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No. 1306 WDA 2023

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

MICHAEL P. FOUST,

Appellant.

BRIEF FOR APPELLANT

Appeal from Final Order of October 10, 2023 Denying
PCRA Petition in the Venango County Court of Common Pleas,
Case No. CP-61-CR-0000679-1993

The Honorable Robert L. Boyer, Judge Presiding.

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II. STATEMENT OF JURISDICTION

Pursuant to 42 Pa.C.S.A. § 742 and 234 Pa. Code § 910, this Court has exclusive appellate jurisdiction of this appeal, as it is an appeal from the October 10, 2023 final order of the Venango County Court of Common Pleas denying Appellant Michael Foust's Post-Conviction Relief Act Petition, Docket No. CP-61-CR-0000679-1993.

III. ORDER IN QUESTION

Mr. Foust appeals from the October 10, 2023 Order issued by the Venango County Court of Common Pleas ("PCRA Court") denying his Post-Conviction Relief Act Petition. [1] The Order states:

> AND NOW, this 10th day of October, 2023, the Court has taken argument on the PCRA Petition in this matter and has thoroughly considered all arguments of counsel. The Court has also reviewed the entire file from this case including the sentence hearing, the factors that Judge White listed as he considered and specifically looked at the language that Judge White used in imposing this Sentence. Considering all arguments and all facts of record, this Court finds that the Sentence of thirty (30) years to life on two separate counts running consecutive, does not violate the Pennsylvania Constitution and does not violate the U.S. Constitution on the prohibition on cruel and unusual punishment therefore, the PCRA Petition is hereby DENIED.

[1] A copy of the October 10, 2023 Order is attached hereto as Appendix A. The PCRA Court's Statement in Lieu of 1925 Opinion is attached hereto as Appendix B. An Excerpt of the October 10, 2023 PCRA Hearing Transcript Containing the Oral Opinion is attached hereto as Appendix C. Pursuant to Pa.R.A.P. 2111(d), Appellant avers that no order to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) was entered by the trial court.

IV. SCOPE AND STANDARD OF REVIEW

The first issue presented here concerns the constitutionality of the *de facto* life without parole sentence of two consecutive 30-years-to-life sentences imposed on Michael Foust under the United States Constitution and the Pennsylvania Constitution. Issues concerning the constitutionality of a criminal sentence are questions of law and this Court's review is plenary.

Alternatively, at issue is whether the trial court abused its authority in resentencing Mr. Foust to a *de facto* life without parole sentence. While such a consideration in this Court typically would be pursuant to an abuse of discretion standard, the standard of appellate review of a juvenile given a life without parole sentence should be plenary to effectuate the constitutional requirement established by the United States Supreme Court in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), that imposition of a life without parole sentence only be imposed on children who are permanently incorrigible, irreparably corrupt, or irretrievably depraved. As *Montgomery* clarified, *Miller v. Alabama*, 567 U.S. 640 (2012), established a new substantive rule of constitutional law.

In reviewing the PCRA Court's denial of post-conviction relief, this Court must determine whether the record supports the PCRA Court's findings and whether its Order is otherwise free of legal error. *See, e.g.*, *Commonwealth v. Fears*, 86 A.3d 795, 803 (Pa. 2014).

Factual findings by the PCRA Court that are supported by the record are given deference on appeal; however, this Court is not bound by factual findings that are not supported by the record. *See, e.g.*, *Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009); *see also Commonwealth v. Benton*, 655 A.2d 1030, 1032 (Pa. Super. Ct. 1995) ("Only factual findings which are supported by the record are binding upon this court.").

The PCRA Court's legal conclusions are reviewed *de novo*. *See, e.g.*, *Commonwealth v. Rios*, 920 A.2d 790, 810 (Pa. 2007) ("[W]e will draw our own legal conclusions as to whether counsel's conduct fell below the constitutionally required standards[.]"), *overruled on other grounds by Commonwealth v. Tharp*, 627 Pa. 673 (2014).

V. STATEMENT OF THE QUESTIONS INVOLVED

1. Do two 30-year sentences which run consecutively amount to a *de facto* life without parole sentence?

   Suggested answer: Yes.

2. Is the imposition of a life (or *de facto* life) sentence unconstitutional under the federal and/or Pennsylvania constitutions where the evidence plainly established that Appellant was redeemable?

   Suggested answer: Yes.

3. Did the PCRA Court err in interpreting the Pennsylvania Constitution's prohibition against "cruel punishment" coextensively with the United States Constitution's prohibition against "cruel and unusual punishment?"

   Suggested answer: Yes.

VI. STATEMENT OF THE CASE

Mr. Foust was found guilty of two counts of first degree murder in 1994 at Docket No. CP-61-CR-0000679-1993 in the Venango County Court of Common Pleas. Mr. Foust was sentenced to two consecutive terms of life without the possibility of parole.

On February 24, 2016, Mr. Foust filed a petition pursuant to the Post Conviction Relief Act ("PCRA") on the basis that his life without parole sentences violated the Eighth Amendment of the United States Constitution as interpreted by *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). On May 12, 2016, Mr. Foust's PCRA petition was granted and his sentence was vacated.

The resentencing hearing was conducted by Judge H. William White of the Venango County Court of Common Pleas. Counsel was appointed on May 12, 2016 and the resentencing hearing occurred less than two months later on July 5, 2016.

Counsel presented arguments that, because he was a minor at the time of his crimes, Mr. Foust had a greater capacity than an adult to change and rehabilitate himself. (N.T. 7/5/16, 142:15-148:23). Counsel offered the testimony of Ms. Karla Webb, Mr. Foust's corrections counselor, that Mr. Foust has positively changed in his ability to express his emotions and in the way he thinks. (N.T. 7/5/16, 70:4-8, 79:1-16). Three additional SCI Albion staff members testified as to Mr. Foust's

success in numerous prison programs. (N.T. 7/5/16, 87:104). Counsel also introduced the following evidence to demonstrate Mr. Foust's rehabilitation during his incarceration:

1. Certificate in Paralegal Studies from the Blackstone Career Institute. (N.T. 7/5/16, 150:15-17).
2. Yearly Course of Continuing Education Certificate as a Certified Peer Specialist, June 2015. (N.T. 7/5/16, 150:20-22).
3. Certified Peer Specialist Training Certificate from Recovery Opportunity Center, 2014 (N.T. 7/5/16, 150:23-25).
4. Support Specialist Certification, April 2014, including 76 hours of training. (N.T. 7/5/16, 150:25-151:2).
5. A Certificate of Awesomeness for Presentation Mindfulness, May 2016. (N.T. 7/5/16, 149:21-22).
6. QPR Gatekeeper Certificate for Suicide Prevention Gatekeeper Program. (N.T. 7/5/16, 149:23-24).
7. Emotional Balance Group Certificate of Completion, 2016. (N.T. 7/5/16, 150:1-2)
8. Act 143 Victim's Awareness Class Certificate of Completion, May 2016. (N.T. 7/5/16, 150:3-5).

9. Green Environment Certificate of Completion, March 2016 (N.T. 7/5/16, 150:6-9).

10. Emotional Balance Group Certificate of Completion, October 2015. (N.T. 7/5/16, 150:10-11).

11. Testimony from four individuals who work at SCI Albion where the defendant is incarcerated. (N.T. 7/5/16, 148:20-23).

12. Certificate of Exceptional Achievement for the preparation of two dogs through the prison's program training support dogs. (N.T. 7/5/16, 151:3-6, 13-15).

13. Certificate of Completion on First Annual Day of Responsibility at SCI Albion, January 2013. (N.T. 7/5/16, 151:7-9).

14. Peer Leader in Low Intensity Violence Prevention Class, 2011. (N.T. 7/5/16, 151:16-18).

15. Completion of hundreds of hours of instruction in business practices. (N.T. 7/5/16, 151:22-152:17).

16. Completion of Study Course for Custodial Maintenance, 2006. (N.T. 7/5/16, 152:18-19).

17. Student of the Year Certificate from SCI Albion's Education Department, 2005. (N.T. 7/5/16, 152:20-21).

18. Violence Prevention Group Certificate of Completion, 2003. (N.T. 7/5/16, 152:22-23).

19. AOD Group Therapy Certificate of Completion, 2002 (N.T. 7/5/16, 152:24-25).

20. Classroom Instructor Aid, 2002. (N.T. 7/5/16, 153:1-3).

21. Stress and Anger Management Certificate of Complete, 1997. (N.T. 7/5/16, 153:4-5).

22. Mental Health First Aid Certificate of Completion, May 2016. (N.T. 7/5/16, 153:10-12).

23. Several Vocational Training Certificates (insulation, vinyl fencing, etc.). (N.T. 7/5/16, 152:13-19).

The Commonwealth did not introduce any rebuttal to the above evidence of rehabilitation. (N.T. 7/5/16, 154:7-9). Judge White then took a 24-minute recess to deliberate. (N.T. 7/5/16, 154:10-13). Judge White explained his ruling and sentenced Mr. Foust to two 30-years-to-life consecutive terms. (N.T. 7/5/16, 154:13; 171:9-11; 174:3).

The Court expressly found that Mr. Foust had been rehabilitated and that he "earned the opportunity to be considered for parole at some time in his life, if he lives long enough." (N.T. 7/5/16, 170:1-5). Judge White found that Mr. Foust "convinced [him] that [he's] trying . . . [and] doing some good with [his] life in the

prison." (N.T. 7/5/16, 172:17-20). In fact, Judge White found "a significant change in his person between the time of his sentencing at age 18 and his person today." (N.T. 7/5/16, 160:20-161:2). Judge White further concluded that Mr. Foust had "demonstrated remorse" for his crimes and "[m]ore importantly, he's demonstrated a sincere effort to rehabilitate" and made "very substantial strides at rehabilitation." (N.T. 7/5/16, 168:12-169:7).

Notwithstanding the Court's findings, it imposed two consecutive sentences of 30 years to life for an aggregate term of 60 years to life. (Re-Sentence Order 2, July 5, 2016 ("The total aggregate sentence imposed is a term of imprisonment of 60 years to Life.")). Judge White explained that "[w]hat [drove] this case is the fact that it was Murder 1, and there were two victims." (N.T. 7/5/16 172:20-23). Judge white elaborated that he could not "in any way rationalize a sentence that is not consecutive. This case—there are two distinct victims. . . . And the effect of that is that [he has] to, in [his] mind, run these sentences consecutively." (N.T. 7/5/16, 169:15-21).

On July 15, 2016, counsel for Mr. Foust filed a post-sentence motion challenging the imposition of two consecutive 30-years-to-life sentences as unconstitutional and an abuse of discretion. (Post-Sentence Mot. 7/15/16). On July 19, 2016, the sentencing court denied the motion without a hearing. (Order 7/19/16). After a timely appeal, the Superior Court affirmed Mr. Foust's sentence:

> As an initial matter, we hold that because the Supreme Court of the United States has severely limited the circumstances under which juvenile defendants may be sentenced to LWOP, a de facto LWOP sentence is illegal in certain circumstances when imposed upon a juvenile offender. We also conclude that, in cases such as the present one that involves multiple killings, we must evaluate the sentence for each crime separately when determining if a term-of-years sentence constitutes a de facto LWOP sentence.

Commonwealth v. Foust, 180 A.3d 416, 420 (Pa. Super. Ct. 2018).

Mr. Foust petitioned on March 23, 2018 for allowance of appeal, which was denied by the Pennsylvania Supreme Court on May 25, 2022. *Commonwealth v. Foust*, 279 A.3d 39 (Pa. 2022) (per curiam).

On May 22, 2023, Mr. Foust filed a Post-Conviction Relief Act Petition in the Venango County Court of Common Pleas. On October 10, 2023, the PCRA Court entered an Order denying his Post-Conviction Relief Act Petition. The PCRA Court found that Mr. Foust's two consecutive 30-year-to-life sentences did not violate the Pennsylvania Constitution and did not violate the U.S. Constitution. Mr. Foust timely appealed the Order.

VII. SUMMARY OF THE ARGUMENT

As a preliminary matter, the PCRA Court erred as a matter of law in determining that Mr. Foust's two consecutive 30-years-to-life sentences—an aggregate 60 years to life—does not constitute a *de facto* life sentence. Because Mr. Foust's sentences arise from a single event, they should also be analyzed as a single

sentence. This Court has not yet considered whether 60 years to life is a *de facto* life sentence, but numerous other jurisdictions have concluded that similar—or shorter—minimum terms amount to *de facto* life.

Mr. Foust's *de facto* life sentence is unconstitutional under the Eighth Amendment for two separate reasons. First, because the Sentencing court expressly found that Mr. Foust was capable of rehabilitation, the sentence is disproportionate under the Eighth Amendment. Despite this finding, the sentencing court explained that the *sole reason* for the imposition of a *de facto* life without parole sentence was the nature of the crime. The sentencing court's analysis was improper as it ignores *Miller*'s requirement that factors other than the crime be considered in sentencing. And in denying Mr. Foust's petition, the PCRA Court rested its determination on its personal relationship with the sentencing court's judge—and not on the evidence in the record. Second, the PCRA Court erred in finding that, although the sentencing court found that Mr. Foust's crime reflected transient immaturity, his *de facto* life without parole sentence did not violate the Eighth Amendment. In *Jones v. Mississippi*, the Supreme Court reaffirmed its holdings in *Miller* and *Montgomery* that a mandatory juvenile life without parole sentence "poses too great a risk of disproportionate punishment" and explained "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." 593 U.S. 98, 110, 106 n.2 (2021)

(first quoting *Miller*, 567 U.S. at 479; and then quoting *Montgomery*, 577 U.S. at 211).

Mr. Foust's *de facto* life sentence is also unconstitutional under Article I, Section 13 of the Pennsylvania Constitution. The body of Pennsylvania case law interpreting Section 13 coextensively with the Eighth Amendment must be reconsidered, as those cases have failed to consider the factors set forth by the Pennsylvania Supreme Court in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), for analyzing provisions of the Pennsylvania Constitution. The text and history of the provision, as well as case law from other states and long-standing policy considerations, all strongly suggest that the Pennsylvania provision is distinct from, and more protective than, its federal counterpart. Properly construed, Article 1, Section 13 would plainly void Mr. Foust's two consecutive 30-years-to-life sentences as unconstitutional *de facto* life without parole sentences that are unreasonably cruel.

VIII. STATEMENT OF REASONS TO ALLOW AN APPEAL TO CHALLENGE THE DISCRETIONARY ASPECTS OF A SENTENCE

In order to challenge the discretionary aspects of a sentence, an appellant must establish that there is a substantial question that the sentence imposed is inappropriate under the Sentencing Code. 42 Pa.C.S.A. § 9781(b); Pa. R. App. P. 2119(f); *Commonwealth v. Kenner*, 784 A.2d 808, 810-11 (Pa. Super. Ct. 2001). Mr.

Foust will raise a "plausible argument" that his 60-years-to-life sentence was (1) "inconsistent with a particular provision of the Sentencing Code;" or (2) "contrary to the fundamental norms underlying the sentencing process." *Commonwealth v. Mouzon*, 812 A.2d 617, 622, 625 (Pa. 2002) (citing *Commonwealth v. Goggins*, 748 A.2d 721, 727 (Pa. Super. Ct. 2000)). Failure to address all relevant sentencing criteria presents a substantial question that the sentence imposed is inappropriate. *Commonwealth v. Dodge*, 957 A.2d 1198, 1200 (Pa. Super. Ct. 2008).

The sentencing court violated section 9721(b) of the Sentencing Code by not balancing Mr. Foust's rehabilitative needs against the protection of the public and the gravity of the offense. *Commonwealth v. Mathews*, 486 A.2d 495, 497-98 (Pa. Super. Ct. 1984). The statute reads in part as follows:

> (b) **General standards.--**In selecting from the alternatives set forth in subsection (a), the court shall follow the general principle 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 on the life of the victim and on the community, and the rehabilitative needs of the defendant.

42 Pa.C.S.A § 9721(b). While the sentencing judge heard testimony on Mr. Foust's rehabilitation, he failed to afford any weight to those rehabilitative needs.

Therefore, Mr. Foust has raised substantial questions which should permit his appeal to proceed. For these reasons, the sentence imposed was excessive and was an abuse of discretion.

IX. ARGUMENT

A. AN AGGREGATE TERM OF SIXTY YEARS TO LIFE IS A *DE FACTO* LIFE WITHOUT PAROLE SENTENCE

The PCRA Court erred as a matter of law in determining that Mr. Foust's two consecutive 30-years-to-life sentences—an aggregate 60 years to life—does not constitute a *de facto* life sentence. (N.T. 10/10/23 34:18-20).

1. Sixty Years To Life Is A *De Facto* Life Without Parole Sentence

Mr. Foust's two consecutive 30-years-to-life sentences result in a sentence of 60 years to life, meaning that he must serve a minimum of 60 years before he can even be eligible to petition for parole. Such a sentence, imposed on a 17-year-old, constitutes a *de facto* life sentence.

The U.S. Supreme Court's Eighth Amendment jurisprudence establishes that the constitutionality of a sentence depends on the actual impact of the sentence upon the individual, not the label of the sentence. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 70-74 (2010); *Miller v. Alabama*, 567 U.S. 460, 579 (2012). While this Court has not determined whether 60 years to life would be a *de facto* life sentence, other jurisdictions have made such determinations when faced with even lower minimum terms.

For example, the Iowa Supreme Court held that a 52½-years sentence was the functional equivalent of life imprisonment, triggering the protections established by

Miller. *State v. Null*, 836 N.W.2d 41, 71-74 (Iowa 2013).[2] The Iowa Supreme Court rejected the state's argument that a "juvenile's potential future release in his or her late sixties after a half century of incarceration" was not barred by *Miller*. *Id.* at 71; *see also Bear Cloud v. State*, 334 P.3d 132, 136, 144 (Wyo. 2014) (aggregate sentence of 45 years); *State v. Riley*, 110 A.3d 1205, 1213-14 (Conn. 2015) (three consecutive sentences for an aggregate 100-year sentence), *cert. denied*, 136 S. Ct. 1361 (2016); *People v. Nieto*, 52 N.E.3d 442, 447, 455 (Ill. App. Ct. 2016) (three consecutive sentences for multiple homicide and nonhomicide crimes); *People v. Reyes*, 63 N.E.3d 884, 887-8 (Ill. 2016) (holding *Miller* rationale applies to a mandatory term of years that "indisputably amount[s]" to life imprisonment); *State v. Booker*, 656 S.W.3d 49, 65-66 (Tenn. 2022) (60-year-to-life sentence requiring a minimum of 51 years); *State v. Kelliher*, 849 S.E.2d 333 (NC App. 2020) (anything more than 40 years).

The Connecticut Supreme Court found one defendant's 50-year sentence was the functional equivalent of a life sentence and, as a result, his sentencing was required to comport with *Miller*. *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1034-

[2] *See also Thomas v. Pennsylvania*, No. 10-4537, 2012 WL 6678686, at *2 (E.D. Pa. Dec. 21, 2012) (vacating a sentence in which a 15-year-old offender would not be parole-eligible until age 83 noting that "[t]his Court does not believe that the Supreme Court's analysis would change simply because a sentence is labeled a term-of-years rather than a life sentence if that term-of-years sentence does not provide a meaningful opportunity for parole in a juvenile's lifetime. This Court's concerns about juvenile culpability and inadequate penological justification apply equally in both situations, and there is no basis to distinguish sentences based on their label.").

5 (Conn. 2015). The Connecticut Supreme Court evaluated the sentence by reviewing life expectancy data, which shows that such a lengthy sentence will result in the likelihood that the individual will die in prison, and concluded that "[s]uch evidence suggests that a juvenile offender sentenced to a fifty year term of imprisonment may never experience freedom." *Id.* at 1046. Federal courts have similarly used life expectancy data in recognizing that a sentence of just under 40 years is the functional equivalent of a life sentence. *See, e.g.*, *United States v. Nelson*, 491 F.3d 344, 349-50 (7th Cir. 2007). The average life expectancy in Pennsylvania is 76.8 years. *Life Expectancy at Birth by State*, Centers for Disease Control & Prevention, www.cdc.gov/nchs/pressroom/sosmap/life_expectancy/life_expectancy.htm. Incarcerated individuals, however, have a significantly reduced life expectancy. *See, e.g.*, Emily Widra, *Incarceration Shortens Life Expectancy*, Prison Policy Initiative (June 26, 2017), www.prisonpolicy.org/blog/2017/06/26/life_expectancy; Deborah LaBelle, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, https://perma.cc/9PSY-3B6Q (the average life expectancy of a juvenile serving a life sentence in Michigan is 50.6 years, 7.5 years lower than for an adult serving a life sentence, and over 27 years lower than the average life expectancy).

Michael Foust will be incarcerated for at least 60 years before he is even eligible to be considered for parole. Such a sentence amounts to a *de facto* life sentence and thus, the PCRA Court's finding to the contrary should be reversed.

2. An Aggregate Sixty-Years-To-Life Sentence Does Not Provide A Meaningful Opportunity For Release

This Court previously found that only his 30-years-to-life sentences, and not the aggregate 60-years-to-life sentence, should be considered in determining whether his sentence constitutes a *de facto* life without parole sentence. *See Commonwealth v. Foust*, 180 A.3d 416, 438 (Pa. Super. Ct. 2018). The Pennsylvania Supreme Court has not opined on this issue. Further, *Foust* relied heavily on *McCullough v. State*, 168 A.3d 1045 (Md. Ct. Spec. App. 2017), which held that a juvenile serving an aggregate 100-years sentence did not violate the Eighth Amendment. The Maryland Supreme Court, however, has since reversed *McCullough*. *Carter v. State*, 192 A.3d 695, 736 (Md. 2018) (combining four consecutive 25-year sentences stemming from one event and holding that the resulting 100-year sentence violate the Eighth Amendment). This Court should thus consider Mr. Foust's aggregate 60-year sentence, not the individual 30-year sentences, in determining that his sentence constitutes a *de facto* life without parole sentence.

The *Foust* Court found persuasive *McCullough*'s reasoning that "permitting consecutive term-of-years sentences 'is not a same sentence different label

situation.'" *Foust*, 180 A.3d at 436 (quoting *McCullough*, 168 A.3d at 1069). The Maryland Supreme Court rejected that argument: "Whether a sentence, stacked or otherwise, is excessive under the Eighth Amendment 'can never be litigated in the abstract but must be assessed on a case-by-case basis.'" *Carter*, 192 A.3d at 730. Rather, there is a spectrum of situations— on one end a "serious crime spree . . . over weeks or months or even years" and on the other end "one event or [] one bad decision that, for various reasons, may involve several separate crimes that do not merge into one another for sentencing purposes." *Id.* at 731. Courts must give consideration "where the stacked sentence falls on the spectrum as well as to the differences between adult and juvenile offenders." *Id.* at 734.

Mr. McCullough, like Mr. Foust, was convicted of more than one count of the same violation, all stemming from the same incident, and received a term of years sentence for each count to run consecutively. *Id.* On appeal the *Carter* court found that McCullough's 100-year aggregate sentence must be considered "no differently than a single sentence." *Id.* at 735. Mr. Foust's sentences—which arise from a single event—should also be considered no differently than a single sentence.

The *Carter* rationale comports with *Miller*'s reasoning: that a juvenile offender must have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller*, 567 U.S. at 479. Considering only individual sentences allows "the Eighth Amendment proscription against cruel and

unusual punishment in the context of a juvenile offender [to] be circumvented simply by stating the sentence in numerical terms that exceed any reasonable life expectancy rather than labeling it a 'life' sentence." *Carter*, 192 A.3d at 737 (Barbera, C.J., concurring).

In the years since *Foust* was decided, several state Supreme Courts have held that an aggregate term of years sentence may give rise to a *de facto* life without parole sentence. *See, e.g.*, *State v. Kelliher*, 873 S.E.2d 366, 381 (N.C. 2020) (two twenty-five-year sentences to run consecutively is a *de facto* life without parole sentence); *White v. Premo*, 443 P.3d 597, 604 (Or. 2019) (finding an aggregate 66-years-and-8-months sentence to be "the functional equivalent of life"); *Ira v. Janecka*, 419 P.3d 161, 166 (N.M. 2018) ("We are persuaded by the Supreme Court's rationale in *Roper*, *Graham*, and *Miller* that [consideration of] the cumulative impact of consecutive sentences on a juvenile is required by the Eighth Amendment.").

In the context of addressing relief through *Graham v. Florida*, 560 U.S. 48 (2010), in which the U.S. Supreme Court banned life without parole sentences for juveniles convicted of non-homicide offenses, the majority of courts agree that *Graham*'s and *Miller*'s analyses extend to children with multiple offenses serving *de facto* life sentences. *See, e.g.*, *Henry v. State*, 175 So. 3d 675, 676 (Fla. 2015) (eight separate felony offenses running a consecutive 90-year sentence); *State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (fourteen parole-eligible life sentences and

a consecutive 92 years in prison); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (three attempted murder counts constituting a 110-years-to life sentence); *People v. Rainer*, No. 10CA2414, 2013 WL 1490107, at *1 (Colo. App. 2013) (aggregate 112-year sentence), *cert. granted*, No. 13SC408, 2014 WL 7330977 (Colo. Dec. 22, 2014).

The United Sates Supreme Court has similarly noted that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without the possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." *Sumner v. Shuman*, 483 U.S. 66, 83 (1987).

Mr. Foust's consecutive 30-year sentences result in an aggregate 60-years-to-life sentence. He will not be eligible for parole until he is in his late 70's. Such a sentence does not provide him with a meaningful opportunity to obtain release before the expiration of his sentence and is therefore a *de facto* life without parole sentence. Accordingly, the PCRA Court's finding to the contrary should be reversed.

B. MR. FOUST'S *DE FACTO* LIFE WITHOUT PAROLE SENTENCE IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The aggregate 60-year-to-life sentence issued to Mr. Foust violates the Eighth Amendment. The sentence is unconstitutional because the sentencing court failed to meaningfully take into account any factor other than the crime itself. The sentence

is unconstitutional for the additional reason that the sentencing court found that Mr. Foust's crime reflected transient immaturity, but nonetheless sentenced him to *de facto* life without parole.

1. The Sentencing Court Failed To Consider Mr. Foust's Youth Attendant Circumstances

The PCRA Court's determination that the sentencing court considered Mr. Foust's youth and attendant circumstances is not supported by the evidence in the record. Rather, the PCRA Court injected its personal knowledge of the sentencing court judge to rationalize Mr. Foust's sentence.

In *Miller*, the Supreme Court held that a mandatory life without parole sentence for juvenile offenders violates the Eight Amendment's prohibition on cruel and unusual punishments. *Miller*, 567 U.S. at 465. *Miller* requires sentencers "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. The Pennsylvania Supreme Court reiterated this requirement in *Commonwealth v. Felder*, explaining that although the Commonwealth does not have "the burden of proving beyond a reasonable doubt that the juvenile is permanently incorrigible," the sentencing court must "consider the mitigating qualities of youth" as required by *Miller*. 269 A.3d 1232, 1244-45 (Pa. 2022) (citing *Miller*, 567 U.S. at 476).

The sentencing court rattled off many of the factors the Pennsylvania Supreme Court endorsed as relevant when considering a life without parole sentence: Mr.

Foust's age and maturity at the time of the offense, his capacity for change, the circumstances of the crime, Mr. Foust's family and environmental circumstances, and Mr. Foust's potential rehabilitation. (N.T. 7/5/16 158:25-163:3); *Commonwealth v. Batts*, 66 A.3d 286, 297 (Pa. 2013) ("*Batts I*"). Notwithstanding these factors, the sentencing court sentenced Mr. Foust to an aggregate term of 60 years to life. (N.T. 7/5/16 170:7-171:10). The *sole reason* for the imposition of a *de facto* life without parole sentence was the nature of the crime: "What drives this case is the fact it was Murder 1, and there were two victims." (N.T. 7/5/16 172:20:22). The sentencing court further noted that it could not in "any way rationalize a sentence that is not consecutive. This case—there are two distinct victims. . . . And the effect of that is that [it has] to, in my mind, run these sentences consecutively." (N.T. 7/5/16 169:15-21).

The sentencing court's analysis was improper as it ignores *Miller*'s requirement that factors other than the crime be considered in sentencing. As this Court in *Commonwealth v. Schroat* held:

> In total, the court's opinion reflects a lack of consideration for Appellant's youth, history, and rehabilitative needs in favor of an inordinate focus on the heinous act he committed as a minor. Appellant presented significant, uncontroverted evidence that he has matured and made steps toward rehabilitation while in prison. Yet, in the sentencing court's view, Appellant has made no progress because he committed murder in 1992. This view directly contradicts the Supreme Court's edict that "children who

> commit even heinous crimes are capable of change[,]" is manifestly unreasonable, and an abuse of discretion.

272 A.3d 523, 530 (Pa. Super. Ct. 2022) (alteration in original) (quoting *Montgomery*, 577 U.S. at 212) (internal citations omitted). So here too—the sentencing court placed an "inordinate focus on the heinous act he committed as a minor" without giving any due consideration to Mr. Foust's "youth, history, and rehabilitative needs." *Id.*

In denying Mr. Foust's petition, the PCRA Court rested its determination on its personal relationship with the sentencing court's judge—and not on the evidence in the record:

> I also know [the sentencing] Judge White extremely well. I've worked with him over the years. I was his law clerk early on in his career. Judge White has been a mentor to me throughout my entire career. So I am familiar. The language he uses and it's typical and it's typical of a lot of judges. When they say, I've considered all these things but, and it goes into things, what he's doing is he's giving you his exercise of discretion. In other words, he's telling you this is why this sentence is here.

(N.T. 10/10/23 30:17-31:3). The PCRA Court's personal knowledge and relationship of the sentencing court's judge is not "evidence of record" that supports its conclusion. *Commonwealth v. Diaz*, 183 A.3d 417, 420 (Pa. Super. Ct. 2018). Moreover, as explained above, the PCRA Court's determination that the sentencing court complied with *Miller*'s requirement to consider factors other than the crime is not supported by the record and should be reversed. *Id.* ("This Court is limited to

determining whether the evidence of record supports the conclusions of the PCRA court and whether the ruling is free of legal error.").

2. Because The Sentencing Court Expressly Found That Mr. Foust's Crime Reflected Transient Immaturity The *De Facto* Life Sentence Is Disproportionate Under The Eighth Amendment

The PCRA Court erred as a matter of law in finding that, although the sentencing court found that Mr. Foust's crime reflected transient immaturity, his *de facto* life without parole sentence did not violate the Eighth Amendment of the United States Constitution. In doing so, it applied the wrong legal standard and reached a conclusion that cannot be reconciled with the sentencing court's factual findings.

In *Jones v. Mississippi*, the Supreme Court reaffirmed its holdings in *Miller* and *Montgomery* that a mandatory juvenile life without parole sentence "poses too great a risk of disproportionate punishment" and is therefore barred by the Eighth Amendment. *Jones v. Mississippi*, 593 U.S. 98, 110 (2021) (quoting *Montgomery*, 577 at 195). Although *Miller* did not impose a "formal factfinding" requirement, the sentencer must have the "discretion to 'consider the mitigating qualities of youth' and to impose a punishment less than life without parole. *Id.* at 106 (quoting *Miller*, 567 U.S. at 476). *Jones* further explained "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." *Id.* at 106 n.2 (quoting *Montgomery*, 577 U.S. at 211).

The Pennsylvania Supreme Court considered the definition of "transient immaturity" in *Commonwealth v. Batts*. 163 A.3d 410, 443-44 (Pa. 2017) ("*Batts II*"), *rev'd on Eighth Amendment grounds*, *Commonwealth v. Felder*, 269 A. 3d 1232 (Pa. 2022). *Batts II* held that a juvenile's crime does not reflect transient immaturity when: (1) "the offender is entirely unable to change," (2) "there is no possibility that the offender could be rehabilitated at any point later in his life," and (3) "the crime committed reflects the juvenile's true and unchangeable personality and character." *Id.* It is "'rare' and 'uncommon'" that a juvenile offender possesses these characteristics. *Id.* (citing *Montgomery*, 577 U.S. at 208). Thus, under *Jones*' explanation of *Miller* and *Montgomery*, where a juvenile offender does not possess these characteristics, he may not be sentenced to life without parole. *Jones*, 593 U.S. at 106 n.2.

At his resentencing hearing, the Court found that there has been a "significant change in [Mr. Foust] between the time of his [original] sentencing and his person today." (N.T. 7/5/2016 160:23-161:2). The Court acknowledged that even at the time of his trial, the court recognized that Mr. Foust had the capacity for change. (N.T. 7/5/2016 159:3-8). The Court further found that Mr. Foust has "demonstrated remorse" and "demonstrated a sincere effort to rehabilitate" and was convinced that

Mr. Foust "has made strides—very substantial strides—at rehabilitation." (N.T. 7/5/2016 169:5-7).

The sentencing court's findings go to the heart of the inquiry of whether Mr. Foust's crime "reflected transient immaturity." The court specifically found that Mr. Foust *is capable* of rehabilitation and that he is able to change—and that he had, in fact, changed. Nevertheless, the court sentenced Mr. Foust to a *de facto* life without parole sentence. Yet, in view of the court's findings, it was not "free to sentence [Mr. Foust,] whose crime reflects transient immaturity[,] to life without parole." *Jones*, 593 U.S. at 106 n.2. Mr. Foust's sentence is thus disproportionate under the Eighth Amendment.

Because Mr. Foust's sentence is disproportionate under the Eighth Amendment, the PCRA Court's finding the sentence does not violate the United States Constitutional prohibition of cruel and unusual punishment should be reversed.

C. A *DE FACTO* LIFE WITHOUT PAROLE SENTENCE IS UNCONSTITUTIONAL UNDER THE PENNSYLVANIA CONSTITUTION

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

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

1. The Pennsylvania Prohibition Against Cruel Punishment Is Not Coextensive With The Federal Prohibition Against Cruel And Unusual Punishment

Even if this Court concludes that Mr. Foust's sentence was permissible and the sentencing process was sufficient under the United States Constitution, the *de facto* life sentence violates the Pennsylvania Constitution's prohibition against "cruel punishment." The Pennsylvania Constitution's prohibition against "cruel punishment" is broader than the United States Constitution's prohibition against "cruel *and* unusual punishment." The body of Pennsylvania case law interpreting these two provisions coextensively has failed to consider the factors set forth by the Pennsylvania Supreme Court for analyzing provisions of the Pennsylvania Constitution, and must be reconsidered.

The Pennsylvania Supreme Court "set forth certain factors to be briefed and analyzed by litigants in each case . . . implicating a provision of the Pennsylvania constitution." *Edmunds*, 586 A.2d at 390. Those factors include: "(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 applicability within modern Pennsylvania jurisprudence." *Id*.

The Pennsylvania Supreme Court has stated that it will not depart from the Eighth Amendment in interpreting Section 13 because there is no unique Pennsylvania history to the "cruel" punishments provision. *See, e.g.*, *Commonwealth v. Bonner*, 135 A.3d 592, 597 n.18 (Pa. Super. Ct. 2016) ("The Pennsylvania prohibition against cruel and unusual punishment is coextensive with the Eighth and Fourteenth Amendment of the United States Constitution. Therefore, we do not conduct a separate analysis of Appellant's state constitutional claim."). In support of this conclusion, the Pennsylvania Supreme Court cites *Commonwealth v. Zettlemoyer*, which surmised that, because Pennsylvania law had originally tolerated the death penalty, the punishment could not be considered "cruel" today. 454 A.2d 937 (Pa. 1983). However, *Zettlemoyer*, which predated *Edmunds*, failed to consider the history of Section 13.

a. The plain text of Section 13 supports an independent meaning

The Pennsylvania provision is nearly identical to the federal constitution, but it diverges in one area: cruel *and unusual* punishment (U.S.) versus cruel punishment (PA). A plain reading makes clear that these distinct phrases cannot be interpreted coextensively. *Cf Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (basic principle of statutory interpretation is that courts should "give effect, if possible, to every

clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."); *Stollar v. Cont'l Can Co*., 180 A.2d 71, 74 (Pa. 1962) ("To fail to give effect to all of the provisions of a statute or to give them an unreasonable or absurd construction violates the fundamental rules of statutory interpretation.").

b. The history of Section 13 is starkly different from that of the Eighth Amendment

The history of a Pennsylvania Constitutional provision must be evaluated when a court endeavors to interpret the provision. *Edmunds*, 586 A.2d 887 at 390. The history of Section 13 demonstrates a focus on deterrence and reform, not retribution, that mandates a unique interpretation of the provision. The drafters of Section 13 had a distinct interpretation of "cruelty." Whereas the United States Constitution's Eighth Amendment has a foundation in English criminal law, the Pennsylvania Constitution's Section 13 is based on enlightenment philosophy. *See* Kevin Bendesky, *The Key-Stone to the Arch: Unlocking Section 13's Original Meaning*, 26 Univ. of Pa. J. Const. L. 201, 208-218 (2023), https://ssrn.com/abstract =4457030 (discussing the disparate historical underpinnings of the Eighth Amendment and Section 13). This is not a distinction without a difference. The Pennsylvania Constitution's drafters were students of the Enlightenment and believed that the purpose of punishment was to deter and reform; that punishments

ought to be proportional to crimes; and, most importantly, that no punishment was permissible unless it was "necessary" for these purposes. *See id.* at 219-235.

The Eighth Amendment "originally sought to prohibit only methods of punishment armed with a "(cruel) 'superadd[ition]' of terror, pain, or disgrace.'" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019). "In all the[] contemporaneous discussions," surrounding the enactment of the Declaration of Rights, as well "as in the prologue of the Declaration," wrote Justice Scalia, "a punishment is not considered objectionable because it is disproportionate." *Harmelin v. Michigan*, 501 U.S. 957, 973 (1991). It is objectionable "because it is 'out of [the Judges'] Power,' 'contrary to Law and ancient practice,' without 'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or imposed by 'Pretence to a discretionary Power.'" *Id.* at 974. The federal Constitution's framers knew that, of the state constitutions, "two prohibited 'cruel' punishments, Pa. Const. Art. IX, § 13 (1790); S.C. Const. Art. IX, § 4 (1790). The new Federal Bill of Rights, however, tracked Virginia's prohibition of 'cruel and unusual punishments.'" *Harmelin*, 501 U.S. at 966. Then, shortly after Congress proposed the Bill of Rights, it promulgated the nation's first Penal Code, which permitted excessive punishments. In *Harmelin*, Justice Scalia conceded that a long mandatory prison sentence "may be cruel," but held that the punishment was outside the purview of the Eighth Amendment only because it "was not unusual in the constitutional sense." *Id*. at 994.

By comparison, in 1776, the Commonwealth's first Constitution mandated proportional punishments and demanded less "sanguinary"—that is, less "cruel; bloody; and mur[d]erous"—ones. *See* Robert James Turnbull, *A Visit to the Philadelphia Prison* 6 (1797). In 1790, the Commonwealth adopted a new Constitution—its current constitution—prohibiting "cruel punishments." In 1793, the Commonwealth's first governor, Thomas Mifflin, asked William Bradford[3] to study the necessity of capital punishments. It was "from satisfactory evidence," Mifflin told the Assembly, "that the experiment in rendering the penal laws of Pennsylvania less sanguinary, has been attended with an obvious decrease of the number and atrocity of offences." Mifflin, in referring the legislature to Bradford's work, declared that "while we consider the prevention of crimes to the be sole end of punishment, we, also, admit, that every punishment, which is not absolutely necessary for that purpose, is an act of tyranny and cruelty." *Journal of the Senate of Pennsylvania* 14 (Zacharia Poulson, 1792).

Early Pennsylvania case law confirms that deterrence and reformation were indeed the guiding principles of Pennsylvania criminal law. *See, e.g.*, *James v. Commonwealth*, 12 Serg. & Rawle 220 (Pa. 1825) (holding the state could not punish

[3] William Bradford served as both the Pennsylvania Attorney General and a Supreme Court Justice of the Commonwealth. In the former position, he attended the 1790 Constitutional Convention. Not long after, he became the second Attorney General of the United States, appointed by George Washington.

a "common scold" by plunging her into water three times with a "ducking stool," rejecting that punishment as incompatible with goals of reformation and deterrence, which were "the just foundation and object of all punishments"); *Commonwealth v. Ritter*, 13 Pa. D. & C. 285 (Pa. 1930) (rejecting retribution as a justification for punishment because it "looks to the past, not the future, and rests solely upon the foundation of vindictive justice" and instead holding "the two elements which should be taken into consideration are those of restraint and deterrence"). The Pennsylvania Supreme Court later "quote[d] with approval" *Ritter*'s "demonstrat[ion] that the necessity for appropriate punishment in criminal cases is chiefly in the interest of the protection of society." *Commonwealth v. Elliot*, 89 A.2d 782, 784 (Pa. 1952); *see also Commonwealth v. Carluccetti*, 85 A.2d 391, 400 (Pa. 1952). This Court must conduct an analysis of Section 13 through the lens of *Edmunds* to determine whether the current interpretation of this provision is sound.

c. Other jurisdictions have interpreted similar provisions more broadly than the Eighth Amendment

Pennsylvania's ban on cruel punishments is not unique; several other jurisdictions have likewise banned cruel punishments, or cruel *or* unusual punishments. Many of these state constitutional provisions have been interpreted to provide greater protections than the Eighth Amendment. *See State v. Vang*, 847 N.W.2d 248, 263 (Minn. 2014) (holding the difference between Minnesota's nearly identical "cruel or unusual" punishment provision as "'not trivial' because the

'United States Supreme Court has upheld punishments that, although . . . cruel, are not unusual" (quoting *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998))); *Hale v. State*, 630 So. 2d 521, 526 (Fla. 1993) ("The federal constitution protects against sentences that are both cruel and unusual. The Florida Constitution, arguably a broader constitutional provision, protects against sentences that are either cruel or unusual."); *Commonwealth v. Concepcion*, 164 N.E.3d 842, 855 (Mass. 2021) (noting that Article 26 of the Massachusetts Constitution "affords defendants greater protections than the Eighth Amendment"); *People v. Anderson*, 493 P.2d 880, 883 (Cal. 1972), *superseded by constitutional amendment*, Cal. Const. art. 1, § 27 (rejecting the idea that the California constitution was "coextensive" with the Eighth Amendment, and holding that use of the disjunctive "or" in the state constitution was significant and purposeful); *People v. Baker*, 229 Cal. Rptr. 3d 431, 442 (Cal. Ct. App. 2018) (California Court of Appeal construed the state constitutional provision separate from its federal counterpart and found that the distinction between Eighth Amendment wording and the California Constitution was "purposeful and substantive rather than merely semantic" (quoting *People v. Carmony*, 26 Cal. Rptr. 3d. 365, 378 (Cal. Ct. App. 2005))); *see also Burnor v. State*, 829 P.2d 837, 839-40 (Alaska Ct. App. 1992) (applying its own "single test to determine whether a statutory penalty constitutes cruel and unusual punishment").

The Washington Supreme Court has also interpreted its constitution as more protective than the Eighth Amendment, and its reasoning is instructive here. *State v. Fain*, 617 P.2d 720, 723 (Wash. 1980) (*en banc*). In *Fain*, the Court reasoned that "[e]specially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation." *Id.* This was clear from historical evidence that revealed that the Framers viewed the word "cruel" as sufficient to express their intent and "refused to adopt an amendment inserting the word unusual." *Id.* In 2018, after an *Edmunds*-like analysis, the Court confirmed its broader interpretation in the context of youth sentencing. *State v. Bassett*, 428 P.3d 343, 346 (Wash. 2018). It reasoned that "on its face" the Washington Constitution offers greater protection because it prohibits "merely cruel" punishments. *Id.* at 349 (quoting *State v. Dodd*, 838 P.2d 86, 96 (Wash. 1992) (*en banc*)). The Court also recognized how the state has evolved, through legislation and case-law, to recognize that children warrant special protection. *Id.* at 350. The Court reasoned that, in the context of juvenile sentencing, the Washington Constitution provided greater protection than the Eighth amendment. *Id.*

Most recently, in *State v. Kelliher*, decided after *Jones*, the North Carolina Supreme Court found that it violates both the Eighth Amendment and "article I, section 27 of the North Carolina Constitution to sentence a juvenile homicide

offender" who is "'neither incorrigible nor irredeemable' to life without parole." *Kelliher*, 873 S.E.2d at 370. The Court found that the North Carolina Constitution, which prohibits "cruel *or* unusual punishments," N.C. Const. art. I, § 27 (emphasis added), offers protections that are distinct and broader than those provided under the Eighth Amendment. *Kelliher*, 873 S.E.2d at 382. The Court noted the different language and presumed that the Framers of the North Carolina Constitution intentionally chose the words "cruel or unusual punishment" to prohibit punishments that were either cruel or unusual, "consistent with the ordinary meaning of the disjunctive term 'or.'" *Id.* The Court looked at the constitutional text, precedent illustrating the Court's "role in interpreting the North Carolina Constitution, and the nature of the inquiry used to determine whether a punishment violates the federal constitution" to hold that the state constitution is *not* in "lockstep" with the Eighth Amendment. *Id.* at 383. The Court also noted how its interpretation changed to conform with contemporary understanding of adolescent development recognized by the Court. *Id.* at 384.

Notably, the North Carolina Supreme Court further held that any sentence, or combination of sentences, which require youth to serve more than 40 years in prison before parole eligibility, is a *de facto* life without parole sentence "because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison" and that such

sentences also violated the Eighth Amendment. *Id.* at 370. The Court reasoned that adopting a position that under *Jones*, "the Eighth Amendment requires nothing more than that 'sentencing courts . . . take children's age into account before condemning them to die in prison'" would repudiate core principles articulated in *Miller* and *Montgomery*. *Id.* at 379 (alteration in original) (quoting *Montgomery*, 577 U.S. at 209). This interpretation is "irreconcilable" with the Supreme Court's own stated characterization of its holding: that *Jones* did not abrogate *Miller*, and the Supreme Court only intended to reject the appendage of new procedural requirements to *Miller* and *Montgomery. Id.* "To hold otherwise would require us to read *Jones* far more expansively" than intended, "the very sin that *Jones* warns us against committing." *Id.* at 380.

d. Policy considerations also weigh in favor of interpreting Section 13 as distinct from the Eighth Amendment

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

Decades later, the Pennsylvania Supreme Court correctly noted that "there is an abiding concern, in Pennsylvania, that juvenile offenders be treated commensurate with their stage of emotional and intellectual development and personal characteristics." *Batts I*, 66 A.3d at 299.

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

20Delinquency%20Benchbook_10-2018.pdf. These jurisdictional changes reflected a shift to ensure the full and complete separation of juvenile courts. The 1972 Juvenile Act further ensured that youth should be treated with care and differentiated from their adult counterparts. The Act provided that children must be placed in juvenile facilities and not adult facilities, unless there are no other appropriate facilities available, in which case they must be kept separate from adults. *See* S.B. 439, 1971-1972 Reg. Sess. (Pa. 1972).

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

for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community." 42 Pa.C.S.A. § 6301(b)(2). This focus on rehabilitation and competency development underscores Pennsylvania's recognition that children are still changing and deserve special protections under the law. The Pennsylvania Supreme Court also has a history of protecting youth. This is evident in *In re J.B.*, where the Pennsylvania Supreme Court held that the Sex Offender Registration and Notification Act ("SORNA") "violates juvenile offenders' due process rights through use of an irrebuttable presumption." 107 A.3d 1, 2 (Pa. 2014). The Court recognized that youth commit sexual offenses due to "impulsivity and sexual curiosity, which diminish with rehabilitation and general maturation," and make them less likely than adults to reoffend. *Id.* at 17. Similarly, in *Batts II* the Court adopted expansive procedural safeguards to protect youth potentially eligible for life without parole sentences. *See Batts II*, 163 A.3d at 443-444. The Court noted the unique attributes of youth (that youth are impetuous, have an underdeveloped sense of responsibility, lessoned culpability and greater capacity for change and rehabilitation than adults) recognized in *Roper*, *Graham*, *Miller* and *Montgomery*. *See Batts II*, 163 A.3d at 428-34. The Pennsylvania Supreme Court only reversed

these safeguards after the Supreme Court's ruling in *Jones* and only upon an interpretation that they were not required under the Eighth Amendment. *Felder*, 269 A.3d at 1243-44. As outlined above, the text, history and policy in Pennsylvania favor a broader reading of its prohibition against cruel punishment. Other state courts also show a trend away from coextensive interpretations towards independent analysis, especially in the context of youth sentencing.

2. Mr. Foust's Sentence Is Cruel Under The Pennsylvania Constitution

The Framers' intent in proposing Article 1, Section 13, would plainly void Mr. Foust's two consecutive 30-years-to-life sentences as they are an unconstitutional *de facto* life without parole sentence and unreasonably cruel. As outlined above, anything that is not necessary to deter or reform *is* cruel under the Pennsylvania Constitution. This is especially true for individuals sentenced as youth, who will serve "more years and a greater percentage of his life in prison than an adult offender." *Graham*, 560 U.S. at 70; *see also Miller*, 567 U.S. at 475. The unique characteristics of youth "diminish penological justifications" for imposing life without parole sentences. *Miller*, 567 U.S. at 472; *Montgomery v. Louisiana*, 577 U.S. 190, 207 (2016). Deterrence cannot be rationalized as the same characteristics that render youth less culpable, "make them less likely to consider potential punishment." *Miller*, 567 U.S. at 472. The need for incapacitation is also lessened because adolescent development diminishes the likelihood that youth will

forever be a danger to society. *Id.* at 472-73. A life behind bars also "forswears" rehabilitation as one will never have the opportunity at a rehabilitated life outside of prison walls. *Id.* at 473.

Mr. Foust was 17 years old at the time of his offenses. He has already served over 30 years in prison. As noted by the court below, he has also shown significant signs of rehabilitation. Currently he will not be eligible for parole until he has served at least 60 years in prison, well beyond his life expectancy. Such a sentence—essentially a sentence to die in prison—serves neither deterrence nor rehabilitation. Given Mr. Foust's youth at the time of conviction, this sentence is unreasonably cruel and unconstitutional under the Pennsylvania Constitution.

X. CONCLUSION

For the foregoing reasons, Appellant Michael Foust requests that this Honorable Court vacate his *de facto* life without parole sentence as unconstitutional and remand the matter for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify this 20th day of February, 2024, that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that requires filing confidential information and documents differently than non-confidential information and documents.

I further certify that the foregoing Brief of Appellant complies with the word count limits as set forth in Pennsylvania Rule of Appellate Procedure 2135 and contains 9,085 words.

/s/ Marsha L. Levick
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