturned by the Court of Appeals of Maryland in Carter v. State, 192 A.3d 695 (Md. 2018). Defendant points to this decision and the decisions from several other states which have held that a court is to look at the sentence in the aggregate when determining whether a *de facto* LWOP sentence was imposed. *Brief of Appellant*, pp.25-28. However, the decision in McCullough, was but one factor the court considered in Foust. The overarching consideration by the panel in Foust was Pennsylvania's extensive history of decisional law which has held "defendant's convicted of multiple offenses are not entitled to a 'volume discount' on their aggregate sentence." Foust, 435.

That the Court of Appeals of Maryland reached a contrary conclusion does not change this longstanding precent from the courts of this Commonwealth. Decisions from other States which Defendant relies upon are distinguishable on this basis as well. North Carolina, for example, specifically discussed the Foust decision as based on Pennsylvania's disavowal of a "volume discount" in sentencing and noted that North Carolina's sentencing statutes differed in this manner from Pennsylvania law as "[their] own caselaw and statutes compel the State to consider consecutive sentences as a single punishment." State v. Kelliher, 849 S.E.2d 333,

349 (N.C. App. 2020), *aff'd*, 873 S.E.2d 366 (N.C. 2022). Pennsylvania law does not have a similar provision.

Additionally, Maryland was just one opinion which has changed since the issuance of this Honorable Court's decision in Foust. While Defendant has noted that Maryland has joined the list of states which view the aggregate sentence imposed when considering if it amounts to *de facto* LWOP, he wholly ignores the decisions of States which have reached a contrary opinion. *See, e.g.*, Lucero v. People, 394 P.3d 1128 (C.O. 2017), *cert. denied sub nom.*, Lucero v. Colorado, 138 S.Ct. 641 (2018)("Multiple sentences imposed for multiple offenses do not become a sentence of life without parole, even though they may result in a lengthy term of incarceration."); Vasquez v. Commonwealth, 781 S.E. 2d 920 (V.A. 2016), *cert. denied sub nom.*, Vasquez v. Virginia, 580 U.S. 1021 (2016)(finding Graham not violated where suspended sentences reduced the active incarceration time 133 years imposed on multiple nonhomicide crimes.); State v. Brown; 118 So.3d 332 (La. 2013)("Graham does not prohibit consecutive term of year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant's lifetime").

The binding decision of Foust, the reasoning and holding of which was based on longstanding Pennsylvania law, commands that we ask whether each of Defendant's individual sentences of 20 years to life is a *de facto* LWOP. The answer

to that is clearly no. Commonwealth v. Dontez Moye, 266 A.3d 666 (Pa. Super. 2021), *appeal denied*, 279 Pa. 1192; 2022 Pa. LEXIS 814 (Pa. 2022)(50 years to life not a *de facto* life sentence).

As Defendant was plainly not sentenced to a *de facto* LWOP sentence, the Eighth Amendment and its protections recognized in Miller, *supra*, are not implicated and Defendant's sentence must be affirmed. While this inescapable conclusion operates to resolve all of Defendant's constitutional claims by removing the factual predicate for them, the Commonwealth will address each in turn as they are also legal incorrect.

B. Defendant's Sentence Does Not Violate the Eighth Amendment As Applied Under a Proportionality Review and Defendant Has Waived Any Such Claim for Failing to Raise it in the Trial Court.

Even if this Honorable Court, sitting *en banc*, or our Supreme Court were to overturn Foust and hold that a court must consider the aggregate sentence imposed when determining if a *de facto* LWOP sentence, Defendant's sentence would still not violate the Eighth Amendment. Defendant raises an as applied challenge asserting that Miller created a substantive rule that a sentencing court must find a juvenile offender to be permanently incorrigible before imposing a sentence of life without parole which was not affected by Jones v. Mississippi, ___ U.S. ___; 141 S.Ct. 1307 (2021). Thus, Defendant claims, if the trial court did not find him to be

permanently incorrigible, his perceived *de facto* LWOP sentence would violate the Eighth Amendment as applied to him. This claim is both waived and meritless.

i. Defendant's Claim is Waived for Failure to Raise in the Trial Court

Defendant's claim in this regard is waived as he failed to raise a separate claim of "narrow proportionality" or "grossly disproportionate" in the court below or in his concise statement of matters complained of on appeal. While Defendant quoted the Supreme Court's language in Miller, Montgomery v. Louisiana, 577 U.S. 190 (2016), and Jones for the broad quotation that

> States are not "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."

Defendant's Statement of Errors Complained of on Appeal, 3/14/2023, p.3 (quoting Jones at 1315). However, such quotations were always within the context of Defendant's argument pursuant to Miller and not to any separate and freestanding disproportionality analysis under either Justice Kennedy's standard in Harmelin v. Michigan, 501 U.S 957 (1991), or any other standard for proportionality review. Rather, Defendant disproportionality assertions were always made within the context of a challenge under Miller itself. Also notable in this analysis is the fact that Defendant himself has not cited any place in the record where he preserved this issue for review as he was required to do so by Pa.R.A.P. 2119(d). Defendant,

having failed to previously raise this proportionality claim, cannot now raise it for the first time on appeal and it is waived. Pa.R.A.P. 302(a).

More importantly, Defendant's concise statement – though hardly concise[3] – does not separately raise a "narrow proportionality" claim and the trial court was not able to discern that Defendant was raising this separate claim to address it in the Rule 1925 Opinion. "The absence of a trial court opinion poses a substantial impediment to meaningful and effective appellate review..." Commonwealth v. Johnson, 565 Pa. 51, 59 (2001). Thus, "[i]t has been held that when the trial court directs an appellant to file a concise statement of matters complained of on appeal, any issues that are not raised in such a statement will be waived for appellate review." Commonwealth v. Smith, 955 A.2d 391, 393 (Pa. Super. 2008)(citing Commonwealth v. Dowling, 778 A.2d 683, 686 (Pa. Super. 2001)).

Accordingly, any claim that Defendant's sentence is unconstitutional based on an Eighth Amendment proportionality review separate from the categorical rule of Miller and Jones is waived for failure to preserve it in the trial court.

[3] Defendant's concise statement is eight pages long consisting of 37 separate claims (15 primary claims and 22 sub-claims and allegations). The failure to submit a clear and concise statement of the issues to be raised is a sufficient basis on which to find waiver of all claims of error. *See* Kanter v. Epstein, 866 A.2d 394, 401 (Pa. Super. 2004).

ii. The Dicta in the Jones Opinion Did Not Create a *Per Se* Proportionality Claim Based on Miller v. Alabama

Even if waiver is excused, this claim must fail. The substance of Defendant's argument in this claim entirely conflates the categorical rule created in Miller with the more general proportionality test of gross disproportionality that could arguably be raised to challenge a sentence for any crime. The foundation for such an argument comes from what Defendant concedes was *dicta* in the Supreme Court's Jones opinion. *Brief of Appellant*, p.32. The relevant paragraph reads:

> 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. The Court's precedents require a discretionary sentencing procedure in a case of this kind. The resentencing in Jones's case complied with those precedents because the sentence was not mandatory and the trial judge had discretion to impose a lesser punishment in light of Jones's youth. **Moreover, this case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence.** *See* Brief for United States as Amicus Curiae 23; **Harmelin v. Michigan, 501 U. S. 957**, 996-1009, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Kennedy, J., concurring in part and concurring in judgment).

Jones, at 1322 (emphasis added).

Defendant reads this statement in conjunction with footnote 2 of that opinion which stated:

> That Miller did not impose a 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, at 1315 n.2. Taken together, Defendant argues that the Supreme Court opened the door to an Eighth Amendment as-applied challenge to a sentence where a defendant may succeed in overturning a life without the possibility of parole sentence (and by extension, a *de facto* LWOP sentence) if the court which imposed sentence did not find that the defendant was permanently incorrigible.

The fatal flaw with Defendant's logic in this regard is that this is precisely the factual finding which the Jones Court held was not required before a Court sentenced a juvenile murderer to life without parole. Jones, at 1318-19 ("In sum, the Court has unequivocally stated that a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18."). It is truly a preposterous reading of the Jones opinion to impute an intention to the High Court that it prior holdings in Miller and Montgomery do not require a factual finding of permanent incorrigibility before imposing a sentence of life without parole, but that if you title your claim to be one under Harmelin, the Court will hold that a life without parole sentence is unlawful under Miller and Montgomery. Such a reading is a truly an absurd outcome and there is no reason to impute an absurd result to the Supreme Court when we do not do so for the Legislature. *See* Commonwealth v. Miller, 212 A.3d 1114, 1122 (Pa. Super. 2022)("Governing presumptions include... that the General Assembly did not intend an absurd results.").

Indeed, a reading of Justice Kennedy's Harmelin concurrence, and the subsequent cases that cite it, makes clear that the majority opinion in Jones was not conveying the proverbial wink and nod to the back door while simultaneously slamming the front door shut. Justice Kennedy's concurrence was a recognition that the Court's prior precedent "recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle." Harmelin, at 997. However, Justice Kennedy continued, "its precise contours are unclear. This is so in part because [the Court] ha[s] applied the rule in few cases and even then to sentences of different types." Id, at 998. Justice Kennedy then went on to review the prior holding of Solem v. Helm, 463 U.S. 277 (1983), against prior precedents to discern common principles to apply in a proportionality review which subsequent courts have further distilled and applied. *See* Commonwealth v. Spells, 612 A.2d 458, 463-64 (Pa. Super. 1992)(en banc), *appeal dismissed*, 643 A.2d 1078 (Pa. 1994).

Quite plainly, the Jones Court was not attempting to incorporate Miller's categorical rule into its already existing proportionality test. Indeed, a reading of Miller confirms that the High Court had already rejected this approach. Miller, at 481 ("Harmelin had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders."). Harmelin itself specifically rejected this idea stating that, in assessing proportionality of a sentence under the

Eighth Amendment, "no one factor will be dispositive in a given case." Harmelin, at 1004 (quoting Solem, at 291 n.17). The Court, in Jones, was merely recognizing that its prior, categorical rule in Miller was separate from its longstanding and independent proportionality doctrine, which has its own separate test, and that the latter line of cases was not invoked in that case.

Moreover, Miller was plainly not violated in this matter as Defendant was not sentenced to a mandatory minimum of life without the possibility of parole. Defendant received a discretionary sentence in which the trial court was able to consider his youthfulness at the time and all of the attendant circumstances. Our Supreme Court made clear, in interpreting Jones, that this procedure and sentence satisfied the Eighth Amendment. Felder, at 1246 ("So long as the sentence imposed is discretionary and takes into account the offender's youth, even if it amounts to a *de facto*, life sentence, Miller is not violated."); *see also*, United States v. Grant, 9 F.4th 186, 200 (3d Cir. 2021)(*en banc*)("Regardless of whether it yields an aggregate sentence of *de facto* LWOP, we will affirm Grant's 60-year sentence on Counts I and II because he received all that he was entitled to under Miller.")

iii. Defendant has Not Developed a Proportionality Claim Under the Harmelin/Solem Test

Petitioner's entire argument in regard to this as-applied, proportionality test is that because the trial court did not make a finding that he is permanently incorrigibly and incapable of rehabilitation, his perceived *de facto* LWOP sentence is *per se*

disproportionate. However, there is no *per se* rule in a disproportionality analysis, the Jones Court did not create one, and, as stated *supra*, the Harmelin Court specifically rejected such an idea.

Rather, the Harmelin/Solem test is applied pursuant to this Honorable Court's *en banc* decision of Spells, which states succinctly recounted the test, stating:

> [the] proportionality test examines: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

Commonwealth v. Baker, 78 A.3d 1044, 1047 (Pa. 2013)(quoting Spells, at 462). Further, "a reviewing court is not obligated to reach the second and third prongs of the test unless 'a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'" Id.

Defendant's brief fails to set forth this test or discuss it in any meaningful way. His proportionality analysis does not even mention the gravity of the offense or the nature of the crime – which is a threshold inquiry. As such, Defendant has waived any claim that his sentence is disproportionate for failure to develop an argument which cites the applicable law and relevant facts. Commonwealth v. Hardy, 918 A.2d 766, 771 (Pa. Super. 2007), *appeal denied*, 596 Pa. 703 (2008)(stating this Court "will not act as counsel and will not develop arguments on behalf of appellant."); Commonwealth v. Maris, 629 A.2d 1014, 1017 (Pa. Super. 1993)("When issues are not properly raised and developed in briefs, when the briefs

are wholly inadequate to present specific issues for review, a Court will not consider the merits thereof.").

The reasons for Defendant's failures in this argument are clear as a proper application of a proportionality review necessarily requires the Court to review the gravity of the offense against the harshness of the penalty. Such a review would plainly not come out in his favor. Defendant came to a community Memorial Day party with a gun. Outside of the apartment building he shot Anthony Jackson who did nothing more than ask him not to bring the gun to the party. He shot Jackie Wilson who was just trying to leave the party, leaving her body to block the doorway. He shot Saphil Taylor, the person he went to the party to kill, in the forehead as he entered the apartment. He then continued to fire into the apartment, killing Milika Brinson with a shot in the back of the head. He shot Lakeisha Monroe as she tried to flee from the shooting. Ms. Monroe, luckily, survived her wounds.

Defendant deliberately murdered four people with premeditation and malice. He severely wounded a fifth and caused terrible emotional trauma to the remainder of the community. Had Defendant been just a few months older, the death penalty would certainly have been a plausible outcome. Nevertheless, Defendant's re-sentencing hearing essentially resulted in him receiving a punishment that is equivalent to a conviction for four counts of third-degree murder. *See* 18 Pa.C.S. § 1102(d). It simply cannot be said that this punishment gives rise to an inference of

gross disproportionality and his claim fails to meet the threshold question for the proportionality test. Accordingly, we need not analyze the remaining factors Baker, at 1047.

Accordingly, Defendant's proportionality claim must fail as it was not preserved in the trial court, not developed in his brief, and utterly meritless.

C. Any Argument that Article I, Section 13 of the Pennsylvania Constitution Provides Greater Protection than the Eighth Amendment to the United States Constitution is Waived for Failure to Preserve in the Trial Court and is Nonetheless Meritless.

Defendant, joined by *amici curiae*, next argues that Article 1, Section 13 of the Pennsylvania Constitution provides greater protection that the Eighth Amendment to the United States Constitution. Based on this, Defendant claims that the Pennsylvania Courts should adopt a separate proportionality test which would essentially create the *per se* rule that the Jones Court specifically rejected and require a finding that the juvenile was incapable of change and rehabilitation before a sentence of life without parole or *de facto* LWOP could be imposed. The brief submitted by *amici curiae* further requests that this Court reinstate the procedural protections from Batts II, which the Felder Court nullified, pursuant to Article I, Section 13 as well as the due process clause of the Pennsylvania Constitution, found at Article I, Sections 1 and 9. *Brief of Amici Curiae*, pp.22-25. However, all of these claims are waived. They are also meritless.

i. <u>All Claims That the Pennsylvania Constitution Provides Greater Protection are Waived for Failure to Raise in the Trial Court</u>

Beginning with the Batts II arguments forwarded in the *Brief of Amici Curiae*, these claims should not be considered at all by this Honorable Court because Defendant has not preserved or raised such a claim. While Defendant argues here, and in the Court, below that a finding of permanent incorrigibility was required under Miller, he never argued that the Batts II protections were required by the Pennsylvania Constitution or survived Felder in any manner. Indeed, Defendant's lengthy and verbose concise statement does not mention Batts II at all. Thus, these arguments are improper as the comments to Rule of Appellate Procedure 531 specifically state that "an *amicus curiae* is not a party and cannot raise issues that have not been preserved by the parties." Pa.R.A.P. 531, *cmnts* (quoting Commonwealth v. Cotto, 753 A.2d 217, 224 n.6 (Pa. 2000)). Thus, any claim which seeks to reinstate the Batts II protections is not before this Court and should not be entertained.

While both Defendant and *amici* assert that Pennsylvania's Constitutional ban on cruel punishments provides greater protection that the Eighth Amendment, this is the first time that this claim was raised in this matter and it is waived. As with Defendant's prior proportionality claim, both he and *amici* fail to point to any place in the record where a claim that the Pennsylvania Constitution provides an

independent claim of relief was raised and preserved despite an obligation to do so. *See*, Pa.R.A.P. 2119(d).

The Commonwealth's independent review of the record does reveal several instances in which Defendant cited to Article I, Section 13 at argument and in filings. *See, e.g., Post Sentence Motion to Vacate the Sentences and Reconsider Sentencing*, 12/1/2022, p.2, ¶7; p.4, ¶14; p.5, ¶17; p.8-9, ¶25; *Supplemental Brief Concerning the Application of Miller v. Alabama to Sentencing*, 11/22/2022, p.4, n.4; and N.T., 11/21/2022, pp.23, 33. However, in each instance, Defendant made either a passing reference to the Pennsylvania Constitution or merely cited it alongside a citation to the Eighth Amendment. At no point in the litigation before the trial court did Defendant assert or argue that the Pennsylvania Constitution provided greater protection than the Eighth Amendment.

To preserve an independent claim under the provisions of the state charter, a defendant must assert this independent claim before the trial court, else it is waived. Commonwealth v. Chamberlain, 612 Pa. 107, 148 (Pa. 2011). The Pennsylvania Supreme Court has held that these general citations to state constitutional provisions are not sufficient to put the trial court on notice that an independent claim asserting greater protections under the state charter is being raised and, thus, they are insufficient to preserve such a claim for appellate review. Commonwealth v. Bell, 211 A.3d 761, 769 n.8 (Pa. 2019)("We find the current situation to be akin to cases

where this Court has repeatedly stated general claims under the state and federal constitutions do not present independent questions of state constitutional law."). Where such a claim is not directly presented to the trial court it is not preserved for review in our appellate courts. Chamberlain, at 149 ("We decline to consider whether state due process should depart from federal due process with regard to missing evidence **where this argument was not directly advanced** in the court below." (emphasis added)).

Accordingly, any independent claim that the Pennsylvania Constitution provides greater protection is waived. Pa.R.A.P. 302(a).

ii. Our Supreme Court Has Already Rejected Defendant's Claim That Article I, Section 13 Offers Greater Protection than the Eighth Amendment

Defendant and *amici* offer an Edmunds[4] analysis which they believe supports a finding that the prohibition against cruel punishments found in Article I, Section 13 offers greater protections than the Eighth Amendment's ban on cruel and unusual punishments. We discern Defendant's argument to be that this Court should find that the state charter has a narrow proportionality rule which adopts the factual finding requirement that was rejected by the Supreme Court in Jones. Even assuming this claim is not waived, this argument has already been rejected by our Supreme Court.

[4] Commonwealth v. Edmunds, 586 A.2d 887 (1991).

In Commonwealth v. Batts, 66 A.3d 286, 297-99 (Pa. 2013)(Batts I), our Supreme Court directly rejected the appellant's claim that Article I, Section 13 provided greater protection than the Eighth Amendment. There, the Court analyzed each of the Edmunds factors presented by *amici* in that matter, which the appellant's brief had deferred to.[5] The Court specifically found that "nothing in the arguments presented suggests that Pennsylvania's history favors a **broader proportionality rule that what is required by the United States Supreme Court**." Batts I, at 299 (emphasis added). Even in its concluding language, the Pennsylvania Supreme Court did not limit its finding of coextensive protections to categorical rules, but specifically included proportionality as it pertains to juvenile sentencing. Id ("the arguments presented do not persuade us that the Pennsylvania Constitution requires a broader approach to proportionality vis-à-vis juveniles than is reflected in prevailing United States Supreme Court jurisprudence.").

In an attempt to distinguish this plain holding of Batts I, Defendant and *amici* point to the concurring opinion of Justice Donohue in Felder. There, in an opinion joined only by then-Justice Todd, the concurrence opined that the Batts I opinion only addressed "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

[5] It is of note that this brief was authored by the same organizations who have submitted a brief in support of Appellant in this matter. Batt I, at 297 n.4.

of the Pennsylvania Constitution, which prohibits cruel punishments." Felder, at 1248 (Donohue, J., concurring)(quotations omitted). However, the binding majority opinion clearly took a difference view stating:

> In Commonwealth v. Batts, 620 Pa. 115, 66 A.3d 286 (Pa. 2013) ("Batts I"), our first post-Miller decision addressing the sentencing of juvenile homicide offenders, we rejected the argument that juveniles can never be sentenced to life without parole, noting that Miller itself did not require such a broad proscription. *See* id. at 296. Instead, we explained Miller requires only "that there be judicial consideration of the appropriate age-related factors set forth in that decision prior to the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile." Id. **We also found nothing to suggest "that Pennsylvania's history favors a broader proportionality rule than what is required by the United States Supreme Court."** Id. at 299.

Felder, at 1235 n.4 (emphasis added).

The clear and unambiguous opinion of the Batts I Court did not limit its discussion and holding to the discrete question of a categorical ban on sentences of life without parole for juvenile murders. It plainly and specifically held that Article I, Section 13 does not have a broader proportionality rule. Batts I, at 299. The Felder majority acknowledged this, Felder, at 1235 n.4, and Justice Donohue's concurrence indicated it understood the majority's position on the subject the concurring opinion made clear that the was written to "distance [Justice Donohue] from any implication that the issue has been resolved." Felder, at 1248 (Donohue, J., concurring).

Moreover, had the majority of the Court in Felder not found that the question of whether Article I, Section 13 of the Pennsylvania Constitution provided greater protection to already be resolved by the Batts I Court, there simply would have been no reason for them to disavow their Batts II ruling as the dissolution of that precedent was only required because of the "absen[ce of] some constitutional impetus." Felder, at 1244. If there was some other potential "constitutional impetus" for the Batts II rules, as Defendant insists, there would have been no occasion to take such drastic action and dissolve the Batts II procedures. Rather, that holding was only required because the majority understood the question of the reach of Article I, Section 13 to have already been conclusively decided.

As Batts I and footnote 4 in Felder clearly state that Article I, Section 13 does not have a greater proportionality requirement than the Eighth Amendment, Defendant's claim that under the state charter must fail.

iii. An Edmunds Analysis Further Compels the Conclusion that Article I, Section 13 Does Not Offer Greater Protection

Even if the Batts I holding was as limited as Defendant suggests and we continue to conduct a new Edmunds analysis, those considerations still compel the same result that the Batts I Court reached – Article I, Section 13 does not provide greater protection to juveniles than does the Eighth Amendment. In assessing whether the Pennsylvania Constitution provides greater protection than the United

States Constitution we are to address the following four concerns: "1.) the 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 the applicability with modern Pennsylvania jurisprudence." Commonwealth v. Edmunds, 526 Pa. 374, 390 (1991).

a. Comparative Textual Analysis

Article I, Section 13 of the Pennsylvania Constitution reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." *Id.* The Eighth Amendment to the United States Constitution reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* Defendant and *Amici* claim that the Eighth Amendment's additional requirements that a punishment be "unusual" in addition to being cruel is a clear intent of the founders to prohibit fewer punishments than that which was outlawed by the Pennsylvania Constitution.

However, Defendant and his *Amici* fail to recognize that our Supreme Court has already held that this textual difference is not a material one. We reiterate that the same *Amici* as has participated in this matter briefed this issue to the Batts I Court which specifically rejected this textual distinction:

> We find the textual analysis provided by Appellant and his *amici* to carry little force. The purport of the argument is 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." *Cf.* Trop v. Dulles, 356 U.S. 86, 100 n.32, 78 S. Ct. 590, 598 n.32, 2 L. Ed. 2d 630 (1958) (plurality) (suggesting that most of the judicial decisions have treated "cruel and unusual" as, essentially, an amalgam).

Batts I, at 298. Moreover, our Supreme Court has previously been given opportunities to address the different language in these two provisions and has nonetheless consistently held that Article I, Section 13 is coextensive with the Eighth Amendment. *See*, Commonwealth v. Zettlemoyer, 454 A.2d 937, 965 (Pa. 1982)("We decline the invitation, and hold that the rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments."); Jackson v. Hendrick, 503 A.2d 400, 404 n.10 (Pa. 1986)("This Court has held that Article I, section 13 of the Pennsylvania Constitution is coextensive with the Eighth Amendment."); Commonwealth v. 5444 Spruce St., 832 A.2d 396, 399 (Pa. 2003)(same). Put simply, Defendant's text-based argument is foreclosed by the longstanding precedent from our Supreme Court.

In addition, the entirety of the argument in support of the finding that the minor discrepancies in the wording of the two provisions is based upon historical understandings of the respective terms. Indeed, both Defendant and his *Amici* rely on the plurality opinion from Justice Scalia in Harmelin v. Michigan, *supra.* However, the portion of the opinion that discussed the historical understanding was

only joined by then-Chief Justice Rehnquist and was not the opinion of the court. Regardless, the United States Supreme Court has long since abandoned any jurisprudence which relies upon the historical understanding of the Eighth Amendment and its terms and has adopted an "evolving standards of decency" test. Miller, at 469 ("we view that concept less through a historical prism than according to 'the evolving standards of decency that mark the progress of a maturing society.'"); Atkins v. Virginia, 536 U.S. 304, 311 (2002)("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail.").

Put bluntly, a textual comparison of the constitutional provisions has little force in questions concerning the Eighth Amendment because the United States Supreme Court's jurisprudence in this arena is not based on the historical understanding of text in the Amendment.

b. History of the Provision Including Case-Law

Pennsylvania's history and case law in this area also supports a finding that the two provisions are coextensive. As noted previously, our Courts have consistently held that Article I, Section 13 does not provide greater protection than the Eighth Amendment. Zettlemoyer, *supra*; Hendrick, *supra*; Commonwealth v. 5444 Spruce St., 832 A.2d 396, 399 (Pa. 2003)(" This Court has held that Article I,

Section 13 of the Pennsylvania Constitution is coextensive with the Eighth Amendment."); Commonwealth v. May, 271 A.3d 475, 484 (Pa. Super. 2022)("The protections provided by Article I, Section 13 of the Pennsylvania Constitution are coextensive with those provided by the Eighth Amendment."), *appeal denied*, 286 A.3d 214 (Pa. 2022). This consistent rejection of Defendant's position weighs heavily in favor of finding the two provisions are coextensive.

Even in the more specific context of juvenile murderers, Pennsylvania has not offered greater protection than what was required by the Eighth Amendment. Prior to the Supreme Court's categorical ban in Roper v. Simmons, 543 U.S. 551 (2005), Pennsylvania would seek and obtain sentences of death for juveniles convicted of murder. *See* Commonwealth v. Hughes, 555 A.2d 1264 (Pa. 1989)(affirming death sentence for Kevin Hughes who was 16 years, 11 months, and 24 days old at the time of his murder and rape convictions); Commonwealth v. Lee, 662 A.2d 645 (Pa. 1995), *cert. denied*, 517 U.S. 1211 (1996)(affirming death sentence of Percy Lee who was 17 years old at the time of his two first-degree murder convictions). There is also no indication that Pennsylvania law ever questioned the constitutional authority to sentence a juvenile murderer to life without the possibility of parole prior to the United States Supreme Court's edict in Miller. Such sentences were regularly imposed upon conviction for murder. *See* Felder, at 1246 n.16 (citing

department of corrections statistics establishing that 521 juvenile homicide offenders had to be re-sentenced after Miller and Montgomery).

While it is true that Pennsylvania's Juvenile Act, 42 Pa.C.S. § 6301, et seq., provided special considerations to juveniles who committed various other criminal offenses, those considerations excluded violent crimes. *See* 42 Pa.C.S. § 6302 (enumerating the violent offenses which are not included in the definition of "delinquent act."). This is particularly true when it comes to the crime of murder which "ha[s] always been excluded from the jurisdiction of the juvenile courts." Commonwealth v. Pyle, 342 A.2d 101, 106 (Pa. 1975). Even so, the fact that the Legislature has historically chose to treat non-violent juvenile offenders different from adults by statutory scheme does equate to a constitutional right. *See* Commonwealth v. Williams, 522 A.2d 1058, 1063 (Pa. 1987)("we note there is no constitutional guarantee of special treatment for juvenile offenders.").

Plainly, the Pennsylvania's history and tradition of punishing juvenile murders always understood that sentences of life without the possibility of parole, and even the death penalty, were constitutionally permissible until United States Supreme Court rulings intervened. More broadly, our Courts have consistently held that Article I, Section 13 did not provide greater protection than the Eighth Amendment.

c. Holdings of Other States

In support of the claim that Pennsylvania's Constitution provides greater protection, Defendant and *Amici* point to holding from Washington, North Carolina, Minnesota, California, Massachusetts, and Alaska. Defendant points to each of these States as interpreting their constitutions are providing greater protection based on the text of their respective charters. However, these text-based interpretations counsel *against* a finding that Pennsylvania's Article I, Section 13 provides greater protections.

Of these cited decisions, only the constitutional provisions of Washington had the same language as the Pennsylvania Constitution's Article I, Section 13. However, this was not the primary concern of the Washington Supreme Court. Rather, the Court emphasized that it was the State's body of law which "evolved to ensure greater protections of children." State v. Bassett, 428 P.3d 343, 349 (Wn. 2018). The Court noted "that established bodies of state law, both statutory and case-based, recognize that children warrant special protections in sentencing. This weighs in favor of interpreting article I, section 14 more broadly than the Eighth Amendment." Id, at 350. Specifically, the Court concluded these special state policy considerations of granting juveniles sentencing protections outweighed a policy of national uniformity for sentencing children. Id. As discussed above, and as will be

discussed further *infra*, Pennsylvania law does not have a history of similar protections.

Of the remaining cases that Defendant and *amici* cite, none have the same similar language as Pennsylvania's Constitution. Alaska's constitutional provision specifically dictates that "Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation." Alaska Const. Art I, § 12. It is this special language that leads Alaska Courts to apply its own "single test" to determine if "a punishment is so disproportionate to the offense committed..." Burnor v. State, 829 P.2 837, 840 (Alaska Ct. of App. 1992). This language has also resulted in Alaska Courts applying "the same test for cruel and unusual punishment and violations of substantive due process," Dancer v. State, 715 P.2d 1174, 1181 (Alaska Ct. App. 1986). The unique nature of their constitutional command for administration of criminal law makes their line of cases uninstructive in our analysis here.

North Carolina, Michigan, Massachusetts, and California all interpreted a constitutional counterpart to the Eighth Amendment which prohibited cruel *or* unusual punishments. State v. Kelliher, 873 S.E. 2d 366, 382 (N.C. 2022)("it is reasonable to presume that when the Framers of the North Carolina Constitution chose the words 'cruel *or* unusual,' they intended to prohibit punishment that

was *either* cruel *or* unusual, consistent with the ordinary meaning of the disjunctive term 'or.'"); People v. Bullock, 485 N.W. 2d 866, 872 (Mich. 1992)("the Michigan provision prohibits 'cruel *or* unusual' punishments, while the Eighth Amendment bars only punishments that are both 'cruel *and* unusual.' This textual difference does not appear to be accidental or inadvertent."); Commonwealth v. Perez, 80 N.E. 3d 967, 973 (Mass. 2017)("The touchstone of art. 26's proscription against cruel or unusual punishment, however, remains proportionality."); People v. Baker, 20 Cal. App. 5th 711, 723 (Cal. Ct. App. 2018)("Article I, section 17 of the California Constitution prohibits infliction of '[c]ruel *or* unusual' punishment. (Italics added.) The distinction in wording is 'purposeful and substantive rather than merely semantic." (alterations in original)). In each of these decisions, the respective courts found that the choice to use cruel or unusual was a prohibition against both types of punishments. However, Article I, Section 13 of the Pennsylvania Constitution chose only to prohibit cruel punishments. Thus, these state decisions are not instructive as they are based on a textual analysis which is obviously broader than the text chose in Pennsylvania's Constitution.

Amici also points to a decision from the Florida Supreme Court which hypothesized that their Constitution provided greater protection because of the language "cruel *or* unusual" used in Article I, Section 17 of the Florida Constitution. Hale v. State, 630 So.2d 521, 526 (Fl. 1993). However, that opinion did not engage

the question and found that inquiry to not be warranted as the length of the sentence was obviously neither cruel nor unusual. Id. Nevertheless, in 2002 Florida adopted a constitutional amendment to their Article I, Section 17 which specifically rejected this argument. That provision now commands:

> The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

Fla. Const. Art. I, § 17.

While citing decisions from six out of 49 other states which support their opinion, neither Defendant nor *amici* discuss any cases from the jurisdictions which have held their constitutionals to provided sentencing protections which are coextensive with the Eighth Amendment of the United States Constitution. Nor do Defendant and *amici* make any attempt to distinguish those holdings. Instead, Defendant and *amici* ask this Court to find expanded protections in the Pennsylvania Constitution based upon a small minority of other jurisdictions which have interpreted language which differs from both the Pennsylvania and the United States Constitution. However, a review of some of the holdings of other states' interpretations of their constitutions demonstrate that there is not even a consensus among other jurisdictions in interpreting the specific language that Defendant cites.

South Carolina has determined that "the use of the disjunctive 'or' rather than 'and' in the South Carolina Constitution is of no importance in this case, since the analysis we employ is the same under both constitutions." State v. Wilson, 413 S.E.2d 19, 27 (S.C. 1992). This holding is directly contradictory to those of states like Michigan or California which interpreted the same language in their Constitutions.

The Constitution of Vermont employs language that specifically requires proportionality between the punishment and the particular offenses.[6] This proportionality requirement rather than a ban on either cruel punishments, unusual punishments, or both, is similar to Alaska's Constitution. Nevertheless, despite this clear difference in command from the Eighth Amendment, their Supreme Court has "applied a similar analysis to that of the U.S. Supreme Court" when interpreting their own Constitution. State v. Venman, 564 A.2d 581 (VT 1989). Tennessee is an example of a state which has identical language to that included in the Eighth Amendment and their Supreme Court has also determined "that these stated and federal constitutional provisions are coextensive." State v. Taylor, 70 S.W. 3d 717, 720 (Tenn. 2002).

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[6] The specific language states "all fines shall be proportioned to the offences." VT Const., Ch.II, § 39. However, their courts have long held that the word "fines" was intended to cover all punishments and not just monetary fines. State v. Burlington Drug Co., 78 A. 882, 884 (1911).

Article I, Section 11 of Delaware's Constitution employs the same as is used in Article I, Section 13 of Pennsylvania's Constitution. Both prohibit only cruel punishments and omit reference to those which are unusual. The Delaware Supreme Court has also noted that: "Together with the Eighth Amendment, Article I, Section 11 traces its heritage to the English Bill of Rights of 1689." Sanders v. State, 585 A.2d 117, 144 (Del. 1990). Despite the omission of the language "and usual," Delaware's "interpretation of Article I, Section 11 has been, and should be, guided by the same general principles that have guided the Supreme Court's interpretation of the Eighth Amendment." Id.

A review of these cases shows that states which have language that differs from the Pennsylvania Constitution are divided over whether that textual difference is meaningful enough to require greater protections than the Eighth Amendment. The Delaware Supreme Court, which has similar language to our Article I, Section 13, has interpreted their provision as coextensive with the Eighth Amendment. Thus, this survey of decisions from other jurisdictions does nothing to undermine the conclusion of the Batts I Court, that Pennsylvania's Article I, Section 13 is coextensive with the Eighth Amendment.

d. Policy Considerations, Including Unique Issues of State and Local Concern and the Applicability with Modern Pennsylvania Jurisprudence.

The extension of protections that Defendant advocates for here is directly contrary to the longstanding policy of this Commonwealth that criminal defendants are not entitled to volume discounts for their crimes. Under our modern jurisprudence, our Supreme Court has long held that a criminal defendant is not entitled to a volume discount for his crimes. Commonwealth v. Reed, 990 A.2d 1158, 1164 (Pa. 2010)(recognizing its previous "admonition to be wary of volume discounting multiple crimes."); Commonwealth v. Nolan, 855 A.2d 834, 839 (Pa. 2004)("This Court will temper such scrutiny against allowing defendants a 'volume discount' on multiple crimes."); Commonwealth v. Belsar, 676 A.2d 632, 636 (Pa. 1996)("To hold that the crimes merge (i.e., that the assault was merely a part of the robbery and not a crime in itself) would be to award criminals the 'volume discount' on crime that we have mentioned before. That we refuse to do."). This longstanding policy of Pennsylvania's sentencing laws was the foundation for this Honorable Court's decision in Foust, when it held that the sentence for individual crimes must be analyzed in determining what is a *de facto* life sentence, and not the aggregate sentence for multiple crimes. Foust, at 434 ("Moreover, extensive case law in this jurisdiction holds that defendants convicted

of multiple offenses are not entitled to a "volume discount" on their aggregate sentence.").

Moreover, the contrary outcome for which Defendant advocates would provide perverse incentives for juvenile offenders. His proposed rule, which would all but require concurrent sentences under these facts, would provide legal encouragement for juveniles to kill multiple people after a first victim falls. Once the first death is caused, there would be no reason to not attempt to eliminate any and all witnesses as well, for there would be no further punishment beyond that of the first victim. There would be no reason not to attempt to escape justice through any and all violent means available at the time as, if Defendant had his way, all sentences would need to be run concurrently at any ultimate disposition.

Outside of our volume discount jurisprudence, our long history of sentencing juvenile murderers on the same footing as adults who commit heinous crimes counsels against a finding of greater protection than the Eighth Amendment. Pennsylvania's modern constitutional jurisprudence has never extended different treatment to juveniles who committed serious crimes of violence. Indeed, as related above in the history discussion, Pennsylvania did not prohibit life without parole for juveniles who committed first- or second-degree murder or even the death penalty for aggravated first-degree murder until the United States Supreme Court found that the Eighth Amendment prohibited it.

e. Conclusion

A review of the Edmunds factors confirms what the Batts I and Felder Courts have already held, the Eighth Amendment is coextensive with Article I, Section 13 of the Pennsylvania Constitution. The text is not substantially different and the Delaware Constitution which shares the same language as our Constitution has been interpreted as coextensive. Our historical sentencing practices with juvenile murderers reflect that no greater protection has been extended within this Commonwealth. Additionally, our modern jurisprudence of not extending volume discounts for multiple crimes further supports this finding. All of these factors lead to the conclusion that this Honorable Court has previously recounted:

> Pennsylvania courts have repeatedly and unanimously held that the Pennsylvania prohibition against cruel and unusual punishment is coextensive with the Eighth and Fourteenth Amendments to the United States Constitution, and that the Pennsylvania Constitution affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution.

Commonwealth v. Elia, 83 A.3d 254, 267 (Pa. Super. 2013), *appeal denied*, 94 A.3d 1007 (Pa. 2014) (quotations and alterations omitted).

Accordingly, Defendant's claims under the Pennsylvania Constitution must fail for the same reasons set forth in discussing Defendant's Eighth Amendment Claims.

D. Did the Trial Court Properly Exercise its Considerable Discretion After Weighing All Appropriate Sentencing Factors Before Imposing a Discretionary Sentence?

Defendant's last challenge assails the discretionary aspects of his sentence. "It is well settled that, with regard to the discretionary aspects of sentencing, there is no automatic right to appeal." Commonwealth v. Mastromarino, 2 A.3d 581, 585 (Pa. Super. 2010), *appeal denied*, 609 Pa. 685 (2011). This appeal is, therefore, more appropriately considered a petition for allowance of appeal. Commonwealth v. Cook, 941 A.2d 7, 11 (Pa. Super. 2007).

> Before we reach the merits of this [issue], we must engage in a four part analysis to determine: (1) whether the appeal is timely; (2) whether Appellant preserved his issue; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the sentencing code.

Commonwealth v. Austin, 66 A.3d 798, 808 (Pa. Super. 2013), *appeal denied*, 621 Pa. 692 (2013)(alterations in original). In this matter, Defendant did file a timely motion for reconsideration and a timely notice of appeal. Thus, we proceed to the Defendant's Rule 2119(f) statement.

Defendant's Rule 2119(f) statement fails to set forth a substantial question. In assessing whether a Rule 2119(f) presents a substantial question, we address only what is contained in that statement and do so before assessing the contents of the argument section. Commonwealth v. Goggins, 748 A.2d 721, 726 (Pa. Super. 2000)(en banc), *appeal denied*, 759 A.2d 920 (Pa. 2000). In assessing that

statement, it is clear that Defendant is only challenging the trial court's decision to run his sentences consecutively for an aggregate sentence of 80 years to life. *Brief of Appellant*, p.21. Such a challenge does not raise a substantial question.

In Commonwealth v. Pass, 914 A.2d 442 (Pa. Super. 2006), the appellant similarly raised a claim that the aggregate sentence imposed was unduly harsh and excessive in light of the circumstances of his case which included his rehabilitative efforts in prison and family circumstances. Pass, at 446. This Honorable Court concluded that the appellant's "claim that the trial court erred in ordering his sentences imposed on August 9, 2005 to run consecutively, instead of concurrently, to a previously imposed sentence does not raise a substantial question." Id. Subsequent cases have "consistently have recognized that excessiveness claims premised on imposition of consecutive sentences do not raise a substantial question for our review." Commonwealth v. Radecki, 180 A.3d 441, 468 (Pa. Super. 2018).

Defendant here does not challenge the sentence imposed for any of his individual murders. Indeed, he does not even acknowledge that each sentence of a minimum of 20 years was well below the starting point of 35 years. *See* Batts II, at 482 (directing sentencing courts to be guided by the minimum prescribed sentences at 18 Pa.C.S. § 1102.1(a) for sentencing juvenile murderers who were convicted after

June 24, 2012.) Defendant's Rule 2119(f) statement does not even recognize this starting point for the purposes of sentencing.[7]

As the essence of Defendant's claim is nothing more than a complaint that the trial court abused its discretion in imposing consecutive sentences, he has failed to raise a substantial question. Radecki, *supra*; Pass, *supra*. As such, he has not properly invoked this Honorable Court's jurisdiction over his discretionary aspects of sentence claim and the judgment of sentence must be affirmed.

Even if the merits of his claim were reached, it is plainly meritless. Following our Supreme Court's decision in Felder, which applied the United States Supreme Court's decision in Jones, "sentencing courts are required to consider only the relevant sentencing statutes, which will guarantee that the sentencer considers the juvenile's youth and attendant characteristics as required by Miller." Felder, at 1246.

> Appellate review of the adequacy of a resentencing court's consideration of factors attendant to the defendant's youth, such as age, culpability, immaturity, childhood trauma, and whether the defendant is permanently incorrigible, involves the review of the discretionary aspects of sentence.

Commonwealth v. Schroat, 272 A.3d 523, 526 (Pa. Super. 2022).

In applying the relevant statutes, it remains true that "[t]he imposition of sentence is vested in the discretion of the trial court and should not be disturbed on

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[7] On appeal, a defendant must provide, **in writing, a statement specifying the following: (1) where his or her sentence falls in the Sentencing Guidelines**, (2) what provision of the Sentencing Code has been violated, (3) what fundamental norm the sentence violated, and (4) the manner in which it violated the norm. Commonwealth v. Moye, 266 A.3d 666, 676 (Pa. Super. 2021).

appeal for a mere error of judgment but only for an abuse of discretion and a showing that a sentence was manifestly unreasonable." Commonwealth v. Williams, 69 A.3d 735, 740 (Pa. Super. 2013). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." Commonwealth v. Walls, 592 Pa. 557, 564 (2007).

> The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the sentencing court is "in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it."

Id., at 565 (quoting Commonwealth v. Ward, 524 Pa. 48 (1990)).

In attacking the validity of a discretionary sentence, it is the duty of Defendant to "establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision." Commonwealth v. Rodda, 723 A.2d 212, 214 (Pa. Super. 1999). To this end, Defendant alleges that the trial court fixated on the facts of the crime as well as Defendant's failure to show remorse, and his prison misconducts. He further alleges that there is no record support for the trial court's finding that Defendant has not taken responsibility, that he continues to engage in criminal thinking and his crimes did not reflect transient immaturity. Defendant further alleges that the trial court's sentence reflects a racial

bias and improperly points to the facts of other cases not included in the certified record. Finally, Defendant claims that the trial court did not adequately consider Defendant's rehabilitative needs. These claims can be distilled into three separate claims, all of which are meritless. Accordingly, the judgement of sentence must be affirmed.

i. Defendant's Sentence Compared to Other Juvenile Murderers

For ease of discussion, this brief will first address Defendant's claim that is premised on comparing his sentence to the sentence of other juvenile murderers. Initially, Defendant's attachment of transcripts from a record in another case and citation to internet sites for factual averments is wholly improper and this Honorable Court should not consider this material as "[i]t is black letter law in this jurisdiction that an appellate court cannot consider anything which is not part of the record in this case." Bennyhoff v. Pappert, 790 A.2d 313, 318 (Pa. Super. 2001), *appeal denied*, 573 A.2d 682 (Pa. 2003)(quotations omitted); Pa.R.A.P. 1925, *cmts* ("An appellate court may consider only the facts which have been duly certified in the record on appeal.").

Attaching documents and materials to an appellate brief does not make them part of the certified record. Commonwealth v. McCafferty, 758 A.2d 1155, 1159 n.6 (Pa. 2000). In an effort to circumvent these rules, Defendant generally points to Pa.R.E. 201. However, this is a rule of evidence with which Defendant could have

asked the *trial court* to take judicial notice of the transcribed record in another case. It is not a rule of *appellate* procedure which allows this Honorable Court to accept documents attached by a party in their briefs. Moreover, Defendant's improper attempt to shoehorn another case's proceedings into this record circumvents the requirements of a "timely request" and the Commonwealth's right "to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed" which are contained in the Rule itself. Pa.R.E. 201(e).

Additionally, "[t]he scope of judicial notice does not extend to the evidentiary record of another case, even though the case arose in the same court and even though the parties to the respective actions are the same." Sluciak v. Cecil Twp. Bd. of Supervisors, 223 A.3d 725, 731 (Pa. Cmwlth. Ct. 2019)(citing Commonwealth ex rel. Ferguson v. Ball, 121 A. 191, 192 (Pa. 1923)). Defendant did not seek to introduce these transcripts, records, or facts into the record at the time of sentencing[8] and did not present any argument in the court below regarding the facts of the *Mazeffa* matter and his Concise Statement only briefly mentioned his aggregate sentence in a footnote. Thus, the trial court has not had any opportunity to address its reasons for running *Mazeffa*'s sentence concurrently while running Defendant's

[8] The only reference made to the Mazeffa case was during the Commonwealth's argument for consecutive sentences where the prosecutor argued as to the distinguishing factors in that case. N.T., 11/21/2023, p.41.

sentence consecutively. Thus, this claim is waived. Pa.R.A.P. 302(a); Pa.R.A.P. 1925(b)(4)(vii).

Nevertheless, the argument is wholly frivolous as there is no factual similarity between the two cases. Robert Mazeffa killed two people – his grandparents with whom he lived – after an argument. He also acknowledged guilt and admitted to the crimes upon the police arresting and questioning him. Defendant killed four people and severely wounded a fifth. He went to the block party with the intent to kill one person and then shot any innocent bystander who got in his way. He further denied and deflected responsibility for his crimes, as will be discussed in more detail below. The two crimes simply bear no relationship to each other and the idea that the two circumstances are comparable is fatuous, at best.

Defendant further attempts to impugn the dignity of the trial court by implying a racial bias for the sentencing disparity. *Brief of Appellant*, p.21. This argument is emblematic of a wholesale failure of Defendant to recognize the nature of his crimes throughout the entirety of his brief as he repeats proportionality arguments. The simple fact is that **Defendant killed four people**. Defendant lists several cases in which other juvenile murders received sentences of 48 years or less and implies that his sentence is disproportionate to these individuals because he is black and they are white. However, Defendant's allegation in this regard utterly fails to recognize the disparity in his crimes as compared to those his lists - the only thing in his case which

is disproportionate to the cases he seeks to be compared to is the number of dead bodies Defendant left lying in his wake.

In short, this argument is waived for failure to raise in the court below and because the facts relied upon are not in the certified record. Moreover, the claim is utterly meritless.

ii. The Trial Court's Findings are Supported by the Record

Defendant argues that the trial court's various findings of fact are not supported by the record evidence. The primary argument in this regard is premised up on Defendant's repeated assertions that his witnesses were unrebutted by expert testimony from the Commonwealth. However, just because an expert witness was not called to give contrary testimony does not mean that an expert's testimony was unrebutted or unchallenged. As with any expert or lay witness, their testimony and conclusions can be challenged through cross examination. Commonwealth v. Flor, 998 A.2d 606, 630 (Pa. 2010)("The Commonwealth did not call its own mental health expert to testify at the penalty proceedings; however, the Commonwealth challenged the defense expert witnesses' testimony with extensive and thorough cross-examination."). After such testimony, the trial court sitting as finder of fact was "free to believe all, part, or none of the evidence, and credibility determinations rest solely within the purview of the fact-finder." Id, at 626. Reviewing the record

as well as the trial court's reasons for its findings, it is clear that all findings of facts were supported by the evidence presented.

The trial court's conclusion that Defendant's crimes did not reflect transient immaturity was amply supported by the record. The trial court recounted the facts and circumstances of the case showing that Defendant's acts were premeditated and designed to settle a grudge that began earlier in the week. He sought out a gun for the purpose of getting even. Opinion, 6/7/2023, p.43 (citing N.T., 10/26/1998). He went to the block party to find his target and shot anyone who got in his way. He then fled the state and bragged about his crimes and that he would shoot the investigating detective if he came to arrest him. Id, at p.44. The trial court's conclusions that these facts do not reflect transient immaturity – but a cold-hearted, premeditated slaying – was amply supported by the record.

As to his refusal to accept responsibility and show remorse, this was again amply demonstrated by the testimony. While Defendant relies on his own self-serving statements to demonstrate remorse and responsibility, he wholly ignores the bulk of the testimony to the contrary which includes testimony from his own witnesses. Even if we discount the version of events Defendant gave during his prison intake process, he still lied and deflected blame for the crimes during his interview with his own expert, Dr. Timme, Id, at p.17 (citing N.T., 11/18/2022, p.248-49). He also lied about the nature of the crimes during group treatment in

prison. Id, at p.12-13 (citing N.T., 11/18/2022, p.133-149). Defendant again told Anthony Jackson's daughter, during mediation, that her father was killed when he was shooting over a bush. Defendant also specifically disclaimed any remorse for killing Saphil Taylor. Id, at p.9 (citing N.T., 11/18/2022, p.88-101). Defendant further lied about the facts and deflected blame when discussing the murders with Lt. Shawn Horner. Id, at p.11-12 (citing N.T., 11/18/2022, p.111-123). Reviewing the trial courts findings and the testimony relied on for those findings, it is clear that there was ample testimony to support the finding that Defendant did not take responsibility for his actions and continued to deflect blame and minimize his role in the murders.

This testimony and these findings further support the trial court's conclusions that Defendant continues to engage in criminal thinking. As the trial court pointed out it its opinion, this conclusion was based upon the testimony of Defendant's own expert, Dr. Gnall. Id, at p.15. A review of Dr. Gnall's testimony supports this conclusion.

> **If I had a sense that a person was blame-shift, was not taking responsibility**, was in some way not -- you know, denying that they did it, that all -- those all -- **all of those factors are considered within criminal thinking at that time**, to what extent does that person at that time or even now.

N.T., 11/18/2022, p.188. Later in the testimony, Dr. Gnall further explained to the judge:

> So **if he explained the crime and how he felt about the crime in such a way that I'm thinking, listen, this guy really doesn't -- he's not accepting responsibility, he's trying to pass it off on somebody else** or whatever, those are antisocial risk factors, antisocial values or beliefs. If he's thinking that, **those are criminal thinking errors**, and that means he still has unmet needs that should've been addressed. If he's still thinking that way, then I need to know that, because those are factors that matter.

Id, at p.217-18. As the prior testimony unequivocally established that Defendant was still claiming he was shooting randomly through the bushes and never went into the residence as late as his evaluation with Dr. Timme, and numerous times before that with prison staff and in mediation, these facts and Dr. Gnall's testimony fully support the trial court's conclusions that Defendant continues to engage in criminal thinking.

iii. The Trial Court Considered All Relevant Sentencing Factors

Defendant's remaining claims challenge the way in which the trial court weighed the evidence. Pennsylvania sentencing law directs that "the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact of the life of the victim and on the community, *and* the rehabilitative needs of the defendant." Commonwealth v. Bonner, 135 A.3d 592, 604 (Pa. Super. 2016), *appeal denied*, 636 Pa. 657 (2016)(quoting 42 Pa.C.S. § 9721(b))(emphasis added).

Here, the trial court not only had the benefit of a pre-sentence investigation report, it also had the benefit of both expert and lay testimony to inform Defendant's

individualized sentencing. "When, as here, the trial court has the benefit of a pre-sentence report, we presume that the court was aware of relevant information regarding the defendant's character and weighed those considerations along with any mitigating factors." Commonwealth v. Seagraves, 103 A.3d 839, 842 (Pa. Super. 2014), *appeal denied*, 116 A.3d 604 (Pa. 2015). For this reason alone, Defendant's challenge to his sentence must fail. *See* Commonwealth v. Boyer, 856 A.2d 149, 154 (Pa. Super. 2004), *aff'd on other grounds*, 891 A.2d 1265 (Pa. 2006)("The sentencing judge can satisfy the requirement that reasons for imposing sentence be placed on the record by indicating that he or she has been informed by the pre-sentencing report; thus properly considering and weighing all relevant factors.").

The trial court further explained that it considered all of this information as well as Defendant's homelife growing up, his untreated ADHD, as well as the fact that it has been seven years since his last prison misconduct. The court considered his positive behavior in prison and his participation in programming. N.T., 11/21/2022, p.64-67. However, much to Defendant's chagrin, the trial court was also required to consider the nature of the crime, its impact on the victims, and the negative portions of Defendant history including his 15 prison misconducts, which included violent misconducts, the fact that he has never fully accepted responsibility for his action, had limited remorse, and killed four people. *Id*, at p.67-68. Plainly, the record reflects that the trial court did consider all relevant factors – including

those factors which are specifically enumerated in Miller as well as 18 Pa.C.S. § 1102.1. N.T., 11/21/2022, p.65.

In an attempt to support his claim, that this Court failed to give proper consideration to his mitigation evidence, Defendant points to Commonwealth v. Schroat, *supra*. Contrary to his assertions, the stark contrast between the facts before the Schroat Court and the matter at hand demonstrate that this Honorable Court did not err in its weighing of the required factors. Initially, Schroat had accrued only four minor misconducts during his 26 years of incarceration and none of them were violent. Id, at 528-29. In comparison, Defendant had 15 misconducts across 24 years and four of them were violent in nature.

Moreover, the expert testimony in Schroat was truly uncontradicted and clearly established that despite his tumultuous and unhealthy upbringing which led to the commission of his offenses, Schroat's time in the more stable environment of prison resulted in a finding that there was currently no evidence of emotional or psychological conditions and that Schroat demonstrated a low risk of violence. Id. Despite this, the sentencing court outright rejected the idea that the passage of time in an institutional and rehabilitative setting could address the psychological concerns which plagued Schroat in his youth. There, the sentencing court stated:

> The internal demons that caused Appellant to stab and strangle Victim did not permanently disappear because of "maturity," brain development, and prison... Contrary to Appellant's expert, the court concludes that the type

> of sickness that drove Appellant to kill Victim did not just disappear with "maturity," or brain development, or prison."

Id, at p.529 (quoting Trial Ct. Op., p.15-16; 18)(alterations omitted).

The clear error committed by the sentencing court in Schroat was using nothing but the nature of time crime itself to discredit any expert opinion. Additionally, with no basis in science, fact, or law, the court there explicitly rejected the underlying premise that any amount of time or intervening treatment could have addressed the issues leading to Schroat's heinous crimes and used only the acts committed nearly thirty years prior to reaching this conclusion. Id, at 530 ("in the sentencing court's view, Appellant has made no progress because he committed murder in 1992.").

The same is simply not true in this matter. Here, the Court explicitly found and commented on the fact that the Defendant has made progress and demonstrated a capacity for change. N.T. 11/21/22, p.67. This Court weighed these factors, along with the other statutory factors, and ultimately deviated downward from the starting point of the mandatory minimum provisions which would have been imposed had these murders been committed after 2012. *See* 18 Pa.C.S. § 1102.1(a)(1). Ultimately, the other required factors militated in favor of consecutive sentences so as to not depreciate the seriousness of the crimes.

Under these facts, this matter is governed by the Superior Court's decision in Commonwealth v. Miller, 275 A.3d 530 (Pa. Super. 2022) *appeal denied*, 302 A.3d

626 (Pa. 2023)(hereinafter "J.J. Miller"). In that matter, the appellant was convicted of first-degree murder for a slaying committed in 1989 while he was 17 years old. At his re-sentencing, pursuant to Miller/Montgomery, he also presented expert testimony on his rehabilitation, the treatment for his drug and alcohol addiction which started when he was very young, his successful training certificates obtained in prison, mentorship of younger offenders, as well as a clean behavioral record since 1999. The Commonwealth presented only victim impact testimony from the victim's family members. J.J. Miller, at 532-33. The court there ultimately sentenced the appellant to a sentence of 55 years to life on the single count of first-degree murder. Id, at 533.

On appeal, this sentence was challenged as too severe of a sentence in that it exceeded the starting consideration point of 35 years. The appellant there, much liked Defendant here, argued that this sentence was based solely on nature of the crime and disregarded evidence that proved he was rehabilitated and demonstrated that he expressed remorse. Ultimately, the Superior Court disagreed:

> Based on our review of the record and relevant case law, we conclude that the court did not abuse its discretion in rendering its sentence. As noted above, it was solely within the province of the sentencing court to weigh the evidence and balance the sentencing factors. Based on the court's consideration of the PSI and the other evidence presented, we conclude that Appellant's sentence of 55 years to life imprisonment is not manifestly unreasonable.

J.J. Miller, at 536 (quotations and citations to trial court record omitted).

While the matter before this Court is distinguishable from the facts in J.J. Miller, those distinguishing characteristics cut against Defendant's arguments. The appellant in J.J. Miller had gone 21 years between his last prison misconduct and the re-sentencing date – including periods of time in which he had no hope of release. Defendant, by contrast, had only gone seven years and that time had occurred only after Defendant was put on notice that a re-sentencing hearing was likely and thus, good behavior was in his best interests. Additionally, a fact that can never be overlooked, Defendant killed four people and received his sentence across four counts of first-degree murder while the appellant in J.J. Miller killed just one person.

The trial court, like the court in J.J. Miller, properly considered all of the relevant factors as required by both statutory and decisional law. The trial court exercised its discretion and weighed those factors against each other as required to ultimately find that Defendant's rehabilitation efforts were worthy of a mitigated sentence on each count, but that each count must run consecutive to each other as to not diminish the seriousness of the crime and to reflect the impact these killings had on the victims and the community. The claim Defendant now forwards to this Honorable Court is nothing more than a request to re-weigh those factors *de novo*, but this is not a proper ground for relief. Commonwealth v. Macias, 968 A.2d 773, 778 (Pa. Super. 2009)("We cannot re-weigh the sentencing factors and impose our judgment in the place of the sentencing court."); *See also*, Commonwealth v. Perry,

612 Pa. 557, 574 (2011)("it is clear that the sentencing court properly considered the nature and circumstances of the offense, including the gravity of the offense and the impact on the life of the victim; the protection of the public; and the history, characteristics, and rehabilitative needs of [Defendant], in imposing its sentence.").

Accordingly, the judgment of sentence must be affirmed.

VII. CONCLUSION

As all of Defendant's claims are either waived, meritless, or both, Defendant's judgment of sentence must be affirmed.

WHEREFORE, based upon the foregoing, the Commonwealth of Pennsylvania respectfully requests that this Honorable Court enter an Order AFFIRMING the judgment of sentence.

Respectfully submitted:

/s/ John T. Fegley

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VIII. CERTIFICATES OF COMPLIANCE

I, John T. Fegley, Esq., attorney for the Commonwealth, do hereby aver that, using Microsoft Word's word count tool, I have determined the principal Brief of Appellant contains 13,992 words. This count includes footnotes but does not include pages which are excludable under Pa.R.A.P. 2135(b).

I 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 non-confidential information and documents.

Respectfully submitted,

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IX. CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document upon the persons and in the manner indicated below:

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