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**IN THE SUPREME COURT OF PENNSYLVANIA**

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**No. 28 MAP 2025**

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**COMMONWEALTH OF PENNSYLVANIA,**
**Appellee,**

**v.**

**IVORY KING,**
**Appellant.**

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# BRIEF OF *AMICI CURIAE* PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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**Appeal from the October 11, 2024 Judgment of the Superior Court at No. 406 EDA 2023 Affirming the Judgment of Sentence of the Court of Common Pleas of Bucks County in No. CP-09-CR-0003727-1998**

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a professional association of attorneys admitted to practice in Pennsylvania and actively engaged in criminal defense representation. Founded in 1988, PACDL is the Pennsylvania affiliate of the National Association of Criminal Defense Lawyers. As *amicus curiae*, PACDL represents the experience and perspective of Pennsylvania's professional criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and who work to achieve justice and dignity for defendants and thus for all citizens and residents of the Commonwealth. PACDL membership includes approximately 900 private criminal defense practitioners and public defenders throughout the Commonwealth.

Pursuant to Pennsylvania Rule of Appellate Procedure 531, *Amici* certifies that no other person or entity has paid for the preparation of, or authored this brief, in whole or in part.

## INTRODUCTION

A person capable of rehabilitation should not be imprisoned for the remainder of their life, without eligibility for parole, for crimes committed as a youth. This is true whether the deprivation of parole eligibility stems from one count with a lifelong term of incarceration or multiple counts run consecutively that result in a lifetime of incarceration. The functional result is the same: the person is incarcerated with no chance of release for crimes of their youth. Life imprisonment with no hope of ever reentering community is "the second most severe penalty permitted by law," *Graham v. Florida*, 560 U.S. 48, 69 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment)). Reason gives way to brutality when such a sentence is imposed on a person the sentencing or re-sentencing court deems capable of rehabilitation for crimes committed as a youth. *Amici* thus concur with Appellant Ivory King's position on the unconstitutionality of the sentence before the Court.

Prior to analyzing whether the life sentence at issue here is a violation of Article 1, Section 13 of the Pennsylvania Constitution, and prior to analyzing whether the life sentence, as applied, violates the Eighth Amendment to the United States Constitution, this Court must determine whether Mr. King's sentence constitutes a *de facto* life sentence. *Amici* thus focus on the second

issue on which this Court granted review: whether the definition of a *de facto* life sentence should include a term of lifetime incarceration that results from the aggregation of multiple term-of-years sentences run consecutively. Otherwise stated, should this Court apply a *de facto* or a *de jure* lens to the question of what constitutes a *de facto* life sentence?

## ARGUMENT

### A. Eighty years of incarceration without parole is a *de facto* life sentence.

Mr. King will not be considered for parole unless and until he reaches the age of 97 years. He will most likely be dead before his sentence permits an opportunity to present a rehabilitated self to a parole board for consideration of release. This is a *de facto* life sentence.

"Kid brains"—teenage brains—are different. That is why imposition of a life without parole sentence for acts committed by youth is constrained by the Supreme Court's directive that sentencing courts must "consider the mitigating qualities of youth." *Miller v. Alabama,* 567 U.S. 460, 476 (2012). *Miller* mandates "that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a life-without-parole sentence." *Commonwealth v. Felder*, 269 A.3d 1232, 1245 (Pa. 2022) (internal quotations and citations omitted); *see also United States v. Grant*, 9 F.4th 186, 200 (3d Cir. 2021) ("What matters for *Miller* purposes is whether the sentencer

considered a juvenile homicide offender's youth and attendant characteristics before sentencing him or her to [life without parole]."). This Court applied *Miller*'s command "to consider the mitigating qualities of youth" when evaluating the constitutionality of a *de facto* life sentence in *Felder*. 269 A.3d at 1243.

A determination of whether a sentence is a *de facto* life sentence should turn on the practical effect of the sentence on the offender, not the formal structure of the sentence. The Superior Court has on several occasions considered so-called *de facto* life sentences. In *Commonwealth v. Schroat*, the Superior Court first considered the implications of *Felder* in a published opinion. 272 A.3d 523 (Pa. Super. 2022). In 1992, Schroat pled guilty to first-degree murder for strangling and stabbing a five-year-old girl when he was seventeen. *Id.* at 525. After *Miller* and *Montgomery*, he was resentenced to life without parole on October 23, 2019. Schroat challenged the court's balancing of the relevant sentencing factors and his youth. *Id.* at 526. During resentencing, Schroat presented evidence that he had matured since 1992, with his life at the time full of abuse and neglect, as well as substance abuse. *Id.* at 529. He had minor misconducts throughout his 26 years in prison, and no history of violence. *Id.* The Commonwealth presented no evidence. The sentencing court nonetheless found that Schroat had deep-seated mental problems and the causes

of his crimes do not disappear with brain development. *Id.* The Superior Court held that the trial court abused its discretion. The Superior Court first found that the sentencing court emphasized the violent nature of the crime and provided little analysis of the factors in 42 Pa. C.S.A. §§ 9721(b), 9725. The Superior Court additionally found that the sentencing court's finding that Schroat had no "diminished culpability" and, despite his status as a minor, failed to consider youth as a sentencing factor when he demonstrated his capacity for change. 272 A.3d at 530.

In *Commonwealth v. Harper*, the defendant was resentenced to 35-to-life. 273 A.3d 1089, 1092 (Pa. Super. 2022). This Superior Court held that Harper did not receive a *de facto* life sentence because he would be approximately 54 years old when he would become eligible for parole. *Id.* at 1094. In addressing *Felder*, the Superior Court noted that the sentence was a product of Pennsylvania's discretionary sentencing system, which includes consideration of youth, and thus was consistent with *Miller*. *Id.* at 1095.

Further, in *Commonwealth v. Miller*, 275 A.3d 530 (Pa. Super. 2022), the Superior Court addressed that sentencing claims, even those alleging a *de facto* life sentence, are properly considered challenges to discretionary aspects of sentencing. *Id.* at 534. The Superior Court reiterated that, when resentencing a juvenile offender, if the Commonwealth does not seek a life without parole

sentence, the sentencing court must consider 42 Pa. C.S.A. § 9721(b), and may consider 18 Pa. C.S.A. § 1102.1(a)(1). 275 A.3d at 535. In *Miller*, the sentencing court had reviewed sentencing materials, testimony from the decedent's family, and a PSI report, and sentenced Miller to 55 years to life. *Id.* at 536. Because the sentencing court reviewed the pre-sentence report, it was presumed to be aware of all the relevant sentencing factors. *Id.* at 535 ("[I]t is presumed that the court is aware of all appropriate sentencing factors and considerations, and that where the court has been so informed, its discretion should not be disturbed.") (citing *Commonwealth v. Ventura*, 975 A.2d 1128, 1135 (Pa. Super. 2009)). Thus, while a lengthy sentence, the Superior Court held it was not an abuse of discretion. *Id.*

Yet, all of these cases demonstrate *de facto* life sentences with a speculative *potential* of parole. Mr. King's first opportunity for parole will be age 97, if he lives that long. There is no way he will be paroled any earlier on the existing sentence and therefore the sentence is a *de facto* life sentence. In Mr. King's case, parole is a mythical proposition as his eligibility for parole review is well past a statistical likelihood of even living that long. *See* Arias, Xu & Kochanek, "United States Life Tables, 2022," *Nat'l Vital Statistics Reports*, Vol. 74, No. 2 (CDC, NVSS, April 8, 2025); Andy Kiersz, *This is When You're Going to Die*, Business Insider, SLATE (Mar. 21, 2014).

A determination regarding whether a sentence is a *de* facto life sentence should term on the years served, not the trail court's sentencing scheme. More specifically, it should turn on the first parole date that the Department of Corrections would permit. It is a simple analysis: will the individual have a meaningful opportunity for parole before they die. If not, they are serving a *de facto* life sentence. Excluding terms of incarceration that last a lifetime from the definition of *de facto* life sentences because they derive from stacked sentences defies common sense.

Ninety-seven is certainly well past retirement age. *See, e.g.*, *United States v. Grant*, 887 F.3d 131, 150 (3d Cir. 2018) (noting that retirement is "the birth of an opportunity for the retiree to attend to other endeavors in life"), *vacated*, 9 F.4th 186 (3d Cir. 2021). Considering additional factors, such as the challenges of reentry after an entire adult life in jail, a first parole opportunity at 97 is not a meaningful chance at parole. Mr. King cannot be paroled any earlier than age ninety-seven on the existing sentence and therefore the sentence is a *de facto* life sentence. Any finding to the contrary is *de jure*, not *de facto*. *Cf.* De Facto, Black's Law Dictionary (defining *de facto*, in part, as "In fact, in deed, actually...").

This common-sense interpretation of a *de facto* life sentence is consistent with the mandates of Pennsylvania law that require sentencing judges to specify

the aggregate minimum sentence when imposing a sentence. *See* 42 Pa. C.S.A. § 9757 ("Whenever the court determines that a sentence should be served consecutively to the one being then imposed by the court . . . the court shall indicate the minimum sentence to be served for the total of all offenses with respect to which sentence is imposed."); 42 Pa. C.S.A. § 9762(f) (instructing that consecutive confinement sentences shall be aggregated into a single sentence with one minimum term and one maximum term). The procedure for calculating parole dates is similarly based on the practical effect of the sentence to the extent it acknowledges that "[s]tate law requires that consecutive sentences be aggregated into one sentence structure with one minimum and one maximum sentence." *See* Pa. Bd. of Prob. and Parole, Case Review and Release Processing Sentence Types and Paroling Authority, § 4.B.2; *see also* 42 Pa. C.S.A. § 9761.

The common-sense interpretation of a *de facto* life sentence is also the just interpretation. If an individual receives an aggregate sentence with a 70-year minimum term of incarceration for a series of burglaries committed at age 16, is that person's lifelong incarceration without meaningful opportunity for parole less cruel than the 16-year-old in *Graham v. Florida*, 500 U.S. 48 (2010), whose life sentence for a single burglary was found to be a violation of the Eighth Amendment? The impact on the individuals is the same and the

constitutionality of both juvenile life sentences should be analyzed the same way.

Unlike the court below, this Court is not bound by *Commonwealth v. Foust*, 180 A.3d 416 (Pa. Super. 2018). There, the Superior Court analyzed whether a sentence constitutes a *de facto* life sentence by considering each count without aggregation. Foust received consecutive 30 year to life sentences, effectively a 60-to-life sentence. *Id.* at 434. The Superior Court, after recognizing the split of authority on the issue, reiterated Pennsylvania's jurisprudence that the imposition of consecutive sentences is discretionary and defendants are not entitled to a "volume discount" for their aggregate sentence. *Id.* at 435. While acknowledging that its own jurisprudence allowed for consideration of aggregate claims, these were only within the confines of discretionary aspects of sentencing challenge. *Id.* The Superior Court was concerned with the "volume discounting" effect of each homicide and ultimately reasoned that *Miller* and its progeny said nothing about the ability of states to provide structured sentencing schemes which allow for consecutive sentences for multiple offenses. *Id.* at 436.

The Court relied upon *McCullough v. State*, an intermediate appellate court decision out of Maryland, which held that consecutive sentences have nothing to do with a juvenile's capacity for change, rather they are reflective of

a state's ability to impose multiple punishments for multiple crimes. 168 A.3d 1045, 1068 (Md. Ct. Spec. App. 2017).

However, *McCullough* was reversed by *Carter v. State*, 192 A.3d 695 (Md. 2018). *Carter* dealt with the same defendant in *McCullough*, who had been sentenced to an aggregate 100 years of incarceration with consideration for parole after 50 years. The Maryland Supreme Court recognized that while sentences in terms of years differ from "life" sentences, these sentencing norms are not necessarily applicable to juveniles. *Carter*, 192 A.3d at 725. In determining whether the term of years is really a life without parole sentence, the *Carter* Court recognized the basic truth that the Eighth Amendment's prohibition against cruel and unusual punishment in the context of a juvenile offender could be circumvented by a term of years sentence. *Id.* at 725-26. Because sentencing is tied to personal culpability, juveniles have a lessened culpability that a sentencing court must consider. *Id.* at 726. The Maryland Supreme Court explained:

> There is no reason to believe that a juvenile would be deterred from crime depending on whether the sentence was 'life' or a number of years that is clearly longer than his or her own life. Finally, there is no difference in terms of rehabilitation or incapacitation between two sentences that would both incarcerate the defendant for the duration of the defendant's life. Neither type of sentence contemplates the defendant returning to society, either as a reformed citizen or as a potential threat.

*Id.* at 726-27. The *Carter* Court then analyzed *when* a term-of-year sentence becomes an effective life without parole sentence, recognizing the wide gulf between a spree actor who commits offenses over weeks or months and someone involved in one event which results in multiple crimes. *Id.* at 731. The latter is where a stacked sentence is most egregious and likely violates *Miller* and ultimately requires reversal. Under the Eighth Amendment, a state "is not required to guarantee eventual freedom," but must allow a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 735.

*Foust*'s rationale is grounded in the Superior Court's formalistic approach to sentencing claims that requires a litigant to raise a "substantial" question and makes consecutive sentencing claims reviewable only if coupled with an excessiveness and disproportionality claim. *Amici* urge this Court to correct the course set in *Foust* and hold that the definition of a *de facto* sentence turns on the effect of the whole sentence on the incarcerated person, regardless of whether the life sentence arises from one charge or multiple charges run consecutively.

### B. The right to be free from cruel and unusual punishment does not turn on how a sentence is structured.

As Justice Donahue aptly observed in her concurring opinion in *Felder*, there is wide variety in how individual juvenile sentences are structured in

Pennsylvania. "[T]he minimum sentence imposed on any given juvenile before becoming eligible for parole could vary widely. One court could immediately parole an 18 year old offender, while another court could impose a 50 year minimum sentence on a 14 year old offender." *Felder*, 269 A.3d at 1249 (quoting *Commonwealth v. Batts*, 66 A.3d 286, 300 (Pa. 2013) (Baer, J., concurring)).

While sentence structure may vary, the guarantee against cruel and unusual punishment in the United States and Pennsylvania Constitutions makes no distinction based on how the punishment is structured. As the Maryland Court analyzed in *Carter*, the structuring of the sentence can amount to the same impermissible sentencing scheme that violates the Eighth Amendment. *Carter*, 192 A.3d at 725. Numerous state courts have concurred with *Carter's* approach that a sentence stated in terms of years can function as a *de facto* life without parole sentence. *Id.* at 726 n.35 (listing examples). *Foust* represents an outlier and ultimately places form over substance. While *Felder* acknowledged that a term of years sentence *may* amount to a *de facto* life sentence, Mr. King's case leaves little in the way of doubt that it is a life sentence and the discretionary sentencing scheme employed in this case runs afoul of actually considering his juvenile status. A determination of whether a sentence imposed on a juvenile offender is unconstitutional cannot be made to depend on whether the juvenile

is serving a single life term or an aggregation of consecutive sentences amounting to a life term.

### C. There are hundreds of juveniles serving *de facto* life sentences in Pennsylvania.

Pennsylvania has one of the highest populations of individuals serving life without parole sentences in the country. Ashley Nellis and Celeste Barry, *A Matter of Life: The Scope and Impact of Life and Long Term Imprisonment in the United States*, The Sentencing Project (2025) (Key Findings). In 2024, Pennsylvania prisons held 2,981 people who were serving life sentences. *Id.* Of those, 926 were serving *de facto* life sentences for crimes committed under the age of 25. *Id.* (Table 10). According to a 2013 report, more than 450 inmates in Pennsylvania were serving life without parole sentences for crimes they committed as juveniles, more than in any other state. *See* Juvenile Law Center, *Juvenile Life Without Parole in Pennsylvania*, available at (https://jlc.org/juvenile-life-without-parole-jlwop-pennsylvania) (last visited July 31, 2025).

### D. Discretion to impose consecutive sentences cannot operate to dilute constitutional protections.

Under Pennsylvania law, two individuals with similar criminal histories who commit near identical crimes can end up with widely different sentencing outcomes based solely on the discretionary choice to run sentences concurrently,

as opposed to consecutively. Constitutional protections against cruel and unusual punishments should not vary based on how this discretion is exercised.

Whereas "the mitigating factors of youth" are required to be considered in imposing a life sentence on a juvenile under *Miller*, age is not expressly among the enumerated factors judges are to consider when making the determination to run sentences consecutively. Rather, sentencing courts are directed as follows:

> [T]he court shall follow the general principle that the sentence imposed should call for total confinement that is consistent with section 9725 (relating to total confinement) and 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. The court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under section 2155 (relating to publication of guidelines for sentencing, resentencing and parole, risk assessment instrument and recommitment ranges following revocation.

42 Pa. C.S.A. § 9721(b). In contrast, the General Assembly requires that age and age-related factors must be considered in evaluating whether to impose a life sentence on juvenile offenders:

> In determining whether to impose a sentence of life without parole . . . the court shall consider and make findings on the record regarding . . .
> . . .
> (7) Age-related characteristics of the defendant, including:

> (i) Age.
>
> (ii) Mental capacity.
>
> (iii) Maturity.
>
> (iv) The degree of criminal sophistication exhibited by the defendant.
>
> (v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.
>
> (vi) Probation or institutional reports.
>
> (vii) Other relevant factors.

18 Pa. C.S.A. § 1102.1(d)

In addition, sentencing courts have discretion when evaluating whether to stack sentences. Consecutive sentences often fail to be reviewed, given entirely to a sentencing court's discretion. *Commonwealth v. Johnson*, 961 A.2d 877, 880 (Pa. Super. 2008). However, there is an extremely narrow exception: excessiveness. In *Commonwealth v. Dodge*, the Superior Court acknowledged that consecutive sentences, for example, are effectively unreviewed unless the consecutive sentences are clearly unreasonable and result in an excessive sentence. 77 A.3d 1263, 1270 (Pa. Super. 2013). The standards in 42 Pa. C.S.A. § 9781 were met when the defendant raised a claim that the consecutive sentences involved a virtual life sentence for non-violent offenses. *Id.* at 1272. The *Dodge* panel recognized that an excessive sentencing claim is a plausible argument in certain circumstances when raised along with a failure to consider

mitigation factors. *Id.* However, the Superior Court further recognized that the caselaw concerning whether a defendant presented a substantial question was "less than a model of clarity and consistency." *Id.* at 1272 n.8 (listing conflicting sources). Consecutive sentences then could constitute a substantial question if raised along with an excessiveness claim in conjunction with the nature of the offense. *Id.*; *see also Commonwealth v. Mastromarino*, 2 A.3d 581, 586 (Pa. Super. 2010) (recognizing that manifest excessiveness in light of the conduct at issue presents a substantial question). This doctrine properly reflects the policy articulated in § 9762(f)'s aggregation rule for consecutive sentences.

This left Mr. King's case essentially unreviewable under Pennsylvania law and his *de facto* life sentence a matter of sentencing structuring. Because the sentences were consecutive, they do not raise a substantial question. Because there were multiple victims, there is no "volume discount." This is despite the key fact of Mr. King's case: he was a child when this happened.

Unless corrected, the decision below creates permissive sentencing schemes wherein juveniles receive consecutive sentences which amount to *de facto* life but their sentences are unreviewable on the merits of reasonableness unless they present a supplemental issue that otherwise amounts to an abuse of discretion. This cannot be squared with the reasoning underlying *Miller*. The constitutional guarantees in the Eighth Amendment and Article 1, Section 13

cannot be avoided by simply dividing a lengthy term of life imprisonment into two or more sentences run consecutive to one another. Further, under *Dodge* and its progeny, the seriousness of a homicide would likely preclude any potential claim of excessiveness and therefore a sentence of consecutive terms amounting to life would be effectively unreviewable under Pennsylvania's appeal standards. This too should not be countenanced.

## CONCLUSION

For the foregoing reasons, as well as those in Mr. King's brief, this Court should reverse the decision of the Superior Court.

Dated: July 31, 2025

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the 4,500-word limit under Pennsylvania Rule of Appellate Procedure 531, in that it contains 3,664 words as determined by the word-counting feature of Microsoft Word, and that the brief complies with the typeface requirements of Pennsylvania Rule of Appellate Procedure 124(a)(4).

Dated: July 31, 2025

Donna A. Walsh

## CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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, which require filing confidential information and documents differently than non-confidential information and documents.

Dated: July 31, 2025

Donna A. Walsh

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing Amicus Curiae Brief upon all counsel of record via PACFile eService, which service satisfies the requirements of Pa. R.A.P. 121.

Dated: July 31, 2025

Donna A. Walsh