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IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PHILADELPHIA

EDA 2023 NO. 1785

COMMONWEALTH OF PENNSYLVANIA

VS.

JOSE HERNANDEZ,
Appellant

BRIEF FOR APPELLANT

Appeal From Dismissal Of The Post-Conviction Petition By The Court Of Common Pleas Of Philadelphia County, Trial Division, Criminal Section, By Order Entered July 5, 2023 On Information CP-51-CR-0603151-1988.

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I. STATEMENT OF JURISDICTION

This Court's jurisdiction to hear an appeal from the judgment of sentence of the Philadelphia Court of Common Pleas is established by 42 Pa.C.S. § 742.

II. ORDER IN QUESTION

This is a timely appeal from the dismissal by the Honorable Barbara A. McDermott on July 5, 2023, of Mr. Hernandez' counseled post-conviction petition on docket CP-51-CR-0603151-1988. Based upon the United States Supreme Court's decisions in *Miller*[1] and *Montgomery*[2] Judge McDermott vacated Mr. Hernandez' four illegal mandatory life sentences and instead imposed four concurrent 45 years to life sentences. Following an unsuccessful appeal, Mr. Hernandez filed a post-conviction petition that challenged those sentences as unconstitutional *de facto* life sentences under the Pennsylvania Constitution. Judge McDermott dismissed that petition without an evidentiary hearing on July 5, 2023, and Mr. Hernandez timely appealed on July 10, 2023.

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1 *Miller v. Alabama*, 567 U.S. 460 (2012).

2 *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

Jose Hernandez challenges the legality of his *de facto* life sentence under the Pennsylvania Constitution. This Court has held in a prior decision in this case that it has a plenary standard of review:

> Appellant's claims implicate the legality of his sentence. "[A] claim challenging a sentencing court's legal authority to impose a particular sentence presents a question of sentencing legality." *Commonwealth v. Batts*, 640 Pa. 401, 163 A.3d 410, 434-435 (2017) (citations omitted). "The determination as to whether a trial court imposed an illegal sentence is a question of law; an appellate court's standard of review in cases dealing with questions of law is plenary." *Commonwealth v. Crosley*, 180 A.3d 761, 771 (Pa. Super. 2018) (citation omitted), appeal denied, 195 A.3d 166 (Pa. 2018).

Commonwealth v. Hernandez, 217 A.3d 873, 877 (Pa. Super. 2019).

The scope of review is evaluation of the entire record and consideration of all evidence actually received. *Commonwealth v. Hilfiger,* 615 A.2d 452 (Pa. Super. 1992).

IV. STATEMENT OF QUESTION PRESENTED

> Are four concurrent 45 years to life sentences a *de facto* life sentence requiring proof, absent here, that the juvenile was permanently incorrigible, irreparably corrupt, or irretrievably depraved?
>
> *Answered in the negative by the court below.*
>
> Because the four concurrent 45 years to life sentences were *de facto* life sentences, should not this Court remand for resentencing?
>
> *Not answered by the court below.*

V. STATEMENT OF THE CASE

The facts and procedural history of this case were discussed by Judge Barbara McDermott in her Order and Opinion dismissing Mr. Hernandez' post-conviction petition. It is adopted here:

> On May 6, 1988, the Petitioner, the then juvenile Jose Hernandez, was arrested and charged with four counts of Murder and related offenses. On January 25, 1990, after a jury trial before the Honorable Eugene H. Clarke, a jury convicted the Petitioner of four counts of First-Degree Murder and one count of Possession of an Instrument of Crime ("PIC"). On that same date, Judge Clarke sentenced the Petitioner to two consecutive and two concurrent terms of life imprisonment without the possibility of parole for the First-Degree Murder convictions, and a concurrent sentence of two and one-half to five years imprisonment for PIC.
>
> On June 25, 2018, after a direct appeal and a

> series of PCRA petitions, this Court granted the Petitioner post-conviction relief and vacated his January 25, 1990 sentence pursuant to *Miller* and *Montgomery*. On June 27, 2018, this Court imposed concurrent forty-five years to life sentences on each count of First-Degree Murder, and no further penalty on PIC. The Petitioner did not file a post-sentence motion.
>
> On July 27, 2018, the Defendant filed a timely Notice of Appeal and later 1925(b) Statements of Error. On August 21, 2019, after this Court issued a 1925(a) Opinion on September 25, 2018, this Superior Court affirmed the Petitioner's Judgment of Sentence. The Pennsylvania Supreme Court denied his Petition for Allowance of Appeal on May 25, 2022.
>
> On May 12, 2023, the Petitioner filed a counseled PCRA Petition. On May 19, 2023, this Court issued a Notice of Intent to dismiss pursuant to PA.R.Crim.P. 907. The Petitioner filed his Response to this Court's 907 Notice on June 8, 2023.

Order and Opinion of McDermott, J. at 1-2 (attached hereto as Exhibit A) (footnotes deleted).

The lower court issued formal 907 Notice on May 19, 2023.[3] Mr. Hernandez filed a response on June 8, 2023.[4] Judge McDermott filed an Order and Opinion on June 22, 2023 in support of her dismissal of the

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[3] The Court's 907 notice is attached hereto as Exhibit B.

[4] Mr. Hernandez' written response is attached hereto as Exhibit C.

PCRA.[5] The matter was formally dismissed on July 5, 2023.[6] A timely appeal was filed on July 10, 2023. On July 14, 2023, Judge McDermott ordered that counsel file a Statement of Errors.[7] Counsel timely filed a timely Statement of Errors on August 3, 2023.[8] The lower court filed a Supplemental Opinion on August 14, 2023.[9]

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5 Judge McDermott's Order and Opinion is attached hereto as Exhibit A.

6 Judge McDermott's written order dismissing the PCRA is attached hereto as Exhibit D.

7 Judge McDermott's order requiring the filing of a Statement of Errors is attached hereto as Exhibit E.

8 Counsel filed a Statement of Errors and is attached hereto as Exhibit F.

9 Judge McDermott's Supplemental Opinion is attached hereto as Exhibit G.

VI. SUMMARY OF ARGUMENT

Jose Hernandez was a juvenile at the time the instant murders were committed. For this reason, his unconstitutional mandatory life sentences were vacated. However, at his resentencing hearing the lower court imposed four concurrent 45 years to life sentences. This sentence is the functional equivalent of a life without parole sentence. Because it was a *de facto* life sentence, that sentence must be judged by the standards established for imposition of life without parole sentences upon juveniles. A juvenile who can be rehabilitated must be accorded an opportunity for release with an opportunity for a meaningful and fulfilled life outside prison walls. Mr. Hernandez specifically challenged the constitutionality of his sentences under the Pennsylvania Constitution's bar against cruel punishments, Pa. Const. Art. 1, Sec. 13, which is broader than the United States Constitution's prohibition against cruel and unusual punishment. As Mr. Hernandez' sentence violates the Pennsylvania Constitution this Court should remand for a new sentencing hearing.

VII. ARGUMENT

Jose Hernandez' Sentence Is Unconstitutionally Cruel Under Article I, Section 13 Of The Pennsylvania Constitution.

Relying on the United States Supreme Court's recent holding in *Jones v. Mississippi*[10] the Pennsylvania Supreme Court ruled that "the sentencing procedures we adopted in *Batts II* 'do not carry the protections of the Eighth Amendment.'" *Commonwealth v. Felder*, 269 A.3d 1232, 1244 (Pa. 2022) (quoting *Commonwealth v. DeJesus*, 266 A.3d 49, 54 (Pa. Super. Ct. 2021) (*en banc*)). However, as stated by Justice Donohue:

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

Felder, 269 A.3d at 1247 (Donahue, J. concurring, joined by Justice Todd).

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

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10 *Jones v. Mississippi*, 141 S.Ct. 1307 (2021).

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

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

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

To determine whether the Pennsylvania statute provides broader protection than the federal statute, a court must analyze: "1) [the] text of

the Pennsylvania constitutional provision; 2) [the] history of the provision, including Pennsylvania case-law; 3) related case-law from other states; and 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Edmunds*, 586 A.2d at 390. This brief addresses those issues.

1. The Text Of The Pennsylvania Constitution Is Broader Than The Eighth Amendment.

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

2. History: Drafters Of Article I, Section 13 Sought To Prohibit All Punishments Which Did Not Deter Or Support Reformation Of The Individual.

In a recent examination of the historical foundations for Pennsylvania's "cruel punishments" ban, one commentator has noted that the original understanding of "cruel" by the Pennsylvania Framers actually favors a broader interpretation of the state provision. *See* Kevin Bendesky, "*The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 U. Pa. J. Const. L. 212 (2023). The Pennsylvania Constitution was adopted on September 28, 1776, ten years before ratification of the United States. Constitution. *Edmunds,* 586 A.2d at 896. In fact, the Federal Bill of Rights "borrowed heavily" from the Declaration of Rights of Pennsylvania and other colonies. *Id*. Pennsylvania ratified its second constitution in 1790, a year before adoption of the Eighth Amendment, and forbid all cruel punishments. Bendesky, *supra*, at 205. This provision remains in the Pennsylvania Constitution to date.

The original purpose of punishment in Pennsylvania was to deter and reform. As adopted by Enlightenment thinkers Cesare Beccaria and Baron De Montesquieu, no punishment was permissible unless necessary, making "cruel" anything that did not deter or reform. Bendesky,

supra, at 215-18 (first citing Montesquieu, *The Spirit of Laws* (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 2018) (1748), and then citing Cesare Beccaria, *On Crimes and Punishments* (1794), reprinted in *On Crimes and Punishments and Other Writing* (Richard Bellamy ed., Richard Davies trans., 2003)). Pennsylvania constitutional Framers wrote against "sanguinary" punishments. *See* Jared Ingersoll*, Report*, 7 J. Juris: New Series Am. L. J. 325, 325 (1821); Bendesky, *supra,* at 213. Framers came to believe that every punishment, that is not absolutely necessary for deterrence, is "tyrannical" and cruel. *See* Bendesky, *supra*, at 216. This informed the meaning of cruelty and led to Section 13 of the Pennsylvania Constitution.

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

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

At the federal level, a punishment also had to be both cruel *and* unusual, as the Court would permit punishments that were unusual, but not cruel. *See Bucklew*, 139 S. Ct. at 1123-24 (citing *In Re Kemmler*, 136 U.S. 436, 447 (1890) (where death by electrocution was a new method of

punishment, and could be considered unusual, but was legal because the "punishment of death is not cruel, within the meaning of that word as used in the Constitution.")). According to the late Justice Scalia, this was intentional as the Framers of the federal Constitution knew of state constitutions, like Pennsylvania's and South Carolina's, which prohibited only cruel punishment and guaranteed proportional punishments, but purposely chose not to adopt such provisions. *See Harmelin v. Michigan*, 501 U.S. 957, 966 (1991); *see also Bucklew*,139 S. Ct. at 1124.

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

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

Pennsylvania's ban on cruel punishments is not unique; several other jurisdictions have likewise banned cruel punishments, or cruel *or* unusual punishments. Many of these state constitutional provisions have been interpreted to provide greater protections than the Eighth

Amendment. *See State v. Vang*, 847 N.W.2d 248, 263 (Minn. 2014) (where the Minnesota Supreme Court found the difference between its nearly identical "cruel or unusual" punishment provision as "'not trivial' because the 'United States Supreme Court has upheld punishments that, although . . . cruel, are not unusual" (quoting *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998))); *Hale v. State*, 630 So.2d 521, 526 (Fla. 1993) ("The Federal constitution protects against sentences that are both cruel and unusual. The Florida Constitution, arguably a broader constitutional provision, protects against sentences that are *either* cruel or unusual."); *Commonwealth v. Concepcion*, 164 N.E.3d 842, 855 (Mass. 2021) (noting that Article 26 of the Massachusetts Constitution "affords defendants greater protections than the Eighth Amendment"); *People v. Anderson*, 493 P.2d 880, 883 (Cal. 1972), *superseded by constitutional amendment*, Cal. Const. art. 1, § 27 (where the California Supreme Court rejected the idea that their state constitution was "coextensive" with the Eighth Amendment, and found that use of the disjunctive "or" in the state constitution was significant and purposeful); *People v. Baker*, 229 Cal. Rptr. 3d 431, 442 (Cal. Ct. App. 2018) (where the California Court of Appeal construed the state constitutional provision separate from its federal

counterpart, and found that the distinction between Eighth Amendment wording and the California Constitution was "purposeful and substantive rather than merely semantic" (quoting *People v. Carmony*, 26 Cal. Rptr. 3d. 365, 378 (Cal. Ct. App. 2005)); s*ee also Burnor v. State*, 829 P.2d 837, 839-40 (Alaska Ct. App. 1992) (applying its own "single test to determine whether a statutory penalty constitutes cruel and unusual punishment").

The Washington Supreme Court has also interpreted its constitution as more protective than the Eighth Amendment, and its reasoning is instructive here. *State v. Fain*, 617 P.2d 720, 723 (Wash. 1980) (*en banc*). In *Fain*, the Court reasoned that "[e]specially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation." *Id.* This was clear from historical evidence that revealed that the Framers viewed the word "cruel" as sufficient to express their intent and "refused to adopt an amendment inserting the word unusual." *Id*. In 2018, after an *Edmunds*-like analysis, the Washington 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 caselaw, to recognize that children warrant special protection. *Id.* at 350. The Court reasoned that, in the context of juvenile sentencing, the Washington Constitution provided greater protection than the Eighth amendment. *Id.*

Most recently, in *State v. Kelliher*, decided after *Jones*, the North Carolina Supreme Court found that it violates both the Eighth Amendment and "article I, section 27 of the North Carolina Constitution to sentence a juvenile homicide offender" who is "'neither incorrigible nor irredeemable' to life without parole." *State v. Kelliher*, 873 S.E.2d 366, 370 (N.C. 2022). The Court found that the North Carolina Constitution, which prohibits "cruel *or* unusual punishments," N.C. Const., art. I, § 27 (emphasis added), offers protections that are distinct and broader than those provided under the Eighth Amendment, *Kelliher*, 873 S.E.2d at 382. The Court noted the different language and presumed that the Framers of the North Carolina Constitution intentionally chose the words "cruel or unusual punishment" to prohibit punishments that were either cruel or unusual, "consistent with the ordinary meaning of the disjunctive term

'or.'" *Id.* The Court looked at the constitutional text, precedent illustrating the Court's "role in interpreting the North Carolina Constitution, and the nature of the inquiry used to determine whether a punishment violates the federal constitution" to hold that the state constitution is *not* in "lockstep" with the Eighth Amendment. *Id.* at 383. The Court also noted how its interpretation changed to conform with contemporary understanding of adolescent development recognized by the Court. *Id.* at 384.

Notably, the North Carolina Supreme Court further held that any sentence, or combination of sentences, which require youth to serve more than 40 years in prison before parole eligibility, is a *de facto* life without parole sentence "because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison" and that such sentences also violated the Eighth Amendment. *Kelliher*, 873 S.E.2d at 370. The Court reasoned that adopting a position that under *Jones*, "the Eighth Amendment requires nothing more than that 'sentencing courts . . . take children's age into account before condemning them to die in prison'" would repudiate core principles articulated in *Miller* and *Montgomery*. *Id.* at 379 (alteration in original) (quoting *Montgomery*, 577 U.S. at 209). This interpretation is

"irreconcilable" with the Supreme Court's own stated characterization of its holding: that *Jones did not* abrogate *Miller*, and the Supreme Court only intended to reject the appendage of new procedural requirements to *Miller* and *Montgomery*. *Id.* "To hold otherwise would require us to read *Jones* far more expansively" than intended, "the very sin that *Jones* warns us against committing." *Id.* at 380.

4. Pennsylvania Has A Long History Of Protecting Youth.

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

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

Pennsylvania history reveals a longstanding commitment to providing special protections for minors against the full weight of criminal punishment. Over 150 years ago, well before the Commonwealth enacted the Juvenile Act, the Pennsylvania Supreme Court approved the detention of children in reform schools or houses of refuge. While the creation of these detention centers was concerning for many reasons, the Court articulated that the goal was explicitly "reformation, and not punishment." *Ex parte Crouse*, 4 Whart. 9, 9 (Pa. 1839). Years later, Pennsylvania passed its first Juvenile Act in 1901. It was immediately subject to constitutional challenge. *See Case of Mansfield*, 22 Pa. Super. 224, 225 (Pa. Super. Ct. 1903). While the *Mansfield* Court found 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)[11].

[11] *Available at* https://prdjcjc.pwpca.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*, 602 A.2d 1307, 1313 (Pa. 1992), 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. 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. § 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.[12]

The Pennsylvania Supreme Court also has a history of protecting youth. This is evident in *In re J.B.*, 107 A.3d 1, 2 (Pa. 2014), where the Pennsylvania Supreme Court held that the Sex Offender Registration

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

and Notification Act (SORNA) "violates juvenile offenders' due process rights through use of an irrebuttable presumption." The Court recognized that youth commit sexual offenses due to "impulsivity and sexual curiosity, which diminish with rehabilitation and general maturation," and make them less likely than adults to reoffend. *Id.* at 17. Similarly, in *Batts II* the Court adopted expansive procedural safeguards to protect youth potentially eligible for life without parole sentences. *See Commonwealth v. Batts* (*Batts II*), 163 A.3d 410, 443-444 (Pa. 2017), *rev'd on Eighth Amendment grounds*, *Commonwealth v. Felder*, 269 A. 3d 1232 (Pa. 2022). The Court noted the unique attributes of youth (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. But *Felder* did not speak to the separate protections under Article I, Section 13.

As outlined above, the text, history and policy in Pennsylvania favor

a broader reading of its prohibition against cruel punishment. Other state courts also show a trend away from coextensive interpretations towards independent analysis, especially in the context of youth sentencing.

B. Mr. Hernandez' Sentence Is Cruel Under The Pennsylvania Constitution.

The Framers' intent in proposing Article 1, Section 13, would plainly void Mr. Hernandez' four concurrent 45 year to life sentences as they are an unconstitutional *de facto* life without parole sentences and unreasonably cruel. As outlined above, anything that is not necessary to deter or reform *is* cruel under the Pennsylvania Constitution. This is especially true for individuals sentenced as youth, who will serve "more years and a greater percentage of his life in prison than an adult offender." *Graham v. Florida*, 560 U.S. 48, 70 (2010); see also *Miller*, 567 U.S. at 475. As clearly outlined in *Miller*, and confirmed in *Jones*, certain punishments are simply disproportionate when applied to youth. The unique characteristics of youth "diminish penological justifications" for imposing life without parole sentences. *Miller*, 567 U.S. at 472; *Montgomery*, 577 U.S. at 207. Deterrence cannot be rationalized as the same characteristics that render youth less culpable, "make them less likely to

consider potential punishment." *Miller*, 567 U.S. at 472. The need for incapacitation is also lessened because adolescent development diminishes the likelihood that youth will forever be a danger to society. *Id.*at 472-73. A life behind bars also "forswears" rehabilitation as one will never have the opportunity at a rehabilitated life outside of prison walls. *Id.* at 473.

This Court has a plenary standard of review because Mr. Hernandez is challenging the legality of his sentences. *Commonwealth v. Hernandez*, 217 A.3d 873, 877 (Pa. Super. 2019). And because Mr. Hernandez is challenging the legality of his sentences, this Court has the authority to correct that illegality. Trial courts have inherent authority to correct patent sentencing errors. In *Commonwealth v. Holmes*, 933 A.2d 57, 65 (Pa. 2007) the Supreme Court held that cases are "amenable to the exercise by a trial court of the inherent power to correct patent errors despite the absence of traditional jurisdiction . . . [T]he limits of jurisdiction enshrined in Section 5505 do not impinge on that time honored inherent power of courts." *See also Commonwealth v. Jones*, 554 A.2d 50 (Pa. 1989) and *Commonwealth v. Cole*, 263 A.2d 339 (Pa. 1970). *Holmes* explained the limits of the inherent power of the court to correct patent errors: "This exception to the general rule of Section 5505 cannot expand to swallow

the rule. In applying the exception to the cases at bar, we note that it is the obviousness of the illegality, rather than the illegality itself, that triggers the court's inherent power. Not all illegal sentences will be amenable to correction as patent errors." *Id.* at 66-67. As the trial court had the inherent power to correct an obviously illegal sentence (a *de facto* life sentence imposed on a juvenile) and this Court has the power to review that error.

Mr. Hernandez was 17 years old at the time of his offenses. He has already served over 36 years in prison. He has also shown significant rehabilitation. His sentence serves neither deterrence nor rehabilitation. Given Mr. Hernandez' youth at the time of the crime, his sentence is unreasonably cruel and unconstitutional under the Pennsylvania Constitution.

VIII. CONCLUSION

For the above reasons, this Court should vacate the sentences imposed and remand the matter to the lower court for resentencing.

Respectfully submitted,

/S/

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

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

Respectfully submitted,

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