



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEJOYNAY FERGUSON,)	
)	
Defendant Below,)	
Appellant,)	
)	
v.)	No. 223, 2021
)	
STATE OF DELAWARE,)	On Appeal from the
)	Superior Court of the
Plaintiff Below,)	State of Delaware
Appellee.)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Carolyn S. Hake (No. 3839)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 N. French St., 7th Floor
Wilmington, DE 19803
(302) 577-8500

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NATURE AND STAGE OF THE PROCEEDINGS

On July 13, 2020, a New Castle County grand jury indicted DeJoynay Ferguson (“Ferguson”) for First-Degree Murder by Abuse or Neglect for the suffocation death of 4-month-old I.T.; forty-eight counts of First-Degree Child Abuse; and four counts of Second-Degree Child Abuse.¹ (A6-32). The child abuse charges stemmed from over fifty incidents that occurred between July 11, 2019 and the day of I.T.’s murder, September 5, 2019, in which Ferguson impeded the breathing of I.T. and two other children, 9-10-month-old J.M. and 14-month-old K.Mu., and physically abused two more children, 11-month-old K.Mo. and 14-month-old E.N., who she was caring for at a daycare. (A6-39; A130-33). All of the charged conduct, including I.T.’s murder, was captured on video surveillance. (*See* A130).

In October 2020, Ferguson filed a motion to suppress her video and audio taped *Mirandized* statements to police, which the Superior Court denied in February 2021.² On April 13, 2021, Ferguson pled guilty to First-Degree Murder by Abuse, six counts of First-Degree Child Abuse, and two counts of Second-Degree Child Abuse. (A118-27). The parties requested a PSI, and the State agreed to enter a *nolle*

¹ Because the victims were minors at the time of the offenses, the State refers to them by their initials.

² *State v. Ferguson*, 2021 WL 754304 (Del. Super. Ct. Feb. 26, 2021).

prosequi on the remaining charges. (A118). The parties did not agree on a recommended sentence. (A118).

On June 25, 2021, the Superior Court considered aggravating and mitigating factors and sentenced Ferguson for: (i) First-Degree Murder by Abuse, to life imprisonment; (ii) each of the six counts of First-Degree Child Abuse, to ten years at Level V, suspended after two years for one year of probation; and (iii) the two counts of Second-Degree Child Abuse, to probation. (A254-61). The court ordered Ferguson's twelve-year unsuspended Level V sentence to be served concurrently with Ferguson's life sentence. (A258-61).

Ferguson appealed and filed her opening brief and appendix. This is the State's Answering Brief.

SUMMARY OF ARGUMENT

I. DENIED. Ferguson pled guilty to: (a) First-Degree Murder by Abuse for suffocating four-month-old I.T. to death; (b) six counts of First-Degree Child Abuse for restricting I.T.'s breathing on 26 different days in the two months prior to her death and restricting two other infants' breathing on multiple occasions; and (c) two counts of Second-Degree Child Abuse for physically abusing two additional infants. The Superior Court did not abuse its discretion in sentencing Ferguson to a life sentence for four-month-old I.T.'s murder and to a non-suspended period of 12 years in prison for her child abuse offenses, to be served concurrently with the life sentence, followed by probation. Ferguson's sentences were within statutory limits and were objectively justified based upon the shocking facts of Ferguson's crimes. Ferguson's claim that the court sentenced her with a closed mind is unsupported by the record. Nor can Ferguson show an "inference of gross proportionality in the first instance" as to her sentences.

STATEMENT OF FACTS³

On the morning of September 5, 2019, the same day that I.T., a healthy little girl, turned four-months-old, Ferguson, the sole caregiver for children in the infant room at Little People Child Development Center (“Little People”) in Bear, smothered I.T. to death with her hands as I.T. laid helplessly on the changing table. The murder was captured on the daycare’s video surveillance. The daycare’s video surveillance also showed Ferguson previously smothering I.T. and two other children on 28 different days, sometimes multiple times a day and, also physically abusing two additional children, between June 26, 2019 (when she started working there) and September 5, 2019 (when I.T. died).

When questioned by first responders and investigators on the day I.T. died, Ferguson repeatedly lied and denied harming I.T. (See A130; B-4-5; B-12-13; B-17-18; B-42-47; A40-117). After being told that surveillance videos from the daycare’s infant room were inconsistent with her account of events, Ferguson confessed to smothering I.T. by putting her hand over I.T.’s nose and mouth until I.T. stopped breathing and moving. (B-43-44; A83-117). Ferguson denied, however, having done anything like that before I.T.’s death. (A109).

³ Because Ferguson took a plea in this case, the facts are taken from Ferguson’s *Mirandized* statement to homicide detectives, video surveillance provided to the Superior Court in connection with sentencing, the Presentence Investigation Report (“PSI”), police reports (which were attached to the PSI), and other documents that were available to the Superior Court.

911 Call

On September 5, 2019, at approximately 10:35 a.m. – three hours after I.T.’s mother dropped off I.T. in Little People’s infant room, first responders and police responded to Ferguson’s 911 call reporting that a four-month-old baby at the daycare was not breathing. (B-4; B-7; B-12; B-21). When paramedics and officers arrived, the daycare owner was performing CPR on I.T. (B-4; B-21). The paramedics and officers took over CPR, but were unable to resuscitate I.T. (B-4; B-17; B-21). I.T. was pronounced dead by a doctor from Christiana Hospital. (B-4; B-21).

The medical examiner performed an autopsy and ruled that I.T.’s death was a homicide caused by “asphyxia due to suffocation.” (B-59-60).

Ferguson’s Initial Statements

Ferguson, I.T.’s sole caregiver at the time of her death in the daycare’s infant room, told first responders that she had put I.T. down for a nap at 10:22 a.m. and discovered I.T. was not breathing when she checked on her five minutes later. (B-17-18).

Over the course of the next few hours, three different officers separately interviewed Ferguson, who was still at the daycare. (B-4; B-12-13; B-17-18). During the interviews, two of which were recorded, Ferguson stated that I.T., who she had been watching at the daycare since the end of June 2019, was a “happy camper” and “pretty normal” when she arrived at the daycare around 7:00 a.m. that

morning, but she later got “drowsy and a little cranky.” (B-4; B-12). Ferguson said she changed I.T.’s diaper because she knew I.T. was going to fall asleep and gave I.T. the rest of her bottle. (B-4; B-12). Ferguson reported that I.T. fell asleep at 10:22 a.m., after which she laid I.T. on her back in her crib. (B-4; B-12; B-17). She stated that she checked on I.T. about five minutes later and discovered that I.T. had flipped herself over so that she was face-down in the crib and was not breathing. (B-4; B-12; B-17-18). After doing two sets of CPR, Ferguson sought help from the daycare’s owner. (B-4; B-12-13). Seconds later, the owner started CPR on I.T. while Ferguson called 911. (B-4; B-12-13).

Surveillance Video

After speaking with Ferguson, responding officers watched surveillance video recorded inside the infant room and observed that Ferguson’s version of events surrounding I.T.’s death was dramatically different from the events captured on the video. (B-4-5; B-33; BS-1).

The video showed I.T.’s mother dropping her off at the daycare at 7:05 a.m. that morning. (B-8; BS-1). At 9:57 a.m., Ferguson fed I.T. a bottle, after which I.T. laid contently in a boppy pillow on the floor. (B-8; B-44 BS-1; A88; A130-33). At about 10:04 a.m., Ferguson suddenly violently grabbed I.T. by the front of her shirt using one hand and aggressively carried her by her shirt to the changing table, causing I.T. to start crying. (B-8; B-24; B-44-45; BS-1; A88; A130-33). During the

few moments that Ferguson was putting on gloves, I.T. calmed down and stopped crying. (BS-1). As I.T. was peacefully laying on the changing table, looking up at the ceiling, Ferguson placed her gloved hands towards I.T.'s face. (B-8; B-24; B-45; BS-1). I.T.'s legs then began frantically kicking. (B-8; B-24; B-45; BS-1). After approximately one-and-a-half minutes, while Ferguson continued to apply pressure to I.T.'s facial area, I.T.'s body became limp and she was no longer moving. (B-8; B-24; B-45; BS-1). Ferguson continued to apply pressure to the area of I.T.'s face for almost another minute and a half, long after I.T.'s legs stopped kicking. (B-8; B-45; BS-1; A130-33). At 10:08 a.m., Ferguson roughly picked up I.T.'s lifeless body from the table. (B-8; B-45; BS-1). Ferguson then carried I.T., whose face was visibly grey and who did not appear to be breathing, to her crib where Ferguson placed her face-down. (B-8; B-24; B-45; BS-1; A130-33). For the next fourteen minutes, Ferguson stood in the doorway interacting and joking with other staff and playing with the other children as I.T. laid motionless in her crib. (BS-1; B-45; A130-33). Ferguson then checked on I.T. several times but offered no assistance for another three minutes. (BS-1; B-45; A130-33). The video then shows Ferguson removing I.T. from the crib and walking out of the video's range before she sits down with I.T. in the rocking chair. (BS-1; B-45; A130-33). Around 10:31 a.m., Ferguson performed CPR on I.T. before she left the infant room at 10:33 a.m.

holding I.T. in her arms, a full 25 minutes after I.T.'s body became lifeless. (BS-1; B-45; A130-33).

The daycare's video surveillance further revealed that Ferguson had been abusing I.T. and four other children assigned to her care in the infant room since she started working at the daycare in July 2019. (BS-1; A130-33; A224-25). Investigators discovered that, between July 16, 2019 and I.T.'s death on September 5, 2019, Ferguson had impeded I.T.'s breathing, starting when she was 2-months-old, on 28 different days, sometimes multiple times a day. (BS-1; A130-33; A224-25). The video also captured Ferguson impeding the breathing of 9-10-month-old J.M. on six different days and impeding the breathing of 14-month-old K.Mu. on her second day in the infant room. (BS-1; A130-33; A224-25). Many of the incidents occurred when the children were not visibly crying. (BS-1; A130-33; A169; A226-27). As during I.T.'s murder, Ferguson could be seen in multiple cases covering a child's face long after the child's legs and arms stopped moving and they appeared limp. (BS-1; A130-33; A169; A226). On two occasions, Ferguson suffocated the child until the child lost consciousness, waited for the child to revive, and then covered the child's face a second time. (BS-1; A130-33; A169; A226). During the process of covering the children's faces, Ferguson generally did not appear angry, but seemed to be calmly waiting for the known outcome. (BS-1; A170). Ferguson sometimes bobbed her head and danced to music or was silly with other children in

the room who were watching while she waited for the child on the changing table to stop breathing. (BS-1; A130-33; A170).

The video also showed Ferguson physically abusing two more infants, 11-month-old K.Mo. and 14-month-old E.N. (BS-1; A130-33; A224).

Ferguson Changes Her Version of Events

After having reviewed the video surveillance, investigators questioned Ferguson at the police station about six hours after the murder. (A40-117). In the interview, which was audio and video recorded and took place after Ferguson was read her *Miranda* rights, Ferguson initially denied harming I.T. (See A130; A40-88).

When confronted with the fact that her statement was inconsistent with the events captured by the infant room's surveillance cameras, Ferguson first stated that she might have been mistaken about whether J.M. was awake or whether he was in his crib or on the floor. (A71-73). Ferguson then stated that she did not change I.T., as she had initially stated, because I.T. had calmed down as she began to change her and that she "definitely" fed I.T. after she picked her up. (A73-74; A85).

When detectives told that she had not rocked and soothed I.T. as she claimed, Ferguson stated that she "really thought" she had done that. (A78). She continued, "Like it was fast. It was just a lot." (A78). She further explained that "[i]t was two babies crying ... [a]t the same time ... [so she] fe[lt] like [she was] not doing

something right, ... [and she] felt overwhelmed.” (A78-79). Ferguson stated that “[u]sually when my kids cry, ... it’s either one or two things, ... either they’re hungry or they’re tired. ... Usually [I.T.] calms down after she has a nap and she didn’t have a nap yet. So, ... I was going through the procedures or starting the procedures of putting her to sleep.” (A79). Explaining again that I.T. and another infant were both crying at the same time, Ferguson stated that she picked up I.T. from underneath her arms as she was sitting on the floor in a boppy pillow and carried her to the changing table. (A81-82). According to Ferguson, she put on gloves to change I.T., but I.T. did not stop crying so she took off the gloves and took I.T. over to the chair to feed her a bottle. (A82).

Detectives again told Ferguson that the surveillance video showed something different happened that day. (A82). When told that she did not pick I.T. up from under the arms, but instead that she grabbed her and used her onesie as a handle, Ferguson agreed that that sounded familiar and explained that she picked her up that way because she “was angry [about] [b]oth of the babies crying at the same time” and felt “[o]verwhelmed.” (A82-83). Ferguson again stated that she put I.T. on the table to change her and then I.T. “stopped screaming ... [a]nd then she started screaming again.” (A84-85). After Ferguson maintained that she did not remember what happened next or what she did to get I.T. to stop crying, detectives told Ferguson that the video showed that: (1) she had first fed I.T. and put her in the

boppy pillow on the floor; (2) about five minutes later, she was visibly angry or frustrated and picked I.T. up from the pillow by grabbing her and using her onesie as a handle; (3) she then put I.T. on the changing table; (4) she put on gloves, but she never took any changing products out and did not change I.T.; (5) I.T. stopped fussing and crying during the three minutes she was on the changing table; and (6) she placed I.T. face-down afterwards in her crib. (A82-88).

When asked again what she did in those three minutes to calm I.T. down, Ferguson finally admitted that she “proceeded to put [her] hand over [I.T.’s] mouth and her nose until she stopped breathing and then [she] proceeded to pick her up and put her inside of her crib face down.” (A89-90). When asked why she did that, Ferguson responded “[o]ut of aggression,” because “[i]t was multiple babies crying at the same time.” (A89, A102). While her hand was clenching I.T.’s nose and mouth, Ferguson recalled that her chest felt tight like when she gets angry. (A100).

Ferguson admitted that she knew I.T. had stopped breathing “[b]ecause she stopped gasping” for breath. (A89-90). Ferguson also told the detective that while she was covering I.T.’s nose and mouth with her hand, she could feel I.T. trying to get air in and I.T. was “clenching” her hands and moving her legs and feet. (A90). Ferguson stated during the three minutes that she was suffocating I.T., she “wasn’t” thinking, although she was aware that she could have taken her hand off at any time in those three minutes and I.T. probably would have been okay. (A91; A102). After

she took her hand off I.T.'s mouth, Ferguson stated that I.T. made one small gasp, but "wasn't breathing anymore." (A89; A101). Ferguson then put I.T. in the crib and walked away. (A91; A101). Ferguson claimed she could not recall what she did next, however, Ferguson said that she went back to I.T. a short time later and tried CPR because I.T. was not breathing. (A91-92). When asked why she would try CPR after she was the one who stopped I.T. from breathing, Ferguson stated, "[c]ause I knew I was gonna get in trouble." (A92). Ferguson admitted that she knew what she did was wrong. (A93; A113).

Ferguson claimed that she did not mean to kill I.T, stating it was her intent "[f]rom the beginning ... to get her to be quiet." (A99-100). Ferguson stated, when she placed I.T. on the changing table, she initially stopped crying for a moment, but then she "started high pitched screaming,"⁴ at which point Ferguson placed her hand over I.T.'s mouth and nose. (A93). Ferguson stated that she thought her actions would "just get her to be quiet in the moment," and she "didn't think of the long-term ... cause of it." (A99-100). However, Ferguson acknowledged that the end result of holding your hand over a person's mouth so the person cannot breathe is "[w]hat happened to [I.T.] ... [d]eath." (A100-01). Ferguson also admitted that she realized that her actions were going to result in I.T.'s death after she took her hand off of I.T.'s mouth and realized I.T. was not breathing. (A101).

⁴ Ferguson's claim was contrary to the video evidence. (BS-1).

When asked if she had ever done anything like that before, Ferguson replied “[n]o.” (A109; *see also* A98-99). Ferguson’s denial was contrary to the video evidence.

Ferguson Pleads Guilty

On April 13, 2021, Ferguson pled guilty pursuant to a plea agreement to First-Degree Murder by Abuse, six counts of First-Degree Child Abuse, and two counts of Second-Degree Child Abuse. (A118-27). In pleading guilty to First-Degree Child Abuse, Ferguson admitted that she restricted I.T.’s breathing on 41 separate occasions between July 16, 2019 and her death on September 5, 2019. (*See* A33-36; A118; A123-24). Ferguson also admitted that she restricted J.M.’s breathing on 6 separate occasions between July 17, 2019 and August 7, 2019 and that she also restricted K.Mu.’s breathing on September 5, 2019. (A34-36; A118; A123-24). In the plea agreement, the parties requested a PSI, and the State agreed to enter a *nolle prosequi* on the remaining charges. (A118). The parties did not agree on a recommended sentence. (A118). The Truth-in-Sentencing Guilty Plea (“TIS”) Form specified that the maximum penalty for the crimes she was pleading guilty was life plus 154 years. (A119). Ferguson affirmed on the TIS Form that no one had promised her what her sentence would be. (A119).

During the plea colloquy, Ferguson confirmed to the court that she understood the nature of her charges and the maximum periods of incarceration that she faced.

(A122-26). Ferguson also understood that she was facing a 27-year minimum mandatory sentence. (A123). She agreed that no one had forced her to take the plea and acknowledged the rights she was waiving by pleading guilty. (A123). The court accepted Ferguson's plea as knowingly, voluntarily, and intelligently entered and deferred sentencing pending a presentence investigation. (A126; A122). The defense also informed the court that they would be submitting a forensic psychological report to the presentence office and the court. (A126). The Superior Court scheduled sentencing for June 25, 2021. (A4 at D.I. 13).

Dr. Cooney-Koss's Psychological Report

On April 15, 2021, the defense provided the court and the presentence office with Ferguson's psychological evaluation, which was completed by Dr. Laura Cooney-Koss, a forensic psychologist. (A128-29; A134-87). Dr. Cooney-Koss met with Ferguson six times for a total of over nineteen hours between September 2019 and February 2021 and reviewed a number of Ferguson's records, including school and medical records. (A134-35). Dr. Cooney-Koss also interviewed Ferguson's mother and sister. (A135).

During the interviews, Ferguson related that, on the morning of September 5, 2019, I.T. had been crying while Ferguson helped the owner's granddaughter fix her hair and clothing and Ferguson "felt a tightness in [her] chest [and had] trouble fully breathing." (A168). She claimed that I.T. was screaming the entire time she was

cleaning up. (A176). Ferguson stated that “[t]he more [she] heard everyone crying, the tighter [her] chest was getting.” (A168). “She recalled putting her hand over [I.T.’s] nose and mouth” and that she “felt angry when she did that.” (*Id.*). When reviewing the video, she observed that “obviously I didn’t care” that day, as evidenced by how she picked up I.T. and remarked that her anger was greater than normal that day. (A176). Ferguson said that she felt more “relaxed and playful” after she suffocated I.T. because “she had been able to release her anger and resolve the source of her stress.” (A176). When asked why she did not seek help for I.T. immediately upon taking her out of the crib, Ferguson stated, “I was just trying to do it myself like before,” and that “[b]y that point I knew I was in trouble.” (A176-77).

Ferguson also stated that she “first thought of putting her hand over [I.T.’s] mouth in order to quiet her when she was crying.” (A172). She described I.T.’s cry as “an ear-ringing nagging cry [that] ... made [her] heart race, ... [and] made [her] feel like [she] wasn’t doing anything right.” (*Id.*). She said that I.T. “was generally inconsolable, which made [her] chest feel tight ... [and] she tried a variety of techniques to calm her when she was upset and they were ineffective.” (*Id.*). Ferguson stated that “[a]fter a while, it became that’s [restricting her breathing] what worked with her.” (*Id.*).

Ferguson also admitted that she became more aware of how the children responded to being suffocated. (A174-75; A169). She told the psychologist that she transitioned from putting her hands over the children's faces two or more consecutive times to doing it once, but for a longer period of time because it was more efficient. (A174). Ferguson further stated she began to use two hands to restrict the child's breathing as she found it to be more effective. (A175). She also started using gloves "in order to not get the child's saliva on her hands." (A175). According to Ferguson, she "typically only engaged in this behavior with the children who cried often, ... [although] [t]here were a few occasions where she restricted a child's breathing out of anger due to their lack of cooperation." (A174). Ferguson described restricting the breathing of the victims as being a kind of "release" for her and that once their bodies calmed down, she also experienced a sense of calm. (A174).

Ferguson denied trying to kill any of the children, reasoning that "often the only results of restricting the child's breathing was that they had a bowel movement and slept, 'so [she] thought it was somewhat harmless.'" (A174). However, Ferguson also stated that she was aware "there was a possibility of harming a child, but to her, the benefits outweighed the risks at the moment." (A174). Ferguson further noted that "as her life spiraled out of control, she started realizing that she could unintentionally kill a child one day with her actions." (A175). Ferguson

admitted that she knew I.T. had aspirated blood after a past incident, but that she did not change her behavior of restricting I.T.'s breathing. (A175).

When asked how she felt about her actions now, Ferguson commented, "I'm not proud of what I have 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." (A177). She claimed that she was remorseful. (A178, A186).

After the interviews, Dr. Cooney-Koss created a comprehensive 54-page report about Ferguson noting, *inter alia*: (1) Ferguson underwent multiple moves during childhood; (2) Ferguson's father was incarcerated before her birth and during her adolescence; (3) Ferguson's father had a significant history of anger; (4) Ferguson's father died when she was 16; (5) during Ferguson's youth, Ferguson's mother was regularly ill and frequently hospitalized; (6) Ferguson's parents had an ongoing tense and unstable relationship, including multiple separations; (7) police were called to Ferguson's home when she was about 15 due to her father attempting to choke her mother; (8) Ferguson's mother was regularly angry and aggressive toward her father; (9) Ferguson's mother disengaged after her father's death; (10) Ferguson felt as if she were the source of arguments within her family; (11) Ferguson felt she was excluded from the emotional bond between her mother and sister; (12)

Ferguson’s mother was reportedly extremely “judgmental and controlling;” (13) Ferguson’s mother did not provide Ferguson with the emotional nurturing she wanted; (14) Ferguson felt her mother demonstrated her love for her in a material way instead of through physical affection; (15) Ferguson felt that others had no boundaries when it came to her life or rights; (16) Ferguson’s very close relationship with her maternal grandmother was fractured when Ferguson was about 8; (17) Ferguson felt that she was constantly being disciplined by her mother; (18) unbeknownst to Ferguson, her family was temporarily homeless for 30 days when she was 10; (19) Ferguson had a sexually abusive experience with a male peer when she was 15; (20) Ferguson had a history of untreated psychiatric symptoms since at least early adolescence; (21) Ferguson had a significant family history of mental illness, including diagnoses with psychotic features; (22) Ferguson had a history of academic difficulty, including a learning disability; (23) Ferguson experienced social rejection; (24) Ferguson had a peer who was killed at her school just a few months before her father’s death; and (25) Ferguson met the criteria for bi-polar disorder, persistent complex bereavement disorder, attenuated psychosis syndrome, generalized anxiety disorder, panic disorder, attention deficit/hyperactivity disorder, and cannabis, alcohol, and tobacco use disorders. (A134-87).

Notably, however, Dr. Cooney-Koss concluded: “[i]n considering the contributory factors that influenced [Ferguson’s] illegal behavior, one is still likely

left with the unresolved feeling of not knowing why [Ferguson's] actions were so extreme or numerous. The question of how [Ferguson] ignored warning signs and logic that might have normally caused one to cease their actions before it got to the point of resulting in an infant's death remains because those influential factors in [Ferguson's] life do not explain or justify a homicide, especially one of an infant.” (A184-85).

The State's Sentencing Memorandum

On June 15, 2021, the State provided its sentencing memorandum to the court, the presentence investigation office, and defense counsel. (A130-33). In it, the State noted that the parties had previously provided the court with Ferguson's final statement to homicide detectives (A40-117) and that Ferguson had made two other statements to a first responder and a detective in which she denied harming I.T. (A130). The State also attached written submissions from three of the victims' families (B-64-74) and clips from Little People's video surveillance: (a) capturing I.T.'s murder; (b) recording Ferguson restricting the breathing of I.T., J.M., and K.Mu. on eight separate occasions; and (c) recording two incidents involving other charged physical abuse by Ferguson. (A130-32; BS-1). The State included the following descriptions of the provided footage:

1. July 25, 2019 (7 minutes)

[Ferguson] is seated on the floor with [I.T.]. She carries [I.T.] to the changing table. [I.T.'s] face is visible and it's clear that she

is not crying. [Ferguson] restricts [I.T.'s] breathing; as she is doing it, [Ferguson] is dancing. [I.T.'s] legs are flailing and arms are twitching. [Ferguson] places [I.T.] back on the floor. A short time later, [I.T.'s] mom ... arrives and picks up [I.T.].

2. July 30, 2019 (14 minutes)

[J.M.] is laying in his crib when [Ferguson] picks him up. [J.M.] does not appear to be crying until [Ferguson] places him on the changing table. [Ferguson] immediately restricts his breathing. [J.M.] kicks and rolls, and [Ferguson] eventually stops; but, she resumes breathing restriction until it appears that [J.M.] is unconscious. [Ferguson] reengages a third time until [J.M.] appears lifeless. [Ferguson] picks [J.M.] up briefly, but sets him back down and apparently provides "rescue breaths" (CPR). [J.M.] appears dazed but conscious when [Ferguson] removes him from the changing table. [Ferguson] never changed [J.M.'s] diaper.

3. August 2, 2019 (17 minutes)

[Ferguson] is positioned out of camera range with [I.T.]. [Ferguson] enters the camera holding [I.T.], who she places on the changing table. [I.T.] is clearly not crying while [Ferguson] changes her. [Ferguson] restricts [I.T.'s] breathing until her arms and legs stop moving. [I.T.] appears unconscious on the changing table, and [Ferguson] changes her diaper again. [I.T.] regains consciousness. [Ferguson] restricts [I.T.'s] breathing again until she appears to lose consciousness. [Ferguson] changes [I.T.'s] diaper a third time, dresses her, removes her from the changing table, and places her on the floor.

4. August 7, 2019 (12 minutes)

[Ferguson] picks up [J.M.], who is clearly not crying, and places him on the changing table (at which point he begins to cry). [Ferguson] restricts [J.M.'s] breathing. [Ferguson] changes [J.M.'s] diaper, and he regains consciousness. [Ferguson] removes [J.M.] from the changing table and places him in his crib.

5. August 8, 2019 (5 minutes)

[Ferguson] appears to return from a break. She immediately focuses on [I.T.], who is laying in her crib. [Ferguson] reaches into the crib, picks up [I.T.] by the shirt, and roughly carries her to the changing table. [I.T.] is clearly not crying. [Ferguson] restricts [I.T.'s] breathing. [Ferguson] picks up [I.T.] by the shirt and places her on the floor. [Ferguson] calmly picked up another child and changed his diaper without incident.

6. August 15, 2019 (1 minute)

Several children are seated on the floor. [Ferguson] walks over to [K.Mo.] and strikes him in the head, knocking him face first onto the floor.

7. August 19, 2019 (7 minutes)

[Ferguson] picks up [I.T.] by the shirt and roughly carries her to the changing table. [Ferguson] immediately restricts [I.T.'s] breathing until she appears unconscious. She removes [I.T.] from the changing table and places her face down in her crib.

8. August 28, 2019 (42 seconds)

[Ferguson] is seated on the floor with [E.N.]. She forcefully grabs him and throws him to the floor.

9. September 4, 2019 (10 minutes)

[Ferguson] picks up [I.T.] from the floor. [I.T.] is clearly not crying. [Ferguson] places [I.T.] on the changing table and begins to “flick” and slap her. [Ferguson] restricts [I.T.'s] breathing, and appears to slap her as she is doing it. [I.T.] appears unconscious while [Ferguson] changes her diaper.

10. September 5, 2019 (16 minutes)

[K.Mu.] is standing at the door to the classroom (her mother works in the daycare in another room). [Ferguson] has [I.T.] on the changing table but never changes her diaper. [Ferguson] walks [K.Mu.] back to the changing area, places her on the changing table and restricts her breathing. [K.Mu.] appears unconscious. [Ferguson] places [K.Mu.] in her crib, without changing her diaper.

11. September 5, 2019 (53 minutes) (converted)

[Ferguson] is fixing the hair and dressing a child, who was not in class. The classroom appears fairly quiet. She adjusts [I.T.] and another infant on the floor. [Ferguson] feeds the other infant a bottle, changes his diaper and returns him to the floor. [Ferguson] feeds [I.T.] and places her back on the floor. [Ferguson] picks up [I.T.] by the shirt and places her on the changing table and immediately restricts her breathing. It appears that [Ferguson] continues to restrict [I.T.'s] breathing long after her legs stopped. [I.T.'s] face is grey and her body is lifeless when [Ferguson] places her face down in her crib. [Ferguson] stands in the doorway interacting with other staff and children as [I.T.] lays motionless in her crib. [Ferguson] checks on [I.T.] several times but offers no assistance. [Ferguson] removes [I.T.] from the crib and walks out of camera. It appears that [Ferguson] is performing CPR, before she exits the classroom holding [I.T.] in her arms.

(A130-33). The State also provided the court with a copy of the findings and opinion page of the autopsy report and a summary of the expert opinion of Dr. Stephanie Deutsch. (*Id.*). According to the autopsy report, I.T.'s cause of death was "asphyxia due to suffocation" and her death was ruled a homicide. (B-59-60). Dr. Deutsch, who had reviewed the surveillance footage, gave the opinion that "[e]ach episode of asphyxiation resulting in hypoxia (as evidenced by the victim's lack of consciousness) posed a risk of death to [I.T., J.M., and K.Mu.] as each episode

initiated a cascade of events whose outcome could have been lethal (asphyxial cardiac arrest and irreversible brain damage...). The last episode of asphyxiation resulting in hypoxia involving [I.T.] initiated a cascade of events that was lethal.” (B-61-63).

Presentence Investigation

In preparing the court-ordered PSI report, dated June 17, 2021, the presentence investigator reviewed various records and attached them as exhibits, including the police report and Dr. Cooney-Koss’s psychological report, and the investigator interviewed Ferguson. (*See* PSI).

Ferguson told the investigator that I.T. “cried a lot and was always in distress... 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.” (PSI). However, the investigator also noted:

[Ferguson] never specifically addressed why she abused the victims. She instead focused on how unhappy she was with life and her lack of moral support. In fact, she complained about feeling depressed; she did not have a social life; she had no friends; she was overwhelmed; and that she was “not mentally there.” It is not clear at this point what actually motivated [Ferguson] to physically harm the victims, but it appears as though she knew what she was doing and what could possibly result from her behavior.

(*Id.*).

Other exhibits the presentence investigator attached to his report included *inter alia*, the indictment, victim impact letters, Ferguson’s educational data, and the State’s June 15, 2021 letter and its attachments. (*Id.*).

Defense’s Sentencing Memorandum

The day before sentencing, defense counsel provided a sentencing memorandum to the Superior Court. (A191-95). Counsel included Dr. Cooney-Koss’s psychological evaluation of Ferguson, which the defense had previously provided to the court and presentence investigator in April 2021 (A128-29; A134-87); Ferguson’s statement comparing her behavior to an addict and stating she “can now see that the reasoning for my mental getaway was selfish” (A196-97); and several character letters from Ferguson’s friends and family. (A198-206). Counsel asked the court to take all the mitigating factors into consideration, including Ferguson’s undiagnosed and untreated mental health concerns, Ferguson’s age of 19 at the time of the offenses, and Ferguson’s acceptance of responsibility for her actions and “great remorse,” and sentence Ferguson at or near the minimum-mandatory sentence. (A191-95).

Sentencing

At Ferguson’s June 25, 2021 sentencing, I.T.’s mother addressed the court and talked about the loss of her only daughter. (A219-21). J.M.’s mother also spoke regarding their suffering and fears about the possible long-lasting effects from

Ferguson's abuse. (A211-13). K.M's parents told the court that their now 3-year-old daughter suffered from nightmares, emotional anxiety, and separation anxiety. (A213-19).

At sentencing, the parties acknowledged that Ferguson's offenses carried a minimum sentence of 27 years at Level V. (A238, 250). The State recommended a 65-year Level V sentence—35 years' incarceration for First-Degree Murder by Abuse, 5 years of incarceration for each of the six counts of First-Degree Child Abuse, and probation for the Second-Degree Child Abuse charges. (A236-37). In making the recommendation, the prosecutor cited five Sentencing Accountability Commission ("SENTAC") aggravating factors: (1) excessive cruelty, (2) need for correctional treatment, (3) undue depreciation of offense, (4) prior abuse of victim, and (5) vulnerability of victim. (A233-37). The prosecutor also spoke about the defense's recommendation to sentence Ferguson at or near the minimum-mandatory sentence, stating that "if this case was as defense counsel states, ... a singular act or apparent that she was simply acting out due to being overwhelmed by crying children or inexperience, the [S]tate may share in their recommendation, but that is not what we have here, which is why the [S]tate is recommending [a 65-year Level V sentence]." (A235-36).

Defense counsel requested the court exercise leniency and sentence Ferguson to a sentence that "doesn't include [Ferguson] spending the rest of her life

incarcerated.” (A239-51). Counsel emphasized Ferguson’s young age at the time of the murder and child abuse; referred to Dr. Cooney-Koss’s report; asked the court to consider the entirety of Ferguson’s life experiences, including her family life, lack of childcare training, immaturity, panic attacks, lack of sleep, and undiagnosed and untreated health conditions; and discussed Ferguson’s remorse. (*Id.*). Ferguson apologized to the victims’ families and stated she was “genuinely remorseful.” (A251-54). She took “full responsibility,” stating “I was in way over my head and I handled it the wrong way. I am having trouble understanding why, too.” (A252).

The Superior Court was not swayed by the defense’s mitigating evidence and sentenced Ferguson to life in prison based on the “shocking” facts of the case. (A254-61).

ARGUMENT

I. THE SUPERIOR COURT DID NOT SENTENCE FERGUSON WITH A CLOSED MIND OR OTHERWISE ABUSE ITS DISCRETION.

Question Presented

Whether the Superior Court abused its discretion in sentencing Ferguson to life in prison for murdering ten-month-old I.T. by smothering her to death and twelve years at Level V for repeatedly restricting the breathing of I.T. and two other children on more than 45 separate occasions spanning two months.

Scope and Standard of Review

“This Court reviews sentencing of a defendant in a criminal case under an abuse of discretion standard.”⁵ To the extent that Ferguson is raising a constitutional claim, this Court’s review is *de novo*.⁶

Merits of the Argument

Ferguson claims that the Superior Court acted with a closed mind in sentencing her, and her sentence was disproportionately harsh. (Op. Br. at 6). Ferguson is mistaken.

Ferguson pled guilty to a Class A violent felony (First-Degree Murder by Abuse), six Class B felonies (First-Degree Child Abuse), and two Class G felonies

⁵ *Fink v. State*, 817 A.2d 781, 790 (Del. 2003).

⁶ *Wescott v. State*, 2009 WL 3282707, at *5 (Del. Oct. 13, 2009).

(Second-Degree Child Abuse). The penalty for First-Degree Murder by Abuse was 15 years up to life imprisonment.⁷ The statutory penalties for each offense of First-Degree Child Abuse ranged from a minimum of 2 years to a maximum of 25 years imprisonment, and the maximum penalty for each count of Second-Degree Child Abuse was 2 years of incarceration.⁸

During the plea colloquy, Ferguson acknowledged that she faced a sentence up to life imprisonment plus 154 years. (A119-20; A123). She also understood that the minimum penalty was 27 years. (A120; A123). Subsequently, the Superior Court sentenced Ferguson within the statutory limits as follows, for: (1) First-Degree Murder by Abuse to life imprisonment; (2) each of the six counts of First-Degree Child Abuse to ten years at Level V, suspended after two years for probation; and (3) each count of Second-Degree Child Abuse to two years at Level V, suspended for one year of probation. (A259-61). The court ordered the 12-year unsuspended sentence to be served concurrently with Ferguson's life sentence. (*Id.*).

Where the sentence falls, as this one does, within the statutory limits, a reviewing court will only consider "whether [the sentence] is based on factual predicates which are false, impermissible, or lack minimal reliability, [or reflect]

⁷ 11 *Del. C.* § 4205(b)(1).

⁸ 11 *Del. C.* § 4205(b)(2), (7).

judicial vindictiveness or bias, or a closed mind.”⁹ ““A judge sentences with a closed mind when the sentence is based on a pre-conceived bias without consideration of the nature of the offense or the character of the defendant.”¹⁰ “[T]he judge must have an open mind for receiving all information related to the question of mitigation.”¹¹ “It is not ‘improper for a sentencing judge to mount the bench with some preconceived notion about the proper sentence to be imposed, but ... it is quite improper for him at that point to have closed his mind upon the subject.’”¹² In Delaware, “a sentencing court has broad discretion to consider ‘information pertaining to a defendant’s personal history and behavior which is not confined exclusively to conduct for which the defendant was convicted.’”¹³

There is no evidence in the record, nor has Ferguson argued, that her sentence was based on inaccurate or unreliable facts. Rather, Ferguson argues the Superior Court sentenced her with a closed mind because the judge imposed a sentence for First-Degree Murder by Abuse that “drastically departed from the presumptive

⁹ *Kurzmann v. State*, 903 A.2d 702, 714 (Del. 2006); *see Wynn v. State*, 23 A.3d 145, 148 (Del. 2011); *Weston v. State*, 832 A.2d 742, 746 (Del. 2003); *Fink*, 817 A.2d at 790).

¹⁰ *Cruz v. State*, 990 A.2d 409, 416 (Del. 2010) (quoting *Weston*, 832 A.2d at 746).

¹¹ *Kurzmann*, 903 A.2d at 714.

¹² *Dabney v. State*, 12 A.3d 1101, 1103 (Del. 2009) (quoting *Osburn v. State*, 224 A.2d 52, 53 (Del. 1966)).

¹³ *Mayer v. State*, 604 A.2d 839, 842 (Del. 1992) (citing *Lake v. State*, 1984 WL 997111, at *1 (Del. Oct. 29, 1984)).

sentence” and was longer than the State’s recommended sentence. (Op. Br. at 22-23). Ferguson also contends that the judge’s explanation for imposing a sentence that deviated from SENTAC’s sentencing guidelines reveals that his mind was closed to considering defense counsel’s mitigation evidence and argument concerning Ferguson’s youth, amenability to rehabilitation (including Ferguson’s expression of remorse), mental health, and lack of criminal history, and instead imposed the sentence with the “sole purpose” of retribution. (*Id.* at 6, 23-34). Ferguson’s claims are unavailing. The record does not support the conclusion that the Superior Court based Ferguson’s sentence on a “preconceived bias, without consideration of the nature of the offense or the character of the defendant.” Rather, the Superior Court’s sentence is not only within statutory limits, but also objectively justified.

The judge’s sentence was within the statutory limits. The fact that the judge gave Ferguson the maximum sentence permitted by statute for First-Degree Murder by Abuse is not, in and of itself, evidence of bias or a closed mind. Nor does it matter that judges have sentenced others for crimes related to the death of a child to lesser sentences than life in prison. Each sentence turns on its own individual facts.

Ferguson argues that the judge sentenced her with a closed mind because the imposed sentence “drastically departed from the presumptive sentence [of 15 years for First-Degree Murder by Abuse] and landed way above that which the State

requested [35 years].” (Op. Br. at 22-23). She is incorrect. While Ferguson’s life sentence for First-Degree Murder by Abuse is beyond the 15 years at Level V presumptive SENTAC sentence, this Court has consistently held that SENTAC guidelines, while advisory, are neither mandatory nor binding upon a sentencing judge, and do not provide a basis for appeal of a sentence that is within statutory authorized limits as in this case.¹⁴ And, the record reflects that, rather than exhibiting a closed mind, the sentencing judge carefully considered the parties’ recommendations in determining the sentence to be imposed. The judge’s decision not to follow the State’s recommendation does not evidence a closed mind.¹⁵

The record also does not support Ferguson’s argument that the Superior Court sentenced her with a closed mind by ignoring mitigating evidence. “[A] sentencing court has broad discretion in determining what information to rely on from a presentence report and related sources.”¹⁶ As such, the court is free to give the

¹⁴ *Soto v. State*, 2019 WL 2523486, at *2 (Del. June 18, 2019) (citing *Siple v. State*, 701 A.2d 79, 83 (Del. 1997) (“[T]here is no constitutional or statutory right in Delaware to appeal a criminal punishment on the sole basis that it deviates from the SENTAC sentencing guidelines.”)); *Milligan v. State*, 2017 WL 443706, at *3 (Del. Jan. 3, 2017); *Fuller v. State*, 860 A.2d 324, 332 (Del. 2004); *Laboy v. State*, 1995 WL 389720, at *1 (Del. June 23, 1995); *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989).

¹⁵ *See Wynn*, 23 A.3d at 151 (affirming sentence that exceeded prosecutor’s recommendation where sentence did not exceed statutory limits and defendant aware of maximum potential sentence); *Dailey v. State*, 2004 WL 439855, at *2 (Del. Mar. 4, 2004) (same).

¹⁶ *Mayes*, 604 A.2d at 843.

mitigating factors presented by the defendant as much or as little weight as it feels appropriate.¹⁷

The sentencing judge ordered a presentence investigation, and both parties submitted information relevant to sentencing to the judge prior to sentencing. (A128-29; A134-87; A191-06; B-55-74; BS-1). The judge held an extensive sentencing hearing during which he allowed the victims' families, the State, Ferguson's attorneys, and Ferguson herself, to speak at length, and heard presentations from both sides regarding mitigating and aggravating factors. (A209-54). The judge was simply not convinced by the mitigating factors to give Ferguson a shorter sentence:

We have now heard from different perspectives that are present in these very unique and very unfortunate circumstances and it now comes to me to decide the appropriate sentence.

But in doing so I want to say a few words to everyone. The victims in this case are represented by the Department of Justice. Aably so, the defendant is also represented by lawyers who have articulated those facts that they believe mitigate the case.

When the Court imposes the sentence, the Court does not speak for either side. This Court speaks for the rest of us, for those in society generally who really don't have a particular stake, except the desire to live in an open, fair and just society and a society that has a judicial system that makes the right decisions for the right reasons.

¹⁷ See *Cheeks v. State*, 2000 WL 1508578, at *3 (Del. Sept. 25, 2000); *Williams v. State*, 110 A.3d 550, 552 (Del. 2015) (noting that because defendant may eventually be released from prison and sentencing judge must consider what sentence best promotes public safety, mitigation evidence plays less central role in non-capital sentencing).

That's what I'm trying to do. I speak not for the victims, not for the defendant, but for the conscience of the community tempered by experience admittedly and by the grace of God with some measure of wisdom from the bench.

To the families who were victimized by the defendant's conduct. I know it is often said — prosecutors love to say it, that this event today will bring you closure or will somehow bring you healing. I will tell you I'm skeptical that it will.

Healing for you will come with time and hopefully a good therapist. This is not going to fix anything.

To the friends and family of [Ferguson], I don't know if you are here, but I read a great deal of correspondence from people who love [Ferguson]. I'll say one of the things that was salient to me in reading all of the materials was as, frankly, pointed out by counsel, the 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.

[Ferguson], you said to the police in your interview on the day you were arrested that what you had done that day had fundamentally altered the rest of your life from that date forward. And it will be your undoing for or you will make the best of your circumstances and while you may feel there is nothing left, I have been around long enough to see individuals released after extremely long sentences through commutations, paroles, clemencies, all manner of proceedings, once the patina of time has, as it does, heals the open wounds that are in this courtroom today.

This case is the worst nightmare of every parent who drops their child off at daycare. The trust that parents put in the hands of these workers is total and it is with the most precious thing in their world.

The case is shocking. Not only in its brutality, but in the utter depraved violation of trust placed in the hands of caregivers by parents with little or no choice in the matter.

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 [Ferguson] would spend a great many years 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 [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.

It is, therefore, the judgment of the Court that the sentence on the count of murder in the first degree by abuse ... should be a life sentence.

In imposing this sentence I will say this with respect to defense counsel's request for concurrent sentencing. I believe that the plea agreement between the parties called for 27 years of mandatory sentence. That's in the range of what we see in sentences in homicide cases. If there were a way to fashion a sentence so that the defendant would be required to serve 27 years before being able to petition for a pardon or parole or a clemency or some other release, I would do so. Unfortunately, it does not work that way. Sentences cannot be both consecutive and concurrent at the same time.

Because I am imposing a life sentence on the murder count and because the additional counts were part of an ongoing pattern ... albeit involving some other babies, I will make the additional child abuse counts concurrent to the life sentence, but consecutive to the other.

So the intent, if it is not clear, is that [Ferguson] should serve at least 27 years of the life sentence before a governor or a parole agency or some other entity will consider a release. It is, of course, as it always

is, up to the executive branch, but the life sentence is imposed because in the Court's view [Ferguson's] eventual release must be a matter of lenity and grace fashioned after time has passed and we know more about what she has done with her time in prison.

Before me today the Court believes the life sentence is appropriate and I will impose it.

(A254-61).

Although Ferguson argues that the sentencing judge's remarks reveal that the judge failed to consider the mitigation evidence because his mind was closed, the transcript reveals nothing to indicate that the judge was anything other than open-minded about the sentencing in this shocking case. Evidence of mitigating factors – including Ferguson's youth, amenability to rehabilitation (including Ferguson's expression of remorse), mental health, and lack of criminal history, was presented to and considered by the Superior Court.¹⁸ The fact that the court was more swayed by the aggravating factors, including the excessive cruelty, previous abuse, and vulnerability of the victims, does not mean that the Superior Court failed to consider the mitigating factors or sufficiently weigh those factors.¹⁹ Indeed, the record

¹⁸ See *Hohn v. State*, 2014 WL 4050183, at *2 (Del. Aug. 14, 2014) (“[B]ecause the transcript of Hohn’s sentencing reflects that the judge listened to victim impact statements, the representations of all counsel, and Hohn’s own expressions of remorse before imposing sentence, the record does not otherwise support a claim that the sentencing judge was biased and/or had a closed mind.”).

¹⁹ See *Mitchell v. State*, 2015 WL 7575022, at *2 (Del. Nov. 24, 2015); see also *Milligan*, 2017 WL 443706, at *2; *Cheeks*, 2000 WL 1508578, at *3.

indicates that the judge considered both “the nature of the case and the character of the defendant” when he sentenced Ferguson. The court observed that this was a shocking and brutal case involving vulnerable victims and a pattern of restricting the victims’ breathing by someone who “basically grew up as most children do [and who] certainly had enough to succeed.” (A254-59). The judge did not sentence Ferguson with a closed mind.

Ferguson also presents no evidence to contradict the court’s remarks that it had read and carefully considered the mitigation evidence presented. In his remarks, the judge stated he had: (1) “gotten many written submissions from many parties” and “read them all” (A210);” (2) “read voluminous correspondence and presentencing materials from many different parties in this case” (A210); and (3) “considered carefully” the mitigation evidence presented, including defense counsel’s comments, Ferguson’s remarks, and the “many additional submissions” he received (A257). Although Ferguson contends that “there are legitimate questions as to exactly what was actually reviewed by the judge” because “irregularities in the record [as a result of the docket not indicating the filing of: (1) Dr. Cooney-Koss’s psychological evaluation, which defense counsel submitted to the judge and presentence investigator’s office on April 15, 2021, and (2) defense counsel’s June 24, 2021 letter to the court providing another copy of Dr. Cooney-Koss’s psychological evaluation and letters from Ferguson, her friends, and family,

which counsel submitted to the judge via electronic mail] prevent a presumption that [the court] read all of the materials submitted by defense counsel” (Op. Br. at 25 n.91), Ferguson’s claim is refuted by the record.

At the conclusion of the April 14, 2021 plea hearing, the defense informed the court that they would be submitting a forensic psychological report to the presentence office and the court. (A126). The next day, counsel sent the report to both the judge and the presentence office. (A128-29). While counsel’s letter does not appear on the docket, the presentence investigator referenced Dr. Cooney-Koss’s report, citing it and also attaching it as an exhibit to the PSI provided to the court. (PSI). Moreover, defense counsel and the State referenced and discussed Dr. Cooney-Koss’s report and defense counsel’s June 24, 2021 sentencing memorandum during their remarks. (A227-29; A236; A239; A244-49). Finally, the sentencing judge’s remarks also demonstrate that he indeed reviewed defense counsel’s June 24, 2021 letter to the court attaching Dr. Cooney-Koss’s psychological evaluation and letters from Ferguson, her friends, and family. Specifically, the judge referenced having received and read the mitigation letters attached to defense counsel’s June 24, 2021 letter when he stated that he had read Ferguson’s written submission and would allow her the opportunity to make further statements at the hearing and that he had read a great deal of correspondence from people who loved Ferguson. (A210; A255).

The record reflects that, rather than exhibiting a closed mind, the Superior Court judge carefully considered the record, the presentence report, the defense’s mitigation materials, the aggravating factors, and the parties’ recommendations in determining the sentence to be imposed. Based upon the record, Ferguson cannot support her assertion that the sentence imposed by the trial judge was “based on “preconceived bias, without consideration of the nature of the offense or the character of the defendant.” Given the shocking nature and circumstances of the charges and the mitigating and aggravating evidence presented at sentencing, Ferguson’s sentence was appropriate.

Finally, Ferguson argues her sentence is disproportionate to the crimes she committed. (Op. Br. at 34-36). Ferguson cites to *Miller v. Alabama*²⁰ as the basis for her argument and points to a “cursory review of discretionary sentences issued for comparable convictions since 2004,” in which the sentences ranged from probation to 35 years of incarceration. (*Id.*). Ferguson’s contentions are unavailing.

The Eighth Amendment prohibits punishment that is either disproportionate to the crime committed or excessive.²¹ “Outside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly

²⁰ 567 U.S. 460 (2012).

²¹ *Bednash v. State*, 2012 WL 2343593, at *2 (Del. June 19, 2012); *Atkins v. Virginia*, 536 U.S. 304, 311 n. 7 (2002).

rare.”²² Proportionality review is limited to “those rare cases in which a threshold comparison of the crime and the sentence leads to an inference of gross disproportionality.”²³ In *Crosby v. State*, this Court announced a two-part test to determine whether a sentence violates the Eighth Amendment:

To determine whether a particular sentence is prohibited, this Court must undertake a threshold comparison of the crime committed and the sentence imposed. If such a comparison leads to an inference of gross disproportionality, then this Court must compare [defendant’s] sentence with other similar cases to determine whether the trial court acted out of step with sentencing norms.²⁴

There is no inference of gross disproportionality here, nor are Ferguson’s sentences excessive.

Based on the terrible facts of this case, the Superior Court sentenced Ferguson for First-Degree Murder by Abuse to life imprisonment and to 12 years of unsuspended Level V time, to be served concurrently with her life sentence, for the remaining offenses. A comparison of Ferguson’s crimes and her sentences does not lead to an inference of gross disproportionality.²⁵ Ferguson pled guilty to murder,

²² *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

²³ *Bednash*, 2012 WL 2345393, at *2.

²⁴ *Crosby v. State*, 824 A.2d 894, 908 (Del. 2003).

²⁵ *See Wallace v. State*, 956 A.2d 630 (Del. 2008) (holding life sentence without probation or parole of 15-year-old defendant convicted of First-Degree Murder against his 9-year-old cousin did not violate Eighth Amendment); *see also Torres v. State*, 1992 WL 53406 (Del. Feb. 7, 1992) (affirming sentences for life imprisonment

“the most heinous violent crime,”²⁶ as well as six counts of First-Degree Child Abuse and two counts of Second-Degree Child Abuse. The statutory penalties for First-Degree Murder by Abuse, a Class A violent felony, range from a minimum of 15 years to a maximum life term.²⁷ The first 15 years at Level V are mandatory and may not be suspended.²⁸ The statutory penalties for First-Degree Child Abuse, a Class B felony, range from 2 to 25 years,²⁹ and the maximum penalty for Second-Degree Child Abuse, a Class G felony, was 2 years of incarceration.³⁰

Ferguson admitted to engaging in a series of dangerous and potentially lethal acts of restricting three infants’ breathing on multiple occasions over the course of two months. Although she knew her actions were wrong, she continued to restrict the victims’ breathing as it made her feel better afterward. One of those infants, four-month-old I.T., died after Ferguson suffocated her previously on 26 different days over the preceding two months. Ferguson’s life sentence is not

without probation or parole of 14-year-old defendant convicted of First-Degree Murder against four victims, including two children).

²⁶ *Lacombe v. State*, 2014 WL 2522273, at *2 (Del. May 30, 2014).

²⁷ 11 *Del. C.* §§ 634, 4205(b)(1).

²⁸ 11 *Del. C.* § 4205(d).

²⁹ 11 *Del. C.* §§ 1103B, 4205(b)(2).

³⁰ 11 *Del. C.* §§ 1103A, 4205(b)(7).

disproportionate given the circumstances of the case.³¹ As this Court noted in *Lacombe v. State*, “[t]here is nothing extreme, or grossly disproportionate, about sentencing a murderer to life in prison.”³² The facts of this case of ongoing crimes that ended in a murder also demonstrate that the concurrent sentence of 12 years of unsuspended Level V time Ferguson received for the child abuse offenses was appropriate. Because the sentences do not raise an inference of gross disproportionality, proportionality review under the Eighth Amendment is not warranted.³³

Finally, Ferguson’s reliance on *Miller* is misplaced. In *Miller*, the United States Supreme Court held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders.³⁴ In this case, Ferguson was not under the age of eighteen when she committed the crimes. Rather, she was 19. Thus, *Miller* is inapplicable.³⁵

³¹ See *Wallace*, 956 A.2d at 639 (“Objective indicia of society’s standards may be found in legislative enactments.”).

³² *Lacombe*, 2014 WL 2522273, at *2.

³³ See *id.* (finding proportionality review unwarranted for life sentence on second-degree murder conviction because sentence did not raise inference of gross disproportionality).

³⁴ *Miller*, 567 U.S. 460.

³⁵ *Flonnory v. State*, 2017 WL 3634216, at *1 (Del. Aug. 23, 2017) (holding “application of juvenile sentencing standards” do not apply to crimes “committed as an adult”); *State v. Scott*, 2017 WL 5075412, at *2 (Del. Super. Ct. Oct. 30, 2017) (finding *Miller* inapplicable because defendant was adult at time of murder).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

DEPARTMENT OF JUSTICE

/s/ Carolyn S. Hake

Bar ID No. 3839

Deputy Attorney General

Department of Justice

820 N. French Street

Wilmington, DE 19801

(302) 577-8500

Dated: February 11, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEJOYNAY FERGUSON,)	
)	
Defendant Below,)	
Appellant,)	
)	
v.)	No. 223, 2021
)	
STATE OF DELAWARE,)	On Appeal from the
)	Superior Court of the
Plaintiff Below,)	State of Delaware
Appellee.)	

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AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.
2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9,994 words, which were counted by Microsoft Word.

Dated: February 14, 2022

/s/ Carolyn S. Hake