No. 24-_____

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA

Respondent,

V.

KEITH ANTHONY ROSARIO

Petitioner.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

APPENDIX

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ORDER

PER CURIAM

AND NOW, this 21st day of February, 2024, the Petitions for Allowance of Appeal are **DENIED**.

A True Copy Nicole Traini
As Of 02/21/2024

Attest: Nicole Traini
Chief Clerk
Supreme Court of Pennsylvania

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KEITH ANTHONY ROSARIO	:	
Appellant	:	No. 931 WDA 2022

Appeal from the Judgment of Sentence Entered March 25, 2022
In the Court of Common Pleas of Washington County Criminal Division at No(s): CP-63-CR-0002611-2017

BEFORE: PANELLA, P.J., BENDER, P.J.E., and PELLEGRINI, J.*

MEMORANDUM BY PELLEGRINI, J.: **FILED: JUNE 21, 2023**

Keith Anthony Rosario (Rosario) appeals from the March 25, 2022 judgment of sentence imposed by the Court of Common Pleas of Washington County (trial court) following this Court's remand for resentencing on his convictions for attempted homicide, two counts of aggravated assault, two counts of kidnapping and conspiracy to commit homicide, aggravated assault and kidnapping.[1] The trial court resentenced him to an aggregate of 25 to 50 years' imprisonment followed by one year of re-entry supervision, a reduction from his original sentence of 35.5 to 90 years' imprisonment. Rosario

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 901, 2501, 2702, 2901 & 903.

challenges the discretionary aspects and legality of his sentence. We reverse and remand for resentencing.

I.

We recounted the factual and procedural history of this matter in detail in Rosario's direct appeal. ***See Commonwealth v. Rosario***, 248 A.3d 599, 604-07, 612 (Pa. Super. 2021). Briefly, in September 2017, Rosario and two other individuals assaulted the victim, Marcus Stancik, as he was walking in an alley. They threw him into their van and drove him to a different location, where Rosario removed him from the vehicle and shot him at the base of his skull near his neck. He attempted to fire a second shot, but his gun jammed, preventing him from doing so. Stancik survived the gunshot wound and identified Rosario as one of his assailants to law enforcement.

Following a jury trial, Rosario was convicted of the above-mentioned offenses. On appeal, he argued in relevant part that his sentences for attempted homicide and conspiracy to commit aggravated assault were illegal, as the Sentencing Code prohibits multiple convictions for inchoate crimes "designed to commit or to culminate in the commission of the same crime." ***Id.*** at 616-19 (citing 18 Pa.C.S. § 906) (emphasis omitted). He additionally argued that his sentences for two counts of kidnapping under 18 Pa.C.S. § 2901(a)(2) and (3) violated double jeopardy principles because they arose from the same criminal act. ***Id.*** at 619. We agreed and vacated the sentences for conspiracy and kidnapping. ***Id.*** at 619, 621 (citing ***Commonwealth v.***

Lopez, 663 A.2d 746 (Pa. Super. 1995)). Because our disposition upset the trial court's sentencing scheme, we remanded the matter for resentencing.

At the resentencing hearing, the parties stipulated to the entry of the presentence investigation report (PSI) prepared prior to Rosario's initial sentencing hearing in 2019. The report included details of Rosario's prior convictions, his family background and educational and employment history, character statements provided by family members and a victim impact statement. The trial court also considered excerpts of the transcript of the original sentencing hearing of statements by Rosario's mother and sister.

Rosario read a prepared statement on his behalf. While not admitting guilt, he expressed remorse to the individuals affected by the crime, particularly his own children. He regretted that his children would grow up without a father and said that he was working to be a productive member of society. He was employed as a janitor in state prison and was waiting to begin a barber shop training program. He was teaching himself Italian, learning about the law and writing a book. He said that he turned down a favorable plea deal for 11 to 22 years of incarceration and believed he was penalized for going to trial when he was sentenced to 35.5 to 90 years of incarceration. He said that he had no violent history in prison and was currently classified as a minimum security risk. He completed classes such as thinking for a change, violence prevention and batterers' intervention and was on the waiting list for additional classes such as money smart, seeking out safety, flaggers and

building and planning. He believed that he was capable of rehabilitation and successfully reentering society.

After receiving this evidence, the trial court resentenced Rosario to an aggregate of 25 to 50 years of incarceration followed by one ear of reentry supervision. For ease of reference, the previous and current sentencing schemes are as follows:

Charge	**June 3, 2019 Sentence**	**March 25, 2022 Sentence**
Attempted homicide	120 to 240 months	120 to 240 months
Aggravated assault, (a)(1)	Merged	Merged
Aggravated assault with a deadly weapon, (a)(4)	36 to 120 months, consecutive	60 to 120 months, consecutive
Kidnapping, (a)(2)	90 to 240 months, consecutive	120 to 240 months, consecutive
Kidnapping, (a)(3)	90 to 240 months, consecutive	Merged
Conspiracy	90 to 240 months, consecutive	Merged
Aggregate	35.5 to 90 years	25 to 50 years

In resentencing Rosario to the statutory maximum on three of the counts, the trial court explained that it found several aggravating factors necessitating the sentence. First, Rosario had been paroled for a different firearms offense approximately four months prior to the instant offenses and he had also been on probation at the time for two prior drug offenses. The trial court considered Rosario's supervised release at the time of his crimes to be a separate aggravating factor from his prior record score and found that

prior attempts at rehabilitating him had failed. Second, Rosario had involved a juvenile with whom he had a bond "much like father and son" in the crimes. N.T., 3/25/22, at 28. Third, the trial court stated that Rosario lacked remorse and had failed to take responsibility for his actions. He did not specifically express remorse to the victim during his allocution and had denied his guilt. Finally, the trial court found that the crime had a profound effect on the victim, who suffered medical issues stemming from the attack and still had the bullet lodged in his face at the time of trial. Based on those reasons, it concluded that the statutory maximum sentences were appropriate. Notably, its reasoning for imposing the sentences following remand were materially identical to the reasoning it provided in support of the original sentence. ***Compare*** N.T., 6/3/19, at 29-31, ***with*** N.T., 3/25/22, at 27-29.

Rosario timely filed a post-sentence motion, which the trial court denied after argument. He timely appealed and he and the trial court have complied with Pa. R.A.P. 1925.

II.

We begin with Rosario's challenges to the discretionary aspects of his sentence.[2] He contends that the trial court abused its discretion because his

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[2] Our standard of review is well-settled:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse

(Footnote Continued Next Page)

sentences for aggravated assault with a deadly weapon and kidnapping exceeded the aggravated range of the sentencing guidelines and were unreasonable. He further contends that these sentences were excessive and that the trial court imposed maximum sentences without considering mitigating circumstances or his individual character.

A.

Before considering the merits of Rosario's claim, we must consider whether he has properly invoked this Court's jurisdiction. ***Commonwealth v. Conte***, 198 A.3d 1169, 1173 (Pa. Super. 2018) (citation omitted). A defendant must preserve his claims at the time of sentencing or in a post-sentence motion, file a timely notice of appeal, and include a statement of reasons for allowance of appeal pursuant to Pa. R.A.P. 2119(f) in his brief and raise a substantial question for review. ***Id***. Rosario has complied with the first three requirements. Accordingly, we proceed to consider whether he has raised a substantial question.

> of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias[,] or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Wallace, 244 A.3d 1261, 1278–79 (Pa. Super. 2021) (citation omitted).

"A substantial question exists only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Commonwealth v. Clarke***, 70 A.3d 1281, 1286–87 (Pa. Super. 2013) (citation omitted). We have previously held that a defendant presents a substantial question when he alleges that the trial court exceeded the aggravated range of the sentencing guidelines without justification. ***See Commonwealth v. Sheller***, 961 A.2d 187, 190 (Pa. Super. 2008). Moreover, a defendant presents a substantial question when he or she alleges that the court imposed an aggravated range sentence without considering mitigating circumstances. ***See Commonwealth v. Bowen***, 55 A.3d 1254, 1263 (Pa. Super. 2012) (citation omitted); ***Commonwealth v. Dodge***, 77 A.3d 1263, 1270-71 (Pa. Super. 2013) (finding a substantial question for our review when a defendant alleged that the court imposed a manifestly excessive sentence without considering mitigating evidence). Rosario has alleged both of these abuses of discretion in his 2119(f) statement.[3] As a result, we find that he has raised a substantial question and proceed to the merits of his claim.

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[3] These claims are not mere challenges to the consecutive nature of the sentences, as argued by the Commonwealth. ***See*** Commonwealth's Brief at 9-10.

B.

When imposing a sentence, a trial court must ensure that the sentence 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. § 9721(b). "The court is not required to parrot the words of the Sentencing Code, stating every factor that must be considered under Section 9721(b). However, the record as a whole must reflect due consideration by the court of the statutory considerations [enunciated in that section]." ***Commonwealth v. Coulverson***, 34 A.3d 135, 145 (Pa. Super. 2011) (citations omitted). A sentencing court is not required to impose the "minimum possible confinement," but rather must craft an individualized sentence after considering "the particular circumstances of the offense and the character of the defendant." ***Commonwealth v. Moury***, 992 A.2d 162, 171 (Pa. Super. 2010) (citations omitted).

When the court imposes a sentence outside of the sentencing guidelines, it is required to provide a statement of reasons for the deviation.[4] ***Commonwealth v. Walls***, 926 A.2d 957, 963 (Pa. 2007). While the guidelines are advisory and not binding on the sentencing court, it must

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[4] This requirement can be satisfied by placing the statement of reasons on the record in open court and in the defendant's presence. ***See Commonwealth v. Bowen***, 55 A.3d 1254, 1263-64 (Pa. Super. 2012).

nevertheless consider the guidelines as one factor in sentencing and provide a reasoned justification for departing from them when it chooses to do so. ***Id.*** at 964; ***Commonwealth v. Sessoms***, 532 A.2d 775, 781 (Pa. Super. 1987) ("The guidelines must be 'considered' and, to ensure that such consideration is more than mere fluff, the court must explain its reasons for departure from them."). Moreover,

> the inherent seriousness of the offense is taken into consideration in the guideline recommendations. If the sentencing court imposes a sentence that deviates significantly from the guideline recommendations, it must demonstrate that the case under consideration is compellingly different from the "typical" case of the same offense or point to other sentencing factors that are germane to the case before the court. These factors include the character of the defendant or the defendant's criminal history.

Commonwealth v. Robertson, 874 A.2d 1200, 1213 (Pa. Super. 2005) (citations omitted). "Where the sentencing court had the benefit of a [PSI], we can assume the sentencing court was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." ***Commonwealth v. Hill***, 210 A.3d 1104, 1117 (Pa. Super. 2019) (internal quotations & citation omitted).

Pursuant to 42 Pa.C.S. § 9781(c)(3), when the sentencing court has imposed a sentence outside the guidelines, we must vacate and remand if "the sentence is unreasonable," otherwise, we must affirm. In ***Walls***, our Supreme Court noted that reasonableness is not defined in the statute and "commonly connotes a decision that is 'irrational' or 'not guided by sound

judgment.'" ***Walls***, ***supra***, at 963. Reasonableness is assessed in two distinct ways. First, 42 Pa.C.S. § 9781(d) states that we shall consider the following:

> (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
>
> (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
>
> (3) The findings upon which the sentence was based.
>
> (4) The guidelines promulgated by the commission.

Id. "A sentence may be found unreasonable if it fails to properly account for these four statutory factors . . . [or] if the sentence was imposed without express or implicit consideration by the sentencing court of the general standards applicable to sentencing." ***Commonwealth v. Durazo***, 210 A.3d 316, 321 (Pa. Super. 2019) (citation omitted, bracketing in original).

Here, Rosario challenges his sentences for aggravated assault with a deadly weapon and kidnapping. Based on his prior record score (PRS) of four and the offense gravity score (OGS) of eight, the standard range of the guidelines for aggravated assault with a deadly weapon was a minimum of 21 to 27 months' incarceration, with an aggravated range of 36 months' incarceration. Rosario was sentenced to the statutory maximum of 60 to 120 months' incarceration on that count. Kidnapping carried an OGS of ten, resulting in a standard range of a minimum of 48 to 60 months' incarceration,

with an aggravated range of 72 months' incarceration.[5] Rosario was sentenced to the statutory maximum of 120 to 240 months' incarceration on that count. Accordingly, his sentences on these two counts were above the aggravated range of the guidelines and we must assess whether they were "reasonable." 42 Pa.C.S. § 9781(c)(3).

C.

Preliminarily, the Commonwealth contends that this Court is bound by the law of the case established in Rosario's prior appeal when determining whether his new sentence is reasonable. In assessing the discretionary aspects of his prior sentence, we explained:

> We also agree the imposition of consecutive sentences did not result in an "excessive aggregate sentence." [Rosario], while on supervised release, kidnapped Stancik, beat him both with his fists and with the gun, threatened him, and forced him to a remote area. He dragged him from the car, shot him execution-style in the back of his head, and when the first shot was not fatal, attempted a second shot, failing only because the gun jammed. We find the aggregate sentence of 35½ to 90 years is not grossly disparate to [Rosario's] conduct and does not "viscerally appear as patently 'unreasonable.'" ***Commonwealth v. Gonzalez–DeJesus***, 994 A.2d 595, 599 (Pa. Super. 2010).

Rosario, ***supra***, at 614-15. The Commonwealth argues that because we concluded that a 35.5 to 90 year sentence was not unreasonable, we are

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[5] Though the trial court applied the deadly weapon used enhancement to this count at Rosario's initial sentencing, it declined to do so on resentencing. ***See*** N.T., 3/25/22, at 23-24.

bound by that assessment in evaluating Rosario's reduced 25 to 50 year sentence.

"The law of the case doctrine refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter." ***Commonwealth v. McCandless***, 880 A.2d 1262, 1267 (Pa. Super. 2005) (*en banc*) (citation omitted). The doctrine serves judicial economy, protects the expectations of the parties, ensures consistency and uniformity, streamlines cases and ensures that litigation can be brought to an end. ***Id.*** However, as a rule intended to promote public policy concerns, it is not absolute. "Hence, the law of the case doctrine might not apply under exceptional circumstances, including: an intervening change in the law, a substantial change in the facts, or if the prior ruling was 'clearly erroneous' and 'would create a manifest injustice if followed.'" ***Id.*** at 1268 (citation omitted).

When this Court upsets a trial court's sentencing scheme, we remand for resentencing and the original sentence is rendered a legal nullity. ***Commonwealth v. Ali***, 197 A.3d 742, 759 (Pa. Super. 2018). Thus, on resentencing, a trial court must "start 'afresh' and re-evaluate the sentencing factors." ***Id.*** This reassessment includes consideration of any evidence that was not available at the previous sentencing hearing, including evidence of the defendant's conduct or performance on supervision in the intervening

time. ***Commonwealth v. Jones***, 640 A.2d 914, 919-20 (Pa. Super. 1994). Accordingly, on remand for resentencing, a trial court is not limited by and should not solely consider the record of the original sentencing hearing. Instead, it must consider all relevant factors outlined in the Sentencing Code in light of the defendant's background and the circumstances of the offense in order to craft an appropriate sentence. ***See Commonwealth v. Luketic***, 162 A.3d 1149, 1160-61 (Pa. Super. 2017); ***Commonwealth v. Finnecy***, 135 A.3d 1028, 1032 (Pa. Super. 2016). As discussed in Part II.B, *supra*, the trial court is not bound on remand by its prior sentencing decisions, but rather must reconsider all of the sentencing factors in light of the newly-developed record and adequately articulate the reasoning behind the sentence it chooses to impose.

The fact-specific nature of this inquiry undermines the Commonwealth's argument that our review of the discretionary aspects of a sentence is bound by the law of the case that derived from an earlier sentencing hearing. On remand for resentencing, the trial court must start afresh in its evaluation of the sentencing factors, ***see Jones***, ***supra***, and our review of the trial court's exercise of discretion is based on that fresh record, ***see Wallace***, ***supra***. Simply put, what is "reasonable" on one sentencing record may not be

reasonable on a subsequent one.[6] Accordingly, we conclude that the law of the case does not require this Court to adhere to a prior panel's assessment of Rosario's sentence based on a different sentencing hearing. ***See also Pepper v. U.S.***, 562 U.S. 476, 506-07 (2011) (holding that the law of the case doctrine does not bind subsequent sentencing court when case is remanded for a *de novo* sentencing hearing).

D.

Rosario's challenges to the discretionary aspects of his sentence are related and we address them together. First, he contends that his sentences for aggravated assault with a deadly weapon and kidnapping were unreasonable because no new information was adduced at the resentencing hearing to justify the increase above the aggravated range of the guidelines. He identifies two changes that occurred between the two sentencing hearings: the trial court did not apply the deadly weapon enhancement to the kidnapping charge, and Rosario presented new information regarding his time in

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[6] Additionally, Rosario was previously sentenced within the aggravated range of the sentencing guidelines on the relevant counts, so we reviewed his sentence to determine whether it was "clearly unreasonable." 42 Pa.C.S. § 9781(c)(2). The aggravated range for kidnapping was based on the application of the deadly weapon enhancement, which the trial court did not apply on resentencing. In the instant appeal, Rosario was sentenced outside the guidelines entirely and we review to determine whether the sentence was "unreasonable." 42 Pa.C.S. § 9781(c)(3). Because we must apply a different legal standard to review the instant sentence, in addition to a different factual record, the law of the case doctrine does not bind our analysis.

incarceration through his allocution. Without more, he contends that the increase from the aggravated range to outside the guidelines entirely was unreasonable. Second, he argues that the trial court failed to consider any mitigating circumstances and based his statutory maximum sentences purely on the nature of the crimes. He acknowledges that the trial court reviewed a PSI, victim impact statement and character statements from Rosario's family members, but argues that the trial court did not consider his efforts at rehabilitation during his incarceration.

The record reveals that the trial court considered the PSI that was prepared prior to Rosario's first sentencing hearing, along with written character statements that had been provided at that time and testimony from Rosario's family members. While Stancik did not appear at resentencing, he provided a victim impact statement. Finally, Rosario exercised his right to allocution to express remorse to his family and explain the steps he had taken toward rehabilitation. After receiving this evidence, the trial court provided the following reasoning for its aggregate 25 to 50-year sentence:

> The Court notes that it has sentenced the Defendant to the statutory maximum allowed by law. The Court has considered the Pennsylvania sentencing guidelines but notes that the guidelines are advisory only. The Court does not believe that a guideline sentence is appropriate, given the facts and circumstances of this particular case. There are several aggravating factors the Court has considered in imposing sentence outside the sentencing guideline recommendations.
>
> First and foremost, at the time of this offense, Defendant was on parole for a firearms violation. He had been paroled less than four months at the time of this—prior to this incident and was under

the supervision of the Pennsylvania Board of Probation and Parole at the time he committed this offense. He was also subject to a consecutive probationary sentence on two prior drug offenses.

While the guidelines include the prior record conviction score, they do not take into account that the Defendant was on supervised release at the time of the new charges.

It is abundantly clear to me that the Court—that prior attempts to rehabilitate the Defendant have failed. It is also noteworthy that the Defendant was on parole for a prior firearms offense when he committed this offense with a firearm.

Further, the Court is troubled by Defendant involving a juvenile, Tyree King, in the criminal episode. Both the Defendant and Mr. King testified at the jury trial that the two of them had a special bond much like father and son. Yet Defendant exposed him to the violent assault on Mr. Stancik, and even encouraged him to remain silent after the commission of the assault.

The Court also considers Defendant's lack of remorse and his failure to accept any responsibility for his actions as an aggravating factor. From the outset and to this day, Defendant has not accepted any responsibility or expressed a scintilla of remorse toward the victim. His only mention of the word remorse in his allocution today was remorse toward his children. Further, he stated at the start of his allocution that it was, "[n]ot an admission of guilt."

Finally, the Court considers the profound impact this assault had on the victim, Marcus Stancik. At the jury trial, the Court had the benefit of hearing extensive medical testimony from the treating emergency room physician. He explained the injuries which resulted from Mr. Stancik being shot in the back of his head and even provided X-rays showing the bullet lodged in his skull.

The Court also heard directly from the victim, Mr. Stancik, the horrifying account of his abduction and assault. His trial testimony demonstrated the extreme mental and physical cruelty inflicted on him by the Defendant. It's truly a miracle that Mr. Stancik survived being shot in the back of his head at close range and that he lived to tell us about it.

> Although Mr. Stancik somehow survived this attempted execution, the bullet remains lodged in his face, a lasting reminder of the atrocities that were committed on September 5, 2017.
>
> For all of these reasons, the Court finds that a guideline sentence would be inappropriate in this case and that the statutory maximum sentence is not only warranted, but it is necessary, as Defendant clearly poses a grave danger to society.

N.T., 3/25/22, at 27-29. As noted *supra*, this reasoning mirrored—and is in fact, almost verbatim—the reasoning the trial court provided for the sentence it imposed initially in 2019. ***Compare*** N.T., 6/3/19, at 29-31, ***with id***. However, in 2019, the trial court sentenced Rosario within the aggravated range of the guidelines for the counts of aggravated assault with a deadly weapon and kidnapping.

We conclude that the trial court abused its discretion in imposing sentences that were substantially outside of the aggravated range of the guidelines on these two counts. The statutory maximum sentences and the trial court's rationale in support were unreasonable in several respects under Section 9781(d). As Rosario argues, the only new information the trial court had before it in resentencing was Rosario's allocution, which did not support an increase in the sentences compared to his initial sentencing in 2019.

The first two factors under Section 9781(d), "[t]he nature and circumstances of the offense and the history and characteristics of the defendant" and "[t]he opportunity of the sentencing court to observe the defendant, including any presentence investigation," are related. 42 Pa.C.S. § 9781(d)(1)-(2). Here, the trial court relied on the presentence investigation

that was prepared prior to Rosario's initial sentencing in 2019 and Rosario offered supplementary information through his allocution. He explained that he was employed as a janitor and was waiting to begin cosmetology school. He was considered a minimum security risk in prison and did not have any history of violence while incarcerated. He had completed numerous classes that were recommended by prison officials, including classes in violence prevention and batterers' intervention, and was on the waiting list for additional optional classes focused on career and life skills. He expressed remorse to his family and a desire to become a productive member of society upon release. His statement represented a marked departure from the statements he provided in 2019 in his original PSI, which focused on asserting his innocence and downplaying any prior incidents of violence.

While we do not discount the trial court's opportunity to observe Rosario at both sentencing proceedings, the reasoning it placed on the record at resentencing evidenced a singular focus on Rosario's statement of remorse and the circumstances of the offenses to the exclusion of any mitigating evidence. The trial court was entitled to consider Rosario's lack of remorse toward the victim as a factor in sentencing. Nonetheless, it was required to consider the evidence Rosario presented regarding his attempts at rehabilitation in the time since his initial sentencing. Here, the trial court did not address that evidence in imposing sentences that were substantially

higher than the ones it imposed prior to Rosario undertaking those rehabilitative efforts.

Next, we consider "[t]he findings upon which the sentence was based." 42 Pa.C.S. § 9781(d)(3). As we have already observed, the trial court's rationale for imposing the statutory maximums following resentencing was substantially identical to the reasoning it provided in support of Rosario's 2019 sentence. However, a trial court on resentencing may not mechanically reimpose its earlier sentence without considering any change in circumstances that may have arisen in the intervening years. ***Jones***, ***supra***, at 920 (citation omitted) ("Reimposing a judgment of sentence should not be a mechanical exercise."). The trial court relied on the same findings to support the 2022 sentence and 2019 sentence, but made no effort to explain why those findings supported a sentence substantially above the guidelines on resentencing when it initially found an aggravated range sentence to be appropriate. This was unreasonable.

Finally, we consider "[t]he guidelines promulgated by the commission" in assessing the reasonableness of a sentence. 42 Pa.C.S. § 9781(d)(4). In this respect, we reiterate that the guidelines already take into account the inherent egregiousness of a particular offense. ***Robertson***, ***supra***, at 1213. Thus, in sentencing outside of the guidelines, a trial court "must demonstrate that the case under consideration is compellingly different from the 'typical'

case of the same offense or point to other sentencing factors that are germane to the case before the court." ***Id.***

Here, the minimum sentence imposed for aggravated assault with a deadly weapon was 24 months *above* the aggravated range of the guidelines. The minimum sentence for kidnapping was 48 months *above* the aggravated range of the guidelines, which the trial court calculated without the deadly weapon enhancement. While the trial court identified several "aggravating factors" to justify its sentence, it did not acknowledge any mitigating circumstances that emerged since the prior sentencing hearing or articulate why those factors supported a departure of six years from the aggravated range of the guidelines, particularly when it had previously found based on the same information that aggravated range sentences were appropriate. Under these circumstances, where the trial court relied on nearly identical rationale to impose a vastly increased sentence, we cannot conclude that it was reasonable for the trial court to exceed the guidelines.

Accordingly, we conclude that the trial court abused its discretion in resentencing Rosario to the statutory maximum sentences on the counts of aggravated assault and kidnapping. As our conclusion upsets the sentencing scheme, we vacate the sentence *in toto* and remand to the trial court to resentence Rosario and to provide adequate reasons for the length of sentence it imposes.

APPENDIX B

III.

Next, we consider whether Rosario's sentence is illegal.[7] He argues that the trial court increased his sentences for aggravated assault with a deadly weapon and kidnapping without any objective information justifying the increase. Despite the decrease in his aggregate sentence, he contends that the trial court cannot overcome the presumption of vindictiveness following his successful first appeal and, as a result, his increased sentences at those counts violate his right to due process under the federal and state constitutions. In response to the trial court's reasoning that it is permitted to attempt to effectuate its original sentencing scheme on remand for resentencing, he argues that it offends due process to allow a court to reimpose an aggregate sentence that was deemed illegal. Additionally, he argues that the count of aggravated assault with a deadly weapon should have merged for sentencing purposes with the count of attempted homicide and that any additional sentence for aggravated assault is illegal.

A.

In ***North Carolina v. Pearce***, 395 U.S. 711 (1969), *overruled in part by* ***Alabama v. Smith***, 490 U.S. 794 (1989),[8] the United States Supreme

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[7] Whether a sentence is illegal is a question of law and our scope of review is plenary. ***Commonwealth v. Maxwell***, 932 A.2d 941, 942 (Pa. Super. 2007).

[8] In ***Alabama v. Smith***, 490 U.S. 794 (1989), the United States Supreme Court held that the presumption of vindictiveness in resentencing does not
(Footnote Continued Next Page)

Court held that "it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant *for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside*." ***Id.*** at 723-24 (emphasis added).

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726. The presumption of vindictiveness and prohibition thereon "emanates from the protections safeguarded to individuals by the Due Process Clause." ***Commonwealth v. Prinkey***, 277 A.3d 554, 565 (Pa. 2022).

Rosario points to ***Commonwealth v. Pearson***, 303 A.2d 481 (Pa. 1973), in support of his vindictiveness claim. There, the defendant was convicted of aggravated robbery on eleven separate indictments and received

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arise when the initial sentence was based on a guilty plea and the second sentence followed a trial after the guilty plea was vacated. ***Id.*** at 795. It did not disturb ***Pearce***'s general holding that a presumption of vindictiveness arises when a sentence is increased following a successful appeal without objective information justifying the increase. ***Id.*** at 799. ***Smith*** is consistent with ***Pearce***'s pronouncement that an increased sentence should be based on new information appearing on the record following the initial proceedings.

sentences of five to ten years' imprisonment, consecutively, on eight of the cases. He received suspended sentences on the remaining three. He was subsequently granted a new trial after a direct appeal. He was retried on six of the indictments, found guilty on five, and was sentenced to consecutive terms of two to four years' imprisonment on each of the five cases, including one in which he had previously received a suspended sentence. ***Id.*** at 482.

On appeal, the defendant argued that his sentence of imprisonment on the indictment for which he had previously received a suspended sentence violated ***Pearce***. Our Supreme Court agreed, holding that no "good cause," which is "limited to events occurring subsequent to the first trial," appeared of record to justify the increased sentence. ***Id.*** at 485. Notably, the Commonwealth argued in ***Pearson*** that the sentence was not vindictive because the aggregate sentence following the second trial was lower than that imposed after the first. Our Supreme Court summarily rejected that argument and held that "[t]he sentence imposed on each indictment is controlling." ***Id.***

In ***Commonwealth v. Barnes***, 167 A.3d 110 (Pa. Super. 2017) (*en banc*), a panel of this Court sitting *en banc* addressed an analogous vindictiveness claim. There, the defendant was convicted of attempted homicide, aggravated assault, kidnapping and recklessly endangering another person. He was sentenced to 20 to 40 years of incarceration for attempted homicide and consecutive terms of 2.5 to five years of incarceration for aggravated assault and kidnapping. On appeal, this Court determined that

the aggravated assault charge merged with the attempted homicide charge and remanded for resentencing. On remand, the trial court sentenced the defendant to 20 to 40 years of incarceration for attempted homicide and a consecutive term of five to ten years of incarceration for kidnapping, resulting in the same aggregate sentence as originally imposed. ***Id.*** at 115.

On appeal, the defendant argued that his increased sentence on the count of kidnapping was the result of judicial vindictiveness. We rejected this piecemeal approach to assessing vindictiveness and held that the aggregate sentence is controlling for evaluating such a claim. ***Id.*** at 124-25. "Indeed, a trial court properly may resentence a defendant to the ***same aggregate sentence*** to preserve its original sentencing scheme." ***Id.*** at 124 (emphasis in original). Thus, while the sentence for kidnapping had increased, the aggregate sentence remained the same and the defendant was not entitled to relief under ***Pearce***. ***Id.*** at 125.

Barnes is controlling here. Unlike the defendant in ***Barnes***, Rosario benefited on resentencing by over ten years—his second sentence was reduced in aggregate from 35.5 to 90 years' incarceration to 25 to 50 years' incarceration. It is of no moment that the individual sentences imposed for aggravated assault with a deadly weapon and kidnapping were increased, as the overall sentence was substantially reduced. The trial court explained in its opinion that it intended to preserve the initial sentencing scheme,

consistent with ***Barnes***. Trial Court Opinion, 9/30/22, at 13-15. This is sufficient to rebut the presumption of vindictiveness and no relief is due.

Rosario's argument based on ***Pearson*** is squarely foreclosed by ***Barnes***, which was also decided on due process grounds. In ***Pearson***, the defendant was convicted on different indictments for different criminal episodes and his sentence for one of those indictments was unjustifiably increased following his direct appeal. Here, much like in ***Barnes***, Rosario was sentenced for multiple counts occurring in the same indictment for the same criminal episode. Regardless of the individual sentences imposed on the counts of aggravated assault with a deadly weapon and kidnapping, his overall sentence was reduced substantially following his successful appeal. Under ***Barnes***, no presumption of vindictiveness arises in this circumstance. Rosario is due no relief on this claim.

B.

Finally, we turn to whether the counts of attempted homicide and aggravated assault with a deadly weapon merge for sentencing purposes.[9]

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[9] The Commonwealth complains in its brief that litigants should not be permitted to raise legality of sentence claims for the first time on appeal and "urge[s] this Court and the appellate courts of this Commonwealth to reconsider the jurisprudence of this procedural morass." Commonwealth's Brief at 23-24 n.3. However, it does not dispute that our Supreme Court has repeatedly held that merger claims implicate the legality of a sentence and are not waivable. ***See***, ***e.g.***, ***Commonwealth v. Edwards***, 256 A.3d 1130, 1136 (Pa. 2021). It is beyond cavil that this Court is bound by our Supreme Court's pronouncements. ***See Commonwealth v. Volk***, 138 A.3d 659, 663
(Footnote Continued Next Page)

Offenses merge when "the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense." 42 Pa.C.S. § 9765. Here, it is undisputed that both offenses arose from Rosario's single criminal act of firing a gun into the back of the victim's head. Accordingly, our analysis is limited to whether all of the elements of attempted homicide are included in the elements of aggravated assault with a deadly weapon or *vice versa*.

"A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime." 18 Pa.C.S. § 901. First-degree murder is a criminal homicide "committed by an intentional killing." 18 Pa.C.S. § 2502(a). "Thus, a conviction for attempted murder requires that the Commonwealth prove beyond a reasonable doubt that the defendant had the specific intent to kill and took a substantial step toward that goal." ***Commonwealth v. Predmore***, 199 A.3d 925, 929 (Pa. Super. 2018) (*en banc*) (citation omitted). As relevant here, a person is guilty of aggravated assault under subsection 2702(a)(4) if he "attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon." 18 Pa.C.S. § 2702(a)(4). The Crimes Code defines "bodily injury" as "[i]mpairment of physical condition or

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(Pa. Super. 2016) (citing ***Commonwealth v. Friday***, 90 A.2d 856, 859 (Pa. Super. 1952)).

substantial pain" and includes "[a]ny firearm" within the definition of "deadly weapon." 18 Pa.C.S. § 2301.

In ***Commonwealth v. Edwards***, 256 A.3d 1130 (Pa. 2021), our Supreme Court explained that merger requires an analysis of the elements of the statute, not the specific facts of the case at issue. ***See id.*** at 1137-38. There, the Court held that aggravated assault and recklessly endangering another person (REAP) did not merge, even when arising out of a single act, when not all statutory alternatives for the former crime were subsumed by the elements of the latter. ***Id.*** at 1139. The crime of aggravated assault under subsection 2702(a)(1) prohibited both *actually* causing serious bodily injury and *attempting* to cause serious bodily injury, while REAP required a showing of actual danger of death or serious bodily injury. ***Id.*** at 1135. The defendant was convicted for a single act of actually inflicting serious bodily injury on the victim. Nevertheless, our Supreme Court held that the charges did not merge for sentencing purposes because it is possible to attempt to put someone in danger of serious bodily injury under subsection 2702(a)(1) without actually doing so under the REAP statute. ***Id.*** at 1138 (citing ***Commonwealth v. Cianci***, 130 A.3d 780, 782 (Pa. Super. 2015)).

While we have not previously addressed whether attempted homicide merges with aggravated assault with a deadly weapon, we have analyzed other subsections of the aggravated assault statute for merger with attempted homicide. We have held that aggravated assault under subsection 2702(a)(1)

is a lesser included offense of attempted homicide. ***See Barnes***, ***supra***, at 120 n.8. In contrast, in ***Commonwealth v. Johnson***, 874 A.2d 66 (Pa. Super. 2005), we held that attempted homicide does not merge with aggravated assault of a police officer under subsection 2702(a)(2) because the crimes each include elements not required by the other: attempted homicide requires proof of a specific intent to kill, and aggravated assault of a police officer requires proof that the victim was an enumerated officer performing official duties. ***Id.*** at 71.

Rosario relies on ***Commonwealth v. Anderson***, 650 A.2d 20 (Pa. 1994), for the proposition that aggravated assault is a lesser included offense of attempted homicide because it is "tautologous that one cannot kill without inflicting serious bodily injury." Rosario's Brief at 47 (citing ***Anderson***, ***supra***, at 583). However, ***Anderson*** was decided in 1994 and predates the current merger statute. We have previously recognized that ***Anderson***'s approach to merger is no longer instructive since the legislature adopted the merger statute. ***See Commonwealth v. Coppedge***, 984 A.2d 562, 564 (Pa. Super. 2009) ("The legislature has thus rejected the prior common law approach to merger espoused in [***Anderson***]. . . . Whether or not the facts of this case comprise both crimes, if the crimes themselves can result in committing one without committing the other, the elements in general are different, and the legislature has said merger cannot apply. The analyses by cases arising before the effective date of 42 Pa.C.S.A. § 9765 are therefore not instructive here.").

Here, the offenses of attempted homicide and aggravated assault with a deadly weapon both include elements that the other does not. Attempted homicide requires proof that the defendant had the specific intent to kill at the time he took the substantial step toward committing the murder. ***Predmore***, ***supra***. A defendant may commit aggravated assault with a deadly weapon without the specific intent to kill, as long as he intentionally or knowingly causes or attempts to cause bodily injury. Similarly, aggravated assault with a deadly weapon requires proof that the defendant committed the offense while using a deadly weapon. 18 Pa.C.S. § 2702(a)(4). Attempted homicide does not, as it is certainly possible to attempt to kill another without employing a weapon, such as by manual strangulation. Thus, because both offenses include elements that the other does not, they do not merge for sentencing purposes under the statute even when based on the same criminal act. ***Jones***, ***supra***; ***Edwards***, ***supra***. No relief is due on this claim.

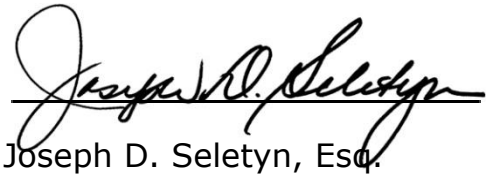
Affirmed in part. Reversed in part. Remanded with instructions. Jurisdiction relinquished.

President Judge Panella dissents.

President Judge Emeritus Bender joins the memorandum.

APPENDIX B

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/21/2023

APPENDIX B

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, Appellee,	)	No. 931 WDA 2022
v.	)	
KEITH ANTHONY ROSARIO, Appellant.	)	

Appeal from the Judgment of Sentence Entered March 25, 2022
In the Court of Common Pleas of Washington County
Criminal Division at No: CP-63-CR-0002611-2017

OPINION PURSUANT TO Pa.R.A.P. 1925(a)

This matter comes before the Superior Court of Pennsylvania upon the appeal of Keith Anthony Rosario ("Appellant") from the judgment of sentence dated March 25, 2022. Appellant filed his notice of appeal on August 17, 2022, following the Court's denial of Appellant's post-sentence motions. On August 17, 2022, this Court ordered Appellant to file and serve a concise statement of matters complained of on appeal no later than twenty-one (21) days after the entry of the order. Appellant filed his concise statement on September 7, 2022. For the reasons set forth below, this appeal should be dismissed.

PROCEDURAL HISTORY

The Court has previously addressed the factual and procedural history of this case in its prior opinion. Nonetheless, the Court will briefly recite the facts that are germane to the instant appeal. Following a jury trial on February 7, 2019, Appellant was found guilty of Criminal Attempt, Homicide, 18 Pa.C.S. § 901(a)/§ 2501(a), a felony of the first degree; Aggravated Assault, 18 Pa.C.S. § 2702(a)(1), a felony of the first degree; Aggravated Assault, 18 Pa.C.S. §

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2702(a)(4), a felony of the second degree; Kidnapping, 18 Pa.C.S. § 2901(a)(2), a felony of the first degree; Kidnapping, 18 Pa.C.S. § 2702(a)(3), a felony of the first degree; and Criminal Conspiracy to Commit Aggravated Assault, 18 Pa.C.S. § 903(a)(1)/§ 2702(a)(1), a felony of the first degree. The Court sentenced Appellant on June 3, 2019, to an aggregate sentence of no less than thirty-five and a half years to no more than ninety years in a state correctional institution. Specifically, the Court sentenced Appellant at Count 1, Attempted Homicide, to no less than one hundred twenty months to no more than two hundred forty months of incarceration in a state correctional institution; at Count 2, Aggravated Assault, the Court imposed no further penalty as it merged with the sentence at Count 1; at Count 3, Aggravated Assault, the Court sentenced Appellant to no less than thirty-six to no more than one hundred twenty months in a state correctional institution; at Count 4, Kidnapping, the Court sentenced Appellant to no less than ninety to no more than two hundred forty months in a state correctional institution; at Count 5, Kidnapping, the Court sentenced Appellant to no less than ninety to no more than two hundred forty months in a state correctional institution; and at Count 6, Conspiracy to Commit Aggravated Assault, to be confined for no less than ninety to no more than two hundred months in a state correctional institution. The sentences were all set to run consecutively to one another.

Appellant filed post-sentence motions, which the Court denied. Thereafter, on November 15, 2019, Appellant filed a Notice of Appeal. In his original appeal, Appellant challenged the individual and aggregate sentences imposed, the imposition of certain costs, the denial of the motion to suppress, and the sufficiency/weight of the evidence. *See* Concise Statement, 1/28/2020.

The Court previously submitted a Pa.R.A.P. 1925(a) opinion when it addressed Appellant's first appeal. Thereafter, on September 30, 2021, the Superior Court issued its opinion and ruling on Appellant's appeal. The Superior Court affirmed Appellant's convictions and affirmed the

denial of suppression, but it remanded the case for resentencing as to conspiracy to commit aggravated assault and kidnapping. The Superior Court held that pursuant to *Commonwealth v. King*, 234 A.3d 549 (Pa. 2020), where there is only one discrete conspiracy to commit a particular act (*i.e.*, to kill the victim), Appellant could only be sentenced on one inchoate offense. As such, he could not be sentenced on both attempt to commit homicide and conspiracy to commit aggravated assault. Therefore, the Court vacated the sentence for conspiracy to commit aggravated assault. Additionally, the Superior Court vacated Appellant's conviction for kidnapping and rejected the Commonwealth's argument that two separate kidnappings had occurred. *Id.* at 620-21.

Following remand, the Court held a resentencing hearing on March 25, 2022. Present at the hearing were Deputy District Attorney John Friedmann, Esquire, and John Egers, Esquire, representing Appellant. At Count 1, Attempted Homicide, the Court sentenced Appellant to no less than one hundred twenty to no more than two hundred forty months in a state correctional institution; at Count 2, Aggravated Assault, the Court imposed no sentence as it merged with Count 1 for sentencing purposes; at Count 3, Aggravated Assault, the Court sentenced Appellant to no less than sixty to no more than one hundred twenty months, to run consecutively to Count 1; at Count 4, Kidnapping, the Court sentenced Appellant to no less than one hundred and twenty to no more than two hundred forty months in a state correctional institution; at Count 5, Kidnapping, the Court imposed no sentence as it merged with Count 4 for purposes of sentencing, and at Count 6, Conspiracy to Commit Aggravated Assault, no further penalty was imposed because it merged with Count 1 for purposes of sentencing. Appellant was therefore sentenced to an aggregate term of no less than twenty-five to no more than fifty years in an appropriate state correctional

institution, followed by twelve months of re-entry supervision. *See* Resentencing Order, 3/29/2022.

After the Court resentenced Appellant, Appellant filed a post-sentence motion to modify the newly imposed sentence, challenging it as an abuse of discretion at Counts 3 and 4. *See* Post-Sentence Motion, 4/7/2022. The Court scheduled argument on the motion for May 25, 2022. After consideration of the Post-Sentence Motion and oral argument thereon, the Court denied Appellant's Motion to Modify Sentence on July 18, 2022. Now the Court addresses Appellant's instant appeal from the order of sentence.

DISCUSSION

Pursuant to Pa.R.A.P. 1925(b), this Court directed Appellant to file a Concise Statement of Errors Complained of on Appeal. Appellant's Concise Statement essentially raises one issue:

> The trial Court abused its discretion by imposing a sentence at Count 3 and Count 4 that was outside of the Sentencing Guidelines, was unreasonable and vindictive, and that the Court failed to consider any mitigating factors.

(Appellant's Concise Statement at 2-3, Paragraphs 1-6.)

Appellant alleges that the Court abused its discretion at Count 3 and Count 4 by imposing a sentence that was outside of the guidelines and unreasonable. (Appellant's Concise Statement at 1, Paragraphs 1-2.) He further alleges that the Court abused its discretion at Count 3 and Count 4 by failing to consider any mitigating circumstances. (Appellant's Concise Statement at 1, Paragraphs 3-4.) Finally, Appellant alleges that the Court abused its discretion at Count 3 and Count 4 by acting vindictively when resentencing Appellant in excess of the prior minimum sentence, in violation of

Appellant's right to due process under Amendment V and Amendment XIV of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, along with Appellant's right to be free from double jeopardy under Amendment V and Amendment XIV of the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution. (Appellant's Concise Statement at 1-2, Paragraphs 5-6.) Accordingly, it appears that Appellant's overarching claim on appeal challenges the discretionary aspects of his sentence.

The Court notes from the outset that it is vested with broad discretion in imposing sentence, and that its sentence will not be overturned on appeal absent an abuse of discretion. *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super. 2003) (internal citations omitted). Importantly, "challenges to discretionary aspects of sentencing do not entitle an appellant to appellate review as of right." *Commonwealth v. Evans*, 901 A.2d 528, 533 (Pa. Super. 2006) (citing *Commonwealth v. Sierra*, 752 A.2d 910, 912 (Pa. Super, 2000)). Prior to reaching the merits of a discretionary sentencing issue, the Superior Court must conduct a four-part analysis to determine:

> (1) Whether appellant has filed a timely notice of appeal, see Pa.R.A.P. 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, see Pa.R.Crim.P. 1410 [now Rule 720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Hyland, 875 A.2d 1175, 1183 (Pa. Super. 2005) ((quoting *Commonwealth v. Martin*, 611 A.2d 731, 735 (1992)). *See also Evans*, 901 A.2d at 533. Notably, if Appellant fails to include a "Statement of Reasons Relied Upon for Allowance of Appeal" in his brief, as required under prong three of the analysis,

Appellant would not be in compliance with Rule 2119(f) and as a consequence, Appellant's discretionary sentencing arguments would be waived. *Martin*, 611 A.2d at 735. Additionally, under prong four of the analysis, "challenges to discretionary aspects of sentencing must raise a substantial question." *Commonwealth v. Ellis*, 700 A.2d 948, 958 (Pa. Super. 1997) (quoting *Commonwealth v. Tuladziecki*, 522 A.2d 17, 18 (Pa. 1987)), and the Superior Court has only been "inclined to find the presence of a substantial question where appellant advances a colorable argument that the trial judge's actions were either inconsistent with the specific provisions of the Sentencing Code, or contrary to the norms which underlie the sentencing process." *Martin*, 611 A.2d at 723; *Commonwealth v. Eby*, 784 A.2d 204, 206 (Pa. Super. 2001).

In the instant matter, the Court denied Appellant's post-sentence motion to modify the newly imposed sentence on July 18, 2022. Subsequently, Appellant filed his notice of appeal with the Clerk of Courts on August 17, 2022, twenty-nine days after the sentence was imposed. As such, Appellant's notice of appeal was timely as it was filed within thirty days of the imposition of sentence and Appellant has satisfied the first prong of the *Hyland* analysis.

With respect to the second prong of the analysis, Appellant's Post-Sentence Motion to Modify Sentence adequately preserved the issue for appeal, satisfying the second *Hyland* prong. *Hyland*, 875 A.2d at 1183. At this stage of the proceedings, the Court does not have Appellant's brief to consider whether they have satisfied the third and fourth prongs of the analysis. If Appellant fails to meet the standards set forth in Rule 2119(f), or if Appellant fails to assert that the Court's sentence raises a substantial question of law, Appellant's right to appeal would be waived. *Martin*, 611 A.2d at 735.

Assuming *arguendo* that Appellant complied with the requirements of the *Hyland* analysis, Appellant's appeal must nonetheless fail on the merits of his claim, as the Court did not abuse its discretion in resentencing Appellant.

Appellant first claims that the Court abused its discretion in resentencing Appellant when the Court imposed a sentence that was "outside of the guideline range and unreasonable." However, the Court was well within its right to impose a sentence that was outside of the ranges of the Sentencing Guidelines. In imposing a sentence, the sentencing court is required to follow the instructions set out in 42 Pa.C.S. § 9721(b), which instructs sentencing courts to consider "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." *Commonwealth v. Velez*, 273 A.3d 6, 9 (Pa. Super. 2022). "The balancing of these [42 Pa.C.S.A.] § 9721(b) sentencing factors is well within the sole province of the sentencing court." *Velez*, 273 A.3d at 10 (citing *Commonwealth v. Lekka*, 210 A.3d 343, 353 (Pa. Super. 2019)). While the sentencing court must consider the Sentencing Guidelines when imposing a sentence, the Sentencing Guidelines are purely advisory, not mandatory, and are merely one of the many factors that the sentencing court must consider. *Velez*, 273 A.3d at 10; *See Commonwealth v. Yuhasz*, 923 A.2d 1111, 1118 (Pa. 2007). It is well within the discretion of the sentencing court to sentence a defendant outside of the Sentencing Guideline range, so long as the sentence imposed does not exceed the maximum statutory sentence. *Velez*, 273 A.3d at 10.

The Superior Court has set forth the requirements of 42 Pa.C.S. § 9721(b) when the sentencing court deviates from the Sentencing Guidelines:

> The statute [42 Pa.C.S. § 9721(b)] requires a trial judge who intends to sentence a defendant outside the guidelines to demonstrate on the record, as a proper starting point, his awareness of the sentencing guidelines. Having done so, the sentencing court may deviate from the guidelines, if necessary, to fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offense as it relates to the impact on the life of the victim and the community, so long as he also states for the record "the factual basis and specific reasons which compelled [him] to deviate from the guideline range."

Commonwealth v. Canfield, 639 A.2d 46, 50 (Pa. Super. 1994) (quoting *Commonwealth v. Royer*, 467 A.2d 453, 458 (Pa. Super.1984)). When the sentencing court deviates from and sentences the defendant outside of the ranges of the Sentencing Guidelines, 42 Pa.C.S. § 9721(b) requires that the sentencing court provide a "contemporaneous written statement" of the reasons for their decision to deviate from the Sentencing Guidelines. *Commonwealth v. Chesson*, 509 A.2d 875, 876 (Pa. Super. 1986); *See also Commonwealth v. McLaine*, 150 A.3d 70, 76 (Pa. Super. 2016). The sentencing court's statement of reasons for the sentence, made orally on the record at the sentencing hearing and in the defendant's presence, constitutes a "contemporaneous written statement" within the meaning of 42 Pa.C.S. § 9721(b), "so long as the record demonstrates with clarity that the court considered the sentencing guidelines in a rational and systematic way and made a dispassionate decision to depart from them." *Royer*, 476 A.2d at 457 (Pa. Super. 1984); *Commonwealth v. Rodda*,723 A.2d 212, 216 (Pa. Super. 1999).

The Superior Court, when determining whether a sentencing court has issued a sentence that was unreasonable, is to be guided by 42 Pa.C.S. § 9781(d), which requires the sentencing court to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the opportunity of the sentencing court to observe the defendant, including any presentence investigation; (3) the findings upon

which the sentence was based; and (4) the guidelines promulgated by the commission. *Commonwealth v. Walls*, 926 A.2d 957, 964 (Pa. 2007). Along with the consideration of the 42 Pa.C.S. § 9781(d) factors, the sentencing court is also to consider the factors as outlined in 42 Pa.C.S. § 9721(b). *Id.*

In this instant matter, the Appellant had a prior record score of four. Count 3, aggravated assault, a felony of the second degree, carries an offense gravity score of eight and a standard range sentence of twenty-one to twenty-seven months. Count 4, kidnapping, a felony of the first degree, carries an offense gravity score of ten and a standard range sentence of forty-eight to sixty months and sixty-six to seventy-eight months if a deadly weapon is used.

Appellant's sentence on remand, with respect to Counts 3 and 4 is as follows: At Count 3, Appellant was resentenced to no less than sixty to no more than one hundred twenty months incarceration, and at Count 4, Appellant was resentenced to no less than one hundred twenty to no more than two hundred forty months incarceration. While the Court deviated from the Sentencing Guidelines when resentencing Appellant at Counts 3 and 4, both sentences did not exceed the statutory maximum. *Velez*, 273 A.3d at 10.

In resentencing Appellant outside of the ranges of the Sentencing Guidelines, the Court satisfied the requirements of 42 Pa.C.S. § 9721(b). Prior to resentencing Appellant, the Court stated the following on the record:

> The Court is aware of the individualized sentencing scheme in Pennsylvania and the sentencing guidelines which take into account Defendant's prior record score and the offense gravity score assigned to each offense...The Court has considered the Pennsylvania sentencing guidelines but notes that the guidelines are advisory only.

(Sentencing Tr. 21:16-20, 27:4-6.) Not only did the Court acknowledge, on the record, that it was aware of and considered the Sentencing Guidelines when resentencing Appellant, the Court explicitly noted Appellant's prior record score, the offense gravity score and standard range sentence for each count, as well as the aggravated and mitigated ranges. (Sentencing Tr. 21:21-23:1.) In doing so, the Court made it abundantly clear that it was not only aware of the Sentencing Guidelines, but thoroughly considered them when resentencing Appellant. *Canfield*, 639 A.2d at 46; *Royer*, 476 A.2d at 457; *Rodda*, 723 A.2d at 216.

In addition to its consideration of the Sentencing Guidelines, the Court further satisfied the requirements of 42 Pa.C.S. § 9721(b) by providing a "contemporaneous written statement," within the meaning of the statute, that explained the Court's rationale for deviating from the Sentencing Guidelines with respect to Counts 3 and 4. In stating its reasons for resentencing Appellant outside of the range of the Sentencing Guidelines, the Court stated on the record:

> The Court does not believe that a guideline sentence is appropriate, given the facts and circumstances of this particular case. There are several aggravating factors the Court has considered in imposing sentence outside the sentencing guideline recommendations. First and foremost, at the time of this offense, Defendant was on parole for a firearms violation...He was also subject to a consecutive probationary sentence on two prior drug offenses...It is abundantly clear to me [the Court] that prior attempts to rehabilitate the defendant have failed. Further, the Court is troubled by Defendant involving a juvenile, Tyree King, in the criminal episode...The Court also considers Defendant's lack of remorse and his failure to accept any responsibility for his actions as an aggravating factor. From the outset and to this day, Defendant has not accepted any responsibility or expressed a scintilla of remorse toward the victim...Finally, the Court considers the profound impact this assault had on the victim, Marcus Stancik. At the jury trial, the Court had the benefit of hearing extensive medical testimony from the treating emergency room physician...The Court also heard directly from the victim, Mr. Stancik, the horrifying account of his abduction and assault. His trial testimony demonstrated the

> extreme mental and physical cruelty inflicted on him by the Defendant...For all of these reasons, the Court finds that a guideline sentence would be inappropriate in this case and that the statutory maximum sentence is not only warranted, but is necessary, as Defendant clearly poses a grave danger to society.

(Sentencing Tr. 27:6-29:22.)

The Court's statement on the record explaining the "factual basis and specific reasons" as to why it decided to resentence Appellant outside of the range of the Sentencing Guidelines on Counts 3 and 4 clearly indicate that the Court "made a dispassionate decision to depart from the sentencing guidelines" in order to "fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offense as it relates to the impact on the life of the victim and the community." *Canfield*, 639 A.2d at 46; *Royer*, 476 A.2d at 457; *Rodda*, 723 A.2d at 216. Furthermore, the Court's stated rationale as to why it imposed a sentence outside of the Sentencing Guideline range at Counts 3 and 4 demonstrate that it satisfied 42 Pa.C.S. § 9781(d) and therefore, the sentence imposed was not unreasonable, considering the circumstances of this case. Accordingly, the Court's compliance with the requirements of 42 Pa.C.S. § 9721(b) in acknowledging and considering the Sentencing Guidelines and providing a "contemporaneous written statement" explaining its reasons for deviating from the Sentencing Guideline range was a proper exercise of its discretion in resentencing Appellant outside of the range provided by the Sentencing Guidelines. As such, Appellant's issue that the Court abused its discretion and imposed an unreasonable sentence by resentencing Appellant outside of the Sentencing Guideline range with respect to Counts 3 and 4 should be dismissed.

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Appellant next contends that the Court abused its discretion by failing to consider any mitigating factors when resentencing Appellant at Counts 3 and 4. The weight that is to be accorded to the mitigating factors that are presented to the court is within the court's exclusive domain. *Velez*, 273 A.3d at 10 (citing *Commonwealth v. Chilquist*, 548 A.2d 272, 274 (Pa. Super. 1988)). Where the trial court possesses a pre-sentence investigation report, it is presumed that the court "was aware of and weighed all relevant information contained [in the report] along with any mitigating sentence factors." *Velez*, A.3d at 10 (quoting *Commonwealth v. Marts*, 889 A.2d 608, 615 (Pa. Super, 2005)); *See also Commonwealth v. Finnecy*, 135 A.3d 1028, 1038 (Pa. Super. 2016).

Prior to resentencing Appellant, the Court had the benefit of possessing a thorough pre-sentence investigation report prepared by Mr. John Pankopf of the Washington County Adult Probation Office, which was introduced into the record and considered by the Court during Appellant's resentencing hearing. (Sentencing Tr. 4:10-5:3, 24:8-11.) While it is presumed that the Court considered all relevant factors, including mitigating factors, through its possession of the pre-sentence investigation report, the Court explicitly considered and weighed all relevant mitigating factors on the record, including character references submitted on Appellant's behalf during the original sentencing hearing, which were entered into the record and considered by the Court during Appellant's resentencing hearing. (Sentencing Tr. 5:23-8:5.) During the resentencing hearing, the Court stated on the record:

> In imposing sentence, the Court is taking into consideration...the thorough presentence investigation report prepared by Mr. Pankopf...the character references given by Kattiria Rosario Gonzalez, Venus Sepulveda, Samantha Nelson, Ava Rivera, Alexi Mendez, Angel Mendez, and Ada Mendez.

(Sentencing Tr. 24:8-16.) In addition, the Court also considered a prepared statement that was presented by Appellant at the resentencing hearing as a mitigating factor. (Sentencing Tr. 9:1-10:23.) Through its possession and consideration of the pre-sentence investigation report prepared by Mr. Pankopf, the character references provided on Appellant's behalf, as well as Appellant's prepared statement, this Court finds that it considered and properly weighed any mitigating factors in fashioning Appellant's sentence at Counts 3 and 4. Accordingly, Appellant's issue that the Court abused its discretion by failing to consider any mitigating factors when imposing Appellant's sentence at Counts 3 and 4 should be dismissed.

As to Appellant's final contention, Appellant claims that the Court abused its discretion by acting vindictively when it resentenced Appellant in excess of the Court's prior minimum sentence imposed at Counts 3 and 4, in violation of Appellant's Due Process rights and his right to be free of double jeopardy. "When a due process violation is raised regarding resentencing, the Superior court must satisfy itself that an increase in a sentence is not the result of judicial vindictiveness." *Commonwealth v. Barnes*, 167 A.3d 110, 123 (Pa. Super. 2017) (citing *Commonwealth v. Walker*, 568 A.2d 201 (Pa. Super. 1989) (disapproved of on other grounds by *Commonwealth v. Robinson*, 931 A.2d 15, 20-22 (Pa. Super. 2007))). Generally, a presumption of vindictiveness arises if the trial court imposes a harsher sentence upon resentencing. *Commonwealth v. Watson*, 228 A.3d 928, 937 (Pa. Super. 2020).

The presumption of vindictiveness can, however, be rebutted where a trial court imposes a higher sentence on certain counts upon resentencing to preserve the integrity of its original aggregate sentence. *Commonwealth v. Conklin*, 275 A.3d 1087, 1095 (Pa.

Super. 2022). "[A] judge can duplicate the effect of the original sentencing plan by adjusting the sentences on various counts so that the aggregate punishment remains the same." *Id.* (quoting *Barnes*, 167 A.3d at 124.) The Superior Court has recognized this right of the trial court on multiple occasions, holding that a trial court does not impose a "vindictive sentence" on the appellant "where his aggregate sentence after remand was decreased considerably...and where it is apparent that the trial court increased Appellant's sentences...not out of vindictiveness, but in an attempt to achieve as much as possible the purpose and effect of its original sentencing scheme." *Conklin*, 275 A.3d at 1096; *See also Commonwealth v. Vanderlin*, 580 A.2d 820, 831 (Pa. Super. 1990)

Appellant was originally sentenced at Count 3 to no less than thirty-six to no more than one hundred twenty months incarceration and at Count 4 to no less than ninety to no more than two hundred forty months incarceration. Including Appellant's sentences at the remaining counts, Appellant initially received an aggregate sentence of thirty-five and a half to ninety years incarceration. As a result of the remand, at the resentencing proceeding the Court merged Count 6 with Count 1 and Count 5 with Count 4. In an effort to achieve the purpose and effect of its original aggregate sentencing scheme, the Court imposed a sentence of no less than sixty to no more than one hundred twenty months incarceration at Count 3 and no less than one hundred twenty to no more than two hundred forty months incarceration at Count 4 upon remand, ultimately resentencing Appellant to an aggregate sentence of no less than twenty-five to no more than fifty years incarceration.

Under the particular circumstances of this case, the Court's decision to increase Appellant's sentence at Counts 3 and 4 in an effort to preserve its original sentencing

scheme was in no way an abuse of discretion and any presumption of vindictiveness that may have attached is rebutted. Appellant's lack of remorse and failure to accept any responsibility, prior failed attempts at rehabilitation, his involving a minor in the violent offense, the brutality of the offense itself, and the impact that the offense has had on the victim as well as the community justify the Court's decision to increase Appellant's sentences at Counts 3 and 4 to achieve the "purpose and effect" of its original aggregate sentence. *Conklin*, 275 A.3d at 1096. Any presumption of vindictiveness that may have attached as a result of Appellant's resentencing at Counts 3 and 4 is further rebutted by the fact that Appellant's aggregate sentence "decreased considerably" upon resentencing. *Id.*

Furthermore, the Court's decision to increase Appellant's sentences at Counts 3 and 4 does not implicate double jeopardy concerns. The Superior Court has consistently held that double jeopardy concerns are not implicated when a trial court responds to a remand order by increasing the appellant's sentence at remaining counts, and the aggregate sentence upon resentencing does not exceed or is lower than the original aggregate sentence. *Conklin*, 275 A.3d at 1096. *See also Commonwealth v. Fields*, 197 A.3d 1217, 1224 (Pa. Super. 2018) (citing *Commonwealth v. Sutton*, 583 A.2d 500, 502-03 (Pa. Super. 1990) and *Commonwealth v. Grispino*, 521 A.2d 950, 954 (Pa. Super. 1987)). On the basis of the foregoing, Appellant's claim that the court abused its discretion by increasing Appellant's sentences at Counts 3 and 4 should be dismissed.

CONCLUSION

For the reasons set forth above, this Court's judgment of sentence entered March 25, 2022 should be affirmed, and this appeal should be dismissed.

DATE: 9/30/2022

BY THE COURT:

Valarie Costanzo

VALARIE COSTANZO, JUDGE

DA
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APPENDIX C

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	No. 2611-2017
	)	
KEITH ANTHONY ROSARIO,	)	
Defendant.	)	

ORDER

AND NOW, this 18th day of July, 2022, upon consideration of the Post-Sentence Motion filed by the Defendant, and following oral argument thereon, it is hereby ORDERED, ADJUDGED, and DECREED that the Defendant's Motion to Modify Sentence is DENIED.

Pursuant to Pennsylvania Rule of Criminal Procedure 720 (B)(4), the Defendant is hereby notified of the following:

a. You have the right to file an appeal to the Pennsylvania Superior Court. This appeal must be filed within thirty (30) days from the entry of this Order and must be in writing;

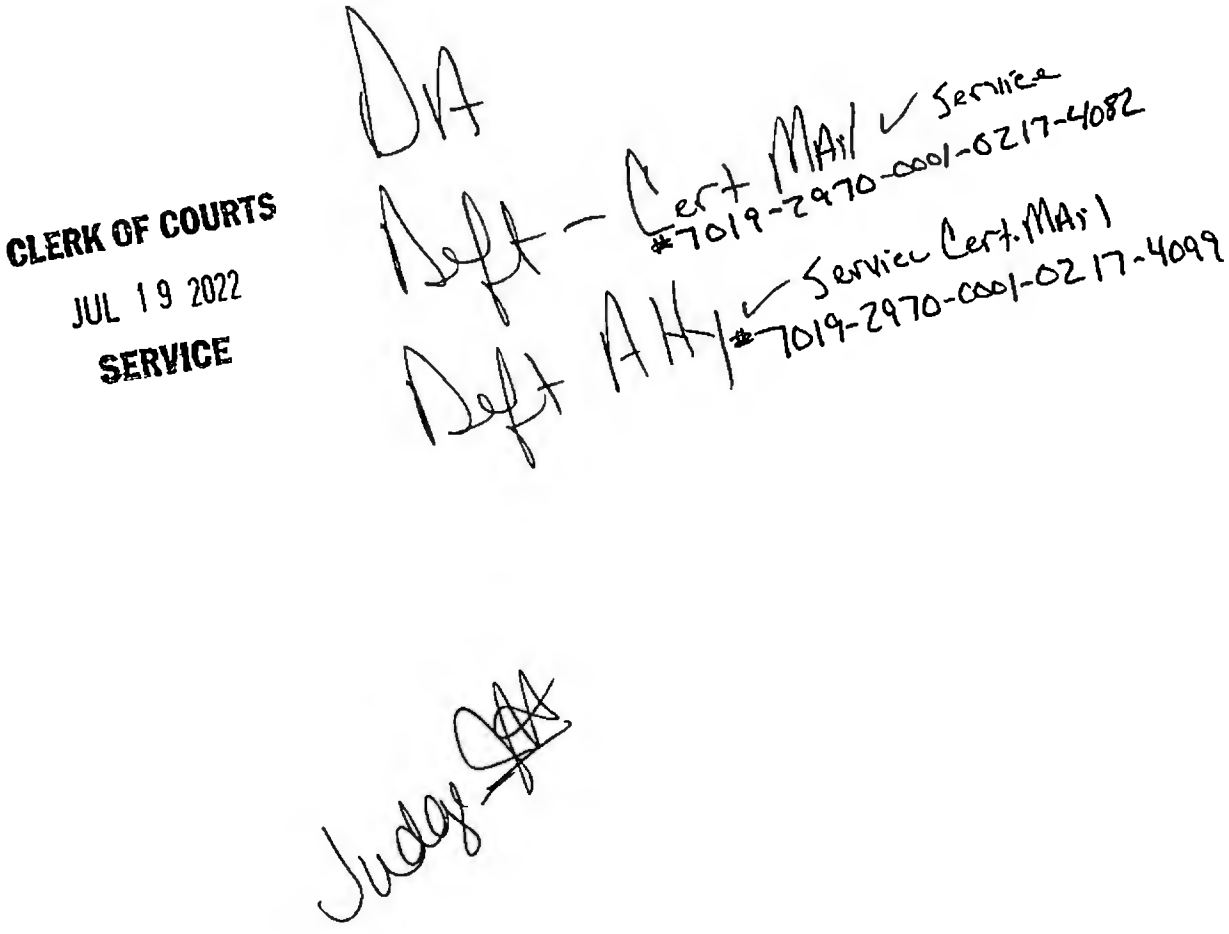
b. You have the right to the assistance of counsel in preparing an appeal, if you so choose. If you cannot afford counsel, you may appeal *in forma pauperis* and proceed with assigned counsel pursuant to Rule 122 of the Pennsylvania Rules of Criminal Procedure;

c. You have a qualified right to request bail pending the outcome of an appeal pursuant to Rule 521(B) of the Pennsylvania Rules of Criminal Procedure.

BY THE COURT:

Valarie Costanzo

VALARIE COSTANZO, JUDGE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Judge

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IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,)
)
vs.) No. CR-2611-2017
)
)
KEITH ANTHONY ROSARIO,)
)
Defendant.)

RESENTENCING HEARING IN THE ABOVE-ENTITLED CAUSE BEFORE THE HONORABLE VALARIE COSTANZO, JUDGE, ON FRIDAY, MARCH 25, 2022, HELD IN COURTROOM NO. 3

APPEARANCES:

John P. Friedmann, Esquire
Deputy District Attorney
Representing the Commonwealth

John E. Egers, Jr., Esquire
Representing the Defendant

ORDER OF SENTENCE

AND NOW, this 25th day of March 2022, based on the Defendant having been found guilty following a jury trial on February 7, 2019, the Court hereby sentences the Defendant as follows:

At Count 1, Criminal Attempt, Homicide, 18 Pa. C.S.A §901(a)/§2501(a), Felony of the 1st Degree, the Court sentences the Defendant to pay the costs of prosecution and be confined for no less than one hundred and twenty (120) months to no more than two hundred and forty (240) months in an appropriate state correctional institution.

At Count 2, Aggravated Assault, 18 Pa. C.S.A §2702(a)(1), a Felony of the

1st Degree, the Court imposes no sentence as it merges with Count 1 for purposes of sentencing.

At Count 3, Aggravated Assault, 18 Pa. C.S.A §2702(a)(4), a Felony of the 2nd Degree, the Court sentences the Defendant to be confined to no less than sixty (60) to no more than one hundred and twenty (120) months in an appropriate state correctional institution. This sentence is to run consecutively to the sentence at Count 1.

At Count 4, Kidnapping, 18 Pa. C.S.A §2901(a)(2), a Felony of the 1st Degree, the Court sentences the Defendant to be confined to no less than one hundred and twenty (120) months to no more than two hundred and forty (240) months in an appropriate state correctional institution. This sentence is to run consecutively to the sentences at Count 1 and Count 3.

At Count 5, Kidnapping, 18 Pa. C.S.A §2901(a)(3), a Felony of the 1st Degree, the Court imposes no further penalty as it merges with Count 4 for purposes of sentencing.

At Count 6, Criminal Conspiracy to Commit Aggravated Assault, 18 Pa. C.S.A §903(a)(1)/§2702(a)(1), a Felony of the 1st Degree, the Court imposes no further penalty as it merges with Count 1 for purposes of sentencing.

As a condition of this sentence, the Defendant shall have no contact directly, indirectly, or by any means with Marcus Stancik.

Defendant's aggregate sentence in this matter is to be confined for no less than twenty-five (25) years to no more than fifty (50) years in an appropriate state correctional institution to be followed by twelve (12) months of re-entry supervision.

The Defendant shall be given credit for time served as calculated by the Department of Corrections.

This entire sentence is to run consecutively to any other sentences the

Defendant is serving.

The Defendant is not eligible for the recidivism risk reduction incentive minimum sentence.

The Defendant shall be returned to SCI Albion forthwith.

In addition to the statutory requirements, the general rules, regulations, and conditions governing probation and parole in Washington County apply to the Defendant.

ORDER REGARDING CONDITIONS OF PROBATION/PAROLE

1. The defendant shall report to their Probation or Parole Officer (PO) as directed and permit their PO to visit them at their residence or place of employment and may be subject to warrantless searches of their residence, vehicle, property, and person, and the seizure and appropriate disposal of any contraband found.
2. The defendant shall report to their PO within 24 hours or the next business day after being released from any institution.
3. The defendant shall only reside at a residence approved by their PO and the defendant shall not change their place of residence without the approval of their PO. The defendant shall not reside with someone who is currently on probation or parole without the approval of their PO.
4. The defendant shall not travel outside of the Commonwealth of Pennsylvania without a travel permit from their PO.
5. The defendant shall notify their PO within 72 hours of any change in employment status. Pay stubs must be submitted to verify employment status
6. The defendant shall abide by a curfew imposed by the court, to be determined by their PO.
7. The defendant shall not purchase, use, or possess alcoholic beverages, and shall not enter bars or taverns.

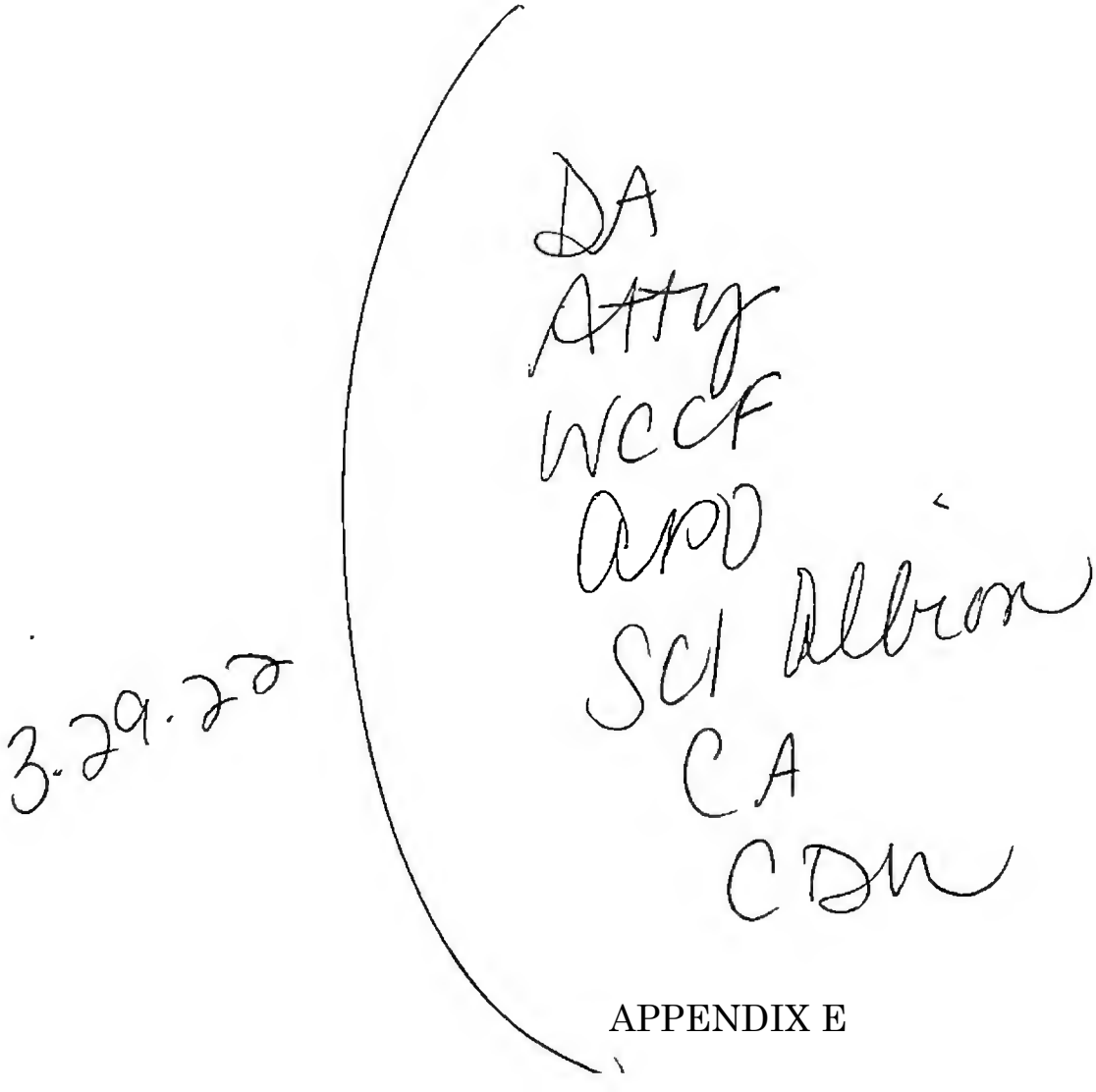
8. The defendant shall not unlawfully possess or use any controlled substances, except as prescribed by a licensed physician for a legitimate medical need or as part of a licensed treatment program.
9. The defendant shall submit to random and periodic testing to determine the use and presence of any illegal substances and alcoholic beverages.
10. The defendant shall not possess any firearms or offensive weapons in their residence, on their person, or in their vehicle.
11. The defendant shall refrain from any assaultive, threatening, or harassing behavior.
12. The defendant shall not violate any municipal, state, or federal laws, and shall notify their PO immediately of any new arrest, investigation, or contact with law enforcement authorities.
13. The defendant shall pay all fines, costs, and restitution imposed by the Court immediately or in accordance with a schedule set forth by the Court or by the Washington County Collections and Disbursement Unit.
14. A defendant who is required to wear a wrist or ankle monitor shall not remove or tamper with their monitor for any reason. If there is a problem with the monitor, the defendant shall immediately notify their PO of same. Self-help in the adjustment or removal of a monitor may be considered a violation of their probation or parole.

(Post-sentencing rights were given to the Defendant.)

BY THE COURT,

Valarie Costanzo J.

VALARIE COSTANZO, JUDGE



APPENDIX E

2021 PA Super 52

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KEITH ANTHONY ROSARIO	:	
Appellant	:	No. 1700 WDA 2019

Appeal from the Judgment of Sentence Entered February 18, 2020
In the Court of Common Pleas of Washington County Criminal Division at No(s): CP-63-CR-0002611-2017

BEFORE: OLSON, J., MURRAY, J., and McCAFFERY, J.

OPINION BY MURRAY, J.: **FILED: March 23, 2021**

Keith Anthony Rosario (Appellant) appeals from the judgment of sentence imposed after a jury convicted him of one count of attempted homicide, two counts of aggravated assault, two counts of kidnapping, and one count of conspiracy to commit criminal homicide, aggravated assault, and kidnapping.[1]

FACTUAL AND PROCEDURAL HISTORY

In the first ten pages of its Pa.R.A.P. 1925(a) opinion, the trial court recounted the procedural history of this case, accurately observing that it "is quite lengthy and complex." Trial Court Opinion, 2/24/20, at 2 n.2. The trial

[1] 18 Pa.C.S.A. §§ 901, 2501, 2702, 2901, and 903.

court also detailed the evidence presented at Appellant's four-day jury trial.[2] ***See id.*** at 10-24. The evidence at trial expanded on the factual recitation in the affidavit of probable cause, which states:

> On 09/05/17 at approximately 2233 hours, PSP was dispatched to the listed location for a report of a gunshot and a male screaming for help. Upon the arrival of PSP units contact was made with Marcus STANCIK. STANCIK related that he had been shot in the head by a male known to him by the nickname of "Sin." Tpr. WEBB who was familiar with "Sin" asked do you mean ROSARIO to which STANCIK replied, yes, Keith ROSARIO. STANCIK was treated at the scene for an injury to his neck and was subsequently transported to Allegheny General Hospital (AGH). At AGH STANCIK was diagnosed with a gunshot wound to the neck at the base of the skull and a bullet was found to be present in his neck upon xray.
>
> [The Affiant] interviewed STANCIK at AGH and STANCIK related he had known "Sin" for about a week. "Sin" lived on Ewing Street near Grove Street. STANCIK stayed at "Sin's" for several nights. "Sin" was described as a 27 year old Puerto Rican from New York. STANCIK was walking along Rt 40 when he was approached by a vehicle in which a male exited and requested STANCIK get in. STANCIK refused and the vehicle left. About 15 minutes later STANCIK was walking in an alley off of Rt 40 when "Sin" and two other individuals stopped a vehicle near him. Sin and another male exited the vehicle, STANCIK was assaulted and then thrown in the vehicle. STANCIK was placed in the back of the vehicle between Sin and another male. Then they drove STANCIK to another location and "Sin" removed STANCIK from the vehicle and shot him in the back of the head.

Affidavit of Probable Cause, 9/6/17.

---

[2] The court noted it addressed Appellant's omnibus pretrial motion (which included Appellant's motions for discovery, severance of trials, severance of offenses, suppression, dismissal as "multiplicitous and duplicitous," writ of Habeas Corpus, change of venue and modification of bail) by separate Opinion and Order issued September 11, 2018. Trial Court Opinion, 2/24/20, at 4.

In a criminal complaint filed on September 6, 2017, the Commonwealth charged Appellant with attempted murder, alleging, "[Appellant] did intentionally attempt to cause the death of another human being by . . . shooting Marcus Stancik in the neck . . ." Criminal Complaint, 9/6/17, at 2. It also charged him with two counts of aggravated assault, stating Appellant "did attempt to cause or did intentionally, knowingly or recklessly cause serious bodily injury to Marcus Stancik under circumstances manifesting an extreme indifference to the value of human life . . . by shooting him with a firearm . . ." and "[Appellant] did attempt to cause or did intentionally or knowingly cause bodily injury to Marcus Stancik with a deadly weapon . . . [Appellant] did use a firearm to shoot Stancik in the neck . . ." ***Id.*** at 2, 4. The Commonwealth also charged Appellant with conspiracy to commit aggravated assault based on Appellant shooting Stancik in the neck with a firearm. ***Id.*** at 3.

The Commonwealth filed a criminal information on November 9, 2017. It stated in pertinent part:

> **COUNT 1: Criminal Attempt - Homicide**
>
> 18 Pa.C.S. § 901(a) - 18 Pa.C.S. § 2501(a) - Felony 1st DEGREE The Actor, with the intent to commit the crime of criminal homicide, in violation of Section 2501 of the Pennsylvania Crimes Code, did an act or acts that constituted a substantial step toward the commission of that crime, that is, the Actor,, acting alone and/or with others, did intentionally shoot MARCUS STANCIK in the neck, and/or head with a firearm, in violation of Section 901(a) of the Pennsylvania Crimes Code, Act of December 6,1972:, 18 Pa.C.S, § 901(a), as amended.

COUNT 2: Aggravated Assault

18 Pa.C.S. § 2702(a)(1) - Felony 1st DEGREE

The Actor did attempt to cause serious bodily injury to another, or caused such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life, that is, the Actor, acting alone and/or with others, did shoot MARCUS STANCIK in the neck and/or head with a firearm intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life, in violation of Section 2702(a)(1) of the Pennsylvania: Crime Code, Act of December 6, 1972, 18 Pa. C.S. § 2702(a)(1), as amended.

COUNT 3: Aggravated Assault

18 Pa.C.S. § 2702(a)(4) - Felony 2nd DEGREE

The Actor attempted to cause or intentionally, knowingly or recklessly caused bodily injury to another with a deadly weapon, that is, the Actor, acting alone and/or with others, did shoot MARCUS STANCIK in the neck and/or head with a firearm, in violation of Section 2702(a)(4) of the Pennsylvania Crimes Code, Act of December 6,1972,18 Pa.C.S. § 2702(a)(4), as amended.

* * *

COUNT 6: Criminal Conspiracy

18 Pa.C.S, § 903(a)(1) - Felony 1st DEGREE

The Actor, With the intent of promoting or facilitating the crimes of criminal homicide and/or aggravated assault and/or kidnapping, in violation of Sections 2501 and/or 2702 and/or 2901 of the Pennsylvania Crimes Code, agreed with another person or persons, namely, RICHARD LACKS, that they or one or more of them would engage in conduct which constitutes the crime of criminal homicide and/or aggravated assault and/or kidnapping, and the Actor committed an overt act or acts in furtherance thereof, in violation of Section 903 of the Pennsylvania Crimes Code, Act of December 6, 1972, 18 Pa.C.S. § 903, as amended.

Criminal Information, 11/9/17, at unnumbered pages 1-2.

A jury trial commenced on February 4, 2019. The jury convicted Appellant on February 7, 2019. The verdict sheet read with respect to the charge of criminal conspiracy, which was count 6:

> If you find the defendant guilty at Count 6 [which the jury did] please indicate whether the following crimes were proven beyond a reasonable doubt as the objective of the conspiracy:
>
> a) Criminal Homicide Agree Disagree
>
> b) Aggravated Assault Agree Disagree
>
> c) Kidnapping Agree Disagree

Verdict, 2/7/19. The jury circled agree on all three crimes. ***Id.***

On June 3, 2019, the trial court sentenced Appellant to an aggregate 35½ to 90 years of incarceration. Appellant filed post-sentence motions which were denied by operation of law on October 17, 2019. Appellant filed this timely appeal; both he and the trial court have complied with Pennsylvania Rule of Appellate Procedure 1925.

Notably, the trial court entered an order correcting Appellant's sentence on February 18, 2020, "to reflect that, at Count 6, [Appellant] **was sentenced on the Charge of Conspiracy to Commit Aggravated Assault**. All other terms and conditions of the Judgment of Sentence shall remain in effect." Order, 2/18/20 (bold in original). Citing both the record and legal authority, the court stated:

> because the typographical error made by the court reporter is patent and obvious, this Court retains the power to correct it although the 30-day period has expired.

Order, 2/18/20.

The record, particularly the transcript from the sentencing hearing, confirms the court only sentenced Appellant for conspiracy to commit

aggravated assault, rather than conspiracy to commit homicide, aggravated assault, and kidnapping. ***See***, ***e.g.***, N.T., 6/3/19, at 27. We have explained:

> "Trial courts have the power to alter or modify a criminal sentence within thirty days after entry, if no appeal is taken." ***Commonwealth v. Quinlan***, 639 A.2d 1235, 1238 (Pa. Super. 1994), *appeal dismissed as improvidently granted*, 675 A.2d 711 (1996). ***See also*** 42 Pa.C.S.A. § 5505 (stating except as otherwise provided or prescribed by law, court upon notice to parties may modify or rescind any order within 30 days after its entry, notwithstanding prior termination of any term of court, if no appeal from such order has been taken or allowed). Nevertheless, once the thirty-day period expires, the trial court usually loses the power to alter its orders. An exception to this general rule exists to correct "clear clerical errors." . . .
>
> "[A]n alleged error must qualify as a clear clerical error (or a patent and obvious mistake) in order to be amenable to correction." ***Commonwealth v. Borrin***, 12 A.3d 466, 473 (Pa. Super. 2011) (*en banc*), *aff'd*, 80 A.3d 1219 (Pa. 2013).
>
> > This Court's case law has addressed the situations where ... the terms of a defendant's sentence as stated at the sentencing hearing conflict (or are deemed incompatible) with the terms of the defendant's sentence as stated in the sentencing order.
> >
> > In these circumstances, for a trial court to exercise its inherent authority and enter an order correcting a defendant's written sentence to conform with the terms of the sentencing hearing, the trial court's intention to impose a certain sentence must be obvious on the face of the sentencing transcript. ... Stated differently, only when a trial court's intentions are clearly and unambiguously declared during the sentencing hearing can there be a "clear clerical error" on the face of the record, and the [signed] sentencing order subject to later correction.

Commonwealth v. Kremer, 206 A.3d 543, 547–48 (Pa. Super. 2019) (some case citations modified or omitted).

Here, the record reflects the clerical error involving the wording of the court's sentence at Count 6, which had no impact on the mathematical calculation of Appellant's 35½ – 90 year sentence. The trial court explained that "due to the court stenographer's error, the [June 3, 2019] sentencing order states that Appellant was sentenced on criminal conspiracy to commit homicide, aggravated assault, and kidnapping. However, Appellant was only sentenced on criminal conspiracy to commit aggravated assault." Trial Court Opinion, 2/24/20, at 9 n.8; ***see also id.*** at 41-42 (citing transcript from sentencing hearing and stating "court stenographer's error undoubtedly qualifies as a clear clerical error."). We therefore proceed to address the issues Appellant raises on appeal.[3]

ISSUES

> I. Did the trial court err in denying [Appellant]'s motion to suppress the .40 caliber handgun found in [Appellant]'s home by concluding Tyree King, a teenager, had apparent authority to consent to a police search of [Appellant]'s home when police believed [Appellant] inside?
>
> II. Did the jury convict on the charge of criminal conspiracy based upon insufficient evidence?
>
> III. Did the trial court abuse its discretion in imposing a sentence that was manifestly excessive and/or unduly harsh making it unreasonable under 42 Pa.C.S. §9781(c)(2) because 1) it was disproportionate to [Appellant]'s crimes of conviction and without consideration of him as an individual and his character references after consideration of the factors in 42 Pa.C.S. § 9721(b); 2) it implied [Appellant] cannot be rehabilitated; and 3) it subjected

[3] For ease of disposition, we have reordered the issues in Appellant's brief.

> [Appellant] to imprisonment and/or parole supervision for the remainder of his natural life?
>
> IV. Do [Appellant]'s individual sentences and aggregate sentence of 35½ years to 90 years imprisonment violate the prohibition against cruel and unusual punishments under both the federal and Pennsylvania Constitutions?
>
> V. Did the trial court err by sentencing [Appellant] on charges of criminal attempt-homicide and criminal conspiracy in violation of 18 Pa.C.S. § 906?
>
> VI. Did the trial court err in imposing two separate sentences for same-episode conduct constituting a "kidnapping" under 18 Pa.C.S. § 2901(a)(2) and (a)(3)?

Appellant's Brief at 10-11.

Suppression

In his first issue, Appellant argues suppression was improper because Tyree King, who consented to the search of Appellant's residence, lacked authority to do so. Appellant emphasizes King's youth, being "sixteen or seventeen," and claims "the record does not establish King had apparent authority or that the police could reasonably believe King had such authority." Appellant's Brief at 51, 53.

At the outset, we recognize our review,

> is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. We are bound by the suppression court's factual findings so long as they are supported by the record; our standard of review on questions of law is *de novo*. Where, as here, the defendant is appealing the ruling of the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted. Our scope of review of suppression

> rulings includes only the suppression hearing record and excludes evidence elicited at trial.

Commonwealth v. Yandamuri, 159 A.3d 503, 516 (Pa. 2017) (citations omitted). Additionally, "[i]t is within the suppression court's sole province as factfinder to pass on the credibility of witnesses and the weight to be given to their testimony. The suppression court is free to believe all, some or none of the evidence presented at the suppression hearing." ***Commonwealth v. Byrd***, 185 A.3d 1015, 1019 (Pa. Super. 2018) (citation omitted).

At Appellant's pretrial hearing, the court observed "there are nine parts to his omnibus." N.T., 5/4/18, at 5. However, the only pretrial issue before us on appeal is Appellant's claim that the court erred in denying his request to suppress a handgun recovered from his residence.

Appellant did not testify or present any witnesses at the pretrial hearing. The only testimony relevant to his suppression claim came from Pennsylvania State Troopers Fred Scott and Mateo Herrera. Trooper Scott stated that he was dispatched to Appellant's residence while he and his partner "were on a call at that time, out at a scene," which was "a serious incident," and "based on the circumstances, we related to the City of Washington they should be on the lookout for an individual whose name we had gotten at that time was [Appellant]." ***Id.*** at 40-41. When Trooper Scott arrived, "three individuals were outside the residence at that time directly in front of the residence . . . on the front stoop or sidewalk." ***Id.*** at 42. Other police were already on the scene and "indicated these three people were the only people inside, to their

knowledge, inside the residence." ***Id.*** Two of the individuals were "younger white females" and the third was Tyree King, "a younger black male [who] indicated he was house-sitting for [Appellant] and that he was watching his dog as well. He gave the impression [Appellant] was out of town." ***Id.*** at 43.

Trooper Scott testified he "asked Mr. King for consent to look for [Appellant] within the residence [because] we had some concerns about his danger level and wanted to make sure he wasn't currently inside the house." ***Id.*** at 44. Trooper Scott told Tyree King "we just wanted to look for" Appellant; although Trooper Scott had no reason not to believe Tyree King was house-sitting for Appellant, and "felt [King's] indication was accurate," he also stated he "did not believe [Appellant] was out of town." ***Id.*** at 45-46. This testimony does not support Appellant's claim that Trooper Scott "believed King a liar and [Appellant] to be present inside, [such that] apparent authority as a housesitter/dog-sitter could not reside with King and thus law enforcement could not rely on King's consent to search [the residence]." Appellant's Brief at 54-55.

In addition, Trooper Scott's partner, Trooper Herrera, testified to being dispatched to Appellant's residence because the officers were looking for Appellant "due to a serious criminal incident that happened on Cove Road." ***Id.*** at 56. Trooper Herrera corroborated Trooper Scott's testimony that three individuals were standing outside the residence; the male, Tyree King,

indicated he was house-sitting while Appellant was out of town, and Tyree King consented to a search of the residence. ***Id.*** at 56-57.

On this record, Appellant argues:

> [Trooper] Scott is clear that he did not believe King in this regard and that he believed [Appellant] [was] inside his residence at 449 Ewing. Yet, no one obtained a search warrant for the residence. The suppression court used circular logic to validate the search of [the residence] that uncovered the handgun by finding apparent authority to consent.

Appellant's Brief at 53. He continues:

> [Trooper] Scott's disbelief of King's statement that [Appellant] was not inside is fatal to a conclusion that apparent authority existed in King because only [Appellant's] absence from [the residence] would give King authority to consent. As Scott believed King a liar and [Appellant] to be present inside, apparent authority as a housesitter/dog-sitter could not reside with King and thus law enforcement could not rely on King's consent to search.

Id. at 54-55.

The record does not support Appellant's claim that Trooper Scott "was clear that he did not believe King," "believed Appellant was inside his residence," and "believed King a liar." Officer Scott specifically stated he "had no reason not to believe King," but "did not believe [Appellant] was out of town," and "wanted to make sure [Appellant] wasn't currently in the house." In addition, both Officer Scott and Officer Herrera testified they were looking for Appellant because he was suspected of being involved in a serious criminal incident and may be dangerous.

The suppression court rejected Appellant's argument, citing the Supreme Court's decision in ***Commonwealth v. Strader***, 931 A.2d 630,634

(Pa. 2007), and finding Tyree King had apparent authority to consent to the search. The court correctly explained that "police must make a determination on whether the facts available to them at the moment would lead a reasonable person of reasonable caution to believe that the consenting party had authority over the premises." Suppression Court Opinion, 9/11/18, at 4 (citing ***Strader***, ***supra***).

> The Pennsylvania Supreme Court explained:
>
> > The Fourth Amendment protects the people from unreasonable searches and seizures. A warrantless search or seizure is presumptively unreasonable under the Fourth Amendment, subject to a few specifically established, well-delineated exceptions. One such exception is a consensual search, which a third party can provide to police, known as the apparent authority exception.
> >
> > A third party with apparent authority over the area to be searched may provide police with consent to search. Third party consent is valid when police reasonably believe a third party has authority to consent. Specifically, the apparent authority exception turns on whether the facts available to police at the moment would lead a person of reasonable caution to believe the consenting third party had authority over the premises. If the person asserting authority to consent did not have such authority, that mistake is constitutionally excusable if police reasonably believed the consenter had such authority and police acted on facts leading sensibly to their conclusions of probability.

Strader, 931 A.2d at 634.

Consent in ***Strader*** was given by an individual named Thornton. The Court stated:

> [Police] knocked on the apartment door. A man who identified himself as Thornton answered the door. Detective Knox showed Thornton a wanted poster of Shields and asked Thornton whether he knew him; Thornton responded he did not. Detective Knox

> asked Thornton whether appellant was in the apartment, and Thornton said "no, he would be back shortly." **Thornton stated he was there temporarily**, and he and another man in the apartment had been there for about a day. Detective Knox asked Thornton whether he was in charge of the apartment. Thornton responded, "yes." Detective Knox asked Thornton for permission to search the apartment for Shields; Thornton consented.

Id. at 632 (citations omitted, bold emphasis added). The Court continued,

> Here, police did not immediately ask Thornton if they could enter; instead, they spoke with him and determined appellant was not present. Before police sought permission to enter the apartment, they asked Thornton whether he had authority to control who entered the apartment. Once Thornton indicated he was in control, police asked him, as an occupant who expressly claimed authority to control the apartment, whether they could enter. The fact police knew appellant was likely to return soon is significantly less important here; police were searching for Shields as a fugitive, making time of the essence so that police could capture Shields and protect the public.

Id. at 635.

Although the appellant in ***Strader*** was not the fugitive sought by police in their search, the case is similar because Thornton, who gave consent, was "there temporarily," like Tyree King, and likewise, time was of the essence because Appellant, although not a fugitive, was sought by police because he was suspected of involvement in a "dangerous incident," and thought to "pose a danger." N.T., 5/4/18, at 41. Confirming Trooper Scott's testimony, Trooper Herrera stated police "were looking for [Appellant] at this time due to a serious criminal incident that happened." ***Id.*** at 56.

The suppression court found that "given the totality of the circumstances, King's age by itself does not invalidate his consent for the

search." Suppression Court Opinion, 9/11/18, at 6. The court noted that King's age was the "only distinction," and "given the substantial similarities in ***Strader*** to the present case . . . the police acted reasonably in their belief that King controlled access to the premise and had apparent authority to consent to search." ***Id.*** at 7. We agree. Appellant's suppression issue does not merit relief.

Sufficiency as to Conspiracy

Appellant next claims there was insufficient evidence to support his criminal conspiracy conviction. Appellant asserts "[t]he facts do not establish beyond a reasonable doubt that [Appellant] entered into a conspiracy with Lacks and King to commit kidnapping, aggravated assault and homicide against Stancik."[4] Appellant's Brief at 66. Appellant filed his brief on July 6, 2020, nearly four months after the court corrected its sentence to indicate that it only sentenced Appellant for conspiracy to commit aggravated assault. Appellant disregards the correction in his sufficiency argument,[5] and focuses on the statutory elements of conspiracy. ***See*** Appellant's Brief at 64-71.

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[4] We note, as cited above, the criminal information only charged Appellant with entering into a conspiracy with Lacks, not King. Criminal Information, 11/9/17, at unnumbered page 1.

[5] Appellant acknowledges the correction in his sentencing argument, where he vaguely states: "The trial court's sentence of [Appellant] for Conspiracy to Commit Aggravated Assault also creates a distinction without a difference among the objects of the conspiracy that raises an academic sentencing guidelines argument unnecessary to resolve here." Appellant's Brief at 40-41.

We begin with our standard of review:

> A claim challenging the sufficiency of the evidence presents a question of law. ***Commonwealth v. Widmer,*** 560 Pa. 308, 744 A.2d 745, 751 (Pa. Super. 2000). We must determine "whether the evidence is sufficient to prove every element of the crime beyond a reasonable doubt." ***Commonwealth v. Hughes,*** 521 Pa. 423, 555 A.2d 1264, 1267 (1989). We "must view evidence in the light most favorable to the Commonwealth as the verdict winner, and accept as true all evidence and all reasonable inferences therefrom upon which, if believed, the fact finder properly could have based its verdict." ***Id.***
> Our Supreme Court has instructed:
>
> > [T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.
>
> ***Commonwealth v. Ratsamy,*** 594 Pa. 176, 934 A.2d 1233, 1236 n.2 (2007).

Commonwealth v. Thomas, 65 A.3d 939, 943 (Pa. Super. 2013).

With respect to criminal conspiracy, the trier of fact must find: (1) the defendant intended to commit or aid in the commission of the criminal act; (2) the defendant entered into an agreement with another (a "co-conspirator") to engage in the crime; and (3) the defendant or one or more of the other co-conspirators committed an overt act in furtherance of the agreed upon crime.

18 Pa.C.S.A. § 903. The essence of a criminal conspiracy is the agreement between co-conspirators.

> Mere association with the perpetrators, mere presence at the scene, or mere knowledge of the crime is insufficient to establish that a defendant was part of a conspiratorial agreement to commit the crime. There needs to be some additional proof that the defendant intended to commit the crime along with his co-conspirator. Direct evidence of the defendant's criminal intent or the conspiratorial agreement, however, is rarely available. Consequently, the defendant's intent as well as the agreement is almost always proven through circumstantial evidence, such as by the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators. Once the trier of fact finds that there was an agreement and the defendant intentionally entered into the agreement, that defendant may be liable for the overt acts committed in furtherance of the conspiracy regardless of which co-conspirator committed the act.

Commonwealth v. Golphin, 161 A.3d 1009, 1018–19 (Pa. Super. 2017) (citations omitted).

The crux of Appellant's argument is that there was insufficient evidence to support his conspiracy conviction because there was no evidence of an explicit agreement or criminal intent. He claims "the evidence reveals [Appellant's] actions were his own," and his actions "can best be described as spontaneous." Appellant's Brief at 70-71. Appellant asserts that "[n]othing suggests [Appellant's] actions were planned, or an agreement to do harm to Stancik existed between [Appellant] and anyone else. The actions of Lacks [] do not evidence an agreement, but a lack of knowledge where [Appellant's] intent lied." ***Id.*** at 70. The record does not support this argument.

As noted and adopted above, the trial court devoted nearly 14 pages to its recitation of the evidence presented to the jury at trial. ***See*** Trial Court Opinion, 2/24/20, at 10-24. With regard to Appellant's conspiracy conviction, the court explained:

> Appellant and Richard Lacks clearly engaged in a criminal conspiracy to commit homicide, aggravated assault, and kidnapping. The evidence demonstrates that, upon initially sighting Mr. Stancik, Mr. Lacks phoned Appellant and informed him he had just seen Mr. Stancik. Appellant then met Mr. Lacks and Mr. King and the parties began to search for Mr. Stancik in the silver Honda Pilot, with Appellant driving the vehicle. When they found Mr. Stancik, Mr. Lacks actively participated in the kidnapping of Mr. Stancik when he aided Appellant in assaulting him and forcing him into the vehicle.
>
> Mr. Lacks also aided Appellant during the commission of the crime in several other ways. First, upon Appellant's request, he drove to the residence at 449 Ewing Street so that Appellant could obtain the .22 caliber handgun, and personally retrieved the handgun from the residence and gave it to Appellant. Appellant held this handgun against Mr. Stancik while in the vehicle and then later used it to shoot him. Furthermore, he complied with Appellant's request to drive towards any nearby body of water. Additionally, Mr. Lacks was able to hear Appellant's verbal threats of violence against Mr. Stancik in the vehicle: "'Shut the fuck up. You're getting what you deserve, you piece of shit[,]'" and "'Shut the fuck up. I'll leave you on the side of the road.'" (Trial Tr. Vol. 1, 120:4-6; Trial Tr. Vol. 2, 17:9-11.) According to Mr. Stancik, Mr. Lacks was in possession of a .40 caliber handgun while in the vehicle. Finally, Mr. Lacks was present at the body of water near 400 Cove Road where Appellant shot Mr. Stancik and testified that he heard a gunshot after Appellant forced Mr. Stancik into the woods.
>
> The foregoing facts indicate that Appellant and Mr. Lacks were engaged in a conspiratorial agreement to kidnap, assault, and murder Mr. Stancik. . . . Appellant and Mr. Lacks were associated with one another; furthermore, they each had knowledge of the crime, were present at the scene of the crime, and participated in the object of the conspiracy. This [c]ourt

> ultimately finds that the jury properly inferred a criminal conspiracy to commit homicide, aggravated assault, and kidnapping between Appellant and Mr. Lacks, and thus, the Commonwealth has sustained its burden with regard to this offense.

Id. at 55-56 (citing ***Commonwealth v. Mitchell***, 135 A.3d 1097, 1102-03 (Pa. Super. 2016)).

We agree with the trial court, and therefore find no merit to Appellant's sufficiency argument.

SENTENCING

In his third issue, Appellant challenges the discretionary aspects of his sentence. "The right to appellate review of the discretionary aspects of a sentence is not absolute, and must be considered a petition for permission to appeal." ***Commonwealth v. Buterbaugh***, 91 A.3d 1247, 1265 (Pa. Super. 2014). "An appellant must satisfy a four-part test to invoke this Court's jurisdiction when challenging the discretionary aspects of a sentence." ***Id.*** We conduct this four-part test to determine whether:

> (1) the appellant preserved the issue either by raising it at the time of sentencing or in a post-sentence motion; (2) the appellant filed a timely notice of appeal; (3) the appellant set forth a concise statement of reasons relied upon for the allowance of appeal pursuant to Pa.R.A.P. 2119(f); and (4) the appellant raises a substantial question for our review.

Commonwealth v. Baker, 72 A.3d 652, 662 (Pa. Super. 2013) (citation omitted). "A defendant presents a substantial question when he sets forth a plausible argument that the sentence violates a provision of the sentencing code or is contrary to the fundamental norms of the sentencing process."

Commonwealth v. Dodge, 77 A.3d 1263, 1268 (Pa. Super. 2013) (citations omitted).

Appellant has complied with the first three prongs of the test by raising his discretionary sentencing claim in a timely post-sentence motion, filing a timely notice of appeal, and including a Rule 2119(f) concise statement in his brief. ***See*** Appellant's Brief at 23-26. Therefore, we examine whether Appellant presents a substantial question.

Appellant contends: (1) the sentence "is disproportionate to the crime of conviction and without consideration of [Appellant] as an individual;" (2) "the sentencing court implied . . . he is without the possibility of rehabilitation;" and (3) the imposition of consecutive sentences resulted in an "excessive aggregate sentence." Appellant's Brief at 24-25. Each of these claims raises a substantial question. ***See Commonwealth v. Swope***, 123 A.3d 333, 338-39 (Pa. Super. 2015) (claim that imposition of consecutive sentences resulted in excessive aggregate sentence may raise substantial question); ***Baker***, 72 A.3d at 662 (claim that failure to account for rehabilitative needs resulted in excessive sentence raises substantial question).

We review Appellant's claim mindful of the following:

> Sentencing is a matter vested in the sound discretion of the sentencing judge. The standard employed when reviewing the discretionary aspects of sentencing is very narrow. We may reverse only if the sentencing court abused its discretion or committed an error of law. A sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an

> abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. We must accord the sentencing court's decision great weight because it was in the best position to review the defendant's character, defiance or indifference, and the overall effect and nature of the crime.

Commonwealth v. Cook, 941 A.2d 7, 11-12 (Pa. Super. 2007) (citations omitted).

Instantly, the trial court explained:

> . . . Contrary to Appellant's assertion, this [c]ourt did consider Appellant's individual characteristics and the character references submitted on his behalf. Prior to sentencing, the [c]ourt thoroughly reviewed the presentence investigation report prepared by John Pankopf. (Sent. Hr'g Tr. 25:17-19.) In addition, the [c]ourt considered the character references submitted by Kattiria Rosario Gonzalez, Venus Sepulveda, Samantha Nelson, Ava Rivera, Alexi Mendez, Angel Mendez, and Ada Mendez. (Sent. Hr'g Tr. 25:25-26:4.) The [c]ourt also heard testimony from Ava Rivera, Appellant's mother, and Kattiria Rosario Gonzalez, Appellant's sister, at the sentencing hearing. (Sent. Hr'g Tr. 10:7-12:14.) Finally, contrary to Appellant's argument, this [c]ourt did not suggest that Appellant could not be rehabilitated but merely stated that the "prior attempts to rehabilitate [Appellant] have failed." (Sent. Hr'g Tr. 29:17-18.) The [c]ourt emphasized that Appellant "had been paroled less than four months prior to this incident and was under the supervision of the Board of Probation and Parole," and was also "subject to consecutive probationary sentences on two prior drug offenses," when the incident occurred. (Sent. Hr'g Tr. 29:8-12.) Further, the offense for which Appellant was on parole was a "firearms offense," and yet, Appellant used a firearm in the instant matter. (Sent. Hr'g Tr. 29:18-21.) In imposing sentence, this [c]ourt had a duty to address the rehabilitative needs of Appellant, and therefore, this consideration was entirely proper.
>
> The [c]ourt's reasoning for the aggravated sentence, which has previously been stated in its entirety, was set forth clearly and thoroughly and with regard for the factors under Section 9721(b).

> Under the particular circumstances of this case, an aggravated sentence was in no way unreasonable, manifestly excessive, or unduly harsh. Appellant's prior failed attempts at rehabilitation, his involving a minor in this violent crime, his lack of remorse, and the sheer brutality of the crime itself indicated to this [c]ourt that an aggravated sentence was appropriate. Ultimately, this [c]ourt finds that its sentence was entirely reasonable under the circumstances, that it complied with Section 9721(b) in all respects, and that it also considered any mitigating factors in fashioning the sentence.

Trial Court Opinion, 2/24/20, at 32-33.

There is no merit to Appellant's contention that the trial court imposed a "manifestly excessive" sentence "disproportionate to the crimes of conviction and without consideration of [Appellant] as an indvidual, his character references or factors in 42 Pa.C.S. § 9721(b)," or that it "implied . . . he is without the possibility of rehabilitation." Appellant's Brief at 24-25. The trial court had the benefit of a PSI. "Where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." ***Commonwealth v. Devers***, 546 A.2d 12, 18 (Pa. 1988). Moreover, it expressly acknowledged Appellant's character references and testimony on Appellant's behalf.

We also agree the imposition of consecutive sentences did not result in an "excessive aggregate sentence." Appellant, while on supervised release, kidnapped Stancik, beat him both with his fists and with the gun, threatened him, and forced him to a remote area. He dragged him from the car, shot him execution-style in the back of his head, and when the first shot was not

fatal, attempted a second shot, failing only because the gun jammed. We find the aggregate sentence of 35½ to 90 years is not grossly disparate to Appellant's conduct and does not "viscerally appear as patently 'unreasonable.'" ***Commonwealth v. Gonzalez–Dejusus***, 994 A.2d 595, 599 (Pa. Super. 2010).

Next, Appellant maintains his "individual sentences and aggregate sentence of 35½ years to 90 years' imprisonment violate the prohibition against cruel and unusual punishments under both the Federal and Pennsylvania Constitutions."[6] Appellant's Brief at 57. We disagree.

> [T]he guarantee against cruel punishment contained in the Pennsylvania Constitution, Article 1, Section 13, provides no broader protections against cruel and unusual punishment than those extended under the Eighth Amendment to the United States Constitution. The Eighth Amendment does not require strict proportionality between the crime committed and the sentence imposed; rather, it forbids only extreme sentences that are grossly disproportionate to the crime.
>
> In ***Commonwealth v. Spells***, [ ] 612 A.2d 458, 462, 417 Pa. Super. 233 (1992) (*en banc*), this Court applied the three-prong test for Eighth Amendment proportionality review set forth by the United States Supreme Court in ***Solem v. Helm***, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637[ ] (1983):
>
> > [A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii)

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[6] An individual's right to be free from cruel and unusual punishment is a nonwaivable challenge to the legality of the sentence. ***Commonwealth v. Seskey***, 86 A.3d 237, 241 (Pa. Super. 2014).

> the sentences imposed for commission of the same crime in other jurisdictions.
>
> ***Spells***, 612 A.2d at 462 (quoting ***Solem***, 463 U.S. at 292[ ]). However, this Court is not obligated to reach the second and third prongs of the ***Spells*** test unless a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.

Commonwealth v. Lankford, 164 A.3d 1250, 1252-53 (Pa. Super. 2017) (some citations and quotation marks omitted).

Here, the trial court properly found that Appellant failed to satisfy the first prong of the ***Spells*** test. Trial Court Opinion, 2/24/20, at 25-27. Given the seriousness of Appellant's offenses, Appellant's sentence is not grossly disproportionate to the crime, and does not violate prohibitions against cruel and unusual punishment. Further, because Appellant has not satisfied the first prong of ***Spells***, we need not address the second and third prongs.

Finally, in his two remaining issues, Appellant challenges the legality of his sentence. He first argues that his sentence on criminal attempt — homicide and criminal conspiracy — violates 18 Pa.C.S.A. § 906. Appellant's Brief at 35-42. He also maintains his "two separate sentences for kidnapping for the same-episode conduct are illegal sentences." ***Id.*** at 42-49.

We have stated:

> The issue of whether a sentence is illegal is a question of law; therefore, our task is to determine whether the trial court erred as a matter of law and, in doing so, our scope of review is plenary. Additionally, the trial court's application of a statute is a question of law that compels plenary review to determine whether the court committed an error of law.

Commonwealth v. Williams, 871 A.2d 254, 262 (Pa. Super. 2005) (citations and quotation marks omitted). Further, challenges to the legality of sentence cannot be waived and may be raised for the first time on appeal. ***Commonwealth v. Dickson***, 918 A.2d 95, 99 (Pa. 2007) ("challenges to sentences based upon their legality" are not subject to waiver).

Appellant first claims his sentence for conspiracy is illegal, asserting, "[18 Pa.C.S.A.] Section 906 prohibits sentencing on both of these findings of guilt." Appellant's Brief at 37 (citations omitted). Section 906 states, "A person may not be convicted of more than one of the inchoate crimes of criminal attempt, criminal solicitation or criminal conspiracy for conduct **designed to commit or to culminate in the commission of the same crime**." 18 Pa.C.S.A. § 906 (emphasis added). Upon review, we find the recent Pennsylvania Supreme Court decision in ***Commonwealth v. King***, 234 A.3d 549 (Pa. 2020) to be dispositive.[7]

In ***King***, the defendant was the passenger in a car driven by a co-conspirator when he fired at least nine bullets at the victim; she survived but suffered serious injuries. ***King***, 234 A.3d at 553. In pertinent part, the criminal information charged the defendant with attempted murder,

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[7] The Supreme Court decided ***King*** on July 21, 2020, approximately two weeks after Appellant filed his brief.

aggravated assault, and a single count of conspiracy. ***Id.*** Relevant to our analysis, the trial court sentenced the defendant to consecutive terms of 20 to 40 years for attempted murder, and 10 to 20 years for conspiracy to commit aggravated assault.[8] This Court affirmed the judgment of sentence. On appeal to the Supreme Court, the defendant argued that the imposition of consecutive sentences for the inchoate crimes of attempted murder and conspiracy to commit aggravated assault violated Section 906. ***Id.*** at 566. The Supreme Court summarized the defendant/appellant's argument as follows:

> despite being charged and convicted of both conspiracy to commit murder and conspiracy to commit aggravated assault, there was only one conspiracy under Section 903(c), as both crimes were "the object of the same agreement or continuous conspiratorial agreement." King's Brief at 27 (quoting 18 Pa.C.S. § 903(c)). Accordingly, he argues the Superior Court erred in "finding there were two separate conspiracies where there was only one agreement." ***Id.*** at 28. King maintains that the Superior Court incorrectly relied on [***Commonwealth v.***] ***Kelly***[, 78 A.3d 1136 (Pa. Super. 2013),] for the proposition that an offender may be sentenced on both attempted murder and conspiracy to commit aggravated assault because the two offenses are not necessarily designed to culminate in the commission of the same crime. ***Id.*** King argues that this rationale "confuses § 906, which is concerned with the underlying crimes, with § 903(c), which is concerned with the number of separate agreements." ***Id.***

Id. at 566-67.

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[8] Like this case, the initial sentencing order was incorrect; it indicated the conspiracy sentence was for conspiracy to commit murder. The trial court subsequently corrected the error to reflect that defendant was sentenced for conspiracy to commit aggravated assault. ***King***, 234 A.3d at 553.

The Supreme Court agreed. It noted the criminal information only charged a single count of conspiracy, and while the verdict sheet listed two conspiracy charges — conspiracy to commit murder and conspiracy to commit aggravated assault — it listed them under one count, Count 2, on the criminal information. ***Id.*** at 568. The Court found there was a single conspiracy, *i.e.*, to kill the victim. ***Id.*** at 569. It opined:

> The Commonwealth's legal argument assumes that there existed a separate conspiracy to commit aggravated assault that was not subsumed within the conspiracy to kill. But a person cannot conspire to kill a targeted individual and not concurrently conspire to commit aggravated assault against the same individual. This Court has held that "[t]he act necessary to establish the offense of attempted murder – a substantial step towards an intentional killing – includes, indeed, coincides with, the same act which was necessary to establish the offense of aggravated assault, namely, the infliction of serious bodily injury." ***Commonwealth v. Anderson***, 538 Pa. 574, 650 A.2d 20, 24 (1994). As such, the single object of both the attempt and conspiracy convictions was [the victim's] murder, and thus, pursuant to Section 906, King could be convicted (*i.e.*, sentenced) for only one of these inchoate crimes.
>
> * * *
>
> The plain language of the specific statute governing this scenario precludes multiple sentences because there is no possibility that the conspiracy to commit aggravated assault existed independently of any conspiracy to kill, nor does the Commonwealth allege any kind of temporal separation or other circumstances to suggest that two conspiratorial agreements could have existed.
>
> By enacting Section 906, the General Assembly declared that where a defendant tries to achieve a result – in this case, murder – but fails to do so, he may only be punished once in the absence of distinct criminal objectives. We thus find that King is entitled to relief.

Id. at 569-70, 572 (footnotes omitted).

Instantly, the Commonwealth acknowledges ***King***. Commonwealth Brief at 18. However, the Commonwealth attempts to distinguish ***King*** by arguing "there are distinct criminal objectives." ***Id.*** at 19. The Commonwealth asserts there was an agreement between Appellant,

> Lacks, and King, that one more of them would kidnap and assault Marcus Stancik, the latter two offenses being committed in the alleyway and with a firearm in the backseat of the Honda Pilot. It is only after those offenses were committed, and thus the conspiracy then existing ended, that [Appellant] directed Lacks and King to find a body of water. For his part, if the conspiracy had not ended before, King ended the conspiracy at that point, handing the phone to Lacks and stating, "I don't want no parts of it."
>
> Once at the chosen body of water, Dam#4 in South Franklin Township, only [Appellant] got out of the vehicle with Stancik, whose head was still covered. Only [Appellant] had retrieved the firearm at that point. Only [Appellant] walked Stancik to the water's edge and shot him in the back of the head. In fact, it is only because of [Appellant's] ineffectiveness or the firearm's malfunction, combined with good luck, that Stancik survived. Once at the dam, [Appellant's] criminal objective changed to kidnapping and homicide of Stancik. Because there are separate and distinct criminal objectives between the attempted homicide and the conspiracy to commit aggravated assault offenses, the conviction and sentence does not run afoul of § 906 or the Supreme Court's analysis in ***King***.

Id. at 19-20.

We are not persuaded by this argument. After careful review, we find the Commonwealth's account of events to be at odds with the record; in addition, their account undercuts their argument that the evidence was sufficient to sustain Appellant's conviction of conspiracy to commit homicide,

aggravated assault, and kidnapping. As set forth above, the criminal complaint described aggravated assault as being the shooting of Stancik in the neck, not the beating in the alleyway or the pistol whipping in the car. Criminal Complaint, 9/6/17, at 2-3. The shooting was the same act referenced in the attempted murder charge. ***Id.*** at 2. In the criminal information, also cited above, the Commonwealth likewise based the aggravated assault charges on Appellant shooting Stancik in the neck. Criminal Information, 11/9/17, at unnumbered page 1. The Commonwealth did not name King as a participant in the conspiracy; they only identified Richard Lacks as a co-conspirator, and stated the conspiracy as being "and/or" with respect to homicide, kidnapping and aggravated assault. ***Id.*** at unnumbered page 2.

In its opening, the Commonwealth spoke about the events as a continuous episode, and never mentioned or suggested that the conspiracy ended when Appellant and Stancik reached the water. N.T., 2/5/19, at 20-25. In its closing argument, the Commonwealth described King as an accomplice, not a co-conspirator. N.T., 2/7/19, at 25. Again, at no point did the Commonwealth suggest there were multiple conspiracies; to the contrary, the Commonwealth described a single, continuous criminal episode. ***Id.*** at 12-29.

The trial court, in its charge to the jury, stated the conspiracy charge was: "to commit criminal homicide and/or aggravated assault and/or

kidnapping." ***Id.*** at 57-58. It specifically named Lacks as the co-conspirator, not Lacks and King. ***Id.*** at 61. The trial court addressed the jury as follows:

> The information alleges that the defendant conspired with Richard Lacks to commit homicide and/or aggravated assault and/or kidnapping and that one or several overt acts were done. As far as numbers are concerned, the minimum requirements for conspiracy are an agreement between two people to commit one crime and one overt act committed by one of them. Thus, you may find the defendant guilty if you are satisfied that he conspired with at least one alleged co-conspirator to commit at least one alleged object crime and that he or that person did at least one alleged overt act in furtherance of the conspiracy.
>
> Before any defendant can be convicted, the 12 jurors must agree on the same person whom the defendant allegedly conspired with, the same object crime and the same overt act. And by object: crime, I mean attempted homicide, aggravated assault or kidnapping; those are the object crimes.
>
> * * *
>
> As general rule, if conspirators have agreed to commit a crime and after that one of them does any act to carry out or advance their agreement, then he has done an overt act in furtherance of their conspiracy. The other conspirators do not have to participate in the overt act or even know about it. In a sense, they are partners, and like partners, they are responsible for each other's actions.
>
> On the verdict sheet, there will be a special section for the crime of conspiracy. If you find that the Commonwealth has proved the defendant guilty beyond a reasonable doubt, you will be asked to mark the crime or crimes that you find proved beyond a reasonable doubt as the objective of the conspiracy. I charge you that a conspiracy can have as its objective one crime or many crimes, but it is your task to determine what objective has been proved beyond a reasonable doubt.

Id. at 61-63. After this charge, the jury returned their verdict of guilty as to conspiracy, and found the objects of the conspiracy were homicide, aggravated assault, and kidnapping. Verdict, 2/7/19.

It was not until sentencing that the Commonwealth first attempted to distinguish conspiracy to commit aggravated assault from the other objects (homicide and kidnapping), when it requested the trial court sentence Appellant only for conspiracy to commit aggravated assault. N.T., 6/3/19, at 19. In its opinion, the trial court acknowledged that sentencing Appellant on both attempted homicide and criminal conspiracy to commit homicide would run afoul of Section 906. Trial Court Opinion, 2/24/20, at 41. The opinion was written prior to the Supreme Court's decision in ***King***, and relies entirely on our opinion in ***Kelly***, which ***King*** effectively overruled. ***See King*** at 570-71.

Consistent with the foregoing, we find the Commonwealth's argument unpersuasive. This case is analogous to ***King*** insofar as the jury found Appellant engaged in a conspiracy to commit homicide, aggravated assault, and kidnapping, but, "because [Appellant] failed in his attempt to [kill the victim, Appellant] could not be sentenced to serve separate terms for the inchoate crime of conspiracy and attempt." ***King***, 234 A.3d at 568. Accordingly, we vacate the sentence for conspiracy.

Appellant also challenges his sentences for kidnapping, stating:

> [Appellant] was illegally sentenced to consecutive sentences under 18 Pa.C.S. § 2901(a)(2) and (a)(3) for kidnapping Stancik. This is because the statutory construction of 18 Pa.C.S. § 2901 and the double jeopardy clauses of the Fifth Amendment to the U.S. Constitution and the Pennsylvania Constitution, Article I, Section 10 prohibit entry of a judgment of sentence under both 18 Pa.C.S. § 2901(a)(2) and (a)(3) as they are the same criminal act.

Appellant's Brief at 42.

Although Appellant did not raise this claim before the trial court, a challenge to the legality a sentence is not waivable. ***Dickson***, 918 A.2d at 99. As Appellant's challenge is one of statutory interpretation,

> [o]ur review is further governed by the Statutory Construction Act, 1 Pa.C.S.A. § 1501 et seq., under which our paramount interpretative task is to give effect to the intent of our General Assembly in enacting the particular legislation under review. ***See*** 1 Pa.C.S.A. § 1921(a) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions."). Generally, the best indication of the General Assembly's intent may be found in the plain language of the statute. In this regard, it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include. Consequently, as a matter of statutory interpretation, although one is admonished to listen to what a statute says; one must also listen attentively to what it does not say.

Commonwealth v. Devries, 112 A.3d 663, 670 (Pa. Super. 2015) (citations omitted).

The crime of kidnapping is defined as follows:

> (a) Offense defined.--Except as provided in subsection (a.1), a person is guilty of kidnapping if he unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with **any of the following intentions**:
>
> (1) To hold for ransom or reward, or as a shield or hostage.
>
> (2) To facilitate commission of any felony or flight thereafter.

> (3) To inflict bodily injury on or to terrorize the victim or another.
>
> (4) To interfere with the performance by public officials of any governmental or political function.

18 Pa.C.S.A. § 2901(a)(1)-(4) (emphasis added).

Appellant argues:

> The statute makes clear that the *actus reus* of kidnapping has a static definition but the *mens rea* is a changing variable. [Appellant] was convicted of two counts of kidnapping, with the two differing intents from (a)(2) and (a)(3), respectively. The act of kidnapping for each of these counts was plead and presented at trial to be the same acts that were committed in one episode. The "any" in reference to the alternative intent makes it clear that at least one of the intents is necessary to convict, but that possessing multiple intents does not allow for multiple convictions for one kidnapping episode.

Appellant's Brief at 43. Appellant relies on this Court's decision in ***Commonwealth v. Lopez***, 663 A.2d 746 (Pa. Super. 1995).

In ***Lopez***, the appellant pled *nolo contendere* to two counts of arson, endangering person, under 18 Pa.C.S.A. §§ 3301(a)(1)(i) and (ii), arising from a single fire. ***Lopez***, 663 A.2d at 747. At sentencing, over appellant's objections, the trial court sentenced her to consecutive sentences of four to ten years imprisonment at each count. On appeal, she argued her sentence was illegal because, "18 Pa.C.S.A. § 3301(a)(1)(i) and 18 Pa.C.S.A. § 3301(a)(1)(ii) . . . are not themselves separate offenses, but rather are alternative means for satisfying 18 Pa.C.S.A. § 3301(a)(1)." ***Id.*** at 748. We agreed, rejecting the Commonwealth's argument that the two sections of the statute, "protect distinct and separate state interests." ***Id.*** We explained:

> Instantly, employing our Supreme Court's example [in ***Commonwealth ex rel. Specter v. Vignola***, 285 A.2d 869, 871 (Pa. 1971)], it is our conclusion that the word "or," used in its ordinary sense, indicates an alternative between two or more unlike actions. Applying that definition to 18 Pa.C.S.A. § 3301(a), we read the statute to mean that any person who either "recklessly places another person in danger of death or bodily injury" or "commits the act with the purpose of destroying or damaging an inhabited building or occupied structure of another" may be prosecuted for and convicted of committing arson endangering persons. However, it simply does not follow from this reading that a person who commits both of the above acts may be sentenced twice for arson endangering persons when only one criminal offense, *i.e.*, starting one fire, has been committed. Not only does such a reading ignore the plain meaning of the word "or," but if applied could raise grave constitutional issues. ***See Commonwealth v. Bostic***, 500 Pa. 345, 456 A.2d 1320 (1983) (intent of double jeopardy clause is to prevent courts from imposing more than one punishment under particular legislative enactment); ***Commonwealth v. Ayala***, 492 Pa. 418, 424 A.2d 1260 (1981) (where, practically speaking, there was only one offense against Commonwealth, defendant may only be punished for one offense, despite number of chargeable offenses arising out of single transaction); ***Commonwealth v. Williams***, 344 Pa.Super. 108, 496 A.2d 31 (1985) (same). Accordingly, because this Court must resolve a statutory issue by reference to the statute's express language, we hold that the trial court's reading of § 3301(a) was in error.

Id. at 749.

We see no meaningful distinction between the statutory interpretation of the arson statute in ***Lopez*** and the kidnapping statute at issue here. A person commits the single crime of kidnapping if he or she satisfies, "any" of the intentions expressed in 18 Pa.C.S.A. § 2901(a)(1)-(4). Therefore, 18 Pa.C.S.A. § 2901(a)(2) and 18 Pa.C.S.A. § 2901(a)(3) "are not themselves separate offenses, but rather are alternative means for satisfying 18 Pa.C.S.A. § [2901(a)]." ***Id.*** at 748. If a defendant is proven to have more than one of

the expressed intentions, he can be convicted under two sections of the statute, but he cannot be sentenced under both, "when only one criminal offense, *i.e.*, [a single kidnapping], has been committed." ***Id.***

On appeal, the Commonwealth asserts ***Lopez*** is inapposite because Appellant committed two kidnappings. Commonwealth Brief at 21. In support, the Commonwealth for the second time makes an argument that is at odds with the record. ***Id.*** at 20-21. The Commonwealth states:

> [Appellant] participated in two separate and distinct kidnapping acts. The first was the literal kidnapping of Marcus Stancik off the alleyway near Hayes Avenue in Washington where he was assaulted, the hood placed over his head, and then forced into the backseat of the Honda Pilot between [Appellant] and Tyree King, and eventually the retrieved firearm shoved in Stancik's side by [Appellant] while the actors drove around. This act constituted the removal of Stancik a substantial distance with the intent to inflict bodily harm or terrorize him, under § 2901(a)(3). The second kidnapping act was by [Appellant] alone when he took Stancik out of the Honda, hood still over his head and walked him to the water's edge intending to kill him. The separate act, and separate intent to facilitate the commission of the felony (attempted) murder, is separate and apart from the kidnapping across the street.

Id.

In addition to being implausible, this is not the argument the Commonwealth made to the jury. In its closing, the Commonwealth recounted a single kidnapping, which included the forcing of Stancik into the car, holding him at gunpoint, taking him out of the car, and walking him to the water. N.T., 2/7/19, at 21, 26, 28. The Commonwealth also argued that Appellant's act of shooting Stancik was part of the conspiracy between Appellant and

Lacks, not a separate act where Appellant acted alone. ***Id.*** at 27. The Commonwealth's appellate argument is not logical, where anytime an individual is forced into a vehicle, and then removed from the vehicle by kidnappers, there would be two separate kidnappings. Had Stancik escaped and been recaptured, for example, we might be inclined to give credence to the Commonwealth's argument. However, our review compels our agreement with Appellant that there was a single kidnapping, albeit one in which the Commonwealth proved intent under two subsections of 18 Pa.C.S.A. § 2901. As such, and pursuant to ***Lopez***, we vacate Appellant's two kidnapping sentences. ***See Lopez*** 663 A.2d at 749. This disposition, like our disposition vacating Appellant's sentence for conspiracy, compels remand. ***See Commonwealth v. Bartrug***, 732 A.2d 1287 (Pa. Super. 1999), *appeal denied*, 561 Pa. 651, 747 A.2d 896 (1999) (holding sentencing error on one count in multi-count case generally requires all sentences for all counts to be vacated so court can restructure entire sentencing scheme).

OUTSTANDING MOTIONS

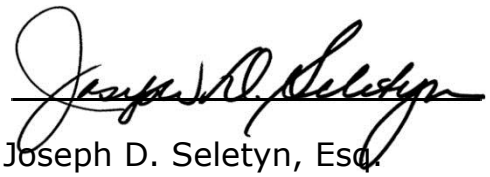
Appellant filed an application for relief on October 19, 2020, in which he requested we take judicial notice of a criminal information filed against Richard Lacks. On October 28, 2019, the Commonwealth responded by filing an application to strike, requesting that any reference to Mr. Lacks' criminal information be stricken because a criminal information "constitutes allegations and is not evidence." Application to Strike, 10/28/19, at ¶ 2. Appellant

responded on November 11, 2019. He "admitted that a criminal information was not introduced into evidence at the jury trial of the Appellant below." Answer to Application to Strike, 11/11/19, at ¶ 2. "It is black letter law in this jurisdiction that an appellate court cannot consider anything which is not part of the record in the case." ***Commonwealth v. Martz****,* 926 A.2d 514, 524 (Pa. Super. 2007). For "purposes of appellate review, what is not of record does not exist." ***Commonwealth v. Holley***, 945 A.2d 241, 246 (Pa. Super. 2008). Accordingly, we deny Appellant's application for judicial notice, and grant the Commonwealth's application to strike.

ORDER

Denial of suppression affirmed. Convictions affirmed. Judgment of sentence vacated. Case remanded for resentencing consistent with this decision. Application for judicial notice denied. Application to strike granted. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/23/2021