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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

REPLY BRIEF OF APPELLANT

January 5, 2024

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Constitutional Provisions

Other Authorities

I. INTRODUCTION

At the heart of Mr. King's legal challenges to his aggregated sentences, which the Commonwealth does not deny constitute a *de facto* life sentence, is the fact that the Sentencing Court expressly found that "[Mr. King] has demonstrated a capacity for change," (R. 438a), and that he is " capable of rehabilitation….", (R. 54a). The Commonwealth never deals with this fact in its brief when addressing Mr. King's legal challenges to his *de facto* life sentence.

Instead, the Commonwealth erroneously mischaracterizes Mr. King's argument, claiming that Mr. King is arguing that the Sentencing Court first had to find him permanently incorrigible before sentencing him to a *de facto* life sentence. This is ***not*** Mr. King's argument, and the distinction is critical. As set forth in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), *Montgomery v. Louisiana*, 577 U.S. 190 (2016), and *Miller v. Alabama*, 567 U.S. 460 (2012), sentencing a child who is capable of change and rehabilitation to life or *de facto* life sentence is disproportionate under the Eighth Amendment. *See Jones*, 141 S. Ct. at 1315 n.2; *Montgomery*, 577 U.S. at 212; *Miller*, 567 U.S. at 479. Thus, while the Commonwealth is correct that under *Jones* 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, here the Sentencing Court made the explicit, substantive findings that Mr. King is capable of change and rehabilitation. As such, Mr. King's

de facto life sentence is disproportionate under the Eighth Amendment, both categorically and as applied to Mr. King. *See id*.

Mr. King's *de facto* life sentence, categorically and as applied to Mr. King, also violates the Pennsylvania Constitution's prohibition on "cruel punishments." Mr. King shows that under the *Edmunds* test, based upon the history of Article I, Section 13 and Pennsylvania's special treatment of children, "cruel punishments" are any punishment of a juvenile that is unnecessary to prevent or deter crime. The Commonwealth does not deny or challenge this history or the conclusion. The United States Supreme Court has held life sentences for juveniles does not deter crime. Thus, because Mr. King is capable of change and rehabilitation, a *de facto* life sentence is a cruel punishment prohibited by the Pennsylvania Constitution.

Finally, Mr. King also shows that the Sentencing Court abused its discretion in imposing a *de facto* life sentence that 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

As set forth, *infra*, Mr. King preserved all of these challenges to his aggregate sentences in multiple filings with the Sentencing Court, and the Sentencing Court addressed them in its Opinion.

For all the reasons set forth in Mr. King's opening Brief (hereinafter "Br.") and herein, this Court should vacate the sentences imposed and remand the matter to the Sentencing Court for the issuance of new sentences.

II. ARGUMENT

A. A *De Facto* Life Sentence for a Child Found to Be Capable of Change and Rehabilitation Is Disproportionate Under the Eighth Amendment

The Commonwealth does not dispute that: when a sentencing court finds that a juvenile is capable of change and rehabilitation, a *de facto* life sentence is categorically disproportionate under the Eighth Amendment[1]; Mr. King's aggregated sentences of 80 years to life constitute a *de facto* life sentence, and; the Sentencing Court expressly found that Mr. King is capable of change and rehabilitation.

Thus, because a *de facto* life sentence is categorically disproportionate under the Eighth Amendment for a child found to be capable of change and rehabilitation, Mr. King's *de facto* life sentence is unconstitutional.

The Commonwealth's only response is that *Commonwealth v. Foust* requires this Court to review Mr. King's sentences individually. 180 A.3d 416, 434 (Pa. Super. 2018). As discussed in Mr. King's opening Brief, while this Court is bound by *Foust*, 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). Mr. King contends that when review is possible, *Foust* should be overruled.

[1] The Commonwealth does not dispute that Mr. King preserved this argument for appeal, which he did. *See* Br, Exh. A ("Statement of Errors") at ¶¶ 1-2, 6-8, 11, 12.

The Commonwealth argues that even though *Foust* favorably cited *McCullough v. State*, 168 A.3d 1045 (Md. Ct. Spec. App. 2017), which was reversed, *see Carter v. State*, 192 A.3d 695 (Md. 2018)[2], *Foust* was predicated upon Pennsylvania case law that holds that a defendant convicted of multiple crimes is not entitled to "volume discounts". But *Foust* erred in relying upon those "volume discount" cases because they all addressed adult defendants, not juveniles, who are "different" than adults. *See Miller*, 567 U.S. at 471; *Graham v. Florida*, 560 U.S. 48, 71 (2010). This distinction matters. While consecutive sentences standing alone may be constitutional, the reality is that "consecutive sentences are not 'standing alone' when they also involve a juvenile defendant." *State v. Kelliher*, 849 S.E.2d 333, 349 (N.C. Ct. App. 2020), review allowed, writ allowed, appeal dismissed, 854 S.E.2d 584 (N.C. 2021), and aff'd as modified, 873 S.E.2d 366 (N.C. 2022). As the United States Supreme Court recognized in *Graham*, "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. ***This reality cannot be ignored***." 560 U.S. at 70-71 (citations and quotations omitted) (emphasis added).

Multiple well-reasoned decisions from courts of other states decided after *Foust*, provide persuasive analyses as to why a court should be able to consider consecutive sentences in the aggregate in determining if the sentences are

[2] Superseded by statute as stated in *Farmer v. State*, 281 A.3d 834, 841 (Md. 2022).

constitutionally disproportionate. *See State v. Kelliher*, 849 S.E.2d 333 (N.C. 2020); *White v. Premo*, 443 P.3d 597 (Or. 2019); *Ira v. Janecka*, 419 P.3d 161 (N.M. 2018); *Carter v. State*, 192 A.3d 695 (Md. 2018). The Commonwealth fails to address *White*, *Ira*, or *Carter*.

The Commonwealth's attempt to distinguish *State v. Kelliher* actually proves why *Foust* is flawed. In explaining its decision to evaluate the constitutionality of consecutive sentences in the aggregate, the North Carolina Supreme Court referred to a North Carolina statute that "compel[s] the State to consider consecutive sentences as a single punishment." 849 S.E.2d at 349 (citing N.C. Gen. Stat. § 15A-1354(b)). That statute directs that a defendant's consecutive sentences should be aggregated and treated, for parole eligibility purposes, as a consecutive sentences as a single sentence. N.C. Gen. Stat. § 15A-1354(b). The Commonwealth argues that Pennsylvania law does not have a similar provision. To the contrary, Pennsylvania views consecutive sentences in the same way for parole purposes. *See* 42 Pa.C.S.§ 9762(f).[3] This is why Mr. King will not be eligible for parole for 80 years. *Kelliher*, among decisions from other state courts, compels a similar analysis here.[4]

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[3] *See* 53 Pa. Bulletin 5267, 5366 (2023). https://www.pacodeandbulletin.gov/secure/pabulletin/data/vol53/53-34/53-34.pdf; Pennsylvania Sentencing Information – Fact Sheet, https://www.cor.pa.gov/community-reentry/Documents/Parole%20Case%20Example/Pennsylvania%20Sentencing%20Information.pdf (last visited January 3, 2024).

[4] *See also State v. Ramos*, 387 P.3d 650, 659 (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

Lucero v. People, cited by the Commonwealth, is distinguishable because the court noted that "Colorado has a parole system, and the parties agree that Lucero will be eligible for parole when he is fifty-seven", thus it was not a true *de facto* life sentence. 394 P.3d 1128, 1133 (Colo. 2017). As to the other two cases cited by the Commonwealth, *State v Brown*, 118 So.3d 332 (La. 2013) and *Vazque v. Commonwealth*, 781 S.E.2d 920 (Va. 2016) *cert. denied sub nom*, *Vasquez v. Virginia*, 137 S. Ct. 568 (2016), their reasoning is flawed when compared to the analysis in the other state Supreme Court cases Mr. King cites. Even *Foust* rejected the reasoning in *Lucero* and *Vasquez*, "find[ing] unpersuasive the reasoning of courts which have upheld de facto LWOP sentences under *Graham* or under *Miller* for juvenile defendants capable of rehabilitation." 180 A.3d at 433.

Mr. King's case demonstrates why *Foust* should be overruled. The Sentencing Court found that Mr. King is capable of change and rehabilitation. Further demonstrating that the Sentencing Court believed Mr. King's crime was a reflection of his transient youth and immaturity, it imposed a sentence of 20 years to life for each victim, a term of years far below the mandatory minimum of 35 years to life under the current statute. 18 Pa.C.S. § 1102.1(a)(1). Thus, Mr. King is not that "rarest of children whose crimes reflect 'irreparable corruption.'" *Montgomery*,

(Wyo. 2014); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013); *People v. Caballero*, 282 P.3d 291, 294-95 (Cal. 2012).

577 U.S. at 726 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)), and the lifetime he will spend in prison is a disproportionate sentence under the Eighth Amendment. *Id.*

Consistent with United States Supreme Court precedent, 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 sentence is disproportionate. It should also hold that Mr. King's aggregated sentences constitute a *de facto* life sentence. Finally, because the Sentencing Court found Mr. King is capable of change and rehabilitation, his sentence is disproportionate under the Eighth amendment, and it should vacate Mr. King's sentences and remand to the Sentencing Court for the issuance of new sentences.

B. As Applied to Mr. King's Case, a *De Facto* Life Sentence Is Disproportionate Under the Eighth Amendment

Mr. King argues that his *de facto* life sentence as applied to him is disproportionate under the Eighth Amendment because he is capable of change and rehabilitation. (Br. at 31-35). Mr. King preserved this argument for appeal. In Mr. King's Statement of Errors, Mr. King stated that the Sentencing Court committed error because his sentence violates that constitutional mandate that life sentences for juveniles be rare and only for crimes that reflect irreparable corruption and, in his case, he is not one of those rare juveniles. (Br. Exh. A at ¶¶ 4, 7-12; *see also generally* Mr. King's Supplemental Brief Concerning the Application of *Miller v.*

Alabama to Sentencing, Nov. 22, 2022; Mr. King's Post Sentence Motion to Vacate the Sentences and Reconsider Sentencing, Nov. 30, 2022, at ¶¶ 2, 6-10, 17 -32). He provided details about why the facts of his case demonstrate that his *de facto* life sentence was disproportionate under the Eighth Amendment. *Id.*

The Commonwealth suggests that Mr. King did not preserve his argument because he did not use the terms "narrow proportionality" or "grossly disproportionate" in his Statement of Errors and other documents filed with the Sentencing Court. But Mr. King did not use those terms because, as set forth in his opening Brief, the proper standard for evaluating an as applied claim in a juvenile's case is the same standard articulate in *Miller*, *Graham*, and *Montgomery*, not "narrow proportionality" or "grossly disproportionate". Mr. King challenges his *de facto* life sentence under those cases and he preserved that argument. *Id.* Even the Sentencing Court acknowledged that Mr. King made these challenges to the legality of his sentence, had the opportunity to address them, and declared them "moot". (R. 33a).

If there is any doubt, this Court may still address Mr. King's as applied claim because, "an appellate court can address an appellant's challenge to the legality of his sentence even if that issue was not preserved in the trial court; indeed, an appellate court may raise and address such an issue *sua sponte*." *Commonwealth v. Hill*, 238 A.3d 399, 407 (Pa. 2020); *Commonwealth v. Batts*, 163 A.3d 410, 435 (Pa.

2017), abrogated on other grounds by *Jones*, 141 S. Ct. 1307 ("There is no dispute, however, that a claim challenging a sentencing court's legal authority to impose a particular sentence presents a question of sentencing legality.") Notably, "[t]he issue preservation requirement 'ensure [s] that the trial court that initially hears a dispute has had an opportunity to consider the issue[,]' which in turn 'advances the orderly and efficient use of our judicial resources[,]' and provides fairness to the parties." *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1274 (Pa 2014) (quoting *In re F.C. III*, 2 A.3d 1201, 1211 (Pa. 2010)). Here, the Sentencing Court declined to address this issue. (R. 33a).

The Commonwealth also asserts that Mr. King did not develop his argument in his Brief, but that is belied by everything Mr. King sets forth in his Brief. (Br. at 31-35).

As to the merits of Mr. King's as applied challenge, relevant here, the Commonwealth does not challenge either that Mr. King's 80 years to life aggregated sentences constitute a *de facto* life sentence or Mr. King's legal conclusion that *Foust* is not binding on an as applied claim. Instead, the Commonwealth mischaracterizes Mr. King's as applied challenge, claiming he seeks to create a rule that a sentencing court must find a juvenile to be permanently incorrigible before imposing a life or *de facto* life sentence. Rather, as set forth above and throughout Mr. King's opening Brief, Mr. King argues that sentencing a child who is capable of change and

rehabilitation to a *de facto* life sentence is disproportionate under the Eighth Amendment. *See Miller*, 567 U.S. at 479; *Montgomery*, 577 U.S. at 211; *Jones*, 141 S. Ct. at 1315, n.2. Thus where, as here, the Sentencing Court expressly found that Mr. King is capable of change and rehabilitation, a *de facto* life sentence, as applied to Mr. King, is disproportionate under the Eighth Amendment.

The Commonwealth argues that if Mr. King does not win his categorical argument, he should not be entitled to circumvent that decision by making an as applied challenge. The *Jones* Court disagreed. While the defendant in *Jones* was not successful on his categorical argument, the Supreme Court noted that he still could have made an as applied challenge. 141 S.Ct. at 1322. Justice Sotomayor's dissent, joined by Justices Breyer and Kagan, also recognized that: "[t]he Court leaves open the possibility of an 'as applied Eighth Amendment claim of disproportionality.'" *Id.*, at 1337 (Sotomayor, J., dissenting).

The Commonwealth then argues that the Court should use the "narrow proportionality" standard discussed in *Harmelin v. Michigan*, 501 U.S. 957, 996–1009 (1991) in evaluating Mr. King's as applied challenge. But the Commonwealth fails to address Mr. King's argument in his opening Brief that the proper standard for his as applied challenge is same standard used for categorical challenges for juvenile defendants applied by *Miller*, *Montgomery*, and *Graham*. (Br. at 32-33). The dissent in *Jones* agreed: "In the context of a juvenile offender, such a[s-applied]

claim should be controlled by this Court's holding that sentencing 'a child whose crime reflects transient immaturity to life without parole ... is disproportionate under the Eighth Amendment.'" 141 S. Ct. at 1337 (dissent, J. Sotomayor) (quoting *Montgomery*, 577 U.S. at 211). Thus, the Court should evaluate Mr. King's as applied claim under *Miller*, *Montgomery*, and *Graham*.

The Commonwealth's final argument refers to Mr. King's crime. But, as recognized by the United States Supreme Court: "[t]he opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 577 U.S. at 212. Mr. King demonstrates the truth of *Miller*: despite his crime, he is capable of change and rehabilitation. (R. 54a, R. 438a). Thus, as applied to Mr. King, his 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. A *De Facto* Life Sentence for a Child Found to Be Capable of Change and Rehabilitation Constitutes "Cruel" Punishment Prohibited by Article I, Section 13 of the Pennsylvania Constitution

Mr. King properly preserved his argument that a *de facto* life sentence for a child capable of change and rehabilitation constitutes cruel punishment prohibited by Article I, Section 13 of Pennsylvania's Constitution. In Mr. King's Sentencing Memorandum dated October 21, 2022, Mr. King stated:

> [A] *de facto* life sentence may violate the Pennsylvania Constitution's prohibition against "cruel punishment." The Pennsylvania Constitutional protection against "cruel punishment" is broader than the United States Constitutional prohibition against "cruel and unusual punishment." *Cf.* U.S. CONST. Amend. 8; PA. CONST. art. 1, § 13. As Justice Donohue noted in her concurrence in *Felder*:
>
> Today's decision does not foreclose further developments in the law as to the legality of juvenile life without parole sentences (or their *de facto* equivalent as alleged here) under the Pennsylvania Constitution nor as to how appellate courts will review the discretionary aspects of such sentences. *Felder*, 269 A.3d at 1247.

Exhibit DS-2 at Resentencing Hearing, at p. 5.

Mr. King reiterated that a *de facto* life sentence would violate Article I, Section 13's prohibition on cruel punishment, both categorically and as applied to him in his: Supplemental Briefing Concerning the Application of *Miller v Alabama* dated November 20, 2022, at p. 4 n.4; closing argument, (R. 393a-395a, 404a); Post-Sentencing Motion for Reconsideration dated November 30, 2022, ¶¶ 2, 7-10, 17-32, and; Statement of Errors, ¶¶ 1, 7, 8, 10.

The Sentencing Court even addressed Mr. King's argument in the Opinion:

> The question of whether "any or all components of Batts II remain in place with respect to the Pennsylvania Constitution's prohibition of [']cruel punishments[']" under Article I, Section 13 of the Pennsylvania Constitution (or "further developments in the law as to the legality of juvenile life without parole Sentences") "remains an open question" in Pennsylvania. S*ee Commonwealth v. Felder*, 269 A.3d at 1247-1250 (Donahue, J. Concurring Opinion joined by Justice Todd).
>
> And so, if or until the Pennsylvania appellate courts address additional legality of the sentence claims raised by juvenile murder defendants in relation to the language and protections of Article l, Section 13 of the

> Pennsylvania Constitution versus the language and protections of the 8th Amendment of the U.S. Constitution (or other due process or equal protection claims), *Felder* is the controlling case law in Pennsylvania when resentencing juvenile murder defendants.

R. 32a-33a (footnotes omitted).[5]

As to the merits of Mr. King's claim, the Commonwealth erroneously "discerns Defendant's argument to be that this Court should find that the state charter has a narrow proportionality rule which adopts the factual requirement that was rejected by the Supreme Court in Jones." Mr. King asks "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." (Br. at 36).

The Commonwealth also contends that *Commonwealth v. Batts*, 66 A.3d 286, 297 (Pa. 2013) ("*Batts I*") rejected the argument that Article I, Section 13 provides a broader proportionality than the Eighth Amendment. Mr. King's argument is different. He argues that there is a distinction between the conceptions of "cruel" in Article I, Section 13 and "cruel and unusual" in the Eighth Amendment, a question unanswered in *Batts I*. *Commonwealth v. Felder*, 269 A.3d 1232, 1235 n.4, 1248 (Pa. 2022), reargument denied (Apr. 12, 2022).

[5] To the extent there is any doubt, which it should not, this Court may still address this claim. *See Hill*, 238 A.3d at 407; *Batts*, 163 A.3d at 435.

As set forth in his opening Brief and *infra*, based upon the *Commonwealth v. Edmunds*, 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. 526 Pa. 374, 586 A.2d 887 (1991).

1. There Is a Textual Difference Between Article I, Section 13's Prohibition on Cruel Punishments and the Eighth Amendment.

The Commonwealth alleges that any differences between Article I, Section 13 and the Eighth Amendment are "minor discrepancies in wording". Former Chief Justice Castille disagreed with this view: "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.'" *Commonwealth v. Baker*, 78 A.3d 1044, 1052 (Pa. 2013) (Castille, C.J., concurring). The Commonwealth does not otherwise address the case law cited by Mr. King on this point.

Instead, the Commonwealth argues that the Pennsylvania Supreme Court has ruled that Article I, Section 13 is coextensive with the Eighth Amendment. But the Commonwealth fails to address the cases cited by Mr. King, which hold that *Commonwealth v. Zettlemoyer* 454 A.2d 937, 967–69 (Pa. 1982), spoke to a coextensive standard only within the context in which that case was decided. *See Commonwealth v. Means*, 773 A.2d 143, 151 (Pa. 2001). Courts remain obligated to conduct a separate Article I, Section 13 analysis: "claims of cruel punishment may

warrant a separate analysis under the U.S. and Pennsylvania Constitutions, as the two could conceivably yield different results in the same factual scenario, particularly where there is some basis for a distinct state constitutional approach." *Baker*, 78 A.3d at 1054–55 (Castille, C.J., concurring).

Thus, the cases cited by the Commonwealth are distinguishable, because even where the Pennsylvania Supreme Court has addressed whether Article I, Section 13 and the Eighth Amendment are coextensive in analyzing whether a forfeiture violates both the U.S. and Pennsylvania Constitutions, *Commonwealth v. Real Prop. & Improvements*, 832 A.2d 396 (Pa. 1986) or in the context of the death penalty, *Jackson v. Hendrick*, 503 A.2d 400 (Pa. 1986), the Court is still required to conduct a separate analysis on the question presented by Mr. King.

2. The Commonwealth Does Not Dispute that When Article I, Section 13 Was Adopted, Cruel Punishments Were Punishments in Excess of What Was Necessary to Prevent Crime.

The Commonwealth does not address the historical background underlying the adoption of the cruel punishments clause and why Pennsylvania considered "cruel punishments" to be punishments unnecessary to preventing crime, and only punishments required for deterrence were permissible. (Br. at 40-42).

Instead, the Commonwealth argues that because Pennsylvania sought and obtained the death sentence for juveniles in the past, this somehow shows that Pennsylvania does not treat children differently than adults. To the contrary, even

when a juvenile is accused of murder, Pennsylvania law still treats those juveniles differently, as that juvenile may petition to have their case transferred to juvenile court. *See* 42 Pa. C.S. § 6322. Further, the cases the Commonwealth cites are distinguishable because in neither case was the Court asked to determine whether such punishments constituted "cruel" punishment under Article I, Section 13. *See Commonwealth v Hughes*, 555 A.2d 1264 (Pa. 1989); *Commonwealth v. Lee*, 662 A.2d 645 (Pa. 1995). Finally, the Commonwealth's argument is contradicted by the Pennsylvania Supreme Court's recognition in *Batts I* that Pennsylvania has a history of treating juvenile offenders differently. 66 A.3d at 299.

Thus, as set forth in his opening Brief and herein, the history of the Pennsylvania Constitution supports this Court holding that sentencing a child capable of change and rehabilitation to life in prison is a cruel punishment.

3. Other Courts Have Found that It Constitutes Cruel Punishment to Sentence a Child Capable of Change to Life in Prison.

The Commonwealth argues that the cases cited by Mr. King in his opening Brief and by the *Amici* that found life sentences for corrigible juveniles to be cruel are distinguishable because the constitutions in those states prohibit "cruel or unusual" punishments, not just "cruel punishments. But the cited cases directly address whether a punishment is "cruel" and, thus, are analogous to Article I, Section 13. For example, in *Kelliher*, although North Carolina's Constitution prohibits

"cruel or unusual punishments", its Supreme Court directly addressed whether sentencing a juvenile who can be rehabilitated to life without parole is "cruel," and answered that question in the affirmative. 873 S.E.2d at 366.

The Commonwealth argues that *State v. Bassett*, which held that "sentencing juvenile offenders to life without parole or early release constitutes cruel punishment" under Washington's Constitution (that prohibits "cruel punishments"), is distinguishable because the "cruel punishment" language was not the court's primary concern. 428 P.3d 343, 355 (Wash. 2018).[6] But the Commonwealth mischaracterizes *Bassett*. In that case, the court undertook an analysis similar to the *Edmunds* analysis, and then held that in the context of juvenile sentencing, the state constitution's prohibition on cruel punishment provides greater protection than the Eighth Amendment. *Id.*

The cases to which the Commonwealth tries to analogize are distinguishable because none of them addressed the contours of "cruel" punishment in a juvenile life without parole case. *See State v. Wilson*, 413 S.E.2d 19, 27 (S.C. 1992)[7] (addressing the death penalty for a mentally ill adult); *State v Venman*, 564 A.2d 561, 581-82 (Vt. 1989) (addressing constitutionality of sentence for adult convicted of filing false Medicaid claims); *State v. Taylor*, 70 S.W.3d 717, 720 (Tenn 2002) (addressing

[6] In Mr. King's opening Brief he cited to *State v. Haag*, 495 P.3d 241, 248 (Wash. 2021), which supports his point but does not state it as explicitly as *Bassett*.
[7] The Commonwealth fails to note that *Wilson* was overruled on other grounds by *Roper*.

whether fine for DUI was "cruel and unusual" where Tennessee Constitution prohibits "cruel and unusual punishment); *Sanders v. State*, 585 A.2d 117 (Del. 1990) (addressing whether defendant found to be mentally ill may be sentenced to death).

Thus, cases from other jurisdictions with similar Constitutional language support an analogous conclusion here.

4. Pennsylvania Policy Supports Holding That a *De Facto* Life Sentence for Corrigible Juveniles Constitutes a Cruel Punishment.

In addressing policy considerations of how this Court is to interpret the Pennsylvania Constitution, the Commonwealth ignores Mr. King's argument that Pennsylvania law has long recognized that children are different than adults and require additional attention and care. (Br. at 46-48).

Instead, the Commonwealth reiterates that criminal defendants are not entitled to volume discounts. The Commonwealth fails to grapple with Mr. King's argument that the case law cited in *Foust* all involved adults, not juveniles. Mr. King is not arguing, and this Court need not find, that all aggregated sentences are *per se* cruel punishment. Mr. King is arguing that Pennsylvania's longstanding policies that regard children differently than adults supports the conclusion that sentencing a juvenile capable of change and rehabilitation to life in prison is a cruel punishment under the Pennsylvania Constitution.

The Commonwealth next engages in fearmongering, asserting that Mr. King's suggested legal holding will encourage children to kill multiple people. The Commonwealth's irrational and conclusory argument is unsupported by facts or law. Indeed, 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; *cf. Roper*, 543 U.S. at 571 (noting "the absence of evidence of deterrent effect" of the death penalty on juveniles as part of its justification for holding the execution of juvenile offenders to be unconstitutional).

D. As Applied to Mr. King, Because the Sentencing Court Found Him to Be Capable of Change and Rehabilitation, His *De Facto* Life Sentence Constitutes "Cruel" Punishment Prohibited by Section 13 of the Pennsylvania Constitution.

The Commonwealth fails to address Mr. King's as applied argument under the Pennsylvania Constitution. The Commonwealth does not dispute that: 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; this Court should follow *Miller's* substantive rule as controlling that evaluation, 567 U.S. at 479, and; Mr. King's aggregated sentences constitute a *de facto* life sentence. Thus, for the reasons set forth in Section II.B, *supra*, and Mr. King's opening Brief, *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.

E. The Court Should Vacate Mr. King's Sentences Because the Sentencing Court Abused Its Discretion.

Mr. King raised a substantial question. This 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) (citing *Commonwealth v. Moury*, 992 A.2d 162, 170 (Pa. Super. 2010)). "'A substantial question exists only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process.'" *Id.* (quoting *Moury*, 992 A.2d at 170) (citation and quotation marks omitted).

Mr. King meets this standard. Here, Mr. King does not challenge the Sentencing Court's decision to run his sentences consecutively. As set forth in his Rule 2119(f) statement, Mr. King challenges the sentences run consecutively as manifestly excessive because "[t]he 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)." (Br. at 21); *see Schroat*, 272 A.3d at 527 (substantial question where alleged "that the sentencing court abused its discretion by sentencing him to an excessive LWOP sentence, placing inordinate focus on the facts of the underlying offense, failing to consider relevant mitigating factors, and failing to consider evidence of his rehabilitation while in prison.")

Accordingly, this Court may turn to the issue of whether the Sentencing Court abused its discretion.

In his opening Brief, Mr. King describes how the Sentencing Court erred by placing inordinate focus on the underlying offense where evidence and unrebutted testimony of expert and lay witnesses belied the Sentencing Court's conclusions. In response, the Commonwealth argues that although it did not present any expert or lay witness testimony to rebut Mr. King's witnesses, an expert or lay witnesses testimony may be challenged through cross-examination. While that is true, the Commonwealth fails to demonstrate where it did so.

Mr. King also argued that the Sentencing Court failed to genuinely take into consideration his rehabilitative needs because it did not explain how Mr. King's rehabilitative needs were served by spending the remainder of his life in prison, especially where his capacity for rehabilitation requires a sentence that would provide him a chance to face a parole board that can evaluate if he is rehabilitated. (Br. at 53-54). The Commonwealth does not dispute this point.

Mr. King argued that the Sentencing Court's conclusion that he continues to engage in "criminal thinking" was not supported, and was contradicted, by the evidence. (Br. at 51-52). The Commonwealth responds by taking Ms. Gnall's testimony out of context. In the testimony quoted by the Commonwealth, Ms. Gnall was not addressing whether Mr. King currently engages in criminal thinking, but was responding to a question about how she factored the actual crime into her opinion. (R. 284a). She explained that the literature and actuarial tools do not take the crime into account when determining whether a defendant is likely to reoffend because there is not a scientifically proven relationship between the two. (R. 285a). The Commonwealth failed to rebut or challenge this testimony.

Further, Ms. Gnall testified that taking all of the evidence presented to her into consideration, even the dispute on whether Mr. King adequately took responsibility for "intentionally" committing the crimes, she concluded in her expert opinion that "Mr. King has mitigated the dynamic risk factors that he presented with on intake to

the prison system. I think those conclusions are sound based on everything that's in my report that I considered in doing that." (R. 308a). The Commonwealth failed to present contrary expert testimony.

Further, Appellee did not dispute that it was unrebutted that: Mr. King had no mental health issues; Mr. King had changed; Mr. King had mitigated his risks taking programs in prison, and that his remaining misconduct free since 2015 indicated a veritable change, and; Mr. King was respectful to inmates and staff, participated in programming that supported other inmates, and staff felt safe around him. (R. 76a, R. 102a-103a; R. 211a-220a, 234a-238a; R. 266a-268a, R. 338a-340a).

The Commonwealth also argues that the Sentencing Court's conclusion that "the murders were premeditated and part of Defendant's ongoing drug business rather than the commission of a crime reflective of 'transient immaturity'" was supported by the record. (R. 3a). It is evident that the Sentencing Court's use of the phrase "transient immaturity" does not have the same meaning the United States Supreme Court assigned to the phrase. The United States Supreme Court used the phrase to refer to *all* juveniles, except those rare juveniles that are "irreparably corrupt." *Montgomery*, 577 U.S. at 208–09. Here, the Sentencing Court expressly found that Mr. King is capable of change and rehabilitation, so acknowledged that Mr. King is not one of the rare, irreparably corrupt juveniles. This conclusion is supported by the unrebutted expert testimony of Dr. Timme that based upon Mr.

King's personal history, he met all of the *Miller* factors, (R. 60a-90a, 321a-363a), something even Appellee conceded in its closing, (R. 429a).

In his opening Brief, Mr. King argues that the Sentencing Court erroneously relied upon Mr. King's alleged failure to adequately demonstrate remorse, and Appellee argues that this finding was supported by the evidence. To the contrary, the conclusion is belied by Mr. King's conduct. At the resentencing hearing, Mr. King did not object to any of the victim impact statements or the admission of photographs of the victims in life or to the Court seeing a video of the crime scene. That is the conduct of someone who accepts responsibility for his crimes and the consequences of those crimes to the families. While incarcerated, among other things, Mr. King participated in a violence prevention group called "Impact of Crime" and shared with the group about his crime and his experience meeting the relative of one of his victims in mediation, (R. 234a-235a), and 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. 158a, 269a-270a).

Mr. King's words demonstrate remorse. All four witnesses who testified in Mr. King's case testified that he took responsibility for the murders and was remorseful. (Br. at 51-53). The Commonwealth fails to address this in his Brief, except to state that Mr. King lied and deflected blame for his crimes when

interviewed by Dr. Timme, but Appellee's record citations do not support that conclusion and neither does the record. Mr. King also stated to the Sentencing Court that he was responsible for killing the four victims and that he was sorry. (R. 367a-370a). The Commonwealth fails to address this in his Brief.

Both Appellee and the Sentencing Court erroneously focused on the gravity of Mr. King's offense and their view that Mr. King had not taken responsibility because he told different versions of the crime in the past and did not admit to intentionally murdering his four victims. But relevant here is that the record reflects that the original trial court agreed that Mr. King was not targeting the people he ended up killing, referring to them as "random faceless victims", which is what Mr. King has taken responsibility for:

> Now, I am convinced and was convinced after hearing the evidence in this case that you were intending to get back at Mr. Ballard, to regain your sense of self worth, or self esteem to impress other people who may not have liked Mr. Ballard, but you ended up killing four people whose only sin was that they came to a party to have fun.

(R. 200a-201a).

The Commonwealth never grapples with that fact. Instead, Appellee raises the mediation in 2010, where, according to Mr. Jackson's daughter, Mr. King expressed remorse for three of the four deceased victims. The Commonwealth does not address that the mediation "changed the way that [Mr. King] really looked at what he had done, not only to the individuals that were murdered but also the impact that that had

on their family and the community at large." (R. 312a). In the years after that mediation, Mr. King took full responsibility and expressed remorse for all of his victims. (Br. at 51-53).

Notably, Appellee does not respond to the fact that Ms. Gnall's unrebutted expert 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."

In his opening Brief, Mr. King argued that the Sentencing Court abused its discretion because it decided to order that the sentences run consecutively based on the crime, without properly considering Mr. King's youth and rehabilitative needs, and because the same Sentencing Court in a different juvenile lifer case stated that it would run two sentences of 45 years to life concurrently because the offender's crime was one event. *Commonwealth v. Mazeffa*, No. CP-09-CR-1213-1986.

In response, Appellee argues that this Court is not permitted to take judicial notice of *Mazeffa*. To the contrary, "[a]n appellate court may take judicial notice of a fact to the same extent as a trial court." *Goff v. Armbrecht Motor Truck Sales, Inc*., 426 A.2d 628, 630, n.4 (Pa. Super. 1980) (*citing* McCormick, Evidence s 333 (2nd ed. 1972)). Mr. King only asks the Court to take judicial notice of the sentencing

standard the Sentencing Court used in issuing concurrent sentences in *Mazeffa*: that it issued concurrent sentences because it viewed the defendant's crime as one event.

The Commonwealth argues that Mr. King waived this argument because the Sentencing Court did not have an opportunity to address this argument. To the contrary, Mr. King first raised *Mazeffa* in his Sentencing Memorandum when addressing the appropriate sentence for Mr. King: "In five resentencing cases previously before this Court, it appears that the Court sentenced each of the defendants to between 40 years to life and 48 years to life. In the case of Richard Mazeffa, the only other defendant who committed multiple homicides, the Court sentenced Mr. Mazeffa to 45 years to life for each of the two murders, to be served concurrently." (Exhibit DS-2 at Resentencing Hearing, at p. 8, n. 2). In his closing, Mr. King argued that the Sentencing Court should give him concurrent sentences "because we believe that the crime should be viewed as one act", which was the standard the Sentencing Court set forth in *Mazeffa.* (R. 402a). Notably, Appellee raised *Mazeffa* in its closing argument. (R.412a). Mr. King raised this issue in his Post Sentence Motion to Vacate the Sentences and Reconsider Sentencing, Nov. 30, 2022, at ¶ 16. Mr. King also referred to *Mazeffa* in his Statement of Errors, which the Sentencing Court cited in its Opinion. (Br., Exh A, p. 8, n.1; R.29a).

The Commonwealth does not address Mr. King's argument as to why his crime should have also been viewed as one event. Br. at 55. This is critical because,

while there is no standard for issuing concurrent versus consecutive sentences in Pennsylvania case law or statute, the Sentencing Court announced its own standard in *Mazeffa*, and then failed to follow that standard in Mr. King's case. This is evidence that the Sentencing Court's decision was arbitrary, at best, rendering the Sentencing Court's sentences an abuse of discretion.

The Commonwealth also argues that because the Sentencing Court had a presentencing report and recited to evidence in its Opinion, it did not abuse its discretion. But it is evident that the Sentencing Court's conclusions are contradicted by the evidence, thus the sentencing court abused its discretion by sentencing Mr. King to an excessive sentence, placing inordinate focus on the facts of the underlying offense, failing to consider relevant mitigating factors, and failing to consider evidence of his rehabilitation while in prison. *See Schroat*, 272 A.3d at 527.

The Commonwealth attempts to distinguish *Schroat*, by reciting the differences between that defendant and Mr. King. But the pertinent conclusion in *Schroat* is that the Commonwealth, as here, did not present any expert testimony at the defendant's Resentencing Hearing to contradict Mr. King's expert opinions, "nor did it introduce evidence proving that Appellant suffers any mental health disorders." *Id.* at 529.

The Commonwealth also argues that *Commonwealth v. Miller*, is analogous to Mr. King's case. 275 A.3d 530 (Pa. Super 2022), *appeal denied*, 302 A.3d 626

(Pa. 2023), but in that case the defendant received a sentence of 55 years to life and will see a parole board when he is 72 years old. When Mr. King is 72 years old, he will still have to live another 25 years in prison before he sees the parole board.

Accordingly, for all the reasons set forth in his opening Brief and herein, 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.

III. 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 7,000 words as prescribed by Pa.R.A.P. 2135.

January 5, 2024 /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.

January 5, 2024 /s/ Caroline J. Heller

CERTIFICATE OF SERVICE

I, Brian T. Feeney, do hereby certify that on this 5th day of January, 2024, a true and correct copy of Reply 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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