EFiled: Jan 12 2022 05:08PM EST
Filing ID 67230005
Case Number 223,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEJOYNAY FERGUSON,	:	
	:	
Defendant—Below,	:	
Appellant	:	
	:	
v.	:	No. 223, 2021
	:	
	:	
	:	
STATE OF DELAWARE	:	
	:	
Plaintiff—Below,	:	
	:	
Appellee.	:	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

Nicole Walker, Esquire [#4012]
Elliot Margules, Esquire [#6056]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorney for Appellant

DATE: January 12, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions:

Statutes:

Rules:

Other Sources:

NATURE AND STAGE OF PROCEEDINGS

On September 5, 2019, DeJoynay Ferguson, (DeJoynay), was arrested for Murder 1st Degree. That charge was later dismissed and, on July 13, 2020, she was indicted on one count of Murder by Abuse or Neglect 1st Degree, forty-eight counts of Child Abuse 1st Degree, and four counts of Child Abuse 2nd Degree.[1] On October 15, 2020, DeJoynay filed a motion to suppress (statement), the State responded on November 30, 2020, and the trial court denied the motion on February 26, 2021.[2]

On April 13, 2021, DeJoynay pled guilty to Murder by Abuse or Neglect 1st Degree, six counts of Child Abuse 1st Degree, and two counts of Child Abuse 2nd Degree.[3] Both parties submitted materials to assist in a court-ordered presentence investigation. DeJoynay also submitted mitigation materials directly to the judge.[4]

On June 25, 2021, the judge sentenced DeJoynay as follows: Murder by Abuse- remainder of her natural life at Level V; each count of Child Abuse 1st Degree- ten years at Level V suspended after two years; each count of Child Abuse 2nd Degree- probation.[5] The judge's comments and DeJoynay's sentences do not support a conclusion that he considered any mitigation in his decision-making process.

This is DeJoynay's Opening Brief in support of her timely-filed appeal.

---

[1] A2; D.I. 4.
[2] A3-4; D.I. 9, 11-12.
[3] A4; D.I. 12.
[4] A128.
[5] See June 25, 2021 Sentence Order, attached as Ex. A.

SUMMARY OF ARGUMENT

1. A lawful sentence must not only fall within statutory limits, it must comport with the principles of due process in that a sentencing judge must reach his decision with "an open mind at least to the extent of receiving all information bearing on the question of mitigation." Here, defense counsel presented the judge with mitigation evidence and argument to ensure that he had the "fullest information possible" concerning DeJoynay's "life and characteristics." The judge's explanation for imposing the drastic sentence, however, reveals that the judge's mind was closed to these arguments. Rather, his comments lay bare that the sole purpose of the sentences he imposed is retribution. Instead of considering DeJoynay's conduct alongside evidence of her youth, amenability to rehabilitation or mental health, the judge made up his mind that her conduct– regardless of any mitigation evidence- necessarily warranted a solely retributive sentencing scheme that included the most severe penalty in Delaware- life in prison. This was not simply an abuse of discretion, it was a violation of DeJoynay's substantial right to due process which requires her sentences be vacated and remanded for reconsideration by a different judge.

STATEMENT OF FACTS

An 18-year-old DeJoynay Ferguson ("DeJoynay") began working at the Little People Child Development Center in Bear, Delaware in January 2019.[6] Due to her minimal training and complete lack of experience with infants, she was initially hired as a teacher's aid.[7] But, she was abruptly thrown into deeper waters and left on her own when the teacher who had been training and supervising her was fired and not replaced.[8]

DeJoynay worked extremely long hours, beginning at 7:30 AM and extending to 6:30 PM, or even as late as 9:00 PM.[9] She "was in way over [her] head"[10] and showed herself to be horribly ill-equipped to rationally deal with her responsibilities. In a striking example which reveals the extent of her immaturity, DeJoynay (repeatedly) made the childlike– literally and figuratively – decision to relieve herself in a diaper rather than leave the infants in her care unattended to use the bathroom.[11] Predictably, she experienced humiliating "accidents because the diapers were not large enough"[12] for her.

---

[6] A139.
[7] DeJoynay did have three months of experience as a "floater" at another preschool working with three-year-olds. A144.
[8] A196.
[9] A146.
[10] A252.
[11] A146.
[12] A146.

The criminally reckless manifestation of DeJoynay's immaturity and unpreparedness is the method she used to deal with the overwhelming experience of numerous crying babies: covering their noses and mouths to get them to stop crying.[13] Because her teenage mind found this process effective and could not foresee the risks involved, she, unfortunately, engaged in the process multiple times.

On one especially tragic occasion, on September 5, 2019, after DeJoynay had turned 19, her reckless technique caused the unintended death of a child.[14] DeJoynay did not initially recognize that the child had stopped breathing when she walked away from the child after applying the technique. However, when she did notice that she was not breathing, she attempted CPR, [15] and "ran" the child into her boss' office, who had another staff member call 911.[16] Soon thereafter, DeJoynay was taken to Delaware State Police Troop 2 and interrogated. It was at this point that she learned for the first time that the child was dead. In response, she cried.[17] While DeJoynay initially hid her role from police, she eventually admitted to her conduct. However, she explained her intent was to keep the child quiet, it was never to kill the child.[18]

---

[13] *See* A185 ("Ms. Ferguson did not have a desire to harm the children and, in fact, showed caretaking gestures after the babies had stopped crying because the reduction in her anxiety and/or anger allowed her to be more genuine.").
[14] A196-97.
[15] A161 (describing video at 10:32 AM).
[16] A161.
[17] A75.
[18] A99.

I. THE JUDGE VIOLATED 19-YEAR-OLD DEJOYNAY'S DUE PROCESS RIGHTS WHEN HE FAILED TO CONSIDER HER MITIGATION ARGUMENTS REGARDING HER YOUTH, AMENABILITY TO REHABILITATION AND MENTAL HEALTH BEFORE HE IMPOSED SENTENCES UPON HER THAT: ARE WHOLLY RETRIBUTIVE IN NATURE; ARE SIGNIFICANTLY MORE SEVERE THAN THE PRESUMPTIVE SENTENCES AND THE STATE'S RECOMMENDED SENTENCES; AND INCLUDE THE MOST SEVERE SENTENCE AVAILABLE IN DELAWARE.

Question Presented

Whether a sentencing judge violates a teenage defendant's due process rights when he fails to consider her mitigation arguments regarding her youth, amenability to rehabilitation and mental health before he imposes sentences upon her that: are wholly retributive in nature; are significantly more severe than the presumptive sentences and the State's recommended sentences; and include the most severe sentence available in Delaware – life in prison.[19]

Standard and Scope of Review

Not only does this Court review a criminal sentence to determine whether it is "within the statutory limits[,]"[20] it determines whether the sentence violates due process in that it is either "based on factual predicates which are false, impermissible,

[19] See Del. Sup. Ct. R. 8.
[20] *White v. State*, 243 A.3d 381, 410 (Del. 2020).

or lack minimal reliability, [or is imposed with] judicial vindictiveness[,] bias, or a closed mind."[21] Finally, issues not raised below are reviewed for plain error.[22]

Argument

A lawful sentence must not only fall within statutory limits, it must also comport with the principles of due process in that a sentencing judge must reach his decision with "an open mind at least to the extent of receiving all information bearing on the question of mitigation."[23] Here, defense counsel presented the judge with mitigation evidence and argument to ensure that he had the "fullest information possible" concerning DeJoynay's "life and characteristics." The judge's explanation for imposing the drastic sentence, however, reveals that the judge's mind was closed to these arguments. Rather, his comments lay bare that the sole purpose of the sentence he imposed is retribution. Instead of considering DeJoynay's conduct alongside evidence of her youth, amenability to rehabilitation or mental health, the judge made up his mind that her conduct– regardless of any mitigation evidence- necessarily warranted a solely retributive sentencing scheme that included the most severe penalty in Delaware- life in prison. This was not simply an abuse of discretion;

---

[21] *Weston v. State*, 832 A.2d 742, 746 (Del. 2003). See *Osburn v. State*, 224 A.2d 52, 53 (Del. 1966).
[22] See Del. Sup. Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096 (Del. 1986).
[23] *Osburn*, 224 A.2d at 53.

it was a violation of DeJoynay's substantial right to due process which requires her sentences be vacated and remanded for reconsideration by a different judge.[24]

DeJoynay's Early Acceptance Of Responsibility.

On April 13, 2021, "at the earliest opportunity possible[,]"[25] 19-year-old DeJoynay pled guilty to 9 charges based on various acts she committed within a period of just over 1 and ½ months. She voluntarily agreed to forego a trial even though the State had not agreed to a sentencing recommendation.[26] The first count to which she pled guilty was Murder by Abuse or Neglect 1st Degree pursuant to 11 *Del. C.* §634 (a) (1). DeJoynay admitted that she had *recklessly caused the death* of a child. She also pled guilty to 6 counts of Child Abuse 1st Degree, pursuant to 11 *Del. C.* §1103B, for causing serious physical injury to a child. Finally, she pled guilty to 2 counts of Child Abuse 2nd Degree, pursuant to 11 *Del. C.* §1103A, for causing physical injury to a child. As to all of the "child abuse" charges, DeJoynay admitted

[24] See *Harden v. State*, 180 A.3d 1037, 1051 (Del. 2018) (remanding for resentencing by a different judge when original sentence was tainted by ineffective assistance of counsel); *State v. Wright*, 131 A.3d 310, 324 (Del. 2016) (finding public confidence in "impartial administration of justice" would be increased if a new judge was assigned to defendant's case on remand) (internal citation omitted); *Samuel v. State*, 694 A.2d 48 (Del. 1997) (remanding for resentencing by a different judge when original sentence was based, in part, on impermissible factors).
[25] A195.
[26] A118.

that she caused the injury "*recklessly or intentionally*."[27] After the guilty pleas were entered, the judge ordered a presentence investigation, (PSI).[28]

Dr. Cooney-Koss' In-Depth Forensic Psychological Evaluation.

After entry of the guilty pleas, both parties forwarded evidence to Investigative Services, (ISO), for purposes of the PSI. On April 15, 2021, defense counsel submitted a 54-page report of an evaluation of DeJoynay conducted by Dr. Laura Cooney-Koss, a Forensic Psychologist.[29] The doctor first met with DeJoynay on September 17, 2019, only two weeks after her arrest. In that meeting, as she recalled the offenses, DeJoynay cried and appeared confused and remorseful about her conduct. She also "took responsibility for her actions and did not try to blame anyone else."[30]

Over the course of 1 1/2 years, the doctor met with DeJoynay 6 times, totaling 19 hours and 30 minutes of face-to-face evaluation time.[31] The doctor reviewed several records relating to DeJoynay and to the nature of the offenses. She also

---

[27] A118, 124-25.
[28] A4, D.I.#12.
[29] A128-129, 134-187.
[30] A169.
[31] A134-135.

reviewed video surveillance clips of the offenses, interviewed DeJoynay's mother and sister;[32] and administered personality and intellectual assessment tests to her.[33]

DeJoynay's Background: Dr. Cooney-Koss relayed that DeJoynay had very few behavioral problems and no criminal record in her past. Further, she had no prior interaction with mental health providers except to be diagnosed with ADHD when she was 12 years old after having displayed symptoms since she was about 10 years old.[34] There were a few noteworthy incidents in her life such as being sexually assaulted by a male peer[35] and having received a concussion when she was in 9th grade when she fell at school and hit her head on the concrete. [36]

Throughout childhood, DeJoynay was frequently involved in extracurricular activities. In high school she participated in Howard Leading Ladies Club and the cross-country team while also maintaining employment.[37] She graduated from Howard High School of Technology in 2018, albeit with relatively poor grades.[38] Additionally, she had a peer who was killed by a fellow classmate.[39]

---

[32] DeJoynay's only full sister is seven years older than her. A139. She has unidentified half siblings, but it does not appear from the record that there was meaningful contact.
[33] A135-36.
[34] A157.
[35] A149-50.
[36] A151
[37] A144.
[38] A144.
[39] A147.

DeJoynay started working at Little People Child Development Center in January 2019, after she graduated from high school. However, she was only 18 years old and was still living at home. Her mom told her that if she did not work, she would be kicked out of the house. While undiagnosed at the time, it was at least clear to family that she was still reeling from the death of her in a horrific forklift accident that occurred 3 years earlier.[40] She had been very close to him and"avoided dealing" with his death.[41] She became withdrawn, "felt empty" and "tried to fill that void in [her] heart with people, usually males, but it never filled it."[42]

Despite her youth, lack of training and emotional state, the day care facility almost immediately placed her as the "sole childcare worker with 4 infants" with little to no supervision. Remarkably, there were cameras in the room which were never monitored.[43] Due to the poor staffing and lack of training, stress mounted in her job. Simultaneously, her depression continued to spiral as demonstrated by her poor hygiene and poor decision making in both her personal and work life.[44]

Neurological Immaturity of Teenagers like DeJoynay: The doctor explained that, in addition to DeJoynay's emotional state, lack of training and sense of being

---

[40] A137, 141.
[41] A137, 141.
[42] A137, 141.
[43] A186.
[44] For example, even though she was without birth control but was scheduled to have her birth control implant replaced soon, she deliberately had sex with her boyfriend, risking the possibility of a pregnancy. A151.

overwhelmed, her decision-making process was further hampered by complications involved with the neurological development of a teenager. While DeJoynay

> was an adult according to legal standards, she was not according to mental health professionals. Researchers have identified the concept of 'emerging adulthood', which captures the unique population of individuals who are 18-25. Typically, emerging adults, like adolescents, continue to present with developmental differences that should be considered when determining their problematic behavior and risk for engaging in future poor behavioral choices.
>
> […]
>
> Research on brain development has found that individuals who are neurologically immature do not tend to think before they act, are sensation-seeking, and are less likely to consider the potential consequences of their actions compared to their adult counterparts.
>
> […]
>
> this population tends to overestimate the value of immediate benefits and underestimate the likelihood and seriousness of future potential ramifications. Compared to adults, juveniles and emerging adults are more concrete in their thinking, do not tend to think toward the future, do not tend to keep things in mind and apply learning from one situation to the next, have difficulty with delayed gratification, have poor emotional regulation, have difficulty tolerating frustration, and tend to have a fluctuating self-identity.[45]

Dejoynay's Remorse And Sincere Attempt To Understand Her Own Conduct: Well over a year after her first meeting with DeJoynay, the doctor reviewed with her video

[45] A183-184.

surveillance clips of the offenses. According to the doctor, DeJoynay appeared to be "invested in the process of self-examination and reflection" in an attempt "to understand how she engaged in the offense[.]"[46] When asked how she felt about her actions which led to the death of an infant, she responded:

> I'm not proud of what I've done. I feel like a piece of crap. For what I've done to her and the family. I do understand what it's like to have someone taken away from you. I still kind of see myself as a monster. I've learned to forgive myself, but that doesn't mean that I don't feel horrible for what I've done. I have to live for the rest of my life with it.[47]

DeJoynay also came to understand how her actions likely scared the children and impacted their health in several ways.[48] She recognized that the parents of the child who was killed probably feel "broken . . . Probably empty when it first happened. Eventually that sadness turned to anger." When asked what she would say to those parents, she said,

> I would tell you [i.e., the parents] how sorry I am, but that won't bring her back. I do want to let you know that I'm remorseful, but that doesn't mean anything to you either. What I did wasn't meant to end the way it did. No words that I can say will change how you feel about me and I can't blame you for that. I know they want to understand why and that they have no closure.[49]

---

[46] A172
[47] A179
[48] A179-80.
[49] A178

DeJoynay's Mental Health Diagnoses: Dr. Cooney-Koss diagnosed DeJoynay with: Bipolar I Disorder, Other Specified Trauma-and Stressor-Related Disorder- Persistent complex bereavement disorder; Other Specified Schizophrenia Spectrum and Other Pschotic Disorder- Attenuated Psychosis Syndrome; Generalized Anxiety Disorder; Panic Disorder; Attention-Deficit/Hyperactivity Disorder; and mild cannabis, alcohol and tobacco use.[50] The treatment she recommended includes medication, therapy and various skills training.[51]

Summary: The doctor summarized the impact of DeJoynay's youth, mental health and lack of coping skills on her conduct as follows:

> Ms. Ferguson's behavior may not seem logical to an average functioning adult, but to a 19-year-old teenager who had no childrearing experience and no coping skills; although she instinctually knew that it was not a good choice, she did not realize just how bad of a choice it was. That is exactly what the research on juvenile and emerging adult brain development shows. From an adult perspective, she was reckless and impulsive. She overestimated the value of the immediate benefits and underestimated the likelihood and seriousness of future potential ramifications. Ms. Ferguson was concrete in her thinking and did not apply learning from one situation to the next. She showed difficulty regulating her emotions and tolerating frustration. While Isabella's death was a tragedy, how it occurred is understandable from a developmental perspective. Ms. Ferguson's neurological immaturity can also be seen in her initial response to finding Isabella not breathing and in her nonchalant attitude when at the police station.[52]

---

[50] A180-81.
[51] A186.
[52] A185.

Ultimately, Dr. Cooney-Koss concluded that with her expression of remorse and her steps toward and interest in continued mental health treatment, DeJoynay was amenable to rehabilitation.[53]

State's Submission To ISO.

On June 15, 2021, the State submitted to ISO information that focused on the nature of the offenses and the effects on the victims' families.[54] Included in the submission were: statements by members of 3 victims' families; video surveillance clips of the charged offenses, along with the prosecutor's own characterizations of those clips; findings and opinion in the autopsy report; and a summary of an expert opinion of a pediatrician/child abuse expert.

The Cursory PSI Report.

The June 17, 2021 PSI report contained a recitation of the facts underlying the offenses and a cursory summary of DeJoynay's family and social history.[55] Also in the report is a summary of statements by members of victim families. Understandably, the loss and/or harm they sustained left them "numb and in shock," and "shaken to the core." And, at least one child suffered from "nightmares, emotional anxiety and separation anxiety."[56]

---

[53] A186.
[54] A130-33.
[55] See June 17, 2021 PreSentence Investigation Report, (PSI Report).
[56] PSI Report at p. 3.

In contrast to Dr. Cooney-Koss who spent 19 hours and 30 minutes with DeJoynay, the investigator met with her only once. Nevertheless, during that one meeting, DeJoynay expressed, "I feel remorse and I have to live with this the rest of my life. I know sorry is not enough and I know I did wrong. There is not much I can do."[57] The investigator acknowledged DeJoynay's mental health issues and Dr. Cooney Koss's assessments regarding her progress in treatment and amenability to rehabilitation. [58] He did not, however, address the significance of DeJoynay's youth.

Additional Mitigation Submissions.

On June 24, 2021, defense counsel provided the judge, attached to an electronic mail, a sentencing memorandum arguing for the imposition of the minimum possible sentences.[59] The defense's argument relied on much mitigation evidence, including that which was attached to the memorandum: a letter of remorse from DeJoynay; seven character letters from family and friends; and the in-depth forensic psychological evaluation.[60]

DeJoynay's Written Expression of Remorse. DeJoynay provided a letter to the judge giving context to the situation in which she found herself when she committed

---

[57] *Id.*
[58] *Id.* at 6-7.
[59] A191-95.
[60] A191-95.

the crimes in this case. Then, as she had done with the doctor, with the PSI investigator and by pleading guilty, she expressed remorse:

> My abuse toward the victim caused so much pain which I have reflected on this fact of this matter and can now see that the reasoning for my mental getaway was selfish and I can't even begin to imagine how terrified or defenseless the victim felt. I know that I hurt a family. I am so very sorry for that. I can't imagine how they feel. While I'm here, I will be focusing on getting help for my depression and mental health. Learning how to handle things a lot better and my triggers and how to cope. I know what I did was wrong, and I never ever wanted to hurt anyone. I am truly remorseful for what I did. I just needed break time to process and cope. I just needed help.

DeJoynay's Conduct Was An Aberration. DeJoynay's mom, Joyce, told the judge that, as a child, DeJoynay "showed compassion and helpfulness" to others. She explained the degree to which her dad's death affected her emotionally. Joyce recognized the seriousness of DeJoynay's conduct in this case but noted that it was out of character with the girl she knew. Finally, she informed the court that she believed DeJoynay was amenable to rehabilitation, "I believe that with medication and treatment DeJoynay can be a positive young lady in society."[61]

One friend who has known DeJoynay since childhood told the judge that she was shocked by DeJoynay's conduct because she has known DeJoynay to be nothing but "a vibrant, loving person with a serving heart."[62] Another friend said DeJoynay had always provided "a helping hand" to others. And, with respect to rehabilitation,

---

[61] A198-99.
[62] A202-03.

she "is doing very well since taking her medication on a regular basis. She still struggles with what has happened and still can't understand how she could do something like that."[63]

Mitigation Argument.

Defense counsel's primary argument was that 19-year-old DeJoynay made reckless decisions rooted in the neurological immaturity of her youth and complicated by her difficulty in regulating her emotions and tolerating frustration that stemmed from her then-undiagnosed mental health issues. Her decision-making was also exacerbated by her lack of training, experience and supervision. Counsel pointed out that she "takes full responsibility for her actions" and that "[s]he pled guilty at the earliest opportunity. Further,

> [w]ith the space to reflect, Ms. Ferguson acknowledges the reprehensibility and senselessness of her actions, and feels great remorse for the pain she has caused so many people. There is no excuse for her choices or actions, but there is important context that perheps provide perspective. She will forever live with regret, knowing that she cause the victims and their families immense and unimaginable pain.[64]

June 25, 2021 Sentencing Hearing.

The State's Recommendation. The totality of the State's sentencing recommendation essentially amounted to 65 years in prison (27 of which are mandatory) followed by probation. This included 35 years in prison on the lead

---

[63] A206.
[64] A195.

charge.[65] In support of its recommendation, the State focused primarily on the nature of the offenses.

The State correctly noted that it would unduly appreciate the seriousness of the offense if DeJoynay was not incarcerated.[66] However, no one argued against incarceration. The question was the length of incarceration to be imposed. For that, the State argued that the multiple counts of child abuse with which DeJoynay was charged justified enhancement of her sentence for recklessly causing the death of a child. The State simultaneously sought enhancement of each of the sentences for the individual counts of child abuse due to the vulnerability of the victims. Yet, as the State acknowledged, the vulnerability of the victims is already accounted for within the calculation of their presumptive ranges for those particular charges.[67] Thus, the State used the same "vulnerability of the victims" multiple times in the calculus of its argument for enhancement.

The State also argued that DeJoynay remained a threat to society so long as it remained unclear what motivated her conduct.[68] What the State ignored, however, is that DeJoynay had insightfully and repeatedly identified her need to get treatment to identify the root of her issues, indicating her amenability to rehabilitation.[69]

---

[65] A236-37.
[66] A235.
[67] A235.
[68] A234-35.
[69] PSI report at p. 7.

The Victims' Families' Comments. Various members of victims' families spoke at the hearing. None expressed any dissatisfaction with the State's recommendation. And, none asked the judge for anything more than "that some sort of justice [be] served[;]" "that no family ever suffers from such a senseless tragedy again[;]"[70] and that

> whatever sentence the young lady receives today, that please incorporate something where she can be seen by someone that perhaps one day will touch her heart and she will have remorse. I'm not saying she don't have it right now, but I would implore or inquire or request, I should say, when she gets her sentence, whatever it may be, that while she's in there, have someone to speak to her that perhaps it may changer her. [71]

The Defense Underscored Its Mitigation Case. After acknowledging the significant loss suffered by the victims,[72] defense counsel highlighted the mitigation evidence and arguments previously submitted to the judge. Specifically, they pointed out that DeJoynay's being "ill-equipped to handle the stress of being the sole teacher caring for up to four infants on her own" was "compounded by her own immaturity at the ages of 18 and 19 and a lack of good judgment and coping skills. Further exacerbating this were Ms. Ferguson's undiagnosed and untreated mental health conditions."[73] DeJoynay

> made the remarkably irresponsible and reckless decision to suffocate one of the infants who was in her room in order to stop her from crying.

---

[70] A213.
[71] A218-19.
[72] A239-40.
[73] A242.

> Tragically Ms. Ferguson found this was an effective way to manage the infants that she was cared with and the expectations that were placed on her. So in her own immaturity and lack of understanding, she kept doing it.[74]

Defense counsel then explained, "it is important – critical to understand that it was never DeJoynay's "conscience objective to either permanently harm or cause the death of any child in her care."[75] He continued his argument with respect to her youth, "[i]n her naive, immature mind her actions seemed temporary and harmless."[76] Finally, counsel noted that her plea was a reflection of her understanding that a "significant punishment is justified" and that she has had "difficulty reducing to words the feelings of remorse and disgust at her own actions."[77]

DeJoynay's Direct Verbal Apology To The Victims' Families. Rather than resting on her statements to the PSI investigator, to Dr. Cooney-Koss and in her written statement to the court, DeJoynay chose to apologize directly to the victims' family members who were in court:

> …this is something that will stay with me the rest of my life. This is not something I just turn off or after a few years it just goes away.
>
> …I can only imagine the hurt I have caused the parents, sibiling[s], their mothers or anybody in the families.
>
> I don't think any words can explain how genuinely sorry I am.

---

[74] A243-44.
[75] A244.
[76] A248.
[77] A249-50.

> I'm going to spend the rest of my life trying to figure out an answer to th[e] question [why this happened], but right now I don't have a perfect answer.
>
> I take full responsibility and I promise to work hard or trying to work with – excuse me – and I promise to do the hard work of trying to figure out may actions.
>
> It hurts me to know I brought you that pain, this tragedy to you. No matter how much I try to tell you it's not going to take the pain away, but I want you to hear it from me that I am genuinely sorry for my actions and I mean that from the bottom of my heart.
>
> …What I did was wrong and I admit that. And I can't take anything back, but what I can do from here on out is to figure out what's wrong and get the help that I do need [.][78]

The Judge's Limited Comments At Sentencing. The judge prefaced his sentencing comments by explaining that he does not speak for the victims or the defendant but for society. He then said he had read "a great deal of correspondence from people who love Ms. Ferguson."[79] However, he did not say whether or not he gave that correspondence any mitigating value. The remainder of his comments on mitigation were that it appeared to him to be a

> d[earth] of materials indicating what I would have expected to see, inter-generational abuse or great privations for her growing up. I didn't see that. I saw a child who basically grew up as most children do. Maybe don't have everything, but certainly had enough to succeed.[80]

---

[78] A251-53.
[79] A255.
[80] A255-56.

Without addressing any of defense counsel's mitigation arguments, the judge made his final conclusions as follow:

> I have considered carefully the comments of all counsel, of each of the victims' families, of the defendant, the many additional submissions I had received. At the end of the day, I am unable to conclude that a sentence of a term of years is the just and fair sentence. A term of years would certainly mean that Ms. Ferguson would spend a great many in prison, but her release would be an eventual inevitability. It would be a date she could circle on the calendar.
>
> I cannot square the idea of Ms. Ferguson's inevitable release with the idea of smothering a four month old baby to death. This is particularly so when the smothering death occurred at the end of a pattern of smothering babies in order to get them to be still while changing their diapers.
>
> A sentence to a term of years would not fairly express the outrage of any society at the completely senseless killing of one of its infant children by someone entrusted to its care.[81]

Exceptionally High Sentences Inconsistent With The Presumptive Amounts.

Had DeJoynay not accepted responsibility, gone to trial and been convicted of all counts in the indictment - she would have received a sentence effectively equal to that which she actually received.[82] With respect to the lead charge, he judge imposed a sentence that drastically departed from the presumptive sentence and landed way

---

[81] A257-58.

[82] The indictment alleged 1 count of murder, 48 counts of child abuse first degree and four counts of child abuse second degree. Essentially, The plea agreement dropped 42 counts of 1st degree and 2 counts of 2nd degree. Assuming the court sentenced Ferguson as to the minimum on all of these charges she would have received life plus 96 years as opposed to life plus 12 which, under the circumstances, is "virtually" the same.

above that which the State requested. The presumptive sentence is 15 years, the State recommended 35 years; but, the judge sentenced the teenager to life in prison – the most severe punishment available in Delaware. The table attached as Exhibit B reflects the excessive nature of the sentences actually imposed by the judge for each count to which DeJoynay pled guilty.

The Judge Sentenced DeJoynay Solely For The Purpose Of Retribution With A Mind Closed To Any Offsetting Mitigation

"For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[83] Accordingly, the United States Supreme Court has emphasized that it is "'[h]ighly relevant—if not essential —to [the] selection of an appropriate sentence'" for the sentencing judge to have "'possession of the fullest information possible concerning the defendant's life and characteristics.'" [84] This, in turn, "'ensures that the punishment will suit not merely the offense but the individual defendant.'"[85]

---

[83] *Pennsylvania ex rel. Sullivan v. Ashe,* 302 U.S. 51, 55 (1937).
[84] *Pepper v. United States*, 562 U.S. 476, 487–88 (2011) (quoting *Wasman v. United States*, 468 U.S. 559, 564 (1984).
[85] *Id*.

Here, defense counsel performed their duty, as articulated by this Court in *Harden v. State*,[86] and presented the judge with mitigation evidence and argument to ensure that he had the "fullest information possible" concerning DeJoynay's "life and characteristics." This included, among other relevant facts, information regarding her youth, her mental health, her amenability to rehabilitation (including deep feelings of remorse),[87] her lack of criminal history, [88] her education and her lack of experience, training, supervision or assistance at the daycare. Yet, the judge's explanation[89] reveals that his mind was closed to all of this mitigation evidence and the arguments upon which they formed the basis:

---

[86] 180 A.3d 1037 (Del. 2018) (finding ineffective assistance of counsel where defense counsel did not develop sentencing theory or properly investigate, prepare and present that theory).

[87] *See Harden*, 180 A.3d 1037 (noting National Legal Aid and Defender Association's Performance Guidelines recognize relevance of defendant's personal history and criminal record for purposes of sentencing).

[88] *Ploof v. State*, 75 A.3d 811, 839 (Del. 2013), *as corrected* (Aug. 15, 2013) (Strine, Chancellor, concurring) (noting defendant's lack of previous criminal record was a mitigating factor constitutionally required to be weighed against the horrible nature of an intentional murder for pecuniary gain).

[89] Title 11, section 4204 (n) of the Delaware Code requires a judge who imposes a sentence that is "inconsistent with the presumptive sentence[] adopted by the Sentencing Accountability Commission" to "set forth on the record [his] reasons for imposing such penalty." See *Gibson v. State*, 244 A.3d 989 (Del. 2020), *rearg den'd* (Jan. 15, 2021); *Siple v. State*, 701 A.2d 79, 83 (Del. 1997) ("This Court's Administrative Directive Number Seventy-Six requires that reasons be given for deviations from SENTAC's sentencing guidelines[.]"); Delaware Sentencing Accountability Commission Benchbook at 123. Compliance with this requirement is necessary for this Court to effectively assess the inconsistent sentence's constitutionality and to determine whether it is either "based on factual predicates which are false, impermissible, or lack minimal reliability, [or is imposed with]

> I have considered carefully the comments of all counsel, of each of the victims' families, of the defendant, the many additional submissions I had received. At the end of the day, I am unable to conclude that a sentence of a term of years is the just and fair sentence. A term of years would certainly mean that Ms. Ferguson would spend a great many in prison, but her release would be an eventual inevitability. It would be a date she could circle on the calendar.
>
> I cannot square the idea of Ms. Ferguson's inevitable release with the idea of smothering a four month old baby to death. This is particularly so when the smothering death occurred at the end of a pattern of smothering babies in order to get them to be still while changing their diapers.
>
> A sentence to a term of years would not fairly express the outrage of any society at the completely senselss killing of one of its infant children by someone entrusted to its care.[90]

While the judge did mention that he had considered comments and submissions of the parties,[91] nothing in the record reveals the sentences he imposed "were the

---

judicial vindictiveness[,] bias, or a closed mind." See *Weston,* 832 A.2d at 746; *Osburn*, 224 A.2d at 53. This review provides protection against an unreasoned and/or illegal departure from the presumptive sentence and is rooted in the principle of due process. See *id.*

[90] A257-58.

[91] Early in the hearing, the judge said that he "read voluminous correspondence and presentencing materials from many different parties in this case[.]" (A210.). However, irregularities in the record prevent a presumption that he read all of the materials submitted by defense counsel. For example, the June 24th submission was submitted to the judge via electronic mail and was copied to the judge's secretary and the State. In the body of the e-mail, defense counsel wrote, "[a] hard copy of this document will be sent to Your Honor in chambers." (June 24 Email). Yet, the docket does not indicate any filing of such documents occurred, either electronically or manually. (A1-5.) Further, according to the Clerk of this Court, as of October 19, 2021, none of these documents are in the file. (A188.). A similar filing of the psychological report to the judge on April 15, 2021 is also not docketed. (A128.).

logical deliberative product of an open-minded jurist, who had carefully considered the proper disposition[.]"[92] Such a deliberative process includes consideration of both the defendant's conduct and the circumstances of her life. In *Rita v. United States*, the United States Supreme Court underscored the significance of addressing a party's "nonfrivolous reasons for imposing a different sentence"[93] than that which the judge imposes. The judge's passing reference in our case to comments and submissions does not rise to the level of satisfying a "deliberative process."

His statements lay bare that the sole purpose of the sentences is retribution and that he did not consider DeJoynay's expression of remorse, acceptance of responsibility, amenability to rehabilitation, her youth or other information provided by defense counsel. The entirety of his rationale is set out in 4 pages of the sentencing transcript, no written decision was issued.[94] The only mitigation evidence he mentioned were the letters submitted by DeJoynay's friends and families. Yet, he did not say whether he gave them any mitigation value. What the judge did say was that there was a "d[earth] of materials indicating what I would have expected to see,

---

Thus, there are legitimate questions as to exactly what was actually reviewed by the judge.

[92] *Siple v. State*, 701 A.2d 79, 85–86 (Del. 1997) (finding judge thoroughly explained basis for exceeding SENTAC guidelines to impose two consecutive life sentences when he listed several aggravating *and* mitigating factors he considered).

[93] 551 U.S. 338, 339 (2007) (addressing the federal requirement that, at sentencing, the judge shall "state in open court the reasons for [his] imposition of the particular sentence").

[94] A254-58.

inter-generational abuse or great privations for her growing up[.]"[95] This comment indicates that only one category of mitigating evidence would be of value to his decision making.

It is true that the judge had sentencing discretion and that it was "not improper for [him] to mount the bench with some preconceived notion about the proper sentence to be imposed[.]" But, as this Court has previously concluded, it is "quite improper for [the sentencing judge] at that point to have closed his mind upon the subject."[96] That the judge closed his mind

> alone [i]s a violation of the intent, purpose and spirit of Criminal Rule 32(a) which requires, by necessary implication, that before finally reaching a decision as to sentence, the sentencing judge have an open mind at least to the extent of receiving all information bearing on the question of mitigation.[97]

While the judge was entitled to discount or give no value to any mitigation evidence or argument, he was required to consider it first.[98] Thus, when the judge in our case closed his mind to mitigation, "*due process [wa]s lacking and the sentence must be*

---

[95] A255-56.
[96] *Osburn*, 224 A.2d at 53.
[97] *Id*.
[98] *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982) (A sentencer may not "refuse to consider… any relevant mitigating evidence.").

struck and the cause remanded for the imposition of sentence in the proper fashion."[99]

While the judge was required to consider all the mitigation evidence presented to him, the judge's failure to consider DeJoynay's youth, amenability to rehabilitation and mental health is significant as defense counsel's sentencing memorandum focused on those factors.

The Sentencing Judge Ignored DeJoynay's Youth.

In the sentencing memorandum, defense counsel explained that the principles in *Miller v. Alabama*[100] support the finding that 19-year-old DeJoynay's youth is a mitigating factor. The argument was based on case law as well as science, as explained by Dr. Cooney-Koss in her psychological report.[101] As *Miller* summarized the argument:

> *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because "[t]he heart of the retribution rationale" relates to an offender's blameworthiness, "the case for retribution is not as strong with a minor as with an adult." *Graham,* 560 U.S. at 71(internal citation and quotation marks omitted); *Roper,* 543 U.S. at 571). Nor can deterrence do the work in this context, because "the same characteristics that render juveniles less culpable than adults"—their

[99] *Osburn*, 224 A.2d at 53 (emphasis added) (even though the judge had at least considered the defendant's criminal record and age, the court remanded for "imposition by a different judge of sentence upon the prisoner.").
[100] 567 U.S. 460 (2012). *See Eddings*, 455 U.S. at 116 (identifying youth as a mitigator for sentencing even if not excuse for legal responsibility)
[101] A183-84.

> immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. *Graham,* 560 U.S. at 72 (quoting *Roper,* 543 U.S. at 571). Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible"—but "incorrigibility is inconsistent with youth." 560 U.S. at 72–73 (internal citation and quotation marks omitted). And for the same reason, rehabilitation could not justify that sentence. Life without parole "forswears altogether the rehabilitative ideal." *Graham,* 560 U.S. at 74. It reflects "an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change. *Ibid."* [102]

Miller held that mandatory LWOP sentences for juveniles (i.e., people under the age of 18 years) are unconstitutional, and provided that courts must have the discretion to consider the mitigating qualities of youth in sentencing decisions.[103] That is because "[i]t is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher order executive functions such as impulse control, planning ahead, and risk avoidance."[104] Further, research supports the notion that the distinction between a 17-year-old's brain and a 19-year-old's brain is arbitrary and should not be overlooked.

While *Miller* applied the scientific principles in a mandatory sense to those who are under the age of 18, those principles apply equally to young adults in

---

[102] *Miller*, 567 U.S. at 472–73 (quoting *Roper v. Simmons,* 543 U.S. 551 (2005) and *Graham v. Florida,* 560 U.S. 48 (2010)).
[103] 567 U.S. 460.
[104] 567 U.S. 472 n.5.

assessing the "character of the defendant" for purposes of sentencing.[105] For example, in *Gall v. United States*, [106] the Court pointed to the sentencing judge's discussion of *Roper*,[107] in the context of the 21-year-old defendant's immaturity. The Court endorsed the judge's conclusion with respect to the consideration of age in sentencing that:

> "Immaturity at the time of the offense conduct is not an inconsequential consideration. Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five.... [T]he recent [National Institutes of Health] report confirms that there is no bold line demarcating at what age a person reaches full maturity. While age does not excuse behavior, a sentencing court should account for age when inquiring into the conduct of a defendant."[108]

Here, despite the doctor's extensive recitation of scientific research as applied to her assessment of DeJoynay and despite defense counsel's legal analysis as to the

---

[105] See *Wright v. State*, 633 A.2d 329, 339 (Del. 1993) (reconizing 20-year-old defendant's youth was relevant mitigating factor because the "signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside"). The memorandum identified multiple jurisdictions that apply *Miller* principles to 'young adults.' Sent Memo at 4. *In re Matter of Monschke*, 482 P.3d 276 (Wash. Ap. Div.2 2021) (holding mandatory LWOP sentences for youthful defendants, 18-20, are unconstitutional); *State v. Norris*, 2017 WL 2062145, at *5 (N.J. Super. Ct. App. Div. May 15, 2017) (ordering resentencing of 21-year-old who received lengthy sentence, noting mitigating qualities of youth").

[106] 552 U.S. 38, 57–58 (2007).

[107] 543 U.S. 551 (2005).

[108] *Gall*, 552 U.S. at 57–58 (citing *Johnson v. Texas,* 509 U.S. 350, 367 (1993) (holding jury was free to consider a 19–year–old defendant's youth when determining whether there was a probability he would continue to commit violent acts in future).

application of that scientific research via *Miller*- the court made no reference to this argument, the psychological evaluation or to DeJoynay's youth.

The Sentencing Judge Ignored DeJoynay's Remorse and Amenability To Rehabilitation.

"That a defendant is remorseful is a mitigating factor to be considered by the jury and judge."[109] The entire purpose of allocution is to allow a defendant to make a mitigation statement that includes, among others, statements of remorse and apologies.[110] In fact, this Court, in *Harden v State*, underscored the significance of the mitigatory effect that remorse can have on a sentence. It is so important that this Court found it to be ineffective assistance of counsel for a defense attorney not to prepare his client to properly "accept responsibility for the horrible crime and profusely apologize to the victims[.]"[111]

Here, DeJoynay repeatedly and sincerely expressed remorse for her conduct. From as early as 2 weeks after her arrest, she began a process of self-reflection wherein her various statements of remorse reflected her attempts to obtain insight into her conduct and to gain a deeper understanding into the pain she caused the

---

[109]*Jackson v. State*, 643 A.2d 1360, 1380 (Del. 1994). See also *Wilhelm v. Ryan*, 903 A.2d 745, 753 (Del. 2006) (finding, in civil case, testimony regarding remorse is relevant for purposes of punishment).

[110] *Shelton v. State*, 744 A.2d 465, 496 (Del. 2000) (quoting *Homick v. State,* 825 P.2d 600, 604 (1992)).

[111]180 A.3d 1037, 1050–51 (Del. 2018).

victims and their families.[112] And, while she could have taken the easy way out, she chose to make a live apology and statement of remorse to the families directly in court at sentencing.

Another significant indicator *in this case* of acceptance of responsibility is DeJoynay's voluntary choice to plead guilty at the earliest possible moment despite there being no promised sentencing recommendation by the State. In other words, she entered a plea without obtaining a substantial benefit in return. According to SENTAC, such an acceptance of responsibility would generally allow for a reduction of a guideline sentence by 25%.[113] Yet, the court chose to ignore that she decided to forego a trial, spare victim families a lengthy trial and save judicial resources.[114] In fact, the sentence the judge imposed was virtually the same as that which she likely would have received had she gone to trial and been convicted of every count in the

---

[112] A169, A172, A177-78; 6/24 letter; sentencing comments; PSI Report at p. 3. See *Pepper*, 562 U.S. at 490 (allowing consideration of evidence of rehabilitation from time of original sentencing through time or resentencing when case on remand).

[113] Sentac Benchbook at p. 29.

[114] "Guilty pleas may be accorded significant mitigating weight because they save judicial resources and spare the victim from a lengthy trial." *Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004); *State v. Murdaugh*, 97 P.3d 844, 861 (Ariz. 2004) (noting trial court found the defendant's "desire to spare …victim's family from the pain of a trial was a mitigating circumstance"); *People v. Guerrero*, 2005 WL 1785257, at *12 (Cal. Ct. App. July 28, 2005) (noting it is appropriate for trial court to consider as mitigation a defendant's acknowledgement of "guilt at an early stage of the proceedings" and "spar[ing] the victims the need to testify at any proceeding"); *State v. Kelly*, 770 A.2d 908, 948 (Conn. 2001) (noting that acknowledging guilt to conserve resources merits leniency).

indictment.[115]

The Sentencing Judge Ignored DeJoynay's Serious Mental Health Issues.

At no point in his comments did the judge discuss Dr. Cooney-Koss' in-depth 54-page forensic psychological report. And, significantly, he never addressed the doctor's mental health diagnoses reached after she spent 19 hours and 30 minutes with DeJoynay over the course of 1 ½ years. The doctor reported that she had diagnosed DeJoynay with the following disorders: Bipolar I Disorder, Other Specified Trauma-and Stressor-Related Disorder-Persistent complex bereavement disorder; Other Specified Schizophrenia Spectrum and Other Psychotic Disorder-Attenuated Psychosis Syndrome; Generalized Anxiety Disorder; Panic Disorder; Attention-Deficit/Hyperactivity Disorder; and mild cannabis, alcohol and tobacco use.[116] For treatment, she recommended medication, therapy and various skills training.[117] The mental health diagnoses and the treatment options are significant conclusions from a development of a "comprehensive social history" with

---

[115] The indictment alleged 1 count of murder, 48 counts of child abuse first degree and four counts of child abuse second degree. Essentially, The plea agreement dropped 42 counts of 1st degree and 2 counts of 2nd degree. Assuming the court sentenced Ferguson as to the minimum on all of these charges she would have received life plus 96 years as opposed to life plus 12 which, under the circumstances, is "virtually" the same.

[116] A180-82. *See State v. Salaberrios*, 2020 WL 6439589, at *5 (Del. Super. Ct. Nov. 2, 2020) (recognizing duty to investigate mental illness for mitigation in noncapital, "high stakes" cases).

[117] A186.

"corroborating documents" and provides "recommendations concerning a criminal client's mental health history and route to rehabilitation."[118] Based on additional assessments by the doctor and others who had been in contact with DeJoynay, it appeared the treatment was effective.[119]

While the judge was not required to put great weight to the doctor's diagnosis, he was required, at a minimum, to carefully consider, on the record, what mitigating weight, if any, to accord to any evidence of mental illness.[120]

Disproportionality Of Sentence Inconsistent With Principles of *Miller*

DeJoynay's extreme sentence was the result of the judge's categorical focus on her conduct, without consideration– i.e. with a closed mind– of her uncontroverted mitigating circumstances. This truth validates one of many constitutional principles that apply in noncapital as well as capital cases. For example, in *Miller*, the Court concluded that "[b]y making youth (and all that accompanies it) irrelevant to imposition of th[e] harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment."[121]

---

[118] Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 Am. J. Crim. L. 41, 63 (2013).
[119] A206.
[120] *Eddings*, 455 U.S. at 115 (identifying mental health as important mitigating circumstance).
[121] *Miller*, 567 U.S. at 479.

A cursory review of discretionary sentences issued for comparable convictions since 2004 shows that, while the legislature considered the possibility of a 15-year sentence for DeJoynay's crime, sentencing judges consistently "square the idea of [a defendant's] inevitable release" with the killing of a child. All of the reviewed cases triggered the "outrage of society" that inevitably flows from the unnecessary and unjustifiable death of our youngest and most vulnerable. They include conduct that, like DeJoynay's, is "senseless."[122] Like DeJoynay's, some include a pattern of crimes against children,[123] and conduct committed by caregivers to whom the care of the child was entrusted.[124] As the table attached at Exhibit C reveals, the sentences range from probation to 35 years of incarceration. Significantly, not one resulted in a natural life sentence, despite every other defendant being older than DeJoynay.

The best explanation for the anomalous sentence in DeJoynay's case is that the non-life sentences issued in every other case reflect a balancing of the outrage, with the applicable mitigation and chance of rehabilitation, which did not occur in

---

[122] A258.

[123] A256; *see* Davis, Sidney DUC# 1405010212; Frank, Laura DUC# 0512006781; Gallaway, Jason DUC# 1012003724; Spence, Detoshia DUC# 1507011740; Walker, Shamar DUC# 1407000542; Wilkerson, James DUC# 0512016514; Wright, Tameke DUC# 1802015485

[124] A256-57; *see* Blackshear, Edjuan DUC# 1901003654; Corbett, Justin DUC# 1402011649; Hammond, James DUC# 1403007996

DeJoynay's case. To be clear, it is not that the judge in our case viewed the mitigation as insufficient to justify a sentence to a term of years, but rather that he did not consider it at all because his mind was closed to it.

CONCLUSION

For the reasons and upon the authorities cited herein, DeJoynay Ferguson's sentences must be vacated and remanded for reconsideration by a different judge.

Respectfully submitted,

\s\Nicole M. Walker
Nicole Walker, Esquire [#4012]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5121

\s\Elliot Margules
Elliot Margules, Esquire [#6056]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorneys for Appellant

DATE: January 12, 2022