[J-53-2022] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 86 MAP 2021
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court dated January 25,
	:	2021 at No. 459 MDA 2020
v.	:	Affirming the Judgment of Sentence
	:	of the Cumberland County Court of
	:	Common Pleas, Criminal Division,
HERMAN ALBERT ARMOLT, JR.,	:	dated February 11, 2020 at No. CP-
	:	21-CR-3273-2018
Appellant	:	
	:	ARGUED: September 15, 2022

CONCURRING OPINION

JUSTICE WECHT **DECIDED: May 16, 2023**

Beginning when he was ten years old, and continuing until he was seventeen, Herman Armolt repeatedly physically and sexually assaulted his minor stepsister, C.L. The Commonwealth did not prosecute Armolt for these crimes until almost thirty years later. When he was prosecuted, Armolt was no longer a "child" for purposes of the Juvenile Act.[1] Therefore, he could not have been tried in a juvenile court.[2] This does not mean that Armolt could not be tried in *any* court. To the contrary, as the Majority correctly holds, "adult criminal courts possess jurisdiction over the prosecution of an individual who is over the age of twenty-one for crimes committed as a juvenile."[3] Armolt cannot escape

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[1] 42 Pa.C.S. § 6302 (defining "child" as a person who "is under the age of 18 years" or "is under the age of 21 years who committed an act of delinquency before reaching the age of 18 years").

[2] 42 Pa.C.S. § 6303(a)(1) (limiting the juvenile court's jurisdiction "exclusively to . . . [p]roceedings in which a child is alleged to be delinquent or dependent").

[3] Maj. Op. at 1.

prosecution for the serial abuse that he inflicted upon his stepsister merely because sufficient time has elapsed to place him beyond the reach of the Juvenile Act.

The Majority also correctly rejects Armolt's argument that the nearly three-decade delay in prosecuting him was the product of the Commonwealth's bad faith, as the record bears no evidence to support such an allegation.[4] Resolving the claim on the facts of this case, the Majority declines to identify, or evaluate the propriety of, the legal foundation of the "improper motive" rule that Armolt invokes.[5] Because consideration of that rule is unnecessary to the disposition of the instant case, I take no issue with the Majority's exercise of restraint. Nonetheless, the rule warrants some brief discussion here.

This "improper motive" rule stems from two Superior Court decisions, *Commonwealth v. Anderson*[6] and *Commonwealth v. Monaco*.[7] In *Anderson*, the sixteen year old defendant struck another juvenile in the head with a baseball bat and was charged with aggravated assault and related offenses.[8] Due to Anderson's status as a minor, the charges were assigned to a juvenile court. However, Anderson failed to appear at his scheduled hearings, and the court issued a bench warrant for his arrest.[9]

When Anderson was nineteen years old, he was arrested again, this time for retail theft. Once again, he failed to appear in court to respond to the charges, and another

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4 *Id.* at 15-16.

5 *Id.* at 16 n.13.

6 630 A.2d 47 (Pa. Super. 1993).

7 869 A.2d 1026 (Pa. Super. 2005).

8 *Anderson*, 630 A.2d at 48.

9 *Id.*

bench warrant was issued.[10] Then, when he was twenty-two years old, he was arrested yet again, on a third set of charges.[11]

After Anderson's third arrest, the Commonwealth re-charged him as an adult for the charges from which he had absconded when he was a juvenile. The juvenile court no longer had jurisdiction over Anderson because he was no longer a "child" under the Juvenile Act. The juvenile court lifted the bench warrant on those charges, and Anderson was set to be tried as an adult on all three cases.[12] Anderson filed a motion to dismiss the formerly juvenile charges on the basis that the trial court lacked jurisdiction over juvenile offenders, a category that included him at the time of the baseball bat assault. The trial court agreed and dismissed the charges. The Commonwealth appealed, and the Superior Court reversed.[13]

The panel explained that the Juvenile Act applies only when an offender is a "child" at the time of prosecution.[14] Because Anderson was no longer a "child," the Juvenile Act did "not apply to him."[15] That did not mean that he "inhabit[ed] a jurisdictional limbo" between the juvenile court and adult court.[16] Instead, the court held, he "should be tried as an adult" for his crimes.[17]

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10 *Id.* at 48-49.

11 *Id.* at 49.

12 *Id.*

13 Id.

14 *Id.* (citing 42 Pa.C.S. § 6302).

15 *Id.*

16 *Id.*

17 *Id.* at 50.

The Superior Court emphasized that any potential inequity in Anderson being tried as an adult for his juvenile crimes resulted from his own actions. Anderson "would have been tried as a child if it were not for his deliberate avoidance of the justice system."[18] "[B]y virtue of his flight," Anderson "denied himself the opportunity to be tried" as a juvenile.[19] The court held that a juvenile cannot willfully abscond from the juvenile system until he is no longer a "child" under the Juvenile Act, and then exploit that absconding to demand that he be tried as a juvenile.

Anderson argued that the Commonwealth should have been precluded from prosecuting him as an adult for his juvenile charges because, when he was nineteen years old and still under the jurisdiction of the Juvenile Act for those charges, the Commonwealth held him in custody on the retail theft charges.[20] Anderson asserted that the Commonwealth should have pressed the juvenile charges at that point, but failed to do so, with the result that Anderson aged out of the juvenile system.[21]

The Superior Court rejected this argument. The court observed that the record contained no evidence that, at the time that Anderson was arrested for retail theft, the Commonwealth knew that Anderson had unresolved juvenile charges, that Anderson informed the Commonwealth of such charges, or that Anderson requested to be tried for the juvenile charges. Because Anderson failed to "avail[] himself of the benefits of the Juvenile Act when they were his as of right," his argument that the Commonwealth should have been barred from prosecuting him as an adult was "groundless."[22] In assessing the

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18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 50-51.

22 *Id.* at 51.

merits of Anderson's claim, the Superior Court did not discuss any constitutional provision, statute, or case law that might be invoked to support the "improper motive" or "bad faith" argument that it had rejected.

More than twenty years would pass before the Superior Court returned to *Anderson* and to the question of whether an "improper motive" exception exists. In *Monaco*, three females reported to the police in 2002 that the defendant had sexually abused them when they were minors during the mid-to-late 1990s.[23] Monaco was a juvenile at the time of each of the sexual assaults. However, he was twenty-two years old when he was charged.[24] Monaco eventually pleaded guilty in adult court to attempted rape and to corruption of the morals of a minor, having never challenged the adult court's jurisdiction over him for the crimes that he had committed as a minor.

Monaco was sentenced to five to ten years in prison and to a consecutive term of probation. He did not file a direct appeal. However, in a subsequent PCRA[25] petition, Monaco contested the adult court's jurisdiction. The PCRA court denied relief, and Monaco appealed.[26]

Relying extensively upon *Anderson*, the Superior Court rejected Monaco's argument that the Commonwealth had only two options: try him as a juvenile, or not at all. The court stressed that the "right to be treated as a juvenile offender is statutory rather than constitutional."[27] And that statutory right applies only to a "child," *i.e.*, one who, at the time of trial, is under the age of twenty-one but committed the subject crimes before

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23 *Monaco*, 869 A.2d at 1027-28.

24 *Id.* at 1028.

25 Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-46.

26 *Monaco*, 869 A.2d at 1028.

27 *Id.* at 1029 (citing *Commonwealth v. Cotto*, 753 A.2d 217 (Pa. 2000)).

turning eighteen. Because the Juvenile Act is "tailored to a child's special needs, the purpose of the Act cannot be extended to adult offenders."[28] The primary objective of the Juvenile Act is to provide "care, protection, safety and wholesome mental and physical development" to children, not to adults.[29] As in *Anderson*, because Monaco was twenty-two at the time of his arrest, the Juvenile Act was inapplicable.

The *Monaco* panel noted that the case differed from *Anderson* in one material way. Unlike Anderson, Monaco did not deliberately abscond, and he did nothing that could be construed as a forfeiture of the terms of the Juvenile Act. Monaco "was not responsible for the delay in his prosecution."[30] But neither was the Commonwealth. The Commonwealth filed the charges approximately two months after the first victim reported the abuse. Nothing suggested that Commonwealth dragged its feet in prosecuting Monaco in an effort to avoid the Juvenile Act's jurisdiction. It was not the Commonwealth's fault that the victims had delayed reporting the crimes for several years.

Employing words that would form the basis for Armolt's "bad faith" argument in the instant case, the *Monaco* panel held that, absent "some *improper motivation* for the delay,"[31] *Anderson* applied, and Monaco properly could be tried as an adult for his juvenile crimes.

As the Majority appears to suggest, the legal basis for the "improper motive" exception is unclear.[32] In *Anderson*, the Superior Court premised its rejection of the defendant's attempt to point the finger at the Commonwealth on the dearth of supporting

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28 *Id.* at 1030.

29 *Id.* (citations omitted).

30 *Id.*

31 *Id.* (emphasis added).

32 *See* Maj. Op. at 16 n.13.

evidence in the record.[33] The *Anderson* court cited no legal authority. In *Monaco*, the panel cited two non-binding, federal cases that upheld adult prosecutions of defendants who had committed their offenses as juveniles: *United States v. Hoo*,[34] and *United States v. Tsang*.[35] In *Hoo* and *Tsang*, there were legitimate bases for the delays in prosecution. And, in both cases, the federal courts refused to bar the prosecutions, even though neither defendant had caused the delay.

As in *Anderson* and *Monaco*, the courts in *Hoo* and *Tsang* appear to have assumed that, had the prosecution delayed the institution of criminal proceedings in order to subject the defendant to the more severe punishments available in the adult system, that prosecution could be barred. In other words, these courts (like Armolt here) presupposed the existence of an exception to the general rule that a person ineligible under the criteria of the juvenile statute for disposition of charges in juvenile court must face those charges in adult court.

But from where does this exception derive? No matter how equitable an exception may be, or how necessary it is to prevent miscarriages of justice, courts (and particularly lower courts) generally cannot conjure rules (or exceptions to rules) from whole cloth. A legal principle must be tethered to some tangible legal source. It must flow from a constitutional provision, a statute, or some other authority. Both the Superior Court and Armolt treat the "improper motive" exception as if its legal underpinnings are well-established. But they are not. Indeed, the courts that have tried to ascertain the legal foundation for the exception have found that foundation to be elusive. For instance, in *Hoo* (a case that does not bind this Court), the United States Court of Appeals for the

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[33] *Anderson*, 630 A.2d at 51.

[34] 825 F.2d 667 (2d Cir. 1987).

[35] 632 F.Supp. 1336 (S.D.N.Y. 1986).

Second Circuit rejected the argument that federal due process principles required the automatic dismissal of charges when the defendant did not cause the delay in prosecution that prevented him from being tried in juvenile court.[36] However, the Court of Appeals did suggest that a delay that prevents a juvenile from obtaining the benefits of a juvenile system could amount to a "deprivation of [a defendant's] constitutional rights" upon a "showing of an improper prosecutorial motive."[37] The Court of Appeals did not explain whether that particular outcome would be mandated by due process, or by some other legal source. Similarly, this Court has never addressed directly whether any provisions of the Pennsylvania Constitution mandate the creation of such an exception.

None of this is meant to suggest that the exception does not or should not exist. To the contrary, such a rule serves a vital interest. Just as a defendant cannot demand to be tried as juvenile when it was his course of action that aged him out of the non-punitive advantages of the Juvenile Act, the Commonwealth also should not be able to game the system and intentionally delay a case solely to attain the more severe sanctions available in the adult criminal system. The legal foundation for such a rule has never been excavated, let alone explored in depth, by this Court. It should be examined in an appropriate case. Because this is not that case, I join the Majority both in holding that Armolt could be tried as an adult and in declining to examine the "improper motive" exception in depth.

I respectfully disagree, however, with the Majority's decision to deem the balance of Armolt's claims to be waived for lack of meaningful development. Armolt first argues that, because he was sentenced to a more severe punishment than that to which he would have (or could have) been exposed had he been tried as an juvenile, his prison sentence

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36 *Hoo*, 825 F.2d at 670-71.

37 *Id.* at 671.

violates the *ex post facto* provisions of both the United States and Pennsylvania Constitutions.[38] Next, Armolt contends that, because he committed his crimes as a juvenile, he should have been sentenced as a juvenile, and that the contrary disposition violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[39] Armolt maintains as well that these purported constitutional violations simultaneously infringed upon his due process rights. Finally, Armolt argues that sentencing him to prison as an adult for crimes committed as a child was so unduly harsh that it violated the Eighth Amendment's Cruel and Unusual Punishments Clause.[40] These claims sound in a challenge to the legality of Armolt's sentence. Thus, he cannot waive these claims, even if they are not developed in a substantive way.

I do not dispute that Armolt's presentation of these claims to this Court is lackluster and insubstantial, at best. The Majority points out that Armolt does not even label his claims as legality-of-sentencing challenges,[41] and that Armolt fails to frame his issues under one of the "[f]our broad categories of [legality] challenges [that] have emerged in our caselaw."[42] But, setting aside any technical matter of categorization, Armolt alleges that his sentence is unconstitutional (under various theories). This is undoubtedly a species of legality-of-sentence claim. Construed fairly, Armolt's issues implicate the legality of his sentence, and he does not necessarily have to do or say anything further to obtain appellate review. He does not need to recite any magic words. So long as the claims, raised by him or even by this Court *sua sponte*, implicate the legality of an

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38 U.S CONST. art. I, § 10; PA. CONST. art. I, § 17.

39 U.S. CONST. amend. XIV, § 1.

40 U.S. CONST. amend. VIII.

41 *See* Maj. Op. at 23.

42 *Id.* (quoting *Commonwealth v. Prinkey*, 277 A.3d 554, 562 (Pa. 2022)).

appellant's sentence, they simply cannot be waived. This is true even if the precise nature of the claims is difficult to decipher.

Like the double jeopardy challenge in *Commonwealth v. Hill*,[43] and like the vindictive prosecution claim in *Prinkey*,[44] Armolt's claims "squarely fall within the third category of legality challenges: claims asserting a constitutional barrier to the exercise of sentencing authority conferred in a facially constitutional statute."[45] Construed fairly, Armolt's claims query whether the *Ex Post Facto*, Equal Protection, Due Process, or Cruel and Unusual Punishments Clauses proscribe his sentence, even though that sentence otherwise is authorized by a valid Pennsylvania law.[46] It is unclear whether the Majority ultimately disagrees with this characterization. The Majority must believe to some degree that at least some of Armolt's claims implicate the legality of his sentence, as the Majority begins its analysis of this issue with a discussion of the basic legal principles that govern such claims.[47] Even if there is some ambiguity as to the nature of Armolt's equal protection and due process claims (a point with which I do not agree),[48] the *ex post facto* and cruel and unusual punishment claims undeniably advance legality of sentence

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43 238 A.3d 399, 409 (Pa. 2020).

44 *Prinkey*, 277 A.3d at 564, 568.

45 *Id.* at 564.

46 *See* 42 Pa.C.S. § 9721(a)(4) (authorizing a punishment of "total confinement" as a sentence upon conviction of a criminal offense).

47 *See* Maj. Op. at 20 (citations omitted).

48 That these clams are undeveloped does not meant they are ambiguous.

arguments.[49] That being the case, the problem is that the Majority holds that Armolt has waived what this Court has long held to be unwaivable claims.[50]

Typically, "an appellant waives any claim that is not properly raised in the first instance before the trial court and preserved at every stage of his appeal."[51] "A challenge that implicates the legality of an appellant's sentence, however, is an exception to this issue preservation requirement."[52] It is axiomatic that "an appellate court can address an

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[49] Notwithstanding my comparison of Armolt's claims to the constitutional issues addressed in *Hill* and *Prinkey*, the Majority insists that I offer no cases in support of my position that Armolt's claims implicate the legality of his sentence. *See* Maj. Op. at 24-25 n.18. Regardless, the Majority refuses to consider Armolt's claims as legality challenges because he "has not asked us to consider that question here." *Id.* But that does not matter. It is contradictory, at the very least, to claim that we can raise legality issues *sua sponte* and then to penalize an appellant for not raising that claim or presenting it in a way that meets this Court's unstated preferences. The fact of the matter is that, because the claims can be raised *sua sponte*, an appellant does not have to say anything about them, characterize them in any way, or even present meaningful argument in support of them.

The real problem appears to be that the Majority does not agree that Armolt's claims actually implicate the legality of Armolt's sentence. To the extent that the Majority is not convinced those claims do so, this does not preclude us from making the initial determination as part of our *sua sponte* review. Or, if this Court has any lingering confusion as to the character of the claims, we can always direct supplemental briefing for clarification.

Even if there is fair disagreement over the nature of some of the issues, there should be none as to claims that a sentence is Cruel and Unusual, or that a sentence violates the *Ex Post Facto* clauses of our Constitutions. The Majority apparently disagrees. The Majority does not explain how these claims do not at least implicate the legality of a sentence, nor does it cite to any cases holding to the contrary. Instead, the Majority deems the issues waived because Armolt failed to do what he is not required to do.

[50] *See Commonwealth v. Dickson*, 918 A.2d 95, 99 (Pa. 2007) ("a challenge to the legality of sentence cannot be waived").

[51] *Commonwealth v. Barnes*, 151 A.3d 121, 124 (Pa. 2016).

[52] *Commonwealth v. Thorne*, 276 A.3d 1192, 1196 (Pa. 2022) (quoting *Hill*, 238 A.3d at 407).

appellant's challenge to the legality of his sentence even if that issue was not preserved in the trial court; indeed, an appellate court may raise and address such an issue *sua sponte*."[53]

Because there are no preservation requirements for such challenges, and because we can introduce the issue entirely on our own initiative, an appellant potentially serving an illegal sentence is under no obligation to raise, let alone develop, such arguments. The law does not require Armolt to say a *single* word, yet the Majority finds waiver for not saying *enough* words. This waiver analysis creates a bizarre incongruity. Consider a civil litigant who appeals to this Court a judgment that, as it turns out, was issued by a court that lacked subject matter jurisdiction. Much like a legality-of-sentencing claim, subject matter jurisdiction is a non-waivable issue, and it can be raised by this Court *sua sponte*.[54] Under the Majority's waiver analysis, if that civil litigant did not raise a subject matter jurisdiction challenge at all, this Court could (and would) raise the matter *sua sponte* and (likely) would vacate the judgment issued by the court that lacked jurisdiction. But, if that litigant raised a subject matter jurisdiction claim in his or her brief, but did not develop the argument to this Court's standardless and arbitrary satisfaction, we would deem the claim waived and would address the merits of other claims, even if we otherwise would have concluded that the lower court lacked jurisdiction. If this is the way we approach non-waivable legal issues, perhaps an appellant might be better off to let this

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53 *Hill*, 238 A.3d at 407.

54 *In re J.M.Y.*, 218 A.3d 404, 415 (Pa. 2019) ("[T]he question of the subject matter jurisdiction of a court is nonwaivable, and, indeed, our Court is empowered to raise the issue *sua sponte*.") (citing *Commonwealth v. Scarborough*, 64 A.3d 602, 608 n.10 (Pa. 2013)).

Court raise the issue *sua sponte* than to run the risk of waiver under today's novel addition to the waiver rulebook.[55]

The Majority does not articulate a clear, workable standard for deciding when a non-waivable claim can be deemed to be waived for failure to present an argument that is sufficiently developed for this Court's review. The Majority says only that we will apply our "considered judgment."[56] What does that mean? How can a party anticipate what does, or does not, satisfy our amorphous, undefinable "considered judgment?" "This is no rule. It is only muddle and confusion."[57] If non-waivable claims can be found to be waived for this reason, the Court must provide at least some guidance as to precisely what level of advocacy is required to fall within this Court's "considered judgment." Today's Majority offers none.

I have no quarrel with the general principle that, when a party fails to develop an argument with a substantive discussion of the issue and with supporting citations to

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[55] In response to this point, the Majority asserts that I seek a "new rule altogether," one that permits a court to raise issues that implicate the legality of an appellant's sentence, "without prompting or advocacy by the parties." Maj. Op. at 25 n.20. This is precisely what I seek. But it is not a "new rule" at all. The ability of courts to raise and dispose of issues without being asked to do so, and without developed advocacy, is exactly what it means to raise an issue *sua sponte*.

Regardless, the Majority misses the point here. The Majority has created a jurisprudential trap for litigants. The law states clearly that challenges to the legality of a sentence cannot be waived. Yet, apparently, that is not true. If the appellant fails to satisfy our "considered judgment" as to the adequacy of the briefing—again, on an issue that we assure the appellant cannot be waived—then the appellant will have waived the issue. However, if this Court chooses to address the issue *sua sponte*, then there is no risk of waiver. It seems to me that, if we are going to set such a trap, and not even tell litigants clearly how to satisfy this Court's standard, litigants might be better off avoiding the trap altogether and simply letting this Court decide the issue on its own.

[56] Maj. Op. at 21-22 (citing *Commonwealth v. Bishop*, 217 A.3d 833, 844 (Pa. 2019)).

[57] *Bishop*, 217 A.3d at 850 (Wecht, J., dissenting).

authority, that issue is waived.[58] The rule serves valid and important purposes. But it applies only to issues that are capable of being waived. Legality-of-sentence challenges are not among those issues. At the very least, this Court should acknowledge that, by imposing a baseline of advocacy, whatever and wherever that line may be, it has now decided that legality-of-sentencing claims no longer are non-waivable. There is no point in continuing to maintain the fiction that legality claims are non-waivable when that apparently is no longer true.

The Majority is correct to say that this Court "may" raise legality-of-sentencing claims *sua sponte*[59] but is not *required* to address such issues. There may be sound jurisprudential reasons that that we opt to exercise our discretion not to review a legality-of-sentence challenge.[60] But the cases upon which the Majority relies for this point do not offer actual examples of this Court affirmatively declining to raise such claims *sua sponte*,[61] nor do they remotely compel us to refuse review of Armolt's claims in this case. For instance, the Majority cites *Commonwealth v. Fahy*[62] as an example of this Court "refus[ing] to entertain" a legality challenge. In that case, in an untimely PCRA petition, Fahy had sought review of the legality of his sentence.[63] This Court "easily dismissed" the claim, but not as a willful exercise of this Court's discretion not to raise such claims *sua sponte*, as the Majority suggests. Rather, because the issue was raised in an

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58 Maj. Op. at 21 (citing *Banfield v. Cortés*, 110 A.3d 155, 168 n.11 (Pa. 2015)).

59 *Id.* at 22 (citing *Hill*, 238 A.3d at 410 n.11).

60 *Id.* at 23-24 (collecting cases).

61 *Id.*

62 737 A.2d 214, 223 (Pa. 1999).

63 *Id.* at 224.

untimely PCRA petition, this Court lacked jurisdiction to assess it.[64] Far from a discretionary choice, this Court's decision was made in the absence of any lawful option to dismissal. That is not the same action as the one that the Majority undertakes today.

The Majority also cites *Commonwealth v. Belak*,[65] which, while presenting a closer comparison, ultimately proves distinguishable. In that case, the defendant declined to present "meaningful argument" on the primary legality-of-sentencing issue before this Court.[66] Instead, Belak chose to present an entirely new argument. Noting that Belak did not raise the issue in his petition for allowance of appeal or in his principal brief, but instead for the first time in his reply brief, this Court declined to review the issue even though "arguments of an unlawful sentence cannot be waived."[67] This Court did *not* decline to review the issue because of the lack of "meaningful argument," but rather because Belak failed to raise the issue in a timely fashion. Here, unlike Belak, Armolt raised the constitutional challenges in his Pa.R.A.P. 1925(b) statement,[68] in his brief to the Superior Court,[69] in his petition for allowance of appeal,[70] and in his brief to this Court.[71] Thus, even though *Belak* corroborates the proposition that this Court retains the discretion to decline to review a legality challenge *sua sponte*, the case is patently

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64 *Id.* at 223.

65 825 A.2d 1252 (Pa. 2003).

66 *Id.* at 1256 n.10.

67 *Id.*

68 *See* Pa.R.A.P. 1925(b) Statement, 3/10/2020, at 1; *see also* Trial Court Opinion, 6/26/2020, at 3-4.

69 *See* Brief for Appellant (Superior Court), No. 459 MDA 2020, at 23-24.

70 *See* Petition for Allowance of Appeal, No. 315 MAL 2021, at 13-14.

71 *See* Brief for Appellant at 24-30.

distinguishable from the instant matter, and does not mandate a similar restraint on our discretion here.

The inapplicability of the Majority's cases notwithstanding, it remains true that this Court is not required by law to address any and all legality-of-sentence claims that are implicated in a case. However, until today, waiver for underdevelopment of a legal argument has never been invoked as a basis for declining to review legality claims. And with good reason: this Court has branded these claims as non-waivable.[72] Because they can be raised *sua sponte*, no briefing is necessary at all, let alone high-quality briefing.

In support of its novel ruling, today's Majority relies upon a handful of cases in which we have invoked the waiver doctrine because a litigant presented undeveloped legal arguments. These authorities include *Wirth v. Commonwealth*,[73] a tax case, *Banfield v. Cortés*,[74] a voting systems case, *Samuel-Bassett v. Kia Motors America, Inc.*,[75] a class-action automobile manufacturing case, and a concurring opinion from *Commonwealth v. Williams*, a capital appeal involving ineffective assistance of counsel assertions that did not pertain to the legality of the sentence.[76] The problem with relying upon these cases is evident. None of them involved challenges to the legality of a sentence. These patently distinguishable authorities cannot justify extension of this form of waiver to traditionally non-waivable claims.

One justification for finding waiver that the Majority repeatedly invokes is this Court's traditional reluctance to identify, and then advance, arguments on a litigant's

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72 *See* Maj. Op. at 20 (citing *Thorne*, 276 A.3d at 1196).

73 95 A.3d 822, 837 (Pa. 2014).

74 110 A.3d at 168 n.11.

75 34 A.3d 1, 29 (Pa. 2011).

76 782 A.2d 517, 532 (Pa. 2001) (Castille, J., concurring).

behalf.[77] This rationale is particularly unpersuasive here, for two reasons. First, the fact that we can raise these claims *sua sponte* expressly refutes the notion that we should not, or cannot, address them without developed advocacy. That is precisely what we do when we exercise our prerogative to raise, and dispose of, these select claims in this way. Second, in the wake of this Court's decision in *Commonwealth v. Hamlett*,[78] it cannot be said that this Court remains uniformly devoted to maintaining its role as solely a neutral arbiter. Although I strenuously dissented,[79] *Hamlett* is now the law of Pennsylvania. It holds unequivocally that, when the Commonwealth fails (or declines) to meet its burden to prove harmless error beyond a reasonable doubt before an appellate court, this Court is more than willing to pick up the prosecutorial torch and carry it.[80] For the *Hamlett* Majority, the primary justification to jettison (for the Commonwealth, at least) the burden of making a developed legal argument is the financial and emotional cost of holding a second trial. In attempting to minimize the fact that the Court was playing lawyer for the Commonwealth, the *Hamlett* Majority remarked that "[t]here are a litany of other interests impacted by the social costs of retrial, including those on the judicial system at large,

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77 *See* Maj. Op. at 21-22 (quoting *Banfield*, 110 A.3d at 168 n.11 ("It is not the obligation of an appellate court to formulate [an] appellant's arguments for him."); *Williams*, 782 A.2d at 532 (Castille, J., concurring) (stating that this Court is "neither obliged, nor even particularly equipped, to develop an argument for the party. To do so places the Court in the conflicting roles of advocate and neutral arbiter. The Court is left to guess at the actual complaint that is intended by the party."); *Commonwealth v. Spotz*, 18 A.3d 244, 282 (Pa. 2011) (explaining that "we will not attempt to divine an argument on [a litigant's] behalf.")).

78 234 A.3d 486 (Pa. 2020).

79 *Id.* at 495-523 (Wecht J., dissenting).

80 *Id.* at 492.

jurors, victims, other witnesses, and the general public," and that there is therefore a "systemic interest in avoiding costly and unnecessary proceedings before the judiciary."[81]

It was on account of these "larger concerns"[82] that the *Hamlett* Majority decreed that, when the Commonwealth entirely omits any discussion of harmless error, or does not advance a substantively developed argument on that point, this Court may nonetheless make the argument on the Commonwealth's behalf. If the costs of re-prosecution justify this Court ruling upon issues not fully developed, surely a person potentially serving an illegal sentence deserves the same treatment. What could be a "larger concern" in our constitutional system than the unlawful detention of a citizen by the government?

Moreover, engaging in a harmless error analysis requires this Court to evaluate what role a legal error played in the factual record, and to assess how a jury would have ruled absent that error. This weighing of evidence is not a task that we are well-suited to perform. Apparently, we are willing to do so to conserve judicial resources, or to prevent witnesses from having to testify a second time. However, a challenge to the legality of a sentence is a pure question of law—a species of appellate claims that we are particularly well-equipped to assess. According to today's Majority, we will not review that strictly legal question without full briefing from the parties. Respectfully, we have gotten this backwards. We should decline to review fact and record-based questions like harmless error, and we should instead be willing to review purely legal questions like challenges to the legality of a sentence.[83]

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81 *Id.* (citations omitted).

82 *Id.*

83 The Majority claims that there can be no "reasonable comparison" between this Court advocating for the Commonwealth in harmless error cases and advocating for an appellant in a legality-of-sentence case. Maj. Op. at 24-25, n.18. The alleged "unique (continued…)

Prior to today, our articulation of the law was clear. A claim challenging the legality of a sentence could not be waived. If the appellant did not raise the claim, we could raise it *sua sponte*, and then rule on it. Following today's opinion, much of what was clear has changed. Now, a legality-of-sentence claim can be waived: (1) if the development of the issue does not satisfy our "considered judgment," despite the fact that the petitioner had no obligation to brief the issue at all; or (2) if there is any other procedurally deficient aspect of the presentation of the issue. The Majority also changes the way this Court can raise legality claims. Prior to today, this Court possessed the authority to raise the claims entirely *sua sponte*. Now, we can raise a legality claim only if it is a "known legality of sentence problem."[84]

None of this was necessary. The Majority has added layer upon layer to our legality-of-sentence jurisprudence in order to avoid addressing Armolt's claims. I would not do so. Instead, I would straightforwardly apply this Court's well-established edict that a challenge to the legality of one's sentence cannot be waived. To apply the rules equally, predictably and as they are written is not to make some "expansive judicial power-grab."[85] Instead, the "power-grab" that occurs here arises when the Majority creates new rules to justify its waiver determination.

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intersection" between harmless error and the right-for-any-reason doctrine does not justify this Court's disparate treatment. Highlighting the substantive differences between these claims cannot obscure the fact that this Court has proven itself willing to advocate for some parties but not others. It is no longer convincing for this Court to state that we do not advocate for parties.

[84] *Id.* at 24-25 n.18. The Majority cites no opinion from this Court for this new limitation. Instead, it relies upon a non-binding concurring opinion and a Superior Court case. Neither warrants this unprecedented limitation on our ability to raise claims *sua sponte*.

[85] *Id.*

Notwithstanding these profound disagreements, because any legality-of-sentence claims readily fail on the merits, I concur in the result reached by the Majority.[86] In my view, no constitutional-based legality-of-sentence claim can succeed here because, as the Majority correctly holds, Armolt could claim no right (constitutional, statutory, or otherwise) to a juvenile disposition of his charges. Consequently, Armolt is entitled to no comparison between the way his case proceeded and how it would have proceeded in juvenile court. Because that comparison is at the heart of each of his legality claims, each must fail. That means that Armolt cannot reasonably claim that he suffered an increase in his sentence—a purported *ex post facto* violation—when he was never entitled to, and did not receive, an initial adjudication in juvenile court. Nor can Armolt establish that his sentence constituted an equal protection or due process violation; the law does not demand that he be tried as a juvenile in the first instance. He was sentenced exactly as anyone else convicted in adult court would have been sentenced. And, finally, for Eighth Amendment purposes, inasmuch as Armolt had no right to a juvenile disposition, there was nothing unduly harsh in his four-to-eight year sentence for a seven-year course of sexual abuse, particularly when the trial court fashioned the sentence, in part, to account for the fact that Armolt was a juvenile at the time that he perpetrated the abuse.

In sum, I join the Majority in holding that, once he was no longer a "child," Armolt could be tried in an adult court for his crimes. I do not join the Majority's decision to deem the remainder of Armolt's arguments waived. I would construe those claims as constitutional challenges to the legality of Armolt's sentence, and I would find that they

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[86] To the extent that the Majority feels that Armolt's claims are truly unreviewable without further development, rather than find them waived, it would be more consistent without our legality-of-sentence jurisprudence to recognize the issues as such, and then hold the case and direct the parties to brief the issues further. *See Hamlett*, 234 A.3d at 494 (noting that, "to enhance fairness," an appellate court can direct supplemental briefing when the parties' efforts fail to assist that court meaningfully).

lack legal merit. Ultimately, I agree that Armolt is not entitled to any form of relief. Thus, I concur in the Majority's disposition of this appeal.

Justice Donohue joins this concurring opinion.