IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 49 MAP 2019

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

SCOTT CHARLES DAVIS,

Appellee.

No. 47 MAP 2019

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

MICHAEL LEHMAN,

Appellee.

BRIEF OF APPELLEES SCOTT DAVIS AND MICHAEL LEHMAN

Appeals from the Orders of the Superior Court of Pennsylvania at 76 MDA 2018 dated December 26, 2018, and 1556 MDA 2017 dated January 4, 2019

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Questions Presented

The question presented in *Commonwealth v. Davis*, 49 MAP 2019, is: Whether costs relating to sentencing, and costs relating to re-sentencing, constitute "costs of prosecution and trial" under 16 P.S. § 1403?

The question presented in *Commonwealth v. Lehman*, 47 MAP 2019, is: Whether the Pennsylvania Superior Court erred as a matter of law by holding that the costs relating to contested expert testimony in a contested resentencing do not constitute costs of prosecution under 16 P.S. § 1403, [ ] and are ineligible for imposition upon a reimbursement as part of a sentence as a matter of law rather than the sentencing court's discretion[?]

Counter-Statement of the Case

Appellee Scott Davis concurs with the procedural history as represented in Appellant's brief and as adopted from the trial court's Pa.R.A.P. 1925(a) opinion. Appellee Davis does take issue with some specific details referenced in Appellant's Factual History, however. The Commonwealth writes:

> It is important to note that Defendant pursued a defense psychological evaluation from a defense expert, and thus the Commonwealth was obligated to respond by seeking an evaluation by an evaluator that the Commonwealth found credible. In this case the Defendant sought an evaluation from Dr. Paul Delfin, and the Commonwealth sought an evaluation by Dr. Larry Rotenberg.

Appellant's Brief, pp. 12-13. As noted in the Commonwealth Motion For Continuance, dated 12/6/16 and attached as Appendix A, the Commonwealth had

retained Dr. Larry Rotenberg before counsel for Scott Davis had retained any expert at all. Nor was the Commonwealth "obligated" to hire an expert at all, since it was not seeking a sentence of life without the possibility of parole[1].

Appellee Michael Lehman concurs with the procedural history as represented in Appellant's brief and as adopted from the trial court's 1925 (a) opinion. Appellee Lehman does take issue with some specific wording referenced in Appellant's Factual History. The Commonwealth writes:

> Defendant was fourteen (14) years old on June 18, 1988, the date on which Defendant and three co-defendants participated in stabbing Kwame Beatty to death with a butcher knife while he slept.

Appellee Lehman takes issue with the Appellant's inference that Appellee participated in the actual stabbing. The Commonwealth later clarifies that Appellee Lehman's role did not involve the actual stabbing incident. Appellant's Brief, pp.7-9.

Summary of the Argument

The issues in these cases are as much about fundamental fairness as they are statutory interpretation. Mr. Davis and Mr. Lehman are "juvenile lifers"—they were children when they committed homicides, and they have spent their entire

[1] It must also be noted that this Court has not mandated the use of expert testimony even had the Commonwealth sought a life sentence without parole. See *Commonwealth v. Batts II,* 163 A.3d 410 at 455-456 (Pa. 2017).

adult lives in jail. The United States Supreme Court and this Court have for the first time given them an opportunity to experience freedom as adults, to make something of their lives beyond the confines of a jail cell. But in order to take advantage of that opportunity—and protect their fundamental constitutional rights to a legal sentence—Mr. Davis and Mr. Lehman had to undergo a resentencing hearing. Now the Commonwealth wants each to pay thousands of dollars in expert witness fees to secure the rights promised them by the highest courts of this country and this Commonwealth. Imposing such costs would chill the fundamental right to a constitutional sentence, serve as a vehicle for retaliation by the Commonwealth, improperly burden the "juvenile lifers" in these cases with unanticipated and undeserved costs, and expand 16 P.S. § 1403 beyond its statutory dictates.

Nevertheless, the Commonwealth thinks that it should not have to pay for the costs of its own experts, as it is not the District Attorney's fault that Mr. Davis and Mr. Lehman received unconstitutional sentences. This position turns Pennsylvania law on its head. A defendant can only be required to pay costs authorized by statute, and such statutes are penal in nature, with any ambiguities construed in favor of the defendants.

It is certainly not Mr. Davis's or Mr. Lehman's "fault" that they received an illegal sentence; the evolving standards of decency that led to cases like *Miller v.*

Alabama, 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) are unpredictable precisely because they are "evolving." Nor was it ever foreseeable to them that they would each be billed thousands of dollars for exercising their fundamental constitutional right to have a legal sentence imposed upon them. A defendant may be on notice when he commits a crime that he will have to pay certain costs, but he is not on notice that he will receive an illegal sentence and have to pay more as a result. The Commonwealth's complaints that Mr. Davis and Mr. Lehman should have taken the deal it offered, and thus avoided the need for any experts, is similarly flawed. The United States Supreme Court explicitly suggested that states "simply entitle all juvenile homicide offenders to be eligible for parole," rather than re-litigating each case. *Commonwealth v. Batts*, 163 A.3d 410, 440 (Pa. 2017). Yet the Commonwealth has declined that suggestion. In its briefing to both this Court and the Superior Court, the Commonwealth has stated that it sees no problem with punishing these defendants for exercising their rights in response to the Commonwealth exercising its own right. Our Constitution forbids such punishment.

In addition to these questions of due process and fairness, there is also a basic question of statutory interpretation. The Commonwealth believes these costs are authorized by 16 P.S. § 1403, which specifies that "where a defendant is convicted and sentenced to pay the costs of prosecution and trial," the defendant

shall pay "the expenses of the district attorney in connection with such prosecution." Under § 1403, the defendant must pay costs associated with investigation, apprehension, and prosecution and trial. Nothing in the statute addresses costs associated with sentencing (or resentencing). The distinction between "prosecution" and "trial" in the statute, coupled with the way the term of art "costs of prosecution" is used in other contemporaneous court-cost statutes, shows that the Superior Court was correct: prosecution is synonymous with conviction, and § 1403 simply does not reach costs associated with sentencing. Indeed, it is not surprising that no statute compels a defendant to pay costs associated with sentencing, as it is the rare case where the District Attorney would have any expenses associated with sentencing.

Two Superior Court panels have said that it is fundamentally unfair to bill Mr. Davis and Mr. Lehman for the thousands of dollars that the Commonwealth spent on experts in order to keep them incarcerated. This Court should affirm the rulings in both decisions and ensure that both individuals be given the opportunity for parole without the burden of a debt they will never be able to pay—a debt they owe only because they "chose" to vindicate their rights rather than spend the rest of their lives in prison.

Argument

After decades of incarceration that began when each was a juvenile, Mr. Davis and Mr. Lehman were resentenced based on an evolved standard of justice that declared mandatory life sentences unconstitutional. Little did they know that such evolution came with a huge price tag, as each was ordered to pay the "cost of prosecution" of their respective resentencings amounting to thousands of dollars. The idea that a defendant would be charged a large amount of money to rectify his own unconstitutional sentence is shocking; but if the cost was a single dollar, the order would nonetheless be unconstitutional, as it would deter defendants from seeking redress for illegal sentences and chill the right to a fair and just outcome. "…(I)t is abundantly clear that constitutional rights are not to be measured in dollars and cents." *Commonwealth v. Clark*, 279 A.2d 41, 45 (Pa. 1971). Such an order would also violate the plain wording of 16 P.S. § 1403, a statute that makes a defendant liable for the costs of prosecution and trial, but by an almost glaring omission makes no mention of the costs of sentencing. Thus, through either a constitutional or statutory lens, the Commonwealth is precluded from seeking costs for sentencing or resentencing.

A. A defendant is not liable for costs associated with sentencing (or resentencing) under 16 P.S. § 1403.

The initial question in this case is whether there is any statutory authority to require that Mr. Davis and Mr. Lehman pay the District Attorney's costs associated

with any sentencing or resentencing. There is not. Instead, the statute that the Commonwealth looks to as authority to bill Mr. Davis and Mr. Lehman, 16 P.S. § 1403, limits its scope to costs that the prosecutor incurs starting at the investigative stage and through conviction.

Section 1403 provides:

> All necessary expenses incurred by the district attorney or his assistants or any officer directed by him in the investigation of crime and the apprehension and prosecution of persons charged with or suspected of the commission of crime, upon approval thereof by the district attorney and the court, shall be paid by the county from the general funds of the county. In any case where a defendant is convicted and sentenced to pay the costs of prosecution and trial, the expenses of the district attorney in connection with such prosecution shall be considered a part of the costs of the case and be paid by the defendant.[2]

The statute makes defendants liable for costs associated with investigating the crime, apprehending the defendant, prosecuting the defendant, and trying the case. Prosecution is of course broader than merely trial, which is why §1403 draws a distinction between the two: it includes costs incurred through actions such as bail hearings, preliminary arraignments, motions *in limine*, and other non-trial actions such as preserving assets pre-trial for restitution pursuant to 42 Pa.C.S. § 9728(e).

[2] The Superior Court in the *Lehman* decision inadvertently cited to 16 P.S. § 4403 instead of § 1403. The only difference is that § 4403 applies to second-class counties (Allegheny), whereas § 1403 applies to all other counties except for Philadelphia (which is itself governed by the same language codified at 16 P.S. § 7708).

But nothing in the statute requires that a convicted defendant pay for the costs associated with *sentencing*.

The Superior Court in the *Davis* decision explained the distinction: prosecution is synonymous with *conviction*, and the prosecution "ends with the conviction or acquittal of the defendant." *See Commonwealth v. Moran*, 675 A.2d 1269, 1272 n.11 (Pa. Super. Ct. 1996) (in the context of § 1403, the "term 'prosecution' would have to be read as synonymous with 'conviction' since a defendant's exoneration of all charges would not permit the imposition of costs of 'prosecution' under 16 P.S. § 1403"). The General Assembly has separately enacted statutes that provide for certain costs after conviction, but none of those statutes reach costs of sentencing, either. For example, before it was repealed, Act 541 of 1959, P.L. 1530, 19 P.S. § 1263, specified that, in any case that is brought before "any appellate court of this Commonwealth," the "necessary expenses of the district attorney in connection therewith shall be paid by the proper county."

There is also a statute that imposes certain other post-conviction costs on defendants—but only those associated with the *collection* of fines, costs, or restitution (as opposed to the imposition thereof). *See* 42 Pa.C.S. § 9728(g) (setting forth that a defendant is liable for things such as transportation costs, filing fees,

and even prosecutorial costs associated with collecting fines, costs, or restitution).[3] Still, Pennsylvania has no statute addressing costs of sentencing.

The problem with the Commonwealth's theory that costs of trial and prosecution include costs of sentencing is that the legislature has never enacted a statute that addresses costs associated with *sentencing*. *See* 1 Pa.C.S. § 1921(b) (statutory construction requires that, when "the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit"). And there is good reason to think that the legislature was not thinking about the costs associated with sentencing when it authorized taxing a defendant for the costs of prosecution, which include investigation and trial. After all, there are generally *no costs* associated with sentencing other than the salary costs for the prosecutor.[4] Indeed, these juvenile lifer resentencing cases are *sui generis* in that sense. The only category of cases where there may be some

[3] Before the Superior Court, the Commonwealth suggested § 9278(g) as a possible basis to authorize costs associated with sentencing, since it makes reference to "costs associated with prosecution." However, in context it is clear that § 9278 in its entirety—and specifically subsection (g)—deals with the *collection* of fines, costs, or restitution. *See Commonwealth v. Gaddis*, 639 A.2d 462, 472 (Pa. Super. Ct. 1994) (explaining that "the separate reference to 'costs' in subsection (g) provides for the collection of costs associated with obtaining a money judgment against the defendant, and does not provide for the imposition of the costs of prosecution itself"). Thus, for example, a defendant would be liable for costs associated with prosecuting a contempt petition or probation violation for nonpayment of fines, costs, or restitution. However, this statute, titled "Collection of restitution, reparation, fees, costs, fines and penalties," has no bearing on costs at sentencing unrelated to enforcing an existing order to make payments.

[4] Of course, this Court has previously ruled that the District Attorney's salary is not taxable under 16 P.S. § 1403. *See Commonwealth v. Garzone*, 34 A.3d 67 (Pa. 2012).

consistent sentencing expenses are death penalty cases,[5] on account of the separate mitigation stage that is constitutionally required—a requirement that arose decades after § 1403 was enacted. In an ordinary case, however, there simply are no separate costs of sentencing.

Such an outcome also makes sense in the historical context. Section 1403 was originally adopted as Act 393 of 1923, P. L. 973, 16 P.S. § 3451, and it was reenacted as part of revisions to the County Code in 1955 through Act 130, P.L. 323, 16 P.S. § 1403.[6] At the time, there were a number of statutes addressing court costs, which are no longer in effect. Among them was Section 64 of the Criminal Procedure Act of 1860, the Act of March 31, 1860, P.L. 427, 19 P.S § 1223 (referred to in the *Lehman* decision as "Section 64"). Section 1223 provided:

> The costs of prosecution accruing on all bills of indictments charging a party with felony, returned ignoramus by the grand jury, shall be paid by the county; and that the costs of prosecution accruing on bills of indictment charging a party with felony, shall, if such party be acquitted by the petit jury on the traverse of the same, be paid by the county; and in all cases of conviction of any crime, all costs shall be paid by the party convicted; but where such party shall have been discharged, according to law, without payment of costs, the costs of prosecution shall be paid by the county; and in cases of surety of the peace, the costs shall be paid by the prosecutor or the defendant, or jointly between them, or the county, as the court may direct.[7]

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[5] Such costs are not generally the subject of litigation, since a defendant who has reached a penalty phase faces the alternative of a death sentence or life without the possibility of parole; thus his ability to pay costs of sentencing, should such costs be imposed, are negligible.

[6] The Commonwealth's brief overlooks that the 1955 provision was simply a reenactment, with some non-substantive alterations, of the 1923 law.

[7] While not specifically before this Court or within the scope of Allowance of Appeal, Appellants wish to make it clear that the long-repealed 19 P.S § 1223 also does not authorize costs associated with sentencing. Even if § 1223 authorized such costs prior to its repeal in 1978,

This provision, since repealed, utilizes the term "costs of prosecution" in the same way as the statute in question in the instant case. If the grand jury rejects the case, the "costs of prosecution" are paid by the county. If the defendant is acquitted, the "costs of prosecution" are paid by the county. Indeed, the same construction and meaning of "costs of prosecution" was used in another contemporaneous law, the Act of May 25, 1897, P.L. 89, 19 P.S. § 1228. That statute provided that in cases of assault, the grand jury would determine "whether the county or the prosecutor shall

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it no longer does. It is true that § 1223 remains part of Pennsylvania's common law through the savings clause in the Judiciary Act Repealer Act ("JARA"), 42 P.S. § 20003. However, it does not authorize this cost for two reasons. First, only costs that are explicitly authorized by statute may be billed to a defendant. *See Commonwealth v. Coder*, 415 A.2d 406, 410 (Pa. 1980). But § 1223 does not authorize any specific costs—it just says, "all costs." By contrast, *other* statutes, such as the one at issue in this case—16 P.S. § 1403—or statutes such as the Criminal Laboratory User Fee, 42 Pa.C.S. § 1725.3(b), or the Judicial Computer Project, 42 Pa.C.S. § 3733(a.1), set forth what those actual, specific costs are. All § 1223 specifies is that a defendant must pay those costs if convicted. Second, even if § 1223 once acted as a font of substantive authority for certain costs, it no longer does, as the JARA savings clause applies only to *procedural* rules, not to substantive areas of law: "If no such general rules are in effect with respect to the repealed statute on the effective date of its repeal, the *practice and procedure* provided in the repealed statute shall continue in full force and effect, as part of the common law of the Commonwealth, until such general rules are promulgated." 42 P.S. § 20003 (emphasis added). As the *en banc* Commonwealth Court has explained, there is a "distinction between substantive and procedural questions for purposes of determining whether" a statute remains in effect under JARA. *Donatucci v. Pa. Labor Relations Bd.*, 547 A.2d 857, 861 (Pa. Comm. Ct. 1988) (en banc). Under *Coder* and the well-established body of case law in Pennsylvania, no court—including this Court through general rules—could impose any costs not authorized by statute. *See, e.g.*, *Commonwealth v. Houck*, 335 A.2d 389, 391 (Pa. Super. Ct. 1975) (en banc) ("The power and authority of the Court to place costs upon the defendant or the prosecutor requires statutory authority."). If § 1223 created a property interest in certain costs to which the Commonwealth is entitled, then it would fall outside the scope of the JARA savings clause and would not be part of Pennsylvania common law; it would simply be repealed. *See Commonwealth v. Garramone*, 176 A. 263, 264 (Pa. Super Ct. 1935) (liability for court costs is governed by statutes, not the common law). Thus, § 1223 remains part of our common law only to the extent it provides some procedural rule.

pay the *costs of prosecution*" when it rejected an indictment. 19 P.S. § 1228 (emphasis added). In other words, the term of art "costs of prosecution" in 19 P.S. §§ 1223 and 1228 is precisely the same as was used when the legislature wrote 16 P.S. § 1403 in 1923; it shows that the legislature consistently viewed the costs of prosecution as covering costs *prior to* conviction. It is for that reason that § 1403 talks about "costs of prosecution *and trial*"—they are statutorily distinct.

Instead of grappling with this, the Commonwealth points to *Commonwealth v. Davy*, 317 A.2d 48 (Pa. 1974), erroneously proclaiming that this Court held in that case that 16 P.S. § 1403 covers even prosecution costs associated with probation violation hearings. Thus, according to the Commonwealth, it must cover the costs at issue in the cases of Mr. Davis and Mr. Lehman. Yet *Davy* does not actually involve 16 P.S. § 1403 at all, as even a cursory examination reveals. Instead, it turned on what were at the time 19 P.S. §§ 1223, 1225, and 1263, as well as the Uniform Extradition Act.[8] All three of those statutory provisions have since been repealed by the Judiciary Act Repealer Act, Act 53 of 1978; as is discussed above in a footnote, they no longer serve as a source of authority to impose any cost. Moreover, the point that the Court made in *Davy* was that the Uniform Extradition Act *explicitly authorized* the county to pay costs associated

[8] To be clear, what is today 16 P.S. § 1403 was *never* numbered as one of the statutes in *Davy*. There appears to be no basis for the Commonwealth's misstatement that *Davy* interpreted § 1403.

with extradition, and the Court reasoned that 19 P.S. § 1223—which at the time required that defendants pay "all costs"—must therefore require that the defendant pay the costs set forth in the Extradition Act. By contrast, 16 P.S. § 1403 does not explicitly address costs associated with sentencing (or re-sentencing).

In light of the plain language of § 1403 and the historical context, there is a distinction between "costs of prosecution" and costs of sentencing. Simply put, "prosecution and trial" is not the same as sentencing, and the legislature certainly knew how to talk about costs associated with "prosecution, trial, and sentencing" if it so chose. *See Hoy v. Angelone*, 720 A.2d 745, 748 (Pa. 1998) (explaining that the legislature knows how to draft a clear statutory command). Moreover, § 1403 must be strictly construed in favor of Mr. Davis and Mr. Lehman because it is penal in nature. *See Commonwealth v. Garzone*, 34 A.3d 67, 75 (Pa. 2012) (version of § 1403 that applies to Philadelphia, 16 P.S. § 7708, "is penal in nature and therefore subject to strict construction"). Strictly construing §1403 leads only to the conclusion that a defendant is liable for costs up to and through conviction—not any additional costs that may arise at a separate sentencing phase. *See id.* (explaining that, where the statute "does not expressly identify" certain costs, and the question "being equivocal (at best), the narrower construction favoring" the

defendants "must prevail"). Accordingly, this Court should affirm the decision of the Superior Court in *Davis*, which is also dispositive of the issue in *Lehman*.[9]

B. Compelling juvenile lifers to pay the costs associated with resentencing, which is required to correct an illegal sentence, is unconstitutional.

Even if there were statutory authority to shift the costs of sentencing onto defendants generally, compelling Mr. Davis and Mr. Lehman to pay for the costs associated with a *resentencing* that occurs only because the defendant has been given an illegal sentence is itself unconstitutional. True, it is not the Commonwealth's fault that the United States Supreme Court changed the constitutional landscape; but neither is it the "fault" of Mr. Davis and Mr. Lehman. The Superior Court in *Davis* correctly explained that a defendant cannot be liable for the costs of resentencing which, "through no fault of his own, occurred only after his sentence was deemed unconstitutional." *Davis*, 207 A.3d at 346. And in

[9] The Commonwealth seems to misunderstand the distinction between a claim that costs of prosecution were imposed illegally, or whether the trial court abused its discretion in imposing certain costs. If there is no statutory basis for imposing a cost, a trial court acts illegally if it does so. On the other hand, if there is a statutory basis, then the exercise of discretion comes into play when the trial court determines the amount of the cost or, in the case of 16 P.S. § 1403, what expenses were "necessary" to the prosecution. The Superior Court correctly determined that there was no legal basis to impose the cost in the first place; thus, there is no need to reach the question of whether the costs were "necessary" or otherwise complied with sentencing requirements in setting the dollar amount of the cost. The *en banc* Superior Court in *Commonwealth v. Boyd*, 73 A.3d 1269, 1272 (Pa. Super. Ct. 2013) (en banc) provided guidance on this point in an analogous context: if a court fails to consider a defendant's ability to pay when it imposes a fine, then it has imposed an illegal sentence; but if it considers the defendant's ability to pay and imposes an amount to which the defendant objects, the defendant can only challenge the exercise of the court's discretion. The question before this Court, however, is whether there is statutory authority to impose the costs associated with resentencing Mr. Davis and Mr. Lehman.

Lehman, the Superior Court reasoned that a defendant could not "reasonably expect to be financially responsible for the costs associated with resentencing necessitated by changes in law many years later." *Lehman*, 201 A.3d at 1287. At their core, these are statements about Due Process: at the time he committed his offense, was the defendant reasonably on notice that he would have to pay these funds—and if not, did he do something else that would have necessitated them? Neither Mr. Davis nor Mr. Lehman can now be constitutionally punished by being compelled to pay thousands of dollars merely because they "chose" to exercise their constitutional right to a legal sentence.[10]

1. Punishing Mr. Davis and Mr. Lehman for seeking a new sentence offends fundamental fairness and chills the exercise of their constitutional rights.

Billing Mr. Davis and Mr. Lehman's for the District Attorney's costs associated with resentencing would unconstitutionally punish them for exercising their constitutional right to a legal sentence. Every defendant has a fundamental constitutional right to a legal sentence, which is protected by the Eighth Amendment. As the *Lehman* court explained, making Mr. Davis or Mr. Lehman

[10] Costs aside, it should be noted that the Commonwealth was not under any obligation to hire an expert in either case, as it explains in its brief that it did not pursue a sentence of life without the possibility of parole for either Mr. Davis or Mr. Lehman. Thus, if this had been an initial sentencing in the post-*Miller* world, no expert testimony would be required to determine if Mr. Davis or Mr. Lehman were "permanently incorrigible." *See Commonwealth v. Batts*, 163 A.3d 410, 477 (Pa. 2017) (explaining the role of an expert when the Commonwealth seeks a sentence of life without parole for a juvenile).

pay "the costs associated with resentencing, [] would punish him for exercising his constitutional right to receive a sentence that comports with the Eighth Amendment of the United States Constitution (as incorporated against the states via the Fourteenth Amendment)." *Lehman*, 201 A.3d at 1286. *See also Commonwealth v. Rivera*, 154 A.3d 370, 381 (Pa. Super. Ct. 2017) (en banc) (defendant has a right to a legal sentence).

The Commonwealth cannot constitutionally punish defendants for exercising these fundamental rights. This Court has explained that it is unconstitutional to "penalize[]" a defendant "for the present exercise of his constitutional right." *Commonwealth v. Bethea*, 379 A.2d 102, 104 (Pa. 1977). Any restrictions are subject to strict scrutiny: "a practice which burdens the exercise of a fundamental constitutional right sometimes may be justified upon a showing that a compelling state interest, incapable of achievement in some less restrictive fashion, outweighs the interest protected by the right." *Id*. at 104-05. This straightforward framework answers the question, as the Commonwealth has *no* compelling interest in shifting the costs of the criminal justice system onto defendants in an effort to save money. The United States Supreme Court has left no ambiguity that saving money does not constitute a compelling government interest: the "conservation of the taxpayers' purse is simply not a sufficient state interest" to infringe on the right to interstate travel—or any other fundamental right. *Memorial Hospital v. Maricopa County*,

415 U.S. 250, 263 (1974). *See also Saenz v. Roe*, 526 U.S. 489, 507 (1999) (rejecting as an insufficient state interest a "fiscal justification"); *In re Smith*, 323 F. Supp. 1082, 1088 (D. Colo. 1971) (explaining that the Supreme Court has ruled "that saving money is not an interest of sufficient importance to be classified as compelling or overriding"); *State v. Wylie*, 516 P.2d 142, 149 (Alaska 1973) ("The United States Supreme Court has reaffirmed its position that the compelling interest standard is not satisfied by urgent fiscal need."); *Pederson v. Superior Court*, 130 Cal. Reptr. 2d 289, 298 (Cal. Ct. App. 2003) ("Cost-shifting, however, does not qualify as a compelling state interest.").[11]

Moreover, it is certainly not a stretch to conclude that assessing thousands of dollars in costs against Mr. Davis and Mr. Lehman would in fact constitute a form of punishment.[12] *See Lehman*, 201 A.3d at 286. This Court in *Bethea* did not

[11] Beyond the recoupment of funds not being a compelling interest as a matter of law, it also does not make any financial sense in this case. If Mr. Davis and Mr. Lehman had not exercised their constitutional right to a legal sentence, they would have literally spent the rest of their lives in jail. It costs $45,288 per year to house one inmate in a Department of Corrections facility. *See* Pennsylvania General Assembly, House Appropriations Committee Primer on Correctional Institutions (Feb. 15, 2019), www.pahouse.com/Files/Documents/Appropriations/series/3001/DOC_BP_102517.pdf. For each decade that they remained imprisoned, Mr. Davis and Mr. Lehman would have each cost the Commonwealth $450,000. As they age, their medical expenses would rise significantly, with geriatric offenders costing states up to twice as much to house as younger offenders. Given that the state's only interest here is recouping money from Mr. Davis and Mr. Lehman, it is irrational to suggest that they should have to pay now that they have saved the Commonwealth millions of dollars moving forward. The Commonwealth certainly has no compelling interest.

[12] According to Black's Law Dictionary (11th ed. 2019), "punishment" constitutes any sanction including "loss of property." As is explained above, Mr. Davis and Mr. Lehman have a property interest in the funds that they would otherwise have to pay to the Commonwealth.

strictly require that a defendant be punished—it was enough for him to be "penalized" or have his constitutional rights "burden[ed]" for there to be a constitutional violation. *See Bethea*, 379 A.2d at 104-05. Regardless, court costs occupy a strange niche in Pennsylvania law. They are not *intended* to be punishment. Instead, costs "are a reimbursement to the government for the expenses associated with the criminal prosecution." *Commonwealth v. Rivera*, 95 A.3d 913, 916 (Pa. Super. Ct. 2014). In this way, they are "akin to collateral consequences" and are like taxable costs in a civil case. *Id*. As this Court has previously explained, costs are "incident of the judgment" and are not a part of the sentence. *Commonwealth v. Giaccio*, 202 A.2d 55, 58 (Pa. 1964), *rev'd on other grounds*, 382 U.S. 399. As a result, they "do not form a part of the penalty imposed by statutes providing for the punishment of criminal offenses." *See also Commonwealth v. Hamel*, 44 Pa. Super. 464, 465-66 (Pa. Super. Ct. 1910) (discussing the longstanding legal status of court costs in criminal cases).

On the other hand, this Court—as well as the Superior Court—has explained that costs are penal in nature. *See, Garzone*, 34 A.3d at 75; *Gaddis*, 639 A.2d at 472. The Superior Court has also ruled that court costs cannot be applied retroactively, in violation of the ex post facto clause, because doing so "attaches greater punishment to all crimes" by expanding the costs imposed. *Commonwealth v. Allshouse*, 924 A.2d 1215, 1230 (Pa. Super. Ct. 2007). *See also Guarrasi v.*

County of Bucks, 176 M.D. 2018, 2018 WL 4374280 at *3 (Pa. Commw. Ct. 2018) (unpublished) (applying the ex post facto clause to court costs). Certainly defendants are routinely punished in the Commonwealth because they are too poor to pay costs, and the Superior Court has repeatedly ruled that trial courts have illegally and unconstitutionally jailed indigent defendants who are too poor to pay. *See e.g.*, *Commonwealth v. Mauk*, 185 A.3d 406 (Pa. Super. Ct. 2018), *Commonwealth v. Diaz*, 191 A.3d 850 (Pa. Super. Ct. 2018), *Commonwealth v. Smetana*, 191 A.3d 867 (Pa. Super. Ct. 2018); *Commonwealth v. Milton-Bivins*, 1870 WDA 2017 and 737 WDA 2018, 2019 WL 4390657 (Pa. Super. Ct. Sept. 13, 2019) (unpublished). Indeed, additional cases where defendants have been held in contempt or jailed for nonpayment continue to percolate through the lower courts. *See Commonwealth v. Sneeringer*, 1344 MDA 2019 (arising out of York County); *Commonwealth v. Hudson*, 611 EDA 2019; *Commonwealth v. Possinger*, 1632 EDA 2019 and 1749 EDA 2019. There is no serious question that imposing thousands of dollars in costs on indigent defendants who have been incarcerated since childhood constitutes a form of punishment.

For these reasons, the Commonwealth's argument regarding entitlement to these costs should fail. Mr. Davis and Mr. Lehman were constitutionally entitled to a legal sentence, and they were entitled to have the trial court impose such a sentence. The Superior Court should be affirmed.

2. The Due Process Clause of the Fourteenth Amendment prohibits billing defendants for expenses for which they had no adequate notice when they committed their offenses.

In both the *Davis* and *Lehman* cases, the Superior Court concluded that it would be unconstitutional to impose the costs of correcting an illegal sentence on the defendant, as it was not "reasonably foreseeable" at the time he committed the offense that he would have to pay such costs. The two Superior Court panels, which relied on this Court's decision in *Coder*, did not explicitly frame this in the context of a specific constitutional provision, but it is a fundamental component of Due Process under the Fourteenth Amendment that an individual must be on notice of the consequences of his actions at the time he commits an offense. While it was reasonably foreseeable that Mr. Davis and Mr. Lehman would have to pay the costs associated arising out of their initial convictions, it was *not* reasonably foreseeable that they would be illegally sentenced and have to pay additional costs in order to receive a legal sentence. In this sense, the heart of the issue is a confluence of reasonable foreseeability under both *Coder* and the principle that retroactive judicial decisions cannot increase the penalty for criminal conduct. The United States Supreme Court's decisions in *Miller* and *Montgomery* entitled Mr. Davis and Mr. Lehman to new sentences. Yet under the Commonwealth's argument, the decisions paradoxically opened them up to additional penal

sanctions in the form of court costs they otherwise would not have to pay. That would be an absurd result.

In *Lehman*, the Superior Court looked to its decision in *Commonwealth v. Weaver*, 76 A.3d 562, 573 (Pa. Super. 2013) for guidance on the appropriateness of billing a defendant for costs that are not his fault. The Commonwealth now argues that, if anything, *Weaver* supports its position because in that case the District Attorney erred, and here he has done nothing wrong. Such thinking is both wrong and irrelevant. The Commonwealth prosecuted Mr. Davis and Mr. Lehman, and the Commonwealth incarcerated them. Neither defendant is attempting to *blame* the Commonwealth for what was always an unconstitutional sentence (even if it took the United States Supreme Court decades to so proclaim).[13] But it is the Commonwealth that imposed that sentence. *See Lehman*, 201 A.3d at 1286-87 ("We see no reason to differentiate between the actions taken by the Commonwealth in prosecuting an action from the actions taken by the Commonwealth in enacting a statute that is later declared to be unconstitutional."). And it is also the Commonwealth that declined the United States Supreme Court's suggestion that it "simply entitle all juvenile homicide offenders to be eligible for

[13] In applying *Miller* retroactively, the United States Supreme Court ruled that automatic life without parole for juveniles was always violative of the Constitution. As it explained in *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016), the court found that there is a "grave risk that many are being held in violation of the Constitution."

parole" rather than contesting every resentencing. *Batts*, 163 A.3d at 440. Regardless, the illegal sentence and resentencing are not the fault of Mr. Davis or Mr. Lehman. It therefore falls on the Commonwealth to bear the costs, not these defendants.

In *Coder*, this Court determined that the defendant's liability for "all costs" under 19 P.S. § 1223 included the costs associated with a change of venue when such a change is necessitated by the defendant's actions. *Coder*, 415 A.2d at 409. This Court adopted the reasoning from the Superior Court's dissent, reasoning that the consequence giving rise to the added costs were "readily foreseeable" to the defendant when he committed the offense. *Id*.[14] The same basic question of what is reasonably foreseeable also arose in *Commonwealth v. Davis*, 760 A.2d 406, 410 (Pa. Super. Ct. 2000), which explained that under United States Supreme Court precedent, courts "may not unforeseeably and retroactively apply case law that increases the penalty for criminal conduct." Both of these threads touch on the case at bar: was it reasonably foreseeable to Mr. Davis and Mr. Lehman that they would have to pay these costs years later?

While there is not a substantial body of case law developing the concept of reasonable foreseeability in a criminal context, the same principle applies in tort

[14] The Superior Court now uses the phrase "reasonably foreseeable" instead of "readily foreseeable." *Lehman*, 201 A.3d at 1287; *Commonwealth v. Chappell*, 2958 EDA 2018, 2019 WL 5063402 at *3 (Pa. Super. Ct. Oct. 9, 2019) (unpublished).

law. In negligence cases, foreseeability means the "likelihood of the occurrence of a general type of risk." *Huddleston v. Infertility Center of America, Inc.*, 700 A.2d 453, 460 (Pa. Super. Ct. 1997) (citation omitted). In other words, a "duty does not exist if the defendant could not reasonably foresee an injury as the result of his acts or if his conduct was reasonable in light of what he could anticipate." *Gibbs v. Ernst*, 647 A.2d 882, 892 (Pa. 1994) (citation omitted). Individuals are not held responsible for events which are not reasonably anticipated or are which are particularly unlikely. *Id*. Certainly neither Mr. Davis nor Mr. Lehman could have anticipated that they would receive an illegal sentence that would necessitate a resentencing to ensure that they are not unlawfully incarcerated. As the Superior Court explained in the *Davis* decision addressing judicial retroactivity, a change in the law after decades of a contradictory practice is not reasonably foreseeable. *Davis*, 760 A.2d at 412. Other Superior Court panels have reached the same basic conclusion. *See Commonwealth v. Johnson*, 1326 MDA 2018, 2019 WL 5212765 at *8 (Pa. Super. Ct. Oct. 16, 2019) (unpublished) ("Appellant should not have been assessed costs which were accrued as a result of changes in the law."); *Commonwealth v. Chappell*, 2958 EDA 2018, 2019 WL 5063402 at *3 (Pa. Super. Ct. Oct. 9, 2019) (unpublished) ("It was not reasonably foreseeable that Chappell would receive an illegal sentence and later be resentenced.").

What this Court in *Coder*, and the Superior Court in *Lehman*, *Johnson*, and *Chappell*, were pointing to when addressing reasonable foreseeability is a fundamental question of Due Process and what constitutes adequate notice to a defendant of the possible deprivation of a constitutionally-protected right.[15] In this case, it dovetails with the judicial retroactivity doctrine, because the *Montgomery* decision had the effect of applying 16 P.S. § 1403 in a way that would not have otherwise occurred to Mr. Davis and Mr. Lehman. As this Court has explained, defendants must have been on notice of the future deprivation of these funds prior to the deprivation thereof. *Buck v. Beard*, 879 A.2d 157, 160 (Pa. 2005). Thus, for example, the Department of Corrections can deduct money from inmate accounts, since the statute governing such deductions was in effect at the time the defendants were sentenced; the statute put the defendants on notice. *Id*. Put in the framework of *Coder* and reasonable foreseeability, the inmates knew that they were going to have those funds deducted.[16] By contrast, nothing in 16 P.S. § 1403 gives notice to

[15] Individuals convicted of crimes have, of course, a property interest in their money that is protected by the Due Process Clause. *See Nelson v. Colorado*, 137 S.Ct. 1249, 1255 (2017); *Buck v. Beard*, 879 A.2d 157, 160 (Pa. 2005).

[16] *Buck* is not a perfect analogy—but no case is when dealing with an issue of first impression. *Buck* was focused on the procedural due process rights available to inmates to contest the policy of the Department of Corrections and to contest the deductions. There was *already* an order specifying that they must pay. Here, the notice issue is different: can Mr. Davis and Mr. Lehman be compelled to pay in the first place when they could not have known these costs would be imposed?

defendants that they will be responsible for the costs of resentencing their illegal sentence.

The principles articulated in *Buck*, *Coder*, and *Davis* by both this Court and the Superior Court have a logical conclusion: in order to impose costs upon a defendant, those costs must have been reasonably foreseeable at the time the offense was committed. Here, the costs of resentencing were not—and could not have been—reasonably foreseeable to the defendants. Per *Coder* and *Davis*, this alone should mean that the Mr. Lehman and Mr. Davis were not on notice of the future costs they would incur, making the imposition of those costs unconstitutional.

However, this Court in *Coder* emphasized another factor which contributed to how reasonably foreseeable the costs associated with the change in venue were. The Court focused on the fact that the change in venue, and the costs associated with that change, were necessitated by the defendant's actions, and not by the Commonwealth. *Coder*, 415 A.2d at 409. This Court reasoned that because the defendant was responsible for the change in venue, the costs associated with the change in venue were reasonably foreseeable to him at the time the crime was committed. By contrast Mr. Davis and Mr. Lehman did not *choose* to do something that would incur additional costs—they could either be imprisoned for the rest of their lives, serving an illegal sentence, or ask to be resentenced constitutionally. It

was hardly a "choice" within the meaning of the word. *See Lehman*, 201 A.3d at 1286 ("Thus, although Appellant 'chose' to receive a constitutional sentence by filing his PCRA petition and petition for a writ of habeas corpus, that does not entitle the Commonwealth to recover the costs associated with the resentencing process.").

For even the possibility that Mr. Lehman and Mr. Davis be responsible for the costs associated with their resentencing, they would have had to be on notice that: 1) they would be resentenced at a later date; 2) there would be costs associated with this resentencing; and 3) they would have to pay those costs. These conditions did not exist. Pennsylvania law is both clear and strict: only those costs authorized by statute can be imposed on a defendant. *See, e.g.*, *Coder*, 415 A.2d at 410; *Commonwealth v. Houck*, 335 A.2d 389, 391 (Pa. Super. Ct. 1975) (en banc). Yet neither Mr. Davis nor Mr. Lehman had notice at the time they committed their offenses that they would be unlawfully sentenced and then resentenced decades later, nor did their actions in any meaningful sense necessitate these new costs. As the Commonwealth acknowledges in its brief, it would have hired experts even if Mr. Davis and Mr. Lehman did not (and even though it had no obligation to do so

since it did not seek a sentence of life without parole).[17] This Court should affirm the Superior Court's rulings.

Conclusion

Imposing costs of sentencing or re-sentencing on defendants, whether those sentencings were contested or not, is not permissible under 16 P.S. § 1403. Such a ruling would be contrary to axiomatic rules of statutory interpretation, would chill the exercise of constitutional rights, and would violate fundamental concepts of due process and the right to be free from cruel and/or unusual punishments as explicated in the Pennsylvania and United States Constitutions. For all of the reasons stated in the instant brief, Appellees ask that this Court affirm the Superior Court opinions in *Commonwealth v. Davis,* 207 A.3d 341 (Pa. Super. 2019) and *Commonwealth v. Lehman,* 201 A.3d 1279 (Pa. Super. 2019).

[17] The Commonwealth incorrectly claims in its brief that it hired an expert in the *Davis* case because Mr. Davis chose to hire his own expert. However, the Commonwealth previously explained to the trial court that it hired an expert even before Mr. Davis did. *See* Commonwealth Motion for a Continuance (Dec. 6, 2016) (attached as Appendix A). This is consistent with the Commonwealth's statement in its brief that that it would have hired an expert even if Mr. Davis and Mr. Lehman had not. *See* Commonwealth's Br. at 23.

Respectfully submitted,

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Counsel for Appellee Michael Lehman

Date: January 27, 2020

Appendix A

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

COMMONWEALTH OF PENNSYLVANIA	:	CP-67-MD-1000728-1980
v.	:	
SCOTT DAVIS	:	FIRST DEGREE MURDER

MOTION FOR CONTINUANCE

AND NOW, this 6th day of December, 2016, the Petitioner, the Commonwealth of Pennsylvania, by and through its agent, Deputy Prosecutor Renée E. Franchi, moves this Honorable Court to continue the sentencing hearing for the captioned matter, originally scheduled for February 23, 2017, for a period of sixty (60) days, and in support thereof, avers as follows:

1. Scott Charles Davis (hereinafter "Defendant"), following a criminal jury trial, was convicted of Murder of the First Degree on May 7, 1981. On June 11, 1982 Defendant was sentenced to a mandatory term of life imprisonment.
2. Defendant's case was remanded for a new sentencing hearing pursuant to the United States Supreme Court's decisions in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).
3. Defendant's sentencing hearing is currently scheduled for February 23, 2017 at 9:30 A.M., at which time the Commonwealth intends to present expert testimony from Dr. Larry Rotenberg.
4. Dr. Rotenberg is unavailable the week of February 20, 2017, and thus, unavailable for the sentencing hearing on February 23.

5. Due to Dr. Rotenberg's unavailability, and as Dr. Rotenberg is a necessary witness for the Commonwealth for this hearing, the Commonwealth requests a continuance of Defendant's sentencing hearing.
6. The Commonwealth contacted Attorney Christopher Ferro, counsel for Defendant in this matter, and notified him of the Commonwealth's intention to file a Motion for Continuance. Attorney Ferro does not oppose a continuance.
7. Additionally, after speaking with Attorney Ferro, it is the Commonwealth's understanding that Defendant has yet to retain an expert to conduct an evaluation of Defendant.
8. As Defendant has not yet retained an expert, and as the Commonwealth has not received an expert report from Defendant, the parties are unable to proceed with sentencing on February 23, 2017 until said report is generated.
9. There have been no prior continuances filed by the Commonwealth in this PCRA matter.
10. No party to this action will suffer prejudice as a result of granting this continuance.
11. As such, the Commonwealth respectfully requests a sixty (60) day continuance of the February 23, 2017 sentencing hearing in the above captioned matter.

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court continue the above captioned sentencing hearing, originally scheduled for February 23, 2017 at 9:30 A.M. in front of the Honorable Judge Christy H. Fawcett, for a period of sixty (60) days.

Date: 12/6/16

Respectfully submitted,

Renée E. Franchi
Deputy Prosecutor
PA ID # 313950
OFFICE OF THE DISTRICT ATTORNEY
45 N. George Street
York, PA 17401
Tel: (717) 771-9600

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

COMMONWEALTH OF PENNSYLVANIA	:	CP-67-MD-1000728-1980
v.	:	
SCOTT DAVIS	:	FIRST DEGREE MURDER

CERTIFICATE OF SERVICE

I hereby certify that on this day, I have served a copy of this Motion for Continuance by hand delivery or first class mail upon the following:

York County Court Administration
45 North George Street
York, Pennsylvania 17401

York County Clerk of Courts
45 North George Street
York, Pennsylvania 17401

Christopher A. Ferro, Esq.
The Law Office of Christopher A. Ferro, LLC
160 E. Market Street
York, Pennsylvania 17401

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COURT ADMINISTRATOR
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YORK COUNTY
JUDICIAL CENTER

FILED
YORK COUNTY
JUDICIAL CENTER
2016 DEC -6 A 11:
DON O'SHEA
CLERK OF COURTS

Date: 12/6/16

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

COMMONWEALTH OF PENNSYLVANIA	:	**CP-67-MD-1000728-1980**
v.	:	
SCOTT DAVIS	:	**FIRST DEGREE MURDER**

ORDER OF COURT

AND NOW, TO WIT, this 8th day of December, 2016, the Commonwealth's Motion for Continuance is hereby **GRANTED**, and the above-captioned matter originally scheduled for a sentencing hearing on February 23, 2017 at 9:30 A.M. in front of the Honorable Judge Christy H. Fawcett is continued for sixty (60) days to a later available court date.

The above mentioned hearing is now scheduled for the following date and time:

Tuesday, April 25, 2017 at 9:30 AM

Copies of this Order shall be provided to the Clerk of Courts; Attorney Christopher Ferro, Defendant's attorney; and Thomas L. Kearney, III, District Attorney; and Attorney Renée E. Franchi, Deputy Prosecutor.

BY THE COURT,

Christy H. Fawcett

Christy H. Fawcett, Judge
York County Court of Common Pleas

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify pursuant to Pa.R.A.P. 2135 that this brief does not exceed 14,000 words.

CERTIFICATE OF COMPLIANCE

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties at the addresses and in the manner listed below:

Via PACFile

James Zamkotowicz
York County District Attorney
45 N. George Street
York, PA 17401

/s/ *Marc Bookman*
Marc Bookman

Dated: January 27, 2020