

No. 1306 WDA 2023

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IN THE SUPERIOR COURT OF PENNSYLVANIA  
WESTERN DISTRICT

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COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

MICHAEL P. FOUST,

Appellant.

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REPLY BRIEF OF APPELLANT

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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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## STATEMENT OF THE CASE

This matter comes before this Court following a timely filed appeal. Appellant Michael Foust timely filed his principal brief on February 20, 2024. The Commonwealth filed its appellee's brief on May 3, 2024. Mr. Foust now timely files this reply brief. Mr. Foust relies upon the Statement of the Case in his original brief.

## SUMMARY OF THE ARGUMENT

In his opening brief, Mr. Foust made two distinct arguments. *First*, Mr. Foust argued that a *de facto* life without parole sentence of two consecutive 30-to-life terms is unconstitutional under the Eighth Amendment of the United States Constitution. *Second*, Mr. Foust argued that a *de facto* life without parole sentence of two consecutive 30-to-life terms is unconstitutional under Article 1, Section 13 of the Pennsylvania Constitution.

The Commonwealth does not dispute that Mr. Foust is entitled to relief on these grounds. Rather, the Commonwealth only attempts to raise two procedural defenses to Mr. Foust's arguments. The Commonwealth first argues that Mr. Foust's arguments have been previously litigated in Mr. Foust's direct appeal. This argument misses the mark for a few reasons. Mr. Foust did **not** argue that his sentence violated Article 1, Section 13 of the Pennsylvania Constitution in his direct appeal, so that argument has never been litigated nor decided. While Mr. Foust challenged his sentence under the Federal Constitution in his direct appeal, his argument here is

distinct because it relies on the Supreme Court’s recent clarification “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.” *Jones v. Mississippi*, 593 U.S. 98, 106 n.2 (2021) (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016)).

The Commonwealth then argues that Mr. Foust makes only discretionary, and not legal, challenges to his sentence, and that these challenges, if not previously litigated, have been waived. Not only have these arguments been preserved by virtue of being raised previously, but Mr. Foust challenges the legality of his sentence, which cannot be waived.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION OVER MR. FOUST’S CHALLENGE TO THE LEGALITY OF HIS *DE FACTO* LIFE SENTENCE

Mr. Foust argues that the PCRA Court erred as a **matter of law** in determining that his two consecutive 30-years-to-life sentences—an aggregate of 60 years to life—do not constitute a *de facto* life sentence, and that his *de facto* life sentence violates both the Federal and Pennsylvania Constitutions. The Commonwealth argues in response that this Court has already addressed this argument on Mr. Foust’s direct appeal of his sentence.

In identifying a legal challenge to a sentence, the Pennsylvania Supreme Court has explained:

[t]he inquiry is whether, assuming the appellant's claim prevails, the result would be that the trial court lacked authority to impose the sentence at issue. If so, then the appellant's challenge implicates the legality of his sentence.

*Commonwealth v. Prinkey*, 277 A.3d 554, 563 (Pa. 2022).

This is exactly what Mr. Foust is arguing here: merely because the sentencing court has discretion does not mean that a court has authority to impose an unconstitutional life without parole sentence. This argument, made under both the Federal and Pennsylvania Constitutions, is independent from the specific facts of Mr. Foust's sentence and any intermediate discretion applied in reaching that sentence. To suggest otherwise would lead to the untenable conclusion that unconstitutional sentences borne out of an exercise of judicial discretion are insulated from challenge.

This Court previously found that only Mr. Foust's 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). Therefore, this Court has not addressed the question of whether an aggregate 60-years-to-life sentence constitutes a *de facto* life sentence. While judges have broad discretion to

determine whether to run individual sentences consecutively or concurrently, the practical and legal effect of two consecutive 30-years-to-life sentence is the functional equivalent of a life sentence, which must enjoy the legal protections set forth by the United States Supreme Court in *Miller v. Alabama*. Moreover, *Foust* relied heavily on *McCullough v. State*, which has since been reversed. *See Foust*, 180 A.3d at 436 (citing *McCullough v. State*, 168 A.3d 1045 (Md. Ct. Spec. App. 2017)); *Carter v. State*, 192 A.3d 695, 736 (Md. 2018); (Br. for Appellant 16-18). This change in authority warrants reconsideration of whether Mr. Foust’s aggregate 60-years-to-life sentence is a *de facto* life without parole sentence.

## **II. MR. FOUST’S ARGUMENTS HAVE NOT BEEN PREVIOUSLY LITIGATED**

The Commonwealth argues that the “discretionary aspects of [Mr. Foust’s] sentence have been previously litigated.” (Br. for Appellee 10). Yet, Mr. Foust does not challenge the *discretionary* aspects of his sentence—he challenges the *legality* of his sentence. Insofar as the Commonwealth argues that Mr. Foust’s Federal or Pennsylvania constitutional arguments have been previously litigated, it is incorrect.<sup>1</sup>

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<sup>1</sup> As a threshold matter, this Court has not considered whether Mr. Foust’s 60-year sentence violates the Federal or Pennsylvania Constitutions because it determined that his individual 30-year sentences did not amount to a *de facto* life without parole sentence. *Foust*, 180 A.3d at 441.

Mr. Foust first argues that his sentence is illegal under the Eighth Amendment of the United States Constitution. He argues that because the trial court found his crime reflected “transient immaturity,” it was not permitted to sentence him to a *de facto* life without parole sentence under *Jones*. *Jones v. Mississippi*, 593 U.S. 98, 106 n.2 (2021) (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016)). *Jones* was decided in 2021—three years after this Court denied Mr. Foust’s direct appeal. Compare *id. with Foust*, 180 A.3d at 441. Accordingly, Mr. Foust’s challenges under the United States Constitution have not been previously litigated.

Mr. Foust also argues that his sentence is illegal under Article I, Section 13 of the Pennsylvania Constitution, which is broader than the Eighth Amendment of the United States Constitution. Mr. Foust relies in part on Justice Donohue’s invitation to mount a Pennsylvania constitutional challenge to lengthy and life sentences as well as new research persuasively suggesting a different interpretation of Section 1, Article 13 of the Pennsylvania Constitution that Pennsylvania courts have unquestioningly relied on for decades. See *Commonwealth v. Felder*, 269 A.3d 1232, 1247 (Pa. 2022) (Donohue, J., concurring) (“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.”); (Br. for Appellant 25-40). These arguments were not advanced during Mr. Foust’s direct appeal and therefore have not been previously litigated.

### **III. MR. FOUST HAS NOT WAIVED HIS LEGALITY OF SENTENCE ARGUMENTS**

Finally, the Commonwealth argues that Mr. Foust has waived the arguments raised in the PCRA Petition. Not so. First, the Commonwealth fails to address any of Mr. Foust’s arguments with specificity. Importantly, Mr. Foust challenges the legality of his sentence under the Federal and Pennsylvania Constitutions. “[L]egality-of-sentence claims are non-waivable and thus **not** required to have been preserved at any prior stage of litigation in order to obtain review thereof.” *Commonwealth v. Jones*, 932 A.2d 179, 183 (Pa. Super. Ct. 2007). Mr. Foust’s claims therefore “are simply not subject to the waiver provision of the PCRA.” *Id.* Accordingly, Mr. Foust has not waived his claims that his 60-years-to-life aggregate sentence violates the Eighth Amendment of the United States Constitution and Article I, Section 13 of the Pennsylvania Constitution.

### **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,

/s/ Marsha L. Levick

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**COUNSEL FOR APPELLANT**

DATED: May 17, 2024

**CERTIFICATE OF COMPLIANCE**

I hereby certify this 17th day of May, 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 hereby certify this 17th day of May, 2024, that the foregoing Reply Brief of Appellant complies with the word count limits as set forth in Pennsylvania Rule of Appellate Procedure 2135 and contains 1,295 words.

/s/ Marsha L. Levick  
Marsha L. Levick